



Broadcasting Public Notice CRTC 2004-58

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Call for comments on a proposed framework for the licensing and distribution of high definition pay and specialty services

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Call for comments on a proposed framework for the licensing and distribution of high definition pay and specialty services

The Commission herein proposes a regulatory framework that covers both the licensing and the distribution of high definition pay and specialty services and invites comments on that framework. Instructions for filing comments are set out at the end of the notice.

Background and summary

1. In *A licensing policy to oversee the transition from analog to digital, over-the-air television broadcasting*, Broadcasting Public Notice CRTC 2002-31, 12 June 2002 (Public Notice 2002-31), the Commission set out the regulatory framework for the transition to over-the-air digital television broadcasting. Subsequently, the Commission issued *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61, 11 November 2003 (Public Notice 2003-61), which dealt primarily with the distribution regime applicable to over-the-air digital broadcasting services.
2. In Public Notice 2003-61, the Commission addressed certain matters affecting the transition of pay and specialty services to high definition. In particular, the Commission announced that it would launch a separate proceeding to establish the licensing and distribution frameworks for Canadian pay and specialty services as they move toward the broadcast of programming in high definition.¹ The Commission also set out the regime that would apply until the completion of that separate proceeding.
3. The present public notice begins the separate proceeding announced in Public Notice 2003-61 by setting out the Commission's initial view of the regulatory framework that should govern the licensing and distribution of high definition pay² and specialty services, and by calling for comment with respect to that initial view.
4. In general, the proposed licensing and distribution policy is intended to encourage the transition of the Canadian broadcasting system to high definition technology. It does so by providing a mechanism for the licensing of transitional high definition pay and specialty services that will permit easy entry to the new technology. However, it will also reward those who make a strong commitment to high definition by tying carriage rights for these services to the provision of minimum amounts of high definition programming.

¹ For the purpose of this notice, the term "high definition" encompasses both the 720p and 1080i picture formats, as defined by the Advanced Television Systems Committee in its A/53 digital television standard, which has been adopted for use both within Canada and the United States of America.

² In this public notice, the term "pay services" refers to all services regulated under the *Pay Television Regulations, 1990*. These include pay, pay-per-view and video-on-demand services.

5. The proposed policy also encourages broadcasting distribution undertakings (BDUs) to carry high definition services by permitting flexibility in the packaging of such services, and provides regulatory certainty by setting out the details of the distribution policy for the new high definition services, including the distribution and linkage rules, the carriage of non-Canadian high definition signals, and provisions governing technical quality and simultaneous substitution.
6. The Commission invites comment on the proposed policy framework that follows, including any issues or questions relating to its implementation, taking into account any differences that exist among distribution technologies. In particular, parties should comment on the issues related to the licensing and distribution of high definition pay and specialty services, setting out what they believe the high definition framework should be.
7. The Commission notes that the proposed policy framework is intended to accommodate the industry's transition from today's analog and low definition digital programming services and distribution technologies to high definition. Therefore, what must also be considered is how and when the current industry structure can be adapted to the high definition framework. Accordingly, parties are requested to set out the steps by which broadcasters and distributors would make the transition to the high definition framework.
8. In Public Notice 2003-61, the Commission stated that once 85% of a BDU's subscribers can receive digital signals, the BDU would be able to apply to remove analog services from its distribution system. The Commission added that it will determine the terms and conditions for the removal of the analog services at the time that it considers such applications. As a consequence, the Commission does not invite comment at this time regarding what these terms and conditions might be.
9. In addition, the Commission intends soon to issue a second public notice announcing its determinations with respect to the establishment of rules to govern the distribution of specialty services on the basic service of fully digital cable undertakings. The Commission encourages those filing comments in response to the matters discussed in this present public notice, 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. In the second notice, the Commission will call for comments on additional questions related to the migration of pay and specialty services to a digital distribution environment.

Introduction

10. The Canadian broadcasting system is currently in a transition period that will eventually end in the complete conversion of television transmission and distribution systems from analog to high definition digital technology. This transition will likely continue for some

years. The transition will be complete when all viewers in Canada can receive high definition programming, whether they use the services of a BDU or rely on over-the-air reception.³

11. As the transition continues, pay and specialty services will need to respond through the provision of increasing amounts of high definition programming. A few have already begun to do so. Some others are reliant on old series or archived material and may therefore not begin to provide programming in high definition for some years. However, as high definition receivers and displays become more common, services will find it increasingly difficult to compete for viewers if they do not upgrade their program formats.
12. As the system moves through the transition, it will be necessary to adjust the regulatory regime. While the Commission envisages a transition that is largely voluntary and market-driven, it will nonetheless be necessary to provide regulatory certainty, and where required, encouragement for the transition, through a policy for the licensing and carriage of the high definition services to be offered by current and future pay and specialty licensees.

Goals of the process

13. In *Call for comments on a proposed policy to oversee the transition from analog to digital over-the-air television broadcasting*, Public Notice CRTC 2001-62, 5 June 2001 (Public Notice 2001-62), the Commission stated that it would be guided by five objectives, which continue to form the basis for its policy approach to the transition to digital and ultimately to high definition:
 - The transition policy should provide guidance to broadcasters, distributors and producers concerning their adoption of the new digital television technology.
 - The continued strength and growth of the Canadian broadcasting industry should be fostered and its cultural objectives maintained.
 - The production, broadcast and distribution of high quality A/53 Canadian programs across the country should be encouraged.
 - Canadian viewers should benefit from these technological advances to the fullest possible extent.
 - The orderly and timely transition to advanced digital television services should not be impeded by unnecessary regulation.

