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Canadian Association of Broadcasters
Association canadienne des radiodiffuseurs

September 14, 2009 *Via Epass*

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin:

Re: **Broadcasting Notice of Consultation 2009-411 – *Policy proceeding on a group-based approach to the licensing of television services and on certain issues relating to conventional television (BNC 2009-411)***

1. The Canadian Association of Broadcasters (CAB) is the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private radio and television stations, networks, specialty, pay and pay-per-view services. The goal of the CAB is to represent and advance the interests of Canada's private broadcasters in the social, cultural and economic fabric of the country.

2. Broadcasting Notice of Consultation (BNC 2009-411) invites interested parties to comment or make proposals in regard to: a) the appropriate modalities and conditions that should govern group-based licensing; b) mechanisms of revenue support for conventional broadcasters; c) issues related to the implementation of the digital transition; and d) issues related to expenditures on Canadian programming. The Commission also seeks parties' input with respect to how broadcasters can adopt concrete and measureable commitments to production, programming and the airing of local television and how broadcasters could achieve a systematic focus on community involvement.

3. According to the Commission, the objective of the BNC 2009-411 proceeding is to establish an overall regulatory framework that will provide all broadcast groups the necessary flexibility to adapt to the rapidly changing communications environment while maintaining that the Canadian broadcasting system remains distinctly Canadian in its content.

Executive Summary

4. The purpose of the CAB's intervention in the current proceeding is to set out the foundation of facts that must be factored into the Commission's policy determinations emanating from the current proceeding. In this submission, the CAB discusses the changing economic realities for broadcasters, the changing regulatory and technology landscape, and advocates for a return to first principles to ensure local television is delivered into their respective local markets and to ensure the integrity of the broadcasters' signal is formally recognized. The CAB's submission will not respond to the specific questions set out in BNC 2009-411. Instead it will set out certain areas deserving redress from the Commission. CAB members will respond to the Commission's questions in their individual submissions. The CAB's comments are divided into five sections as described in detail below.

Changing economic realities

5. The Commission's determinations in the current proceeding must be governed by the economic factors as they exist today as well as the lingering and/or potentially irreversible changes brought about by the prolonged economic downturn. Impacts to consumer spending have attendant downstream impacts to advertising, service packaging and affiliation payments. New forms of advertising are already starting to emerge and others risk filling the void left by on demand rather than appointment viewing. Advertising revenues are down and every market reporting to the TVB is seeing declines in spot TV revenue. This is a time of economic flux for Canadian broadcasters and according to credible economists, a slower than anticipated return to economic recovery, is predicted. This is not the time to layer on additional regulatory obligations.

Local into local must be a regulatory priority

6. The perverse outcome of the Commission's one station per province policy adopted in Broadcasting Public Notice CRTC 2008-100 (BPN 2008-100) is that over-the-air broadcasters, who invest in DTV transmitters to serve, in some cases, as little as 2% of the market, may lose as much as one third of its former viewing audience as a result of being dropped by DTH. The CAB accordingly recommends that "one station per province" DTH carriage policy be eliminated and that the Commission return to the Broadcasting Act objective of ensuring that Canadians have access to all local programming in their market by mandating the carriage of <u>all</u> local television signals (French, English and third language local television services) on <u>each</u> DTH service provider for distribution in their local markets. The CAB further recommends that the Commission require DTH service providers be directed to file within 60 days of the Commission's determination regarding the current proceeding a detailed plan indicating how they will implement carriage of all local television signals into their local markets before August 31st, 2012.

The integrity of the broadcaster signal must be formally recognized

7. The programming rights purchased by Canadian broadcasters are the bedrock of broadcasters' revenues and must not be conditional, or diminished by regulation. To this end, the CAB recommends three specific measures to uphold the value of these rights namely to change the eligibility criteria for the provision of HD simultaneous substitution, to mandate program

deletion or alternatively non-simultaneous substitution of U.S. signals in markets where Canadian broadcasters hold exclusive rights and finally, to permit program substitution of HD programming in local markets.

