Broadcasting Public Notice CRTC 2003-37

Ottawa, 16 July 2003

Direct-to-home (DTH) broadcasting distribution undertakings - simultaneous and non-simultaneous program deletion and the carriage of local television signals in smaller markets

Introduction to* Licence amendment for ExpressVu – relief from requirements for simultaneous and non-simultaneous program deletion*, Broadcasting Decision CRTC 2003-257, 16 July 2003, and* Licence amendment for Star Choice – relief from requirements for simultaneous and non-simultaneous program deletion*, Broadcasting Decision CRTC 2003-258, 16 July 2003

This public notice marks the culmination of a public process held to investigate concerns about the impact of the distribution of optional local television signals by direct-to-home (DTH) broadcasting distribution undertakings (BDUs) on smaller market television stations across Canada (see Call for comments – Carriage of local television stations by DTH undertakings in smaller markets*, Public Notice CRTC 2001-103, 28 September 2001; Public Notice 2001-103). The public process launched by Public Notice 2001-103 also came to include consideration by the Commission of applications filed in the summer and fall of 2002 by the licensees of Canada's two DTH BDUs, namely Star Choice Television Network Incorporated (Star Choice) and Bell ExpressVu Inc., the general partner, and BCE Inc. and 4119649 Canada Inc. (Partners in BCE Holdings G.P.), the limited partners, carrying on business as Bell ExpressVu Limited Partnership (ExpressVu). These applications were for licence amendments that would suspend the existing conditions of licence that specify the applicants' obligations for carrying out simultaneous and non-simultaneous program deletions.*

The conditions of licence mentioned above were imposed by the Commission in order to protect the program rights purchased by the licensees of local television programming undertakings. The conditions of licence were also intended to protect the advertising base of local and regional television stations, and thus their ability to meet their commitments to Canadian programming.

The Commission's determination to examine the matters raised in each of the applications in the context of its consideration of the concerns that were the subject of Public Notice 2001-103 was based on the arguments advanced by the licensees of the two DTH BDUs. ExpressVu and Star Choice both argued that their applications contained proposals that would: a) respond fully to the concerns of small market television broadcasters regarding the distribution of optional local television signals;

and b) substitute, in place of conditions of licence requiring program deletion, adequate, alternative measures to compensate for the impact of the importation by DTH BDUs of distant Canadian and non-Canadian signals into local markets. This public notice thus also serves as the introduction to the Commission's decisions on these applications.

Introduction and background

The Commission's original policy and licensing framework for direct-to-home broadcasting distribution undertakings

1. In *New, national, direct-to-home satellite distribution undertaking,* Decision CRTC 95-901 (Decision 95-901), and *New, national, direct-to-home satellite distribution undertaking*, Decision CRTC 95-902 (Decision 95-902), 20 December 1995, the Commission approved applications for licences to carry on new direct-to-home (DTH) broadcasting distribution undertakings (BDUs). The licensing framework for these new DTH BDUs was set out by the Commission in *Introductory statement – Licensing of new direct-to-home (DTH) satellite distribution undertakings, and new DTH pay-per-view (PPV) television programming undertakings*, Public Notice CRTC 1995-217, 20 December 1995 (Public Notice 1995-217). The current licensees of the two national DTH BDUs are Bell ExpressVu Inc., the general partner, and BCE Inc. and 4119649 Canada Inc. (Partners in BCE Holdings G.P.), the limited partners, carrying on business as Bell ExpressVu Limited Partnership (ExpressVu), and Star Choice Television Network Incorporated (Star Choice).

2. In Public Notice 1995-217, the Commission acknowledged the need to provide flexibility to new distribution competitors and to establish a competitive balance among new and existing distribution undertakings. It noted that a key challenge would be to implement a policy framework that maximized contributions to the Canadian broadcasting system, yet provided sufficient flexibility to support the competitive entry of satellite distribution technology.

3. Because the new DTH services were to be national services, and in light of the expense of up-linking to satellites local and regional conventional broadcast signals, the Commission decided that DTH BDUs should be required to distribute a basic service[1] consisting only of the programming service of at least one of each of the Canadian Broadcasting Corporation's (CBC) French- and English-language television networks, and of at least one affiliate of each television network licensed on a national basis (e.g., CTV). Under the DTH licensing framework established by the Commission, DTH BDUs were also obligated to make available to subscribers, on a discretionary basis, all Canadian pay and specialty services, subject to the availability of satellite capacity. Beyond that, the licensees were free to determine what additional services they would distribute from among all of the other licensed Canadian television services and all

---

[1] DTH BDUs, like cable BDUs, are now also required to distribute to all subscribers, as part of the basic service, the programming services of the Aboriginal Peoples Television Network (APTN), the French-language TVA Network (TVA), the French- and English-language versions of the House of Commons service and the Cable Public Affairs Channel (CPAC). DTH licensees are also required to distribute the service of the National Broadcast Reading Service, VoicePrint, on an audio channel, adjacent to CBC radio where possible, to all persons subscribing to any basic service package that has a preponderance of English-language services.

eligible non-Canadian services, subject to certain tiering and linkage requirements, and provided that there was never less than a preponderance of Canadian programming services delivered to any subscriber.

4. In its 1995 licensing decisions, the Commission required DTH BDU licensees, by condition of licence, unless otherwise authorized, to perform certain program deletions. ExpressVu's conditions of licence continue to require it to delete programming otherwise receivable by subscribers located within the Grade B (local service) contour of a Canadian television station when ExpressVu distributes programming identical to that being broadcast by the local Canadian station (whether simultaneously or within the same broadcast week), if requested to do so by the licensee of the local television station. The Commission imposed similar conditions of licence on Star Choice in *New, national, direct-to-home satellite distribution undertaking*, Decision CRTC 96-529, 27 August 1996.

5. In Public Notice 1995-217, the Commission stated, as reasons for imposing such requirements, that:

> …the protection of program rights purchased by Canadian television programming undertakings is fundamental to maintaining the integrity of the Canadian rights market, and to protecting the advertising base of local and regional television stations so that they may meet their commitments to Canadian programming.

6. In Public Notice 1995-217, the Commission also noted the discussions that had taken place between certain of the applicants for DTH BDU licences and the Canadian Association of Broadcasters (CAB) concerning alternative measures that could be used to compensate broadcasters or protect local and regional program rights and advertising revenues. The Commission stated that it would accept alternatives to program deletion requirements that had been mutually agreed upon by all parties.

Requests by ExpressVu and Star Choice for relief from their condition of licence requirements

7. In *Options for Extending Protection of Program Rights: Call for Comments*, Public Notice CRTC 1997-7, 10 January 1997 (Public Notice 1997-7), the Commission announced a public process to consider the possibility of introducing additional substitution measures that would apply to cable and other BDUs, including non-simultaneous substitution, and to assess the merits and feasibility of program deletion. The advanced substitution measures proposed in that public notice would have provided for substitution of a local station's programming service over an out-of-market station's programming service, in a wider range of circumstances.

8. Subsequently, in *Deferral of Policy Process to Consider Options for Extending Protection of Program Rights*, Public Notice CRTC 1997-7-2, 9 April 1997, the Commission deferred this process indefinitely in response to a CAB request. The Commission noted that the process announced in Public Notice 1997-7 had been "…initiated, in large measure, as the result of the urging of the CAB and its individual

members" to consider a variety of advanced substitution measures that would have extended the protection of local broadcasters' program rights. According to the CAB at that time, its analysis of the various approaches to enhanced rights protection had revealed that there were "severe limitations" to each of the options that had been proposed for examination as part of the proceeding.

9. In their comments filed in response to Public Notice 1997-7, the DTH BDU licensees argued that the Commission had established conditions of licence requiring them to perform non-simultaneous program deletions in anticipation of similar requirements that it would subsequently apply to cable and other terrestrial BDUs. According to the DTH BDU licensees, the indefinite deferral of the process launched by Public Notice 1997-7 left them as the only BDUs subject to non-simultaneous program deletion requirements. This, they submitted, was inconsistent with the principal of fair and equitable treatment. Accordingly, they filed applications requesting that the Commission relieve them of the requirements of their conditions of licence. The Commission announced receipt of the applications in Public Notice CRTC 1997-60, 16 May 1997. In their interventions to these applications, television broadcasters acknowledged the possible need to limit the program deletion requirements, but requested that the Commission encourage the DTH BDU licensees to negotiate with them to reach an effective agreement concerning these matters.

10. In *Proposed licence amendments affecting the program deletion and substitution requirements of DTH satellite distribution undertakings*, Decision CRTC 97-576, 8 October 1997, pursuant to these applications by the DTH BDUs, the Commission temporarily suspended the conditions of licence of ExpressVu and Star Choice respecting simultaneous and non-simultaneous program deletion. The Commission, however, stated the expectation that the parties involved in the matter use the period during which the conditions of licence were suspended "to negotiate and reach an agreement on appropriate mechanisms that could be employed by DTH distribution undertakings to protect the program rights and advertising base of Canadian television stations".

11. Comprehensive Memorandums of Understanding regarding the compensation of television licensees (the original MOUs) were later reached, albeit at different times, between the CAB and each of ExpressVu and Star Choice. In Decision CRTC 98-500, 23 November 1998, and in *Applications for temporary relief from the requirements of conditions of licence pertaining to identical programming deletion and for authorization to offer a second set of "4+1" U.S. signals as part of a discretionary package*, Decision CRTC 2000-39, 11 February 2000, the Commission found that the terms of the original MOUs provided appropriate compensation to affected broadcasters. The Commission again extended relief to ExpressVu and Star Choice from application of their conditions of licence, in each case, until the earlier of the end of August 2000 and the date upon which the DTH satellite distribution undertaking obtained 500,000 subscribers.

Summary of the original MOUs

12. The Commission's decisions regarding the original MOUs fell approximately fifteen months apart. In the later decision pertaining to Star Choice, the Commission noted that, while certain elements of the text of the agreement negotiated by Star Choice with the CAB were different from those set out in the ExpressVu agreement with the CAB, the two agreements were materially identical.

13. Under the provisions of the original ExpressVu MOU, ExpressVu would compensate an "affected broadcaster"[2] by paying it the sum of $0.20 per month for each DTH subscriber a) residing within the Grade B contour of the affected broadcaster's television station, and b) who had purchased a basic service package, the services of which were in the same official language as that of the station operated by the affected broadcaster. If a subscriber had purchased both an English-language and a French-language basic service, all affected broadcasters in that market would be compensated. For affected broadcasters that operated more than one over-the-air television service in a market (i.e., a twin stick operation), direct compensation would increase to $ 0.30 per subscriber per month.

14. The original MOU contained a further provision that the CAB would support a separate application by ExpressVu for authority to distribute a second set of U.S. commercial network television signals on a discretionary basis. The original MOU provided that, if the Commission approved that application, ExpressVu would pay the CAB $0.25 per month for each ExpressVu DTH subscriber who purchased such a second set of U.S. commercial network television signals on a discretionary basis. ExpressVu's application was subsequently approved in Decision CRTC 98-501, 23 November 1998 (Decision 98-501).

Changes in the broadcasting environment and the growth of DTH

15. In the period since the original MOUs came into effect, developments in the broadcasting environment have brought increasing challenges, particularly for television broadcasters. They have been obliged to adapt quickly to the consequences of expanding competition and consumer choice in the form of new programming services, both Canadian and non-Canadian, including pay and specialty services, and services originating from several different time zones, all contributing to substantial audience fragmentation.

16. The growth in the DTH industry has also been significant. Although cable remains the dominant means of broadcasting distribution, a large number of Canadians are choosing DTH as an alternative. According to Mediastats, on 31 January 1999, the two DTH BDUs served a total of 385,350 subscribers. As of March 2003, the combined total had increased to about 1,973,900 subscribers.

---

[2] An "affected broadcaster" was defined as one whose signal was not distributed by ExpressVu and who was entitled to request deletion, but excluded persons or corporations that owned or controlled more than 30% of a licensed television undertaking that was already distributed by ExpressVu. The original ExpressVu MOU contained a list of 19 affected broadcasters.

17. DTH distributors carry a selection of local signals, but they have tended mainly to be those originating from large markets. There are relatively few small market stations available in the menu of services offered by DTH BDUs. The distribution by DTH BDUs of distant Canadian signals, primarily from larger markets, increasing audience fragmentation brought about by the introduction of new pay and specialty services, and the growth in the number of DTH subscribers, have combined to raise concerns among the licensees of small market stations about the potential erosion of their local audiences. As described below, complaints by small market broadcasters about the impact of DTH caused the Commission to initiate a public proceeding to examine the issue further.

Impact of DTH on small market broadcasters

18. In *Complaint by Cogeco Radio-Télévision inc. concerning signal carriage by Star Choice Communications Inc.*, Decision CRTC 2001-609, 28 September 2001 (Decision 2001-609), the Commission addressed matters raised in a complaint filed by Cogeco Radio-Télévision inc. against Star Choice. In its complaint, Cogeco Radio-Télévision inc. alleged that Star Choice, by distributing local TVA signals from Chicoutimi/Jonquière and Sherbrooke, and not local TQS and CBC French-language service signals from those markets, had breached section 9 of the *Broadcasting Distribution Regulations* (the Regulations) by conferring an undue preference on TVA and by subjecting Cogeco to an undue disadvantage.

19. In its decision, the Commission found that the evidence before it was insufficient to conclude that Star Choice had conferred an undue preference on TVA or that Cogeco Radio-Télévision inc. had been subjected to an undue disadvantage. It nevertheless determined that further investigation was warranted of the circumstances involving local television stations and the distribution decisions of DTH licensees, as raised by Cogeco Radio Télévision inc. in its complaint and in a number of other complaints before the Commission alleging undue preference or disadvantage.

20. Accordingly, in *Call for Comments - Carriage of local television stations by DTH undertakings in smaller markets*, Public Notice CRTC 2001-103, 28 September 2001 (Public Notice 2001-103), the Commission requested the views of interested parties, as part of a two-stage process, regarding the factual context, the financial and technical considerations and policy implications raised by or related to the impact of the distribution by DTH licensees of local television signals and out-of-market television services in smaller markets. In addition, the Commission asked for comment on the following possible courses of action:

- Make no change to the current CRTC policy and regulations, leaving DTH licensees free to choose the local signals they distribute without limit.