³ Even when the transition is complete, some programs may still be in low definition formats, and some television displays may not show the full resolution of high definition signals.

14. In addition, Public Notice 2002-31 set out three other principles governing the transition of over-the-air television services to digital, resulting from previous processes:
- In general, digital technology should be treated as a replacement for analog technology.
 - A voluntary transition, developing at a pace set by the marketplace rather than by mandated deadlines, is the appropriate approach for the Canadian broadcasting system.
 - The issuance of new, transitional licences is preferable to the amendment of existing licences.
15. The Commission is of the view that these same objectives and principles, as they are discussed below, should apply to the transition of both pay and specialty services from analog and low definition digital to high definition digital broadcasting.

Licensing policy

Replacement technology

16. Consistent with the above, in the Commission's view, it is appropriate to treat high definition technology as a replacement for the analog and low definition digital technology used by today's pay and specialty services.
17. In Public Notice 2003-61, the Commission stated that, as is the case for over-the-air digital television services, digital versions of pay or specialty services that contain any amount of programming in high definition would be referred to as "upgraded versions."⁴ These upgraded versions would provide essentially the same programming as their analog or low-definition digital counterparts. However, it was also anticipated that some of the programming on an upgraded service could be new, and not simply high definition versions of programs broadcast on the counterpart service.

Unduplicated programming allowance

18. In Public Notice 2002-31, the Commission determined that a new transitional digital television licence would be issued for each over-the-air digital television undertaking. The Commission established a maximum allowance of 14 hours per week for programming on the transitional digital over-the-air service that is not duplicated on its counterpart analog over-the-air service.⁵ The purpose of the allowance was to balance the

⁴ As with over-the-air digital television services, the balance of the programming would be composed of material in low definition formats.

⁵ Paragraph 25 of Public Notice 2002-31 states in part: "Where the licensee of an analog television undertaking is also the licensee of a transitional digital television undertaking, it will be authorized to broadcast a maximum of 14 hours per week of programming on the digital service that is not duplicated on the analog service. Broadcasters will be free to provide

need to grant enough flexibility for programmers to innovate and experiment with the need to establish sufficient limits to prevent the creation of what would be, in effect, distinct new services.

19. These same considerations apply in the case of pay and specialty services. The Commission considers that it would therefore be appropriate to set the same 14-hour allowance for pay and specialty services, Canadian as well as non-Canadian. Similarly, the Commission would require that all of the programming in the 14-hour allowance be in high definition formats, and that it conform to the counterpart service's nature of service definition as well as to other conditions of licence and expectations. However, while up to 14 hours of unduplicated programming would be permitted, the upgraded service would be free to provide lesser amounts of unduplicated programming, and might choose to offer none.

New licences preferable

20. The Commission also considers that issuing new licences offers more benefits than issuing licence amendments, including an allowance for the appropriate and orderly examination of a number of related matters, such as any outstanding distribution and linkage issues, as well as the possible regulation of carriage rates. These issues are discussed in the "Distribution policy" section of this notice.
21. In keeping with the principles outlined above, the Commission proposes to proceed through the issuance of new high definition-transitional (HD-transitional) licences, a class of licence for which existing pay and specialty licensees, subject to certain terms and conditions, would generally qualify when offering upgraded versions of their services with any amount of high definition programming.
22. The Commission does not consider that HD-transitional licences should be subject to any minimum requirements to produce or broadcast high definition programming. As mentioned above, certain specialty licensees, by virtue of the nature of the services they offer, make considerable use of older programming, and thus may offer only small amounts of high definition programming at first. At the same time, however, the Commission generally considers that the services provided under HD-transitional licences should not receive mandatory carriage by BDUs unless they do provide certain minimum levels of high definition programming. Otherwise, if access rights were granted without a minimum requirement for high definition programming, a significant carriage burden could be placed on the distribution industry with little in the way of apparent benefit to the broadcasting system and the viewing public.
23. The Commission therefore proposes that the access rights of pay and specialty HD-transitional licensees to carriage by BDUs be linked to the provision of minimum amounts of high definition programming. HD-transitional licensees who meet the

lesser amounts of unduplicated digital programming, and may choose to offer none. A minimum of 50% of the unduplicated digital programming must be Canadian."

minimums would have access and carriage rights as described in the section of this notice titled Distribution policy. Services that do not meet these minimums would still be licensed, but carriage arrangements would be established through negotiations. The Commission acknowledges that this approach would differ from that established for over-the-air digital television services in Public Notice 2003-61, wherein the Commission determined that, “except as otherwise provided under a condition of licence, a distribution undertaking must carry the primary signal of Canadian over-the-air digital television signals identified in sections 17, 32 and 37 of the Regulations.” Unlike over-the-air broadcasters, however, pay and specialty licensees do not have to bear the substantial costs of constructing transmitters to provide their upgraded services. As the Commission stated in Public Notice 2003-61, over-the-air broadcasters must be afforded the opportunity to maximize their advertising revenues by having their over-the-air digital television services reach as many viewers as possible.

