



Broadcasting Public Notice CRTC 2005-1

Ottawa, 7 January 2005

Determinations with respect to the establishment of rules to govern the distribution of specialty services on the basic service of fully digital cable undertakings; and call for proposals for a framework to guide the migration of pay and specialty services from analog to a digital distribution environment

The Commission has decided not to establish new rules for the distribution of specialty services on the basic service of fully digital cable broadcasting distribution undertakings at this time. However, it is now calling for proposals for a framework that will govern the migration of pay and specialty services from analog to digital distribution. The Commission notes that the issues raised by this call for proposals are related to those raised by Call for comments on a proposed framework for the licensing and distribution of high definition pay and specialty services, Broadcasting Public Notice CRTC 2004-58, 6 August 2004 (Public Notice 2004-58). Accordingly, the Commission's determinations in the new proceeding may be influenced by its determinations in the proceeding initiated by Public Notice 2004-58.

Introduction

1. In *Call for comments on the establishment of rules to govern the distribution of specialty services on the basic service of fully digital cable undertakings*, Broadcasting Public Notice CRTC 2002-48, 16 August 2002 (Public Notice 2002-48), the Commission sought comments on the rules that should govern the distribution of specialty services on the basic service¹ of those cable broadcasting distribution undertakings (cable BDUs) that distribute programming to subscribers exclusively via digital technology (fully digital cable BDUs).

Positions of parties

2. The Commission received 24 comments in the first stage of the proceeding and 9 in the second. In general, distributors and their representatives, specifically the Canadian Cable Telecommunications Association (CCTA), the Canadian Cable Systems Alliance Inc., Quebecor Media Inc., Saskatchewan Telecommunications (SaskTel) and TELUS Communications Inc. (TELUS), supported a shift towards a more market-driven approach that would permit the basic service to be determined through negotiation and

¹ The basic service refers to the service distributed by licensed broadcasting distribution undertakings (BDUs) as a package for a single fee. It is composed of the programming services that licensed BDUs are required to distribute pursuant to sections 17, 32 or 37 of the *Broadcasting Distribution Regulations*, section 9(1)(h) of the *Broadcasting Act*, the distribution and linkage requirements, as currently set out in *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2004-56, 29 July 2004, or a condition of the BDU's licence, as well as any other authorized service that a licensed BDU decides to include in the package.

consumer demand. They recommended that the Commission drop the dual status rules,² not only in a digital distribution environment but also in analog, noting that the analog specialty services governed by those rules are now well-established and no longer need the protection that dual status affords. Distributors further submitted that increased flexibility in the analog distribution environment would facilitate the transition to digital distribution.

3. Cable BDUs and BDUs using digital subscriber line technology (DSL BDUs) also generally recommended that the Commission re-examine the rules that currently apply to analog distribution with a view to establishing competitive equity with direct-to-home distribution undertakings (DTH BDUs), arguing that asymmetric regulations for DTH BDUs are no longer necessary or appropriate. SaskTel and TELUS further argued that, as fully digital distributors, they should already have the same latitude as DTH BDUs.
4. Broadcasters and their representatives, including the Canadian Association of Broadcasters (CAB), Astral Media inc. (Astral), CHUM Television Inc., CTV Inc. (CTV), Pelmorex Communications Inc., and Vision TV: Canada's Faith Network/Réseau religieux canadien (VisionTV) generally opposed a market-driven approach and supported the continuation of the dual status rules in a digital distribution environment. They suggested that this was the best way to ensure that the benefits that have accrued from the existing regulatory framework continue to be realized as the industry completes the transition to digital distribution. They recommended that any changes to the distribution rules should also include consideration of mechanisms to ensure that specialty services are able to continue to meet their commitments, either through reconsideration of their obligations or through specific regulatory safeguards related to pricing, packaging, penetration, wholesale rates and promotion.
5. Le Regroupement francophone de créateurs de contenus (Le Regroupement) responded on behalf of l'Association de l'industrie du disque et du spectacle du Québec, l'Association des producteurs de films et de télévision du Québec, l'Association des réalisateurs et réalisatrices du Québec, la Société des auteurs de radio, télévision et cinéma, la Société professionnelle des auteurs compositeurs du Québec, and l'Union des artistes. Le Regroupement pointed out that the Francophone market is not subject to the same criteria as the Anglophone market, and that the distribution system should above all respond to objectives of the *Broadcasting Act* (the Act), not to the requirements of market forces. It noted that, in 1987, when the Commission granted the first licences for specialty services with the objective of providing more diversity and curbing the erosion of Francophone audiences, the Commission determined that French-language specialty services should have the benefit of a protected environment.
6. Astral, which owns most of the French-language specialty services, emphasized that the Act clearly affirms that the Canadian broadcasting system is a public service that is essential for maintaining and strengthening national identity and cultural sovereignty.

