



Broadcasting Public Notice CRTC 2006-74

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Regulatory framework for the licensing and distribution of high definition pay and specialty services

Table of contents	Paragraph
Background	1
The proceeding	1
Parties to the proceeding	4
The transition model and governing objectives	6
Commission's proposal	6
Positions of parties	9
Commission's analysis and determinations	19
Major elements of the framework	24
Licensing and distribution of HD pay and specialty services	24
<i>Commission's proposal</i>	24
<i>Positions of parties</i>	26
Allowance for unique programming	34
<i>Commission's proposal</i>	34
<i>Positions of parties</i>	35
Required levels of HD programming for distribution rights	37
<i>Commission's proposal</i>	37
<i>Positions of parties</i>	41
Genre protection	47
<i>Commission's proposal</i>	47
<i>Positions of parties</i>	48
Exceptions to the required levels	50

<i>Commission's proposal</i>	50
<i>Positions of parties</i>	51
New services	54
Commission's analysis and determinations	57
<i>Licensing and distribution of HD pay and specialty services</i>	57
<i>Allowance for unique programming</i>	66
<i>Required levels of HD programming for distribution rights</i>	69
a) Introduction	69
b) English-language services	70
c) French-language services	73
d) Ethnic services	76
e) Services that do not make the transition to HD	77
<i>Genre protection</i>	79
<i>Exceptions to the required levels</i>	82
<i>New services</i>	84
Details of the carriage obligations of distributors	85
Commission's proposal	85
<i>General</i>	85
<i>Pay-per-view television services</i>	91
Positions of Parties	92
Commission's analysis and determinations	100
Projected capacity demands	114
Technical quality	118
Commission's proposal	118
Positions of parties	122
Commission's analysis and determinations	126
Simultaneous substitution	131

Non-Canadian services	134
Commission's proposal	134
Positions of parties	137
Commission's analysis and determinations	146
Preponderance	153
Commission's proposal	153
Positions of parties	154
Commission's analysis and determinations	156
Distribution and linkage	160
Commission's proposal	160
Positions of parties	166
Commission's analysis and determinations	172
<i>The applicable rules</i>	172
<i>Exceptions</i>	181
<i>Channel position</i>	183
Wholesale rates	186
Commission's proposal	186
Positions of parties	187
Commission's analysis and determinations	190
The pace of the transition to digital and HD	195

This notice sets out the Commission's policy framework for the licensing and distribution of high definition (HD) pay and specialty services. The policy proceeding was initiated by Call for comments on a proposed framework for the licensing and distribution of high definition pay and specialty services, Broadcasting Public Notice CRTC 2004-58, 6 August 2004 (Public Notice 2004-58). The proposed framework, as described in some detail in that earlier notice, was based, where appropriate, on the principles set out in A licensing policy to oversee the transition from analog to digital, over-the-air television broadcasting, Broadcasting Public Notice CRTC 2002-31, 12 June 2002, and in The regulatory framework for the distribution of digital television signals, Broadcasting Public Notice CRTC 2003-61, 11 November 2003.

This notice sets out highlights of the positions of the parties and details the Commission's analysis and determinations with respect to the policy framework proposed in Public Notice 2004-58. The matters addressed include the licensing regime to apply to pay and specialty programming services with HD content, obligations on the part of broadcasting distribution undertakings to distribute such services, and applicable distribution and linkage rules.

The Commission is prepared to give fast track consideration to applications by existing pay and specialty services for licence amendments authorizing the provision of HD programming or for new broadcasting licences to carry on what will be known as HD-transitional digital pay television undertakings and HD-transitional digital specialty television undertakings, provided that the applications accord with the policy objectives, principles and licensing conditions set out in this public notice.

The new regulatory framework will require changes to the Broadcasting Distribution Regulations, the Pay Television Regulations, 1990, the Specialty Services Regulations, 1990, certain exemption orders and the distribution and linkage rules.

Background

The proceeding

1. In *Call for comments on a proposed framework for the licensing and distribution of high definition pay and specialty services*, Broadcasting Public Notice CRTC 2004-58, 6 August 2004 (Public Notice 2004-58), the Commission set out a proposed framework to govern the licensing and distribution of high definition (HD) pay and specialty services, and called for comments with regard to that proposed framework. In Public Notice 2004-58, the Commission made proposals related to matters such as the licensing regime to apply to programming services with HD content, obligations on the part of broadcasting distribution undertakings (BDUs) to distribute HD services, and applicable distribution and linkage rules.

2. In the present public notice, the Commission announces the determinations it has made following its consideration of comments received in response to Public Notice 2004-58. This public notice is the latest in a series of policy rulings regarding the broadcasting industry's transition from analog to digital technology, and ultimately to HD. Earlier proceedings resulted in the issuance of the following framework documents:
 - *A licensing policy to oversee the transition from analog to digital, over-the-air television broadcasting*, Broadcasting Public Notice CRTC 2002-31, 12 June 2002 (Public Notice 2002-31);
 - *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61, 11 November 2003 (Public Notice 2003-61); and
 - *Digital migration framework*, Broadcasting Public Notice CRTC 2006-23, 27 February 2006 (Public Notice 2006-23).
3. The Commission intends to issue a further public notice initiating a proceeding to finalize the HD framework to apply to direct-to-home (DTH) BDUs.

Parties to the proceeding

4. The Commission received comments from more than thirty parties in response to Public Notice 2004-58, including the following representatives of the broadcasting distribution industry: the Canadian Cable Systems Alliance Inc. (CCSA), the Canadian Cable Telecommunications Association (CCTA), Cogeco Cable Inc. (Cogeco), Quebecor Media Inc. (QMI), Rogers Cable Communications Inc. (Rogers), Shaw Communications Inc. (Shaw), Bell ExpressVu¹ and the prospective Class 1 distribution service of Bell Canada (collectively, Bell Canada), the Canadian Satellite Users Association (CSUA), Star Choice Communications Inc. (Star Choice), and MTS Allstream Inc. in a joint submission with Saskatchewan Telecommunications and TELUS Communications Inc. (MTS Allstream et al.). The views of program service providers were provided by the Aboriginal Peoples Television Network Inc. (APTN), Alliance Atlantis Communications Inc. (Alliance Atlantis), Astral Media Inc. (Astral), the Canadian Association of Broadcasters (CAB), the Canadian Broadcasting Corporation (CBC), CHUM Limited (CHUM), Corus Entertainment Inc. (Corus), CTV Inc. (CTV), Global Television Network Inc.² (Global), Pelmorex Communications Inc. (Pelmorex) and Vision TV. The views of program producers were provided by the Alliance of Canadian Cinema Television and Radio Artists (ACTRA), Ellis Entertainment Corporation and the Directors Guild of Canada. Seven individuals submitted comments, as did a consumer electronics manufacturer – LG Electronics Canada (LG Electronics).

¹ 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.

² On 1 September 2005, Global Television Network Inc. amalgamated with CanWest Media Inc. and other CanWest subsidiaries to continue as CanWest MediaWorks Inc.

5. Certain programmers, namely Astral, Alliance Atlantis, CHUM, Corus, CTV and Global submitted with their comments a copy of a Memorandum of Understanding (MOU) that they and Rogers Broadcasting Limited had entered into with Rogers. The MOU addressed the migration of English- and third-language analog pay and specialty services to digital distribution, as well as aspects of the distribution of HD versions of analog and Category 1 pay and specialty services.

The transition model and governing objectives

Commission's proposal

6. In Public Notice 2004-58, the Commission reiterated certain principles and objectives that it had previously set out as the basis of its approach to the transition to digital, and ultimately HD, technology. In particular, it noted the following objectives originally set out in *Call for comments on a proposed policy to oversee the transition from analog to digital over-the-air television broadcasting*, Public Notice CRTC 2001-62, 5 June 2001 (Public Notice 2001-62):
- the transition policy should provide guidance to broadcasters, distributors and producers concerning their adoption of the new digital television technology;
 - the continued strength and growth of the Canadian broadcasting industry should be fostered and its cultural objectives maintained;
 - the production, broadcast and distribution of high quality A/53 Canadian programs across the country should be encouraged;³
 - Canadian viewers should benefit from these technological advances to the fullest possible extent; and
 - the orderly and timely transition to advanced digital television services should not be impeded by unnecessary regulation.
7. The Commission also noted the following principles set out in Public Notice 2002-31 regarding the transition of over-the-air television signals to digital technology:
- in general, digital technology should be treated as a replacement for analog technology;
 - a voluntary transition, developing at a pace set by the marketplace rather than by mandated deadlines, is the appropriate approach for the Canadian broadcasting system; and

³ That is, the A/53 digital television standard as defined by the Advanced Television Systems Committee.

- the issuance of new, transitional licences is preferable to the amendment of existing licences.
8. In Public Notice 2004-58, the Commission stated that these same objectives and principles should apply to the transition of pay and specialty services from analog and standard definition (SD) digital to HD digital broadcasting.

Positions of parties

9. With regard to the first of the three principles set out in paragraph 7 above, the Commission stated in Public Notice 2004-58 that it would be appropriate to treat HD technology as a replacement for the analog and low definition digital technologies used by today's pay and specialty services.
10. The CCTA stated that this premise is false, and that any framework based on it is inappropriate and will result in an inefficient allocation of capacity. The CCTA submitted that there is no single model or technology for distributors and programming services in the digital environment, and that a number of realities "should inform the Commission that a framework based on HDTV as a replacement technology is impossible to justify."
11. In this context, the CCTA submitted first that many cable systems will continue to operate hybrid analog-digital systems for a number of years, for reasons of regulation, cost and customer convenience. Second, some cable systems have already duplicated channel line-ups in both analog and digital, and intend to use this model to build customer loyalty. Third, a significant percentage of specialty and pay programming is not, and in some cases may never be, in HD. Fourth, the CCTA submitted that, while some cable systems may quickly convert to an all-digital platform, most distributors are not in a position to carry all the existing channels in HD, even if such content were widely available.
12. Finally, the CCTA added that one of the most significant difficulties with assuming an all-HD evolution under a must-carry environment is that, during the transitional period, a single programming service could be distributed in analog, SD and HD. In the CCTA's view, this would represent a highly inefficient use of capacity that could be better allocated to other services. Moreover, a policy framework based on this scenario assumes that a duplicate service in a particular technology automatically has priority over other digital services.
13. Shaw agreed, in part, that HD technology should be treated as a replacement for the analog and SD digital technology used by today's pay and specialty services. Shaw cautioned, however, that the transition phase to HD will be lengthy, and may not even commence for some BDUs for some time. In its view, the precise timeframe for making the transition from analog to digital, and from digital to HD, will be determined by each cable BDU on the basis of its financial and technical capacity and the needs and interests of its subscribers.

