Broadcasting Public Notice CRTC 2005-61

Ottawa, 16 June 2005

Introduction to Broadcasting Decisions CRTC 2005-246 to 2005-248: Licensing of new satellite and terrestrial subscription radio undertakings

This public notice serves as an introduction to Broadcasting Decisions CRTC 2005-246 to 2005-248 of today's date in which the Commission approves, subject to certain conditions of licence, applications by Canadian Satellite Radio Inc. (CSR), SIRIUS Canada Inc. (Sirius Canada), and CHUM Limited, on behalf of a corporation or a partnership to be established (CHUM/Astral), for licences to operate new radio undertakings that will each provide a package of radio channels to subscribers for a monthly fee.

The programming of the CSR and Sirius Canada undertakings will be delivered primarily by satellite, with terrestrial transmitters as required to fill in gaps in coverage. Each of these undertakings will provide a mix of Canadian-produced channels and non-Canadian produced channels.

The service of the CHUM/Astral undertaking will be delivered entirely by terrestrial transmitters and all channels will be Canadian-produced.

In this notice, the Commission also provides a licensing framework for satellite subscription radio undertakings. Approval of the CSR and Sirius Canada applications is conditional upon the applicants filing, within 150 days of the date of the decisions, written confirmation of their acceptance of the terms and conditions set out in the licensing framework and the decisions, including any necessary revisions to their agreements with their US partners. Failure to provide such confirmation within the required timeframe shall render these decisions null and void.

Background

1. In *Call for applications for a broadcasting licence to carry on a multi-channel subscription radio programming undertaking*, Broadcasting Public Notice CRTC 2003-68, 23 December 2003, the Commission announced that it had received applications for a licence to carry on a satellite audio distribution undertaking.

2. Consistent with the procedures generally followed by the Commission in such cases, it called for applications from other parties wishing to seek authority to carry on such an undertaking, or some other form of subscription radio undertaking. The Commission subsequently gazetted three applications for licences to carry on subscription radio

services, distributed by satellite and/or terrestrial transmitters for direct reception by subscribers. These applications were considered at a public hearing in the National Capital Region, which commenced on 1 November 2004.

3. In the call for applications, the Commission stated that, since there are no subscription radio undertakings currently licensed for operation in Canada, it was seeking comment on a number of issues, in order to ensure that the policy objectives of the *Broadcasting Act* (the Act) would be met. These issues included the appropriate levels of Canadian content and French-language programming that should be provided by the proposed services, support for Canadian talent development (CTD), and the impact that the licensing of these new services would have on existing licensed audio services.

4. Since each of the proposals was based on a different technology platform utilizing a discrete spectrum assignment, the applications were not competitive on technical grounds. Therefore, the Commission also sought comment on how many subscription radio services, if any, the Canadian market could support.

The applications

Canadian Satellite Radio Inc.

5. Canadian Satellite Radio Inc. (CSR) is owned and controlled by John Bitove, a Canadian citizen and resident. CSR proposed to offer the service of XM Satellite Radio Inc. (XM), currently operating in the United States (US), across Canada, on a subscription basis. Under the terms of its agreement, XM would make available four of its 101 audio channels to enable CSR to provide two all-Canadian music channels, one in English and one in French, an English-language comedy channel, and a French-language news/talk channel.

6. CSR submitted a study with its application that it commissioned Telesat Canada to prepare regarding the provision of satellite radio service in Canada (the Telesat Study). The Telesat Study stated that the construction, launch and operation of a Canadian-owned satellite for the provision of digital radio services appears to be uneconomical at the present time, and could not be accomplished prior to 2010 due to international regulatory and spectrum allocation impediments.

7. CSR therefore concluded that the most cost-effective and technologically-appropriate means to provide satellite radio service to Canadians would be to use existing satellites through an alliance with XM.

8. At the public hearing, CSR committed to launch its service with a fifth Canadian-produced channel offering multicultural multilingual programming, and to add three more Canadian-produced channels by the end of its fifth year of operation if additional satellite bandwidth is available from XM. The applicant also advised that, since it had submitted its original application, XM had increased the number of non-Canadian programming channels it distributes to 122.

9. CSR made a commitment that 1,872 original hours per year, or 36 hours per week, of "lateral programming" would be broadcast on the non-Canadian music channels. The applicant defined lateral programming as Canadian-produced programs featuring Canadian artists that would be broadcast on channels originated by XM.

10. CSR estimated that Canadian selections currently represent approximately 2.5% of all selections that are broadcast on XM's music channels. CSR made a commitment that, if licensed, it would ensure that 7% of all new weekly additions to the playlists for XM's channels would be Canadian selections.

11. In its original application, CSR undertook to spend $4.1 million on CTD initiatives in its first licence term. In May 2004, this commitment was increased to $19.75 million, and at the hearing CSR commited to a minimum contribution of 4% of projected revenues and no less than $1.2 million per year. CTD contributions would be allocated equally between initiatives for the development of English- and French-language talent.

12. CSR also stated that it would increase its CTD contributions by 1% of revenues for each of the three new Canadian-produced channels that it undertook to add by the fifth year of operations in the event that such a channel did not launch due to lack of satellite capacity.

13. In its application, CSR noted that US satellite coverage of virtually all of Canada's population, combined with Canada's access to US consumer electronics markets, has created the environment necessary for a satellite radio grey market to develop in this country. The "grey" market refers to Canadian subscribers who are receiving unauthorized signals by paying monthly fees, but are using US addresses to subscribe. The applicant submitted that unless there is a licensed Canadian alternative, the growth of the satellite radio grey market in Canada may be even greater than the satellite television grey market, since the hardware is cheaper. It noted that Canadians own ten times as many radio as satellite television units. CSR stated that a satellite radio grey market means lost revenues and opportunities for the Canadian music and broadcasting industries, and results in the inability to protect Canadian culture since grey market services are not subject to any Canadian content requirements.