² A service having dual status, if carried by a BDU, must be distributed as part of the basic service, unless the programming service agrees in writing to be carried on a discretionary tier.

Astral stated that the Canadian broadcasting system's activities cannot be left to market forces, but must be regulated in order to meet the objectives of the Act. Astral noted that, when specialty services were introduced in the early 1980s, two types of services were authorized: discretionary subscription services (pay television) and basic cable services. Due to the different modes of distribution, these two types of services were subject to very different rates. In the French-language environment, the monthly rates for discretionary subscription services were several times higher than rates for services carried on basic. It was only under these conditions that these two types of Canadian services were able to develop.

7. Three other main issues emerged from the comments, related to the following:
 - the criteria for selecting the services that should have basic carriage status on fully digital cable BDUs;
 - the appropriateness of establishing rules for fully digital cable BDUs at this time; and
 - the growing need for guidelines to govern the transition from an analog to a digital distribution environment.

Criteria for selecting services for basic carriage

8. Only a few parties commented on specific criteria that could be adopted for determining the services that should receive mandatory basic carriage on fully digital cable BDUs. VisionTV recommended that the Commission preserve a public “greenspace” in the broadcasting system for services mandated to address identifiable public policy goals, rather than commercial interests.
9. The Commissioner of Official Languages recommended that the Commission continue to ensure that Canadians have access to a broad array of national, regional, educational and cultural services in both official languages. Similarly, Le Regroupement recommended that the Commission continue to determine the services that have to be distributed as part of the basic service. Le Regroupement submitted that services distributed as part of the basic service should include public broadcasting services in both official languages and services that most fully reflect Canadian culture in music, drama and documentary programming, as well as local services.
10. The Union des consommateurs noted the rising costs of cable service and recommended that the Commission take advantage of this proceeding to establish a small and affordable basic service composed only of local Canadian signals and community channels, where they exist. The Union des consommateurs submitted that, if rates increased unduly, a return to rate regulation might be desirable. It also recommended that the Commission consider the possibility of requiring all distributors to distribute a package of French-language services.

The timing of establishing rules for a digital basic service

11. The majority of parties to this proceeding suggested that it was premature to establish rules concerning the distribution of specialty services on the basic service of fully digital cable BDUs. Many submitted that it is difficult to forecast with any accuracy what a fully digital distribution environment will look like. The CCTA, for example, suggested that, for both regulatory and economic reasons, it was unrealistic to believe that fully digital cable BDUs would emerge in the near future. For its part, the CAB submitted that there was no urgency to develop new rules for the distribution of specialty services by fully digital cable BDUs. It suggested that the Commission should conduct a comprehensive review of the framework governing all BDUs once it is clear that the cable industry is committed to becoming fully digital with no analog offering. The Directors Guild of Canada (DGC) suggested that the process was premature, and noted that the Commission risks establishing rules for a world that will not exist for many years to come. The DGC further stated that it would be hard to comment on the end game without commenting on the rules that need to be put in place to govern the transition from analog to digital distribution.

The need for guidelines to govern the transition from an analog to a digital distribution environment

12. Several parties emphasized the importance of setting the ground rules for the transition of analog services to digital distribution. The CCTA specifically urged the Commission to initiate a separate proceeding to examine the continued appropriateness of the existing distribution rules, given the state of competition in distribution, as well as issues related to the transition to a fully digital distribution environment. The CAB recommended that the Commission enunciate principles to guide the transition from analog to digital distribution. CTV also suggested the development of rules to ensure an orderly and balanced transition.