- Establish a “carry one, carry all requirement” whereby a DTH licensee deciding to distribute one local signal from a particular market would be required to distribute all other local signals serving that same market.

- Permit DTH licensees to distribute as many television signals as they wish, but require that the signals of local stations only be made available to subscribers in the markets that the local stations are licensed to serve.

- Require DTH licensees to obtain prior approval from the Commission before adding any new conventional Canadian television signals.

- Any other alternatives, including combinations of the above.

Comments in response to Public Notice 2001-103

21. The Commission received 272 submissions in Phase I of this proceeding and 13 reply comments in Phase II. The principal positions and issues raised by the parties are summarized below.

22. ExpressVu and Star Choice argued in support of the existing licensing framework on the basis that additional mandatory carriage requirements would increase costs and place demands on channel capacity. They expressed the view that the present level of flexibility is required for DTH BDUs to remain competitive with the cable distribution industry and with competition from U.S. DBS operators.

23. Comments filed by cable industry representatives urged that the carriage obligations of DTH BDUs be brought into line with those of cable BDUs. At the same time, they argued that the economic interests of television broadcasters must be balanced by the desire of consumers for choice and diversity and by the need to ensure that BDU capacity is used efficiently.

24. In its Phase I submission, the CAB filed a study prepared by Strategic Inc. The study concluded that, from 1997 to 2000, the viewing of satellite-delivered television services had increased, while the overall tuning to local television stations had decreased. According to the study, the television markets most severely affected by this trend were those having populations of less than 300,000. For example, in Lloydminster, almost 50% of total television viewing in 2000 was to services delivered by satellite. According to the CAB, the consequence has been lower advertising revenues for small market stations and a diminished capacity to fulfil their local programming obligations. The following specific measures were proposed by the CAB:

    - make mandatory the carriage by DTH BDUs of all local signals, for delivery as part of the basic service to all subscribers resident in the licensed service area of each station;

    - require prior Commission approval for the distribution of all distant Canadian signals (existing approvals for such distribution would be terminated); and

    - permit the distribution to any subscriber of one set of 4+1 U.S. network television signals only, originating from a time zone that maximizes opportunities for simultaneous signal substitution.

25. In their filings, Newfoundland Broadcasting Co. Ltd. (NTV) and CHUM Limited submitted that DTH BDUs should contribute to a fund that would compensate affected local broadcasters. Specifically, they suggested that DTH BDUs redirect to such a fund a portion of the 5% of their gross revenues derived from broadcasting activities that they are currently required by the Regulations to contribute to Canadian programming.

26. Approximately 225 other submissions were filed in response to Public Notice 2001-103, including those by interested individuals, community associations and elected municipal, provincial and federal representatives. All were concerned about the increasingly difficult financial circumstances confronting small market broadcasters. Approximately 160 of the submissions in this group related to French-language stations serving small markets and, in particular, those operated by Télé Inter-Rives Ltée (Télé Inter-Rives) and Radio Nord Inc.

27. In their own submissions, Télé Inter-Rives and Radio Nord Inc. cited a study indicating that the decrease in viewing for their local stations, which did not receive DTH distribution, had been essentially to the benefit of larger stations serving Montréal and Québec, which were affiliated to the same networks as their smaller stations and did receive DTH distribution. The study suggested that between 10% and 25% of the audience in the markets served by Télé Inter-Rives and Radio Nord Inc. tuned to the Montréal or Québec stations rather than to the smaller markets' own local television services.

28. In its submission, the CBC noted that Francophone residents of markets where they form a minority do not have access to their regional French-language CBC signals because these signals do not fall under the mandatory carriage obligations of DTH BDUs. According to the CBC, DTH licensees should distribute all regional CBC stations, in both French and English, so that all Canadians can receive their local CBC services.

Applications by ExpressVu and Star Choice

29. In August 2002, while the Commission's deliberations were still ongoing with respect to the process initiated by Public Notice 2001-103, ExpressVu filed an application for a licence amendment that would grant it temporary relief from its conditions of licence regarding simultaneous and non-simultaneous program deletion. ExpressVu stated that the process launched by Public Notice 2001-103 had prompted a round of negotiations between ExpressVu, Star Choice and the CAB, culminating in a new Memorandum of Understanding (the MOU) between ExpressVu and the CAB dated 12 August 2002. The MOU contained measures that would serve as alternatives to program deletion, and requested that the program deletion requirement remain suspended as long as the MOU remained in effect. ExpressVu also advised that it and the CAB would make separate applications for approval of a new local and regional programming fund referred to in the MOU.

30. The MOU also stated that, should the Commission not approve the MOU as a whole, the parties would no longer have an agreement on the matter of program substitution and deletion or on the carriage of distant Canadian signals and a second set of U.S. commercial network signals.

31. The Commission announced receipt of ExpressVu's application in Broadcasting Public Notice CRTC 2002-57, 4 October 2002 (Public Notice 2002-57). In that notice, the Commission described the MOU as addressing a number of issues, such as the carriage of distant signals (including time-shifted signals), compensation for small market television stations, additional carriage for small market stations, both on an emergency basis and once new satellite capacity becomes available, and the creation of an independent local and regional television programming fund. The Commission implemented a three-phase process to consider ExpressVu's application. It stated in Public Notice 2002-57 that the process was intended to gather "additional information with respect to this application and to co-ordinate the Commission's efforts more efficiently given the issues raised in the process contemplated by Public Notice 2001-103".

32. In Phase 1, the Commission required ExpressVu and the CAB to file a detailed brief explaining why they believed the proposals in the MOU were in the public interest and how the proposals addressed all of the issues set out in Public Notice 2001-103, and describing the proposed programming fund in more detail. In Phase 2, the Commission invited comments from the public concerning ExpressVu's application and, in particular, the MOU and the proposed programming fund. In Phase 3, the Commission gave ExpressVu and the CAB the opportunity to reply to comments.

33. In its letter of 12 November 2002 filed during the first stage of the proceeding, ExpressVu submitted that "the joint CAB-ExpressVu proposals will benefit not only small market broadcasters, who remain the primary focus of the MOU, but also consumers and the Canadian broadcasting system as a whole. These proposals, therefore, are very much in the public interest."

34. In Broadcasting Public Notice CRTC 2002-71, 19 November 2002 (Public Notice 2002-71), the Commission announced a two-stage process to consider an application filed by Star Choice for licence amendments that would replace its existing conditions of licence requiring simultaneous and non-simultaneous deletion of programming with new conditions requiring local broadcaster carriage and compensation. Star Choice set out its proposed alternative conditions in a submission dated 28 October 2002.

35. Star Choice submitted that, unlike ExpressVu, it had not been successful in concluding a new MOU with the CAB. It argued, however, that it had "put forward very reasonable carriage and compensation proposals which we believe will further the interests of Canada's local broadcasters – particularly unaffiliated broadcasters in small communities". It added, "We also believe that funding should be allocated to ensure that local broadcasters can reflect the interests of their communities".

36. The applications by ExpressVu and Star Choice are examined in greater detail below.

Overview of interventions

37. The Commission received 84 interventions concerning ExpressVu's application in Phase 2 of the proceeding initiated by Public Notice 2002-57. A total of 55 interventions were filed with regard to the application by Star Choice in Phase 1 of the proceeding initiated by Public Notice 2002-71. Interveners included producers, associations representing producers and other creative talent, funding organizations, private broadcasters, the CBC, licensees of cable BDUs, Members of Parliament and other interested parties. An overview of the comments made by these parties is set out below. Positions of parties are discussed further below in the context of the Commission's discussion of specific aspects of each application.

Producers, associations, and funding organizations

38. Independent production companies, associations representing producers and other creative talent, and funding organizations filed comments focused primarily on the proposals contained in the applications for the creation of an independent local and regional programming fund. Producers, funding organizations and other industry associations, including the Canadian Film and Television Production Association (CFTPA) and 27 of its members, the Documentary Organization of Canada (formerly the Canadian Independent Film Caucus), the Canadian Television Fund (CTF), Telefilm, provincial film commissions, the Canadian Conference of the Arts, the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the Directors Guild of Canada and the Writers Guild of Canada all objected to ExpressVu's proposal for the creation of a new programming fund. In particular, they objected to the proposal that monies used to create the fund be diverted away from the CTF.

Private broadcasters

39. The CAB strongly supported the ExpressVu application, which was based on the MOU between this applicant and the CAB. Some private broadcasters also submitted letters in support of the application by ExpressVu. The CAB, however, did not support the application by Star Choice. Among other things, the CAB submitted that a proposal contained in the Star Choice application would permit the distribution, in certain small markets served by local stations, of certain television signals originating from earlier time zones and affiliated with the same networks as the local stations. According to the CAB, such distribution would be precluded under its MOU with ExpressVu. The CAB was also concerned that the suggestions by Star Choice for the creation of a local and regional programming fund differed in some respects from ExpressVu's proposal.

The CBC

40. The CBC expressed concern with respect to both applications. The CBC urged the Commission to require DTH distributors to provide the CBC with carriage comparable to that provided to private broadcasters. In making this request for carriage parity, the CBC outlined what it considered to be a number of other deficiencies with regard to the

carriage of CBC services by the DTH undertakings. The CBC also stated that it did not support the proposals that would delete or partially black out, in certain markets served by local stations, the identical signals of other stations having the same network affiliation and originating from within the same time zone, or delete within these same markets identical signals from certain earlier time zones.

Cable BDUs

41. The interventions filed by cable BDUs did not support either of the applications. A joint submission by Rogers Cable Inc. (Rogers), Quebecor Media Inc. (Quebecor) and Cogeco Inc. (Cogeco) proposed an approach that, among other things, would have the DTH BDUs uplink the signals of all licensed Canadian television stations. They also proposed that rules similar to the priority carriage rules applicable to cable BDUs be put into place to ensure that DTH subscribers receive all local, regional, and extra regional television signals as part of the basic service.

DTH BDUs

42. In its intervention opposing the Star Choice application, ExpressVu noted the differences between that application and its own. According to ExpressVu, its MOU with the CAB was a fair and reasonable compromise, given all the issues and the conflicting commercial objectives of DTH undertakings and conventional broadcasters. ExpressVu noted that the Star Choice application did not contain provisions such as a limitation on signals from certain earlier time zones, nor did it propose to use non-simultaneous substitution. In ExpressVu's opinion, the Canadian broadcasting system would be better served if the CAB had a common agreement with both DTH providers.

43. In its intervention to the ExpressVu application, Star Choice stated that DTH BDUs had made tremendous progress toward resolving issues pertaining to the carriage of local stations. Star Choice submitted that, in the course of its negotiations with the CAB and in its application, it had expressed a willingness to commit to signal carriage and compensation provisions and fund commitments similar to those in the MOU. However, Star Choice stated that it did not support the provisions in the MOU providing for signal deletion and blackouts in certain small markets.

Other interested parties

44. The vast majority of remaining interventions were addressed to the ExpressVu application and expressed support, in particular, for the MOU.

Examination of specific provisions of the ExpressVu and Star Choice applications

Signal carriage and compensation

Applicants' commitments

45. In their respective applications, both DTH BDUs made commitments to distribute the signals of 13 stations selected from a larger list of what they described as small market, independently owned television stations. This larger list of nineteen stations was set out as Appendix A to the MOU and is included in Appendix A to this notice. The applicants indicated that "independently-owned" stations meant stations that are not owned by any of the eight larger ownership groups that were listed in Appendix B to the MOU. These ownership groups are also identified in Appendix B to this notice.

46. The ExpressVu and the Star Choice applications contained similar signal carriage commitments with respect to the small market, independently owned stations, as described below.

- Both applicants undertook to distribute the signals of four small market independent stations that had been identified by the CAB as requiring distribution on an urgent basis. These stations were: CKSA-TV Lloydminster (CBC), CITL-TV Lloydminster (CTV), CFTK-TV Terrace (CBC) and CJDC-TV Dawson Creek (CBC). In its reply to interventions, ExpressVu stated that it was already distributing these stations.

- Both ExpressVu and Star Choice made commitments to distribute the signals of nine other stations listed in Appendix A. Four of these stations, including CHOT-TV (TVA) Gatineau, broadcast in French. Both applicants proposed to distribute a maximum of two stations per small market independent ownership group. Both ExpressVu and Star Choice made commitments to distribute these signals within 60 days of the commercial deployment of their respective new satellite facilities (Nimiq 2 and Anik F2) or, in any event, by no later than 31 December 2003.

- Both applicants committed to distribute the signals of the 13 small market, independently owned stations mentioned above (the select stations) to those DTH subscribers who reside within the Grade B contours of the television stations in question.

- Both applicants stated that they would provide "equitable distribution" of television stations owned by larger broadcast groups, as listed in Appendix B. In determining what constitutes "equitable distribution", both DTH BDUs stated that they would take into consideration: a) the local television programming assets owned and operated by each large broadcast group and the total revenue earned from these assets; and b) the market share obtained by each large broadcast group for the television stations in their respective markets. ExpressVu also stated in its application that its existing arrangements with Rogers Media Inc. would continue to apply with respect to the distribution of signals of television stations owned by that group. ExpressVu noted further that it and Corus Entertainment Inc. have a separate agreement that would also continue to apply with respect to equitable DTH distribution.

- Both applicants committed to afford reasonable commercial consideration to the views of broadcasters respecting the television signals to be distributed pursuant to their applications. However, ExpressVu noted that, while such input would not be unreasonably rejected, the selection of additional television stations was at its sole discretion as per current and past regulatory practice.

- ExpressVu committed in its application to distribute the signals of eight stations belonging to the larger broadcast ownership groups, and stated that four of these would be French-language stations. Star Choice, however, did not commit in its application to distribute the signals of a specific number of stations owned by these larger broadcast ownership groups.

- Both applicants committed to employ up to a maximum of two additional transponders in order to meet the distribution requirements outlined in their respective applications. Should there remain excess capacity on the two transponders, the applicants proposed that it would be used by their DTH undertakings solely for the signal carriage of local or regional Canadian television stations.

- Both ExpressVu and Star Choice undertook to absorb all transmission costs, including the backhaul costs, associated with the additional distribution commitments referred to in their applications.

- ExpressVu undertook to provide an officer’s certificate attesting to the satisfaction of any distribution requirements pursuant to the MOU at the written request of the CAB.