SIRIUS Canada Inc.

14. Upon licensing, SIRIUS Canada Inc. (Sirius Canada) would be owned by three corporations, with the Canadian Broadcasting Corporation (CBC) and Standard Radio Inc. (Standard) each holding a 40% voting interest, and Sirius Satellite Radio Inc. (Sirius), an American corporation, holding a 20% voting interest. Sirius Canada originally proposed to distribute the CBC's existing Radio One and La Première Chaîne radio services, two new channels (one in English and one in French) produced by the CBC, and 74 US channels provided by Sirius, the other company that provides a satellite radio service in the US.

15. Subsequent to the filing of its application, Sirius Canada proposed to add a fifth Canadian-produced channel that would be programmed by Standard, and, at the hearing, the applicant indicated that it would add three more Canadian-produced channels to its

service when it has 300,000 subscribers, or if additional satellite capacity becomes available. It further advised that the number of programming channels that would originate from its US partner had increased to 120.

16. Sirius Canada committed to contribute 5% of the revenues from its service to CTD initiatives, and stated that this commitment is consistent with the general standard adopted for broadcasting distribution undertakings set out in the *Broadcasting Distribution Regulations* (the BDU Regulations).

17. Based on Sirius Canada's revenue projections for the first licence term, this would represent $21.5 million over 7 years in contributions to CTD. Sirius Canada also proposed to allocate its CTD contributions equally between initiatives for the development of English- and French-language talent.

18. In its application, Sirius Canada also warned that, in the absence of a Canadian alternative, the development of a satellite radio grey market is not a theoretical possibility, but a reality. This applicant submitted that evidence suggests that the grey market in US satellite radio services has begun to develop in Canada, but that through approval of its application, the Commission could ensure that it does not become firmly established.

CHUM Limited, on behalf of a corporation or partnership to be established (CHUM/Astral)

19. CHUM/Astral, a corporation or a partnership to be established in which CHUM would hold an 80.1% voting interest and the remaining 19.9% will be held by Astral Media Radio inc., proposed a subscription radio service that would initially offer 50 music channels through the use of digital terrestrial transmitters. Ten of these channels would be in the French language. The applicant stated that all of the channels would be Canadian-produced and would generally fulfil the weekly requirements for Canadian musical selections and French-language vocal musical selections that apply to conventional radio stations. Under the terms of the *Radio Regulations, 1986* (the Radio Regulations), radio licensees, subject to conditions of licence, must devote, during each broadcast week, at least 35% of musical selections from content category 2 (Popular Music), at least 10% of musical selections from content category 3 (Special Interest Music) and at least 7% of musical selections played during ethnic programming periods to Canadian selections. The Commission further allows "oldies" stations, by condition of licence, to devote 30% of musical selections from category 2 to Canadian selections, in light of the more limited availability of Canadian music appropriate to the format. The applicant further proposed to increase the number of channels offered from 50 to 100 in the fourth year of operation.

20. CHUM/Astral also committed to contribute approximately $8.3 million during the first licence term to CTD initiatives, which represents approximately 2% of projected revenues for the proposed service. The applicant stated that 75% of the contributions would be allocated to initiatives supporting English-language talent, and 25% would be allocated to initiatives supporting French-language talent.

21. CHUM/Astral indicated that, during the first phase of the roll-out of the service, transmission facilities for single frequency networks would be built in five cities: Montréal (Quebec), Ottawa, Toronto and Hamilton (Ontario) and Vancouver (British Columbia). As the licence term progressed, additional transmission facilities would be constructed to serve other areas, including St. John's (Newfoundland and Labrador), Charlottetown (Prince Edward Island), Halifax (Nova Scotia), Saint John (New Brunswick), Gatineau, Québec, Sherbrooke and Trois-Rivières (Quebec), Kingston, Kitchener and Guelph, London, Windsor, Oshawa, Barrie and St. Catharines/Niagara (Ontario), Winnipeg (Manitoba), Saskatoon and Regina (Saskatchewan), Calgary and Edmonton, later expanded to include Red Deer and other cities between Calgary and Edmonton (Alberta), and Victoria, and the Fraser Valley (British Columbia).

22. The applicant proposed that by the end of the first licence term, the programming provided by its undertaking would be available to 60% of the population, if only one of the satellite-based proposals was authorized on what it referred to as equitable terms and conditions, or to 75% of the population if the Commission approved the CHUM/Astral proposal but did not approve either of the applications to provide satellite radio service. The additional 15% would be accomplished by adding transmitters in some 50 smaller communities across Canada. In addition, the applicant stated that it would try to accelerate the provision of service in certain Quebec communities including Québec, Sherbrooke, Trois-Rivières and Gatineau. CHUM/Astral indicated that it would not launch its proposed service if the Commission were to also approve both applications for satellite subscription radio undertakings.

Interventions

23. The Commission received almost 800 interventions from various organizations and individuals from across the country, with the vast majority of submissions expressing support for the licensing of one or all of the proposed undertakings.

24. In addition to those individuals who were interested in subscribing to the new services, interveners supporting the applications included a number of Canadian musicians and comedians who welcomed the opportunity to gain exposure throughout Canada and, in the case of the satellite-based proposals, North America. These interveners also noted the monetary support for Canadian artists that the applicants had proposed in the form of CTD initiatives.

