



## Broadcasting Public Notice CRTC 2003-23

Ottawa, 30 April 2003

### Exemption of cable broadcasting distribution undertakings that serve between 2,000 and 6,000 subscribers

*In this Public Notice, the Commission determines that it is appropriate to exempt, under certain conditions, the class of cable broadcasting distribution undertaking (BDU) that serves between 2,000 and 6,000 subscribers. This class of undertaking generally includes Class 2 BDUs and most of those Class 3 BDUs not already exempted under the Exemption order for small cable undertakings, issued as an appendix to Exemption order respecting cable systems having fewer than 2,000 subscribers, Public Notice CRTC 2001-121, 7 December 2001. Cable BDUs that are fully interconnected with other BDUs will be ineligible for exemption unless the aggregate number of subscribers served by the interconnected BDUs is less than 6,000. The Commission will issue a proposed exemption order for comment at a later date.*

*In addition, the Commission announces its intention to change the regulatory framework applicable to Class 2 cable BDUs that would not be eligible for exemption by:*

- *amending the distribution and linkage requirements to approximate those applicable to direct-to-home BDUs; and*
- *removing the requirement contained in section 48 of the Broadcasting Distribution Regulations that BDUs install facilities and provide basic service upon request.*

### Background

1. Section 9(4) of the *Broadcasting Act* (the Act) specifies the circumstances in which the Commission shall exempt certain classes of broadcasting undertakings from any or all of the requirements of Part II of the Act or of a regulation made thereunder, including the requirements to obtain a licence and to adhere to regulations passed pursuant to Part II. Specifically, section 9(4) states:

(4) The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

2. In *Changes to the Commission's approach to cable undertakings – Proposed exemption for cable systems with fewer than 2,000 subscribers, and implementation of a regional licensing model*, Public Notice CRTC 2001-59, 29 May 2001 (Public Notice 2001-59), the Commission announced its determination to implement changes to the regulatory framework under which cable broadcasting distribution undertakings (BDUs) operate. One of these changes was the Commission's determination to exempt from licensing those cable BDUs that serve fewer than 2,000 subscribers. The Commission's finding was that licensing such BDUs was not necessary to achieve the objectives of the Act, and further, that an exemption would allow them to operate with increased efficiency and reduced licensing-related expenses so as to compete more effectively with direct-to-home (DTH) and multipoint distribution system (MDS) BDUs. In Public Notice 2001-59, the Commission described the exemption of the smallest cable systems as a first step in updating its approach to licensing and regulating cable systems in response to the expansion of competition within the BDU industry.
3. The Commission subsequently issued *Exemption order for small cable undertakings* (the Small cable exemption order) as an appendix to *Exemption order respecting cable systems having fewer than 2,000 subscribers*, Public Notice CRTC 2001-121, 7 December 2001. Under the Small cable exemption order, cable BDUs with fewer than 2,000 subscribers are eligible for exemption if they operate their own head-end and do not operate within all or part of the service area of a Class 1 or a Class 2 cable BDU.
4. On 5 July 2002, the Canadian Cable Television Association (CCTA) submitted an application proposing that (a) the Small cable exemption order be amended to include Class 3 licensees with more than 2,000 subscribers, and (b) that all Class 2 licensees be exempted from licensing through a new exemption order. The Commission subsequently issued *Proposal by the Canadian Cable Television Association (CCTA) to exempt small cable undertakings - Call for comment*, Broadcasting Public Notice CRTC 2002-62, 18 October 2002 (Public Notice 2002-62).
5. The proceeding conducted pursuant to Public Notice 2002-62 provided for the submission of written comments in two stages. The Commission received 18 written comments during the two stages. In the first round of comments, the Canadian Cable Systems Alliance (CCSA) suggested an alternative to the CCTA's proposal. Specifically, the CCSA proposed that the Small cable exemption order be amended to exempt all Class 3 undertakings and Class 1 and Class 2 undertakings that meet certain criteria. The CCSA proposal is examined in greater detail in later sections of this notice.

#### **The current regulatory framework for cable BDUs**

6. There are three classes of licence which are assigned to cable BDUs, generally, but not exclusively, on the basis of the number of subscribers they serve. Class 1 cable BDUs normally serve more than 6,000 subscribers, while Class 2 cable BDUs serve 2,000 to 6,000 subscribers and Class 3 cable BDUs serve fewer than 2,000 subscribers.

