



## Broadcasting Public Notice CRTC 2005-34

Ottawa, 18 April 2005

### **Auditing of distributor subscriber information by programming services**

*The Canadian Association of Broadcasters (CAB) submitted a request that the Broadcasting Distribution Regulations (the Regulations) be amended to incorporate general terms and conditions pertaining to the conducting of audits of the subscriber information of broadcasting distribution undertakings (BDUs) for the purpose of verifying the accuracy of affiliation payments made to program service providers by BDUs. Subsequently, in Call for comments on a request to amend the Broadcasting Distribution Regulations to add provisions governing the audit of affiliation payments, Broadcasting Public Notice CRTC 2004-20, 31 March 2004 (Public Notice 2004-20), the Commission invited the views of interested parties on the CAB's request.*

*The Commission, having considered the CAB's request and the comments filed in response to Public Notice 2004-20, does not find it appropriate to introduce specific audit provisions into the Regulations at this time. However, in order to ensure that programming services are able to obtain reasonable access to information held by BDUs regarding subscribers to their services, the Commission announces herein a set of guidelines related to the auditing of such information. These guidelines will be used by the Commission in its dispute resolution processes and are meant to aid in the development of appropriate audit provisions for inclusion in future affiliation agreements between programming services and distributors. However, should the guidelines prove ineffective in reducing the number of audit-related disputes that the Commission is asked to resolve, the Commission would be prepared to amend the Regulations to incorporate these or other provisions at a later date.*

### **Introduction**

1. The providers of Canadian pay and specialty programming services receive remuneration from broadcasting distribution undertakings (BDUs) that distribute their services. The total remuneration paid by a BDU to a programming service provider is generally based on the number of BDU subscribers that receive the programming service. If a programming service provider wishes to verify the accuracy of the payments received from a BDU, an audit of the subscriber information held by the BDU must be undertaken. Where the commercial relationship between a programming service provider and a BDU is governed by an affiliation agreement, that agreement may address the rights that the former has with respect to audits, and the terms under which they may be conducted.

2. Concerns relating to the auditing of subscriber information held by BDUs have been raised by programming services in various Commission proceedings in recent years.<sup>1</sup> In its *Broadcasting Policy Monitoring Report 2003*, the Commission also noted that a number of competitive disputes received by the Commission involved, at least in part, issues related to such audits.
3. The Commission's current policy with respect to audits of BDU subscriber information conducted on behalf of programming services is set out in *Ownership of analog discretionary services by cable undertakings*, Public Notice CRTC 2001-66, 7 June 2001 (Public Notice 2001-66), and *Star Choice Television Network Incorporated – Licence amendment*, Broadcasting Decision CRTC 2003-124, 25 April 2003 (Decision 2003-124). In Public Notice 2001-66, the Commission stated:

A programming service is entitled to obtain, at its expense and on an annual basis, independently verified subscriber numbers for the service in question to validate the basis for programmer compensation.

4. In Decision 2003-124, the Commission stated:

[The Commission] is satisfied that the existing regulatory safeguards, including sections 9 and 12 of the *Broadcasting Distribution Regulations*, are sufficient to ensure programmers fair and reasonable treatment regarding payments and audit rights.

5. At the 20 October 2003 Public Hearing in Gatineau, the Commission considered renewal applications for licences held by Star Choice Television Network Incorporated (Star Choice) and Bell ExpressVu Limited Partnership (ExpressVu).<sup>2</sup> During the hearing, the Canadian Association of Broadcasters (CAB) and several programming service providers noted the difficulties encountered in obtaining audit access to BDU subscriber information. The CAB provided a "10-point audit framework" developed by its members and proposed that conditions of licence be introduced for Star Choice and ExpressVu that would require them to conform to this framework.
6. In a 12 December 2003 letter to the Commission, the CAB proposed that the *Broadcasting Distribution Regulations* (the Regulations) be amended to include a requirement that all BDUs provide audit access to programming services so that

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<sup>1</sup> See *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000; *Principles for the launch of Category 1 and 2 digital services*, Public Notice CRTC 2001-57, 25 May 2001; *Ownership of analog discretionary services by cable undertakings*, Public Notice CRTC 2001-66, 7 June 2001; *Amendments to conditions of licence relating to structural separation for Cancom and Star Choice*, Broadcasting Decision CRTC 2002-84, 12 April 2002; *Star Choice Television Network Incorporated – Licence amendment*, Broadcasting Decision CRTC 2003-124, 25 April 2003 (Decision 2003-124); and *Introductory statement to Broadcasting Decisions CRTC 2004-129 and 2004-130, which renew the licences of the ExpressVu and Star Choice direct-to-home satellite distribution undertakings*, Broadcasting Public Notice CRTC 2004-19, 31 March 2004.