Disruptive regulations impacting pay and specialty services

8. On or before August 31, 2011 a number of new regulations will take effect that will significantly, permanently and irreversibly alter the pay and specialty service business model. The elimination of the mandated wholesale rate, changes to specialty packages and numerous changes to the BDU regulations are anticipated to have a wide ranging impact on existing pay and specialty revenues. In addition to this, the Commission is contemplating allowing BDUs to sell advertising in the local availabilities and to offer non-Canadian packages on VOD. Regulatory measures that impact the ability of pay and specialty services generate revenue or to negotiate reasonable carriage arrangements with BDUs means lower profitability and lower contributions to Canadian programming. The CAB accordingly recommends that the Commission give due consideration to the impact of the forthcoming regulatory changes to the pay and specialty services business model.

Other trends impacting pay and specialty services

9. Recent data shows increased viewing and advertising on unregulated platforms. Some research suggests that Canadians are some of the world's most avid viewers of online video and that 22% of Canadians surveyed watched or downloaded a long form video content such as a feature film or television program. Viewing to unregulated platforms may even be reaching a tipping point with up to 20% of online viewers reducing their TV viewing in favour of online videos. Advertisers are following eyeballs. As the ad spend on the internet increases, advertising revenue for other media will begin to plateau resulting in less revenues to linear broadcasters to maintain their regulatory obligations. The Commission's recently released financial summaries for pay and specialty services reveals that profitability for the sector has decreased slightly and that some specialty services are barely profitable. The CAB accordingly recommends that the Commission give due consideration to the impact of the ongoing market changes to the pay and specialty services business model brought about by new technologies and platforms.

10. The Commission must remain ever vigilant of the economic and media market within which Canadian broadcasters must operate. There are numerous circumstances that lie beyond their control that are significantly impactful. Layering on onerous regulation or regulations with unintended circumstances will further weaken the industry during a very difficult transition period.

1.0 Introduction

11. The current public proceeding initiated by the Commission is taking place at the juncture of two worldwide phenomena that are having, and will continue to have a profound impact on the television sector for years to come. This proceeding occurs at a time when Canada is still impacted by the most severe worldwide economic downturn and at a time when fundamental changes to the business model of traditional media in general, and television in particular, are being propelled by disruptive technologies and new platforms that have collectively changed the way people consume media and advertisers spend to reach their audiences.

12. The current proceeding is also taking place at a time when the regulatory framework governing pay and specialty services is transforming to accommodate the migration to a digital framework. On or before August 31, 2011 several regulatory measures will take effect that risk impacting Canadian pay and specialty services significantly, permanently and irreversibly. Among the many changes include the change to services packages, the elimination of the wholesale rate, changes to the BDU exemption threshold and attendant regulations, and potential loss of revenue due to local avails and VOD. These are discussed in more detail in section 4.0 below.

1.1 Global Economic Transformation

13. On the economic front, while we are seeing indications that Canada (as well as other countries) may have turned the corner from the downturn, most experts caution that the road ahead remains treacherous. The economic recovery is predicted to be slow. The Economist recently declared that while the global recession may be coming to an end, the ingredients of a lasting recovery are still missing. Increasingly concerns are being raised about growing government budget deficits and their short term relief that *"solid global recovery demand healthy and balanced growth in private demand. Unfortunately that still seems far off."*[1] The Economist further noted in another article that even if the housing market stabilizes in the U.S., *"consumer spending will stay weak as households pay down debt. In America and other post-bubble economies, a real V-shaped bounce seems fanciful."* Rather *"a gloomy U with a long, flat bottom of weak growth is the likeliest shape of the next few years."*[2]