7. In general, the regulatory obligations of each type of cable BDU are set out in the *Broadcasting Distribution Regulations* (the Regulations). The regulatory obligations of Class 1 licensees are the most extensive. The regulatory obligations of Class 2 licensees are less onerous than those of Class 1 BDUs, but considerably greater than those of Class 3 cable BDUs. The majority of those undertakings that would otherwise be licensed as Class 3 cable BDUs meet the criteria for exemption under the Small cable exemption order, and are accordingly exempt from licensing requirements and the Regulations.
8. There are two circumstances in which the class of licence held by a licensee is not related to the number of subscribers it serves:
  - In *New regulatory framework for broadcasting distribution undertakings*, Public Notice CRTC 1997-25, 11 March 1997 (Public Notice 1997-25), the Commission decided that, where a new entrant BDU is authorized to operate within the service area of an existing BDU, the new entrant should generally be issued the same class of licence as that held by the incumbent BDU with which it will compete, regardless of the number of subscribers the new entrant actually serves.
  - A number of Class 3 licensees were originally licensed as Part III cable undertakings. This designation was made without regard to the number of subscribers served. Such BDUs were authorized to operate in communities that were considered to be remote and underserved because the signals of no more than two licensed television stations were receivable over-the-air. These systems now have access to virtually the same services that are distributed by other cable BDUs, due to the deployment of newer distribution technologies. While many former Part III licensees serve fewer than 2,000 subscribers, others have continued to be licensed as Class 3 services despite serving 2,000 or more subscribers.
9. There are also some cable BDUs that operate under multiple licences, but are interconnected to such an extent that, together, they effectively function as a single system in the provision of broadcasting distribution services. In most cases, these interconnected systems have a single owner. The interconnection of cable systems may create what is, in effect, a single larger cable undertaking out of a number of systems that are nonetheless licensed and regulated as separate undertakings.

#### *Distribution of Canadian programming services*

10. In general, any licensed programming service may be distributed by a cable BDU to its subscribers under the Regulations. Class 1 and Class 2 cable BDUs, however, are required to include, as part of the basic service provided to all subscribers, local, regional and extra-regional television signals as defined. While there is a similar requirement for Class 3 cable BDUs, it does not include the obligation to distribute extra-regional signals.
11. Class 1 and Class 2 cable BDUs must also distribute, as part of the basic service offered to all subscribers, the programming services of the Aboriginal Peoples Television Network (APTN), the French-language TVA Network (TVA) and the Cable Public Affairs Channel

(CPAC)<sup>1</sup>. They must also provide the service of the National Broadcast Reading Service (NBRS), VoicePrint,<sup>2</sup> as the secondary audio program of the CBC Newsworld service, where the BDU elects to provide the latter service. Class 1 cable BDUs are subject to certain additional distribution requirements not applicable to Class 2 licensees, such as the obligation to distribute all Canadian specialty services in the official language of the market they serve.

*Simultaneous substitution*

12. Class 1 cable BDUs are required, upon request by a local or regional television station, to distribute the signal of that television station in the place of the signal of non-Canadian services or lower priority Canadian services when the programming is comparable and broadcast simultaneously. Class 2 BDUs must only perform this substitution for the services of privately-owned local television stations.

*Distribution and linkage*

13. Class 1 and Class 2 cable BDUs are subject to the distribution and linkage rules set out in *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Public Notice CRTC 2001-90, 3 August 2001 (Public Notice 2001-90).
14. In these rules, certain services are categorized as “dual status services” while others are categorized as “modified dual status services”. Where a Class 1 or a Class 2 cable BDU distributes a dual status service, it must offer the service as part of the basic service, unless the provider of that service consents to its distribution as an optional or discretionary service. Where a modified dual status service is carried, it must be offered as part of a discretionary package of services unless both the provider of the service and the BDU agree to its distribution as part of the basic service received by all subscribers. The distribution and linkage rules stipulate that Class 1 cable BDUs, which are obliged by the Regulations to distribute all Canadian specialty services in the official language of the market they serve, and all other cable BDUs that choose to distribute pay or specialty services, must adhere to the linkage requirements set out in Public Notice 2001-90.
15. The linkage requirements specify the ratio of Canadian to non-Canadian services that may be provided within each discretionary package of services offered by a cable BDU. Any given package must contain at least one Canadian pay service for each five non-Canadian services offered. A discretionary package must also contain one Canadian specialty service for each non-Canadian service. Further linkage requirements pertain to such matters as the distribution of U.S. superstations, single or limited point of view religious services, and adult programming services.

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<sup>1</sup> *Television Northern Canada Incorporated*, Decision CRTC 99-42, 22 February 1999; *TVA Group Inc.*, Decision CRTC 98-488, 29 October 1998; and *Licence renewal for CPAC; and issuance of a distribution order*, Broadcasting Decision CRTC 2002-377, 19 November 2002.

<sup>2</sup> *National Broadcast Reading Service Inc. (VoicePrint)*, Decision CRTC 2000-380, 11 September 2000.