- With respect to the 13 small market, independently owned stations, both ExpressVu and Star Choice made commitments to pay interim compensation to the appropriate broadcaster in the amount of $0.20 per month per DTH subscriber located within the Grade B contour of the signal. This interim compensation in respect of a given signal would terminate once a DTH BDU begins to distribute the signal. Star Choice also undertook to provide to a third party independent auditor all necessary information regarding subscriber numbers in small markets served by independently owned broadcasters to verify and facilitate the payment of interim compensation.

- ExpressVu and Star Choice made commitments not to distribute more than two sets of U.S. commercial network television signals, and committed to pay to the CAB $0.25 per month for every DTH subscriber who purchases a second set of U.S. network television signals.

- ExpressVu undertook to provide similar compensation to two licensees that are not CAB members.

- The two applications contained provisions that a DTH BDU's obligation to distribute the signal of a small market, independently owned station, pursuant to the applications, would cease where a change in voting equity results in a change of control of voting equity in accordance with Commission regulations, and where such a change also entails a change in network affiliation, and/or a material change in the programming, of the station in question. Furthermore, any change of control of voting equity of any such station would not trigger any additional obligations to distribute the signals of stations owned by the larger ownership groups listed in Appendix B.

Views of interveners

47. The comments received with respect to the carriage and compensation commitments focused primarily on signal carriage issues. There were few comments on the proposed compensation arrangements.

Private broadcasters

48. Of the few private broadcasters who intervened, Mid West Television Ltd. (Mid West), licensee of both CKSA-TV (CBC) and CITL-TV (CTV) Lloydminster, was in support of the ExpressVu application. The signals of both Mid West stations were designated to receive emergency distribution under the MOU and were, in fact, being distributed by ExpressVu at the time the intervention was filed. Mid West noted the positive feedback it had received from local ExpressVu subscribers regarding this distribution. Mid West also stated that, since the introduction of DTH service in Canada, the Lloydminster market has consistently had the highest DTH penetration of any community in the country. According to the intervener, 55% of all BDU subscribers in that community are DTH subscribers. In Mid West's view, implementation of the MOU would ensure that Lloydminster viewers continue to have a local television service.

49. NTV, based in St. John's, stated that the ExpressVu and the Star Choice applications struck an appropriate balance between the interests of local television station operators, DTH distributors and Canadian television viewers. NTV noted that distribution of local television services such as those it provides would ensure that Canadians who live outside their province of origin remain connected with their families and local roots.

50. Télé Inter-Rives is a small market independent television broadcaster that operates four stations, the signals of which are earmarked for potential distribution under both the ExpressVu and the Star Choice applications. Télé Inter-Rives stated that it supported

without reservation ExpressVu’s application. The intervener was satisfied that the MOU presented a fair and reasonable solution, and considered that it was a model that should be adopted by Star Choice and approved by the Commission.

51. Craig Media Inc. commented in its intervention to the Star Choice application that its company continued to be the only one of those belonging to the larger broadcast ownership groups that did not receive carriage of its major market signals by DTH distributors.

52. La Fédération des télévisions communautaires autonomes du Québec (La Fédération) opposed the MOU, arguing that it reinforced the view that the current state of DTH technology prevents DTH BDUs from distributing the programming of local community television stations. The intervener submitted that this was contrary to the Commission's objectives set out in *Proposed policy framework for community-based media*, Public Notice CRTC 2001-129, 21 December 2001. La Fédération reiterated the position of independent community television stations that there should be an obligation on the part of all BDUs, including DTH, to distribute their programming services.

The CBC

53. The CBC acknowledged the importance of DTH BDUs providing carriage opportunities to independently-owned local television stations in their own markets as a means to expand the number of DTH subscribers who have access to their local stations. However, the CBC objected to the approach taken by the DTH BDUs to the national distribution of local and regional signals, including those of stations owned and operated by the CBC. The CBC stated that, at a minimum, it should be given carriage parity with the major private broadcasters in all markets. It noted that neither ExpressVu nor Star Choice met this minimum standard. According to the CBC, at the time it filed its intervention, ExpressVu was distributing only six of thirteen originating CBC English-language regional television services, while Star Choice was distributing only seven. The CBC stated that, at that time, ExpressVu distributed the signals of nine CTV stations. Further, Star Choice was carrying the signals of five TVA stations, compared to only two French-language CBC stations.

54. The CBC stated that, in its view, a combination of monthly compensation and enhanced carriage would be reasonable, provided the CBC’s entitlement to carriage parity was recognized and implemented**.**

55. Other concerns regarding DTH signal carriage identified by the CBC in its intervention included the following:

- Although 39% of the residents in Northern Canada were DTH subscribers, none received CBC North, as it was distributed by neither Star Choice nor ExpressVu.

- No Francophones living in Ontario or in the Prairie region had DTH access to the CBC’s French-language services originating in that province or that region.

- Anglophones in Quebec did not have DTH access to any CBC English-language stations originating in that province.

- No Canadians, including the almost one in five Ottawa residents who subscribed to DTH services, were able to receive either the English- or the French-language CBC Ottawa television signals.

56. The CBC requested that the Commission initiate a full public hearing process to hear and review the applications in greater detail.

Cable BDUs

57. As noted above, Rogers, Quebecor and Cogeco filed a joint intervention to the two applications. The three parties stated that, although ExpressVu and Star Choice agreed to distribute the signals of the “hardest hit” television stations identified by the CAB, there were many television stations that would not receive DTH distribution. They suggested that, as an alternative to the applicants’ proposals, DTH licensees should be required to uplink all Canadian television stations. Furthermore, they proposed that rules similar to the priority carriage rules applicable to cable BDUs be put into place to ensure that DTH subscribers receive all local, regional, and extra regional television signals as part of their basic service.

Star Choice’s response to interventions

58. In response to the CBC’s statement that it should be given carriage parity with other large broadcasters, Star Choice stated that, should its application for new program deletion conditions of licence be approved, it would offer equitable carriage to large private broadcaster groups in the same manner as provided for in ExpressVu’s application. Star Choice noted that its proposal included criteria for the determination of what constitutes “equitable carriage”. Star Choice also noted that it had informed the CBC that it would provide the CBC with equitable carriage, should Star Choice’s application be approved by the Commission.

59. Star Choice stated, however, that it did not believe it would be helpful to make specific numerical commitments in this regard. Nor did it consider that equitable carriage necessarily meant numerical parity among groups. Star Choice added that, should the Commission determine an equitable carriage provision to be appropriate, a broadcaster who disagreed with Star Choice’s implementation of such a provision would be able to discuss its concerns with Star Choice or approach the Commission for dispute resolution.

60. In response to the intervention filed jointly by the three cable companies, Star Choice stated that these companies had made an erroneous assumption that the Canadian DTH industry was a mature industry that no longer faced any technological constraints. Star Choice added that, while satellite capacity was increasing, it would never be economical or desirable, from the perspective of the Canadian broadcasting system, for DTH BDUs

to distribute the signal of every local Canadian television station. In its view, to use available capacity for this purpose would deny carriage to other existing and future Canadian programming undertakings, reduce the breadth of programming choice available to subscribers and undermine the business plans of the DTH BDUs.

61. Further, Star Choice stated that a broad “local-into-local” model for the Canadian DTH industry would be a tremendous waste of national transponder capacity and would be contrary to the *Broadcasting Act*’s objective that BDUs provide efficient delivery of programming at affordable rates using the most effective technologies.

ExpressVu’s response to interventions

62. In response to the CBC’s intervention, ExpressVu submitted that, given finite satellite capacity, cost limitations, the competing needs of new specialty services, interactive television (ITV), high definition television (HDTV) and third-language services, it had struck a fair balance among all the broadcasting station groups, including the CBC. ExpressVu noted that it had estimated that implementing its commitments to backhaul, uplink and provide satellite capacity to accommodate the additional signals proposed for distribution under the terms of the MOU would cost the company $6.5 million per year, without generating any offsetting incremental revenue.

63. ExpressVu added that, under its application, the opportunities for viewing CBC programming would be far greater than they would be if the existing conditions of licence with respect to program deletion were implemented. In addition, in its view, the independently-owned CBC affiliates would continue to struggle to produce local programming, absent approval of its application.

64. ExpressVu noted that the program schedules of the independently-owned local CBC affiliates whose signals are slated for distribution under the MOU include between 40% and 75% of the CBC network programming, and that the stations’ signals would be available to all ExpressVu subscribers in their respective local markets. ExpressVu added that its proposal would also ensure that the CBC network programming not offered by the local CBC affiliate would be made available to all ExpressVu subscribers on a channel located adjacent to that used to distribute the signal of the local affiliate.

65. In response to the joint intervention by Rogers, Quebecor and Cogeco, ExpressVu stated that the interveners’ proposal that DTH should uplink all Canadian television stations was unworkable from both a consumer and a business perspective. According to ExpressVu, this would require use of as many as six additional transponders by each DTH operator, tying up capacity that should be reserved for future capacity-intensive services such as HDTV and ITV. ExpressVu added that the cable proposal represented a fundamental change in the DTH carriage rules and, thus fell outside the scope of the current process.

66. In its reply to the intervention by La Fédération, ExpressVu stated that the intervener’s request that DTH BDUs distribute the signals of community television stations was unrealistic. In the applicant’s view, satellite carriage of such services would be an unwise

and uneconomical use of satellite capacity. ExpressVu suggested that there were other alternatives for these services, including those established in *Policy framework for community-based media*, Broadcasting Public Notice CRTC 2002-61, 10 October 2002.

The Commission's determination

67. The Commission notes that over-the-air broadcasters, including television broadcasters, have traditionally been licensed with the expectation that they will provide audiences resident in their local service areas with programming that reflects their needs and concerns. In providing such programming, local licensees can make a significant contribution to the attainment of the objectives of the *Broadcasting Act*, and in particular that set out in section 3(1)(i)(ii), which specifies that programming provided by the Canadian broadcasting system should be drawn from local, regional, national and international sources.

68. As noted above, local broadcasters have faced increased competition for audiences from a number of sources in recent years, including pay and specialty services and distant over-the-air signals distributed by both cable and other BDUs.

69. As also discussed above, DTH BDUs have significantly increased their subscriber base in recent years, and many of these subscribers reside in regions not served by cable. The Commission has not required DTH BDUs to distribute a large selection of local television signals. Those local signals they do distribute tend to originate from larger urban centres. Based on an examination of information filed on the record and that provided in the annual financial returns filed with the Commission by the licensees of television undertakings, the Commission is of the view that the audiences and the revenues of stations serving markets with populations of fewer than 300,000 people have been particularly affected by the migration from over-the-air to DTH viewing.

70. For example, annual return information indicates that, over the past five years, stations serving markets with populations of fewer than 300,000 people have experienced a decline in local advertising revenues, a decline that is somewhat more pronounced for independently-owned stations than for those owned by larger broadcast ownership groups. The profitability of conventional television stations generally has also been declining over the past five years, with the decrease in profitability being the most pronounced among small market, independently owned stations. Financial return information also indicates that the local advertising revenues of the 17 small market, independently owned stations listed in Appendix A that serve populations of fewer than 300,000 people[3] have decreased from $14.6 million in 1998 to $11.9 million in 2002. In this regard, the Commission considers that smaller broadcast ownership groups do not have the same resources as larger ownership groups, and are unable to benefit from economies of scale to the same extent. Thus, they have fewer resources with which to cope with declines in audiences and in advertising revenues.

[3] The revenues of two of the 19 stations listed in Appendix A, namely CHOT-TV and CFGS-TV Gatineau, are excluded from this calculation as the market they serve has a population in excess of 300,000.

71. The Commission considers that the proposed carriage arrangements would provide DTH subscribers in the affected communities with convenient access to their respective local stations. While DTH distribution of these stations would not guarantee viewing, such distribution would provide these stations with the opportunity to attract additional viewers and to increase advertising revenues.

72. In light of the above, the Commission is satisfied that the proposed carriage arrangements for small market, independently owned stations, as set out in the two applications, are appropriate as part of a set of measures constituting an alternative to the applicants' existing program deletion conditions of licence. With implementation of the above DTH carriage commitments, these stations should be in a better position to contribute to local expression and reflection in their respective communities. Accordingly, the Commission will, at the time of licence renewal, review with these licensees their plans for local programming, in light of the DTH carriage commitments.

73. As mentioned earlier, both ExpressVu and Star Choice made commitments to distribute these signals by the earlier of 60 days following the commercial deployment of their respective new satellite facilities (Nimiq 2 and Anik F2) and 31 December 2003. The Commission notes that, in a press release dated 11 April 2003, Telesat announced that it has "cleared the satellite [Nimiq 2] to provide direct-to-home television services to Canadians".

74. With regard to the proposal for the "equitable distribution" of stations belonging to larger broadcast ownership groups, the Commission notes that the list of larger ownership groups is representative of all of the major private broadcasters in Canada. Further, the Commission considers the criteria used to select the particular stations to be distributed to be generally appropriate, and notes that both applicants have undertaken to consider the views of the broadcasters in question. The CAB noted that it developed this concept of equitable distribution jointly with ExpressVu with a view to ensuring a "fair opportunity for stations from the larger broadcast groups to receive distribution". The Commission notes that parties have recourse to the Commission if they consider that the concept of equitable distribution is not applied fairly in a particular case. In light of the above, the Commission is satisfied that the proposal for the distribution of stations from the larger broadcast ownership groups is also appropriate as part of a set of measures constituting an alternative to the applicants' existing program deletion conditions of licence.

75. The Commission notes the submission of Rogers, Quebecor and Cogeco that DTH undertakings should distribute all licensed Canadian television stations. Due to cost and capacity considerations, the Commission does not consider it appropriate to require DTH undertakings to do so. In the Commission's view, the distribution proposals advanced by ExpressVu and Star Choice strike an appropriate balance among the competing objectives of ensuring that a) subscribers have access to local programming, b) there is

sufficient capacity to ensure the distribution of specialty, pay, pay-per-view, ethnic and emerging services such as ITV and HDTV, and c) DTH BDUs remain viable competitors in the distribution market.

76. With regard to point c) above, the Commission notes that, according to ExpressVu, the distribution of the 13 small market, independently owned stations as proposed will generate little additional revenue for the DTH licensees. On the other hand, the record indicates that the DTH undertakings will incur significant costs to backhaul, uplink and provide satellite capacity to distribute signals. Specifically, ExpressVu submitted that these costs would amount to $6.5 million per year, a figure that was not disputed by any of the parties who intervened with respect to this application.

