



Canadian Association of Broadcasters  
Association canadienne des radiodiffuseurs

May 8, 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:  
*Review of the Regulatory Frameworks for Broadcasting Distribution Undertakings  
and Discretionary Programming Services***

### **Introduction**

1. The Canadian Association of Broadcasters (CAB) is pleased to provide these Reply comments in respect of the above-noted proceeding.
2. As presented in our various written submissions in this process and during our appearance on April 10, the CAB supports a regulatory framework for over-the-air (OTA), specialty and pay TV programming services and for broadcasting distribution undertakings (BDUs) which builds on the successes achieved to date so as to ensure that Canadians will continue to have access to the best broadcasting system in the world.
3. The CAB notes that the vast majority of parties participating in this process, representing a wide range of stakeholder groups and interests, shared many of the same thoughts on what is needed to meet this common goal, and equally shared the same concerns regarding the future of the Canadian broadcasting system should the Commission adopt the deregulatory agenda advocated by some others.
4. In this respect, the CAB submits that a general consensus emerged through the hearing process regarding the importance to the system of maintaining rules which promote the provision and receipt of a diverse selection of Canadian television services and which both recognize and provide support for the significant contributions those services make to the creation and presentation of Canadian programming.

5. In particular, the CAB submits that the Commission has been sent a clear message highlighting the importance of ensuring a meaningful preponderance of Canadian services, access rules and genre protection (respecting both domestic and foreign services).

### **The CAB's Recommended Framework**

6. In developing a recommended framework for OTAs, discretionary services and BDUs, the CAB focused on the need to prioritize those elements of the current framework which make a clear and positive contribution to the success of the broadcasting system while eliminating unnecessary rules and providing increased flexibility where warranted.
7. We have set out the full details of the CAB's recommended framework in the Appendix to this Reply submission. Without detracting from the importance of any one component of our recommended framework, it includes the following key elements:
  - Access rights for all licensed analog & Category 1 specialty and pay services, including such third-language services;
  - Preponderance of Canadian discretionary programming services at the offer and reception levels;
  - 1:1 linkage rule for discretionary packages;
  - Genre exclusivity for licensed Canadian services based on their Nature of Service;
  - Protection for all licensed Canadian pay and specialty services against the entry of totally or partially competitive foreign services;
  - Buy-through obligations for foreign third-language services;
  - Recognition of the special challenges facing independent or smaller programmers.
8. As noted above, most of the parties to this proceeding supported these positions or ones which are similar in principle. They did so in the shared interest of maintaining those aspects of the regulatory system which have proven to be effective over the years in providing Canadians with a world-leading choice of diverse and attractive television services.<sup>1</sup>
9. It is important for the Commission to recognize that even BDUs supported some of the above positions: for example, Rogers supported a strong test against the entry of foreign services, TELUS supported access rules and genre protection, and even Shaw supported preponderance in discretionary packages.

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<sup>1</sup> As the CAB demonstrated in our oral remarks, Canadians enjoy more access to both domestic and foreign television services on a per capita basis than anywhere else in the world: we have more than twice as many choices as the UK, three times as many as France, five times as many as Japan and more than 10 times as many as the U.S., the world's biggest media powerhouse.

10. Nevertheless, the common theme in the BDUs' presentations was "trust [so-called] market forces" to ensure the best results for Canadian TV viewers and for the Canadian broadcasting system.
11. In the CAB's view - which, again, is clearly shared in this respect by most other parties to this proceeding - doing so would be a mistake.

