



**Canadian  
Association of  
Broadcasters**

**L'Association  
canadienne des  
radiodiffuseurs**

January 25, 2008

*Via Epass*

Mr. Robert A. Morin  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, Ontario  
K1A 0N2

Dear Mr. Morin:

**Re: Broadcasting Notice of Public Hearing CRTC 2007-10-4:  
*Review of the Regulatory Frameworks for Broadcasting  
Distribution Undertakings and Discretionary Programming  
Services***

The Canadian Association of Broadcasters (CAB) is pleased to offer the enclosed comments to the Commission on the above-noted matter. You will note that the Executive Summary has been translated and incorporated into the submission.

The CAB requests the opportunity to appear at the public hearing to be held commencing April 7, 2008. The CAB's participation in the oral phase of this proceeding will enable a full examination of the implications for the private conventional and discretionary television sector of the Commission's stated intention to "...take a revitalized approach ... that aims at reducing regulation to the minimum essential to achieve the objectives of the [Broadcasting] Act, relying instead on market forces wherever possible."

Sincerely,

***Original signed by***

Glenn O'Farrell  
President and CEO



**CAB | ACR**

# **Review of Regulatory Frameworks for BDUs and Discretionary Programming Services**

**Submission to the CRTC  
by the Canadian Association of Broadcasters**

**Broadcasting Notice of Public Hearing CRTC 2007-10-4  
January 25, 2008**

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**CAB Vision: The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.**

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## Sommaire exécutif

1. L'Association canadienne des radiodiffuseurs (ACR) accueille favorablement la confirmation, de la part du Conseil, selon laquelle cette instance portera sur les enjeux fondamentaux se rapportant à l'avenir du secteur de la télévision en direct.
2. Les perspectives économiques du secteur de la télévision privée générale en sont à un point critique. Selon les résultats d'une analyse du rendement financier du secteur de la télévision générale, il se dégage une tendance peu encourageante, à savoir la diminution soutenue de la rentabilité au cours des dernières années, et il s'agit là d'une tendance qui se produit dans le cadre d'une économie florissante de tous les autres points de vue. Contrairement à ce que le Conseil a déjà indiqué, les tendances à la baisse que nous constatons à l'heure actuelle ne sont pas attribuables à un phénomène cyclique auquel on peut s'attendre. Ces tendances témoignent plutôt d'un problème grave au niveau de la structure comme telle.
3. De plus, le rendement financier prévu de la télévision privée générale pour la période de 2007 à 2011, compte tenu des conséquences possibles de la conversion à la transmission en mode numérique, annonce des perspectives encore plus sombres. On s'attend que les bénéfices avant intérêt et impôts (BAII) de l'ensemble du secteur baissent à -6,2 % en 2011. Exprimé en dollars, cela représente une perte de près de 150 millions \$ avant intérêts et impôts en 2011.
4. Étant donné ces questions graves au sujet de la viabilité immédiate et à long terme du secteur de la télévision privée générale, le Conseil doit examiner les moyens appropriés de rétablir le modèle d'entreprise de la télévision en direct le plus tôt possible.
5. En plus des mesures spécifiques contenues dans ce mémoire, d'autres mesures plus ciblées pourraient être nécessaires afin de tenir compte pleinement des circonstances particulières de divers sous-secteurs de l'industrie de la télévision privée (radiodiffuseurs de langue anglaise, radiodiffuseurs de langue française, radiodiffuseurs opérant dans de petits marchés, etc.). Les mémoires déposés par les membres de l'ACR traiteront de ces enjeux au besoin.
6. De plus, l'ACR tient à souligner que les services de programmation de langue française ont tenu leurs propres rencontres pour discuter des enjeux reliés à cette instance. Les discussions ont porté sur l'état de santé du système de radiodiffusion en général et en ce qui a trait en particulier aux défis systémiques auxquels fait face le marché de langue française.
7. Lors de ces discussions, il a été longuement question des faits marquants, ainsi que des réalités bien différentes des marchés de langue française et de langue anglaise. Les échanges ont également porté entre autres sur la question de la substitution simultanée — qui, pour des raisons évidentes, n'entre pas en ligne de compte dans le marché de langue française — ainsi que de la distribution des signaux éloignés, une activité qui ne génère pas les mêmes enjeux dans un marché ne comportant qu'un

seul fuseau horaire contrairement aux enjeux résultant des six fuseaux horaires dans le reste du pays.

8. À ce jour, les discussions des participants ont été porteuses à plusieurs niveaux mais demeurent non concluantes pour l'instant, les parties prenantes voulant prendre acte des commentaires qui seront soumis au Conseil au cours de cette première phase du processus en cours. À cet égard, l'ACR se réserve le droit de commenter davantage ce sujet lors de la phase de réplique.

#### Distribution prioritaire

9. La distribution prioritaire se veut le moyen de protection fondamental qui reflète l'objectif de la politique sur la radiodiffusion énoncé au sous-alinéa 3(1)t(i) de la *Loi sur la radiodiffusion*, selon lequel les EDR « devraient donner priorité à la fourniture des services de programmation canadienne, et ce en particulier par les stations locales canadiennes. » **Par conséquent, l'ACR exhorte le Conseil à :**

- **conserver les exigences actuelles en matière de distribution prioritaire par les EDR par câble, et**
- **établir une exigence relative à la distribution prioritaire pour les SRD qui soit semblable à celle qui s'applique aux services câblodistribués, c.-à-d. exiger la distribution, à tous les abonnés aux SRD qui sont situés à l'intérieur du périmètre de rayonnement de classe B de ces stations, de la programmation de chaque station de télévision en direct qui est le point de départ d'émissions locales, y compris les retransmetteurs.**