14. The CBC submitted that digital technology should be treated as a replacement for analog technology. However, HD should not be considered as a replacement for SD pay and specialty services. Rather, it should be regarded as an adjunct. In support of its position, the CBC noted that HD requires five or six times the bit rates currently allocated to SD channels. In the CBC's view, there is not enough space segment in the system to accommodate all of the existing pay and specialty services in HD formats.
15. The second of the three principles set out in Public Notice 2002-31, that is, that the transition should take place at the pace set by the marketplace, seemed to be generally accepted, with only a few interveners expressing concerns with regard to it.
16. LG Electronics suggested that the Commission consider implementing specific deadlines for the transition to HD. LG Electronics was concerned that, although consumers appear to be embracing digital television technology in their homes, HD programming development is lagging behind the technology adoption rates.
17. Mr. Mario Bartel noted that, as an avid consumer of HD television, he had seen the amount of available HD programming "explode". He added, however, that "98% of that programming is American." In his view, if Canadian specialty and pay television services are to attract "fickle eyeballs", they must provide compelling programming of equal or superior technical merit that viewers cannot otherwise source elsewhere. Mr. Bartel submitted that Canadian specialty and pay services that apply for a digital HD licence should, as a condition of that licence, be required to produce a "roadmap" outlining their commitment to implementing the technology and to adding to the pool of original HD programming, as well as a timeline for achieving these commitments.
18. Randy Coghill submitted that "providers" should be required to provide the available bandwidth for new HD channels, be they Canadian or American, within a certain period of time.

Commission's analysis and determinations

19. With regard to the proposed replacement model, the Commission expects that, over time, all or most of the pay and specialty services will upgrade their programming to the new digital HD standard in order to meet the expectations of the marketplace. Services in some genres, movies and sports for example, are well placed to make the transition to HD. In fact, they have already begun to do so. However, services in other genres could take longer to make the transition, particularly those based on the broadcast of archived material or those whose business plans and financial resources dictate a more gradual approach to upgrading their production, master control and distribution facilities.
20. Unlike over-the-air services, the pay and specialty services rely entirely on terrestrial, satellite and wireless BDUs for their delivery, and therefore need not construct digital broadcast transmitters to reach their audiences. These services will not necessarily lose their ability to operate in analog or SD format as the transition progresses, because there

will be no spectrum re-assignment issues that would preclude their continued operation. As HD displays become ubiquitous, however, they might well find it increasingly difficult to retain their viewers if they do not upgrade their program formats.

21. In the Commission's view, considerations such as those raised by interveners relate more to the timing of the transition, rather than to the question of whether HD will ultimately replace SD broadcasting. Accordingly, the Commission considers that the service replacement model remains appropriate, and adopts that model to govern the transition of the pay and specialty services to HD.
22. With regard to the market-driven approach to the transition to HD, the Commission notes the growing concern among industry observers that the Canadian industry is falling behind the American industry in the transition to HD broadcasting. However, the Commission considers that the framework set out in this public notice, along with the expectations of viewers, will provide appropriate incentives for the pay and specialty services to proceed with the transition. Accordingly, the Commission will not at this time mandate specific deadlines for the transition of the pay and specialty services to HD. However, should the incentives noted above prove insufficient, the Commission would be prepared to consider further measures to ensure that the objectives of the *Broadcasting Act* (the Act) and the Commission's objectives for the transition to digital and HD broadcasting are achieved.
23. As for the other principles and objectives set out in Public Notice 2004-58, the Commission has borne them in mind in finalizing the framework set out in this public notice. They are discussed, as relevant, in the sections that follow.

Major elements of the framework

Licensing and distribution of HD pay and specialty services

Commission's proposal

24. As noted above, in Public Notice 2004-58, the Commission stated as a principle that the issuance of new, transitional licences is preferable to the amendment of existing licences. Accordingly, the Commission proposed to proceed through the issuance of new HD-transitional licences. It stated that, subject to certain terms and conditions, existing pay and specialty licensees would generally qualify for this new class of licence when offering upgraded versions⁴ of their services containing HD programming, regardless of the amount.
25. The Commission further proposed that most BDUs be required to distribute upgraded versions of pay and specialty services that they are currently obliged to distribute, provided that those services offered certain specified minimum amounts of HD

⁴ In Public Notice 2003-61, the Commission stated that, as is the case for over-the-air digital television services, digital versions of pay or specialty services that contain any amount of programming in HD would be referred to as "upgraded versions." These upgraded versions would provide essentially the same programming as their analog or low-definition digital counterparts.

programming. The licensees of pay and specialty services whose upgraded versions that did not provide the specified minimum amounts of HD programming would be expected to negotiate with distributors for carriage of those upgraded versions.

Positions of parties

26. While acknowledging that some regulatory authority would be needed for an HD-transitional undertaking, the CAB and certain programmers suggested that authority should be granted by way of licence amendment, rather than through the issuance of a new licence. In the CAB's view, to proceed by licence amendment would be a more streamlined and efficient procedure for both the Commission and licensees, and would still provide the Commission with the necessary tools to oversee the HD component of a licensee's service.
27. Alliance Atlantis had no preference as to whether a new licence was issued or an amendment was made to an existing licence. Its paramount concern was that there be no regulatory barrier to entry for existing Canadian specialty services. It submitted that approval of an application for the issuance of a new HD-transitional licence should be automatic if the application proposed an upgraded version of an existing service. It acknowledged that a more protracted process should be anticipated for any deviation from the "upgraded service" model.
28. The operators of pay and specialty services generally did not oppose the Commission's proposal to tie distribution rights to the provision of certain minimum levels of HD programming. However, for the most part, they submitted that the minimum HD thresholds proposed by the Commission were too high.
29. Several distributors expressed concerns with regard to proposed requirements to provide distribution, citing capacity limitations and costs. Certain distributors noted that they are eager to distribute HD content, and suggested that the Commission rely more on market forces to achieve its objectives. In their view, a market-based approach, with no distribution rights, would create a more open, competitive marketplace for the distribution of pay and specialty services.
30. Shaw, in particular, submitted that each cable and satellite system operating in Canada has different capacity and market concerns, and different consumer demands. In its view, each system will therefore have to determine how to accommodate the enormous demands that will be made on its capacity as a result of the transition to HD television. Shaw argued that the most appropriate way to encourage the development of HD television without unduly affecting the management of capacity would be to adopt a market-based approach to the distribution of HD services. Shaw therefore proposed that there be no carriage obligations imposed on BDUs with respect to the distribution of HD services, either during or following the transition to digital distribution. Rather, Shaw considered that consumer demand and the capacity of each cable system should determine whether a particular HD service is distributed by a BDU.

31. Shaw further submitted that access rules should require that only one version of a programming service be distributed, whether it is analog, SD or HD digital, with the choice of which version or versions to be distributed to be made by the BDU in response to competition concerns and market forces. In Shaw's view, this would also assure an efficient allocation of capacity.
32. Some distributors did not specifically oppose the notion of required distribution, but expressed the view that the minimum required amount of HD must be sufficient to warrant such distribution.
33. None of those parties filing comments in the proceeding explicitly disagreed with the Commission's specific suggestion that no minimum amount of HD programming be required of those services that do not have "must-carry" status. However, some parties linked the requirement to provide minimum levels of HD content to genre protection. Other parties submitted that the Commission should require HD-transitional licensees to provide minimum amounts of HD content, as a condition of licence.

Allowance for unique programming

Commission's proposal

34. The Commission proposed that HD-transitional pay and specialty licensees be permitted to offer a maximum of 14 hours per week of programming that is not duplicated on their counterpart analog or SD versions, consistent with the allowance established for over-the-air broadcasters in Public Notice 2002-31. The Commission proposed that all of this programming must be in HD, must be at least 50% Canadian in origin, and must conform to the service's nature of service definition and to other conditions of licence and expectations.

Positions of parties

35. With the exception of CTV, there was general acceptance by the parties of the Commission's proposal that pay and specialty transitional HD-licensees be permitted to offer a maximum of 14 hours per week of programming that is not duplicated on their counterpart analog or SD versions. CTV suggested that the limit be raised to 21 hours of unduplicated HD programming for services already launched or that launch within six months of the release of the HD framework.
36. Bell supported the notion that a transitional licensee should be granted an allowance of unduplicated HD programming. However, it considered that the proposed requirement that at least 50% of any unduplicated programming must be of Canadian origin was too high in the early years. Bell proposed that broadcasters should be given more flexibility, in order to encourage them to provide HD programming at the earliest possible time and meet consumer expectations. Bell proposed that requirements as to Canadian content within the 14-hour allowance be phased in over the first five years of the licence term.

Required levels of HD programming for distribution rights

Commission's proposal

37. As noted above, in Public Notice 2004-58, the Commission proposed that, in order to receive distribution rights, HD-transitional licensees would have to adhere to conditions of licence requiring minimum levels of HD programming. With respect to the HD versions of English- and French-language programming services, the proposed levels were as follows:
- if the proposed HD-transitional service is an English-language service, at least 50% of the programming on the proposed service must be in HD format; and
 - if the proposed HD-transitional service is a French-language service, at least 30% of the programming must be in HD format, of which at least 50% must have been originally produced in French.
38. Section 18(5)(c) of the *Broadcasting Distribution Regulations* (the Regulations) sets out the circumstances under which a Class 1 BDU shall distribute ethnic programming services. In Public Notice 2004-58, the Commission requested comment on the amount of HD programming the upgraded version of an ethnic programming service should be required to broadcast in order to receive distribution by a BDU under section 18(5)(c), but made no specific proposal.
39. Under the framework proposed in Public Notice 2004-58, a programming service offering less than the applicable minimum level of HD content would not be granted distribution rights. Rather, providers of such services would negotiate with BDUs for distribution.
40. The Commission further proposed that services electing not to make the transition to HD would retain their current access rights, each to the equivalent of one SD digital channel. Furthermore, once a BDU passed the benchmark threshold of 85%, and the Commission approved an application to remove duplicate analog services,⁵ the digital versions of these services would retain their access rights, each to the equivalent of one SD digital channel.

⁵ At paragraph 56 of Public Notice 2003-61, the Commission stated that a BDU may submit an application requesting approval to cease the carriage of analog signals once 85% of the BDU's subscribers have the ability to receive digital services by means of digital television receivers or set-top boxes. The Commission added that it would determine, at that time, the terms and conditions under which the analog services may be removed from the system.