24. The Commission encourages the licensees of upgraded pay and specialty services to produce and acquire as much wide-screen format⁶ programming as possible for broadcast at times when high definition programming is not being aired.
25. The Commission would also invite such service providers to apply for an HD-transitional licence for the upgraded versions of their existing services. The proposed terms and conditions of such licences are set out below.

HD-transitional licence (pay or specialty)

26. An HD-transitional pay or specialty licence would, in general, be granted on the application of an existing pay or specialty licensee, subject to the following conditions:
 - a) the proposed upgraded service must provide the same audio and video programming as its existing licensed analog or low definition digital counterpart (LD-counterpart) service, with the exception of up to 14 hours per week of programming that need not be duplicated on its counterpart service;
 - b) unduplicated programming provided within the 14 hours permitted for such programming
 - i) must consist entirely of high definition programs, and
 - ii) must be at least 50% Canadian in origin;
 - c) the upgraded service must conform to the “nature of service” description of the LD-counterpart service;
 - d) programming on the upgraded service must respect the LD-counterpart service’s current obligations and conditions of licence;⁷ and

⁶ Wide-screen format programming is that having an aspect ratio of 16:9 instead of the familiar NTSC aspect ratio of 4:3.

- e) all programs that are produced in a high definition or low definition wide-screen format, and that are available to the licensee in that format, must be broadcast in that format. However, programming originally produced in the 4:3 aspect ratio need not be re-formatted as wide-screen, and low definition programming need not be line-doubled.

High Definition programming conditions

- 27. In addition, as discussed in the later section of this notice entitled Carriage obligations under the digital transition, an HD-transitional service would receive distribution by a BDU provided the licensee of the HD-transitional service adheres to conditions of licence requiring minimum levels of high definition programming. With respect to English- and French-language services, these minimum levels are as follows:
 - a) If the proposed service is an English-language service, at least 50% of the programming on the proposed service must be in high definition format.
 - b) If the proposed service is a French-language service, at least 30% of the programming must be in high definition format, of which at least 50% must have been originally produced in French.
- 28. Section 18(5)(c) of the Regulations states that, except as otherwise provided under a condition of its licence, a licensee shall distribute, to the extent of available channels,

the ethnic programming service of a programming undertaking authorized to provide the service to all or any part of the licensed area of the undertaking if

 - (i) the licensee was distributing the service on May 16, 1994, or
 - (ii) 10% or more of the total population of all cities, towns and municipalities encompassed in whole or in part within the licensed area of the licensee is of one or a combination of the ethnic origins to which the service is intended to appeal, according to the most recent population figures published by Statistics Canada.
- 29. The Commission invites comment on the amount of high definition programming that an ethnic programming service should be required to broadcast to receive distribution by a BDU.

⁷ Concerning such matters as Canadian content, Canadian programming expenditures, closed captioning and described video.

Exceptional cases

30. In a limited set of exceptional cases, it may be in the public interest to grant carriage rights for HD-transitional services that offer less than the amount of high definition programming that might otherwise be specified for services offered in a particular official language or for ethnic programming services. For example, there might be situations where,
- a) carriage of the HD-transitional service is essential to the continued viability of a particular service;
 - b) the service is adjudged to make an important contribution to the Canadian broadcasting system; and
 - c) the service would have difficulty procuring and producing high definition programming in the early years of the transition.
31. The Commission invites comment on what criteria it might use to determine whether an exception should be granted in respect of any service, how the criteria would be measured, and what, if any, lesser requirements for the provision of high definition program requirements should be imposed.

Timing of licence applications and new entrants

32. In Public Notice 2003-61, as an interim measure, the Commission allowed for the provision of upgraded versions of existing pay and specialty services by licence amendment. Specifically, the Commission stated:
- In the interim, the Commission will permit the licensee of a Canadian pay or specialty service to make available for distribution an upgraded version of the service, provided that not less than 95% of the video and audio components of the upgraded and analog versions of the service are the same, exclusive of the commercial messages and of any part of the service carried on a subsidiary signal. The Commission will authorize such an upgraded version by means of an amendment to the licence of the corresponding analog service. The authorization will be granted for a term of three years.
33. The Commission's intention is that the services offered under HD-transitional licences would replace those offered under the amended licences. As discussed above, a new HD-transitional licence would offer a service the opportunity to provide up to 14 hours per week of unduplicated programming. Moreover, once the high definition content conditions are met, the carriage rights described later in this notice would be conferred upon the licensee. The Commission expects those licensees that operate high definition services by licence amendment to submit applications for HD-transitional licences once the final policy framework is adopted.

34. Most pay and specialty licensees do not currently operate high definition services. In general, the Commission is of the view that these licensees should be given a reasonable period of time to prepare business plans and to apply for HD-transitional licences. During this period, they will continue to enjoy the genre protection that they currently have. However, genre protection in the high definition world cannot be guaranteed if an existing licensee fails to apply for an HD-transitional licence within a reasonable period of time. The audience for high definition programs should not be deprived of the opportunity to enjoy high definition program services in a particular genre or genres indefinitely.
35. In light of the above, the Commission proposes that, should an existing licensee fail to apply for a HD-transitional licence within a reasonable period, or otherwise fail to demonstrate that it is prepared to submit an application on a timely basis, the Commission would consider an application by a prospective new entrant for a licence to carry on an HD-transitional service in the programming genre provided by the existing licensee's service.
36. In addition, during the transition period, the Commission would continue to consider applications for licences to provide new high definition services. Such applications would, as now, be assessed in accordance with the Commission's current practices and policies, including those regarding market entry, ownership, licensing and programming, as well as any policies ultimately adopted with regard to minimum amounts of high definition programming.
37. The Commission notes that the practice of issuing licence amendments to authorize upgraded versions would cease once the final policy framework is adopted.