## **Retaining and Building on a Proven Framework**

### **Measuring Preponderance in a Meaningful Manner**

12. All parties which addressed the matter agreed that BDUs should continue to be required to abide by a preponderance of Canadian services obligation, with many (including some BDUs) supporting a model which, at a minimum, would ensure preponderance in program packages.
13. While the CAB supports maintenance of preponderance measured at the subscriber reception level, too, we also wish to highlight the need for the Commission to establish an appropriate and meaningful definition of which services qualify for the preponderance test. This is particularly important given that some of the rules which currently work in tandem with the preponderance test to support Canadian services may be eliminated as a result of this current proceeding.
14. The CAB submits that the preponderance test should be applied in a manner that encourages and promotes the distribution and subscriber take-up of Canadian specialty and pay services, rather than as simply a means to justify the offering and take-up of more and more foreign services. Unfortunately, the current test, as set out in s. 6 of the *Broadcasting Distribution Regulations* (the Regulations), accomplishes the latter rather than the former.
15. Pursuant to s. 6 of the Regulations, the Canadian services upon which a BDU may currently rely to meet its preponderance obligation include, in addition to licensed specialty and pay services: priority carriage OTA services; the community channel; distant OTA signals; and exempt programming services. Also included are local and distant radio stations and pay audio services.<sup>2</sup>
16. The CAB submits it is unnecessary and inappropriate to include in the preponderance test services which are already offered on the basic service: as subscribers must already take these services, including them in the test does nothing to incent their subscriber take-up.

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<sup>2</sup> Subsection 6(2) of the Regulations provides: "Except as otherwise provided under a condition of its licence, a licensee shall ensure, in respect of each of analog and digital technology, that a majority of the video and audio channels received by a subscriber are devoted to the distribution of Canadian programming services, other than programming distributed on program repeat channels." "Canadian programming service" is defined in s. 1 of the Regulations to mean: "a) a programming service that originates entirely within Canada [which would include exempt programming services] or is transmitted by a licensed station; b) a programming service consisting of community programming; c) a specialty service; d) a pay television service; e) a television pay-per-view service; f) a DTH pay-per-view service; g) a video-on-demand service; h) a pay audio service."

17. The CAB similarly questions the appropriateness of including exempt services and distant signals in the test: doing so only promotes the increased carriage of such services (so as to make the BDU eligible to carry and package more foreign TV services) with little net gain for the broadcasting system.<sup>3</sup>
18. To ensure the preponderance test is indeed meaningful, and serves to promote the BDU distribution and the subscriber take-up of Canadian television services which they are not already obliged to receive, the CAB submits that the preponderance test should be based only on *discretionary* Canadian specialty and pay services.
19. Thus section 6 of the Regulations should be amended to provide:

Except as otherwise provided under a condition of its licence, a licensee shall ensure, in respect of each of analog and digital technology, that a majority of the video channels<sup>4</sup> received by a subscriber as discretionary services are devoted to the distribution of licensed Canadian specialty and pay television services, other than programming distributed on program repeat channels.<sup>5</sup>

### **The Continued Need for a Canadian Packaging Rule**

20. While at least some of the BDUs committed to providing discretionary packages which would contain more Canadian than foreign services, the CAB submits that the Commission should ensure this is the case by maintaining its current 1:1 linkage rule so Canadian services retain pride of place in discretionary packages.
21. This is particularly important if the Commission retains its current broad preponderance test: as a result of the current regulatory approach to measuring preponderance, Shaw's basic service for its Calgary system, for example, contains over 30 "qualifying" Canadian video services. This means that, absent linkage rules, Shaw (Calgary) could currently offer and package up to 29 foreign TV services which its customers could take without a requirement to subscribe to *any* Canadian discretionary services.<sup>6</sup>
22. The CAB submits that it would be contrary to Canada's broadcasting policy for the Commission to permit – indeed sanction – such a model which promotes the take-up of foreign services and the corresponding avoidance of Canadian services.
23. The CAB submits that the only way to retain pride of place for Canadian discretionary services, and to avoid the real possibility for the Americanization of the distribution system,

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<sup>3</sup> The CAB is prepared, however, to accept inclusion in the preponderance test of discretionary Canadian distant signals, if the Commission adopts our retransmission consent proposal: see below at pars. 24 – 29.

<sup>4</sup> A separate preponderance test should also be established for audio services.

<sup>5</sup> "[D]iscretionary service", "specialty service" and "pay television service" are already defined in s. 1 of the Regulations.