Positions of parties

41. As noted above, pay and specialty service providers generally did not oppose the Commission's proposal that only those programming services providing certain minimum levels of HD be granted distribution rights. For the most part, however, they submitted that any such HD thresholds should be set at much lower levels than the ones proposed in Public Notice 2004-58 for English- and French-language services.
42. Specifically, the CAB recommended that access and must-carry rights be granted for English-language services providing 25% HD content during the evening broadcast period, ramping up to 50% in year six. For French-language services, the CAB recommended that the levels be 15% during the evening broadcast period, increasing to 30% in year six. The CAB proposed that the levels for ethnic services be decided on a case-by-case basis. Astral submitted that, given the significant barriers to launching a critical mass of HD programming in francophone markets, particularly in the early years of HD, even the lower thresholds for BDU carriage proposed by the CAB for French-language services would be difficult to meet.
43. The MOU, entered into by several programmers, set out requirements pertaining to HD versions of English- and third-language services currently distributed as analog services. The MOU's requirements took into account whether or not services in the relevant analog tier have migrated to digital distribution. Specifically, the MOU provided that, prior to the migration, services offering 50% HD content in prime time, measured on a weekly basis, would have distribution rights. This threshold would drop to 25% after migration, ramping up 5% per year to 50% in prime time.
44. The CBC stated that, from its perspective, the proposed thresholds for HD material were too high. It noted that, by year three, Newsworld and RDI were aiming to offer just 15% of their respective evening broadcast schedules in HD.
45. Although several BDUs expressed opposition to required distribution, they also indicated an overall willingness to carry services that provided adequate amounts of HD programming. Accordingly, if the Commission were to grant distribution rights, they supported the Commission's proposal to tie those rights to the provision of minimum amounts of HD programming, and submitted that a meaningful HD threshold must be adopted for this purpose.
46. In this regard, while the CCTA objected to must-carry requirements in general, it submitted that, if such requirements are imposed, the minimum threshold of HD content to attain must-carry status should be no lower than 50%. Shaw and Star Choice stated that, while they could accept the Commission's overall threshold, the minimum level should be raised to 75% in prime time. Bell Canada suggested that the HD threshold be raised to 70% for English-language services and 40% for French-language services. It also recommended that English-language services be required "to match the HD levels

of their U.S. counterparts within five years, should the U.S. services' HD content levels exceed 70%." LG Electronics supported the distributors' position in this respect, suggesting that it was essential for the Commission to take a stronger, more central role in the development of HD programming.

Genre protection

Commission's proposal

47. In Public Notice 2004-58, the Commission stated that existing pay and specialty licensees should be given a reasonable period of time to prepare business plans and to apply for HD-transitional licences. The Commission added that, while a licensee would continue to enjoy its existing genre protection during this period, the Commission would consider an application by a prospective new entrant for a licence to carry on an HD-transitional service in the programming genre provided by the existing licensee's service should the licensee fail to apply for an HD-transitional licence within a reasonable period, or otherwise fail to demonstrate that it is prepared to submit an application on a timely basis.

Positions of parties

48. Programmers were generally of the view that full genre protection must be maintained through the transition. The pay and specialty services expressed a number of general concerns with the Commission's proposal. For example, CTV submitted that full genre protection is fundamental to specialty services. Corus submitted that the Commission must maintain its genre protection policies in order to ensure that Canadian services can maintain access to foreign program rights and format concepts for adaptation to the Canadian market. Corus added that, to ensure that the Canadian system evolves rapidly, the Commission could establish a sunset provision that would require a Canadian service to achieve certain levels of HD content within a certain period to maintain genre protection. Astral submitted that, if adopted, the Commission's proposal could have the unintended effect of introducing an incentive for non-Canadian services to withhold rights to HD programming in order to ultimately achieve more relaxed genre rules.
49. Bell Canada supported the Commission's proposal for the removal of genre protection for a Canadian "analog/SD" service that fails to apply for an HD-transitional licence within a reasonable period. Further, Bell Canada submitted that the period set aside for genre protection should be no longer than one year, and should be terminated earlier should an application be filed by a Canadian BDU for authorization to distribute a non-Canadian HD service offering at least the same percentage of HD programming, in a similar genre, as that required of the Canadian licensee in order to require distribution by BDUs. The CCSA considered that, if there is an overall weakness in the Commission's proposed transition framework, it is that the framework is "light" on mechanisms designed to motivate the programmers to move forward quickly in developing new HDTV services and content. For this and other reasons, the CCSA submitted that two years would be a "more appropriate grace period."

Exceptions to the required levels

Commission's proposal

50. In Public Notice 2004-58, the Commission stated that, in a limited set of exceptional cases, it may be in the public interest to grant distribution rights for HD-transitional services that offer less HD programming than would otherwise be required in order to obtain such rights. The Commission requested comment on what criteria it might use to determine whether such an exception should be granted, and how the criteria would be measured. The Commission noted the following as a situation where such an exception might be warranted:
- carriage of the HD-transitional service is essential to the continued viability of a particular service;
 - the service is adjudged to make an important contribution to the Canadian broadcasting system; and
 - the service would have difficulty procuring and producing HD programming in the early years of the transition.

Positions of parties

51. CTV submitted that HD services that do not meet the minimum HD content thresholds should have the ability to apply to the Commission for distribution rights on a case-by-case basis, and that this should not be limited to exceptional cases. According to CTV, the genre of a service, its financial circumstances, BDU system capacity, and the manner in which the service will contribute to the fulfilment of the objectives of the Act, would be the criteria relevant to the assessment of such an application.
52. The CCTA stated that, while it objected to any must-carry requirements, if such requirements are imposed, the minimum amount of HD content necessary to attain must-carry status should remain at not less than 50%. In the CCTA's view, anything less would provide insufficient additional HD material to justify the allocation of capacity.
53. Shaw submitted that the concept that certain services should be given special or more favourable regulatory treatment with respect to how they are distributed is at odds with the desire of Canadian consumers for the flexibility to decide which services they want delivered to their homes.

New services

54. In Public Notice 2004-58, the Commission stated that, during the transition period, it would consider applications for licences to provide new HD services, which would be assessed in accordance with the Commission's current practices and policies, including those regarding market entry, ownership, licensing and programming, as well as any policies ultimately adopted with regard to minimum amounts of HD programming.

55. Under the Commission's proposed framework, the distribution rights of any new HD pay and specialty service would be determined at the time the service was licensed, and would range from required distribution to a situation where distribution would be left totally to negotiations between the programmer and distributors.
56. The CAB took the position that "for any programming service that meets its HD threshold requirement, distribution should be guaranteed."

Commission's analysis and determinations

Licensing and distribution of HD pay and specialty services

57. Having considered the comments received, the Commission remains of the view that the issuance of new HD-transitional licences to existing pay and specialty services, rather than the granting of licence amendments, is more consistent with the concept that digital services, and specifically HD services, should be treated as replacements for analog services. Accordingly, the Commission considers that existing pay and specialty services should ultimately be issued new licences for HD versions of their services. Nonetheless, the Commission notes the submissions of parties that proceeding by way of licence amendment would offer certain advantages. In particular, the Commission considers that proceeding by way of licence amendment offers a quicker and more efficient process for granting an existing pay and specialty service an authorization to offer HD programming, without significant regulatory obligations or process.
58. In light of the above, the Commission adopts a hybrid regime aimed ultimately at issuing new HD-transitional licences to the existing pay and specialty services, but permitting such services to proceed in the short term by way of amendment to their current licences, should that approach better suit their immediate circumstances.
59. However, the Commission remains of the view that an upgraded programming service's right to distribution should be conditional on a commitment on its part to provide certain minimum levels of HD programming. Without such commitments, BDUs could find it necessary to distribute duplicate versions of services, with very little ultimate benefit to the broadcasting system or to viewers in the form of increased availability of HD programming.
60. Accordingly, licensees of existing pay and specialty services that are prepared to make a firm commitment to provide an upgraded version with a specified minimum amount of HD programming may apply for new HD-transitional licences. The conditions of these licences will require programmers to provide this specified minimum amount of HD programming. The Commission will require the majority of BDUs to distribute these HD-transitional services, and holders of HD-transitional licences will be granted genre protection, consistent with the Commission's existing policies. Details as to the specific minimum amounts of HD programming that will be required and the associated distribution rights and genre protection are discussed further below.

61. With regard to the suggestion that the Commission permit BDUs complete discretion as to which HD-transitional services will be distributed, the Commission is not persuaded that this would provide sufficient encouragement for the roll out of HD services or, more generally, would contribute to the attainment of the overall objectives of the Act during the transition to HD. The Commission notes that such discretion would indeed permit BDUs to differentiate themselves by offering unique service packages. However, the Commission considers that there could be significant negative consequences for programmers, and possibly for consumers, that outweigh any contribution to the Canadian broadcasting system in the form of enhanced competition in the market for distribution services.
62. In this regard, the Commission notes that programmers in the Canadian marketplace are relatively dependent on a handful of key distributors in order to reach their audiences, those being Rogers, Shaw/Star Choice, Bell ExpressVu, Videotron and Cogeco. This dependence on key distributors is particularly acute in the smaller, French-language market. In the Commission's view, the failure of particular services to obtain distribution from one or more of these key distributors would have an unduly negative impact on them, and would certainly make it more difficult for them to make the transition to HD. In addition, consumers, who generally subscribe to only one distributor, could find themselves deprived of some of their current programming services.
63. The Commission recognizes that distributors as well as programmers face challenges in making the transition to HD, in particular, with regard to capacity and necessary upgrade costs. The Commission notes that, as described below, distributors will generally be obliged to carry only those HD pay and specialty services that must, by condition of licence, offer certain minimum amounts of HD programming. As also discussed below, a distributor's obligation to provide distribution will be subject to available capacity until such time as the distributor has completely ceased the distribution of programming services on an analog basis.
64. An existing pay or specialty service that wishes to begin the transition to HD, but is not in a position to guarantee the provision of the specified amounts of HD content, may seek authorization to offer an upgraded version by way of licence amendment. However, as with the interim approach to the authorization of upgraded versions set out in Public Notice 2003-61, these HD authorizations will be subject to certain restrictions. In particular, their term will be limited to three years. Further, as noted above, there will be no obligation on the part of BDUs to distribute these upgraded services, and distribution arrangements will thus have to be negotiated with the BDUs.
65. Programmers may apply for HD-transitional licences either at the outset, or after a period of operation under a licence amendment. The new HD-transitional licences, once granted, will replace any short-term authorizations granted by licence amendment, including those that the Commission first announced in Public Notice 2003-61. In either case, the financial and programming obligations of the analog or SD service will apply to the corresponding HD version. For example, the conditions of licence specifying

requirements for Canadian program expenditures will be worded so as to ensure that the requirements that apply to the analog or SD service also apply to the HD-transitional service. For a program that is broadcast on both the analog or SD service and the HD-transitional service, the licensee may, of course, apportion its Canadian program expenditures for the program between the two services as it sees fit, provided its total Canadian program expenditure requirements are met.

Allowance for unique programming

66. With respect to an allowance for unique programming, the Commission remains of the view that a 14-hour allowance is appropriate for pay and specialty services granted new HD-transitional licences, as it is consistent with the objectives articulated in Public Notice 2002-31 and reiterated in Public Notice 2004-58. That is, it will allow the existing programming services some flexibility to develop HD services, while preventing those HD services from changing in such a way as to evolve into services that differ entirely from their analog or SD counterparts.
67. The Commission will impose the conditions proposed in Public Notice 2004-58 to require that all of the programming within the 14-hour allowance for unique programming must be in HD and must conform to the undertaking's nature of service definition, as well as to any other relevant condition of licence or expectation. Further, the Commission will require that a minimum of 50% of this unique programming be Canadian.
68. Those services that are authorized to offer HD programming by way of licence amendment will remain subject to the requirement initially imposed in Public Notice 2003-61 that the programming on the analog or SD service and on the upgraded service be comparable, that is, not less than 95% of the video and audio components must be the same.⁶ Further, the Commission will require that all of the programming making up the 5% allowance be provided in HD.