#### Substitution simultanée

10. Les avantages économiques de la substitution simultanée sont non seulement notables, mais aussi essentiels pour la viabilité du secteur de la télévision générale. Selon les estimations faites par Armstrong Consulting dans une étude effectuée par cette firme, la valeur économique de la substitution simultanée pour les services de télévision privée générale en direct de langue anglaise en 2006-2007 s'établissait entre 222 millions \$ et 271 millions \$, dépendant de la méthode utilisée pour établir l'estimation.
11. Selon les données statistiques et financières les plus récentes qui ont été publiées par le Conseil, la totalité du secteur de la télévision privée générale a réalisé un bénéfice d'exploitation d'un total de 171 millions \$ et des BAII de 91 millions \$ pour l'année de radiodiffusion 2005-2006. De toute évidence, les services canadiens de télévision en direct subiraient des conséquences désastreuses s'ils perdaient leurs privilèges au chapitre de la substitution simultanée.
12. Étant donné (i) l'impératif sous-jacent de la politique concernant la protection des droits de programmation, (ii) le fait qu'il n'existe pas de mesure de remplacement réaliste ou pratique pour la substitution simultanée comme moyen de respecter cet

impératif, et (iii) l'avantage économique notable de la substitution simultanée pour le secteur de la télévision privée générale, **l'ACR soutient que la substitution simultanée doit demeurer comme élément essentiel du cadre de distribution des EDR et que le Conseil doit y veiller rigoureusement.**

Le Fonds pour la programmation locale dans les petits marchés (le Fonds)

13. Depuis sa mise sur pied il y a quatre ans, le Fonds s'est avéré un moyen essentiel d'épauler les 17 stations indépendantes sur les petits marchés qui sont admissibles à recevoir de l'aide financière à l'heure actuelle. Malgré la baisse de la rentabilité, ces stations ont non seulement pu continuer à respecter leurs engagements sur le plan de la programmation locale, mais ont pu également entreprendre des nouvelles initiatives pour mieux servir leurs collectivités respectives.
14. Les radiodiffuseurs qui exploitent leurs services sur les petits marchés font face à des défis économiques jamais vus jusqu'ici. Il est évident qu'en l'absence de l'appui apporté par le Fonds, il existe un danger réel que les stations du genre ne soient pas en mesure de continuer à offrir leurs services dans de nombreux petits marchés, et encore moins d'assurer une quantité raisonnable de programmation locale.
15. Il y aurait lieu de confirmer le Fonds comme élément essentiel du cadre de réglementation régissant les stations indépendantes sur les petits marchés. À ce titre, **l'ACR soutient que le Conseil devrait adopter certaines mesures précises pour faire en sorte d'accorder au Fonds un statut davantage important et permanent :**
  - Enchâsser, dans le *Règlement sur la distribution de radiodiffusion (le Règlement)*, une exigence selon laquelle les SRD autorisés sont tenus de contribuer au Fonds.
  - Modifier le *Règlement* de sorte à exiger un versement mensuel au Fonds.
  - Renforcer le Fonds en exigeant que les EDR par câble qui fonctionnent dans les marchés desservis par les services bénéficiaires du Fonds y contribuent.
  - Élargir la liste de stations admissibles au Fonds afin d'y inclure les trois stations locales qui sont exploitées par Corus Entertainment Inc. et aussi la station de TQS qui dessert Trois-Rivières.

### Signaux éloignés

16. Le Conseil a encouragé les radiodiffuseurs et les EDR à négocier des accords qui assureraient, théoriquement, une compensation juste et équitable aux radiodiffuseurs pour les conséquences qu'ont les signaux éloignés sur les droits de programmation qu'ils ont acquis. En pratique, toutefois, les accords de compensation en place ne tiennent pas suffisamment compte du véritable tort économique causé aux radiodiffuseurs. En 2005-2006, le montant total de compensation payée par les services de câblodistribution et les EDR qui sont des SRD en ce qui concerne la distribution de signaux éloignés s'établissait à moins de 17 millions \$, alors que dans l'ensemble, le coût estimatif des répercussions se chiffrait à près de 81 millions \$.
17. Les radiodiffuseurs ne sont pas en mesure de négocier des conditions davantage raisonnables pour la distribution de leurs propres signaux, et ce pour deux raisons :
  - (i) ils n'ont pas le droit de refuser la distribution de leurs signaux dans les marchés éloignés en l'absence d'un accord entre les parties, et
  - (ii) le Conseil s'est montré peu disposé à faire respecter les règles sur le retrait des émissions comme mesure de remplacement pour les accords négociés.
18. L'ACR soutient que **le Conseil devrait adopter les mesures davantage équitables qui suivent pour régler la question des signaux éloignés :**
  - **Autoriser une EDR par câble ou une EDR qui est un SRD à distribuer les signaux d'une station de télévision canadienne dans les marchés éloignés seulement s'il existe un accord signé entre l'EDR et la station autorisée dont les signaux seront diffusés dans ces marchés éloignés.**
  - **Résoudre l'enjeu touchant la distribution d'une deuxième série de signaux américains « 4+1 », étant donné que les dommages causés aux stations locales canadiennes par de tels signaux dépassent de façon significative les compensations payées par les EDR.**
  - **Il y aurait lieu de conserver les conditions de licence actuelles selon lesquelles les SRD sont tenus de supprimer les émissions identiques pour les signaux éloignés du même fuseau horaire et du même réseau à l'intérieur du périmètre de rayonnement de classe B des stations indépendantes sur les petits marchés.**
  - **Il faudrait veiller à l'application stricte des règlements sur la substitution simultanée en ce qui concerne la câblodistribution des signaux éloignés.**