Stages of the transition to digital and to high definition service

38. The Commission foresees the transition as taking place over three stages. Cable BDUs are currently in the first stage of this transition, characterized by their distribution of analog as well as digital services. The second stage would be characterized by the absence of analog services. Instead, BDUs would offer a mix consisting predominantly of low definition digital services with some high definition services. In the third stage, high definition digital services will predominate. These latter two stages will occur at different times for different BDUs, and each stage will have its own regulatory obligations.
39. In Public Notice 2003-61, the Commission provided for a possible end to the first stage, when it concluded as follows:

A BDU may submit an application requesting the Commission's approval to cease the carriage of analog signals once 85% of the BDU's subscribers have the ability to receive digital services by means of digital television receivers or set-top boxes. The Commission will determine, at that time, the terms and conditions under which the analog services may be removed from the system.

40. Once a cable BDU is permitted to remove analog services, it would enter the second stage in which its subscribers would receive both low definition and high definition digital services, just as subscribers to direct-to-home satellite distribution undertakings (DTH BDUs) do now. The Commission expects that, when a BDU's analog services are removed, it would have substantial bandwidth capacity to reassign to the distribution of additional digital services and to other purposes.
41. In the third and final stage, low definition services would be phased out and all services would be produced and distributed in high definition. However, as indicated earlier, even when the transition is complete, some programs on high definition services may remain in low definition formats, and some television displays may not show the full resolution of high definition signals.

Distribution capacity issues

42. The Commission considers that the underlying objectives and principles of its transition policy, as listed in the section of this notice entitled Goals of the process, would be served by facilitating the industry's co-ordinated progress through the second and third stages of the transition. Accordingly, the Commission proposes to encourage the licensing of upgraded versions of existing services and to ensure their carriage when the high definition content conditions are met.
43. At the same time, the Commission notes that carriage of high definition services, particularly during the first stage of the transition, will have a significant impact on the carriage capacity of BDUs. Since the bandwidth demands of high definition are as much as five times greater than low definition, the rapid addition of upgraded versions of all existing analog and low definition digital services would place a demand on overall system capacity that may be difficult to accommodate. By implementing system upgrades over time, however, and possibly by adopting efficiencies in modulation and compression technologies as they become available, the broadcast distribution industry would be better equipped to meet this demand.
44. One of the difficulties facing distributors is uncertainty over the timing of the high definition transition. Whether or not there will be demand for capacity that cannot be met will depend on the following four factors:
 - how quickly over-the-air as well as pay and specialty services convert to high definition;
 - how quickly BDUs add capacity through system upgrades or the launch of additional satellites;
 - how quickly consumers adopt digital reception technology, permitting capacity to be freed by removing analog services from cable BDUs; and

- the possible adoption of more efficient compression and modulation technologies that would enable distributors to accommodate the bandwidth demands of high definition programming.
45. The Commission encourages the industry to provide its views on the capacity issue, particularly as it relates to the factors listed above. The Commission is especially interested in receiving suggestions concerning how its proposed regulatory framework can best address today's capacity and technology constraints. Comprehensive projections of both supply and demand for high definition services should be included in comments where possible.
46. In order to assist in the management of capacity issues, the Commission considers that, once pay and specialty licensees have developed their immediate and long-term plans for the launch of high definition services, these plans should be conveyed to distributors so that they, in turn, can plan for the carriage of such services. This information could be provided on a confidential basis.

Distribution policy

Authority to carry high definition services

47. As noted above in the section entitled Timing of licence applications and new entrants, the Commission provided, in Public Notice 2003-61, for the issuance of temporary authorities by way of licence amendment for pay and specialty services to provide upgraded versions of their existing services for a maximum of three years. It further provided a general authority for BDUs to distribute such upgraded services as follows:

Subject to the access requirements, the authority to distribute a discretionary or optional service, whether it be over-the-air, pay or specialty, and Canadian or non-Canadian, will also include the upgraded version of that service.

Carriage obligations during the digital transition

48. As noted earlier, the Commission proposes that access and carriage rights for HD-transitional licensees be tied to their provision of the minimum amounts of high definition programming described in the licensing policy set out above.
49. As described below, the Commission also proposes that carriage and access rights on the system of a particular BDU be linked to the stage of the transition reached by that BDU, as well as to the class of the BDU licence.
50. This approach is intended to ensure a smooth transition to high definition, to provide a degree of regulatory certainty and, in the longer term, to provide an opportunity to simplify the carriage and access regime. Linking carriage obligations to the stage of the transition reached by the BDU would allow its available channel capacity to be taken into account. It would also ensure that existing service offerings are not disrupted.

51. HD-transitional services that do not meet the high definition content conditions would, like low and high definition Category 2 services, have the same carriage status in all stages of the transition: that is, their carriage would be subject to negotiation.