<sup>6</sup> There is also some uncertainty as to whether a BDU may rely on its audio channels - e.g. the radio stations and pay audio channels offered as part of its basic service - to create room for the carriage of foreign video services. If this is the case, a BDU, absent linkage rules, could offer and package a significantly larger number of foreign TV services - as many as 100 - which its customers could take without a requirement to subscribe to any Canadian discretionary services.

is to maintain the rule that ensures there are as many Canadian services as foreign ones offered in any discretionary package, i.e. a 1:1 linkage rule.

### **Distant Signals**

24. The record of this proceeding clearly supports the CAB's position that the Commission must revise its current approach to the distribution of distant signals. BDU arguments that the Commission should maintain the status quo are disingenuous – they are well aware that the Commission is unable or unwilling to enforce its program deletion regulations and that, consequently, broadcasters have no real ability to negotiate appropriate compensation agreements in lieu of program deletion.
25. The result is that current compensation arrangements, including the Small Market Local Programming Fund (SMLPF), amount to some \$17 million annually, while the impact of the distribution of distant signals on Canadian television broadcasters totaled almost \$81 million in 2005/2006.<sup>7</sup>
26. In short, the current distant signals policy is deeply flawed and cannot yield equitable results.
27. The CAB has proposed a solution to the distant signals situation that addresses the underlying issue of protecting program rights and responds to the circumstances of both large station groups and small market independently-owned broadcasters. Reduced to its essentials, the CAB proposal has two key elements:
  - A requirement that a BDU obtain the consent of a broadcaster before that broadcaster's OTA signal may be distributed outside of its priority carriage market;
  - A strengthening of the SMLPF by: (i) enshrining BDU contribution requirements in the Regulations; (ii) extending contribution requirements to include cable BDUs operating in markets served by television stations eligible to access the SMLPF; and (iii) extending eligibility to access the SMLPF to the three OTA stations operated by Corus and the TQS station serving Trois-Rivières; and
  - With regard to the distribution of the second set of U.S. 4+1 signals, the CAB noted in its January 25 submission that the economic impact attributable to such signals is almost three times greater than the amount of compensation received by broadcasters. Furthermore, if the number of distant Canadian signals distributed by BDUs was to drop as a result of the implementation of the broadcaster consent requirement recommended above, there could be significantly increased tuning to the second set of US 4+1 signals on a time-shifted basis. In these circumstances, the damage to local Canadian stations could grow significantly. Certain of the CAB's members have proposed ways to resolve this issue.
28. Adopting this solution would resolve the Canadian distant signals issue once and for all, without the need for further Commission intervention. In particular, the requirement that a

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<sup>7</sup> See Armstrong Study submitted with the CAB's January 25, 2008 filing.

BDU obtain a broadcaster's consent before its OTA signal may be distributed in distant markets eliminates the need for the Commission to adjudicate disputes respecting appropriate compensation. Since distant signals do not have access entitlements, there is no role for the Commission to play should the parties not agree to the terms of distribution of a given signal into distant markets – the signal would simply not be carried outside of its priority carriage market in the absence of a negotiated agreement.

29. This is an appropriate, market-based solution that gives a broadcaster a say in the distribution of its OTA signal outside of the territory that the Commission has licensed it to serve.