## Executive Summary

1. The Canadian Association of Broadcasters welcomes the Commission's confirmation that the scope of this proceeding will address fundamental issues related to the future of the over-the-air (OTA) television sector.
2. The economic outlook for the private conventional television sector is at a crisis point. An analysis of the financial performance of the conventional TV sector shows a trend of steadily declining profitability over the past several years, a trend that has occurred in an otherwise healthy economy. Current downward trends are not the result of a routine cyclical phenomenon, as has previously been suggested by the Commission, but rather demonstrate a critical underlying structural issue.
3. Moreover, projections of the financial performance of private conventional television from 2007 to 2011, taking into account the potential impact of the conversion to digital transmission, reveal an even more worrisome outlook, with profitability before interest and taxes (PBIT) of the overall sector expected to decline to -6.2% in 2011. In dollar terms, this represents a loss of almost \$150 million before interest and taxes in 2011.
4. In light of these serious questions about the immediate and long-term viability of the private conventional television sector, the Commission needs to consider appropriate approaches to fix the business model for OTA television at the earliest possible opportunity.
5. In addition to the particular measures addressed in this submission, other more targeted measures may also be required to fully address the specific circumstances of various sub-sectors of the private conventional television industry (English-language broadcasters, French-language broadcasters, small market broadcasters, etc.). Where appropriate, these matters will be addressed in the submissions of individual CAB members.
6. The CAB notes that the French-language broadcasters held their own meetings to discuss the issues connected with this proceeding. The discussions focused on the health of the broadcasting system in general and on the particular structural challenges of the French-language market.
7. During the course of these discussions, the key facts and the very different realities of the English- and French-language markets were dealt with at length. The talks also addressed, among other things, the issue of simultaneous substitution – which does not, for obvious reasons, come into play in the French-language market – as well as the distribution of distant signals, an activity that does not generate the same issues in a market contained within a single time zone as it does in an entire country with six time zones.
8. To date, the participants' discussions have been fruitful on many levels, but remain inconclusive for the moment, as the stakeholders wish to take note of the comments

that will be submitted to the Commission during this phase of the proceeding. The CAB reserves the right to comment further on this subject in the reply comment phase of the proceeding.

#### Priority carriage

9. Priority carriage is a fundamental protection that reflects the broadcasting policy goal set out in Section 3(1)(t)(i) of the *Broadcasting Act*, which requires that BDUs “should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations.” **Accordingly, the CAB urges the Commission to:**

- **Maintain existing priority carriage requirements for cable BDUs.**
- **Establish a DTH priority carriage requirement similar to cable; i.e., require the distribution of each OTA television station that originates local programming to all DTH subscribers located within the Grade B contour of that originating station, including any rebroadcasters.**

#### Simultaneous substitution

10. The economic benefits of simultaneous substitution are significant and critical to the viability of the conventional television sector. A study conducted by Armstrong Consulting estimates that the economic value of simultaneous substitution for English-language private conventional television broadcasters in 2006/2007 was in the range of \$222 million to \$271 million, depending on the approach used to arrive at the estimate.
11. According to the most recent statistical and financial information published by the Commission, the entire private conventional television sector generated a total operating income of \$171 million and a PBIT of \$91 million for the 2005/2006 broadcast year. It is clear that the loss of simultaneous substitution privileges would have devastating consequences for Canadian OTA broadcasters.
12. Given (i) the underlying policy imperative respecting the protection of program rights, (ii) the fact that there is no realistic or practical alternative to simultaneous substitution as a means of respecting this policy imperative, and (iii) the significant economic benefit of simultaneous substitution to the private conventional television sector, **the CAB submits that simultaneous substitution must remain as an essential element of the BDU distribution framework and must be rigorously enforced by the Commission.**

#### The Small Market Local Programming Fund (SMLPF)

13. In the four years of its existence, the SMLPF has proven to be of critical assistance to the 17 small market independently owned stations that are currently eligible to receive support. Even in the face of declining profitability, these stations have not

only been able to sustain existing local programming commitments, but they have been able to undertake new initiatives to better serve their local communities.

14. Small market broadcasters are facing unprecedented economic challenges and it is clear that without the support provided by the SMLPF there is a very real danger that such stations would be unable to continue operations in many small markets, let alone sustain any reasonable level of local programming.
15. The SMLPF should be confirmed as an essential component of the regulatory framework for small market independently owned stations. As such, **the CAB submits that the Commission should adopt certain specific measures to ensure that the SMLPF is accorded a more prominent and permanent status:**
  - **Enshrine the requirement for DTH licensees to contribute to the SMLPF in the *Broadcasting Distribution Regulations (BD Regulations)*.**
  - **Amend the BD Regulations to require monthly payments to the SMLPF.**
  - **Strengthen the SMLPF by requiring contributions from those cable BDUs that operate in markets served by recipients of the SMLPF.**
  - **Expand the list of stations eligible to benefit from the SMLPF to include the three local stations operated by Corus Entertainment Inc. and the TQS station serving Trois-Rivières.**

#### Distant signals

16. The Commission has encouraged broadcasters and BDUs to negotiate agreements that would, in theory, provide broadcasters with fair and equitable compensation for the impact of distant signals on the program rights they have acquired. In practice, however, current compensation arrangements are inadequate in reflecting the actual economic harm to broadcasters. In 2005/2006, total compensation received from cable and DTH BDUs in respect of the delivery of distant signals was less than \$17 million, while estimated overall impact was almost \$81 million.
17. Broadcasters lack the ability to negotiate more reasonable terms of distribution for their own signals, for two reasons:
  - (i) broadcasters have no right to withhold their signals from distribution into distant markets in the absence of an agreement between the parties; and
  - (ii) the Commission has been unwilling to enforce program deletion regulations as an alternative to negotiated agreements.

18. The CAB submits that the Commission should adopt the following, more equitable approach to resolve the distant signals issue:
- Authorize a cable or DTH BDU to distribute a Canadian television station in distant markets only if the BDU has a signed agreement with the licensee of the station to be distributed in those distant markets.
  - Resolve the issue of the distribution of the 2<sup>nd</sup> set of US 4+1 signals, given that the damage to local Canadian stations caused by such signals significantly exceeds the compensation paid by BDUs.
  - Existing conditions of licence requiring DTH operators to delete identical programming on “same time zone, same network” distant signals within the Grade B contour of small market independently owned stations should be maintained.
  - Simultaneous substitution regulations should be strictly enforced with respect to the cable distribution of distant signals.