BDUs in the first stage of the transition

52. Class 1, Class 2 and interconnected Class 3 cable BDUs would, while in the first stage of the transition (i.e. when services are distributed in both analog and digital forms), be required to carry the upgraded versions of all pay and specialty services that they are currently obligated to carry in analog or standard definition digital form, provided that the upgraded versions meet the high definition content conditions set out earlier. Carriage of these upgraded versions would be subject to available channel capacity,⁸ as set out in the *Broadcasting Distribution Regulations* (the Regulations), as amended from time to time.⁹
53. Exempt cable BDUs that serve between 2,000 and 6,000 subscribers would, while in the first stage of the transition, be required to carry the upgraded versions of all pay and specialty services that they are currently obligated to carry in analog or standard definition digital form, provided that the upgraded versions meet the high definition content conditions set out earlier. Carriage of upgraded versions meeting the high definition content criteria would be subject to available channel capacity, as set out in Appendix A of *Exemption order respecting cable broadcasting distribution undertakings that serve between 2,000 and 6,000 subscribers; and Amendment to the Broadcasting Distribution Regulations*, Broadcasting Public Notice CRTC 2004-39, 14 June 2004.

BDUs in the second stage of the transition

54. Once their analog services are removed, Class 1, Class 2, interconnected Class 3 cable BDUs, as well as exempt cable BDUs that serve between 2,000 and 6,000 subscribers, would enter the second stage of the transition. With the release of substantial bandwidth resources, distribution capacity should no longer be a constraint that would limit access by Canadian services that meet the high definition content criteria. Accordingly, once the analog services have been removed from such BDUs, carriage rights would no longer be subject to “available capacity” considerations in respect of HD-transitional licensees that adhere to the high definition content conditions set out earlier. The obligation to carry these pay and specialty services would thus be similar to the priority carriage requirements of section 17 of the Regulations.

⁸ “Available channel” is a defined term in the Regulations. In addition, section 18(7) of the Regulations allows an exception to the access requirements if the only available channel is one on which the licensee is distributing a non-Canadian programming service that was distributed by a licensee before 6 May 1996.

⁹ Paragraph 69 of Public Notice 2003-61 stated: “The Commission considers it appropriate, however, to amend the Regulations to specify that, if a non-Canadian analog service was added to a distributor’s channel line-up before 6 May 1996, either the upgraded version or the analog version of that service, at the distributor’s option, will receive grandfathered carriage. The other version will be considered a post-1996 service and the channel on which it is distributed will be considered an available channel for the purpose of the Regulations.”

55. DTH BDUs do not distribute services in analog and are therefore currently in the second stage of the transition. In Public Notice 2003-61, the Commission announced that it would launch a separate proceeding to examine the regulatory framework governing the obligations of DTH undertakings with respect to the carriage of high definition services. As an interim measure pending completion of that proceeding, DTH undertakings would be required to provide access for all HD-transitional licensees that are subject to the high definition content conditions, excluding Category 2 services.
56. The distribution capacity of multipoint distribution system (MDS) undertakings is constrained by the limited bandwidth assigned to them. MDS undertakings are subject to access and carriage requirements that are applied through the imposition of specific conditions of licence that take these bandwidth limitations into account. In view of the spectrum demands of the high definition services, the Commission proposes to continue this approach.
57. Provided they have a nominal bandwidth capacity of 550 MHz or more and deliver programming services on a digital basis, all Class 3 cable BDUs that are not interconnected, and all exempt cable BDUs that serve fewer than 2,000 subscribers, could fulfil their obligations to certain specialty services¹⁰ by distributing either the low definition¹¹ versions of such services or their upgraded versions that meet the high definition content conditions set out earlier. This approach would apply in all stages of the transition.
58. The Commission emphasizes that, for the purpose of calculating the ratio of majority-language to minority-language services that a BDU distributes, as prescribed in section 18 (11.2) of the Regulations or in the applicable exemption order, the current requirements will remain unchanged. Thus, where a BDU distributes either an analog or a low definition version of a particular service, as well as the upgraded version of that service, the two versions would be counted as one service.
59. The access and carriage regime described above would not necessarily apply to all new high definition pay and specialty services¹² that the Commission might license in the future, given that the number of new services licensed could be high. Carriage rights would be among the issues to be decided at the time of the licensing of such new services and could range from required carriage to a situation where carriage would be negotiated between the licensee of the pay and specialty service and the distributor.

¹⁰ As set out in section 33.3 of the Regulations and in *Amendments to the Exemption order for small cable undertakings*, Broadcasting Public Notice CRTC 2002-74, 19 November 2002, cable BDUs covered by the exemption order that have a nominal bandwidth of 550 MHz or more and that deliver any programming service on a digital basis are required to distribute minority-language specialty services on a 10:1 ratio basis as well as the English- and French-language versions of the proceedings of the House of Commons and the English- and French-language versions of the public affairs programming service of the Cable Public Affairs Channel Inc. (CPAC).

¹¹ Low definition services may be either analog or digital.

¹² That is, services for which there is no analog or low definition counterpart.

Pay-per-view television services

60. Pay-per-view television programming services generally provide multiplexed programming to distributors, meaning that the programming service is distributed to subscribers across a number of different channels. Section 18(6) of the Regulations states:

If a licensee is distributing a pay-per-view service in a licensed area on more than 10 analog channels, the Commission may declare one or more channels in the licensed area to be available channels for the purpose of [section 18(5)].