The Commission's analysis and determinations

13. The transition to digital distribution is well underway, with several distributors, including DTH BDUs, multipoint distribution system (MDS) BDUs, and DSL BDUs already distributing services on a fully digital basis. In addition, larger multiple system cable operators provide a substantial array of digital services in addition to those services distributed using analog technology. Vidéotron ltée, Cogeco Cable Canada Inc., and Rogers Cable Inc. are already distributing services to some subscribers on a fully digital basis.
14. The Commission has already established some rules with regard to the services that must be offered as part of a basic service distributed using digital technology. In *Renewal of the licence for TV5 Québec Canada*, Broadcasting Decision CRTC 2003-77, 27 February 2003, the Commission clarified the distribution and linkage requirements applicable to the distribution by terrestrial BDUs of dual status services to subscribers who receive all their services via digital distribution technology. The Commission determined that such cable BDUs are required to distribute specialty services that have dual status as part of

the basic service, regardless of whether the subscriber receives the service via analog or digital distribution technology, unless the programming service has consented in writing to the contrary.

15. In addition, some rules for basic service distributed via digital technology are being set in the context of the development of the overall framework for digital broadcasting and the distribution of digital signals. For example, in *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61, 11 November 2003 (Public Notice 2003-61), the Commission ruled that the signals of licensed, priority, digital television stations must be carried as part of the basic service distributed via digital technology. The Commission further notes that Public Notice 2003-61 specified that, once 85% of a cable BDU's subscribers are served digitally, the licensee of such a BDU may apply to be relieved of the obligation to distribute analog signals. The Commission stated that the terms and conditions under which analog services may be removed would be considered at that time.
16. Although the transition to a digital distribution environment has begun, the Commission agrees with those parties who submitted that the development of fully digital cable BDUs may not occur for some time, and that it is difficult to predict what the environment will be like at that time. In addition, the record of this proceeding clearly demonstrates a need to explore issues related to the broader question of the migration of analog programming services to digital distribution. Finally, the Commission considers that the appropriate regulatory approach to the distribution of specialty services by fully digital cable BDUs could be better examined in a broader context that would take such migration issues into account.
17. In light of the above, and based on the record of this proceeding, the Commission does not consider it appropriate, at this time, to alter the approach set out in paragraph 14 above regarding the distribution of analog dual status specialty services on the basic service, whether distributed via analog or digital technology. The Commission notes that, until such time as it may rule otherwise, the existing rules with respect to the distribution of specialty services will continue to apply. Specifically, Class 1 BDUs must distribute a specialty service that has dual status as part of the basic service, unless the operator of the programming service has consented in writing to its distribution on a discretionary basis, regardless of whether the subscriber receives a completely analog service, a hybrid analog and digital service, or a fully digital service.
18. In *Call for comments on a proposed framework for the licensing and distribution of high definition pay and specialty services*, Broadcasting Public Notice CRTC 2004-58, 6 August 2004 (Public Notice 2004-58), the Commission set out its preliminary view concerning the framework that should apply to Canadian pay and specialty services as they move toward the broadcast of programming in high definition.
19. The policy framework set out in Public Notice 2004-58 anticipates the complete conversion of television transmission and distribution systems from analog to high definition digital technology. In Public Notice 2004-58, the Commission noted that it

would issue a second public notice related to the migration of analog pay and specialty services to a digital distribution environment. It encouraged those filing comments in response to Public Notice 2004-58, in particular those addressing the steps by which broadcasters and distributors would make the transition to the high definition framework, also to consider the issues set out in that second public notice.

20. In light of the above, the Commission considers it appropriate to call for proposals concerning a framework to govern the migration of analog pay and specialty services to digital distribution in a manner that will contribute to the attainment of the objectives of the Act and advance, rather than compromise, the transition to high definition digital technology.

Toward a framework to govern the migration of analog programming services to digital distribution

21. In establishing a framework to govern the migration of analog pay and specialty programming services to digital distribution, the Commission must seek to contribute to the attainment of the various policy objectives set out in section 3 of the Act. The Commission considers that digital technology can contribute to the attainment of those objectives in a number of ways. Among other things, digital technology will permit more efficient delivery of programming services, consistent with section 3(1)(t)(ii) of the Act, provide increased flexibility for distributors, facilitate the development of new types of services and related revenue sources for both programmers and distributors, and expand the choice of services for subscribers. The Commission therefore wishes to encourage the rollout of digital distribution technology, and seeks to maximize its contribution to the attainment of the objectives set out in section 3(1) of the Act.
22. To consider issues surrounding the migration of analog pay and specialty services to digital distribution, the Commission has, to date, relied chiefly on an industry working group process. In *Establishment of an industry working group to examine the digital distribution of existing pay and specialty services*, Public Notice CRTC 2000-113, 4 August 2000, the Commission called on the industry to develop proposals to govern the migration of existing services from analog to digital distribution. The Digital Migration Working Group (the working group) filed its report in February 2001. The report highlighted some common ground with respect to the need for more flexibility for smaller cable BDUs. However, distributors and programmers were unable to come to a consensus with respect to larger cable BDUs, and therefore set out their respective positions separately.
23. A second working group process with respect to large cable systems was established in *Digital migration issues – Reconvening of working group regarding large cable systems; and Call for comments regarding small cable systems*, Public Notice CRTC 2001-58, 25 May 2001 (Public Notice 2001-58), and *For the attention of the participants in the Digital Migration Working Group and other interested parties*, Circular No. 446, 2 November 2001. The process with respect to smaller cable BDUs resulted in *Small*