77. The Commission considers that the requests by the CBC for carriage parity of its services with those of the major private networks, the issue of CBC's regional French-language services, and the other issues that the CBC identified as DTH carriage deficiencies, are matters that are broader than the concerns regarding small market television stations. They are thus beyond the scope of the proceedings initiated by Public Notice 2001-103 and by the licence amendment applications submitted by ExpressVu and Star Choice. The Commission notes, however, that the above carriage arrangements provide for the carriage of certain CBC small market affiliates. Specifically, at least six of the thirteen small market, independently owned stations to be distributed are affiliates of the CBC.

78. The Commission notes that the CBC will have an opportunity to raise the broader issues related to the distribution of its services by DTH BDUs at the time of the DTH licence renewals. The Commission has already indicated in *Achieving a better balance: Report on French-language broadcasting services in a minority* environment, Public Notice CRTC 2001-25, 12 February 2001, that it expects satellite service providers to offer the signals of the CBC in both official languages. Furthermore, the Commission indicated that it would deal with the issue of the distribution of the regional services of the CBC and of la Société Radio-Canada (SRC) when it considers the licence renewal of satellite service providers.

79. The Commission also finds appropriate, as part of a set of measures constituting an alternative to the applicants' existing program deletion conditions of licence, the proposal to limit to two the sets of U.S. commercial network television signals that may be distributed to a DTH subscriber, the proposed compensation of $0.25 per month for each DTH subscriber who purchases a second set of U.S. network television signals, the change of ownership provisions, and the provision relating to interim monthly compensation of $0.20 per subscriber, payable by a DTH BDU to each small market independent station until such time as the station's signal is distributed.

Substitution and deletion of signals

80. The current applications reflect differing approaches to simultaneous and non-simultaneous substitution, the distribution of same time zone/same network signals in select small markets and the distribution of earlier time zone/same network signals in select small markets.

Simultaneous substitution over non-Canadian programming services

81. In Decision CRTC 95-901 approving the application for the DTH BDU now operated by ExpressVu, the Commission imposed the following condition of licence with respect to simultaneous substitution:

> 4(a) the licensee shall delete the programming of a non-Canadian television programming service distributed on the DTH undertaking, and substitute the identical programming of a Canadian television programming undertaking whose signal is also distributed on the DTH undertaking.

82. Decision CRTC 96-529 licensing Star Choice contained a substantially similar condition of licence with respect to simultaneous substitution. In Decision CRTC 97-576, the Commission approved an amendment to this particular condition of licence and replaced it with the following language requiring the licensee to:

> delete a non-Canadian television programming service and substitute the identical programming service of the Canadian television programming undertaking whose signal is also distributed by the licensee, provided that both the non-Canadian television programming service and the Canadian television programming service originate from the same up-link centre.

83. In the MOU, ExpressVu undertakes to:

> …take all necessary measures to maximize the opportunities for simultaneous substitution, without prior notification from broadcasters, by ensuring that the US commercial network signals (up to a maximum of two sets) made available to DTH subscribers are sourced in Eastern Canada from urban centres in the Eastern time zone that match the time zone of Canadian television stations situated in Toronto. For Western Canada, the US commercial network signals will be sourced from urban centres in the Pacific time zone that match the time zone of Canadian television stations situated in Vancouver.

84. The Commission notes that this provision, which was also contained in the original MOU, is consistent with ExpressVu's current authority to distribute a second set of four U.S. commercial signals, one from each major television network, and one non-commercial U.S. signal (4+1 U.S. network television signals). Specifically, in Decision 98-501, the Commission authorized ExpressVu to make available a second set of 4+1 U.S. network television signals from either the Eastern or Pacific time zones.

85. The Commission notes that ExpressVu performs simultaneous substitution at the uplinks. Therefore, it performs program substitutions on a national basis, with only one Canadian signal being substituted over a given non-Canadian signal. The substituted Canadian signal is then distributed to all ExpressVu subscribers, regardless of where they are located in the country.

86. As described in its current application, Star Choice uses virtual channel override technology to perform simultaneous substitution. This technology uses a software-driven switch at the subscriber's set top box, rather than a switch at the uplink. It allows Star Choice effectively to substitute, at the set top box, the signal of any local broadcaster carried by Star Choice in the place of an incoming U.S. network television signal broadcasting the same program at the same time.[4] Essentially, virtual channel override directs the set top box to tune to the Canadian simulcast specified (i.e., that of the nearest local broadcaster distributed on Star Choice) when the viewer selects the U.S. channel.

87. The Commission notes that no intervener commented on simultaneous substitution. The Commission notes further that the approaches of both DTH licensees to simultaneous substitution over non-Canadian programming services are consistent with the original MOU and in accordance with the licensees' existing simultaneous substitution conditions of licence. The approach adopted by ExpressVu benefits television broadcasters whose signals originate from Toronto or Vancouver. The use of virtual channel override by Star Choice on identical U.S. signals offers a more localized form of simultaneous substitution, and thus has the potential to directly benefit a larger number of broadcasters.

Non-simultaneous substitution

88. In Public Notice 1997-7, non-simultaneous substitution was described as a form of signal substitution in which the programming of an out-of-market station is replaced by the identical programming broadcast by a local station, even when the programming is broadcast at different times on the two stations. The Commission noted in that public notice that, with non-simultaneous substitution, local broadcasters would no longer need to consider the program schedules of other broadcasters in order to take advantage of program substitution. It added, however, that broadcasters could be faced with significant additional costs, including those associated with providing the separate feed and buying the necessary program rights for the additional broadcast of the program. The Commission also noted that non-simultaneous substitution could create technical difficulties for both distributors and broadcasters.

89. In the original MOU, ExpressVu undertook to perform non-simultaneous substitution in an effort to maximize substitution opportunities. In its current application, ExpressVu stated that it would:

[4] As discussed later in this notice, Star Choice also proposed in its reply to use this technology in the markets of select, small market, independently owned stations to substitute the local signal of these stations over the identical television signals of Canadian stations having the same network affiliation and originating in the same time zone.

> …effect non-simultaneous substitution for Canadian television signals that it distributes provided that the broadcaster requesting the non-simultaneous substitution provides a written notification of no less than four (4) days prior and also provides a seamless, real-time fibre feed of the signal to be substituted, at the broadcaster's cost, to Bell ExpressVu's designated broadcast centre to accommodate a consumer transparent program substitution. The broadcaster requesting non-simultaneous substitution will assume all incremental copyright obligations in respect of any program substituted on a non-simultaneous basis.

90. The current Star Choice application did not propose non-simultaneous substitution. In its application, Star Choice stated that to perform this type of substitution would be much more costly to Star Choice than to ExpressVu. Star Choice noted that its operations are closely interlinked with those of its parent company, Canadian Satellite Communications Inc. (CANCOM). CANCOM is the licensee of a national satellite relay distribution undertaking (SRDU) authorized to distribute Canadian and non-Canadian television services to cable BDU affiliates. Star Choice noted that it and CANCOM operate three uplink centres and make use of a shared delivery platform to distribute four different sets of the 4+1 U.S. network television signals. Star Choice argued that it and CANCOM must balance the needs of their respective customers in making use of this platform, and stated that it would be required to devote substantially more equipment and human resources than ExpressVu to effect non-simultaneous substitution.

Views of interveners

91. Only the Canadian Cable Television Association (CCTA) made a specific comment regarding non-simultaneous substitution. The CCTA stated in its intervention to the applications that:

> If Star Choice were required to remove signals or effect non-simultaneous substitution in certain markets, CANCOM cable customers in other markets would be precluded from receiving signals and/or individual programs on those signals. Therefore, any condition of licence imposed on Star Choice must take into consideration the possible impact on [CANCOM's] customers.

The Commission's determination

92. Based on the arguments presented by Star Choice, the Commission agrees that the licensee cannot provide non-simultaneous substitution for reasons of cost associated with the fact that its technical operations are so closely co-ordinated with those of CANCOM's SRDU.

93. Based on the significant cost to television broadcasters and the technical complexity associated with non-simultaneous substitution, the Commission considers it unlikely that broadcasters whose signals are distributed by ExpressVu, particularly those serving small markets, would request that ExpressVu perform non-simultaneous substitution. The Commission considers that, in most cases, the costs to the broadcaster, including the

costs of providing ExpressVu with a time delayed feed for a particular program, would outweigh any incremental advertising revenues the broadcaster might earn. As a result, the Commission considers that this provision would be of no real benefit to broadcasters, particularly small market broadcasters.

94. Accordingly, the Commission does not consider it necessary to require either applicant to perform non-simultaneous substitution as part of a set of measures constituting an alternative to the applicants' existing program deletion conditions of licence.

Removal or partial blackout of same time zone/same network signals in select small markets

The ExpressVu/CAB approach

95. The Commission notes that, pursuant to sections 3.1 and 3.2 of the MOU, DTH subscribers resident within the Grade B contours of the signals of the 13 small market, independently owned television stations selected for distribution would not receive other Canadian television signals originating from the same time zone and affiliated with the same network. Under the MOU, this restriction would not apply to out-of-market television stations owned and operated by either the CBC or SRC while these stations were broadcasting programming that was not identical to, and simultaneous with, that being broadcast by the local station.

96. In a letter to the Commission dated 4 November 2002, the CAB stated that CTV and ExpressVu had agreed to a similar arrangement to ensure that any unduplicated CTV programming from CTV affiliates would remain available to its DTH subscribers in those local markets. According to ExpressVu, when either the CBC or CTV is showing network programming that is not duplicate programming, DTH subscribers will also have available to them, on a channel contiguous to the local CBC or CTV channel, a channel that will contain the network programming not broadcast by the local station.

97. ExpressVu stated in its reply to interventions that the objective of this provision in the MOU is to provide small market, independently owned stations that would be distributed by ExpressVu in accordance with the MOU, some measure of protection from the impact of Canadian signals in the same time zone with the same network affiliation. ExpressVu further submitted that the provision would also ensure that DTH subscribers in these select markets continue to have access to all CBC and CTV network programming.

98. In its Phase 1 submission to the proceeding initiated by Public Notice 2001-103, the CAB stated that, in the case of independent television stations serving small markets, DTH has had a proportionately greater financial impact, and that additional measures were thus required to ensure the continued provision of local service and local reflection. ExpressVu stated in its application that, given the "perceived need to offer small-market independent broadcasters a further measure of assistance, ExpressVu and the CAB agreed on certain safeguards for independent small market broadcasters, as set out in section 3.3 of the MOU, which limit certain distant signals from same and earlier time zones" in these selected markets.

Star Choice's proposal for the distribution of same time zone/same network stations in these select markets

99. Star Choice stated in its application that it was opposed to any requirement to remove or blackout, in small markets, same network signals from the same time zone. It submitted that such measures would create consumer frustration and a perception that the Canadian broadcasting system limits consumer choice. Accordingly, Star Choice's application contained no provision to remove or black out such signals.

Views of interveners

100. The CBC stated that CBC affiliates are not a complete substitute for CBC owned and operated stations, as none of the affiliates carry the full CBC programming schedule. The CBC noted that, of the total amount of network programming available, the amount that an affiliate carries within its schedule may vary from as little as 33% to as much as 90%.

101. The CBC also stated that it cannot accept the removal of its signals originating from any "same time zone" CBC station. It made the following statement with respect to the same time zone/same network signal blackout or partial deletion proposal by ExpressVu:

> This plan would turn a CBC same time zone channel into a "Swiss cheese of programming" and dead air leaving subscribers confused over whether a blacked out CBC channel was coming back in half an hour, gone for the night or experiencing technical difficulties.

102. The CBC stated further that the extra effort required to repeatedly check the interactive program guide to find out the status of a CBC channel was, in its opinion, something virtually no subscriber would consider acceptable.

103. In its intervention to the application by Star Choice, the CAB noted the following:

> Star Choice could readily use its "virtual channel override" system, subject to Commission approval, to substitute programming of the local CBC affiliate over the identical programming of a distant CBC owned and operated station from the same time zone.

Star Choice's reply to interventions

104. In its 17 January 2003 reply, Star Choice stated that, in the case of the select small market stations, it was prepared to use its virtual channel override technology in lieu of the partial blackout or deletion of signals from within the same time zone and affiliated with the same network. This would permit it to substitute, at the set top box, the signal of a small market, independently owned station in the place of an out-of-market, same network signal originating from within the same time zone. Star Choice submitted that this measure would be sensitive to the needs of viewers and the CBC, and would improve the local broadcaster's presence.

ExpressVu's reply to interventions

105. ExpressVu replied that the restrictions on the signals to be received in these specific markets would not result in the removal of network programming from the television screens of DTH subscribers in the select small markets. Rather, such restrictions would encourage DTH subscribers within the reach of the CBC, SRC, CTV, TVA, and TQS signals transmitted by independently-owned stations in the select small markets to watch their local television channels instead of programming on other affiliates of the same network.

106. ExpressVu also stated in its application that, clearly, it would prefer to provide its subscribers with all of the signals that it distributes, but that, in the interest of the continued existence of small market independent broadcasters, it has agreed to the proposed limitations on the grounds that it was necessary to achieve a balanced MOU with the CAB.

The Commission's determination

107. As discussed earlier in this notice, DTH has had a greater negative impact on the viewership and advertising revenues of small market, independently owned television stations than on other television broadcasters. In the Commission's view, in addition to carriage, further measures are warranted to provide such small market, independently owned stations with the opportunity to attract additional viewers and to increase advertising revenues.

108. Both applicants have proposed measures that would assist certain small market, independently owned stations by reducing the presence in their markets of same time zone/same network television signals. The Commission considers that the respective measures proposed by the applicants would afford the 13 small market, independently owned stations that will be distributed some degree of protection from the impact of same time zone/same network signals, thus providing them with the potential to increase their local audiences, their advertising revenues, and their ability to offer local programming and local reflection.

109. The Commission notes ExpressVu's commitment that CBC, SRC and CTV programming not offered by the local affiliate of these networks would be made available to ExpressVu's subscribers on a channel that would be adjacent to that of the local affiliate. Thus, with respect to these networks, only duplicate programming would be deleted. ExpressVu also stated that it would make subscribers aware of these arrangements.

110. The Commission expects ExpressVu to provide notification to its subscribers, through the provision of billing inserts, electronic program guide updates and on-screen notifications, in order to minimize the impact on subscribers of the blackout or partial removal of same time zone/same network programming.