Required levels of HD programming for distribution rights

a) Introduction

69. In considering the appropriate levels of HD programming for required distribution, the Commission has sought to find a level of HD content that is low enough to be achieved by the majority of programming services without imposing an undue burden, but high enough to warrant the required upgrades of the country's distribution systems and to satisfy the consumer demand for HD programming. Having considered the comments received, the Commission is adopting HD thresholds for required distribution that are somewhat lower than those proposed in Public Notice 2004-58.

⁶ This will permit some 8.4 hours per week of unique programming on the upgraded service, assuming a 168-hour broadcast week.

b) English-language services

70. With respect to English-language services, HD-transitional licences will be issued with conditions of licence requiring the levels of HD programming set out below:
- The Commission will require that a minimum of 50% of the programming broadcast during the evening broadcast period, i.e., 6 p.m. to midnight, be HD programming. This amount equates to 21 hours per week of HD programming during the evening broadcast period.
 - In order to ensure the availability of a sufficient overall level of HD programming to warrant required distribution, the Commission will impose a second requirement that a minimum of 30% of the programming broadcast during the broadcast day be HD programming, from the beginning of the licence term. For a service having a broadcast day of 18 hours, this represents 37.8 hours of HD programming per week.
 - In order to ensure an increase in the availability of HD programming over the medium term, the Commission will impose a requirement that a minimum of 50% of the programming broadcast during the broadcast day be in HD by the beginning of year six of the first licence term.
 - While the Commission expects licensees to make maximum use of Canadian HD programming from the commencement of their operations, the Commission will require that, by the beginning of year six of the first licence term, a minimum of 50% of the HD programming that a licensee must broadcast, under each of the above requirements, be Canadian.
71. The Commission will require that each of the levels specified above be achieved each week, on average, over a broadcast year.
72. The Commission will also require that all of the programming on the HD-transitional undertaking that was produced in the wide-screen 16:9 aspect ratio be broadcast in that aspect ratio, and that all of the programming that was produced in HD format be broadcast in that format.

c) French-language services

73. In Public Notice 2004-58, the Commission proposed an HD threshold for French-language services that would be lower than that required of English-language services. In this regard, the Commission cited the more limited availability of French-language HD programming, the additional costs of dubbing English-language material into French, and the smaller size of the market. In light of such factors, and in view of concerns expressed regarding the availability of French-language HD content, the Commission remains of the view that the minimum levels of HD content required to obtain distribution rights should be lower for French-language services than for English-language services. Accordingly, with respect to French-language services, HD-

transitional licences will be issued with conditions of licence requiring the minimum levels of HD programming set out below to be achieved each week, on average, over the broadcast year.

- 30% HD content during the evening broadcast period, i.e., 6 p.m. to midnight;
- 20% HD content during the broadcast day, from the beginning of the licence term;
- 30% HD content during the broadcast day by the beginning of year six of the first licence term; and
- by the beginning of year six of the first licence term, a minimum of 50% Canadian content in the HD programming that a licensee must broadcast under each of the above requirements.

74. In Public Notice 2004-58, the Commission proposed, as an additional requirement for French-language HD services, that one half of the HD programming must be produced as original French-language programming, either Canadian or non-Canadian. This proposal was added to ensure that the HD programming not consist entirely of English-language material dubbed into French. There were no objections to this proposed additional requirement, and the Commission adopts it as part of its regulatory framework.

75. The Commission will also require that all of the programming on the HD-transitional undertaking that was produced in the wide-screen 16:9 aspect ratio be broadcast in that aspect ratio, and that all of the programming that was produced in HD format be broadcast in that format.

d) Ethnic services

76. The CAB recommended that the Commission consider appropriate benchmarks for ethnic services on a case-by-case basis. The Commission notes that the ethnic programming services that currently enjoy a degree of required distribution and that would be subject to the thresholds set out here are the five services to which section 18(5)(c) of the Regulations applies.⁷ With respect to these services, the Commission adopts the HD benchmarks and requirements set out above for French-language services (with the exception of the requirement set out in paragraph 74). Upgraded versions of the ethnic programming services meeting these benchmarks will be granted distribution rights under the circumstances noted in section 18(5)(i) or (ii) of the Regulations. In the Commission's view, these levels will provide a reasonable amount of HD material to viewers, without constituting an undue hurdle for the services to overcome.

⁷ These are Fairchild Television, Talentvision, Telelatino, Odyssey and South Asian Television. The Commission notes that there are no Category 1 ethnic services.

e) Services that do not make the transition to HD

77. As proposed in Public Notice 2004-58, services that elect not to make the transition to HD will retain their current distribution rights. In addition, once the benchmark threshold of 85% is passed and the Commission approves an application to cease the distribution of analog services altogether, those SD services that have not made the transition to HD will retain their distribution rights, each to the equivalent of one SD digital channel.
78. Distribution, packaging and other issues pertaining to the migration of analog services to SD digital are addressed in detail in Public Notice 2006-23, setting out the digital migration framework.

Genre protection

79. In Public Notice 2004-58, the Commission stated that, should an existing licensee fail to apply for an HD-transitional licence within a reasonable period, or otherwise fail to demonstrate that it is prepared to submit an application on a timely basis, the Commission would consider an application from a prospective new entrant for a licence to carry on an HD-transitional service in the programming genre of the existing licensee. The Commission considers this approach to be consistent with a market-driven transition to HD, and adopts it on an on-going basis. In order to ensure competitive fairness, if an HD service does not upgrade on a timely basis, as described below, and its genre is awarded to a new licensee, the Commission will oblige the new licensee to meet appropriate Canadian content, program expenditure and other regulatory requirements.
80. As indicated earlier, the Commission will consider analog and SD services to have upgraded to HD once they have been granted new HD-transitional licences and are required by condition of licence to broadcast the levels of HD programming necessary to receive distribution rights. Obtaining an HD-transitional authorization by licence amendment will not be considered sufficient for a pay or specialty service to be granted genre protection, because no minimum amount of HD programming will be required under such licence amendments.
81. More specifically, HD amendment authorizations will be granted for terms of three years. Should a licensee holding an amended licence not seek and obtain a new HD-transitional licence by the end of the third year, its HD authorization will lapse.⁸ The Commission may then consider it appropriate to entertain applications for a new HD-transitional licence by other parties wishing to provide an HD service in the same programming genre as that occupied by the licensee whose HD authority has lapsed.

Exceptions to the required levels

82. The Commission will consider granting distribution rights to services that do not meet the above-noted HD benchmarks only in limited circumstances. The Commission will consider requests for such rights pursuant to section 9(1)(h) of the Act. The Commission

⁸ The Commission would not be precluded from granting renewals in exceptional circumstances.

will be guided by its established precedents in determining whether or not such rights should be accorded to any particular service,⁹ and in general will issue such an order only when a compelling case can be made that mandatory distribution of the service in question will make a particular contribution to the attainment of the objectives of the Act, despite the fact that the service does not provide the otherwise requisite levels of HD content. The Commission will expect any HD-transitional service seeking mandatory distribution by way of an order under section 9(1)(h) of the Act to make a commitment to provide some HD content, and an appropriate alternate level of HD programming would be required by its conditions of licence.

83. As indicated above, upgraded services that cannot meet the benchmarks and that are unable to convince the Commission, based on the criteria usually applied under section 9(1)(h) of the Act, that they warrant mandatory distribution, will have the option of negotiating distribution with distributors, as is currently the case with Category 2 services.

New services

84. With regard to applications for licences to provide new Canadian HD services, the Commission sees no reason to depart from its existing practices with regard to such matters as market entry, ownership and programming. With regard to the distribution of new Canadian HD services, the Commission notes that, under existing practices, it licenses services that have distribution rights (e.g., Category 1 services), as well as those that do not (Category 2 services). The Commission expects that this approach will continue. However, the Commission would generally expect any services seeking distribution rights to provide the minimum levels of HD content normally associated with such rights (except as discussed in the preceding section).

Details of the carriage obligations of distributors

Commission's proposal

General

85. In Public Notice 2004-58, the Commission proposed a two-stage approach to the distribution of those HD services granted distribution rights. During the first stage of the transition, when services are distributed in both analog and digital form, all Class 1, Class 2, fully interconnected Class 3 BDUs, and exempt cable BDUs that serve between

⁹ See, for example, *Order respecting the distribution of the French-language television service of TVA Group Inc.*, Public Notice CRTC 1999-27, 12 February 1999; *Order respecting the distribution of the Aboriginal Peoples Television Network*, Public Notice CRTC 1999-70, 21 April 1999; *National Broadcasting Reading Service Inc. (VoicePrint)*, Decision CRTC 2000-380, 11 September 2000; and *Licence renewal for CPAC; and issuance of a distribution order*, Broadcasting Decision CRTC 2002-377, 19 November 2002.

2,000 and 6,000 subscribers¹⁰ would be required to distribute the upgraded HD versions of all Canadian pay and specialty services that they are currently required to distribute, subject to available channel capacity, and provided that these services offered the appropriate minimum levels of HD programming specified in that public notice.

86. The Commission proposed that, once the analog services are removed and distributors have moved on to the second stage of the transition, the distribution regime move to a must-carry model. That is, the distributors noted above would be required to distribute the upgraded versions of the pay and specialty services, provided that these services offered the appropriate minimum levels of HD programming, without regard to capacity constraints, thus ensuring the distribution of these services across Canada.
87. Under the Commission's proposed framework, provided they have a nominal bandwidth capacity of 550 MHz or more, and deliver programming services on a digital basis, Class 3 cable BDUs that are not interconnected, and exempt cable BDUs that serve fewer than 2,000 subscribers, could fulfil their obligations to distribute certain specialty services¹¹ by distributing either the SD versions of such services or upgraded versions that meet the HD content conditions set out earlier. This approach would apply in all stages of the transition.
88. The Commission emphasized that, for the purpose of calculating the ratio of majority-language to minority-language services that a BDU distributes, as prescribed in section 18(11.2) of the Regulations or in the applicable exemption order, the current requirements would remain unchanged. Thus, where a BDU distributes either an analog or an SD version of a particular service, as well as the upgraded version of the service, the two versions would be counted as one service.
89. The Commission noted that DTH BDUs do not distribute services on an analog basis and are therefore currently in the second stage of the transition. The Commission reiterated, as announced in Public Notice 2003-61, that DTH undertakings would be the subject of a further proceeding. As an interim measure, pending completion of that proceeding, the Commission stated that DTH undertakings would be required to provide access to all HD-transitional licensees that are subject to the HD content minimums, excluding Category 2 services.
90. Multi-point distribution system (MDS) undertakings would remain subject to access and carriage requirements applied through specific conditions of licence that take into account their limited bandwidth.

¹⁰ See Appendix A of *Exemption order respecting cable broadcasting distribution undertakings that serve between 2,000 and 6,000 subscribers; and Amendment to the Broadcasting Distribution Regulations*, Broadcasting Public Notice CRTC 2004-39, 14 June 2004.

¹¹ Generally, such BDUs are obliged to carry one service in the language of the minority for every 10 services in the language of the majority.