61. For its part, section 18(5) identifies those services, namely the specialty, pay television, pay-per-view and, in certain circumstances, ethnic programming services that, depending on the official language of the market, must be distributed “to the extent of available channels.”
62. In view of the amount of bandwidth required to distribute high definition services, the Commission proposes that the number of digital channels that may be used by a multiplexed high definition pay-per-view television service, without raising the possibility that one or more might be declared as “available channels,” would be restricted to no more than three high definition channels in all stages of the transition, as compared to the current limit of ten analog channels specified in section 18(6). The Commission notes that this would not preclude the existence of multiplexed pay-per-view services that make use of more than three digital channels.

Exceptions to the carriage requirements

63. The current provision in the Regulations that allows for exceptions to carriage requirements, by way of condition of licence, would continue.
64. Some Class 2 and smaller cable BDUs do not yet offer digital services, and cannot be said to have begun the digital transition. Such BDUs cannot distribute high definition services and would continue with their current carriage regimes until such time as they develop digital capacity.

The predominance rule

65. Section 6(2) of the Regulations provides that a licensee shall ensure “that a majority of the video and audio channels received by a subscriber are devoted to the distribution of Canadian programming services....” This provision would continue and, for this purpose, each HD-transitional licensed service would count as a separate service. This would also be true for upgraded non-Canadian services. In Public Notice 2003-61, the Commission stated that it would amend section 6(2) “...to make it clear, in respect of digital technology, that the upgraded versions of Canadian and non-Canadian services are counted as distinct services when determining if the majority of video services received by a subscriber are Canadian.”

Channel position

66. Except as proposed below in the section entitled Distribution and linkage, the positions of HD-transitional pay and specialty services in distributors' channel line-ups would not be subject to regulation.

Access rights of existing services

67. The preceding proposals encompass only the proposed carriage rights of high definition pay and specialty services. Services that elect not to make the transition to high definition would retain their current access rights. Furthermore, once a BDU has passed the benchmark threshold of 85% and the Commission has approved an application to remove the duplicate analog services, the digital versions of these services would still retain their access rights, each to the equivalent of one low definition digital channel.

Distribution and linkage

68. Historically, the packaging of analog pay and specialty services by cable BDUs has generally been determined by the limits of analog trap technology, the order in which services were licensed, and various regulatory provisions.
69. For Class 1 and Class 2 licensees, the distribution and linkage requirements are set out in section 20 of the Regulations and in *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2004-56, 29 July 2004 (Public Notice 2004-56). For DTH BDUs, the requirements have been set out in section 40 of the Regulations and in *Linkage requirements for direct-to-home (DTH) satellite distribution undertakings*, Public Notice 2001-89, 3 August 2001 (Public Notice 2001-89). The requirements for MDS undertakings have been addressed by the Regulations, by conditions of licence and by Public Notice 2004-56. It should be noted that the regulatory requirements imposed on distributors operating in majority English-language markets differ somewhat from those imposed on distributors operating in majority French-language markets.
70. Licensing frameworks and decisions have, over the years, created a number of different carriage options for pay and specialty services. Two of the more important are the "dual status" and "modified dual status" provisions, which apply to the distribution of specialty services by Class 1 cable BDUs. "Dual status" means that, where carried, a service must be carried as part of the basic service, unless the programming service agrees in writing to be carried on a discretionary tier. "Modified dual status" means that, where carried, a service must be carried as part of a discretionary tier, unless both the BDU and the programming service agree to carriage as part of the basic service.
71. While the Commission considers that this distribution and linkage regime has been a significant factor in the successful establishment of a healthy pay and specialty sector, a number of factors, including consumer demands for more purchasing options, favour a more flexible model. To satisfy these demands, distributors will wish to exercise all of the flexibility that digital carriage affords.

72. Further, in the past, the regulation of wholesale and retail prices by the Commission has been an important means of framing how services were packaged and marketed by distributors. However, the Commission's regulatory regime has changed and, today, well over 90% of Class 1 BDU subscribers are served by BDUs whose retail rates are not regulated.
73. Accordingly, the Commission proposes to adopt a less restrictive set of distribution and linkage rules for HD-transitional pay and specialty services. Specifically, for these transitional services, the Commission considers that rules similar to those currently applicable to DTH BDUs would be appropriate for all large BDUs. The key change proposed by the Commission involves the dual status and modified dual status provisions, which currently apply to Class 1 cable BDUs, but not to DTH BDUs. Under the proposed regulatory framework, the dual status provisions would not generally be carried forward for high definition services distributed by cable BDUs.
74. In light of the above, the Commission proposes that the following distribution and linkage requirements would apply to DTH BDUs as well as to all Class 1 and Class 2 BDUs in the first and second stages of the transition, when offering high definition services:
- a) A Canadian HD-transitional pay television service may be linked in a given discretionary package with no more than five non-Canadian services, or their upgraded versions, specified in Appendix A¹³ of the List of Eligible Satellite Services.¹⁴ In no case may a licensee distribute more than five non-Canadian programming services linked with Canadian pay television services, regardless of the number of Canadian pay television services distributed by the licensee.
 - b) Each Canadian HD-transitional specialty service, distributed within a discretionary package that may include one or more Canadian specialty and/or pay television services, may be linked with no more than one of the non-Canadian services or its upgraded version, specified in Appendix A of the list of eligible satellite services, excepting Section B of that Appendix.
 - c) A licensee may designate one of the U.S. superstations, or its upgraded version, specified in Section B of Appendix A of the list of eligible satellite services and distribute the signal of that superstation within a given discretionary package that may include one or more Canadian HD-transitional specialty and/or pay television services.