111. Star Choice, in its reply, stated that it would use virtual channel override to substitute the local small market broadcaster's signal over distant Canadian signals carrying identical programming that is broadcast simultaneously.

112. Thus, the Commission notes that, under the respective measures proposed by the applicants, DTH subscribers in most small markets would not lose access to programming, because the only programming that would be deleted or overridden would be duplicated programming.

113. The Commission notes that ExpressVu made no commitment to make available TVA and TQS programming not offered by the local affiliate in four small markets in Quebec. Thus, out-of-market TVA and TQS signals will be deleted in their entirety in these four small markets. However, very little non-network programming is broadcast by the stations of these networks. In fact, the only non-network programming consists of local news programming. As a result, ExpressVu subscribers would lose access to only a minimal amount of programming in the four markets in question.

114. In light of the above, the Commission finds appropriate, as part of a set of measures constituting an alternative to the applicants' existing program deletion conditions of licence, both the proposal by ExpressVu to partially black out or delete same time zone/same network Canadian TV signals in select small markets, and the commitment by Star Choice to override same time zone/same network Canadian TV signals in select small markets.

Limitation on signals from earlier time zones

115. The Commission notes that DTH BDUs make available to particular locations programming originating from earlier and/or later time zones. This is commonly referred to as "time shifting". For the purposes of the discussion of time shifting contained in this notice, an "earlier" time zone is defined as one located to the east, while a "later" time zone is defined as one located to the west, of a given time zone. Time shifting permits DTH subscribers to watch the same episode of a program at a different time than it is broadcast locally. The opportunity to view time-shifted programming is also available to digital cable subscribers through the purchase of a package of distant Canadian signals or a second set of 4+1 U.S. network television signals.

116. In Phase 1 of the proceeding initiated by Public Notice 2002-57, the CAB stated that, in recent years, local broadcasters have faced significant challenges. According to the CAB, one of the challenges faced by broadcasters has been audience fragmentation caused by the large numbers of DTH subscribers in local markets whose expanded viewing options include access to distant signals originating from many different time zones.

The ExpressVu/CAB approach

117. As a means to minimize the impact of time-shifting on the small market, independently owned stations that would be distributed under the MOU, ExpressVu proposed to place limits on the distribution to subscribers in those select markets of distant Canadian television signals originating from earlier time zones. Section 3.3 of the MOU reads as follows:

> Subject to the limitation described in Section 3.2, DTH subscribers located within the Grade B contours of the television stations listed in Appendix A will have limited access to distant Canadian signals from earlier time zones which share the same network affiliation as the licensed television station listed in Appendix A as follows:
>
> a) where the DTH subscriber resides in the Mountain or Pacific time zones, access to distant Canadian signals affiliated to the same network as the local television station will be limited to those from the Central time zone; and
>
> b) where the DTH subscriber resides in the Central and Eastern time zones, access to distant Canadian signals affiliated to the same network as the local television station will be limited to those from the Atlantic time zone.
>
> For greater certainty, these limitations relate to programming distributed on a pre-release basis only from earlier time zones. There are no limitations placed on programming, which is post-released and is distributed from later time zones.

Star Choice's approach

118. Star Choice stated in its application that the removal or blackout of same network signals, as proposed by ExpressVu, would create consumer frustration and the perception that the Canadian broadcasting system limits choice. Star Choice added that the removal of services from subscribers would:

- deny DTH subscribers in small communities the same breadth of television service available to DTH subscribers in urban areas;
- undermine public confidence in Canadian DTH and further encourage the development of the grey and the black markets in Canada; and
- reduce the availability of CBC service in small markets across Canada.

Views of interveners

119. In its intervention, the CBC stated that implementation of ExpressVu's proposal with respect to earlier time zone signal deletion would mean that subscribers living in areas served by stations owned and operated by the CBC would be better served, in terms of the total number of CBC signals available to them, than those DTH subscribers resident in the select markets served by independently-owned CBC affiliates. The CBC submitted that, in such circumstances, it would have no choice but to disaffiliate from such

broadcasters as soon as possible, because “only in that way would the CBC fulfil its statutory mandate to ensure the broadest possible distribution of its programming”.

120. Mid West stated in its submission to the proceeding initiated by Public Notice 2001-103 that ExpressVu’s proposal to limit the reception by DTH subscribers in select small markets of distant signals having the same network affiliation as the independently-owned stations in those small markets would assist in resolving the issue of devaluation of program distribution rights. According to Mid West, much of the CTV network programming it airs on CKSA-TV Lloydminster is delivered to DTH subscribers in that community at an earlier hour than it appears on CKSA-TV, through the signals of other CTV affiliates operating in earlier time zones. Mid West stated that, in the circumstances, program rights protection was necessary.

121. The joint intervention filed by Rogers, Quebecor and Cogeco to the applications suggested that, as an alternative to ExpressVu’s proposal, DTH operators be permitted to purchase from the CAB the rights to distribute a package of time-shifted services.

ExpressVu’s reply to interventions

122. In reply, ExpressVu stated the following with respect to the rationale behind its proposal to limit the distribution of distant signals to DTH subscribers:

> Distant signals provide DTH subscribers with not only the opportunity to “time-shift” their program choices, but also to access news and views from regions coast to coast. Understandably, ExpressVu is reluctant to reduce, particularly for its existing subscribers, the channel and program choices that customers currently enjoy. Nevertheless, in the context of the negotiations and the perceived need to offer small market broadcasters a further measure of assistance, ExpressVu and the CAB have agreed on certain safeguards for independent small market broadcasters which limit certain distant signals from same and earlier time zones.

Star Choice’s reply to interventions

123. In its reply to interventions, Star Choice submitted that DTH BDUs should not be required to remove or black out programming in small markets, as it would severely reduce access to the CBC and other broadcasters in those markets. Star Choice also submitted that such requirements would undermine certain objectives of the Canadian broadcasting policy as expressed both in law and policy over the past two decades, including the following:

- the extension of public and private Canadian broadcasting services to all parts of Canada is a fundamental objective that the Commission has pursued since its inception (*CRTC Response to the Report of the Task Force on Access to Television in Underserved Communities*, Public Notice CRTC 1985-60, 22 March 1985);
- the extension of a range of broadcasting services in English and French to all Canadians as resources become available (*Broadcasting A*ct, section 3(1)(k)).

- the provision by the CBC of programming that reflects Canada and its regions to national and regional audiences, while serving the special needs of those regions (*Broadcasting Act*, section 3(1)(m)(ii)).

124. Star Choice stated that any limitations on viewer choice would undermine DTH competitiveness and the policy successes it has achieved, and would unfairly disadvantage viewers in small communities.

The Commission's determination

125. The Commission notes that the introduction of Canadian DTH services has given subscribers across Canada access to a selection of conventional television signals from different time zones. If ExpressVu's proposal were implemented, DTH subscribers in select small markets in Western Canada would lose access to a significant number of signals from other time zones, specifically, from the Atlantic and Eastern time zones and, in some cases, from the Mountain time zone. DTH subscribers in select small markets in the Eastern time zone would not lose signals from any other time zone. That is, they would still have access to signals from Atlantic Canada and from all later time zones. Thus, ExpressVu's proposal would create a situation in which, in the small markets in question, DTH subscribers' access to television signals of the same network as their local station, but from different time zones, would be unequal from one part of the country to another. In the Commission's view, this would be inconsistent with a number of the policy objectives set out in the *Broadcasting Act.*

126. Accordingly, the Commission does not consider it appropriate to limit the distribution, in select small markets, of Canadian television signals from earlier time zones as part of a set of measures constituting an alternative to the applicants' existing program deletion conditions of licence.

Proposals by DTH licensees for a local and regional programming fund

127. Section 44 of the Regulations requires DTH BDUs to contribute 5% of their gross revenues derived from broadcasting activities to Canadian programming. At least 80% of this contribution, or 4% of revenues, must be directed to the CTF, and the remainder of the contribution (i.e., 1% of revenues) may be allocated to one or more independent production funds**.**

128. The Commission notes that the MOU contains a clause providing for new financial measures to ensure the continued provision of local and regional television programming in the form of a new, independent, local and regional programming fund (the proposed fund). The proposed fund would assist in the creation, development and production of television programming by local and regional private television stations. Pursuant to the MOU, ExpressVu undertook to contribute annually to the proposed fund an amount representing 2% of its gross revenues derived from broadcasting activities. This contribution would be made from the 5% contribution to Canadian programming already required under section 44 of the Regulations.

129. ExpressVu and the CAB agreed to use their best efforts to have the Commission amend section 44 of the Regulations to permit ExpressVu to redirect, to the proposed fund, the 2% of its gross revenues derived from broadcasting activities that is currently directed to the programming fund organizations identified in section 44 of the Regulations.

130. The proposal would result in a reduction in ExpressVu's required contribution to the CTF from 4% to 2% of revenues. The applicant clarified that, following approval, it would contribute 2% to the CTF, 2% to the proposed fund, and 1% to the Bell Broadcast and New Media fund, an existing independent production fund.

131. In a submission prepared by the CAB and filed with the application by ExpressVu, the CAB stated that the proposed fund would serve the public interest, and that similar measures to support local expression have been in place for several years. It noted, as an example, that cable licensees having more than 20,000 subscribers are permitted to direct two-fifths of their contribution to Canadian programming, or 2% of their gross revenues derived from broadcasting activities, to the operation of their community channels. The CAB noted further that smaller cable systems may direct all of their 5% contribution to their community channel operations. The CAB further asserted that the establishment of the proposed local and regional programming fund would result in a more equitable regulatory framework for cable licensees and DTH licensees, and would ensure the continued availability of local programming to television viewers across Canada.

132. In its application, Star Choice stated that, were the proposed fund approved, it would be willing to contribute up to 2% of its gross revenues derived from broadcasting activities to the proposed fund, provided that the 2% was re-allocated from monies it currently contributes to the CTF. Star Choice suggested that the proposed fund could either be operated as an independent production fund or be administered by the CTF.

Information requested by the Commission

133. In Public Notice 2002-57, the Commission required the CAB and ExpressVu to provide certain information regarding the proposed fund, including:

- the objectives of the fund;
- the structure of the fund and how it would be governed;
- the eligibility criteria;
- the monitoring/evaluation mechanisms in the fund;
- the mechanisms to ensure that the proposed fund would be targeted to small markets; and
- the fund's potential impact on the CTF.

134. In response, the CAB and ExpressVu provided the following information regarding the proposed fund:

The objective of the fund

135. The objective of the fund would be to subsidize the creation, development and production of television programming exhibited by local and regional private television stations.

Structure and governance

136. The proposed fund would be incorporated as a not-for-profit corporation. Its Board would be independent of, and operate at arm's length from, the DTH undertaking(s) that contribute to the proposed fund. The proposed fund would comply with all relevant guidelines for independently administered funds, as set out in *Contributions to Canadian Programming by Broadcasting Distribution Undertakings*, Public Notice CRTC 1999-29, 16 February 1999.

Eligibility criteria

137. An eligible applicant would be any private television undertaking, in respect of local and/or regional programming broadcast on its undertaking.

Monitoring and evaluation mechanisms

138. Television stations benefiting from the fund would be required to submit an annual report, describing how the funding enabled them to maintain and/or enhance the creation, development and production of local and regional television programming in their respective markets.

139. The fund administrator would prepare an annual report detailing the disposition of the funds received during the preceding year, based on the reports received from the individual television stations. This report would be filed with the Commission, to be placed on the public file.

Targeting small markets

140. The Board of the proposed fund would be charged with the task of ensuring that funding requirements unique to small market broadcasters were properly addressed. Small market broadcasters would also benefit from streamlined administrative procedures for filing applications for funding.

Impact of the fund on the CTF

141. The CAB acknowledged that approval of the fund would have an impact on the level of funding that would otherwise be available to the CTF from ExpressVu's contribution, and estimated that this reduction would amount to approximately $12 million in the first year of operation. However, the CAB stated that the amount of funding provided by

DTH licensees in particular has been increasing rapidly in recent years, from $11 million in 1999-2000 to $32.5 million in 2001-2002. The CAB suggested that total funding available to the CTF, even with a redirection of a portion of ExpressVu's contributions to the proposed local and regional programming fund, would eventually be higher than historical levels.

142. The CAB contended that, from a public policy perspective, it is as valid to support the maintenance of local and regional television programming as it is to support the production of programming that benefits from funding provided by the CTF. It submitted that the challenge for the Commission would be to strike an appropriate balance between two objectives.

Summary of interventions

143. In response to Public Notices 2002-57 and 2002-71, the Commission received fifty-five comments concerning the proposed fund. Of these, forty were opposed to the initiative, primarily because it would redirect a portion of the contributions by DTH licensees to Canadian programming away from the CTF.

144. Several of the opposing interveners noted that the CTF is oversubscribed, and contended that the proposal would allow DTH licensees to divert funds intended to fulfil one regulatory obligation, namely to contribute to Canadian programming, to fulfil another regulatory obligation, namely to provide compensation for the negative impact of DTH on local stations.

145. Opposing interveners raised the following further objections to the proposed fund:

- The estimate contained in the ExpressVu application was that only $12 million would be diverted from the CTF. ExpressVu had also suggested that this amount would be made up through contributions to the CTF that would increase in tandem with future growth in the DTH industry. Interveners estimated, however, that the contribution to be diverted from the CTF, if it were to include 2% of the gross revenues earned by Star Choice through its broadcasting activities, would increase to between $16 and $20 million annually, and stated that this would represent a permanent annual loss to the CTF.

- The CTF provides invaluable support for the creation of Canadian drama, which is in decline in Canada and needs the support of the CTF more than ever.

- The suggestion that the proposed fund would be analogous to the funding directed by the cable industry to the support of the community channel is flawed; there is a difference between funding a community channel and transferring money to commercial broadcasters. The Commission's new community channel policy is designed to encourage programming that broadcasters would not do, and the required regulatory framework applicable to the community channel would be unacceptable to conventional broadcasters.

- There is no evidence of a crisis in local programming and there is no guarantee that the proposed fund would generate a single new program.

- The proposed fund is open to all private broadcasters, but should be targeted exclusively to small market or affected broadcasters.

146. The CBC also intervened in opposition to the proposed fund, pointing out that it relies heavily on CTF funding and would be negatively affected by any reduction in the CTF's resources. The CBC also noted that it would have no access to the proposed fund, since it would only be available to private broadcasters.