Pay-per-view television services

91. In Public Notice 2004-58, the Commission noted that pay-per-view television programming services generally provide multiplexed programming to distributors, meaning that the programming is distributed to subscribers across a number of different channels. The Commission noted further that section 18(6) of the Regulations provides that, if a licensee is distributing a pay-per-view service in a licensed area on more than 10 analog channels, the Commission may declare one or more channels in the licensed area to be available channels for the purpose of section 18(5) of the Regulations. In view of the amount of bandwidth required to distribute HD services, the Commission proposed that the number of digital channels that may be used by a multiplexed HD pay-per-view television service, without raising the possibility that one or more might be declared to be “available channels”, would be restricted to three HD channels, in all stages of the transition.

Positions of parties

92. The CCTA submitted that the Commission’s staged application of must-carry rules fails to address the realities of the market, and is “inappropriate for a number of reasons.” First, the CCTA submitted that the Commission had not established why duplicate pay and specialty services should have priority over other types of innovative and culturally diverse digital services, a consideration that the CCTA considered “particularly relevant given the low penetration of HDTV and competing demand for other services.”
93. Second, the CCTA contended that the Commission had failed to take into consideration the competitive environment faced by all capacity-constrained BDUs, particularly small systems. The CCTA submitted that these systems need more, not less, flexibility in order to compete.
94. Third, the CCTA disputed the Commission’s assumption that interconnected systems will have greater ability to carry more HDTV channels. In the CCTA’s view, many interconnected systems have limited capacity.
95. Finally, the CCTA argued that the Commission’s proposal would increase the regulatory obligations of exempt small cable systems, which, in its view, suggests that the Commission has abandoned the objectives of small system deregulation.
96. On a more specific level, the CCTA took exception to the Commission’s proposal to limit HD pay-per-view to three channels, which it described as “highly inappropriate and customer-unfriendly.” In its view, HD movie channels should be seen as a principal driver of digital service, and pay and pay-per-view services, which, it submitted, are increasing their commitment to HDTV, should not be penalized.

97. Star Choice commented on the impact of the Commission's proposals for DTH distributors, noting the Commission's statement that such distributors are already in "the second stage of the transition." Star Choice disputed the Commission's apparent assumption that DTH BDUs, being all-digital, are more capable of accommodating must-carry services than hybrid cable BDUs, and submitted that DTH BDUs should not be subject to more rigorous carriage requirements than cable BDUs.
98. MTS Allstream et al. submitted that the Commission's proposals are premised on an erroneous assumption, namely, that once distributors have achieved the second stage of the transition and have thus become fully digital, they no longer face any capacity issues. In their submission, "this is simply not true for new entrants in the competitive distribution market." In fact, MTS Allstream et al. submitted that the Commission's "intent ... is problematic in that it unduly favours the incumbents, namely, the transitioning cable and DTH BDUs."
99. In this context, MTS Allstream et al. submitted that, unlike BDUs migrating from analog to digital distribution, fully digital BDUs have no subscribers that would be unable to receive the HD signals transmitted. Accordingly, duplicate distribution by fully digital BDUs would provide no added benefit to consumers or to the broadcast industry. According to MTS Allstream et al., duplicate distribution could, however, be harmful to new entrants in the second stage of the transition in light of capacity constraints. MTS Allstream et al. submitted that BDUs such as themselves should not be required to carry two virtually identical signals, and that duplicate carriage of HD signals should not apply to fully digital BDUs.

Commission's analysis and determinations

100. With regard to the submissions of the CCTA, the Commission does not agree that its proposed distribution requirements do not recognize market place realities, or that they inappropriately impose regulatory requirements on small systems. As discussed above, the Commission is imposing a requirement for distribution only with regard to services whose analog or SD counterparts already have "must-carry" status and that are obliged, by condition of licence, to offer specified minimum amounts of HD content. As to the question of the "priority" given to HD versions of existing pay and specialty services, the Commission considers its framework, as proposed and as adopted earlier in this document, to be consistent with the notion of HD as a replacement for today's analog and SD technology. The Commission also considers some level of support for these services, in the form of distribution requirements, appropriate in order to ensure that they attain sufficient penetration levels, within a reasonable period of time, to warrant the investment required of the providers of the services.
101. With regard to smaller systems, the Commission notes that, as discussed below, its proposal explicitly took into account both system size and system capacity. In particular, the framework proposed no requirements whatsoever with respect to very small systems with limited capacity, and provided flexibility to other small systems as to how they might meet any distribution requirements applicable to them, i.e., by distributing either SD or HD versions of pay and specialty services.

102. The Commission also notes that its proposed framework must be assessed in light of its determinations in Public Notice 2006-23. In Public Notice 2006-23, the Commission put in place a framework that will guide the migration to a digital distribution environment of those pay and specialty services that were approved under an analog licensing framework. Subject to certain packaging rules, the digital migration framework provides considerable flexibility for cable BDUs not affiliated with the four largest cable system operators (Rogers, Shaw, Videotron and Cogeco) to immediately migrate such services to full digital distribution, ceasing analog distribution entirely for these services. The public notice also established mechanisms whereby the four large cable system operators could cease analog distribution of such services on a tier-by-tier basis, provided, among other things, that at least 85% of subscribers to the tier have at least one set-top box in their homes and are receiving one or more programming services on a digital basis. These measures will permit cable BDUs to cease the distribution of analog services, and thereby harvest the capacity for the distribution of HD and other digital services.
103. As stated in Public Notice 2003-61, a BDU may submit an application requesting the Commission to permit it to cease the distribution of analog signals entirely, once 85% of the BDU's subscribers have the ability to receive digital services by means of digital television receivers or set-top boxes. It is only at this stage of the transition that the distribution obligations proposed in Public Notice 2004-58 would no longer take capacity limitations into account.
104. Finally, with regard to the submissions referring to the particular capacity concerns of fully interconnected systems and of new entrants such as MTS Allstream et al., the Commission notes that any BDU that is unable to meet the distribution requirements established in this public notice has the option of applying to the Commission for relief from those requirements, bearing the onus of persuading the Commission that such relief is warranted. In light of the public interest in encouraging the distribution of HD services, the Commission considers it appropriate that individual BDUs bear that onus.
105. Therefore, in light of all of the above, the Commission adopts the distribution requirements as proposed in Public Notice 2004-58. For greater clarity, the Commission reiterates that requirements to distribute HD services that are licensed with conditions requiring them to meet the requisite minimum HD content levels are subject to available channel capacity during the first stage of the transition, i.e., when services are distributed in both analog and digital form. In this regard, the Regulations state as follows:

“available channel” means any unrestricted channel of a distribution undertaking in a licensed area, other than a channel on which is distributed

- (a) the programming service of a licensed programming undertaking other than a video-on-demand programming undertaking;

(b) community programming;

(c) the House of Commons programming service; or

(d) a programming service consisting of the proceedings of the legislature in which the licensed area is located.¹²

106. The Commission also notes that section 18(6) of the Regulations currently states as follows:

(6) if a licensee is distributing a pay-per-view service in a licensed area on more than 10 analog channels, the Commission may declare one or more channels in the licensed area to be available channels for the purposes of subsection (5).¹³

107. Given the greater amount of bandwidth required by HD services, the Commission reduces the number of channels used by a multiplexed HD pay-per-view television service that are guaranteed¹⁴ distribution from ten to three, as proposed in Public Notice 2004-58. In response to the concerns expressed by the CCTA, the Commission notes that this will not preclude larger HD multiplexes. However, such distribution will be subject to negotiations and contingent upon the availability of sufficient capacity.

108. Once all analog services are removed from its system, and a distributor moves on to the second stage of the transition, the obligation for BDUs to distribute pay and specialty services licensed with conditions requiring them to meet the specified minimum HD levels will no longer be “subject to available channels”.¹⁵

109. With regard to ethnic services distributed pursuant to section 18(5)(c) of the Regulations, the current distribution requirements will apply to the HD versions of these services, provided that they have obtained HD-transitional licences with conditions of licence requiring the minimum HD content level for such services, set out earlier. As with other HD-transitional services required by condition of licence to meet these thresholds, the current access right (“to the extent of available channels”) will be replaced by a “must-carry” right, with respect to those systems that have dropped their analog services.

¹² See section 1 of the Regulations.

¹³ Section 18(5) of the Regulations sets out the obligations of Class 1 licensees with regard to the distribution of pay and specialty services.

¹⁴ Channels beyond the specified limit would be considered ‘available’ for the purposes of the Regulations.

¹⁵ In this regard, the Commission notes that the Regulations prescribe certain services that a BDU generally must carry. By way of example, with respect to Class 1 and Class 2 BDUs, these services are set in sections 17 and 18. In addition, the Regulations authorize, but do not require, the distribution of certain other services. With respect to Class 1 and Class 2 licensees, for example, these services are listed in section 19 of the Regulations, which lists services a licensee “may distribute in the licensed area”, provided that the licensee “satisfies the requirements of sections 17 and 18”.

110. The Commission also notes that the Regulations currently impose certain obligations for BDUs to distribute pay and specialty services in the official language of the minority. Most notably, section 18(11.1) obliges Class 1 and Class 2 systems with at least 750 MHz of capacity and using digital technology to distribute all English- and French-language specialty services, other than Category 2 services. As proposed in Public Notice 2004-58, this obligation will continue to apply with respect to HD-transitional services required by condition of licence to meet the HD content thresholds set out earlier. In addition, for the purpose of calculating the ratio of majority-language to minority-language services that a BDU distributes, as prescribed in section 18(11.2) of the Regulations or in the applicable exemption order, where a BDU distributes either an analog or an SD version of a particular service, as well as an upgraded version of the service, the two versions will be counted as one service.
111. With regard to the submissions of Star Choice, as noted above, the Commission intends to initiate a further proceeding to finalize the obligations of DTH undertakings with regard to the distribution of HD services, and deal with any issues that may arise concerning the distribution of HD signals by their related satellite relay distribution undertakings. As an interim measure, pending completion of that proceeding, the Commission will require DTH undertakings to provide access to all HD-transitional licensees that are subject to conditions of licence requiring them to meet the specified minimum levels of HD content, excluding Category 2 services. The Commission considers that, pending completion of the further proceeding, they should be in a position to meet this requirement.
112. With respect to MDS licensees, the distribution of HD-transitional services will be governed by specific conditions of licence that take into account the limited bandwidth available to these licensees. Such distribution will be addressed on a system-by-system basis, as MDS licences come up for renewal.
113. The Commission's proposed framework did not include any distribution obligations with respect to non-interconnected Class 3 systems having a nominal bandwidth of less than 550 MHz or that do not deliver programming on a digital basis. The Commission will not at this time impose any such obligations.

Projected capacity demands

114. In Public Notice 2004-58, the Commission considered that, once pay and specialty licensees have developed their immediate and long-term plans for the launch of HD services, these plans should be conveyed to distributors so that they, in turn, can plan for the distribution of such services. The Commission noted that this information could be provided on a confidential basis.
115. There was little mention of this proposal in the comments received, other than in those filed by CTV. CTV submitted that requiring a broadcaster to disclose its launch plans for HD services to a distributor, even on a confidential basis, could potentially place the broadcaster at a significant competitive disadvantage.