25. Gregg Terrence of Indie Pool, an organization representing independent Canadian musicians, stated that many of Canada's unsigned independent artists are already getting airplay in the US on the XM and Sirius satellite services and, for this reason, "overwhelmingly supported" the licensing of CSR and Sirius Canada.

26. Mr. Terrence submitted that there are scores of highly talented and emerging Canadian independent recording artists who are underserved by conventional radio stations, and that XM already plays more independent Canadian music than Canadian radio station do. Mr. Terrence stated:

> Canadian Satellite Radio also supports niche formats, like adult alternative, heavy metal, traditional jazz, reggae, bluegrass, world and children's radio. This support will help prop up non-commercial Canadian content that is currently underserved. They will help fill the airplay gap with a music philosophy that puts the focus on the artists, especially independent acts, that aren't being played on Canadian radio.

27. A number of industry associations also intervened, including the Coalition of Canadian Audio-visual Unions (CCAU), the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ), the Canadian Recording Industry Association (CRIA), ACTRA Performers Society, the Canadian Media Guild (CMG), the Canadian Music Publishers Association (CMPA), the Canadian Independent Record Production Association (CIRPA), Friends of Canadian Broadcasting (Friends), and the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

28. These associations opposed the satellite-based applications by CSR and Sirius Canada on the basis that these applicants proposed insufficient levels of Canadian content. Many cited section 3(1)(f) of the Act, which states that each broadcasting undertaking shall "…make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources."

29. SOCAN, CIRPA and the CMPA submitted that new subscription radio services should be required to broadcast the same minimum levels of Canadian musical selections that are required of conventional radio stations that feature similar musical formats i.e., 35% in the case of popular music, 10% for special interest music, and 7% for third-language services.

30. CRIA asserted that the Commission must consider carefully whether the proposed services meet the statutory obligations for promoting Canadian culture set out in the Act, and also ensure that the services licensed in these proceedings do not set a precedent for approving insufficient Canadian content commitments on the basis of technological determinism.

31. In its intervention, ADISQ submitted that the issues raised in this process should have been addressed at a separate policy hearing before the applications for subscription radio services were considered. ADISQ stated that appropriate Canadian content levels and the promotion of Canadian artists are essential to ensure a balanced Canadian broadcasting system, and that these applications risk upsetting the fragile balance that currently exists. At the hearing, ADISQ stated that the level of French-language vocal musical selections

proposed by both satellite applicants was unacceptable, and that contributions to CTD cannot replace the broadcast of musical works. It reiterated that, under the Act, undertakings have obligations in terms of both contribution and presentation, not contribution or presentation.

32. Friends expressed similar concerns with the satellite-based proposals, stating that both applications pose a threat to the integrity of Canadian broadcasting policy. Friends submitted that licensing services that do not meet established carriage and expenditure requirements is unjustified and could create a precedent-setting expectation that existing licensees could be authorized to reduce their exhibition requirements. Conversely, Friends was of the view that the CHUM/Astral application conformed with Canadian broadcasting policy and "was worthy of sympathetic consideration by the Commission."

33. The National Campus and Community Radio Association (NCRA) submitted that the satellite-based applications represent a significant departure from several decades of Canadian broadcasting policy. The NCRA added that its concern extends beyond the proposed satellite services' music channels, since the applicants have also proposed numerous channels of news, talk and sports without any significant Canadian choices in these areas. In this regard, the intervener noted that the proposed services would have more Spanish-language channels than French-language channels, and that the applicants would be presenting ESPN rather than TSN, Fox News rather than CBC Newsworld, and Bloomberg rather than ROBTv. The NCRA further suggested that a weather channel distributed by these services would probably not present any Canadian weather information.

34. The Commission also received interventions from a number of licensed radio broadcasters, including Corus Entertainment Inc. (Corus), Rogers Broadcasting Limited, the OK Radio Group Ltd., Larche Communications Inc., the Jim Pattison Broadcast Group, CKUA Radio Network (CKUA), and Global Communications Limited (Global). These interveners did not oppose the licensing of subscription radio undertakings, but asserted that any licensee's programming should be truly national in scope, and that any licensee should be prohibited from carrying any advertising so as to complement, not compete with, the local service provided by existing radio stations.

35. CKUA submitted that approval of the satellite applications would increase the potential market for the two US satellite radio services by a factor of approximately 10% by annexing the Canadian domestic market as an additional base from which to seek subscribers. CKUA suggested that the allocation of 10% of the available bandwidth to the carriage of Canadian channels could be seen as a reasonable quid pro quo for the US services being permitted to access revenues from the Canadian domestic market.

36. Corus proposed a formula whereby one Canadian channel would be added for every new foreign channel added beyond the first service offer of 100 channels, until an overall ratio of one Canadian channel to 10 foreign channels is reached. Corus also contended that satellite radio could have a significant impact on conventional radio and pay audio services since the new satellite services would result in a loss of listeners to these

services and would impact advertising revenues for conventional radio stations even if the satellite radio services do not sell any advertising. Corus argued that the current regulatory requirements for conventional radio stations and pay audio services must be examined to ensure that these services can compete and survive in the face of competition from satellite radio.

37. In addition to submitting its own application for a subscription radio licence, CHUM/Astral submitted a joint intervention opposing the satellite-based proposals, arguing that these applications contradict important principles of the Act and the Commission's regulations. CHUM/Astral argued that, since the satellites that would deliver the satellite services are owned and operated by their American partners, CSR and Sirius Canada would not be fully in control of their own services, and therefore could not assume the responsibilities of licensees.