<sup>2</sup> Bell ExpressVu Inc., (the general partner), and BCE Inc. and 4119649 Canada Inc. (partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership.

programming services could verify the accuracy of the affiliation payments made to them by BDUs. The CAB suggested that the audit framework that it had proposed at the 20 October 2003 Public Hearing could be used by the Commission as a reference point to formulate amendments to the Regulations.

7. On 31 March 2004, the Commission issued *Introductory statement to Broadcasting Decisions CRTC 2004-129 and 2004-130, which renew the licences of the ExpressVu and Star Choice direct-to-home satellite distribution undertakings*, Broadcasting Public Notice CRTC 2004-19, 31 March 2004, in which the Commission declined to include audit provisions as conditions of licence and stated its intention to address audit-related issues on an industry-wide basis in the context of a separate proceeding. On the same day, the Commission issued *Call for comments on a request to amend the Broadcasting Distribution Regulations to add provisions governing the audit of affiliation payments*, Broadcasting Public Notice CRTC 2004-20 (Public Notice 2004-20).

### **Summary of comments received**

8. In response to Public Notice 2004-20, the Commission received comments from the CAB, CTV Inc. (CTV), Pelmorex Inc. (Pelmorex) and the Community Media Education Society (CMES). The Commission also received comments from the following BDUs and organizations representing BDUs: the Canadian Cable Systems Alliance (CCSA); the Canadian Cable Telecommunications Association (CCTA); Cogeco Inc. (Cogeco); Manitoba Telecom Services Inc., Saskatchewan Telecommunications and TELUS Communications Inc.; Express Vu; and Star Choice.
9. The CAB, CTV, Pelmorex and CMES were generally in favour of introducing new provisions to the Regulations that would specify the terms and conditions under which a BDU would be required to provide audit access. They argued that the Commission's prior statements, contained in Public Notice 2001-66 and Decision 2003-124, had been ineffective in ensuring that BDUs co-operate on a timely basis or, in some instances, at all, in providing such access. According to CTV and the CAB, these policy statements were too general and limited in scope to provide programming services with the tools necessary to obtain or exercise an audit right. In particular, these parties expressed the view that the Commission had been silent on a number of matters for which, in their view, greater clarity was needed regarding what constitutes reasonable audit access, including:
  - the scope of information to which a BDU should provide access;
  - the timing of audits and the notice periods provided by each party;
  - the information that should be kept confidential and/or retained by the auditor; and
  - the identity of the auditor and the meaning of the term "independent verification".

10. Programming service providers generally argued that parties should adhere to any audit provisions established by the Commission as minimum requirements, and that such requirements should complete or supersede existing or future contracts that did not include audit terms or contain audit terms less rigorous than the regulatory requirements.
11. For their part, BDUs and their industry representatives argued that they had met and would continue to meet the terms of affiliation agreements in all areas, including audit rights. Most indicated that there were only a small number of BDUs that had adopted poor business practices with respect to the negotiation and/or application of these agreements, and that the Commission would be acting unfairly were it to impose a general audit requirement on all BDUs in order to address concerns related to only a few BDUs.
12. BDUs noted that they had consistently acknowledged the legitimate right of programming service providers to verify the number of subscribers to their programming services, when specified by contract. BDUs expressed a willingness to provide programming services with access to the records necessary to audit and verify this information. However, they pointed out that differences in the commercial relationships between certain programming services and BDUs, as well as the use of record-keeping systems that differ from one BDU to another, would make the inclusion of “one-size-fits-all” requirements in the Regulations either ineffective or unduly intrusive. BDUs generally argued that audit rights should continue to be negotiated as part of affiliation agreements, and should not be imposed by regulation.