*Contribution to the production of Canadian programming*

16. Class 1 and Class 2 licensees are obligated to contribute at least 5% of their annual gross revenues derived from broadcasting activities to the production of Canadian programming. They may fulfil this obligation through:
  - contributions to the Canadian Television Fund (CTF) or to another independent production fund; and/or through
  - contributions to local expression, generally in the form of funding directed to the operation of a community channel.
17. The maximum portion of this obligation that a licensee may meet through contributions to local expression varies in relation to both the class of the licensee and the number of subscribers it serves. Class 2 licensees, for example, may direct all of their required annual financial contribution (the full 5% of their gross revenues derived from broadcasting activities) to local expression. Class 1 licensees with 20,000 or more subscribers may allocate up to 2% of their gross revenues derived from broadcasting activities to local expression. Class 1 licensees with less than 20,000 subscribers may allocate up to 3.5% of their gross revenues derived from broadcasting activities to local expression. Any portion of the minimum 5% requirement that is not directed to local expression must be contributed to the CTF or another recognized independent production fund.

**The CCTA proposal**

18. Under the CCTA's proposal, Class 3 licensees having 2,000 or more subscribers would be subject to the conditions of exemption contained in the Small cable exemption order as amended.
19. The new exemption order proposed by the CCTA for Class 2 undertakings would contain terms and conditions of exemption similar to those contained in the Small cable exemption order, as well as several additional conditions of exemption that would correspond to the requirements currently applicable to Class 2 BDUs. In the CCTA's view, these additional requirements should include the mandatory carriage of APTN, TVA and CPAC as part of the basic service, the carriage of VoicePrint as the secondary audio program for CBC Newsworld, where this latter service is distributed by an exempt BDU, and the obligation to contribute 5% of their gross revenues derived from broadcasting activities to the production of Canadian programming. However, the CCTA proposed that the existing distribution and linkage rules be replaced with a requirement that each subscriber receive a preponderance of Canadian programming services. All other obligations that currently apply to Class 2 cable BDUs would be eliminated under the CCTA proposal.

## **The CCSA proposal**

20. In its comments in response to Public Notice 2002-62, the CCSA generally supported the CCTA's proposal, but considered that it did not take into account the particular needs of "independent" licensees, that is to say those that are not owned or operated by one of the four largest cable multi-system operators (MSOs): Rogers Cablesystems Inc. (Rogers), Shaw Communications Inc. (Shaw), Vidéotron ltée and Cogeco Cable Inc.
21. The CCSA advanced an alternative proposal that, in its view, would better address the concerns of these independent licensees. Specifically, the CCSA recommended that the scope of the existing Small cable exemption order be extended to include all Class 3 BDUs, as well as all independent Class 1 and Class 2 licensees that serve fewer than 20,000 subscribers. Under this proposal, exempt BDUs would be obliged to meet only those conditions of exemption contained in the Small cable exemption order.

## **Positions of parties**

22. The CCTA contended that Class 2 and Class 3 cable licensees frequently operate in small or isolated communities, and collectively provide service to only a small portion of Canadians. In the CCTA's view, due to the relatively small number of subscribers that would be affected by an exemption of Class 2 and the remaining Class 3 licensees, the regulation of these licensees is immaterial to the implementation of the Act's objectives. The CCTA proposal was generally supported by Quebecor Media Inc (QMI), Saskatchewan Telecommunications Inc. (SaskTel), and NBRIS.
23. As noted above, the CCSA also generally concurred with the CCTA's arguments, but argued further that regulatory obligations are a burden that hinders the ability of the independent Class 1 and Class 2 BDUs to compete with other BDUs, such as DTH BDUs. The CCSA stated that cable BDUs owned by the four largest MSOs have many benefits that are not available to independent cable BDUs, such as lower operating costs due to a broader subscriber base and the market power to negotiate lower programming costs. In the CCSA's view, cable BDUs owned by the four largest MSOs can, as a result, offer a range of services that enables them to compete more effectively with DTH BDUs. It argued that, by exempting independent cable BDUs, the Commission would recognize the differences between independent BDUs and those that are owned by one of the four largest MSOs, and help redress the competitive imbalances described above.
24. The CCSA proposal was supported in comments submitted by nine independent cable companies. These parties argued that exemption should be restricted to independent cable BDUs, since they have higher costs and have recently experienced greater subscriber losses than cable BDUs owned by the four largest MSOs. These parties also argued that independent BDUs are experiencing financial problems due to competition and that an exemption would permit them to compete more effectively.