## I Introduction

1. The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.
2. The CAB is pleased to provide these comments in response to Broadcasting Notices of Public Hearing CRTC 2007-10-3 and CRTC 2007-10-4, concerning the proceeding to review the regulatory frameworks for broadcasting distribution undertakings (BDUs) and discretionary programming services. In these notices, the Commission clarified that the scope of this proceeding would encompass matters related to the charging of a fee for the distribution of over-the-air (OTA) television signals, including issues related to distant signals. It also set out a revised process for the filing of further comments and the scheduling of a public hearing.
3. The CAB welcomes the Commission's confirmation that fundamental issues related to the future of the OTA television sector will be addressed as part of the current proceeding. As we argued in our original submission on October 19, 2007 (Phase 1 submission), in light of serious questions about the immediate and long-term viability of the private conventional television sector, the Commission needs to consider appropriate approaches to fix the business model for OTA television at the earliest possible opportunity. Doing so within the context of the current proceeding offers the best opportunity to recalibrate the relationship between programming services and BDUs in a manner that will yield a coherent solution to the current challenges facing all sectors of the industry.
4. In these comments, in keeping with the revised process established by the Commission, the CAB addresses certain key issues related to the distribution of OTA signals by cable and DTH undertakings.
5. With regard to existing measures that are of critical importance to OTA television sector, the CAB's comments focus on the following matters:
  - the fundamental principle of priority carriage of local and regional OTA television stations by all BDUs;
  - the importance of maintaining and strictly enforcing simultaneous substitution regulations as a means to protect program rights;
  - the need to maintain and strengthen the Small Market Local Programming Fund.
6. In addition, the CAB proposes a new, more equitable solution to the distant signals issue, in light of the significant negative impact that the virtually unfettered

distribution of distant signals is having on local television stations in all markets, large and small.

7. Finally, the CAB is not addressing in this submission matters that pertain to the regulatory framework for the licensing and distribution of discretionary programming services. The CAB outlined its position with respect to such matters in its Phase 1 submission, and further reserves the right to respond to comments filed by other parties with respect to both discretionary services and OTA television in the reply comments to be filed on February 22, 2008.

## **II The financial performance of the conventional TV sector**

8. It is important that the Commission gain a clear understanding of the economic situation of the OTA television sector in order to fully appreciate the need for immediate action. To this end, the CAB's Phase 1 submission included a study that examined recent trends in the financial performance of private conventional television in Canada and projected this performance over the next five years.<sup>1</sup>
9. The Armstrong Consulting analysis shows that the English- and French-language OTA sector is clearly experiencing a fundamental shift in its financial structure given changes in advertising, audience fragmentation, distribution models and competitive service offerings.
10. More specifically, and as highlighted in CAB's Phase 1 submission, the study finds that, from 2002 to 2006:
  - Expenses for the private conventional television sector as a whole increased at a compound annual growth rate (CAGR) of 5.4%, while revenues increased more slowly at a CAGR of 3.8%. As a result, profitability before interest and taxes (PBIT) decreased substantially over the period, to only 4.1% in 2006.
  - The study shows similar results for private English-language conventional television, given that this sub-sector has traditionally accounted for about 80% of the total revenues and expenses of the overall sector. PBIT has declined steadily, dropping to only 3.4% in 2006.
  - For private French-language conventional television, similar trends emerge, with PBIT declining to 7.2% in 2006. Furthermore, in each year from 2002 to 2006 total expenses incurred by private French-language broadcasters exceeded total advertising revenues, and this trend accelerated during the period. Total advertising revenues covered 90% of total expenses in 2002, but only 80% of total expenses in 2006.

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<sup>1</sup> *The Profitability of Private Conventional TV: Projections to 2011*, Appendix 4 of the CAB submission re Broadcasting Notice of Public Hearing 2007-10, October 19, 2007.

- For television operators operating in small markets, current trends are even more ominous, with PBIT dropping to -3.6% in 2006. Results for 2006 represent a net loss before interest and taxes of more than \$14 million for small market broadcasters.
11. Particularly troubling is the fact that the current trend of declining profitability of the conventional television sector has occurred in an otherwise healthy economy. This shows that current downward trends in the profitability of private conventional television are not the result of a routine cyclical phenomenon, as has previously been suggested by the Commission, but rather demonstrate a critical underlying structural issue.
  12. The Armstrong Consulting study also included projections of the financial performance of private conventional television from 2007 to 2011, taking into account the potential impact of the conversion to digital transmission. Going forward, the outlook is even more worrisome:
    - Over the period from 2007 to 2011, expenses for the overall sector are projected to increase at a CAGR of 4.3%, while revenues are projected to increase at a CAGR of only 2.2%. PBIT is therefore expected to continue declining over the period, from 1.6% in 2007 to -6.2% in 2011. In dollar terms, this represents a loss of almost \$150 million before interest and taxes in 2011.
    - For the private English-language sub-sector, the Armstrong Consulting projections yield similar results, with PBIT continuing a steady decline to -7.0% in 2011. The profitability of the private French-language broadcasters is projected to drop to -3.0% in 2011.
    - Finally, broadcasters operating in small markets will continue to be in a worsening loss position throughout the period from 2007 to 2011, with PBIT sinking to -13.2% in 2011.
  13. It should be noted that the projections for 2007 to 2011 assume that the Canadian economy will remain strong. Any significant economic downturn would result in an even greater negative impact on the private television sector as a whole.
  14. In summary, this analysis demonstrates that the economic outlook for the private conventional television sector is at a crisis point. The CAB submits that, unless the Commission takes corrective action, the situation will continue to worsen given the significant challenges related to the digital transition and the shut-down of analog transmitters in 2011, increasing domestic and foreign programming costs and the need to attract audiences in an increasingly competitive environment.
  15. In these circumstances, the CAB submits that the Commission must, as a first step, unequivocally confirm the two fundamental regulatory underpinnings of the

conventional television sector, namely priority carriage requirements for all BDUs and simultaneous substitution of identical programming to protect program rights.