### **BDU Advertising**

30. Less than a year ago<sup>8</sup>, the Commission re-confirmed its policy that local avails on foreign services are to “be used for the benefit of the Canadian broadcasting system and primarily to promote Canadian programming services”.
31. The CAB continues to oppose granting BDUs the right to use local avails on foreign services to sell commercial advertising. Regardless of how much resulting revenue a BDU may be willing (or required) to contribute to Canadian programming<sup>9</sup>, allowing BDUs to sell local avails will only result in a redistribution of existing advertising revenues.
32. As the Commission recognized in denying previous BDU and third-party applications to insert advertising into local avails on foreign services, adding more advertising minutes to the system does not result in incremental, new advertising growth. The advertising market is already fragmented, and most specialty channels and OTAs and radio stations (particularly in small markets) have available inventory.
33. Moreover, allowing BDUs to sell local avails on foreign services would substantially increase the inventory of available spots and thereby dramatically drive down per unit rates. While BDUs would be unaffected by a resulting downward impact on these rates (given that any revenue from local avails would be “gravity” to them), this would have a devastating impact on both radio and television programmers and their ability to fund their operations, including their Canadian programming expenditures. Some Canadian specialty services even fear being dropped altogether from advertisers' buy plans if alternative opportunities to advertise on popular US satellite services are opened up.
34. It is important for the Commission to recognize that the term “local” avails is a misnomer: the CAB notes that, while some BDUs claimed that their ability to sell avails would have little impact on TV broadcasters' advertising revenues because the BDUs would only target local advertisers, US cable operators increasingly sell “local” avails on a regional or national basis, in part because, like Canadian cable systems, they are extensively interconnected. If

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<sup>8</sup> Broadcasting Decision CRTC 2007-169, June 8, 2007.

<sup>9</sup> E.g. through contributions to the Canadian Television Fund.

given access to avails, Canadian BDUs will no doubt follow the lead of their US counterparts.

35. A 2004 analysis, employing a methodology accepted by the CRTC, estimated that the potential revenue to cable from selling local avails was \$60M per year. The CAB updated the analysis using the same accepted methodology, and calculated that the value of local avails in 2007 would have been \$90M (source: Strategic Inc.).
36. This estimate could be somewhat conservative, however, when compared to the US situation. There, the sale of advertising by local cable systems generated over \$5.1B in revenues in 2006 (source: TVB). This includes advertising sold in cable-produced local programming as well as the sale of the local avails in specialty television services. If even 5% of this \$5B amount represented the potential size of the Canadian local avails market, the value of local avails would be \$250M. US observers such as Yankee Group consider this to be part of total television advertising revenues, which supports the argument that local avails revenues siphon advertising dollars away from advertising on conventional and specialty television and are not incremental to the system.
37. The CAB is unaware of any recent developments that would warrant a change to the Commission's policy regarding the use of local avails on foreign services. In fact, the rationale for not permitting BDUs access to local or national commercial revenues is even stronger today given that the BDU industry continues to flourish with increasing revenues and profits, while the financial picture for conventional television continues to suffer.
38. The CAB submits that ad avails on foreign satellite services must continue to be used to promote licensed Canadian television services on a strict cost recovery, non discriminatory basis and must be accessible to all licensed Canadian programming services.
39. The CAB is also opposed to BDUs having access to ad avails for any reason on licensed Canadian services.

## **Responses to Undertakings and Commission Questions**

### **Access Rules (Undertaking in response to question from Commissioner Cugini)**

40. As indicated above, the CAB supports maintenance of the access rules for analog and Category 1 specialty and pay TV services. The CAB notes that the vast majority of the parties to this proceeding, including TELUS, also support access rules.
41. During our oral appearance, Commissioner Cugini asked about the possibility of adding a "can remove" provision for BDUs should access rules be retained (Transcript, Vol. 3, lines 3862 – 3866).
42. The CAB submits that the Regulations already permit a BDU to seek relief from the access rules with respect to one or more analog or Category 1 services, as sections 18 (applicable to

Class 1 BDUs) and 38 (applicable to DTH BDUs) provide that the access obligations therein are “[e]xcept as otherwise provided under a condition of [the BDU’s] licence”.

43. Accordingly a BDU can apply for an amendment to its licence to seek a condition granting it relief from its access obligations for one or more applicable services. In each case, the BDU would have to fully justify its request. The process, if triggered, would also provide the affected service and the public an opportunity to argue why the service should not be removed.