38. This, they contended, is contrary to section 3(1)(a) of the Act, which provides that the Canadian broadcasting system "shall be effectively owned and controlled by Canadians." CHUM/Astral claimed that real control of the satellite-based services would appear to rest with the American operators because most facets of the operations of these services would take place outside the Commission's territorial jurisdiction.

39. Global submitted that the satellite-based applicants did not adequately address the policy shortcomings inherent in their applications, and that, if the low levels of Canadian content proposed are to be accepted, an accompanying high level of support for CTD and a high degree of newness and diversity on the Canadian channels should be expected.

40. With respect to the issue of the satellite radio grey market, Friends and CHUM/Astral were of the view that the satellite-based applicants were overstating the extent and ultimate threat of Canadians subscribing to the US satellite radio services. CHUM/Astral contended that, in the absence of licensed terrestrial transmitters, many urban dwellers would find reception of satellite signals difficult, reducing the appeal and demand for grey market satellite radio services. Both CHUM/Astral and Friends submitted that authorizing the importation of more than 200 US channels into Canada would do more damage to the Canadian broadcasting system and music industries than the negative impact of the satellite radio grey market.

41. Global also questioned the claims by the satellite-based applicants that licensing their proposals was essential to prevent the satellite radio grey market from undermining the Canadian broadcasting system. Global submitted that, since the satellite-based applicants proposed to duplicate 96% of the programming distributed by the US satellite services, and that many of the proposed Canadian channels would rebroadcast existing Canadian services, the positive impact of these new undertakings would appear to be minimal.

Applicants' replies

42. In response to the interventions opposing their applications, both CSR and Sirius Canada submitted that, under the terms of section 3(1)(f) of the Act, the maximum or predominant use of Canadian resources is not required in circumstances where the nature

of the service is such that it is not practicable to require the undertaking to make maximum or predominant use of Canadian resources. According to these applicants, such circumstances may include situations where the content or format of the service is specialized or in a language other than English or French, but it is not limited to those situations.

43. CSR and Sirius Canada argued that the proposed satellite radio services consist of a specialized format and that format comes within the exception set out in section 3(1)(f). The applicants argued that the service model set out in their applications is predicated on using satellite technology that cannot be replicated in Canada due to the limited size of the market, and is the only way to establish a Canadian-controlled service that will reach all Canadians.

44. Both satellite-based applicants submitted that the Commission has made exceptions to the requirement for maximum or predominant use of Canadian resources in a number of situations. They noted that such flexibility has been applied in the case of conventional radio stations, which are only required to ensure that at least 35% of their popular musical selections, and at least 10% of special interest musical selections are Canadian. According to these applicants, the Commission has also established very low minimum levels for the broadcast of Canadian music on ethnic radio services, which must ensure that 7% of musical selections aired each broadcast week during ethnic programming periods are Canadian.

45. These applicants also submitted that the Commission granted flexibility when it licensed pay-per-view services, which must maintain a ratio of no less than 1:12 with respect to Canadian and non-Canadian first-run feature films. The satellite applicants cited these situations as precedents where the Commission has decided in the public interest not to require maximum or predominant use of Canadian resources as per section 3(1)(f) of the Act.

46. Sirius Canada stated that it was sympathetic to the desire of interveners for more Canadian channels, but that satellite technology involves a North American platform and there is a limit to the amount of bandwidth that can be obtained.

47. In their applications, CSR and Sirius Canada also pointed to numerous examples of Canadian music being played on the US channels, and contended that many emerging Canadian artists receive far more exposure on these channels than they do on Canadian conventional radio stations. CSR indicated that Canadian selections make up about 2.5% of the music played on XM, and that this represents massive exposure to listeners for Canadian artists, given the size of the US market. Although neither CSR nor Sirius Canada could commit its US partner to broadcast a minimum level of Canadian content on the US channels, both applicants proposed to employ a “Canadian ambassador” who would actively seek out and champion Canadian musical selections, and encourage the program directors of the US satellite services to include Canadian selections on their playlists.

48. With regard to the impact that these new services could have on existing conventional radio stations and pay audio services, CSR and Sirius Canada both submitted that, in the US, where satellite radio has been available for a number of years, the US radio industry is financially healthy, and the introduction of satellite radio has had no discernible effect on its success. They concluded that this suggests that their services would have no significant impact on the financial strength of the conventional radio sector in Canada.

49. CHUM/Astral stated that for subscription radio to succeed in Canada it must be complementary to, rather than competitive with, conventional radio stations. For this reason, this applicant stated, it has proposed a service that would not rely on advertising and would not provide subscribers with local weather or traffic information.

50. With respect to local programming and local advertising, all three applicants indicated that they would accept a condition of licence that precludes the broadcast of either. However, Sirius Canada requested an exception for the local programming contained in the programming of Radio One and La Première Chaîne, and to allow for the possibility of rebroadcasting some of the programming of Standard's talk radio stations. CSR indicated that it was willing to accept a condition of licence prohibiting the airing of local programming, including local advertising, but wanted the ability to broadcast six minutes per hour of national advertising.

51. On the issue of the impact these proposals would have on pay audio services, Sirius Canada stated that its service would be available as a stand-alone subscription service requiring specialized receivers that may be installed in cars, homes, cottages and other locations. In contrast, it noted that pay audio services are only available from cable companies and direct-to-home (DTH) satellite operators, whose focus is the distribution of television programming, and who typically include pay audio services as part of their basic digital television tier. The applicant argued that this means that the price points for satellite radio and pay audio would be radically different: $12.95 per month for satellite radio versus no separate charge for pay audio when bundled with basic digital television service. Sirius Canada maintained that this would make the two services complementary, not competitive, and that, given the well-established position of pay audio services in the Canadian market, the introduction of subscription radio would not have an adverse impact on pay audio licensees.