¹³ List of Part 2 Eligible Satellite Services

¹⁴ The most recent lists are set out in *Revised lists of eligible satellite services*, Broadcasting Public Notice CRTC 2004-52, 15 July 2004.

75. A BDU licensee is not permitted to offer a package of services containing only non-Canadian high definition services, save for the following two exceptions:
- a) Any Canadian single or limited point of view religious programming service, and any non-Canadian religious satellite service set out in the List of Eligible Satellite Services, may be offered on a stand-alone digital discretionary basis. Such services may also be offered in a package with other Canadian single or limited point of view religious services or with non-Canadian single or limited point of view religious satellite services. Distributors are not permitted to offer such services in packages with any balanced religious service or with any other type of Canadian or non-Canadian programming service.
 - b) BDU licensees are not permitted to package an adult programming service in such a way that subscribers are obligated to purchase the service in order to purchase any other programming service, unless it is also an adult programming service. Licensees are required to take measures to fully block the reception of both the audio and video portions of any Adult programming service to subscribers who request that it not be receivable in their home (in either unscrambled or scrambled mode).
76. The Commission proposes that these linkage rules apply equally to DTH BDUs as well as to all Class 1 and 2 cable, wireline and MDS BDUs. None of the other rules that are currently set out in Public Notices 2004-56 and 2001-89, applicable to cable and DTH BDUs, respectively, would be carried forward for high definition services. For cable BDUs, this would include sections 3 through 5, 7 (b)(iii) and 16 (b)(iii) of Public Notice 2004-56. For DTH BDUs, this would include sections 3 and 7 (b)(iii) of Public Notice 2001-89.
77. The reduced distribution and linkage regime currently in force for smaller cable BDUs and exempt systems would also apply to high definition services carried on such systems.
78. The Commission invites comment on the proposals above, and in particular on the question of whether it should be permissible to link non-Canadian high definition services only with Canadian high definition services or whether low definition services could also be included. Further, if the linkage of non-Canadian high definition services is to be restricted, parties are asked to comment on how non-Canadian high definition services should be defined or designated for the purposes of the rules.

Exceptions to the distribution and linkage requirements

79. In the case of a service that is adjudged to make an important contribution to the Canadian broadcasting system, an argument could be made that the dual status or other linkage provisions applicable to its analog version should be transferred to the high definition version should this be determined essential to the continued viability of the service.

80. Parties who consider that the Commission should carry the dual status or other specific linkage provisions forward for a particular HD-transitional service are asked to set out what regulatory criteria should be used and how such criteria should be measured and applied in making such a determination.

Carriage of non-Canadian services

81. In Public Notice 2003-61, the Commission determined that authority to distribute an analog non-Canadian service would also include authority to distribute the high definition upgraded version of the service, provided that not less than 95% of the video and audio components of the two versions of the service were the same, exclusive of the commercial messages and of any part of the service carried on a subsidiary signal. The Commission also indicated that it would review this determination in the present proceeding.
82. In addition, the Commission must determine the regulatory framework under which it will evaluate applications to add new non-Canadian high definition pay and specialty services that have no analog or low definition digital counterpart services to the lists of eligible satellite services.
83. The Commission considers that, in a market-driven transition without an imposed deadline, the entry of non-Canadian high definition services, whether they are new services or upgraded versions of existing services, could provide an important incentive for Canadian pay and specialty services to upgrade their low definition analog and digital services to high definition, and spur innovation and creativity in the development of new Canadian high definition services. New non-Canadian high definition services could also make attractive packaging partners for Canadian services.
84. The Commission considers that the market impact of a new non-Canadian high definition service would likely depend on a number of factors, including the programming genre of the non-Canadian service and whether or not there were Canadian services with which it would be partially or wholly competitive. The market impact would also depend on the penetration of high definition receivers. Although the penetration of such receivers is currently limited, it will no doubt grow over time. In addition, there may be a concern that non-Canadian services might consume limited distribution capacity that Canadian services may need.
85. Taking the above into account, the Commission is of the view that, in the interest of speeding the digital transition, BDUs should have the means and the regulatory flexibility to create attractive packages of high definition services.
86. Accordingly, the Commission proposes to follow its current practices when considering requests to add new non-Canadian high definition services to the lists of eligible satellite services. The competitive aspects of any new non-Canadian high definition services, including those related to the high definition format, would be addressed at the time that the request is made to add the non-Canadian services to the lists.

87. With respect to upgraded versions of non-Canadian services, the Commission proposes to give the same degree of latitude as it gives Canadian services in terms of their non-duplicated programming. Therefore, a non-Canadian high definition service containing a maximum of 14 hours per week of programming that is unduplicated on its analog or low definition digital counterpart service would be authorized for carriage under the same terms as the counterpart service.
88. In addition, as noted in Public Notice 2003-61, the Regulations will be amended to clarify that, where a non-Canadian analog service was added to a distributor's channel line-up before 6 May 1996, either the upgraded version or the analog version of that service, at the distributor's option, will receive grandfathered carriage. The other version will be considered a post-1996 service.