**Points System Model for Mandated Basic Carriage (Undertaking in response to questions from Commissioner Morin)**

44. The CAB acknowledges Commissioner Morin’s efforts to, in his words, find a dynamic solution for the objectives raised globally by this hearing, to provide a direction while contributing to the predictability that companies need in order to invest and convince their investors, and to ensure transparency, fairness, predictability and timeliness.
45. We have carefully considered Commissioner Morin’s model, including assessing its results, and have consulted at length with our members regarding its structure and potential implications for the broadcasting system.
46. The CAB appreciates that Commissioner Morin’s model could provide some certainty with respect to which services would get access to the basic service and under what conditions. However, given that there are so many variables in making such an assessment beyond Canadian content levels and program expenditures - including contributions to diversity and to the various other broadcasting policy objectives in s. 3 of the *Broadcasting Act* - the CAB questions whether an entirely objective model, notwithstanding its attractiveness because of that very characteristic, would be sufficient to accomplish this goal.
47. In studying the model and reviewing Commissioner Morin’s related explanations during the hearing as well as his detailed written description of how it would work, including his responses to likely questions, we noted with concern the apparent expectation that the model would be designed to replace the need for the distribution and linkage rules and for other detailed regulations. The CAB submits there are a number of other matters beyond basic carriage that the Commission needs to address in this proceeding. As outlined in our written submissions and oral presentation and referenced above, the CAB supports a number of regulatory rules, such as access for analog and Category 1 specialty and pay services, genre protection, preponderance and 1:1 linkage, which we submit are all necessary to ensure the continued success of the Canadian broadcasting system. Accordingly, the CAB cannot support the notion that Commissioner Morin’s model, if adopted, would replace the need for other important regulatory rules.
48. Should Commissioner Morin’s model be considered instead as simply one component of the more comprehensive framework as advocated by the CAB, we would note that much work would still be required in order to establish one or more appropriate thresholds and to consider the possibility of bonus systems for priority programming or other ways to

acknowledge the important contributions to the system various services may make beyond their Canadian content and program expenditure levels.

49. While we envisage that this exercise could become quite complicated, the CAB would be pleased to participate in making the necessary determinations should parties to this proceeding convince the Commission to adopt this model. We also expect that, as the broadcasting system evolves, these and other aspects of the model would need regular review to ensure they remain relevant and appropriate. The CAB would participate in these ongoing and necessary reviews as well.

### **Regulatory Approaches to VOD and SVOD**

50. On the last day of the hearing, the Chairman asked parties to address in their final submissions regulatory approaches to video-on-demand (VOD) and subscription VOD (SVOD) and, in particular, to delineate: a) those features which distinguish VOD and SVOD from linear programming services; and b) the appropriate rights and obligations which should accrue to both broadcasters and BDUs in the VOD and SVOD environment.
51. It is relatively easy to distinguish VOD - sometimes called *transactional* VOD (TVOD) - from linear programming; it is much less easy to do so for SVOD – hence the CAB’s concerns that SVOD could provide for the back-door entry into Canada of unauthorized foreign services or the creation of unlicensed, competitive quasi-linear Canadian services.
52. The primary distinction between TVOD services and linear programming services is that subscribers wishing to access programming from the former must order and pay for – i.e. *transact* for - programs on a one-off basis. In this respect, a TVOD service is akin to a pay-per-view (PPV) service, the primary difference being that PPV programs are scheduled by the PPV service provider whereas TVOD programs are accessed from the TVOD provider’s library at a time of the customer’s choosing.
53. With SVOD, on the other hand, a customer need only pay once (typically monthly) for access to an extensive library of programs. In this respect, it is akin to a linear pay television service. More accurately, SVOD is akin to linear pay TV with a built-in, fully-programmed Personal Video Recorder (PVR) as, again, program access is at the time of the customer’s, rather than the service’s, choosing.
54. The CAB is concerned that SVOD will be used – in fact is already being used - to provide a back-door entry for programming from foreign sources not authorized to provide their programming services in Canada. Examples where this is already happening are: “Howard TV on Demand” (offered by Rogers) which offers unlimited access for a monthly charge to uncensored Howard Stern content totaling more than 30 hours of new programming each month; “WWE 24/7 On Demand” (also on Rogers) which offers 40 hours of content each month including network shows, specials, pay-per-view events, and best-selling videos from WWE’s library; and “Anime on Demand” (Rogers, Shaw and Eastlink) which offers 25-30 hours of Anime Network content at any time per month. None of Howard TV, WWE TV or the Anime Network is currently authorized for distribution in Canada, yet full program

schedules from these unauthorized services are now available for a monthly fee through these SVOD services.