52. With respect to the issue of effective control of the undertaking and the programming it would distribute, CSR argued that the following three elements would ensure that the physical operation of the undertaking would be under Canadian control:

- exercise by CSR of control over the conditional access system that enables Canadian subscribers to receive the signals transmitted by the XM satellites and its terrestrial repeaters;

- control by CSR over the retransmission of the signal of the XM satellites using terrestrial repeaters located in Canada, since such repeaters are owned by CSR; and

- determination of which programming elements cannot be provided to Canadian subscribers and resulting actions taken by CSR to ensure that addressable receivers owned by CSR subscribers only receive programming services that are authorized for distribution in Canada.

53. Sirius Canada stated that it would be appropriate for the Commission to adopt measures to ensure that licensees are accountable for the programming on the non-Canadian channels as well as on the Canadian channels. The applicant suggested that provisions similar to those in section 8 of the BDU Regulations regarding carriage of content be set out as conditions of licence. Under these conditions, according to Sirius Canada, subscription radio licensees would be prohibited from broadcasting:

- programming that contravenes any Canadian law;
- programming that is abusive or that tends to or is likely to subject any group or class of individuals to hatred or contempt;
- programming that uses obscene or profane language; and
- false or misleading news.

54. To make this accountability effective, Sirius Canada stated that its subscribers would only receive signals that have been selected for distribution by the Board of Directors of Sirius Canada, which will have the sole responsibility for authorizing and de-authorizing the Canadian receivers.

55. With respect to the question of how many subscription radio services the Canadian market could support, CSR was of the view that the Canadian market is capable of supporting all three services being proposed in this proceeding. According to CSR, the presence of three competitors in the market would stimulate consumer awareness and demand enough to support all three service providers.

56. Sirius Canada stated that its business plan is predicated on two national satellite services being licensed simultaneously in Canada. In its view, the current lack of distribution infrastructure for a terrestrial subscription radio service provider means that it would be some time before it could become a significant competitive force in the marketplace. For this reason, Sirius Canada considered that the impact of the CHUM/Astral proposal on its business plan would be negligible.

57. CHUM/Astral submitted that the Canadian market is probably capable of supporting its proposed service and one of the satellite-based undertakings, under conditions where both have what it called equitable regulatory obligations.

58. In response to the interveners who questioned the applicants' claims regarding the extent and potential threat of the satellite radio grey market, CSR stated that there was abundant evidence that a grey market is growing extremely quickly in Canada. The applicant

attributed this to extensive advertising by XM and Sirius in US media that are received in Canada. CSR also noted that more than two-thirds of respondents (68%) to its marketing survey indicated that government opposition to satellite radio in Canada would not stop them from subscribing. The applicant also cited a national survey conducted by General Motors in Canada in January 2004 that indicates 2% of respondents already subscribe to satellite radio.

59. CSR submitted that thousands of "XM ready" radios have been sold in Canada, thousands more are on store shelves, and major consumer electronics companies have included components in most of their automobile radio products which allow the radios to be upgraded for satellite reception.

The Commission's analysis and determinations

60. In addition to the objective set out in section 3(1)(f) of the Act, regarding the use of Canadian creative and other resources by each broadcasting undertaking, the broadcasting policy for Canada set out in the Act also declares that the programming provided by the system should be varied and comprehensive (section 3(1)(i)(i)); that the system should be adaptable to scientific and technological change (section 3(1)(d)(iv)), and that a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available (section 3(1)(k)). The Act also sets out a regulatory policy that calls for the Canadian broadcasting system to be regulated and supervised in a flexible manner that facilitates the provision of broadcasting to Canadians (section 5(2)(d)), and that is readily adaptable to scientific and technological change (section 5(2)(c)).

61. While these objectives are pertinent to the consideration of all three of the subscription radio applications in this proceeding, the proposed satellite-based services and the terrestrially-based service raised a number of different regulatory issues. The two types of services are accordingly dealt with separately below.

Satellite subscription radio undertakings

62. The Commission considers that the introduction of satellite subscription radio into Canada would contribute substantially to the fulfilment of the above-noted policy objectives in a number of ways, including the following:

- it would increase the diversity and comprehensiveness of programming choices available to Canadians;
- it would cover the entire country, bringing new services to rural and remote areas where radio options are often quite limited;
- it would increase exposure and monetary support for Canadian musicians, particularly new and emerging artists; and

- it would offer Canadian radio listeners multi-channel services in their cars and other vehicles, using a proven technology that is being deployed south of the border.

63. The Commission notes, however, that for the foreseeable future, satellite subscription radio services will not be available in Canada via satellite facilities that are owned and operated by Canadians. As indicated in *Notice No. DGTP-007-04 - Proposed Clarification to the Government Satellite-use Policy for the Delivery of Broadcasting Services*, 21 October 2004 (Proposed Clarification to the Satellite Use Policy), the Departments of Industry and Canadian Heritage stated:

    (a) Canada has no satellite facility capable of distributing digital satellite radio broadcasting and is unlikely to have such a facility in the future.
    (b) Canada has not secured with the International Telecommunications Union the required spectrum resources at the S-band to develop its own specialized satellites.