14. These cautious views are shared by other economists such as Nouriel Roubini, one of the few experts who correctly predicted in advance the current economic crisis. In an Op-Ed piece published recently in the Financial Times, Roubini submitted that *"In countries running current account deficits, consumers need to cut spending and save much more, yet debt-burdened consumers face a wealth shock from falling home prices and stock markets and shrinking incomes and employment."*[3] This combined with massive public deficits, the need for financial institutions to deliver much more than has been done so far and the fact that commodities like oil and food prices are increasing faster than

[1] http://www.economist.com/opinion/displaystory.cfm?story_id=14085688
[2] The Economist article entitled "U,V or W For Recovery" dated August 20, 2009.,
[3] Page 7 of the Financial Times article entitled "The Risk of a Double-Dip Recession is Rising", Nouriel Roubini, dated August 24, 2009

fundamentals warrant, leads Roubini to conclude that *"the recovery is likely to be anemic and below trend in advanced economies and there is a big risk of a double-dip recession."*[4]

15. Despite these cautionary notes, it is tempting to conclude that, once economies rebound, customers will start spending again as they did before. Yet, there are good reasons to think that what looks likely to be the worst downturn since the Depression will spark profound shifts in shoppers' psychology. In an article published last April in the Economist entitled "From buy, buy to bye-bye", it is stated that:

> *"The trend towards thrift will not disappear when the economy picks up. For one thing, those banks left standing after the bust will be far more parsimonious with consumer credit. For another, many people will still be intent on rebuilding their nest-eggs, which is reflected in sharply rising rates of saving. Sociologists also detect a distinct change in people's behavior. Until the downturn, folk had come to assume that "affluence" was the norm, even if they had to go deeply into dept to pay for gadgets and baubles. Now many people no longer seem consumed by the desire to consume; instead, they are planning to live within their means, and there has been a backlash against bling. So for years to come, many more households will be firmly focused on saving, splashing out only occasionally on a big-ticket item…The downturn will also accelerate the use of social media, such as blogs and social-networking sites, by consumers looking for intelligence on firms and their products. As trust in brands is eroded, people will place more value on recommendations from friends."*[5]

16. As this new phenomenon is taking place, marketers are starting to take notes and are adjusting to a new reality. One of them, Andy Donchin, director of media investment at Carat, a major media buying agency that buys ad time on behalf of companies such as Pfizer was recently quoted in the Wall Street Journal as saying: *"This downturn has changed the way marketers think about spending, if not forever, then at least for a very long time."*[6]

17. Why does all this matter in the context of this proceeding?

18. It matters because reduced consumer spending during and after the recession is translating into reduced advertising revenues for traditional media. Lower consumer spending on cable and DTH services means reduced wholesale fees to discretionary services. For an industry that relies on a healthy economy to generate new products that need to be advertised, and global advertising spending projected to decline, the short term forecast is to remain cautionary.

19. This coincides with the so called media revolution whereby the traditional media business model is being significantly challenged by technological changes that have changed the way people consume media and, as a result, are driving a shift in advertising spending away from traditional media such as television. In fact many experts are now saying that the recession is only accelerating and exacerbating the disrupting trend that is forcing traditional media, and importantly, to redefine its business model to find growth in other areas.

[4] Ibid.
[5] The Economist article entitled "Buy, Buy to Bye-Bye," dated April 2, 2009.
[6] Wall Street Journal article entitled "Networks hold back selling as in advance" dated August 10, 2009.

20. According to PwC, globally, broadcast TV advertising will drop 13 per cent this year, and decline 1.5 per cent through 2013 to $116.2B (US) long after the recession will be over.[7] According to Veronis Suhler Stevenson, a private equity group specializing in media, in the US, spending on television is forecast to fall 9 per cent this year to $44.7B as marketers move money into areas of internet search and sponsorship.[8] In its 2009 Advertising Forecast, Zenith Optimedia estimates that advertising revenue for broadcast television in the US will have declined by 11 % over the period 2007 and 2011.[9] Already, for the first six-months of 2009 preliminary figures from Nielsen show a 15.4 per cent year-on-year decline in US advertising revenues, which represents a staggering loss of 10 billion dollars. More specifically, while cable television (discretionary services) was the only media on which ad spend increased, up 1.5 per cent across English language channels and up 0.6 per cent for Spanish channels, by contrast, "spot" advertising, booked at short notice, fell by 17.4 per cent in the top 100 local TV markets.