25. EastLink, a division of Bragg Communications Incorporated, argued that there are fundamental, qualitative differences between independent cable BDUs and those that are owned and operated by the four largest MSOs. EastLink stated that the Commission should recognize these differences by exempting all independent cable BDUs with fewer than 20,000 subscribers, as proposed by the CCSA.
26. The Canadian Association of Broadcasters (CAB) opposed the proposals of both the CCTA and CCSA and noted that, in Public Notice 2001-59, the Commission rejected similar arguments in its findings with respect to the current Small cable exemption order. The CAB also expressed concern that both the CCTA and CCSA proposals would eliminate simultaneous substitution obligations as well as distribution and linkage requirements now applicable to Class 1 and Class 2 BDUs. It argued that relieving licensees of these obligations through an exemption order might result in reduced audiences and considerable harm for Canadian broadcasters.
27. Midwest Television Ltd. (Midwest) which operates the CTV affiliate television station CITL-TV in Lloydminster, Alberta, also took issue with the proposed removal of simultaneous substitution requirements for Class 1 and Class 2 BDUs. Midwest emphasized the importance of these requirements to its financial well being. It noted, as an example, that the simultaneous substitution of its programming did not occur for several months during the Bureau of Broadcast Measurement's 2001 Fall study, due to technical problems with its own facilities as well as with those of the cable BDU serving Lloydminster. The result was a considerable drop in CITL-TV's measured audience size during this period and a corresponding negative impact on the advertising revenue it was able to generate.
28. Although it generally supported the CCTA proposal, SaskTel noted that any licensees that were operating in part or in all of the service area of a Class 1 or Class 2 licensee were excluded from the current Small cable exemption order. In SaskTel's view, a similar provision should be included in any new exemption order to ensure that a Class 2 licensee with a service area that includes areas also served by SaskTel's regional Class 1 BDU continues to be ineligible for exemption.
29. The CCTA disagreed with SaskTel's interpretation of this provision of the Small cable exemption order and argued that the exclusion referred to was intended to apply only to a new entrant with fewer than 2,000 subscribers that competes with an incumbent BDU. The CCTA argued that, where a new entrant is issued a Class 1 licence to provide service to an area that includes that served by an exempt incumbent BDU, the incumbent BDU should not be excluded from exemption.
30. The Directors Guild of Canada (Directors Guild) and the Writers Guild of Canada (Writers Guild) also opposed the CCTA and CCSA proposals, citing concerns that exemption of these undertakings might reduce the amount of money contributed to the CTF and other funds dedicated to the production of Canadian programming.

31. The CCTA replied that its proposal included a condition of exemption that would require exempt undertakings to contribute 5% of their gross broadcasting-related revenues to the production of Canadian programming. It argued that its proposal would thus have no impact on contributions to Canadian programming.

## **The Commission's findings**

### **Exemption of smaller systems**

32. As noted above, section 9(4) of the Act requires a determination by the Commission that the licensing of a particular class of undertaking and the application of other requirements under Part II of the Act would not contribute in a material manner to the implementation of the policy objectives for the Canadian broadcasting system set out in section 3 of the Act. Upon such a finding, the Commission is required to exempt that class of undertaking, under terms and conditions it deems appropriate, from some or all of the licensing or regulatory requirements made under Part II.
33. The *Broadcasting policy monitoring report 2002*, 14 November 2002, and other annual returns information collected by the Commission, indicate that Canadian BDUs licensed by the Commission, including cable, DTH, MDS and other undertakings, served a total of 9,392,979 Canadian subscribers in 2001. Of this total, Class 1 cable licensees served 6,837,679 subscribers (72.8%), while Class 2 cable licensees and the remaining Class 3 cable licensees served 340,920 (3.6%) and 297,161 (3.2%), respectively. The remaining subscribers (20.4%) were served by BDUs other than cable. Thus, an overwhelming majority of Canadian subscribers received distribution services from Class 1 cable licensees and BDUs other than cable, while only a small minority were served by Class 2 and Class 3 licensees.
34. Class 2 and Class 3 cable licensees, partly in recognition of their smaller subscriber base and more limited resources, have lesser obligations than Class 1 licensees. They are not obligated, for example, as are Class 1 licensees, to distribute all the Canadian specialty services in the language of the majority of the market they serve. In imposing greater carriage requirements on Class 1 licensees, the Commission has recognized that distribution to the larger subscriber base they serve is critical to the success of Canadian specialty services and therefore to the provision of a broad range of Canadian programming, consistent with the cultural objectives of the Act.
35. Exemption of Class 2 and Class 3 undertakings will help them to operate with increased efficiency and reduced expenses and, therefore, to compete more effectively. Nevertheless, since they serve a small minority of Canadians, the Commission considers that their exemption from compliance with all of the requirements of Part II of the Act and regulations made thereunder will not materially affect their contribution to the implementation of the objectives of the Act. The Commission is therefore satisfied that it is appropriate to exempt a class of undertaking that would generally include Class 2 and Class 3 cable BDUs.



36. With respect to the larger Class 1 cable licensees, however, the Commission considers that the licensing of these systems is critical for, among other things, the broad distribution of programming services, under appropriate terms and conditions. It therefore concludes that the licensing of Class 1 undertakings, including those not owned or operated by the four largest MSOs, makes a material contribution to the attainment of the policy objectives of the Act. It therefore does not consider it appropriate to exempt any Class 1 undertaking, including the Class 1 undertakings proposed by CCSA.