Wholesale rates

89. A number of licensed analog specialty services have basic wholesale rates that have been approved by the Commission. Historically, the wholesale rate established for a service was intended to recover for the program provider the costs incurred to acquire and promote its programming, deliver this programming to distributors, and ensure a fair return on its investment. The retail rates charged in turn by a BDU to its subscribers serve to recover its distribution costs, promotional and other expenses, and also to provide it with a fair return on investment. As noted above, however, Class 1 BDUs representing well over 90% of all subscribers in Canada that are served by such undertakings have retail rates that are not regulated by the Commission. These undertakings are free to raise their basic and discretionary rates within the limits set by a competitive marketplace.
90. From a regulatory perspective, establishing the initial benchmarks for what would be an appropriate wholesale rate for the high definition version of a specialty service would be a complicated exercise and would involve an extensive public process. Given that few households are currently capable of receiving high definition services, the initial audiences having access to any high definition service would be relatively small. Bandwidth expenses would depend on spectrum availability and opportunity costs. High definition program rights may be another issue that would have to be addressed when setting rates. At the end of the day, however, because relatively few of the larger cable BDUs remain rate regulated, any wholesale rate that might be set for an HD-transitional service would have an indirect impact, at best, on the retail prices paid for the service by consumers.
91. Given these considerations, the Commission is of the view that it would be preferable if the wholesale rate for each high definition service was set by negotiations 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, albeit important, consideration.

Digital migration

92. 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 service of those cable BDUs that distribute programming to subscribers exclusively via digital technology.
93. The record of that proceeding clearly demonstrated that issues related to the migration of analog programming services to digital distribution need to be explored in a broader context. In particular, a full consideration of these issues would provide important regulatory certainty to broadcasters and distributors who must be able to develop business plans for the longer term. Accordingly, as indicated at the outset of the present notice, the Commission intends soon to issue a further public notice announcing its 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 calling for further public comment on the issues mentioned above.
94. Until such time as the Commission rules otherwise, the existing distribution and linkage rules will continue to apply to the carriage of the low definition analog and digital pay and specialty services.

Technical quality

95. In Public Notice 2003-61, the Commission noted that, while technology is evolving, the term “high definition” would encompass both the 720p and 1080i picture formats, as defined by the Advanced Television Systems Committee in its A/53 digital television standard. For the purposes of this public notice, and as clarified below, the 720p and 1080i line formats in that standard will continue to define “high definition” for the purposes of transmission and distribution.
96. The Commission considers that the quality of the audio and video is of major importance in the transition of pay and specialty services to high definition. For this reason, the Commission clarifies the definition of the term “high definition” to exclude certain methods of reformatting video images. Specifically, low definition images can be converted to images that may meet the definitions in A/53 through line-doubling techniques or through the use of algorithms that stretch a 4:3 picture to fill a 16:9 screen. Images converted in this manner will not, however, be deemed to be high definition because they would not contain the detailed video information that gives high definition its unique quality.
97. Furthermore, high definition picture formats do not by themselves guarantee the highest picture quality. For example, the digital compression of a signal may not change the format (i.e., the number of lines), but if taken too far, may introduce picture degradation that could result in disappointment to viewers who have purchased expensive high definition receivers and displays.

98. The Commission believes that program providers and program distributors bear equal responsibility for the technical quality of the programming that is delivered to viewers through the distribution chain, beginning with the production of programming in high definition and ending with its display on high definition sets.
99. In Public Notice 2003-61, the Commission required that program signals should be of the same quality and in the same format as those received by the BDU, without any degradation. The Commission considers that this provision should apply to the signals of high definition pay and specialty services, as it does to over-the-air signals.
100. The Commission further considers that pay and specialty service providers, like over-the-air broadcasters, should ensure that the transmission of ancillary data accompanying their programming does not decrease the quality or quantity of high definition programming.¹⁵

Simultaneous substitution

101. BDUs may carry out simultaneous substitution requests from licensees of specialty services, in accordance with section 30 of the Regulations. In Public Notice 2003-61, the Commission extended the regime of substitution rights for over-the-air broadcasters to high definition services, but with the additional principle that the quality of the signal of the service making the substitution request must be the same as or higher than the quality of the signal to be replaced. The Commission proposes to also apply this provision to the signals of high definition pay and specialty services, in cases where BDUs carry out simultaneous substitution.

Call for comments

102. The Commission invites comments that address the proposed policy framework set out above, as well as any issues or questions relating to its implementation, taking into account any differences that exist between distribution technologies. Parties may also wish to advance other proposals that they believe would better meet the objectives set out in the *Broadcasting Act*. The Commission will accept comments that it receives on or before **5 November 2004**.
103. 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.

¹⁵ Paragraph 34 of Public Notice 2002-31 states in part: "The Commission will expect broadcasters to ensure that the transmission of data does not affect the quality or quantity of DTV programming broadcast to viewers, and more specifically, that it does not supplant or impair the delivery of HDTV programming when it is available."

Procedures for filing comments

104. Interested parties can file their comments 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
105. Submissions longer than five pages should include a summary.
106. 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.
107. 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.
108. 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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Fax: (902) 426-2721

405 de Maisonneuve Blvd. East

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Fax: (416) 954-6343

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Secretary General

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