21. According to the latest advertising figures from TVB, advertising revenue for conventional and specialty television was down for the first 11 months of the 2008-2009 broadcast year compared to the first 11 months of the 2007-2008 broadcast year. Further, every market reporting to TVB is seeing declines in spot TV revenue. Even markets considered by the Conference Board to be fairly robust from a GDP and retail sales perspective are showing weak results from an ad spot perspective.

1.2 New Revenue Sources

22. Faced with this widespread phenomenon, very few if any industry experts or broadcast executives still believe that the broadcast television business model remains sound. In an article recently published by the Financial Times, part of a series on the future of media, Chase Carey, chief operating officer of News corp. is quoted saying *"In broadcasting, we have an ad-supported business model that does not work."* [10]Likewise, Gerhard Zeiler, chief executive of RTL, the biggest European broadcasting company said in an Financial Times article dated August 26, 2009 that *"[i]n the future, advertising will not pay all the bills"*, and *"every free-to-air group will have to think about, for example Pay-TV, about online services, about video-on-demand"*[11]. In fact, more and more broadcasters around the world are now entertaining the idea of morphing their over-the-air advertising driven model into a pay-TV model. For instance, as reported by the Financial Times, in Britain some analysts hope a new chief at ITV, the largest over-the-air private broadcaster, where advertising revenue fell by 15 per cent in the first half of 2009, might pursue a pay-TV model. As for the US, both NBC Universal and Fox Network are also hinting their over-the-air TV stations could, in the near future, act more like cable networks.

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[7] Page 14 of the Financial Times article by Kenneth Li entitled "Television executives reach for the rest button" dated September 1, 2009.
[8] Ibid.
[9] Page 13 of the Financial Times article entitled "$10Billion of Advertising Vanishes from Media Markets in the First Half by Andrew Pedgediffe-Johnson.
[10] Page 14 of the Financial Times article by Kenneth Li entitled "Television executives reach for the rest button" dated September 1, 2009
[11]http://www.ft.com/cms/s/0/cff8865a-9261-11de-b63b-00144feabdc0.html?catid=66&SID=google

23. Different broadcasters around the world are adopting a variety of strategies to adapt their business model to the new economic reality. Similarly Canadian television service providers are exploring their own strategies specific to the Canadian market. In their own submissions, CAB members will address these strategies and related regulatory measures for dealing with the erosion of the conventional television business model.

1.3 New Forms of Advertising

24. The changing business landscape is not limited to the conventional television sector. In a new book entitled "The Chaos Scenario" Bob Garfield, a media analyst and journalist for Advertising Age, argues that *"In the next decade, specialty television services will also be severely impacted by the digital revolution because the distributors that carry their signals also provide Internet access to consumers that increasingly watch video content through the web, which in turn will impact on programming services subscriber bases and revenue".*[12] In fact, eMarketer estimates that *"by next year, half of the US population will watch online video, a tipping point in the media industry."*[13] In this context, it should be noted that specialty services are the only media platform in this country to be subjected to regulatory limits on advertising.

25. Further aggravating the decline in advertising for both conventional and specialty services is the increased take up of personal video recorders (PVRs). According to PwC Global Entertainment and Media Outlook, 2009 17.7% of Canadian households currently have a PVR and this is projected to increase to 51.3% by 2013. While PVR usage is not having an impact on viewership to television services, it is impacting viewership to advertising as Canadians can skip through the ads. As penetration of PVR will increase it will have an impact on how advertising is being purchased on television. It is indeed anticipated that forms of advertising that cannot be skipped such as product placement will represent a growing, and increasingly important part of advertising spending on television. This in turn will reduce the value and monetizing opportunities on foreign, especially US programming, acquired by Canadian broadcasters, since advertising decisions will be made outside of Canada.