116. Having considered CTV's concern, the Commission notes that, although the programming services compete with each other in an overall sense for viewers and advertisers, the analog and Category 1 specialty services have generally been licensed on a one-per-genre basis, and are therefore not subject to direct competition from other services operating in the same genre.
117. The Commission remains of the view that pay and specialty programmers should provide distributors with notice of capacity demands related to their provision of HD programming, regardless of whether that programming is authorized in a new HD-transitional licence or by way of an amendment to an existing licence. As proposed in Public Notice 2004-58, this notice can be provided on a confidential basis. In addition, the Commission would consider it acceptable for programmers to provide immediate and longer-term estimates of capacity demands on an aggregate basis, for example, by ownership group or through their industry association.

Technical quality

Commission's proposal

118. In Public Notice 2004-58, the Commission stated that, as a general principle, program providers and program distributors should bear equal responsibility for the technical quality of the programming that is delivered to viewers through the distribution chain, beginning with the production of programming in HD and ending with its display on HD sets.
119. In Public Notice 2004-58, the Commission reiterated that, while technology is evolving, for the purposes of transmission and distribution, the term "high definition" would encompass both the 720p and 1080i picture formats, as defined by the Advanced Television Systems Committee in its A/53 digital television standard.¹⁶
120. In addition, the term "high definition" was clarified to exclude certain methods of reformatting video images, such as line doubling of SD images and the use of algorithms that stretch a 4:3 picture to fill a 16:9 screen. The Commission also considered that pay and specialty services providers, like over-the-air broadcasters, should ensure that the transmission of ancillary data accompanying their programming does not decrease the quality or quantity of HD programming.¹⁷
121. The Commission added that HD picture formats do not, by themselves, guarantee the highest picture quality. For example, the digital compression of a signal may not change the format (i.e., the number of lines), but if taken too far, may introduce picture degradation that could result in disappointment to viewers who have purchased

¹⁶ As originally stated in Public Notice 2003-61.

¹⁷ Paragraph 34 of Public Notice 2002-31 stated in part: "The Commission will expect broadcasters to ensure that the transmission of data does not affect the quality or quantity of DTV programming broadcast to viewers, and more specifically, that it does not supplant or impair the delivery of HDTV programming when it is available."

expensive HD receivers and displays. In this regard, the Commission considered that the program signals of pay and specialty services distributed by a BDU should be of the same quality and in the same format as those received by it, without any degradation.

Positions of parties

122. Bell Canada opposed the policy proposal, stating that “the Commission should let the consumer marketplace, and not the regulator, be the ultimate judge of the quality of a BDU’s delivery platform.”
123. MTS Allstream et al. fully supported the Commission’s objective of ensuring that consumers benefit from the full effect of HD television. However, they noted that standards are constantly evolving and submitted that, as they do, BDUs should have some say in how the signals are transmitted. MTS Allstream et al. noted that the most significant developments in distribution capacity will be made through compression technology. In their view, by leaving technical quality entirely at the programming undertaking’s option, the Commission could be unduly hampering innovation respecting compression technology. They therefore submitted that, in keeping with market-driven principles, the quality of program signals should be negotiated between program providers and distributors. MTS Allstream et al. added that this would most successfully serve the best interests of the consumer.
124. Alliance Atlantis supported the Commission’s proposal, stating that:

[In] the present digital environment, compression ratios have in some cases been altered to such an extent that the quality of the product being seen by our customers is substantially degraded. Given that the attraction of HDTV for consumers is the superior picture and sound quality, we agree it is imperative that all players ensure that the best quality product reach the homes of consumers.
125. None of the parties objected to the Commission’s clarification of the definition of the term “high definition” to exclude certain methods of reformatting video images.

Commission’s analysis and determinations

126. Signal quality is a matter of concern to viewers, particularly those who have spent significant sums to upgrade their television displays/receivers in order to enjoy the full video and audio benefits of the new HD technology. Signal quality is likewise a matter of concern to programmers. From a programmer’s point of view, it makes little sense to upgrade facilities and bear the expense of producing programming in HD, only to see the quality of the picture degraded in the distribution chain.
127. It is also in the best interest of BDUs to ensure that their subscribers receive the full benefits of HD technology. At the same time, it must also be acknowledged that meeting technical quality standards can have significant cost and capacity implications for certain distributors.

128. Bell Canada and MTS Allstream et al. suggested that technical standards are unnecessary, as the marketplace will be the ultimate judge of what quality standard is adopted. However, as discussed earlier, the Canadian marketplace is characterized by a small number of key distributors, with the result that pay and specialty services do not have the option of withholding their programming services from distributors who do not maintain adequate signal quality. Likewise, there are viewers who are reliant on a particular distribution platform to receive their video and audio programming services, for example, those in remote areas served only by DTH.
129. For these reasons, the Commission will impose the same quality standards for the distribution of the pay and specialty services as it did for the distribution of the over-the-air services, as proposed in Public Notice 2004-58. Specifically:
- for the purposes of the framework set out in this public notice, the term “high definition” will encompass both the 720p and 1080i picture formats, as defined by the Advanced Television Systems Committee in its A/53 digital television standard;
 - low definition images subjected to line-doubling techniques or algorithms that stretch a 4:3 picture to fill a 16:9 screen will not be considered to be HD for the purposes of this framework; and
 - the program signals of pay and specialty services distributed by a BDU must be of the same quality and in the same format as those received by it, without any degradation.
130. The Commission will also require pay and specialty services to ensure, just as those holding over-the-air transitional digital television licences are required to ensure, that the transmission of ancillary data accompanying their programming does not decrease the quality or quantity of HD programming.

Simultaneous substitution

131. Under section 30 of the current Regulations, specialty services may request that Class 1 and Class 2 BDUs perform simultaneous substitution, and the BDU is authorized, but not required, to perform the substitution. Requirements applicable to the DTH BDUs are set out in section 42 of the Regulations and in the DTH licensees’ conditions of licence.
132. At paragraph 101 of Public Notice 2004-58, the Commission proposed to require that the signal quality of the service making the substitution request must be the same as or higher than the quality of the signal to be replaced, in cases where BDUs are asked to carry out simultaneous substitution of the signals of specialty services.

133. There were no objections to this proposal. Further, simultaneous substitution is not currently a major issue for specialty services as it occurs only rarely. The Commission therefore adopts the proposal as it was set out in Public Notice 2004-58.

Non-Canadian services

Commission's proposal

134. In Public Notice 2003-61, the Commission determined that a BDU's authority to distribute an analog or SD digital version of a non-Canadian service would also include the authority to distribute the HD version of that service, provided that not less than 95% of the video and audio components of the two versions were the same, exclusive of commercial messages and of any part of the service carried on a subsidiary signal. The Commission indicated in Public Notice 2003-61 that it would review that determination in the present proceeding.
135. In Public Notice 2004-58, the Commission proposed that, like licensed Canadian pay and specialty services, non-Canadian services be permitted to offer a maximum of 14 hours per week of programming that is not duplicated on their counterpart analog or SD versions, without requiring Canadian sponsors to seek authorization for distribution of the HD versions.
136. The Commission also proposed in Public Notice 2004-58 to follow its current practices when considering requests to add new non-Canadian HD services to the Lists of Eligible Satellite Services (the lists), thus authorizing their distribution in Canada. That is, the competitive aspects of any new non-Canadian HD service, including those related to its being offered in HD format, would be addressed at the time the request to add the service to the lists was considered.

Positions of parties

137. The CAB opposed the proposal to grant non-Canadian services the same 14-hour unduplicated program allowance as Canadian services, arguing that it could create an effective change of format for the programming service, would achieve no public policy objective and would be potentially damaging to Canadian programming services. The CAB and some programmers suggested that the distribution of a non-Canadian service offering any amount of HD programming, whether unduplicated or not, should require a separate authorization through an appropriate process.
138. Distributors agreed with the Commission's preliminary view that the entry of non-Canadian HD services, whether new services or upgraded versions of existing services, could provide an incentive for Canadian pay and specialty services to upgrade their analog and SD services to HD. However, not all distributors agreed with the Commission's proposal that it consider authorizing the distribution of new non-Canadian HD services based on its existing criteria.

139. Star Choice, for example, submitted that there should be no restrictions on additions of new non-Canadian HD services to the lists. In its view, “choice is the most effective means by which Canadian viewers’ loyalty to the Canadian broadcasting system can be maintained.” It also considered competition to be the most effective means to provide an incentive to Canadian programmers to upgrade their services.
140. Shaw similarly submitted that, in an HD environment, the current practices used to consider requests to add new non-Canadian HD services to the lists should be eliminated.
141. MTS Allstream et al. submitted that the Commission should relax the current test in order to support greater consumer take-up of HD. In their view, the Commission should encourage HD regardless of source and thus facilitate the addition of HD signals to the lists. It contended that this competitive approach would be most in tune with the Act’s objective of providing the Canadian public with a diversity of programming options and would have the effect of spurring the transition for Canadian services.
142. The CCTA submitted that requests for authorizations to distribute non-Canadian HD services should be dealt with by the Commission on a streamlined and expedited basis, within 60 days of their receipt.
143. Bell Canada noted that, in response to *Call for comments on a request by the CCTA for the addition of HD Net and Discovery HD Theater to the lists of satellite services eligible for distribution on a digital basis*, Broadcasting Public Notice CRTC 2004-61, 10 August 2004, it had urged the Commission to defer the authorization of Discovery HD Theater for a short time to give The Discovery Channel an opportunity to upgrade its service and acquire the HD programming rights for Canada. Bell Canada urged the Commission to take a similar approach with each application to add a non-Canadian HD service.
144. Programmers generally accepted the Commission’s proposal that it apply its existing criteria to requests for the addition of new non-Canadian HD services to the lists. CTV, however, submitted that the Commission “should not establish an HD Framework based on the impact analysis of the Canadian HD universe as it currently stands.” In this regard, CTV submitted that the Commission “should not put public policies in place today, or approve the entry of non-Canadian HD services, that will have a significant impact on Canadian broadcasters in the future, when there is a critical mass of Canadian viewers with digital receivers.” CTV submitted that the addition to the lists of new non-Canadian HD services should be considered based on the Commission’s current test, applied on a “technologically neutral basis”, and subject to a number of “safeguards”. Among other things, CTV submitted that BDUs should not be permitted to add new non-Canadian HD services until they have dropped their analog services. Further, CTV suggested that, before being authorized for distribution in Canada, a non-Canadian

service should be required to demonstrate that it has used its best efforts to partner with a Canadian service or that it is not appropriate to so partner. CTV also suggested that there be a review of all non-Canadian services every seven years, unless there is a complaint in the interim, to ensure that they are in compliance with Commission policy.

145. Finally, CTV submitted that non-Canadian HD services should be required to meet certain benchmarks with respect to HD content. In particular, it proposed that they be obliged to offer a minimum 25% HD content during prime time, ramping up to 50% by year six.