147. A number of interveners, including Zoot Capri Entertainment, the Canadian Independent Film and Video Fund, and the Bell Broadcast and New Media Fund, cited the important role played by independent funds in supporting the creation of Canadian programming. These interveners stated that any decision regarding the proposed fund should not result in a reduction in the contributions made by the DTH licensees to existing independent production funds.

148. CTV, Mid West and NTV intervened in support of the proposed local programming fund. However, NTV noted that it was not clear how the monies would be accessed by smaller stations, or how the fund would be administered. NTV stated that a much larger portion should be devoted to smaller, independent stations to ensure that the fund benefits those who are significantly affected by out-of-market signals.

149. A number of individuals, including seven Members of Parliament, submitted interventions that indicated support for the proposal to fund local and regional programming.

Response to interventions

150. ExpressVu acknowledged the concerns regarding the redirection of monies from the CTF to a local and regional programming fund, and submitted that this proposal was a compromise between legitimate conflicting interests. The applicant stated that the proposed fund would buttress local broadcasters against the competitive pressures of the multi-channel market, and sustain DTH subscriber satisfaction and DTH licensees' drive to financial viability. ExpressVu further contended that, if DTH continues to grow, the impact on the CTF would be short-lived. Although the creation of the fund would have a modest, short-term impact on the money available to the CTF, the CTF would be replenished and set on a track for continued growth after a short transition period.

151. In its response, the CAB acknowledged the important role of the CTF in the production of priority Canadian programming, but maintained that local and regional reflection is an equally important element of the Canadian broadcasting system, and also deserving of support. The CAB asserted that, given the changes that have taken place in the environment over the past several years, the proposed fund would recognize the legitimate needs of both of these programming elements in the broadcasting system, and would strike a balance between the two in terms of financial support.

152. The CAB noted that local and regional news and reflection rank among the top-rated programs in any given market across the country. In Anglophone markets, local and regional news programs are the only Canadian programs listed among the top ten most-watched programs, usually ranking in the top five. At the same time, the CAB submitted that the ability of television broadcasters to provide local reflection has been seriously threatened due to declining audience shares in an increasingly competitive and fragmented market.

153. The CAB disagreed with the views of interveners that, because community channel funding results in the creation of new programming which would not otherwise be produced, it was inappropriate to draw an analogy between such funding and the proposed fund. Rather, the CAB submitted that the proposed new fund would ensure the continued availability of programming that would otherwise cease to be economically viable, and would provide support for incremental improvements to the quality and/or quantity of local and regional programming.

154. The CAB submitted further that the proposed fund would not diminish ExpressVu's obligation to contribute to Canadian programming. The CAB contended that the fundamental obligation placed on ExpressVu is to contribute 5% of its gross revenues derived from broadcasting activities to support Canadian programming, and that this obligation would continue to be met through its support of local programming.

The Commission's analysis

155. In assessing the merits of the proposed fund as part of a set of measures constituting an alternative to the applicants' existing program deletion conditions of licence, the Commission has taken into account the comments submitted in response to Public Notice 2002-57 and Public Notice 2002-71, as well as those filed pursuant to Public Notice 2001-103. The Commission has also analysed the financial returns submitted by all television stations in Canada, and has identified the following concerns regarding the proposed fund.

Scope of the proposed fund

156. The objective of the process initiated by the Commission in Public Notice 2001-103 was to explore issues related to the DTH distribution of out-of-market stations in smaller television markets.

157. The Commission notes that the CAB, in its Phase I submission responding to that public notice, filed a study that concluded that, while DTH is adversely affecting all television broadcasters, the impact has been most severe on stations serving markets below 300,000 in population. According to this study, as the number of DTH subscribers has increased, small market stations, virtually none of which have been distributed by DTH, have been losing viewers to television signals delivered by DTH. The study indicated that this has resulted in less advertising revenue for small market stations and a diminished ability to fulfil local programming commitments.

158. The Commission notes that the annual return information filed by television broadcasters supports in some respects the study filed by the CAB. In particular, in examining the financial returns of television broadcasters, the Commission notes that total local advertising revenues for all television stations have decreased by 1.3% per year in the last five years.

159. The Commission considers that a number of factors have likely contributed to this decline in viewership and in advertising revenues, including both audience fragmentation and general market conditions. With regard to audience fragmentation, the Commission notes that sixty-two new specialty and pay television services have been licensed and launched since 1998, and are distributed by both DTH and cable distribution undertakings. However, the Commission considers that at least part of the increase in audience fragmentation in recent years can be attributed to the impact of out-of-market signals distributed by DTH BDUs.

160. As discussed earlier with regard to distribution arrangements, annual return information indicates that the advertising revenues of small market, independently owned stations have been more severely affected than those of the industry overall. In particular, local advertising revenues for the select stations (excluding CHOT-TV and CFGS-TV Gatineau) have declined by an average of 5.0% per year over the period 1998 to 2002.

161. The Commission considers that television stations owned by the larger broadcast ownership groups can benefit from economies of scale, and have access to resources to cope with the impact of eroding audiences and advertising revenues that are not available to small market, independently owned stations. The Commission notes in this regard that, during the proceedings dealing with the licence renewal applications of the major English-language television groups, Bell Globemedia Inc. (CTV) and CanWest Media Inc. (Global) in 2001, and CHUM Limited and Craig Media Inc. in 2002, only one raised the impact of the distribution of out-of-market television stations by DTH as an issue affecting their local programming commitments for the next licence term. Craig did cite the impact of DTH viewing in the Brandon market as one of the reasons for a proposed reduction in local programming by CKX-TV Brandon.

162. The Commission notes that the fund proposed by ExpressVu and the CAB would make no distinction between large and small broadcasters. All private television undertakings would be eligible to receive assistance from the proposed fund. For the reasons stated above, the Commission considers it unnecessary to provide funding for local programming to all conventional television stations across Canada, regardless of market size or financial circumstances. In particular, the Commission does not consider it appropriate to permit the use of DTH subscriber revenues, as proposed in this initiative, to subsidize the production of local programming by stations controlled by the larger broadcast ownership groups.

163. However, recognizing that the distribution of out-of-market stations by DTH BDUs has contributed to the significant decline in the advertising base of small market, independently owned television stations, the Commission considers that there is merit in having DTH BDUs provide financial assistance to the stations listed in Appendix A (excluding CHOT-TV and CFGS-TV Gatineau, which serve a market having a population of more than 300,000), to ensure that they are able to provide local programming to their respective communities.

Amount of proposed fund

164. ExpressVu proposed, and Star Choice agreed, that two-fifths of the required contributions by DTH BDUs to Canadian programming should be directed to the proposed fund. Based on the combined revenues of ExpressVu and Star Choice in 2002, this would represent approximately $18 million available each year to support the production of local programming.

165. The Commission notes that the level of funding from DTH contributions proposed by ExpressVu and the CAB would far exceed the annual amount necessary to support the local programming provided by the 17 small market, independently owned stations identified above.

166. The financial returns indicate that these 17 stations spent approximately $7.3 million on station-produced programming in the 2002 broadcast year. The Commission considers that an amount representing 50% of these expenditures would have a significant positive impact on the quality and/or quantity of local programming provided by these stations. Therefore, the Commission has determined that an appropriate contribution would be $3.6 million annually. This amount would represent approximately 0.4 % of gross revenues earned by the DTH BDUs from their broadcasting activities during the 2002 broadcast year.

Source of funds

167. Each applicant proposed that 2% of its annual gross revenues derived from broadcasting activities be used to fund and sustain the proposed fund. This would be half of the CTF contribution currently required of each licensee, which contribution would be reduced from 4% to 2% of the gross revenues derived by each licensee from broadcasting activities.

168. The CAB submitted that the maintenance of local and regional television programming is as valid an objective as the production of the Canadian programming now funded by the CTF. It also contended that the proposed fund would be consistent with the regulatory provisions that allow cable systems to allocate some or all of their 5% contribution to Canadian programming to local expression.

169. The Commission notes that the funding provided by cable licensees is essential to the very existence of community channels. Unlike private television stations, community channels are restricted to non-commercial community programming and sponsorship

messages. In 2002, sponsorship revenues for all community channels across Canada totalled $3.9 million, while cable licensees devoted $83.7 million to the operation of their community channels.

170. ExpressVu, supported by the CAB, contended that the creation of the proposed fund would have a relatively modest, short-term impact on total funds available to the CTF, and that these contributions would be quickly replenished after a short transition period. ExpressVu asserted that continued growth in the DTH subscriber base would result in contributions to the CTF returning to, and ultimately exceeding, current levels.

171. In the Commission's view, this argument appears to be based on the assumption that future DTH subscriber growth will be comparable to that achieved during the past five years. However, whereas past growth was based primarily on attracting viewers who had never subscribed to multi-channel distribution systems, continued growth in the DTH subscriber base is likely to result primarily from the migration of customers from other types of BDUs. Ultimately, any increase in DTH revenues attributable to the movement of subscribers to DTH BDUs and away from other BDUs would provide little or no net increase in contributions to the CTF.

172. As noted by a number of interveners, the contributions that are diverted from the CTF represent a permanent loss to that agency. Even if DTH contributions return to and ultimately exceed previous levels, the fact remains that millions of dollars that would have gone to the CTF will have gone elsewhere.

173. Interveners also noted that the CTF has been oversubscribed for a number of years, and that there is no evidence to indicate that there will be a sufficient increase in CTF contributions to meet the demand for funding assistance in the foreseeable future.

174. Based on the above, the Commission does not consider it appropriate to permit the diversion of DTH contributions from the CTF to provide financial assistance to small market stations. Consequently, the Commission will not be commencing a process to amend the Regulations to implement this proposal.

The Commission's determination

175. For the reasons set out above, the Commission is not satisfied that the applicants' proposed programming fund, as it would be constituted under the MOU, would be appropriate as part of a set of measures constituting an alternative to the applicants' existing program deletion conditions of licence.

176. However, as part of a set of such measures, the Commission is prepared to approve a new, independently administered fund intended to permit DTH licensees to assist small market, independently owned television licensees in contributing to Canadian programming and, in particular, to meeting their commitments to local programming.

177. In *Contributions to Canadian Programming by Broadcasting Distribution Undertakings*, Broadcasting Public Notice CRTC 2003-38, 16 July 2003 (Public Notice 2003-38), the Commission amends its criteria for independent production funds to enable DTH licensees to provide such financial assistance to small market, independently owned stations. For funds with such objects, fewer criteria will apply.

178. In *Licence amendment for ExpressVu – relief from requirements for simultaneous and non-simultaneous program deletion*, Broadcasting Decision CRTC 2003-257, 16 July 2003 and *Licence amendment for Star Choice – relief from requirements for simultaneous and non-simultaneous program deletion*, Broadcasting Decision CRTC 2003-258, 16 July 2003 (Decisions 2003-257 and 2003-258), the Commission has announced its determinations with respect to the applications by ExpressVu and Star Choice, respectively. Specifically, the Commission has determined that it will suspend the application of the program deletion conditions of ExpressVu and Star Choice provided that, among other things, the licensees each contribute, annually, not less than 0.4% of their gross revenues derived from broadcasting activities to such a fund. In order for a DTH BDU licensee to have its program deletion conditions of licence suspended before such a fund is established, the licensee should place the required contribution in trust in an interest bearing account, to be conveyed with interest to such fund when it is established.

179. As noted above, the MOU between ExpressVu and the CAB stated that, should the Commission not approve the MOU as a whole, the parties would no longer have an agreement on the matter of program substitution and deletion or the carriage of distant Canadian signals and a second set of U.S. commercial network signals. Nevertheless, as the Commission has indicated in Decision 2003-257, as long as ExpressVu fulfils the measures set out in that decision, it will be relieved of the program deletion conditions of licence regardless of whether the MOU continues to be in effect.

180. Accordingly, the Commission invites the licensees of the stations listed in Appendix A (excluding CHOT-TV and CFGS-TV), or the CAB on their behalf, to file for Commission approval, by **14 October 2003**, a proposal for a new, independently administered fund intended to assist the licensees of these small market, independently owned television stations in meeting their commitments to local programming. Any such proposal should meet the criteria set out in Public Notice 2003-38.

181. The Commission considers that such a fund, once approved and established, would meet the definition of an independent production fund in section 44(1)(b) of the Regulations.

182. The determinations in this public notice were made by a majority vote of the Commission, as were those in Public Notice 2003-38 and in Decisions 2003-257 and 2003-258.

Secretary General

Appendix A

Small market, independently owned television stations by ownership group

Ownership group	Station	
Jim Pattison Industries Ltd.	Two (2) of	CHAT-TV Medicine Hat (CBC) CFJC-TV Kamloops (CBC) CKPG-TV Prince George (CBC)
Mid West Television Ltd.		CKSA-TV Lloydminster (CBC) CITL-TV Lloydminster (CTV)
Norcom Telecommunications Limited		CJBN-TV Kenora (CTV)
Radio Nord Communications inc.	Two (2) of	CFGS-TV Gatineau (TQS) CHOT-TV Gatineau (TVA) CKRN-TV Rouyn-Noranda (SRC) CFEM-TV Rouyn-Noranda (TVA) CFVS-TV Val d'Or (TQS)
Télé Inter-Rives ltée	Two (2) of	CIMT-TV Rivière-du-Loup (TVA) CFTF-TV Rivière-du-Loup (TQS) CKRT-TV Rivière-du-Loup (SRC) CHAU-TV Carleton (TVA)
Standard Radio Inc.		CFTK-TV Terrace (CBC) CJDC-TV Dawson Creek (CBC)
Thunder Bay Electronics Limited		CKPR-TV Thunder Bay (CBC) CHFD-TV Thunder Bay (CTV)

Appendix B

Ownership Groups

Bell Globemedia Inc. (CTV)
CanWest Media Inc. (Global)
CHUM Limited
Cogeco Radio-Télévision inc. (TQS)
Quebecor Media Inc. (TVA)
Craig Media Inc.
Corus Entertainment Inc.
Rogers Media Inc.

Dissenting opinion of Commissioner Barbara Cram

I respectfully disagree with my colleagues in the majority. In my view this decision represents a substantial acceleration in the trend towards the demise of conventional local television and consequently local and regional programming in our Broadcasting system.