cable systems – Digital migration policy, Public Notice CRTC 2001-130, 21 December 2001 (the small cable digital migration policy). The reconvening of the working group did not result in any further consensus, and the working group was adjourned indefinitely in March 2003.

24. Parties to the present proceeding suggested that a working group was not the most appropriate way to deal with the important policy issues that surround the migration of analog services to digital distribution, and argued that such matters would best be dealt with by the Commission.
25. The Commission notes that broadcasters and distributors share common interests in maximizing the penetration of programming services generally. These common interests provide a basis for the successful cooperation of broadcasters and distributors through the transition from analog to digital distribution, and should ultimately lead to an environment defined by less detailed regulation.
26. In considering the most appropriate framework for the migration of specialty and pay services from analog to digital distribution, the Commission will continue to be guided by the considerations set out above. The Commission also considers that several principles and requirements that have been enunciated in a number of recent public notices and decisions could form an appropriate basis for a framework to govern the transition from analog to digital distribution. These are set out below.

Consent

27. Broadcasters have emphasized the importance of requiring cable distributors to obtain the consent of analog programming services before distributing such services on a digital basis. For their part, distributors have expressed concern that programmers of analog services may unreasonably withhold such consent, thus slowing the pace of the transition to digital distribution.
28. In Public Notice 2001-58, the Commission stated the following:

In order to clarify the terms on which digital tiers will be launched in the near future, the Commission considers it appropriate to establish an interim approach with regard to the question of consent. Pending final resolution of this issue (as discussed below), the Commission considers that, as a matter of broadcasting policy, the duplicate distribution of existing analog services on digital tiers must have the prior consent of the programmer. Such consent could take the form of (a) explicit terms relating to digital carriage in existing (or renegotiated) affiliation agreements, or (b) a separate agreement or consent relating solely to digital carriage.

29. In the small cable digital migration policy, the Commission stated that:

... consent for carriage generally is fundamental to the programmer's right and ability to control its product. Accordingly, in the case of small cable systems as herein defined, the Commission finds that the programmer's consent is required for the digital distribution of existing analog services. However, in the case of such systems, there are circumstances in which the Commission will expect consent to be provided.

30. In the small cable migration policy, the Commission also noted that it had interpreted the access rules in section 18(5) of the *Broadcasting Distribution Regulations* as requiring analog distribution. As a result, the distribution by a Class 1 cable operator of an analog service only via digital technology would require authorization from the Commission, while duplication on digital would not raise the same concern with regard to section 18(5). In the circumstances where the Commission expected the programmer's consent to be given for the distribution of its service via digital technology, the Commission stated that it would be inclined to approve applications from small cable systems for the necessary conditions of licence, provided that the system was otherwise in compliance with the carriage rules.

31. As the industry moves toward the digital distribution environment, different packaging and marketing arrangements will continue to evolve. The Commission invites comment on whether programmer consent should be required for the migration of analog services to digital distribution on all cable BDUs, and, if so, under what circumstances. The Commission also invites comment on the circumstances under which it should expect programmers to provide consent to cable BDUs.

Provision of a basic service

32. It is the Commission's view that the concept of a basic service that is available to all subscribers remains relevant in both an analog and digital distribution environment. As noted above, the Commission has maintained the requirement for cable BDUs to provide a basic service, regardless of whether the subscriber receives service on a totally analog basis, a hybrid analog and digital basis, or a fully digital basis. The Commission also notes that DTH BDUs, MDS BDUs and DSL BDUs, which already offer fully digital services, are required to provide a basic service.

33. The principle of a digital basic service is set out in a number of the Commission's recent decisions regarding the transition to digital broadcasting, most notably in Public Notice 2003-61, in which the Commission determined that the signals of licensed, priority, digital television stations must be distributed as part of the digital basic service.