26. It is therefore against this backdrop that the CAB is intervening in the context of the current proceeding. The CAB agrees that important steps are being taken by the Commission to respond to Canadian broadcasters' challenges in an ever changing competitive environment. More, however, is necessary.

27. Indeed in some ways, the challenges facing Canadian commercial broadcasters are even greater than those faced by broadcasters in other countries. With the greater use of product integration and other forms of advertising, Canadian broadcasters will have less control over advertising revenue for foreign programming, thus denying them an important source of revenue. At the same time, Canadian Internet users are the most avid viewers of online video in the world,

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[12] Le Devoir article entitled "La fin des émissions" by Stéphane Baillargeon dated August 29, 2009.

[13] Page 14 of the Financial Times article by Kenneth Li entitled "Television executives reach for the rest button" dated September 1, 2009

further fragmenting the video advertising marketplace and making the competition for consumer attention and advertiser dollars fiercer.

28. With this in mind, the CAB seeks regulatory redress for both its conventional as well as for its pay and specialty services members from current or intended regulatory measures that will, in their aggregate, have a detrimental impact on broadcasters' ability to serve the Canadian public. As an outcome of the current proceeding the CAB seeks the following:

- that the Commission eliminate the "one signal per province" policy established in PN 2008-100 and mandates carriage of all local television signals (French, English and third language local television services) on each DTH service provider for distribution in their local markets;

- that the Commission require DTH service providers to file within 60 days of the Commission's determination regarding the current proceeding a detailed plan where they will indicate how they will implement carriage of all local television signals into their local markets before August 31st, 2012;

- that the programming rights purchased by Canadian broadcasters not be conditional or diminished by regulation;

- that the Commission give due consideration of the forthcoming regulatory and market changes that will specifically impact the pay and specialty services business model.

29. The CAB respectfully submits that the Commission's efforts to adopt market based policies should never be at the expense of the increasingly challenging role that Canadian broadcasters play in delivering Canadian culture to Canadians television sets. Due regard must be given to the formidable financial difficulties that lay ahead for Canadian broadcasters, particularly conventional television broadcasters. This, in CAB's view, requires that the Commission aim for regulatory measures adapted to the specific circumstances of broadcasters rather than a "one size fits all" approach on regulation. In what follows, the CAB sets out its arguments supporting the relief requested and the evidence relied on.

2.0 Local into Local

2.1 Request to eliminate the "one per province" policy

30. The CAB has consistently maintained and advocated in favour of the fundamental principle that all local television services should be carried by DTH services in their local market. This principle is as important today as it has been in the past. Accordingly, the CAB requests that the *"one signal per province"* policy introduced by the Commission in its PN 2008-100 be eliminated because it goes against the objective of the Broadcasting Act and the Commission's own policy objectives to ensure that the Canadian public has access to local programming. Furthermore,

the *"one station per province"* policy, should it be maintained by the Commission, will introduce further regulatory asymmetry between what cable subscribers can access versus what DTH subscribers can access, which would not serve the public interest.

31. The CAB recommendation does not supersede, but rather complements, the request filed on June 5th, 2009 by small and independent television broadcasters seeking that the Commission ensure their local television stations continue to be carried on DTH beyond August 31st, 2011. While, in Broadcasting Notice of Consultation CRTC 2009-577, the Commission invited interested parties to comment on the small and independent television broadcasters' June 5, 2009 request, the CAB nevertheless recommends the Commission consider its more expansive local into local recommendation, in the context of the current proceeding.

32. The CAB strongly believes that the Commission must ensure that BDUs, including DTH service providers, give priority to the carriage of Canadian programming services, particularly local television services as mandated under the Broadcasting Act. Thus, the CAB further requests that the Commission mandate carriage on all DTH service providers of all local television signals (French, English and third language) in their own local markets.