55. These examples demonstrate the real possibility that other currently unauthorized services could find their way into Canada through the guise of an SVOD service.
56. The CAB is also concerned that BDU VOD licensees could similarly use their SVOD platform to develop unlicensed quasi-linear Canadian services that would, by genre and programming, compete directly with licensed Canadian services.
57. The CAB notes that, in 2000, the Commission tried to respond to concerns about SVOD services, with their low Canadian content obligations, becoming competitive threats to licensed linear services by prohibiting SVOD services from offering programming packages where the total period during which the programming may be viewed exceeds one week<sup>10</sup> (“the one-week rule”). As demonstrated by the examples above, however, BDU VOD licensees have managed to employ creative means to get around this SVOD limitation, thus making it an ineffective regulatory measure.
58. It is for this reason - to prevent the back-door entry of both unauthorized foreign services and unlicensed competitive quasi-linear Canadian services – that the CAB submits that 1) VOD licensees must secure their rights to programs to be offered on an SVOD basis solely from licensed Canadian linear services or from already authorized foreign linear services; and 2) SVOD programming must have already aired on the related linear service or be scheduled to air on the linear service in the same month in which it is made available on an SVOD basis. Both obligations are necessary to ensure that a VOD licensee may not effectively distribute an unlicensed or unauthorized television service in the guise of an SVOD service.
59. In this way, existing SVOD services like The Movie Network on Demand and Super Écran sur demande would continue, and other services similarly tied directly to licensed and authorized services could be developed. The CAB submits that adherence to these rules is the only way to ensure SVOD does not serve to render ineffective the Commission’s licensing framework for Canadian specialty and pay TV services or the policy behind the Commission’s lists of eligible satellite services, but instead makes a positive contribution to meeting Canada’s broadcasting policy objectives.
60. The CAB does not propose that a similar program rights rule be applied to TVOD services given, as noted above, they do not resemble linear services in the manner that SVOD services do.
61. In addition, the CAB submits that any VOD or SVOD program that contains a commercial message must satisfy the following three criteria:
  - The program must be obtained from a licensed Canadian programming service;

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<sup>10</sup> Public Notice CRTC 2000-172.

- The program must be offered in a manner that is subject to, and in accordance with, the terms of a signed written agreement that is entered into between the VOD licensee (typically a BDU) and the operator of the Canadian programming service undertaking that broadcasts the program; and
- The program must not contain commercial messages that are sold or inserted by a VOD licensee or foreign broadcaster into the programs. For certainty, a VOD licensee is prohibited from directly selling advertising on its VOD platforms, and it is recognized that the sale of advertising and related revenue should be the sole domain of the Canadian programming service that is responsible for providing the content to the VOD licensee.

### **Aggregator Model for VOD (Undertaking in response to questions from Vice Chair Arpin)**

62. During our oral appearance, Vice Chair Arpin asked for the CAB's position on AETN's proposal to use "content aggregators" to provide VOD programs to VOD licensees.<sup>11</sup> As the CAB understands AETN proposal, this type of VOD program delivery allows program providers to distribute content on a more efficient "one-to-many" basis – without the need to establish a separate delivery pipeline for each VOD licensee. It also means that each VOD licensee must accept the same electronic file of any given program that is provided to all other VOD licensees.
63. The CAB considers that allowing the use of "content aggregators" to deliver VOD programs may have the potential to allow a greater number of VOD licensees to have access to VOD programs. However, we submit that more information is required regarding such matters as the role, identity (including nationality) and impact on programmers of such aggregators. The CAB is willing to enter into discussions with potential aggregators to explore these matters.