IN THE BEGINNING

Television started out as a local off air signal in various communities across Canada. There was a lot of local programming. This meant that people in the communities saw their children in Reach for the Top and other shows and they saw their neighbours and themselves in talk shows or the news.

As time went on programming became more expensive and sophisticated as did the technology. The local stations banded together formally or informally to share programming. American programming started to predominate, Canadian content rules became necessary. Networks and network programming emerged to reduce costs and remain profitable.

Cable opened up a whole new world for consumers. There was the possibility of choice of stations not just those one picked up from the television antennae. To sustain itself cable needed content and more choices. To drive cable penetration, cable was allowed to carry US off air networks as long as they carried the Canadian ones. In the 1980's the national specialty emerged. These were channels with a single signal carrying programming of general interest to everyone in Canada. To drive consumers to buy them, further American specialties were allowed to be carried on cable. Choice and Canadian content were the priorities. By the end of the century over 60 Canadian specialty channels were licenced by the Commission.

Both viewing to and the finances of the original television, local conventional television, came increasingly under pressure. As part of the regulatory bargain, in allowing the American networks in Canada, the conventional television was given the right to require simultaneous substitution. For any American shows purchased by the conventional television networks and shown at the same time on the US network, the cable distributors were required to substitute the signals for the Canadian advertising and the result being Canadian viewers saw the Canadian advertisements. Conventional television was therefore paid for the audience on both their station and the American network station.

This tool of simultaneous substitution on American programming became an important facet in the economic plan for the conventional broadcasters to finance the remainder of the programming. The Commission introduced its Television Policies aimed at ensuring room for Canadian programming; however these policies referred to specific types of programming being required. Some of these, such as drama, were only viable if produced on a national level.

Room on the schedule for local and regional programming is constantly diminished. As a result, revenue for this programming diminishes. This vicious circle of less revenue/less local programming has epitomized the history of local conventional television. However, there still appears to be a resounding demand for local programming. Two conventional television competitors, CHUM and A Channel, emerge in the larger centres with a programming strategy of being 'intensely local'. Their success attests to the popularity of local programming.

At the end of the century DTH emerges. It was to be a national distributor. DTH would bring the national specialty programming and more choices to those who had none in rural and uncabled areas. As DTH was a national distributor and it was competing against the strong incumbent cable companies, it was required to carry very few local television signals. Naturally, the DTH operators chose to carry the local signals from the larger centres to increase their attractiveness to the larger urban areas.

What was contemplated as to the fate of the local conventional television in the smaller urban areas at the time of the first DTH regulatory framework? Certainly the phenomenal growth of DTH was not contemplated, but surely DTH success in terms of subscriber growth must have meant this clash of interests, between the growth or success of a national distribution system versus local programming and the presence of a local television broadcaster, was inevitable.

With DTH, conventional television was again considered to the extent of requiring simultaneous substitution, similar to cable, to protect Canadian rights. The result is the original agreement between the Canadian Association of Broadcasters and the DTH undertakings. The contemplation at the time, at least by the broadcasters, was that DTH would have minimal growth and that they posed little threat to cable which had strenuous obligations regarding carrying local television signals.

Since 1998 there have been at least 4 significant and interrelated blows to local television, all interrelated themselves with the growth of DTH:

a) Viewing to Canadian specialty television versus the Canadian conventional television has reached and surpassed the tipping point. Canadians used to watch the expensive programming on conventional television more than they viewed the Canadian specialty television collectively, now they don't. The audience share to conventional television, including the local stations, has reached a new low.

b) The CBC is in the process of disaffiliation. For example, people in Yorkton, Prince Albert, Swift Current, all in Saskatchewan, used to have their own CBC affiliate station in their community with their own news, reporters, involvement in community events and their own 'space' on the schedule of the national broadcaster. CBC has now chosen, for what it may be argued are perfectly valid commercial reasons, to cease these affiliations. CBC has left reporters in some of these communities but now all Saskatchewan will see the same news originating from Regina. The time allotted in the schedule for news remains the same thus news from all of these stations and communities will receive less individual coverage. CBC has applied for the same disaffiliation in Red Deer, Alta. with the citizens of Red Deer to receive the Calgary news feed after the application.

c) In 2001, radio had four times the growth in local advertising compared to television. Local advertisers on television are either not getting the audience they need because the television station lacks the coverage due to DTH or there is no inventory for them to buy as national advertising pays more. Advertisers perceive television less and less as a local medium.

d) Smaller cable companies are under financial stress. In the past years the Commission has seen many surrenders of Class 3 licences and has acknowledged this financial stress to the extent of exempting both Class 2 and Class 3 licensees from licensing. These cable companies have less than 6000 subscribers or a population of approximately 18,000. These cable companies were required to carry the local television signals, DTH is not.

At the time of the original Public Notice in this proceeding in 2001, none of the possibilities for carriage or non carriage for local conventional television were positive. It should also be noted that these were not options for local conventional television as the choice as to carriage remained in the sole discretion of the DTH undertaking. The possibilities were:

a) Not being carried. The loss of audience share, and thus reach to advertisers, was substantial a mere three years after full satellite availability in the Fall of 2000. Of the total hours per capita viewing the following percentages are to satellite in the following communities:

Pembroke 35.9%
Terrace-Kitimat 36.2%
Red Deer 24.7%
Prince Albert 42.7%
Lloydminster 44.5%

By the fall of 2002, satellite penetration in Lloydminster was 59%. By May of 2003, satellite penetration in Prince Albert is 55% and 28% in Regina.

b) Being carried. But because DTH carries many distant signals of the same network, the viewing to the local station is cannibalized by its own and other signals in other time zones by virtue of time shifting. As time shifting is virtually always to an earlier time zone, local conventional television stations in the West are the more disadvantaged. In the Fall of 2002, BBM reported earlier time shifting to Canadian conventional viewing in Vancouver, Calgary, Lloydminster, Regina-Moose Jaw, Winnipeg, and Thunder Bay averaged 12.9%, with Vancouver having 16%, Calgary having 14% and the numbers generally descending going further east. In the markets of Toronto, Chicoutimi-Jonquière, Rouyn-Noranda, Rivière-du-Loup and Saint John-Moncton the early time shifting in the fall of 2002 was an average of 1.8%. Thus west of Thunder Bay even if a station is carried on DTH it loses an average of 12.9% share to earlier time shifting.

c) it may well be that the worst possibility for a conventional television station is not being carried when the other conventional stations in the same market are being carried by DTH. Not only does the broadcaster face the loss of audience share roughly equivalent to DTH penetration share but unlike being in a single station market the advertiser has other television options with DTH reach. Thus it is possible that the uncarried broadcaster loses even more advertisers than his colleagues in single station markets. This is particularly devastating to the new conventional broadcasters, A Channel and CHUM, as their marketing strategy and raison d'être of being local is essentially decapitated by non carriage when their local competitors are carried. Perception is everything for advertisers.

SO HERE WE ARE

Public Notice CRTC 2001-103, 28 September 2001, called for comment on the impact of DTH distribution of local and out-of-market television signals in smaller television markets, the impacts of carriage and non carriage, the financial and technical implications for DTH undertakings of distributing local signals and possible alternatives to the existing carriage rules for DTH in smaller markets. Throughout this process smaller markets have been seen as those with a population of 300,000 or less. These consist of Chicoutimi-Jonquière, Rimouski, Red Deer, Carleton, Thunder Bay, Rouyn-Noranda, Sydney-Glace Bay, Charlottetown, Rivière-du-Loup, Brandon, Yorkton, Prince George, Prince Albert, Lloydminster, Terrace-Kitimat, Medicine Hat, Dawson Creek and Kenora.

These markets have either local television stations that are owned by the six larger groups of conventional television such as CTV (hereinafter called the 'group owned stations) or the local television stations are owned by independents (hereinafter called the independently owned stations).

Based on CRTC data, from 1998 to 2002 the PBIT margin in all of these smaller markets fell by an average of 5.5%. The PBIT margin of the 17 independently owned small market stations, excluding CJBN Kenora, fell by just under 6% in the same period of time. From 1998 to 2002 revenues for the 'group owned' small market stations had an average growth rate of negative 2.3% while the independently owned small market stations' average growth rate was negative 2%. Average PBIT's for all conventional television stations in Canada dropped from 1998 by an average of 3.5%, and of those in the smaller markets the group owned stations fell by 11.7% and the independently owned stations fell by 14.4%. Admittedly this entire decline was not caused by DTH; however given the DTH penetration rates in these small markets a lot of them now being over 50% DTH carriage cannot not have a substantial impact.

There is no statistically material difference between the decline of the group owned small market stations and the independently owned stations and this forms the essence of my disagreement with the majority. While at paragraph 70 the majority states that the decline in local revenue was 'somewhat more pronounced' for the independently-owned stations, the fact is that the group owned stations had a higher negative growth of total revenue from 1998 to 2002.

I have difficulty with the majority decision contrasting advertising revenues in paragraphs 107 and 160. The contrast made is between the independently owned small market stations and the total television revenues in Canada. No contrast is provided between the group owned small market stations and total television revenues which it would show an even greater negative impact on revenues than on the independently owned small market stations ---because as stated before total revenues for these latter stations (group owned) fell MORE that the revenues of the independently owned stations. This process was about local television in smaller markets. As there is no statistically material difference in the decline in all of the local television in these markets, it follows that there is no statistical basis in terms of impact on the stations to justify providing relief to some and not to others.

The majority believes that the larger conventional broadcast groups can 'weather' the poor financial results of their smaller market stations. I disagree. These companies are private corporations owned by shareholders who demand a return on their investment. In the past the Commission has allowed many reductions in commitments including local programming because of the poor financial returns or other perfectly valid commercial reasons. And although the Commission expects certain commitments in return for the privilege of a license, it has always been recognized there is a limit when the privilege becomes a burden. It is not realistic to consider that the Commission would insist on an obligation that would cripple a broadcasting undertaking. Nor is it realistic to insist on unequal obligations between conventional television broadcasters, with some providing service to the smaller markets while others are only in the larger urban centres and the consequences of providing service to these smaller markets has resulted in a competitive inequity.

The only question that remains is when the larger broadcast groups will 'go black' in the smaller markets. The Commission has really no power or ability to stop a broadcaster from doing simply ceasing to operate one or many stations. DTH penetration is in excess of 50% in many of the small markets. Surely the value of the local programming is diminished if less than 50% of the market area now receives that programming on the satellite. At the present rates of DTH growth in these areas (55% from the fall of 1997 prior to full satellite availability to spring 2003) 40% will receive this local programming in 2004, 30% in 2005 and 20% by the expiry of the Memorandum of Agreement between the CAB and ExpressVu in 2006. Given regulatory lag, it is possible that less than 10% of the viewing area would actually view the station, if it still exists, by the time a review of this policy would be published.

In agreeing that DTH did not necessarily need to carry them in certain markets, it is possible that the major station groups perceived that the proposed local programming fund and their eligibility thereto was sufficient recompense. However my colleagues in the majority have refused such relief. While being most assiduous about not increasing the obligations voluntarily assumed by ExpressVu in the MOU and Star Choice by proposal, my colleagues in the majority were not as meticulous about the benefits to accrue to the broadcasters in the same document. In my view this simply gives the conventional television broadcasters one more reason to apply for relief from the Commission or alternatively simply go black in the smaller markets.

FRAMING OF THE QUESTION

The issue has been framed by the DTH undertakings and Telesat as wasting an already scarce transponder capacity versus minimal local programming provided by local conventional TV. ExpressVu refers to the “use of scarce capacity to air 30 minutes of local programming”. In response to a proposal to carry all local conventional television on DTH, Star Choice refers to this as a “tremendous waste of national transponder capacity” saying this would be contrary to the *Broadcasting Act* requiring BDU’s to “provide efficient delivery of programming at affordable rates using the most effective technology”. Telesat, the owner of the transponder capacity, refers to the same proposal as a “tremendously inefficient use of this limited capacity”.

From the outside, local conventional television stations in the smaller centres appear to be the last outposts in the wild east, west or north, having only 30 minutes of burglaries, second level sports and blizzard information. Indeed, this does not appear worth saving.

I beg to differ.

DTH

The newest DTH competitor, ExpressVu, was licensed in 1995. ExpressVu chose to use a different technology from its competitor Star Choice. This meant that Star Choice and ExpressVu could not share the same transponders for the same signal. Thus for each signal carried by the DTH competitors, separate transponders were required. In other words, for each DTH distributor to carry CBC television in Edmonton two transponders were required.

Clearly there must have been valid business reasons for ExpressVu choosing a different technology, e.g. this would make it more difficult and costly for the consumer to move from one DTH to the other, thus reducing ‘churn’. There were surely other equally valid reasons.

The second relevant business decision made, this time by both DTH operators, was to heavily subsidize their acquisitions. The record of this proceeding refers to a subsidization amount of $700 per subscriber. The consequence was a phenomenal growth of DTH subscribers, far exceeding all expectations. Another consequence was that, to date, neither competitor is in a cash flow positive position.

Should this cash flow issue be relevant to the Commission? If so, should the fact that it is at least partially caused by a business choice also be relevant? Should the Commission occupy itself with the viability of the DTH distributors? And in the balancing of interest, should DTH viability be a priority to the continuation of a presence across Canada of local television?

LOCAL BROADCASTING

The *Broadcasting Act* talks of a Canadian Broadcasting System, the goals of which are both cultural and economic. And a Canadian system means that all Canadians are to be enriched both culturally and economically.

At the national level, Canadian content drives both of these goals. Canadian content shows Canadians to Canadians on the television screen. Secondly Canadian production creates jobs, expertise in writing, acting, producing and necessitates the building of infrastructure to support this production.

At the local level, local television does even more than this. Local/regional news and reflection is, according to the CAB, the top rated programs in any market. They say in Anglophone markets news is the only Canadian program in the top 10 and is usually in the top 5. This is where television as a medium connects with the viewer when, for example, the ‘Hero of the Week’ is shown to his or her neighbours. But there is more and that is the pivotal role of local TV in the community. Local television not only tells the viewer about all of the fundraising events for local charities and the local arts scene, but also their personnel are there participating, being masters of ceremonies, competing in dragon boat races, and bringing the community together in common goals. Local television is one of the major building blocks of the community and of the Broadcasting system. It attaches people to others forming their community, building a sense of togetherness both in the community but also in the country. To me this fulfills the cultural goals of the *Broadcasting Act* at a far deeper level and also fulfills the economic goal at a more immediate and visible level to individual Canadians. In sum Canadians connect with their local and regional programming, they watch and are entertained by the rest of the programming.