16. Second, given the dire circumstances facing broadcasters operating in small markets, it is absolutely critical that the Small Market Local Programming Fund be confirmed as a permanent long-term measure to assist in the production and exhibition of local programming in such markets.
17. Third, the CAB submits that the Commission needs to adopt new measures to resolve the distant signals issue once and for all, in view of the significant impact that the distribution of distant signals by cable and DTH BDUs is having on the value of the program rights held by Canadian broadcasters.
18. Each of these matters is discussed in more detail in the balance of this submission.
19. In addition to the particular measures addressed in this submission, other more targeted measures may also be required to fully address the specific circumstances of various sub-sectors of the private conventional television industry (English-language broadcasters, French-language broadcasters, small market broadcasters, etc.). Where appropriate, these matters will be addressed in the submissions of individual CAB members.
20. Finally, the CAB notes that the French-language broadcasters held their own meetings to discuss the issues connected with this proceeding. The discussions focused on the health of the broadcasting system in general and on the particular structural challenges of the French-language market.
21. During the course of these discussions, the key facts and the very different realities of the English- and French-language markets were dealt with at length. The talks also addressed, among other things, the issue of simultaneous substitution – which does not, for obvious reasons, come into play in the French-language market – as well as the distribution of distant signals, an activity that does not generate the same issues in a market contained within a single time zone as it does in an entire country with six time zones.
22. To date, the participants' discussions have been fruitful on many levels, but remain inconclusive for the moment, as the stakeholders wish to take note of the comments that will be submitted to the Commission during this phase of the proceeding. The CAB reserves the right to comment further on this subject in the reply comment phase of the proceeding.

### **III Priority carriage**

23. The CAB's Phase 1 submission emphasized the importance of priority carriage rules in supporting the special role of local television broadcasters within the broadcasting system. Priority carriage ensures that all local television stations can reach all potential viewers within their local markets, whether they choose to receive signals

over-the-air or through a licensed BDU. It is a fundamental protection that reflects the broadcasting policy goal set out in Section 3(1)(t)(i) of the *Broadcasting Act*, which requires that BDUs “should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations.”

24. From the beginning, the Commission has consistently applied the principle of priority carriage to the regulation of cable television undertakings. More recently, the Commission confirmed the continued relevance of priority carriage to the cable distribution of digital television stations, noting that it is not only consistent with the *Broadcasting Act*, but also that it is critical to the success of the digital transition.<sup>2</sup>
25. The CAB submits that it is now time to apply the same principle to the carriage of local television stations by DTH undertakings. Our Phase 1 submission discussed this issue in some detail, particularly in light of the historic concern that the perceived limitation on DTH capacity outweighed the goal of the *Broadcasting Act* respecting the carriage of local Canadian stations. The CAB believes that this concern should no longer be the paramount consideration, for the following reasons:
  - Industry Canada has recently awarded new orbital slots for Canadian satellite operators, which will yield additional capacity for DTH distributors.
  - Both ExpressVu and Star Choice have filed information with the Commission concerning current and future plans for the carriage of SD and HD television services. Much of this information has been granted confidentiality, but the Commission has the ability to assess the ability of ExpressVu and Star Choice to distribute local television stations into their local markets.
  - The allocation of DTH capacity is a matter of assigning priority to different categories of services. Both DTH distributors have ample capacity (and will have more in the future) to distribute dozens of channels of PPV services and various non-Canadian services, for example, while claiming a shortage of capacity to carry all Canadian OTA stations that originate programming. The *Broadcasting Act* requirement to give priority to the distribution of local television stations should be the governing principle, not the commercial interests of the DTH operators.
  - Telesat’s Phase 1 submission confirmed that, as a result of Industry Canada’s recent announcement, it will be authorized to develop three additional satellites for the Broadcasting Satellite Services (BSS) broadcasting platforms. It also advised that discussions are ongoing with Industry Canada with respect to the use of the Extended Ku-band for DTH purposes on the Fixed Satellite Services (FSS) platform. Finally, Telesat pointed out that the next generation of transmission and coding standards, MPEG-4 with DVB-S2, will help alleviate current constraints on satellite capacity. All of these considerations point to the availability of additional satellite capacity.

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<sup>2</sup> *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61.

26. Local television stations that are not distributed by DTH are placed in an untenable position with respect to their ability to serve their local markets. The high penetration of DTH in many markets means that such stations are essentially invisible to a large percentage of the local audience, while their competitors do have access to DTH viewers. The CAB believes that DTH capacity concerns no longer provide justification for not implementing the fundamental broadcasting policy objective of priority carriage with respect to DTH undertakings. DTH licensees should be expected to manage their capacity in a way that achieves this objective.
27. Accordingly, the CAB makes the following recommendations with respect to priority carriage:
- Maintain existing priority carriage requirements for cable BDUs.
  - Establish a DTH priority carriage requirement similar to cable; i.e., require the distribution of each OTA television station that originates local programming to all DTH subscribers located within the Grade B contour of that originating station, including any rebroadcasters.

#### **IV Simultaneous substitution**

28. The CAB's Phase 1 submission addressed the recommendation contained in the Dunbar-Leblanc Report<sup>3</sup> that the Commission should (i) reassess the net benefit of simultaneous substitution and (ii) determine whether there are other more direct means that would retain the revenues associated with simultaneous substitution while regaining control over the prime time schedules of Canadian OTA broadcasters and enhancing the prospect for the exhibition of Cancon when most Canadians are watching TV.
29. With respect to the second part of this recommendation, the CAB submission pointed out that, given the underlying goal of protecting the program rights acquired by Canadian television stations, the only alternatives to simultaneous substitution would be non-simultaneous substitution and/or program deletion. After reviewing the practical implications of both of these potential alternatives, however, the CAB's Phase 1 submission concluded that there are no realistic, practical solutions to the protection of program rights that the Commission is willing or able to enforce, other than simultaneous substitution.
30. With regard to the economic benefits of simultaneous substitution, the CAB submission pointed to the 1990 Donner study<sup>4</sup>, which provided estimates of the net advertising revenues that accrued to local television stations, including English- and French-language private television stations and CBC/SRC television stations, from

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<sup>3</sup> *Review of the Regulatory Framework for Broadcasting Services in Canada*, Final Report of Laurence J.E. Dunbar and Christian Leblanc.