64. The process to secure the required spectrum and to put Canadian-owned satellites that would deliver Canadian satellite subscription radio services in the future would take many years. Furthermore, even if such satellites were available, the Commission notes that the Telesat study indicated that it is questionable whether the Canadian market is large enough to make such satellite facilities economically viable. In the US, by contrast, S-band spectrum was secured from the International Telecommunications Union, and the Federal Communications Commission has licensed satellite radio services that utilize all designated S-band spectrum, and that cover Canada as well as the United States.

65. Although there was little quantitative evidence submitted as to the number of Canadians who are subscribing to the US satellite radio services via the grey market, the availability of satellite radio receivers from Canadian retailers, as well as the studies submitted by the applicants, and the many interventions submitted in support of the applications, indicate that Canadians are interested in receiving satellite subscription radio services and would subscribe to them via the grey market, if no Canadian alternative is made available.

66. As regards the impact of satellite services on existing licensed radio and pay audio services, the Commission notes that no quantitative evidence was presented to indicate that this new form of radio service would have a significant negative impact on either. In this regard, the Commission notes that the licensed broadcasters who intervened did not oppose the licensing of the proposed undertakings, but argued only that the new services should contribute adequately to the Canadian broadcasting system and should be prohibited from distributing local programming and commercial messages. As regards pay audio, the Commission notes that the licensees of both existing Canadian pay audio undertakings appeared at the hearing in supporting roles. CBC, the licensee of the Galaxie pay audio service, appeared as an applicant in connection with the Sirius Canada proposal. Corus, the licensee of the Max Trax pay audio service, appeared with CSR in support of its application.

67. In light of the above, the Commission finds, on balance, that the licensing of satellite subscription radio services would contribute to the achievement of the policy objectives set out in the Act, and that building on the services now provided using US satellite facilities represents the optimal solution for providing Canadian satellite subscription radio services to Canadians. In this regard, the Commission notes that, in the Proposed Clarification to the Satellite Use Policy, the Departments of Industry and Canadian Heritage stated that "spectrum could be made available domestically to accommodate the provision of digital satellite radio broadcasting in Canada using US satellite facilities."

68. With respect to the use of Canadian creative and other resources in the creation and presentation of programming, as noted above, section 3(1)(f) of the Act provides as follows:

> each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French or English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

69. The Commission recognizes that in building Canadian services on the services now provided using US satellite facilities that already carry extensive multi-channel services for the US market, the bandwidth available for the delivery of Canadian channels will be limited by the relative sizes of the Canadian and US markets and by the commercial considerations of the US satellite operators. The Commission considers that, as a result of these factors, the nature of these Canadian satellite subscription radio services renders the predominant use of Canadian creative and other resources impracticable. The Commission has therefore turned its attention to what the greatest use of Canadian creative resources might be, under the circumstances.

70. In this regard, after considering the applications and the comments of interveners, the Commission is not convinced that the applicants have proposed the greatest practicable use of Canadian creative and other resources. The Commission is particularly concerned by how few Canadian-produced channels were proposed for distribution by the proposed satellite subscription radio undertakings, both in terms of absolute numbers and as a proportion of the total number of channels to be offered, which, as noted above, have increased since the original proposals were submitted. Accordingly, the Commission considers it appropriate to only approve these applications subject to a number of conditions of licence requiring the applicants, *inter alia*, to provide higher numbers of Canadian-produced channels than were originally proposed.

71. The Commission finds that approval of the CSR and Sirius Canada applications, subject to those conditions of licence, and to the terms and conditions set out below will serve the public interest and contribute to the fulfilment of the objectives for the Canadian

broadcasting system set out in the Act. It further finds that the mechanisms proposed by CSR and Sirius Canada will ensure that the proposed undertakings are effectively controlled by the licensees.

72. The Commission has determined that approval of these applications will be conditional on the applicants filing, within 150 days of the date of the decisions, written confirmation of their acceptance of the terms and conditions set out in the licensing framework and in the licensing decisions, including any necessary revisions to the agreements with their US partners. Failure to provide such confirmation within the required timeframe shall render these decisions null and void.

Licensing framework for satellite subscription radio undertakings

The appropriate ratio of Canadian to non-Canadian channels

73. As noted above, dependence on US satellites for signal delivery limits the amount of bandwidth available to Canadian licensees which, in turn, limits the amount of Canadian programming that can be presented to Canadian audiences. However, the proposal by the satellite-based applicants to offer 5 Canadian-produced channels and 120 or more US channels means that less than 5% of all channels would be Canadian. The Commission considers that this represents an unacceptably low level of Canadian programming to be distributed by licensed Canadian undertakings.

74. The Commission considers that the particular circumstances of satellite subscription radio justify a requirement that a minimum of 10% of all channels received by Canadian subscribers be Canadian-produced channels. Therefore, the Commission has determined it appropriate to require, by condition of licence, that each licensee distribute to each of their Canadian subscribers, a maximum of nine non-Canadian-produced channels for each original Canadian-produced channel that it distributes. In no case may Canadian subscribers to a satellite subscription radio service be offered a package of channels in which, at any point in time, original Canadian-produced channels constitute less than 10% of the total channels offered to those Canadian subscribers.

Original Canadian-produced channels

75. Given the lack of satellite bandwidth available for Canadian channels, the Commission considers that the retransmission of existing radio stations would be a questionable use of this limited resource. Furthermore, allowing linkage of non-Canadian channels with existing licensed Canadian radio stations would allow for the distribution of US channels without the creation of new Canadian programming. Therefore, a Canadian-produced channel will be considered to be “original” when not less than 50% of the program content is produced for and first broadcast on that channel.

Full-time Canadian-produced channels

76. Linkage with US channels must be with full-time original Canadian-produced channels, available 24 hours per day, to ensure the proper proportion of Canadian and US channels at all times.