### **Establishing appropriate audit terms – the Commission’s general approach**

13. Programming services derive revenue primarily from two sources: subscriptions and advertising. As noted above, subscription revenues are received from BDUs and are based generally on the number and type of BDU subscribers that receive the programming services. Subscriber information is also a factor in setting the rates charged by programming services for advertising.
14. It is BDUs that compile and hold the subscriber information upon which the payments made to programming services are based, and that are used by the programming services, at least in part, to determine their advertising rates. The accuracy of the BDUs’ subscriber information relating to programming services is thus of substantial importance to the financial well-being of these programming services. In the Commission’s view, the ability of a pay or specialty service to have an audit conducted, where necessary, to verify the accuracy of such information is fundamental to its business, and is thus essential to its contribution toward the achievement of the objectives of the *Broadcasting Act* (the Act). The Commission considers further that an audit right is among the “reasonable terms for carriage, packaging and retailing” that BDUs are called upon to provide pursuant to section 3(1)(t)(iii) of the Act.

15. Based on the record of this proceeding, and in light of the number and nature of disputes that have arisen related to audits, the Commission considers that its prior policy statements have not been sufficient to address audit-related issues. In the Commission's view, further action is required in order to ensure that programming services are able to overcome difficulties experienced in attempting to audit BDU subscriber information pertaining to their services.
16. At the same time, the Commission is concerned that the introduction of audit provisions into the Regulations could be an unnecessarily complex, burdensome and inflexible approach to resolving the concerns raised in this proceeding. The Commission does not therefore find it appropriate to include audit provisions in the Regulations at this time.
17. Rather, the Commission concludes that the most appropriate course at this time would be to set out its view as to what constitutes reasonable terms for the conduct of an audit of subscriber information on behalf of a programming service. In the Commission's view, clearly articulated guidelines related to the auditing of subscriber information would aid parties considerably in negotiating contractual provisions that involve audit issues. Such provisions, in turn, are likely to reduce the number of occasions on which parties find it necessary to seek recourse to the Commission with respect to audit issues.
18. Nevertheless, should these guidelines prove ineffective in reducing the number of audit-related disputes that the Commission is asked to resolve, the Commission would be prepared to amend the Regulations to incorporate these or other provisions at a later date.
19. The following sections of this notice examine the views of interested parties with respect to what would constitute reasonable terms for the audit of subscriber information held by BDUs, and set out the Commission's analysis and determinations with respect to each such audit term. The Commission considers that the timing of audits and the scope of information considered in an audit should balance the need of the programming service to verify the accuracy of its subscriber information and related revenue against the need of the BDU not to be unduly burdened by the audit process.

## **Audit terms**

### **The auditor**

#### *Views of the parties*

20. Programming services generally argued that the selection of the auditor should be left solely to the programming service requesting an audit. Most programming services also indicated a willingness to pay the cost of an audit, barring extenuating circumstances. Some programming service providers favoured being able to choose an auditor who is independent of the programming service, while some wished to have the audit conducted by a member of their staff.

21. BDUs opposed having a programming service provider's staff perform audits of subscriber information, citing confidentiality concerns. In their view, auditors should be independent professionals whose services are paid for by the programming service. BDUs further suggested that the auditor selected should be acceptable to both the programming service provider and the BDU.

*The Commission's analysis and determination*

22. In the Commission's view, the independence of the auditor is essential to ensuring the accuracy and legitimacy of audits of BDU information related to the subscribers to programming services. The Commission considers that an employee of the programming service, or another party that is not independent of the programming service, could be perceived as biased and that an audit by such a person could potentially provide the programming service with inappropriate access to confidential information.
23. The Commission considers that all audits should be performed by external auditors who are chartered or certified public accountants licensed in one or more jurisdictions in Canada. In the Commission's view, they have the necessary expertise to conduct the audits and are subject to professional standards regarding independence and objectivity.
24. As regards payment, the Commission considers that the programming service should generally pay for the services of the auditor, although parties to an affiliation agreement may wish to specify circumstances in which the BDU would assume all or part of the expense incurred where, for example, the audits showed material deviations from subscriber information originally provided to programming services, or where BDUs were responsible for unduly delaying or prolonging audits.
25. The Commission notes that BDUs expressed concern with allowing a programming service to select the auditor. It is the Commission's view, however, that the programming service should generally be permitted to select the auditor, since it is the programming service that will generally bear the cost of the auditor's service. At the same time, the Commission recognizes that there may be exceptional circumstances when a BDU has reasonable grounds to object to the programming service's choice. In such cases, if the parties cannot agree on an auditor, it would be open to one or both of them to refer the matter to dispute resolution.

**Scope of information audited**

*Views of the parties*

26. Programming services proposed that auditors be given access to any system or document held or owned by a BDU containing information related to the distribution of the programming service requesting the audit.