<sup>4</sup> Arthur Donner, PhD, *The Financial Impacts of Section 19.1 of the Income Tax Act (Bill C-58) and Simultaneous Substitution*, 1990.

the substitution of their signals over US and distant Canadian television signals in 1988 and 1990.

31. In light of the Dunbar-Leblanc recommendation that the net benefit of simultaneous substitution should be reassessed, the CAB commissioned Armstrong Consulting to undertake a new study to estimate the economic value of simultaneous substitution for private conventional television broadcasters in the broadcast year 2006/2007. The results of this study are included with this submission as Appendix 1, *The Economic Value of Simultaneous Signal Substitution for English-Language Private Conventional Television Broadcasters*.
32. The Armstrong Consulting study estimates that the economic value of simultaneous substitution for English-language private conventional television broadcasters in 2006/2007 was in the range of \$222 million to \$271 million, depending on the approach used to arrive at the estimate. Furthermore, the study concludes that the approach yielding an economic value of \$271 million in 2006/2007 has the highest probability of being accurate.
33. The CAB submits that, no matter which approach is deemed most appropriate, the economic benefits of simultaneous substitution are significant and critical to the viability of the conventional television sector. According to the most recent statistical and financial information published by the Commission, the entire private conventional television sector generated a total operating income of \$171 million and a PBIT of \$91 million for the 2005/2006 broadcast year. Removing the results for Quebec to approximate the results for the English-language private television sector yields an operating income of \$123 million and a PBIT of \$62 million. Given the Armstrong Consulting estimate of \$222 to \$271 million as the economic benefit of simultaneous substitution for English-language private conventional television, it is clear that the loss of simultaneous substitution privileges would have devastating consequences for Canadian OTA broadcasters.
34. In the submissions filed on October 19, 2007, only Shaw Communications Inc. proposed the elimination of the simultaneous substitution rules. Other BDUs have not advocated such an extreme measure, in recognition of the importance of the underlying policy rationale re the protection of program rights and the very real and essential economic benefits that are attributable to this measure.
35. In light of (i) the critical importance of the underlying policy imperative respecting the protection of program rights, (ii) the fact that there is no realistic or practical alternative to simultaneous substitution as a means of respecting this policy imperative, and (iii) the significant economic benefit of simultaneous substitution to the private conventional television sector, which enables greater investment in the production and acquisition of Canadian programming, the CAB submits that simultaneous substitution must remain as an essential element of the BDU distribution framework and must be rigorously enforced by the Commission.

## V The Small Market Local Programming Fund

36. In Public Notice CRTC 2003-257 the Commission announced the creation of a new fund to assist small market, independently owned television licensees in contributing to Canadian programming and, in particular, to meeting their commitments to local programming. This fund, now known as the Small Market Local Programming Fund (SMLPF), is supported by both DTH licensees through contributions of 0.4% of their revenues derived from broadcasting activities.
37. In the four years of its existence, the SMLPF has proven to be of critical assistance to the 17 stations that are currently eligible to receive support. As noted earlier in this submission, small market broadcasters are facing unprecedented economic challenges and it is clear that without the support provided by the SMLPF there is a very real danger that such stations would be unable to continue operations in many small markets, let alone sustain any reasonable level of local programming.
38. With the proceeds of the SMLPF over the past four years, even in the face of declining profitability, the 17 small market independently owned stations have not only been able to sustain existing local programming commitments, but they have been able to undertake new initiatives to better serve their local communities. These are initiatives that would otherwise have not been possible.
39. Appendix 2 contains a partial listing of some of the programming initiatives undertaken by these stations in just the last two years, thanks to the SMLPF. In addition to the examples provided, these stations have also undertaken numerous other programming initiatives, equipment upgrades, hiring of new staff, etc., measures that have been essential to the maintenance and improvement of ongoing programming. By any measure, the CAB submits that this fund has been a tremendous success.
40. The Commission itself recently confirmed the importance of the SMLPF in Broadcasting Public Notice CRTC 2007-53 *Determinations regarding certain aspects of the regulatory framework for over-the-air television* (the TV Policy Review decision). The Commission specifically considered the circumstances of small market independently owned broadcasters, concluding that:

*...independent broadcasters play an important role in providing local programming outside of major markets. In order to provide local programming of high quality, they need the financial strength that results from reasonable affiliation agreements and financial support. The Commission is of the view that the Small Market Programming Fund is achieving its objectives by enabling independent small market stations to provide local programming to the communities they serve...*
41. The CAB strongly believes that this fund should be confirmed as an essential component of the regulatory framework for small market independently owned stations. As such, the CAB submits that the Commission should adopt certain

specific measures to ensure that the SMLPF is accorded a more prominent and permanent status.

42. The Commission's current approach is to treat this fund as one of a package of measures that the DTH licensees must fulfil in order to be relieved of program deletion obligations. Going forward, however, in view of the distant signals discussion and recommendations in the next section of this submission, the CAB submits that the requirement for DTH licensees to contribute to the SMLPF should be decoupled from relief from the requirement to undertake program deletion and enshrined in the *Broadcasting Distribution Regulations* (BD Regulations) based on its merits. In this way, those stations that are entitled to benefit from the SMLPF would have some assurance that this critical support for their local programming initiatives will continue.
43. Furthermore, the Commission should amend the BD Regulations to require monthly payments to the SMLPF. As the CAB has documented in recent correspondence with the Commission, there have been ongoing issues with respect to the timely remittance of payments to the SMLPF by Star Choice, and the resulting delays in disbursing funds to the local television licensees have severely compromised the ability of some small market broadcasters to plan and carry out local programming initiatives. Including a requirement for monthly contributions to the SMLPF in the BD Regulations would create certainty with respect to the obligations of the DTH licensees in this regard and would provide the Commission with the necessary enforcement tools.
44. The CAB further submits that the Commission should strengthen the SMLPF by requiring contributions from those cable BDUs that operate in markets served by recipients of the SMLPF. This would ensure regulatory parity between cable and DTH and further support the production of local programming in those communities.
45. Finally, as proposed in the CAB's Phase 1 submission, the Commission should expand the list of stations eligible to benefit from the SMLPF to include the three local stations operated by Corus Entertainment Inc. and the TQS station serving Trois-Rivières. These stations serve small markets and, like the small market independently owned stations, cannot reasonably benefit from the consent regime for carriage into distant markets that is discussed in the next section.