34. The Commission invites proposals that reflect the continued relevance of a basic service.

Distribution and linkage rules

35. In Public Notice 2004-58, the Commission proposed a less restrictive set of distribution and linkage rules for high definition transitional pay and specialty services, particularly for cable BDUs. Specifically, the Commission considered that rules similar to those currently applicable to DTH BDUs would be appropriate for all large BDUs. In proposing this approach, the Commission noted that a number of factors favour a more flexible model, including consumer demand for more purchasing options and distributors' desire to exercise the flexibility that digital distribution affords in order to satisfy that demand.
36. In proposing less restrictive distribution and linkage rules for high definition transitional pay and specialty services, one of the key changes advanced by the Commission was elimination of the dual and modified dual status provisions for high definition services distributed by cable BDUs.
37. Consistent with the above, the Commission invites parties to submit proposals that envisage less restrictive distribution and linkage rules for the migration of the analog services to digital distribution.

Wholesale rates

38. In Public Notice 2004-58, the Commission noted that relatively few of the larger cable BDUs remain rate regulated, and thus are free to raise their rates within the limits set by the competitive marketplace. Given these and other considerations, the Commission was of the view that it would be preferable if the wholesale rates for the high definition versions of specialty services were set by negotiation between the parties, in which any wholesale rate approved by the Commission in respect of a current analog or low definition digital service would be but one consideration.
39. The Commission notes that, in an environment where BDUs are largely rate deregulated, any wholesale rate established by the Commission can have only an indirect impact on the retail prices paid by consumers. Accordingly, consistent with the view expressed in Public Notice 2004-58, the Commission invites comment on whether it would be also appropriate that wholesale rates for the digital distribution of analog pay and specialty programming services be set by negotiation between the parties.

Call for proposals

40. In addition to commenting on the above principles, the Commission invites parties to submit proposals on a framework to guide the migration of analog pay and specialty services through the transition to a digital distribution environment in a manner that will contribute to the attainment of the objectives of the Act and advance, rather than compromise, the transition to high definition digital technology. Parties are requested to be as specific and as comprehensive as possible on the elements of that framework. Parties should also support their framework proposals with realistic business scenarios based on the packaging, distribution, marketing and wholesale rates of analog pay and

specialty services during the transition, in both the English- and French-language markets.

41. For each scenario, an analysis should be provided of the impact of the proposed framework on the overall business models of both programmers and distributors, including the current revenue bases and profitability, as well as their costs associated with the transition to digital distribution. The proposed framework should also seek to balance the concerns of programmers and distributors, while ensuring an attractive and affordable service for consumers.
42. As indicated in the preceding paragraphs, the issues raised by this public notice are related to those raised by Public Notice 2004-58. Accordingly, the Commission's determinations in the present proceeding may be influenced by its determinations in the proceeding initiated by Public Notice 2004-58.
43. The Commission will accept proposals that it receives on or before **7 March 2005**.
44. Parties may file replies commenting on the proposals on or before **29 March 2005**.
45. The Commission will not formally acknowledge comments. It will, however, fully consider all comments and they will form part of the public record of the proceeding, provided that the procedures for filing set out below have been followed.

Procedures for filing proposals

46. Interested parties can file their proposals to the Secretary General of the Commission by using ONE of the following formats:
 - Intervention/Comments form
available from the Commission's web site by indicating and selecting the public notice number under the *Decisions, Notices and Orders* section

OR

 - **by electronic mail to**
procedure@crtc.gc.ca

OR

 - **by mail to**
CRTC, Ottawa, Ontario K1A 0N2

OR

 - **by fax at**
(819) 994-0218

47. Submissions longer than five pages should include a summary.
48. Please number each paragraph of your submission. In addition, please enter the line ***End of document*** following the last paragraph. This will help the Commission verify that the document has not been damaged during transmission.
49. The Commission will make comments filed in electronic form available on its web site at www.crtc.gc.ca but only in the official language and format in which they are submitted. Such comments may be accessed in the *Public Proceedings* section of the CRTC web site. Copies of all comments, whether filed on paper or in electronic form, will also be placed on the public examination file.
50. The Commission encourages interested parties to monitor the public examination file and the Commission's web site for additional information that they may find useful when preparing their comments.

Examination of public comments and related documents at the following Commission offices during normal business hours

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Secretary General

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