**Definition of a class of exempt undertaking**

37. The Commission notes that both the CCTA and CCSA suggested the use, at least in part, of the current class of licence held by a cable BDU as the basis for defining an exempt class of undertaking. The CCSA proposed the additional use of the ownership of a cable BDU as a criterion in defining an exempt class of undertaking.
38. The Commission finds that the use of the current class of licence held by a licensee as the basis for defining a class of exempt undertaking would be too inflexible in that it would only take into consideration the characteristics of the cable BDU at the time of its last licence renewal. In the Commission's view, a definition based on the class of licence currently held by a BDU would disregard changes that may have occurred since the last licence renewal or that may occur in the future. Nor would it address such circumstances as those affecting interconnected systems, or class 3 systems that currently have more than 2,000 subscribers (former Part III systems).
39. With respect to the ownership criterion proposed by the CCSA, based on an examination of financial and other information contained in the annual returns it collects, the Commission considers that the Class 2 and Class 3 licensees owned by the four largest MSOs and the independent Class 2 and 3 licensees of a similar size often operate under similar circumstances and face many similar challenges. Further, the Commission notes that the use of the ownership criterion proposed by the CCSA raises the possibility that a particular cable BDU might go from full regulation under the current regulatory regime to exemption due, in part, to its ownership, then back again to full regulation if purchased by one of the four largest MSOs, resulting in significant administrative burden for both the Commission and cable BDUs.
40. The Commission notes that the Small cable exemption order defined a class of exempt undertaking as including those cable BDUs that:
- serve fewer than 2,000 subscribers;
  - operate their own head end (i.e. are not fully interconnected with other systems); and
  - do not serve all or part of the service area of a Class 1 or Class 2 licensee.
41. The class of exempt undertaking is defined primarily by the number of subscribers served. However, the definition incorporates two additional qualifications that exclude fully interconnected cable BDUs, as well as new entrants that compete directly with incumbent Class 1 or Class 2 licensees.

42. The Commission finds that the use of similar criteria would be appropriate for defining a class of undertaking eligible for exemption under a new proposed exemption order. Such an approach, while closely related to the existing licence class system, would allow for exceptions to that system and would provide the important benefit of treating all systems of comparable size equally, regardless of their ownership and the manner in which they have been licensed in the past.
43. With respect to what number of subscribers might be used as the threshold for defining an exempt class, the Commission is of the view that aligning this number with the thresholds used to define existing licence classes would have the benefit of using a threshold familiar to the industry.
44. The Commission concludes that the class of undertaking eligible for exemption should consist of those cable BDUs with 2,000 to 6,000 subscribers, subject to certain further conditions of exemption.
45. It is the Commission's determination that, where separately licensed undertakings are fully interconnected, they will be eligible for exemption only if the total number of subscribers served by the interconnected systems does not exceed 6,000. In order to accommodate subscriber growth, exempt undertakings would, in the future, be able to exceed the 6,000 subscriber threshold by up to 10%, i.e., by up to 600 more subscribers, without licensing. The Commission notes that this approach is consistent with that taken in the Small cable exemption order.
46. Where a new entrant has been licensed as a Class 1 BDU to operate in all or part of the service area of another Class 1 licensee, and is in competition with that licensee in accordance with the Commission's determination in Public Notice 1997-25, the new entrant will be ineligible for exemption regardless of the number of subscribers it serves. The Commission notes that SaskTel, in its comments in this proceeding, interpreted a similar provision in the Small cable exemption order to mean that the entrance of a new Class 1 or Class 2 competitor into an area served by an exempt undertaking would make that latter undertaking no longer eligible for exemption. The Commission agrees with the CCTA that this provision in the Small cable exemption order was intended to address a situation in which a new entrant that might otherwise be eligible for exemption is licensed as a Class 1 or Class 2 undertaking because it offers services in the territory of a Class 1 or Class 2 undertaking. Contrary to SaskTel's interpretation, the Commission confirms that the provision was not intended to make an exempt undertaking ineligible for continued exemption due to the presence in its service area, of a new entrant licensed as a Class 1 or a Class 2 cable undertaking.
47. The Commission notes that several types of cable BDUs will be captured under the Commission's proposed definition of a new class of exempt undertaking, including:
  - Class 2 cable BDUs that individually serve between 2,000 and 6,000 subscribers and that are not interconnected with other BDUs;
  - Class 2 cable BDUs interconnected with other Class 2 or Class 3 BDUs that, in

- combination, serve fewer than 6,000 subscribers;
- Class 3 cable BDUs interconnected with other Class 2 or Class 3 BDUs that, in combination, serve fewer than 6,000 subscribers; and
- Class 3 cable BDUs that individually serve between 2,000 and 6,000 subscribers.