27. BDUs, however, suggested that auditors should have access only to that information necessary to verify the number of subscribers receiving the programming service for the period in question. ExpressVu cited a specific concern with respect to providing auditors with direct access to its master customer database, and noted that this system is already “rigorously audited” annually.

*The Commission’s analysis and determination*

28. Given the extent and variety of records and systems used by BDUs, the Commission considers that specifying the records or information held by BDUs that need or need not be provided to an auditor would be impracticable. In the Commission’s view, it is the proper role of the auditor to determine, in each instance, what information is necessary for the conduct of the audit.
29. The Commission also notes that a party that considers that an audit has been conducted improperly has recourse to other complaint and arbitration mechanisms, such as those of professional associations that establish and enforce professional standards related to auditing and auditors.
30. With respect to ExpressVu’s concern that some audits may duplicate work that has already been performed by other independent auditors, the Commission considers that it may be necessary for an auditor to re-examine, at least to some extent, information that has already been audited. For example, there may be cases where the sampling methodology or sample size used for the purposes of an earlier audit on behalf of a distributor may not be appropriate for the purposes of an audit conducted on behalf of a programming service.
31. There was general agreement among parties commenting on the matter that audits should cover only a one-year period, and that a previous period covered by a service-specific audit should not be re-audited. Certain programming services, however, suggested longer audit periods, particularly in cases where it would be the first audit of the BDU by that programming service. The Commission considers that, in most cases, audits covering a period of up to one year would not create an undue burden for the BDU.

**Timeframes for the conduct of audits**

*Views of the parties*

32. Programming services proposed that specific timeframes be set with respect to such matters as the commencement of an audit following a request, the BDU’s response to the audit report, and the resolution of any discrepancy that may be uncovered by an audit.
33. BDUs were primarily concerned that providing audit access not be unduly burdensome. They argued that the number of audits they are required to accommodate should be manageable, that audits should take place at times during the year that are convenient to their work schedules, and that the period covered by any audit should be reasonable.

34. The Commission notes that the CAB and certain programming services proposed that, within 60 days of a request, a BDU should be expected to agree to a mutually acceptable date for the commencement of an audit. The CCTA and certain BDUs expressed their willingness to abide by this time-frame.

*The Commission's analysis and determination*

35. In the Commission's view, a fixed and generally applicable timeframe for the completion of each of the various phases of an audit process, such as the time allowed to perform the audit, complete the audit report, review its contents and resolve any discrepancies, would not be reasonable, given the numerous different affiliation arrangements that exist among programmers and distributors.
36. The Commission considers, however, that it would be reasonable to establish a suitable timeframe within which programming services and BDUs would be expected to reach agreement on the date that an audit would begin. In the Commission's view, the 60-day period that was proposed by the CAB and accepted by the CCTA would ensure that programming services are able to begin an audit within a reasonable period. This would allow BDUs a measure of flexibility to negotiate dates that would accommodate their own schedules, as well as any audit requests they may have received from other programming services. It would also be appropriate that, during this 60-day period, parties agree upon the specific period that would be covered by the audit.
37. BDUs and programming service providers generally agreed that audits should be conducted no more than once a year and that those programming services that are part of the same ownership group should, to the extent possible, coordinate their audit requests so that they can be conducted coincidentally. BDUs stressed the importance of such joint audits in minimizing the burden they face in accommodating audit requests.
38. Accordingly, the Commission expects the operators of one or more programming services operated by the same ownership group to co-ordinate, to the extent possible, any requests to audit the subscriber information held by a BDU so as to minimize the burden on the BDU operator of accommodating such requests. Programming services should also coordinate any requests to audit the subscriber information of different BDUs within the same ownership group.

**Confidentiality of information**

*Views of the parties*

39. Programming services proposed that auditors sign agreements to ensure that the confidentiality of programming service information is maintained. These parties also requested that auditors be permitted to retain such information as would be necessary to validate the conclusions contained in audit reports.

40. BDUs proposed that, in any audit of a BDU's subscriber information, auditors be required to sign agreements to maintain the confidentiality of such information. Further, BDUs generally argued that auditors should not be permitted to retain information following an audit, and should be required to return or destroy information following the completion of an audit or the resolution of any discrepancies.