### **Network Personal Video Recorder (NPVR)**

64. On the last day of the hearing, the Chairman also asked parties to provide in their final submissions additional information respecting NPVR and its potential impact on CRTC policies.
65. The CAB has reviewed those portions of the hearing transcripts where TELUS highlighted its interest in and plans for NPVR. We also note that, in its appearance, Shaw stated that it is no longer pursuing NPVR notwithstanding that it had been considering NPVR for some time.
66. The CAB notes that, while referenced briefly by Shaw, TELUS did not raise the fact that the introduction of NPVR in the US is currently the subject of ongoing and heated

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<sup>11</sup> As stated in the AETN Phase I submission, "Content aggregators facilitate VOD program delivery by transporting electronic files of programs to cable operators' headends and preparing these files for deployment over the cable operators' VOD infrastructure."

litigation in the Cablevision case<sup>12</sup>. In that case, the studios have argued, amongst other things, that NPVR (or, as Cablevision calls its proposed service, Remote Storage Digital Video Recorder, or RS-DVR) is effectively a VOD service and therefore Cablevision must secure VOD rights for the programs recorded and subsequently made available on an on-demand basis to its customers. The same argument would apply here.

67. An important difference also impacting on the legal status of NPVR in Canada, which does not exist to the same extent in the US, is the fact that, in Canada, consumers who record TV shows for later viewing, whether on a VCR, in-home PVR or, potentially, through an NPVR, are infringing copyright.<sup>13</sup> For this reason, Canadian BDUs are actively seeking an amendment to the *Copyright Act* to create a “time-shifting right” similar to that which exists in the US and some other jurisdictions. The creation of such a right, however, is not expected in the short-term, if at all. Nevertheless, even if such a right is ultimately created in Canada, lengthy litigation will no doubt ensue to determine whether the right applies in the NPVR context.
68. In short, the CAB submits that the introduction of NPVR in Canada would raise all the same rights issues as VOD plus other legal issues that will no doubt trigger lengthy litigation. These matters may ultimately be addressed in commercial negotiations between rights holders and BDUs and/or through the courts. At this point in time, however, the CAB does not foresee that NPVR will have an impact on CRTC policies.

## Conclusion

69. In our concluding remarks during our April 10 appearance at the CRTC’s public hearing, the CAB pointed out that the public record in this proceeding was replete with evidence of success in accomplishing the objectives of the *Broadcasting Act*. While the CAB appeared early on in the oral hearing, the public record that developed subsequent to our presentation served only to reinforce this evidentiary fact.
70. The Canadian broadcasting system has succeeded to date in many ways. It is the CAB’s view - and one shared by many other participants in this lengthy proceeding - that the best and most effective means for the CRTC and other stakeholders in the broadcasting system to build on these successes going forward is to maintain those key regulatory rules which have served the system so well to date. It is not the time to dismantle or discard those rules based on the unproven hope that all will continue to be well without them. To the contrary, it is time to reinforce the rules that have proven their value, to eliminate only those that have proven to be of limited or no value, and to address the outstanding issues that the CAB and its members - and others - have identified as necessary to make our system even better.

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<sup>12</sup> *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.* (2007 WL 867093) – now under appeal.

<sup>13</sup> For various reasons, rightsholders have not pursued copyright infringement cases against individual Canadians who record TV shows for time-shifting purposes in their homes; however, it is fully expected that rightsholders would pursue an action against a large corporate entity that launched an NPVR service.

71. It is much easier to tear down than it is to build; we urge the Commission, however, to resist taking the easy path and instead continue to embrace the challenge of building and maintaining a unique and strong Canadian broadcasting system.
72. The CAB appreciates the opportunity to provide these Reply comments as a follow-up to the recent hearing.