48. The Commission recognizes that licensees will be unable to fully assess their eligibility for exemption until a final exemption order is issued by the Commission. In accordance with the Commission's normal practice, the Commission will first issue a Public Notice soliciting comment on a proposed exemption order for the class of undertaking described above. The Commission will also solicit comments on appropriate language that could be used both in the proposed new exemption order contemplated herein and in an amended Small cable exemption order to clarify the Commission's intent with respect to the issue raised by SaskTel.
49. Consistent with the approach taken by the Commission in implementing the Small cable exemption order, once a final exemption order is issued by the Commission, licensees will be given an opportunity to assess their eligibility and to determine whether they wish to avail themselves of the exemption or remain as licensees.

#### **Conditions of exemption**

50. The Commission agrees with both the CCTA and CCSA that exempt undertakings should be subject, at a minimum, to conditions similar to those contained in the current Small cable exemption order. The Commission also considers that, since the class of undertaking to be exempted under the new order will serve a larger base of subscribers, certain additional conditions of exemption are required. These are discussed below.

#### *Carriage of programming services*

##### *Positions of parties*

51. The CCTA proposed that exempt undertakings continue to be subject to the general distribution obligations that are currently applicable to Class 2 licensees. Under the CCSA proposal, however, independent Class 1 and Class 2 cable BDUs with fewer than 20,000 subscribers would no longer be required to distribute the APTN, TVA and CPAC programming services. Nor would they be obliged to distribute extra-regional services or programming services in the official language of the minority in the market they serve. In addition, these BDUs would no longer be required, under the CCSA's proposal, to distribute the VoicePrint programming service as the secondary audio program of the CBC Newsworld programming service, where the latter service is distributed.

#### *The Commission's determination*

52. In recent decisions pertaining to the APTN, TVA, VoicePrint and CPAC services<sup>3</sup>, the Commission determined that the wide distribution of these services was in keeping with the furtherance of the objectives of the Act and, on this basis, obligated all Class 2 cable BDUs to offer these services in accordance with the terms and conditions set out in those decisions.
53. The Commission notes that the CCSA advanced no persuasive evidence or rationale to demonstrate why these distribution obligations should not be continued.
54. The Commission concludes that, in addition to the carriage obligations found in the Small cable exemption order, the conditions of exemption contained in the proposed new order should include requirements to distribute, as part of the basic service, the APTN, TVA and CPAC programming services, as well as the VoicePrint programming service as the secondary audio program of CBC Newsworld, where the latter programming service is distributed.
55. Consistent with the CCTA's proposal and with the Commission's findings in *Achieving a better balance: Report on French-language broadcasting services in a minority environment*, Public Notice CRTC 2001-25, 12 February 2001, the Commission will also include requirements for the distribution of programming services in the official language of the minority in the market served by an exempt undertaking.

#### *Simultaneous substitution*

##### *Positions of parties*

56. Under both the CCTA and CCSA proposals, exempt undertakings would not be required to provide simultaneous substitution. The CCTA argued that there are very few Class 2 cable BDUs operating in areas in which a private local television station can request simultaneous substitution. It also indicated that few of these local stations have made requests for simultaneous substitution.
57. The CAB did not dispute that only a small number of local stations had made simultaneous substitution requests of Class 2 cable BDUs. Rather, the CAB submitted that this fact is irrelevant. The CAB contended that simultaneous substitution will continue to be critical to local broadcasters and should not be eliminated regardless of the few stations that request it. The CCTA argued that it is inappropriate to impose simultaneous substitution requirements on an entire class of cable BDU for the benefit of a very few broadcasters.

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<sup>3</sup> Decisions 99-42, 98-488, 2000-380, and 2002-377, respectively.

58. As noted, Midwest emphasized the importance of the simultaneous substitution requirements to its financial well-being and argued that the elimination of these requirements would have a significant negative impact on the advertising revenue that affected broadcasters would be able to generate.

*The Commission's determination*

59. In the Commission's view, although there are relatively few broadcasters entitled to request simultaneous substitution from Class 2 cable BDUs, the broadcasters that can do so are generally those broadcasters that operate in the smallest local markets and that most require this type of protection.
60. The Commission considers that simultaneous substitution provides significant benefits to the Canadian broadcasting system, such as the protection of program rights. Accordingly, the Commission concludes that it is necessary to include, as a condition of exemption, a requirement that exempt undertakings provide simultaneous substitution, but only at the request of a local television station.