## **VI Distant signals**

46. The Commission's current distant signals policy was established in Public Notice CRTC 1995-217, the Introductory Statement to the licensing decisions for new DTH undertakings. In that notice, the Commission set out its policy to authorize the distribution of Canadian television stations into distant markets, subject only to the requirement that the DTH licensees delete programs on distant signals that duplicate programming provided by local television stations.

47. The program deletion requirements, if implemented, would have been an appropriate measure to protect the program rights of local television stations. Such rights are significantly devalued when identical programming on distant signals is allowed to be broadcast in local markets, given that it fragments the audience for such programming and reduces the advertising revenues available to local broadcasters.
48. The Commission, however, was unwilling to enforce the program deletion requirements out of a concern that to do so would hamper the ability of the DTH licensees to compete effectively with the incumbent cable distributors. Accordingly, the Commission effectively required broadcasters and DTH distributors to negotiate “alternative measures” in lieu of program deletion, and these alternative measures ultimately took the form of financial compensation payable to broadcasters in lieu of program deletion in respect of both distant Canadian signals and also the 2<sup>nd</sup> set of US 4+1 network signals.
49. A similar approach was subsequently adopted in the case of the distribution of distant signals by cable BDUs, such that for the past several years both DTH and cable BDUs have distributed numerous Canadian distant signals and a second set of US 4+1 signals into virtually all markets across the country.
50. As indicated in the CAB’s Phase 1 submission, the distant signals issue is having a significant negative impact on the private conventional television sector, and in particular on English-language broadcasters. A study conducted by Armstrong Consulting and filed as part of CTVglobemedia’s submission to the 2006 TV Policy Review proceeding concluded that, in the absence of enforceable program deletion regulations with respect to the distribution of identical programming delivered by both Canadian and non-Canadian distant signals into local markets, the economic impact of distant signals on local television broadcasters was a loss of advertising revenues of over \$70 million in 2004/2005.
51. As noted in the CAB’s Phase 1 submission to the current proceeding, the CAB has commissioned Armstrong Consulting to update the earlier study, and the updated results are attached as Appendix 3, *The Economic Impact on Local Private Television Stations from the Distribution of Distant Canadian Television Stations and a Second Set of US 4+1 Television Stations on Digital Cable and DTH: Updated*. This update should be read in conjunction with the original study with respect to the detailed methodology used.
52. The updated study shows that the impact of distant signals continues to grow. Overall, the incremental advertising revenues that could have accrued to local private television broadcasters, if digital cable and DTH subscribers had not had access to identical programming on distant Canadian and a 2<sup>nd</sup> set of US 4+1 television stations, rose to \$80.7 million in 2005/2006, an increase of about \$9.8 million over 2004/2005. Increases occurred both for digital cable and DTH and for each category of distant signals, Canadian and the 2<sup>nd</sup> set of US 4+1 signals.
53. Of this overall impact, the larger portion is attributable to the importation of distant Canadian signals, at about \$70 million, with the 2<sup>nd</sup> set of US 4+1 signals responsible for an economic impact of approximately \$11 million. Furthermore, with respect to

- distant Canadian stations specifically, DTH distribution has a significantly more pronounced economic impact on local broadcasters than cable distribution.
54. The latter finding is attributable to a number of factors.
  55. First, the study assumes that cable distributors adhere to existing simultaneous substitution regulations with respect to identical programming broadcast on distant stations at the same time as its broadcast by a local station. This means that, for the purposes of the study, there is no economic impact attributable to “station-shifting” (i.e. the viewing of a program on a distant station at the same time as the same program is broadcast by a local station). All impact estimated by the Armstrong Consulting study attributed to cable delivery of distant signals is therefore the result of “time-shifting”.
  56. DTH, on the other hand, does not carry out simultaneous substitution (or deletion) on behalf of local stations with respect to any simultaneously broadcast identical programming on distant stations (with the exception of deletions of identical programming broadcast by “same time zone, same network” distant signals within the Grade B contour of small market independently owned stations). This means that impact due to station-shifting is a significant factor for DTH, over and above the impact attributable to time-shifting. For example, according to the CanWest MediaWorks submission to the 2006 TV Policy Review proceeding, station-shifting accounts for almost half of the total DTH impact on CanWest attributable to viewing of distant Canadian stations.
  57. The CanWest submission also pointed out that the regulatory obligation for cable BDUs to carry out simultaneous substitution on all distant signals is not fully respected. In practice, therefore, there would be an additional economic impact due to station-shifting by cable subscribers, over and above the impact estimated in the Armstrong Consulting study. Rigorous enforcement of existing simultaneous substitution regulations for cable would ensure that this issue is properly addressed.
  58. The second reason for a higher impact of distant Canadian signals delivered by DTH is that many local stations are still not carried by DTH in their local markets. This in effect represents a double-barrelled impact – DTH viewers in the local market do not have the option of viewing the local stations while, at the same time, they have ready access to much of the same programming through a larger number of distant signals originating from markets across the country. As discussed earlier in this submission, priority carriage by DTH of all local stations that originate local programming, within their recognized market area is an absolutely essential requirement to assist local stations in reaching their audience. This measure, however, would only help to reduce to a certain degree the overall impact of distant signals; it would not eliminate it.
  59. Thirdly, DTH undertakings tend to carry more distant Canadian signals than many of the cable BDUs with which they compete. While Rogers Cable, for example, has a relatively extensive line-up of distant Canadian signals comparable to that distributed by DTH, many other terrestrial BDUs carry significantly fewer distant signals. The