The appropriate number of Canadian-produced channels

77. As noted above, both CSR and Sirius Canada proposed to distribute five Canadian-produced channels when they launch their respective undertakings, with the possibility of increasing this to eight Canadian-produced channels at some point in the future. Sirius Canada indicated that the agreement with its US partner contains the provision to negotiate the addition of Canadian channels when the Canadian service has 300,000 subscribers. CSR proposed to distribute three more Canadian-produced channels in the first licence term, and to increase its CTD contributions by 1% of total revenues in the fifth year of operation for each of these additional channels that it was unable to launch.

78. Regarding the launch of the new undertakings, the Commission is of the view that, in addition to the 10% ratio set out above, a minimum of eight original Canadian-produced channels must be distributed by each licensee, as a condition of licence. This will provide a critical mass of Canadian-produced channels to ensure that there is a meaningful amount of Canadian content available on the service.

Music channels

79. The Commission notes that both applicants proposed to distribute three music and two spoken-word Canadian channels, and cited the important role the Canadian-produced music channels would play in providing exposure to Canadian musicians. Accordingly, the Commission expects that a minimum of 60% of the Canadian-produced channels distributed by these licensees will be music channels.

Canadian content

80. The Commission notes that the average minimum level of Canadian content of the Canadian-produced channels proposed by the applicants was approximately 90% in the case of CSR, and approximately 80% in the case of Sirius Canada. In view of the limited number of Canadian-produced channels that the applicants proposed to distribute on their services as a proportion of the total channel offering, the Commission considers it essential that the Canadian-produced channels contain high levels of Canadian content.

81. The Commission has therefore imposed a condition of licence requiring each licensee to ensure that a minimum of 85% of the musical selections broadcast each week on the Canadian-produced channels, considered together, are Canadian. This condition will therefore be applied to the Canadian-produced channels as a whole. The Commission notes that Canadian content obligations for conventional radio stations are a minimum of

35% for popular music and 10% for special interest music. Assuming a 50-50 mix of popular and special interest music, the 85% requirement will result in five Canadian-produced music channels providing the number of Canadian musical selections broadcast by approximately 27 conventional radio stations.

82. The Commission has also decided to require, by condition of licence, that an average of not less than 85% of the spoken-word programming on the Canadian channels be Canadian. Spoken word programming is Canadian provided that it is produced in Canada and a Canadian is the primary performer or speaker.

French-language programming

83. Section 3(1)(d)(iii) of the Act indicates, among other things, that the Canadian broadcasting system should reflect the linguistic duality of Canada. The Commission has therefore determined it appropriate to require, by condition of licence, that a minimum of three of the initial eight Canadian-produced channels, and subsequently not less than 25% of the Canadian-produced channels distributed by these services, be in the French-language. Furthermore, each French-language channel must devote to musical selections in the French language, on a weekly basis, a minimum of 65% of the vocal music selections from category 2, as defined in the Radio Regulations.

Canadian talent development contributions

84. In addition to the required levels of Canadian programming to be distributed by the satellite subscription radio undertakings, the Commission considers it appropriate to include a condition of licence requiring each satellite radio licensee to contribute, each year, a minimum of 5% of its gross annual revenues to eligible third parties associated with CTD and other artistic talent or other initiatives approved by the Commission. Licensees must report the names of the third parties associated with CTD, together with the amounts paid to each, in their annual returns. Given that CSR proposed to contribute 4% of its gross annual revenues to CTD, the Commission has also decided to require it to file for approval by the Commission, before commencing operations, its proposal for the expenditure of CTD contributions that it will undertake in order to fulfil the 5% requirement.

85. In accordance with their commitments, each licensee is required, by condition of licence, to allocate 50% of its total annual contribution to CTD initiatives for the development of Canadian English-language talent, and 50% to initiatives for the development of Canadian French-language talent. Each licensee will also be required, by condition of licence, to file annual reports describing the CTD initiatives it has undertaken, the amount spent on each initiative, and the total amounts expended on English- and French-language talent.

Support for new Canadian music and emerging talent

86. The Commission notes that one of the key benefits of the new undertakings cited by the applicants and several interveners was the exposure that would be provided to new and emerging artists who receive little or no airplay on conventional radio stations. In its application, CSR made a commitment that 52% of all musical selections distributed on the Canadian-produced channels will have been released in the previous six months.

87. The Commission also considers that it is important that satellite subscription radio undertakings broadcast selections by new and emerging artists. Therefore it is imposing on each licensee a condition of licence requiring it to ensure that, between 6 a.m. and midnight each week on each Canadian music channel, a minimum of 25% of the musical selections broadcast will be new Canadian musical selections, and a minimum of 25% will be Canadian selections by artists who have not had a musical selection that has reached a position on one or more of the charts identified in the list set out in Circular 445, 14 August 2001, as may be amended from time to time. For the purposes of this condition, a “new Canadian musical selection” is a Canadian selection that has been released in the 6 months prior to the date that the musical selection is broadcast. The Eastern time zone will be used when determining compliance with this condition of licence. The licensee will also be responsible for specifying on the music lists it provides to the Commission, the release date of all musical selections it broadcasts.

Restrictions on local programming and local advertising

88. The Commission has imposed conditions of licence requiring that none of the Canadian-produced channels distributed by the licensees contain any original local programming or local commercial messages. For purposes of this condition, “original local programming” means programming that is produced for broadcast on the satellite subscription radio undertaking that targets a particular geographic community or locality and includes, but is not limited to, commercial messages, news, weather and traffic information.