*Distribution and linkage*

*Positions of parties*

61. In the CCTA's view, the distribution and linkage rules applicable to Class 2 cable licensees place them at a competitive disadvantage relative to their primary competitors, namely the DTH licensees, which operate under a simpler and more flexible set of distribution and linkage rules. The CCTA argued that the distribution and linkage rules that apply to Class 2 licensees should be no more onerous than those that apply to DTH licensees. The DTH distribution and linkage rules are set out in *Linkage requirements for direct-to-home (DTH) satellite distribution undertakings*, Public Notice CRTC 2001-89, 3 August 2001 (Public Notice 2001-89). In the CCTA's view, regulatory parity between Class 2 and DTH licensees could be achieved by replacing the Class 2 distribution and linkage rules with a simple requirement that a preponderance of Canadian services be distributed. According to the CCTA, such a change would permit flexibility and ensure continued carriage of Canadian services, consistent with the Act's objectives.
62. The CCTA further argued that continued regulation would not be necessary to maintain the effect of the current distribution and linkage rules, since these rules are and will continue to be observed through existing service packages that rely largely on analog traps installed by BDUs at considerable expense. In the CCTA's view, cable BDUs would not likely alter service packages substantially, even if these rules were eliminated, due to the costs associated with adding, removing or replacing these traps.
63. The CCSA and EastLink maintained that the current distribution and linkage rules limit the ability of independent licensees to respond to the interests of customers. These parties submitted that the primary benefit associated with removing these rules would be to provide flexibility in packaging services to meet the specific interests of the individual community a licensee serves. The CCSA, in particular, indicated that packaging flexibility

could potentially be a key competitive advantage. At the same time, these parties argued that the removal of the distribution and linkage rules would be unlikely to have a negative impact on programming services due to analog trapping.

64. The CAB opposed the CCTA position, citing concerns that the elimination of the existing rules would permit Class 2 licensees to repackage services in a way that might reduce the audience available for Canadian programming services. The CAB argued that the distribution and linkage rules continue to be a central element of the BDU policy framework and that they will continue to contribute to the widespread distribution and diversity of the Canadian pay and specialty services offered to subscribers. In the CAB's view, changes to the distribution of pay and specialty services could reduce the contribution of these services to Canadian program development.
65. The CAB also disputed the contention that cable BDUs would be unlikely to change service packages due to the associated analog traps. It submitted that, if analog traps prevent changes to service packages, there should be no need to remove distribution and linkage requirements. It added that small cable systems have traditionally sought greater regulatory flexibility in order to create non-Canadian programming bundles to the detriment of Canadian programming services.

*The Commission's determination*

66. The Commission considers that the composition of service packages purchased by subscribers could be altered without making changes to existing analog traps. For example, since the analog traps block access to a specific range of channels offered as a package of services, the services from one package could be replaced by services in another package without altering the total channels included in any service package and blocked out by a particular trap.
67. If the distribution and linkage requirements were removed, this could result in a BDU offering discretionary packages that contain only non-Canadian services, as the CAB has suggested. In the Commission's view, such an offering would be contrary to the objectives of the Act and could not be dealt with through the simple preponderance rule proposed by the CCTA.
68. The Commission notes that the reason given by BDUs and their representatives for requesting that distribution and linkage rules not be included as conditions of exemption was to provide parity between exempt undertakings and DTH BDUs. DTH BDUs operate under linkage rules set out in Public Notice 2001-89. The DTH rules differ from the Class 2 rules set out in Public Notice 2001-90 primarily in that the DTH rules do not include requirements related to packaging on the basis of the dual status or modified dual status of specialty services. Both the DTH rules and the Class 2 rules do, however, contain certain common elements, such as the prohibition against offering a discretionary package that includes only non-Canadian services.

69. The Commission further notes that, while Class 2 BDUs are not generally required to distribute pay or specialty services on an analog basis, if a Class 2 BDU elects to distribute a pay or specialty service, it must adhere to the distribution and linkage rules. The Commission considers it likely that, if these rules are simplified, exempt undertakings would choose to distribute more pay or specialty services, thus contributing to the broader distribution of Canadian services.
70. Taking all of the above into account, the Commission considers it appropriate to include conditions of exemption that would have the effect of approximating the simpler distribution and linkage obligations of DTH undertakings as set out in Public Notice 2001-89, including the elimination of distribution requirements for discretionary services that vary depending on whether such services have dual status or modified dual status. In the Commission's view, these conditions of exemption would ensure that exempt undertakings have the packaging flexibility they have requested while continuing to contribute to the implementation of the objectives of the Act.

*Contribution to the production of Canadian programming*

*Positions of parties*

71. Under the CCTA's proposal, the existing obligations with respect to contributions to Canadian programming would be maintained as a condition of exemption. In the CCTA's view, this would ensure that contributions are not reduced.
72. Under the CCSA proposal, however, exempt undertakings would no longer be required to make contributions to the production of Canadian programming, either through the provision of a community channel or through direct payments to the CTF or other funds.
73. The CAB, the Directors Guild and the Writers Guild emphasized the importance of contributions to the CTF and other production funds to the on-going production of Canadian programming. They argued that the contributions to these funds by BDUs represent a corresponding direct contribution to the attainment of the objectives of the Act by ensuring diversity, encouraging cultural expression and strengthening the independent production sector.
74. The Directors Guild and the Writers Guild, in particular, indicated that maintenance of these obligations was the issue of most importance for them in this proceeding. In their view, the amount of funds available for the production of Canadian programming is insufficient as it stands, and any reduction would exacerbate the current funding crisis, thereby weakening the strength and diversity of the Canadian broadcasting system.
75. The nine independent cable BDUs that filed comments in response to Public Notice 2002-62 emphasized the competitive importance of maintaining the funding for the operation of community channels, even if they are not required to do so. AGI Cablevision Inc. (Amtelecom), for instance, described the community channel as one of the few

remaining positive factors differentiating between cable and DTH BDUs. Amtelecom confirmed that BDU licensees would not likely abandon the significant investments made in community channels, even if contribution requirements were removed.