- impact attributable to distant signals increases as the number of such signals increases.
60. Finally, it should be noted that Shaw Cablesystems was not distributing distant Canadian signals during the 2005/2006 broadcast year. The CAB submits that the overall impact of cable-delivered distant signals as estimated in the Armstrong Consulting update for that year would have been measurably higher had Shaw been distributing distant Canadian signals.
  61. The Commission's approach to the distant signals issue has been to encourage broadcasters and BDUs to negotiate agreements that would, in theory, provide broadcasters with fair and equitable compensation for the impact of distant signals on the program rights they have acquired. In practice, however, current compensation arrangements are inadequate in reflecting the actual economic harm to broadcasters, and broadcasters lack the ability to negotiate more reasonable terms of distribution for their own signals. There are two key reasons for this:
    - (i) broadcasters have no right to withhold their signals from distribution into distant markets in the absence of an agreement between the parties; and
    - (ii) the Commission has been unwilling to enforce program deletion regulations as an alternative to negotiated agreements, even though such requirements have been included in the BD Regulations since 1998.
  62. The result is a collection of compensation arrangements based either on historical interim agreements that were known to be inadequate, or on a Commission decision in the case of Rogers Cable<sup>5</sup> that did not even attempt to address actual impact. Such arrangements provide a level of compensation that fails to come even close to actual impact.
  63. According to the CAB's records, total compensation received from cable and DTH BDUs in respect of the delivery of distant signals in 2005/2006 was less than \$17 million, including about \$6.4 million to the SMLPF. In contrast, as noted earlier, estimated overall impact was almost \$81 million in 2005/2006, leaving a gap of some \$64 million in potential revenues drained from private conventional television broadcasters.
  64. The Commission most recently addressed the distant signals issue in the TV Policy Review decision. The Commission again called on parties to enter into negotiations with respect to the suspension of program deletion requirements, with the purpose of such agreements to "ensure that local and regional OTA broadcasters receive fair and equitable compensation for the impact that distant signals have on the program rights that they have acquired."

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<sup>5</sup> Broadcasting Decision CRTC 2005-198 re Rogers Cable Communications Inc. established compensation of \$0.50 per subscriber per month in lieu of program deletion with respect to distant Canadian signals distributed by Rogers Cable.

65. The CAB submits that there is little chance that, under the current regulatory framework, negotiated agreements could significantly narrow the gap between actual impact attributable to the importation of distant signals on the one hand, and the amount of compensation that could reasonably be negotiated on the other. In practice, broadcasters would have essentially zero leverage going into such negotiations, for the reasons discussed above. The CAB strongly believes that a new approach is now required.
66. As noted in our Phase 1 submission, the Dunbar-Leblanc Report recommended that the Commission undertake a review of its distant signal policy and consider amending the carriage rules for the distribution of distant signals to ensure that programming rights of OTA stations are adequately protected. The CAB supports this recommendation, and submits that the Commission should adopt the following, more equitable approach to resolve the distant signals issue:
- Amend the BD Regulations to authorize a cable or DTH BDU to distribute a Canadian television station in distant markets only if the BDU has a signed agreement with the licensee of the station to be distributed in those distant markets. The basis of negotiations could include but would not be limited to consideration of factors such as the value of the signal to the BDU, the potential impact on the broadcaster of allowing distribution of its signal into distant markets, or any other factor as may be determined to be relevant on a case-by-case basis. All existing authorizations to distribute distant Canadian signals would be terminated with the coming into force of this requirement.
  - With regard to the distribution of the 2<sup>nd</sup> set of US 4+1 signals, the CAB notes that the updated impact analysis estimates total damage of approximately \$11 million in 2005/2006 due to the carriage of such signals, almost three times the amount of compensation broadcasters received in that year. Furthermore, if the number of distant Canadian signals distributed by BDUs were to drop as a result of the implementation of the broadcaster consent requirement recommended above, there could be significantly increased tuning to the 2<sup>nd</sup> set of US 4+1 signals on a time-shifted basis. In these circumstances, the damage to local Canadian stations could grow significantly. As a result, the Commission needs to resolve this issue.
  - Existing requirements, imposed by condition of licence, that the DTH operators must delete identical programming broadcast on “same time zone, same network” distant signals within the Grade B contour of small market independently owned stations should be maintained.
  - Simultaneous substitution regulations should be strictly enforced with respect to the cable distribution of distant signals.

## VII Conclusion

67. The CAB strongly supports the Commission's decision to expand the scope of this proceeding to include consideration of matters that are central to the long-term viability of the conventional television sector.
68. In this submission, the CAB has made recommendations with respect to four key elements of the Commission's regulatory framework for conventional television:
- the need to maintain cable priority carriage requirements and extend similar requirements to DTH;
  - the need to maintain and strictly enforce simultaneous substitution regulations;
  - the need to maintain and strengthen the Small Market Local Programming Fund, in view of its critical importance to the ability of small market independently owned television stations to properly serve their local markets; and
  - the need to adopt a new, market-based solution to the distant signals issue to ensure that the program rights of conventional television broadcasters are adequately protected.
69. In addition to these measures, other more targeted measures may also be required to fully address the specific circumstances of various sub-sectors of the private conventional television industry (English-language broadcasters, French-language broadcasters, small market broadcasters, etc.). Where appropriate, such measures will be addressed in the submissions of individual CAB members.
70. The CAB appreciates the opportunity to participate in this proceeding, and looks forward to the next round of written comments in February and the public hearing in April.

## VIII Appendices

1. The Economic Value of Simultaneous Signal Substitution for English-Language Private Conventional Television Broadcasters
2. Examples of Programming Initiatives Supported by the Small Market Local Programming Fund in 2005/2006 and 2006/2007
3. The Economic Impact on Local Private Television Stations from the Distribution of Distant Canadian Television Stations and a Second Set of US 4+1 Television Stations on Digital Cable and DTH: Updated

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