Restrictions on national advertising

89. In its application, CSR proposed to broadcast an average of six minutes per hour of national advertising. The Commission is satisfied that the revenue garnered from this amount of advertising will not have a significant impact on existing radio stations. It has therefore imposed conditions of licence that permit satellite radio licensees to distribute a maximum of six minutes per hour of national commercial messages. For purposes of these conditions of licence, a “national commercial message” is a commercial message, as defined in section 1 of the Radio Regulations, that is purchased at a national rate and receives national distribution on the service.

Adherence to the Regulations and Industry Codes

90. The Commission notes that both CSR and Sirius Canada committed to be accountable for the content of the programming contained on all Canadian and non-Canadian channels distributed by their undertakings. In this regard, the applicants have undertaken not to broadcast anything in contravention of the law, any abusive comment, or any obscene or profane language. CSR and Sirius Canada have also committed to adhere to the Canadian Association of Broadcasters' (CAB) *Sex-Role Portrayal Code for Television and Radio Programming*, and CSR has further committed to abide by the CAB's *Broadcast Code for Advertising to Children.* Accordingly, the Commission has imposed conditions of licence requiring adherence to the relevant sections of the Radio Regulations, and to the aforementioned codes. The Commission notes that both applicants committed to take whatever action is necessary to ensure adherence to the regulations and codes including, if necessary, the removal of a channel from their program offerings.

91. The Commission is also requiring, by condition of licence, that the licensees maintain sequential lists of all musical selections played on each channel it distributes. Licensees will be required to maintain these lists for a period of four weeks from the date of broadcast, and forward these lists to the Commission upon request, along with a notarized attestation of their accuracy.

Restriction on video

92. The approval granted in the accompanying decisions is to carry on a satellite radio undertaking for the distribution of audio channels. Any activity by satellite radio undertakings involving the distribution of video will require separate prior approval by the Commission.

Grey market subscribers

93. As noted above, both applicants expressed much concern regarding the potential for growth of the satellite radio grey market in Canada. In this regard, the Commission also notes that, in its agreement, Sirius Canada and its US partner undertake to cooperate to prevent individuals from subscribing to each other's services. Furthermore, the Commission notes the clause in CSR's agreement with XM that prevents XM from providing Canadian subscribers with access to programming that cannot be provided in Canada due to regulatory restrictions. In its application, CSR committed to report to the Commission each year on its success in repatriating grey market subscribers.

Proposed amendment to the satellite use policy

94. In response to the Commission's request for clarification of the policy regarding the use of foreign satellite facilities for the transmission of Canadian satellite radio services, the Departments of Industry and Canadian Heritage initiated a public process to review this policy. The current satellite use policy as it applies to broadcasting undertakings states that the undertakings

> … should make use of Canadian satellite facilities to carry (receive and/or distribute to Canadians) all Canadian programming services but may use either Canadian or non-Canadian satellite facilities to carry foreign-originated services that are intended primarily for foreign audiences, and are authorized, in whole or in part, for distribution by the CRTC; and under no circumstances should an undertaking make use of exclusively foreign satellites for the distribution of its services to Canadians.

95. While no decision has yet been issued regarding the Proposed Clarification to the Satellite Use Policy, the Departments of Industry and Canadian Heritage stated that they are of the preliminary view that potential digital satellite radio broadcasting services raise an exceptional circumstance. The Departments further stated that, without prejudice to the current licensing process being carried out by the Commission, they acknowledged the need to clarify the satellite use policy and proposed the addition of the following provision:

> in exceptional circumstances, where no Canadian satellite facilities are available, or likely to be available in a reasonable time frame, to accommodate specialized satellite delivery of a broadcasting service to the public e.g. satellite radio services including vehicular reception, the use of foreign satellite facilities is permitted to distribute Canadian programming services;

Terrestrial subscription radio undertakings

96. In the Proposed Clarification to the Satellite Use Policy, the Departments of Industry Canada and Canadian Heritage stated that spectrum could be made available to accommodate the provision of such terrestrial subscription radio broadcasting in the L-band. The Commission notes that the inability of terrestrial undertakings to provide complete coverage of Canada's population and geography means that, both in the short and longer term, there will be significant gaps in the service such an undertaking provides. The Commission notes that the original goal of the CHUM/Astral proposal was to reach 60% of the population by the end of the licence term. Even under its revised proposal to reach 75% of the population by the end of the first licence term, this would leave 25% of the population and, on a geographic basis, large regions of the country, without service.

97. In addition to the limitations in signal coverage, the CHUM/Astral proposal involves the use of transmission and receiver technology that, while in use in other forms in Europe and Asia, will require significant modifications and development before it can be implemented in the Canadian market. At the same time, given that the satellite and terrestrial subscription radio undertakings are discretionary in nature, and based on proprietary technology, the Commission has determined that a competitive environment is appropriate to provide consumers with a range of choices as to how they will receive this type of service. Furthermore, the CHUM/Astral application proposes levels of Canadian content, French-language programming, and support for the development of Canadian talent that will make a significant contribution to fulfilling the policy objectives of the Act.

98. The Commission acknowledges the applicant's position that it is unlikely that the Canadian market can support more than two subscription radio services, and that it would not launch its proposed service if both satellite proposals were also implemented. Nevertheless, the Commission has determined that this application is in keeping with existing Commission policies and objectives, and has approved it in *Terrestrial subscription radio undertaking*, Broadcasting Decision CRTC 2005-248, of today's date, subject to the terms and conditions contained therein. The Commission notes that it has not imposed minimum coverage requirements for the roll-out of this service.

Secretary General