*The Commission's determination*

76. The Commission notes that, currently, Class 2 BDUs may, subject to certain limitations, contribute to the production of Canadian programming, either through direct payments to independent production funds such as the CTF or through the funding of a community channel. According to the annual return information collected by the Commission, the cable BDUs that may be eligible for exemption under the proposed order contribute to the production of Canadian programming predominantly through the funding of community channels. In 2002, for example, Class 2 cable BDUs contributed approximately \$10 million to local expression, while contributing only \$75,000 to independent production funds. In fact, the proportion of funds contributed to either local expression or independent production funds by a Class 2 cable BDU may vary from year to year, at the cable BDU's discretion.
77. Although cable BDU licensees are not required to provide a community channel service, the Commission considers that such services, where offered, play an important role in their communities. The Commission notes the commitment of the CCTA, CCSA and their respective members to maintain their funding of the operation of community channels, notwithstanding any exemption order. To support the continued provision of community channel services, the Commission will include a condition of exemption that at least 5% of annual gross, broadcasting-related revenues are contributed to the development of Canadian programming. Exempt BDUs may continue to make that contribution either through direct payments to independent production funds or through the funding and distribution of community channel services. For greater clarity, this would mean that, where an exempt BDU chooses to reduce or discontinue funding of a community channel service, that undertaking would be required to contribute a corresponding amount to an independent production fund to meet this condition of exemption.
78. The Commission's community channel policy is set out in *Policy framework for community-based media*, Broadcasting Public Notice CRTC 2002-61, 10 October 2002. As stated in that policy, the Commission considers that the cable community channel is, and will continue to be, the primary vehicle for the delivery of access programming and other community-based programming. In that notice, the Commission announced its intention to amend the Regulations to incorporate certain provisions of this policy. To ensure consistency in the manner in which these community channels are operated, the Commission considers it appropriate to also include conditions of exemption that reflect the principal provisions of the Commission's community channel policy.



*Additional changes to the regulatory framework  
applicable to Class 2 licensees*

79. The Commission notes that, although many Class 2 cable BDUs will become exempt from licensing requirements, certain others will be ineligible for exemption. The Commission considers that certain changes should be made to the regulatory framework applicable to the remaining Class 2 BDUs so as to provide additional flexibility in the distribution and packaging of programming services and in the manner in which they serve customers.

*Distribution and linkage*

80. As noted above, the Commission considers that there would be benefits associated with providing Class 2 cable BDUs with greater flexibility in the packaging of services. Accordingly, the Commission finds that the distribution and linkage rules applicable to Class 2 BDUs, i.e. those that will be ineligible for exemption under the proposed new exemption order, should be amended so as to be aligned with the requirements applicable to DTH BDUs.

*Installation of facilities and the requirement to provide service*

81. Section 48 of Part 5 of the Regulations requires that Class 1 and Class 2 licensees install facilities and provide service on request, unless relieved of this obligation by condition of licence.
82. In the CCTA's view, this obligation is no longer appropriate in the case of Class 2 BDUs, since many smaller systems "have already been built out to their technical limits" and, further, because many Class 1 systems have been relieved of this obligation as part of the deregulation of their basic service rates.
83. None of the parties that provided comments in response to Public Notice 2002-62 objected to the removal of this obligation.
84. The Commission agrees with the CCTA that it is no longer appropriate to impose this obligation on Class 2 licensees, and intends to amend the Regulations accordingly.

*Broadcasting licence fees*

85. The Commission notes that exemption from licensing requirements relieves exempted broadcasting undertakings from the requirement to pay broadcasting licence fees.

## **Further process**

86. In order to implement its determinations, the Commission will solicit comment, at a later date, on:
- a proposed exemption order for cable BDUs that serve between 2,000 and 6,000 subscribers under the conditions discussed above;
  - proposed changes to the Small cable exemption order currently included in the appendix to Public Notice 2001-121 in order to address situations where an exempt incumbent serves an area that is also served by a new entrant licensed as a Class 1 or 2 undertaking; and
  - proposed changes the Regulations for the purpose of removing the requirement that Class 2 BDUs install facilities and provide service on request.

Secretary General

*This document is available in alternative format upon request and may also be examined at the following Internet site: <http://www.crtc.gc.ca>*