*The Commission's analysis and determination*

41. The Commission considers that the use of external auditors provides a reasonable degree of assurance that the confidentiality of information gathered in the course of an audit will be maintained according to professional standards. The Commission notes, however, that professional accounting organizations may require that certain information be retained by auditors so that it may be reviewed for compliance with applicable standards. In the Commission's view, where auditors are required to retain information necessary to demonstrate compliance with professional standards, the retention of confidential information for this purpose should not be considered a violation of the confidentiality of information of either the BDU or the programming service.
42. The Commission's primary concern is that confidential information provided to an auditor by a BDU over the course of the audit not be conveyed to the programming service that has requested the audit or to other parties. The programming service is entitled to obtain from the BDU only the number and type (i.e., direct or indirect, or under a specific packaging or distribution arrangement otherwise specified in an affiliation agreement) of the BDU's subscribers receiving its service and the related revenue payable to the service during the period covered by the audit. The Commission considers that the BDU, prior to the commencement of the audit, should be able to require the auditor to sign an agreement to maintain the confidentiality of any other information that may be examined by the auditor over the course of the audit. Similarly, there may be circumstances where a programming service participating in a joint audit may also wish to require an auditor to sign an agreement to maintain the confidentiality of its information.

**Resolution of discrepancies found in audits**

*Views of the parties*

43. Programming services generally argued that discrepancies found in audits should be resolved within timeframes specified by regulation. They further considered that BDUs should be required to pay programming services a set interest rate on any monies owed.
44. BDUs suggested generally that resolution of discrepancies should be left to the parties. With respect to the interest on discrepancies uncovered by audits, BDUs proposed that, if programming services were to receive interest on monies owed, then BDUs should also receive interest if an audit uncovers overpayment.

### *The Commission's analysis and determination*

45. The Commission considers that, should an audit uncover any discrepancies, the most appropriate recourse for either the programming service or the BDU should be that set out in the contract. Where necessary, other remedies such as negotiations, arbitration or litigation may be contemplated. Based on the record of the proceeding, the Commission does not consider that it is appropriate for it to establish a mechanism for dealing with audit-related financial claims or to establish an interest rate or fixed timeframes for resolution of such issues.

### **Summary of audit terms**

46. The Commission's view of what it generally considers to constitute reasonable terms are summarized below.

#### **The auditor**

- The auditor should be a chartered or certified public accountant licensed in Canada, professionally accredited to perform audits and independent of both the programming service and the BDU.
- The programming service provider should generally pay for the services of the auditor, although parties may wish to specify circumstances in which the BDU would assume all or part of the expense.
- While the programming service provider should generally select the auditor, the BDU may object to the choice of auditor on reasonable grounds (e.g., that the auditor is not independent).

#### **Scope of the audit**

- The period covered by the audit should be reasonable. In most cases, a period of one year would be reasonable.
- The auditor should be responsible for determining, in accordance with professional standards, the specific information to which access is required in order to verify the programming service's subscriber numbers and associated revenues.

#### **Timeframe for commencing an audit**

- The programming service and BDU should reach agreement on the date that an audit will commence within 60 days following the request for an audit.
- Programming services owned by the same ownership group should coordinate, to the extent possible, their audit requests of a BDU so as to minimize the burden of accommodating such requests.

- Programming services should co-ordinate any requests to audit the subscriber information of different BDUs within the same ownership group so as to minimize the burden on the BDU operator.

### **Confidentiality of information**

- The programming service operator requesting an audit is entitled to obtain from the BDU, via the independent auditor, only the number and type (i.e., direct or indirect, or under a specific packaging or distribution arrangement otherwise specified in an affiliation agreement) of the BDU's subscribers receiving the programming service and the amount of related revenue payable to the service during the period covered by the audit. The BDU may require the auditor to sign a confidentiality agreement with respect to any other information prior to the commencement of the audit.

### **Implementation of audit principles**

#### **Impact on affiliation agreements**

47. As mentioned above, the Commission does not propose, at this time, to implement the audit terms described above as amendments to the Regulations. Rather, the audit terms shall serve as guidelines; as such, they should not be viewed as superseding the terms of existing affiliation agreements.
48. However, the Commission expects future agreements negotiated between programming services and BDUs either to incorporate the audit terms set out above or to negotiate mutually agreed terms on the matters covered in this notice. In the Commission's view, the principles and terms set out in this notice generally constitute an appropriate minimum standard for the audit of BDU subscriber information conducted on behalf of a programming service, and will be used as a point of reference in the Commission's consideration of future disputes relating to audit issues that may be brought before it.

Secretary General

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