Sincerely,

*Original signed by*

Glenn O'Farrell  
President and CEO

## APPENDIX CAB's Recommended Framework<sup>14</sup>

### Basic Service and OTAs

- A buy-through basic service for terrestrial and DTH BDUs that includes, at a minimum, local<sup>15</sup> and regional OTA services<sup>16</sup>, CBC/SRC, provincial educational and legislative services, and s. 9(1)(h) services, grouped together beginning with the basic band or lowest channel numbers used; subject to the agreement of the applicable service, BDUs may continue to add Canadian analog or Category 1 specialty services to basic; BDUs may also, at their option, maintain the community channel and a single set of US 4+1 services on basic.
- Retain and enforce simultaneous substitution obligations (including with respect to Canadian distant signals).
- Require a BDU to obtain the broadcaster's consent before its OTA signal may be offered to subscribers in distant markets; eliminate program deletion regulations re distant Canadian signals.
- Amend the Regulations to require DTH licensees to continue to contribute 0.4% of revenues to the Small Market Local Programming Fund, with payments on a monthly basis, and extend the same contribution requirement to cable BDUs operating in markets served by recipients of the SMLPF.
- Allow the three Corus stations and the TQS station in Trois-Rivières to access the SMLPF.

### Discretionary Services

- Maintain access rights to terrestrial and DTH BDU systems for all licensed analog & Category 1 specialty and pay services, including such third-language services.
- Preponderance of Canadian programming services at the offer and reception levels.
- 1:1 linkage rule for discretionary packages.
- Maintain genre exclusivity for licensed Canadian services, but based on their Nature of Service.
- Continue to prohibit the entry of foreign services that are deemed to be totally or partially competitive with an existing licensed Canadian service.
- Buy-through obligations for foreign third-language services.
- Recognition of the special challenges facing independent or smaller programmers.

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<sup>14</sup> This is a summary. For complete details, see the CAB's Phase I, II and III and Reply submissions and April 10 appearance at the public hearing.

<sup>15</sup> Including "local into local" for DTH. The need for this rule is only reinforced by the recent decision by Star Choice to drop various OTA services.

<sup>16</sup> Per the definitions of "local television station" and "regional television station" as currently provided in the *Broadcasting Distribution Regulations*; hence, the priority status of the television stations that currently meet either of these definitions would be maintained. This would not result in the addition of any additional currently-licensed stations to the basic service of terrestrial BDUs.

- Each analog and Category 1 specialty service must be offered in a package (themed or all-inclusive) before it can be offered on a standalone or pick-a-pack basis.
- BDUs in francophone markets must offer an all-in package of all analog discretionary French-language specialty services before offering them in a theme package or on a standalone/pick-a-pack basis.
- Retain the current regulatory framework for ethnic services; foreign ethnic services authorized for distribution in Canada must be offered in packages with licensed ethnic services that operate in the same language or that serve the same ethnic community.
- Eliminate the restrictions on traditional and non-traditional advertising for specialty services as the Commission has done for OTAs.<sup>17</sup>
- An efficient and effective final offer dispute resolution mechanism.
- Incorporation of “good commercial practices”<sup>18</sup> in the Regulations.

### **VOD/SVOD**

- Promote growth and contributions of VOD while ensuring it does not provide “back door” entry for unauthorized US services.
- Replace 1-week SVOD rule with rules requiring that SVOD programming must be sourced from a licensed Canadian broadcaster or already-authorized foreign service and must have been aired, or be scheduled to air in the same month, on the corresponding linear service.
- Canadian content contributions should be commensurate with other classes of licence with access rights.

### **BDU Advertising**

- Fundamental principles:
  - i. The sale of advertising must remain the sole domain of programmers.
  - ii. All ad revenues go to the programmer providing the programming.
  - iii. Allocation of transactional VOD revenues generated by a broadcaster’s programs subject to negotiation.
- Maintain current restrictions on the sale of advertising in the local avails of US satellite services.
- Permit commercials (incl. dynamic ad insertion) in VOD but only in programs obtained from a licensed Canadian broadcaster and subject to a written agreement.

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<sup>17</sup> See Broadcasting Public Notice CRTC 2007-53.

<sup>18</sup> See Broadcasting Public Notice CRTC 2005-35.