Some interveners contended that there is no crisis in local programming. Local programming has however been much diminished and this has been much discussed by ordinary Canadians. In 1997, the Commission went across Canada talking to people asking what they wanted to see on television. The Commission did the same in 1998 talking, in part, about what they wanted to see on CBC television. Virtually unanimously it was local and regional programming. This year the Heritage Committee of the House of Commons heard the same thing. Clearly Canadian perceptions and opinions are different from those of these interveners and of the majority, at least as to priorities.

THE BROADCASTING SYSTEM IN THE BALANCE

At the end of the day, Canadian programming for all Canadians is that which must remain and must be the priority. The broadcasting system can and will survive without major consequences if one or two competitors in broadcasting distribution do not survive. DTH is after all merely a conduit for programming and there are other competitors, albeit smaller but perhaps with different business plans and strategies.

Unlike distributors, Canadian conventional television is unique to the system and local and regional programming cannot be replaced with national programming nor is there any equivalent substitute. If local television is diminished to the point of demise in large parts of the country, there will no longer be a Canadian Broadcasting System available to all Canadians all across the country. All television will become national and to a large extent disconnected with ordinary Canadians.

I WOULD HAVE PREFERRED

That we as a Commission had spent time looking both at the past trends but also ventured into what the future would look like. This was after all a policy process. Given the phenomenal growth of DTH penetration in Canada and the fact that policies are to have some durability, I believe it behooved us to attempt some thought on future scenarios. What is the tipping point where smaller and even medium market local stations will no longer be viable if they are not carried on DTH? And given the past trend of growth, even if it is diminished somewhat, at what point do we have to consider that DTH is no longer a national distribution undertaking but also a local distribution undertaking?

Unfortunately, I believe this policy decision of the majority has already been overtaken even before it has become public.

There are two distinct and equally important repercussions of DTH in the marketplace. Following are the repercussions and what I believe the Commission should have done. They are:

a) The lack of carriage by DTH of small market local conventional television stations. There is no material difference in the impact of DTH between any of the local conventional television stations in the small markets, regardless of their ownership structure. I would have wanted to look at the projections both as to DTH penetration and financial viability in these markets and as a policy decided that once DTH penetration reached a certain percentage (that at which the station could no longer make a reasonable return) that carriage by DTH would be required of all stations in that particular market. After all at a certain point if

DTH receives a substantial portion of the subscriber revenue from that market, it should have concomitant obligations. Given that this would be a new policy there may have to be some transitional rules somewhat delaying immediate carriage. Thereinafter the DTH undertakings could assess their potential costs versus the amount they wish to pay to acquire the subscribers and proceed with the business plan developed as a result of this assessment.

b) Distant signal carriage by DTH is a different and distinct problem. The DTH operators had a curious position as to their carriage. First of all, as to those signals they presently carried, they asserted they should be entitled to carry these distant local signals without either paying the broadcaster for them or receiving permission of the broadcaster, as they are a “key means for DTH to differentiate their services” and an important component in the sale of DTH to new customers as well as in the retention of subscribers. And while the distant signals have some value as, in agreeing not to carry some in the MOU, ExpressVu says this is “a financial contribution to the MOU”, paying for them is a totally separate issue.

The record shows that cable companies have to pay the broadcasters for their permission to be carried should those cable companies wish to carry their distant signals. DTH cannot do this, they say, as this would be altering the regulatory rules and they would be forced to take these signals off and lose subscribers.

The facts are clear that DTH considers the carriage of the distant local signals of their choice to be a financial benefit to them and the DTH operators pay nothing for them.

On the other side of the equation are the broadcasters whose distant signals the DTH undertakings are carrying, without any permission from the broadcasters or specific approval of the Commission. Local television’s only source of revenue is advertising and advertisers pay for the target market and nothing more. Thus the broadcaster is not paid for “spill”, viewers outside the market. As an example a television station from Winnipeg is carried throughout Canada, but only gets paid for its audience in Winnipeg. It loses on average 12.9% of its share due to time shifting for which it is not paid, but also its programming is also seen in Regina, Calgary and Vancouver for which it is likewise not paid. The DTH undertakings say this is a commercial issue and not a regulatory one. Prior to the MOU, the CAB replied to this assertion saying that this would require a complete reversal of advertising buying practices in North America to somehow convince advertisers to pay for their spill.

In my view this is a regulatory issue and one which must be addressed immediately. Either there is no value to distant signals, in which case the cable distributors must be given relief, or alternatively there is value to these signals and as advertisers see no value in spill, the entities being advantaged by the signals, all distributors be they cable or DTH must pay.

THE FUTURE HAS HAPPENED

I believe circumstances have already made this policy decision of the majority outdated. As noted DTH penetration is still growing at a significant pace to the point where not only the smaller markets are being impacted. Regina-Moose Jaw and other markets with populations over 300,000 are beginning to be substantially affected with DTH penetration rates in excess of 25%. Surely, if the major broadcast groups are deemed by the majority to be able to weather the DTH storm, it must be predicated on the fact that their medium market stations would remain at least the status quo in terms of revenues and PBIT's. And in these medium markets the situation is exacerbated by the fact that the smaller market normally had single stations or twin stick affiliates with CBC; but in the medium markets where there is more than 1 local station and typically it is in these markets that some stations are carried and others are not. As stated above, the worst possibility of all.

Clearly I disagree with the majority as to the priority of local and regional programming and the repercussions of this decision to the Canadian Broadcasting system as a whole.

Dissenting opinion of Commissioner Stuart Langford

I disagree with the determinations reached by a majority of the Commission and contained in the two public notices and two decisions issued today. The Introductory Public Notice accurately reviews the history of the matters at issue in those public notices and decisions. As well, it provides a comprehensive review of the process and the positions of the parties leading up to today's release. Unfortunately, there its effectiveness and the effectiveness of the other public notices and decisions cease.

Half measures:

The public notices and decisions issued today propose compromise rather than solution, temporary and partial appeasement rather than final and comprehensive resolution, expediency rather than justice. The result is wholly unsatisfactory. It provides faint hope for some small, market independent broadcasters and no comfort to others. It encourages direct-to-home (DTH) broadcasting distribution undertakings (BDUs) to starve existing independent production funds in order to feed a new local programming subsidy. It treats a select few symptoms of some small market broadcasters' distress, but completely ignores the real root cause of those symptoms. Optimists might call it a start; realists are more likely to brand it an exercise in half measures.

The underlying issue:

Paragraphs one through 66 of the Introductory Public Notice demonstrate beyond question that the main issue underlying this lengthy process, the impact of distant signals on the program rights and advertising revenues of small market, independent, local and regional stations, has been recognized as crucial by the Commission since the first days of satellite distribution:

> "... the protection of program rights purchased by Canadian programming undertakings is fundamental to maintaining the integrity of the Canadian rights market, and to protecting the advertising base of local and regional television stations so that they may meet their commitments to Canadian programming." (Public Notice 1995-217)

It is for this reason that the 1995 and 1996 Commission decisions licensing ExpressVu and Star Choice contained conditions of licence (C.O.L.s) requiring these DTH BDUs to delete out-of-market sourced programming identical to that carried by local and regional television stations when requested to do so by those stations.

“Temporary” relief:

Because DTH satellite distribution was in its infancy, subscribers few, capacity limited and launch costs high, the Commission subsequently agreed to suspend the C.O.L.s requiring simultaneous and non-simultaneous deletion intended to protect local and regional rights. Instead, it accepted a "temporary" scheme (Decision CRTC 98-500) by which DTH BDUs were relieved of their deletion obligations in exchange for establishing a compensation regime designed to offset the revenue losses suffered by local and regional broadcasters who would see their audience shares decline once distant signals began to penetrate their markets. At the time, the combined ExpressVu/Star Choice subscriber base was well under a half million nation-wide. Today, that number has soared to almost two million.

Decline and fall:

In some markets, as many as 50% of viewers obtain their television signals via satellite. The movement from off-air and cable to DTH has had a profound impact on local and regional, small market, independent broadcasters in three ways: First, where once they were the exclusive or near-exclusive signal providers in their markets, now they must compete with dozens of other conventional broadcasters, some of whom offer exactly the same national and foreign programs as themselves. Second, distant signals beamed into their markets via satellite from earlier time zones, provide viewers in their markets with the option of seeing their favourite prime time shows before they are scheduled for local broadcast. Finally, a good many local/regional television stations' signals are not carried by either DTH provider. ExpressVu and Star Choice subscribers in these markets cannot choose to watch their local station unless they go to the trouble of switching from DTH to a traditional antenna or else purchase a second television complete with a dedicated antenna positioned to receive their local station.

This situation threatens to bankrupt a good many small market, independent local and regional signal providers. Even some larger broadcasters, who cannot get a signal carried on DTH, are feeling the pain. As viewers switch to DTH and lose easy access to their local stations, they soon grow comfortable sourcing their favourite shows elsewhere. These comfort levels are increased by the convenience of the options DTH BDU's provide their subscribers in the nature of "shifted" viewing times for signals emanating from earlier time zones. As viewers desert their local stations, those stations see their market shares decline and their advertising revenues fall. Less revenue means fewer dollars to purchase program rights and to produce local programs.

Carry and protect:

The Commission has it within its power to resolve this problem. Two simple decisions would begin the process of restoring integrity to the notion of television markets, reviving the value of purchased program rights and rejuvenating the profit margins of small market independently owned broadcasters. First, a decision must be made requiring DTH BDUs, at their cost, to carry **all** independently owned, small market, local and regional television stations in their own markets. Second, all distant signals carrying programs for which small market, independently owned, local and regional broadcasters have purchased program rights must be replaced by identical programs provided by those local and regional broadcasters.

If these two simple decisions cause some difficulties for DTH BDUs, so be it. ExpressVu and Star Choice are no longer infant industries in need of special care and nurturing by a maternal-minded Commission seeking to encourage competition in a distribution market dominated by the cable industry. DTH BDUs have had more than sufficient time to establish themselves as equal competitors, and they have done so. Market analysis shows a clear and accelerating pattern of migration from cable to DTH, with no evidence that the trend will slow down, let alone reverse direction in the foreseeable future.

Painful choices:

The majority decision, underlying the public notices and decisions released today, falls far short of taking the two steps required. Rather than guaranteeing satellite carriage for all small market independently owned television stations listed in Appendix "A" (a list I would have expanded to include the television stations owned by Craig Media Inc.), it assists some while leaving others in an unenviable position. The public notices and decisions released today guarantee each owner DTH carriage for two of its signals. Those who own one or two stations will breathe a sigh of relief. Owners of three or more must make painful choices.

Which Peter, which Paul?

In order to relieve that pain and to attempt to compensate small market, independent broadcasters for its inaction on the key issue of distant signals, (see Introductory Public Notice, parag. 126) the Commission, by majority, decided to amend its criteria for establishing independent production funds to permit DTH BDUs to create a local and regional programming fund. Initially, such a fund had been proposed in the memorandum of understanding (MOU) negotiated between the Canadian Association of Broadcasters (CAB) and DTH BDUs. That proposal would have seen one half of the annual contributions made to the Canadian Television Fund (CTF) by ExpressVu and Star Choice diverted from the CTF to a new local and regional broadcasting fund to be distributed as a subsidy to **all** Canadian conventional television broadcasters, regardless of size, in order to help defray the cost of local and regional programming. This proposal was rejected by the Commission which was unwilling to rob **that** Peter to pay **that** Paul. The public notices and decisions issued today, however, demonstrate that a majority of the Commission is willing to allow DTH BDUs to rob a different Peter to pay another Paul.

The new production fund approved today, while smaller and more narrowly focussed than that proposed in the MOU, requires ExpressVu and Star Choice to "each contribute, annually, not less than 0.4% of their gross revenues" to subsidize local television production by small market, independently owned television stations. However, it does not specify that this 0.4% of gross revenues must be new money. Section 44 of the Regulations has, until now, required DTH BDUs to contribute 5% of their gross revenues derived from broadcasting activities to Canadian programming. At least 4% must be directed to the CTF. The other 1% can go either to the CTF or to some other qualified independent production fund or funds.

Double trouble:

Until now, ExpressVu and Star Choice have chosen to split their 5% contributions, as permitted, into two parts: 4% to the CTF and 1% to independent funds, the Bell Broadcast and New Media Fund and the Shaw Children's Fund. Under the new system, approved by the majority today, the 4% contributions to the CTF will continue but there is every likelihood that the 1% contributions to independent funds will be eroded. In order to make the newly required contributions to local and regional production, ExpressVu and Star Choice may utilize monies previously earmarked for their chosen independent production funds. The majority's decision to allow this is troubling for two reasons.

First of all, a subsidy is a poor substitute for fair opportunity. It does nothing to encourage market integrity or to protect program rights. Secondly, the record of this proceeding, though lengthy and extensive, nowhere contains an analysis by parties or interveners of the impact of allowing ExpressVu and Star Choice to shift funding from existing independent production funds in order to subsidize a new fund. The model suggested in the MOU would have seen a transfer of money from the CTF to local broadcasters. ExpressVu and Star Choice's independent funds would have remained intact. The majority decision leading to the issuance of today's public notices and decisions is bound to take ExpressVu and Star Choice, to say nothing of those who rely on their independent production funds, by surprise.

Back to basics:

The scheme proposed in today's public notices and decisions is hopelessly flawed and is not one to which I can subscribe. Canada has a distant signals policy designed to maintain the integrity of a system that licences specific conventional broadcasters to operate in defined markets. In return, that system offers broadcasters specified protections within those markets. In the interests of nurturing a competitive distribution paradigm, we have allowed those protections to erode. It is now time to return to basics, to reactivate the Commission's sensible distant signals policy and, as much as possible, to guarantee the future viability of independent broadcasters in small markets. This will burden DTH BDUs with additional costs, true, but they are no longer struggling new companies and they are not without resources. They are firmly established competitors in the distribution industry with an attractive product and a significant market share. Certainly, there is little likelihood that compelling DTH BDUs to adhere to the distant signals policy will deal them a fatal financial blow. The same cannot be said for the effect upon small market, independent broadcasters of not doing so.

Dissenting opinion of Commissioner Cindy Grauer

I agree with my colleague Commissioner Langford in his dissenting opinion and for the reasons he has articulated.