Commission's analysis and determinations

146. With regard to services already on the lists, the Commission notes that adoption of the suggestion that distribution of HD versions require a separate authorization would entail a further process in order to authorize the distribution of any service that added any amount of HD programming, no matter how minimal. In the Commission's view, such a further regulatory process is unnecessary. The Commission notes that a non-Canadian service already on the lists, and thus authorized for distribution in Canada, has already been the subject of a regulatory process involving its assessment against the Commission's established criteria. With regard to the appropriate level of unduplicated programming, as with Canadian services, the Commission considers that a 14-hour allowance for unduplicated programming in the HD version of a non-Canadian service should prove low enough to prevent the format of the HD service from diverging from that of its analog or SD version. Nevertheless, should a complaint be received that the HD version of an existing authorized service had changed so as to become, in effect, a different service, the Commission could consider no longer permitting the distribution of that HD version in Canada.
147. With respect to the addition of new HD services to the lists, the Commission notes that, recently, it has authorized new non-Canadian services for digital distribution only. The Commission is not persuaded that its approach to the addition of new non-Canadian HD services should differ substantially from its current approach to the addition of SD digital services. Accordingly, the Commission will apply its current tests, as set out in the following documents, as may be updated or amended in the future:
- with respect to third-language non-Canadian services, in *Improving the diversity of third-language television services*, Broadcasting Public Notice CRTC 2004-96, 16 December 2004 (Public Notice 2004-96); and
 - with respect to other non-Canadian services, in *Call for proposals to amend the lists of eligible satellite services through the inclusion of additional non-Canadian services eligible for distribution on a digital basis only*, Public Notice CRTC 2000-173, 14 December 2000, and in *Revised lists of eligible satellite services*, Broadcasting Public Notice CRTC 2004-52, 15 July 2004.

148. With regard to the first of the above bullets, the Commission notes that, at paragraph 57 of Public Notice 2004-96, it stated the following with respect to non-Canadian, third-language, general interest services added to the digital lists after 16 December 2004:

To address the concern that the addition of a non-Canadian, general interest, third-language service may have a negative impact on any of the analog services or on any Category 2 service operating in the same language or languages, the Commission will adopt new distribution and linkage requirements for these services. In light of the more substantial requirements imposed on the analog services, specifically their Canadian programming spending obligations, and their greater obligations for the exhibition of Canadian content relative to those required of ethnic Category 2 services, the Commission will impose, where relevant, a requirement for a buy-through of the analog services operating in the same language. To help to foster licensed, general interest, third-language ethnic Category 2 services, the Commission will also impose, where relevant, a must-offer requirement....

149. The Commission is of the view that it is equally desirable to offset the possible negative impact that may result from the addition of non-Canadian third-language general interest HD services to the lists. Accordingly, the Commission will apply the rules introduced in Public Notice 2004-96 to the HD versions of non-Canadian services added to the digital lists after 16 December 2004. That is, where a BDU wishes to distribute the HD version of such a general interest non-Canadian service that offers 40% or more of its programming in any of the Cantonese, Mandarin, Italian, Spanish, Greek or Hindi languages, that non-Canadian HD service may only be distributed to customers who also subscribe to the corresponding licensed Canadian ethnic service, whether in analog, SD or HD.
150. Similarly, the offering of HD versions of non-Canadian, third-language, general interest services added to the digital lists after 16 December 2004 will require that the BDU also offer at least one general interest, Category 2 service in the same principal language, whether in analog, SD or HD, provided that such a service has been launched.
151. With regard to the second bullet under paragraph 147 above, in accordance with the competitiveness test applicable to services other than non-Canadian, third-language, general-interest services, the Commission will consider any competitive issues related to the technical format of any proposed new non-Canadian HD service at the time the request to add the service to the lists is considered.
152. With regard to the CCTA's suggestion that the processing of requests to add new non-Canadian HD services to the lists of eligible HD services be accelerated, the Commission sees no reason why this class of request should be treated differently from other requests for the addition of services to the lists.

Preponderance

Commission's proposal

153. In Public Notice 2004-58, the Commission noted that section 6(2) of the Regulations provides that a licensee shall ensure “that a majority of the video and audio channels received by a subscriber are devoted to the distribution of Canadian programming services” The Commission proposed that this provision continue, and that, for this purpose, each HD-transitional licensed service would count as a separate service. This would also be true for upgraded versions of non-Canadian services.

Positions of parties

154. There was general support across the industry for maintaining a Canadian preponderance requirement, although there was some discussion of the details by certain distributors. Rather than the current approach under which the preponderance rule is applied at the level of the subscriber, Shaw and Star Choice suggested that it be applied at the level of the distributor. That is, the preponderance rule should be modified to specify that a majority of the ‘shelf space’ on a distribution system must be assigned to Canadian programming services, with consumers having the ability to select, without restriction, the specific services that they want to receive.
155. The CAB supported maintaining the requirements for the overall predominance of Canadian vs. non-Canadian services, but added that the predominance provision should distinguish between SD and HD services; that is, the Commission should require a predominance of Canadian vs. non-Canadian SD services, and a predominance of Canadian vs. non-Canadian HD services.

Commission's analysis and determinations

156. In the opinion of the Commission, many of the limitations of a market-based distribution regime, discussed above, would apply to Shaw's preponderance proposal, as well. In particular, although services would still be available to subscribers across distribution platforms, the proposal could have unduly negative consequences for the revenue bases of some discretionary services and their respective abilities to provide quality Canadian programming.
157. With regard to the CAB's suggestion, the Commission does not consider it necessary to apply a predominance rule separately to SD and HD programming. The Commission further considers that it could unduly limit the number of non-Canadian HD signals distributed in Canada, thereby creating a disincentive for viewers to invest in HD sets and set-top boxes and for programmers to make the commitments necessary to obtain an HD-transitional licence.
158. In light of the above, the Commission adopts the preponderance rule as proposed in Public Notice 2004-58.

159. As noted in Public Notice 2003-61, the Commission will amend section 6(2) of the Regulations “to make it clear, in respect of digital technology, that the upgraded versions of Canadian and non-Canadian services are counted as distinct services when determining if the majority of video services received by a subscriber are Canadian.”

Distribution and linkage

Commission’s proposal

160. With regard to distribution and linkage, the Commission proposed to adopt a less restrictive set of rules for HD-transitional pay and specialty services. Specifically, the Commission considered that rules similar to those currently applicable to DTH BDUs would be appropriate for all larger BDUs. The key change proposed involved the dual and modified dual status provisions that currently apply to Class 1 cable BDUs, but not to DTH BDUs. Under the proposed framework, these provisions would not be carried forward for HD services distributed by cable BDUs.
161. In particular, the Commission proposed to apply the following distribution and linkage rules to DTH BDUs, as well as to Class 1 and Class 2 BDUs, in both the first and second stages of the transition, when offering HD services:
- A Canadian HD-transitional pay television service may be linked in a given discretionary package with no more than five non-Canadian services, or their upgraded versions, specified in Appendix A of the List of Eligible Satellite Services. In no case may a licensee distribute more than five non-Canadian programming services linked with Canadian pay television services, regardless of the number of Canadian pay television services distributed by the licensee.
 - Each Canadian HD-transitional specialty service, distributed within a discretionary package that may include one or more Canadian specialty and/or pay television services, may be linked with no more than one of the non-Canadian services, or its upgraded version, specified in Appendix A of the List of Eligible Satellite Services, excepting Section B of that Appendix.
 - A licensee may designate one of the U.S. superstations, or its upgraded version, specified in Section B of Appendix A of the list of eligible satellite services and distribute the signal of that superstation with a given discretionary package that may include one or more Canadian HD-transitional specialty and/or pay television services.
162. Further, the Commission proposed that a BDU licensee not be permitted to offer a package of services containing only non-Canadian HD services, with the following two exceptions:

- Any Canadian single or limited point-of-view religious programming service, and any non-Canadian religious satellite service set out in the List of Eligible Satellite Services, may be offered on a stand-alone digital discretionary basis. Such services may also be offered in a package with other Canadian single or limited point-of-view religious satellite services. Distributors are not permitted to offer such services in packages with any balanced religious service or with any other type of Canadian or non-Canadian programming service.
- BDU licensees are not permitted to package an adult programming service in such a way that subscribers are obliged to purchase the service in order to purchase any other programming service, unless it is also an adult programming service. Licensees are required to take measures to fully block the reception of both the audio and video portions of any adult programming service to subscribers who request that it not be receivable in their home (in either unscrambled or scrambled mode).

163. The Commission further proposed that none of the other rules set out in the distribution and linkage requirements then applicable to Class 1 and Class 2 licensees and to DTH distribution undertakings be carried forward to HD services. Specifically, the Commission indicated that provisions set out in *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2004-56, 29 July 2004, and in *Linkage requirements for direct-to-home (DTH) satellite distribution undertakings*, Public Notice CRTC 2001-89, 3 August 2001, related to the following would no longer apply:
- the distribution of Canal Z, Séries+, Canal Évasion, and ARTV by Class 1 licensees in Francophone markets;
 - the distribution of TV Food Network and Food Network Canada;
 - the distribution of certain services solely as discretionary services; and
 - prohibitions on the linking of services on the list of Part 2 eligible satellite services or the list of DTH eligible satellite services with a Canadian specialty service distributed on the basic service.
164. Under the proposed framework, the reduced distribution and linkage regime currently in force for small cable BDUs and exempt systems would also apply to HD services carried on such systems.
165. Finally, the Commission invited comment on whether it should be permissible to link non-Canadian HD services only with Canadian HD services or whether SD services could also be included. Further, if the linkage of non-Canadian HD services was to be restricted, parties were asked to comment on how non-Canadian HD services should be designated for the purposes of the rules.

Positions of parties

166. Programmers generally considered that the current linkage rules should be continued in the digital environment. The CAB suggested that the dual status provisions should not only be maintained for cable undertakings, but should also be imposed on DTH undertakings.
167. CTV proposed that all Canadian HD services be packaged with all non-Canadian HD services in one large HD package, unless the Canadian programmer consents to a different packaging. In addition, CTV stated that a BDU should not be permitted to offer the HD version of a Canadian specialty service to a customer unless the customer first subscribes to the package containing the SD version of the service. A number of discretionary services suggested that HD services should be linked only with other Canadian and non-Canadian HD services.
168. In the context of the digital migration generally, the programmers opposed or expressed concerns about stand-alone distribution of their programming services.
169. Astral submitted that, for the French-language market, the framework should emphasize the importance of maintaining large discretionary packages. In its view, a move to lower penetration packages or à la carte distribution would have negative consequences. Astral also stated that the burden of proof should rest with a BDU to demonstrate that a given package in a digital environment does not constitute an undue preference or an undue disadvantage.
170. By contrast, the CCTA recommended that the distribution and linkage rules be eliminated entirely and replaced with a simple requirement for an overall preponderance of Canadian services, regardless of signal format. In the CCTA's view, the creation of "must-buy" status for certain so-called "essential" services that offer HD content would be premature in several respects. The CCTA also emphasized its position that any carriage requirements should apply equally to both cable and DTH BDUs.
171. QMI supported the elimination of the dual status provisions. It also suggested that it should be permissible to link HD services with either HD or SD services. Bell Canada and MTS Allstream et al. agreed with this position, remarking that the Commission should not use the new HD transition policy as an opportunity to expand the existing linkage obligations. In particular, they submitted that Section C of the lists of Part 2 eligible satellite services should not be made subject to the 1:1 linkage requirement, as it would be disruptive to subscribers and a burden on BDUs that have relied on the current framework to build their service offerings. Bell Canada added that the distinction between Section A and Section B of the lists should be eliminated.

Commission's analysis and determinations

The applicable rules

172. As noted earlier, in a market-driven transition having no fixed deadline, each pay and specialty service will make the transition to HD at its own individual pace. It will not be possible for distributors to replicate their existing analog tiers in HD until the very end of the transition period, if then, because each individual analog and SD service making up those tiers will upgrade in accordance with its own schedule.
173. On a more specific level, the Commission notes that, at paragraph 99 of Public Notice 2006-23, it determined that the dual status and modified dual status provisions would generally cease to apply to the digital distribution of specialty services on 1 September 2007, eighteen months from the date of that public notice.¹⁸ In so determining, the Commission found that such designations had likely served their purpose. The Commission found further that the existing designations do not necessarily reflect current priorities and may create competitive inequities between older specialty services and those services that have been licensed more recently, including Category 1 services.
174. In addition to the above, in a transition that most parties agreed should be market driven, the Commission is of the view that the demands and expectations of the marketplace and the consumer should be given more rein. More specifically, the Commission considers that to preserve the distinctions that currently exist between cable and satellite undertakings with regard to the applicability of requirements for the distribution of dual and modified dual status programming services, and to retain the designation of programming services as having such status, would not be appropriate or justified in an HD environment. Accordingly, such designations will not apply with respect to the distribution of HD services, whether authorized by new HD-transitional licences or by amendments to existing licences.
175. For similar reasons, the Commission considers it unnecessary and inappropriate to retain distribution and linkage rules such as those noted in paragraph 163 above. Accordingly, such rules, including rules related to the packaging of French-language services and the fees to be paid to providers of such services, will not apply with respect to the distribution of HD versions of such services, whether authorized by new HD-transitional licences or by amendments to existing licences.
176. The Commission will, however, retain certain other rules with respect to distribution and linkage. In particular, the Commission will impose a general prohibition on discretionary packages containing only non-Canadian services, with the exceptions noted at paragraph 162 above with regard to single or limited-point-of-view religious services and adult programming services. Consistent with Public Notice 2006-23, the Commission will require that BDUs offer each HD-transitional specialty service as part of a package before it can be distributed on a stand-alone or "pick-a-pack" basis.

¹⁸ Dual and modified dual status provisions will continue to apply to the distribution of these services on an analog basis.

177. In addition, the Commission will extend the 1:1 and 1:5 ratios that currently apply to the linking of Canadian specialty and pay services, respectively, with services on sections A and B of the lists. That is, these ratios will now apply to the linkage of Canadian services with non-Canadian services on the digital lists, with the exception of third-language non-Canadian services. For third-language non-Canadian services, the general prohibition on packages consisting totally of non-Canadian services will apply, in addition to the “buy-through” and “must-offer” requirements set out in paragraphs 149 and 150 above, dealing with non-Canadian services.
178. The Commission will also retain the provision that prohibits BDU licensees from packaging an adult programming service in such a way that subscribers are obliged to purchase the service in order to purchase any other programming service, unless it is also an adult programming service. Further, BDUs will continue to be required to take measures to fully block the reception of both the audio and video portions of any adult programming service to subscribers who request that the service not be receivable in their home (in either unscrambled or scrambled mode).
179. As noted above, in Public Notice 2004-58, the Commission requested comment on whether it should be permissible to link non-Canadian HD services only with Canadian HD services or whether SD services could also be included.
180. The Commission notes that any concern relating to this particular matter will diminish with time, as more and more services offer more and more HD content. The Commission also considers that, given that programming services will likely convert to HD on their own timetables, it would be unduly restrictive to require that HD services be linked only with HD services, and SD services only with SD services. Accordingly, the Commission has decided not to prescribe linkage rules based on technical format. Distributors will therefore be free to package Canadian HD services with either HD or SD Canadian and non-Canadian services, provided the above linkage requirements are respected.

Exceptions

181. In Public Notice 2006-23, the Commission noted that, given its determination to drop dual and modified dual status designations in the digital environment, it was appropriate that the Commission further consider the composition of the basic service in that environment. In addition to the services that must be distributed as part of the basic service by virtue of the Regulations and orders issued pursuant to section 9(1)(h) of the Act, the Commission noted that certain SD specialty services may also warrant distribution as part of the digital basic service. The Commission stated that it would entertain, pursuant to section 9(1)(h) of the Act, applications for such distribution status, on an exceptional basis. The Commission set out the criteria it would expect applicants to meet in order to be granted distribution as part of the basic service.
182. The Commission notes that there may be HD specialty services that also warrant distribution as part of the digital basic service. It is open to the Commission to grant requests for basic distribution status to any such service, pursuant to section 9(1)(h) of

the Act. In doing so, the Commission will be informed by the objectives for the basic service set out at paragraph 106 of Public Notice 2006-23, and will require the applicant to demonstrate that it meets the criteria set out at paragraph 108 of that public notice.

Channel position

183. In Public Notice 2004-58, the Commission proposed that, except as provided in its proposed distribution and linkage requirements, the positions of HD-transitional pay and specialty services in distributor's channel line-ups would not be subject to regulation.
184. CTV stated the view that "the predominance of Canadian programming services could best be achieved via favourable channel positions," but acknowledged that the Commission's proposal was consistent with current Commission practice. APTN submitted that, in a wholly digital environment, the grouping of basic services, "and their placement together at the digital equivalent of the basic band," would be a logical migration of carriage principles from an analog to a digital environment. Further, to the extent that HD channels are meant to serve as replacements for existing analog channels, it would make sense that the principles that historically governed the placement of analog basic channels should also govern the placement of HD channels.
185. The Commission considers channel placement to be of reduced relevance in a digital environment. The Commission therefore adopts the proposal set out in Public Notice 2004-58.

Wholesale rates

Commission's proposal

186. In Public Notice 2004-58, the Commission proposed to step back from wholesale rate regulation. That is, the Commission proposed that the wholesale fees for the HD-transitional services be set by negotiations between the parties.

Positions of parties

187. The CAB proposed that the Commission continue to regulate the wholesale fees of specialty services granted digital dual status and modified dual status, after the transition to HD is complete. However, the CAB suggested that, during the transition itself, any separate fee for HD versions of such services should not be regulated by the Commission. Rather, this fee should be negotiated with each BDU, taking into account the increased value to subscribers of an HD version of a service. In addition, the CAB recommended that the Commission be prepared to entertain an application from the licensee of a dual status or modified dual status specialty service to increase its regulated wholesale fee in recognition of the increased capital and operating costs of producing, acquiring and/or delivering the content of its HD-transitional service.

188. The CBC stated that the transition to digital does not necessarily compel the abandonment of regulated wholesale rates. Pelmorex and Alliance Atlantis also supported the retention of regulated wholesale rates. However, Alliance Atlantis went on to state that it “strongly believes that no regulated fee should be charged for merely an upgraded version of an existing service to which the consumer already subscribes.”
189. For their part, the distributors favoured the setting of wholesale fees by negotiation. QMI added that there should be no separate fee for the HD version of a service: [TRANSLATION] “From our perspective, the existence of a supplementary fee for the HD version of a specialty service would seem offensive.”

Commission’s analysis and determinations

190. Having considered the comments received, the Commission remains of the view that wholesale rates for HD services are generally best left to negotiations between the parties. Among other things, the Commission considers this approach to be most consistent with a transition to HD that is market-driven, and with the elimination of the status provisions of the distribution and linkage requirements. The Commission also notes that the majority of BDUs are rate deregulated, even for basic services. Therefore, the Commission’s establishment of wholesale rates would have only an indirect impact on retail rates charged to the consumer.
191. Nonetheless, the Commission considers it appropriate for it to specify that, for any HD specialty service that it mandates for basic distribution under section 9(1)(h) of the Act, the current wholesale rate for the basic distribution of the corresponding analog or SD digital service will apply to the HD version, unless the service applies for and is granted a different rate.
192. HD services applying for distribution as part of the basic service pursuant to section 9(1)(h) of the Act, and which are seeking a wholesale rate that differs from the corresponding analog or SD rate, will be expected to provide full supporting information to permit the Commission to establish an appropriate rate. In particular, the Commission will expect such applicants to provide a full rationale for their requested wholesale rate, including underlying assumptions, the incremental costs of the HD transitional service, the estimated incremental revenues that the proposed rate would generate, and the estimated return on investment.
193. As discretionary wholesale rates will not be set by the Commission, situations may arise where programming services that are guaranteed distribution are unable to come to terms with distributors. The Commission notes in this regard that, in *Good commercial practices*, Broadcasting Public Notice CRTC 2005-35, 18 April 2005, the Commission reiterated its view that commercial arrangements between BDU operators and programmers are matters best determined by negotiations between the parties, without its intervention, and that, while there may be circumstances where the Commission determines that it must intervene in the public interest, it expects that this would occur only in exceptional cases, for example, when the attainment of the objectives set out in

the Act could be compromised. With regard to this last point, the Commission added that evidence of substantial harm caused to a licensed programming service would, in the Commission's view, be a pertinent factor in making such a determination.

194. In the Commission's view, the cost of the transition to HD is a cost of doing business for both distributors and programmers. Therefore, in the event of a dispute (that is, one in which the Commission finds it appropriate to intervene), both distributors and programmers will be expected to provide full supporting information, including the relevant incremental costs and revenues associated with the HD version of the service concerned, the existing wholesale and retail rates for the analog or SD version (or the retail rates of the relevant package), the recent actual return on investment for the analog or SD version, and the estimated return on investment for the HD version, at the rate proposed by the party.

The pace of the transition to digital and HD

195. As the Commission stated earlier in this notice, the slow pace of the Canadian transition to HD relative to that of the U.S. is a matter of growing comment and concern, both with respect to over-the-air services and pay and specialty services. Further, the gap between Canada and the U.S. is widening as the U.S. digital roll out gains momentum. The production of HD programming is also much greater in the U.S. than in Canada. In the Commission's view, if the gap continues to widen, it will take its toll on the Canadian broadcasting system, and audiences for all Canadian services will be affected. Given the consequences for the Canadian broadcasting system, the Commission expects the broadcast industry to pick up the pace of its transition.
196. The policy frameworks set out in Public Notices 2002-31 and 2003-61 contain regulatory incentives for broadcasters to undertake the transition to HD. With regard to pay and specialty services, the framework set out in the preceding paragraphs provides similar regulatory incentives, as well as a number of new ones. The Commission considers that these incentives, together with potential further audience losses to non-Canadian services, should stimulate the industry to accelerate the transition to HD. As noted earlier, should this prove not to be the case, the Commission would be prepared to consider further measures to ensure that the objectives of the Act, as well as the Commission's principles and objectives for the transition to digital and HD broadcasting, are accomplished.

Secretary General

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