33. In *Regulatory framework for broadcasting distribution undertakings (BDUs) and discretionary programming services Broadcasting Public Notice 2008-100*, the Commission determined that DTH services will be required to distribute, as part of their basic service within each province, one television station per province, where one such station exists, from each of the major television ownership groups as well as one independently-owned local TV station in the province. This applies only to local French-language and English-language OTA television services. There is no provision for the carriage of third language local television stations despite the fact that the Commission stated that these services provide an important role in terms of diversity of programming to the benefit of a large and increasingly important portion of the Canadian population.

34. To illustrate the impact of the decision that would come into force on 1 September 2011, a DTH BDU might choose to distribute CTV's local Vancouver television station but not its Victoria station, or to carry only V[14]'s Montreal signal but none of the other V local stations in the province of Quebec. This situation could have a significant adverse impact on the viability of many, if not most television stations, among them stations that will have to be converted to DTV by August 31st, 2011.

[14] Formally known as TQS.

35. As illustrated in the table below, there are **38 local private television signals** (French, English and third language) currently not carried on Shaw Direct and **35 local private television signals** not carried on Bell TV.

Number of Channels devoted to Canadian OTA Local Services

	Shaw Direct	**Bell TV**
Number of Private OTA Local Stations Carried	58	61
Number of Public OTA Local Stations Carried	17	20
Total number of Local OTA stations Carried	75	81
Number of Private Local Stations Not carried in Identified DTV Markets	20	17
Number of Private Local Stations not Carried – Smaller Markets	18	18
Total Number of Private Local Stations not Carried on DTH	38	35

Source: CAB, based on Bell TV and Shaw Direct published channels lineups at July 29, 2009.

36. Put differently, 40 % of all private local television services are currently not distributed by Shaw Direct; 36 % are not carried on Bell TV.

37. Carriage on DTH is vital to the survival of private OTA broadcasters. Having their signals carried on both DTH service providers is vital to large and small broadcasters that will be expected to convert to DTV in the near future. Based on the list of markets established by the Commission, private broadcasters estimate having to convert approximately 100 transmitters with an average cost per transmitter of about $1 million and no material new revenues opportunities. This represents a significant capital investment to be made in the context of a severe economic recession and uncertainties surrounding the viability of the conventional television business model. Yet, out of the 63 private television originating stations expected to undertake digital conversion, 23 (or 36 %) of them are not carried on at least one DTH service provider, and 14 (22 %) are absent from the offerings of both Shaw Direct and Bell TV.

38. In light of the Commission's expectation that the private OTA broadcasters invest in the necessary equipment and technology to enable the conversion to DTV of their TV signals in the identified markets on or before August 31st, 2011, and given the significant capital cost such an undertaking will require from broadcasters in a very challenging economic environment, it is critical that all OTA signals that will have to be converted to digital be carried on cable and on each DTH service provider in their local market.

39. Without these stations' carriage on DTH, a significant percentage of the potential audience in many identified DTV markets will not even have the option of tuning to the local DTV (nor analogue) station as part of their DTH service. This in turn would translate into significant losses in advertising revenue for "must convert" local stations currently carried on one or both DTH service providers, preventing them from offsetting capital investment necessary to convert to fund their DTV conversion of their signal and to fund the creation of local programming.

40. To leave such fundamental decisions in the hands of the DTH undertakings could have devastating consequences on the viability of an important number of these local stations that are expected to be converted to DTV within the next two years. As illustrated in the table below, viewing to television, in the markets expected to be converted to DTV, is currently (2009) overwhelmingly done through BDUs, of which DTH subscribers represent a significant share of the market:

Market	Cable in %	DTH in %	OTA Reception in %
Edmonton	61	32	7
Regina	65	30	5
Saskatoon	58	30	12
Winnipeg	68	23	9
London	55	36	9
Windsor	61	21	18
Kitchener	59	32	9
Ottawa-Anglo	57	36	7
Ottawa-Franco	66	27	7
Quebec	70	22	8
Trois-Rivieres	63	30	7
Sherbrooke	59	33	8
Riviere-du-Loup	59	32	9
Saguenay	64	34	2
St-John's	64	30	6
Saint-John/Moncton	51	41	8
Halifax	70	25	5
Charlottetown	50	42	8
National*	65	27	8

Source: BBM EM Statistics, Spring 2009; * Source: BBM, Spring 2008

41. The above chart illustrates that private broadcasters are being asked to invest significant sums of money in markets where off air reception of television signals is very limited and may represent, in some cases, as little as 2% of the market. A case in point is the TQS licensee who will need to invest approximately $1 million dollars to convert its Saguenay local TV transmitter to DTV, even though only 2 % of the market's households receive television signals off air. At the same time, its signal which is currently carried on both DTH service providers might very well be dropped by one or both DTH service providers, preventing it from accessing more than a third

of its potential viewers. Likewise, CTV's CJOH (currently carried on Shaw Direct but not on Bell TV) would be converted to DTV to serve 7 % of Ottawa's English-speaking households, but if it was not carried by either DTH provider, it could be prevented in the future from accessing 36 % of its potential viewing market.

42. In smaller markets, the level of penetration of DTH is in general significantly higher than the national average, as illustrated by the table below.

Market	Cable in %	DTH in %	OTA Reception in %
Okanagan-Kamloops	59	36	5
Prince George	51	41	8
Dawson Creek	28	58	14
Lloydminster	22	69	7
Medecine Hat	50	42	8
Red Deer	44	46	10
Yorkton	28	63	9
Sudbury	55	44	1
Thunder Bay	52	42	6
Kingston	40	56	4
Peterborough	35	54	11
Rouyn-Noranda	61	32	7
Carleton	53	43	4
Terrace Kitimat	40	42	18

Source: BBM EM Statistics, Spring 2009.

43. It is therefore essential that all local television services, including those operating in small markets be carried on both Shaw Direct and Bell TV.

2.2 CAB's request aligns with the CRTC's objective regarding local programming

44. The CAB's request requiring for mandated carriage on DTH of all private local television services (English, French and ethnic) in their local markets is consistent with the objectives of the Broadcasting Act, specifically section 3 (t) (i) stipulating that *distribution undertakings should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations.*

45. The CAB's request also aligns with the Commission's objective to ensure that Canadians continue to receive a diversity of local programming, including local news programming. As the Commission recognized in Public Notice 2008-4:

"It is from the local media that most Canadians receive the information that is critical to their understanding of local, regional, national, and international issues. Local media help to shape Canadians' views and to equip them to be active participants in the democratic life of the country."

46. In Broadcasting Public Notice 2008-100 it is further stated that:

"In the Commission's view, it is in the public interest for the Canadian broadcasting system to include healthy local stations that will enrich the diversity of information and editorial point of view".

47. In the CAB's view it is impossible to ensure the health of local television stations if they are not being carried on highest-penetration satellite of the DTH undertakings, which have become the distribution platforms of choice by which nationally, one-quarter of Canadian households access television.

48. The CAB's request would also introduce symmetry between DTH and terrestrial BDUs who are mandated to provide carriage of all local television signals into their local market.

49. The CAB request also aligns with the recommendations in the June 2009 report from the Standing Committee on Canadian Heritage. Among the Standing Committee's recommendations was the following:

"The Committee recommends that the Canadian Radio-television and Telecommunications Commission enforce the carriage by satellite carriers of local signals that are carried on cable systems." (Recommendation 14)

50. Adopting the CAB's recommendation to mandate the carriage of all local stations by DTH providers would more closely align the Canadian local broadcasting policy with regulatory measures implemented in the US. In 1999, the US Congress adopted the Satellite Home Viewer Improvement Act (SHVIA) implemented by the FCC. The FCC regulation put in place in the wake of the adoption of SHVIA requires DTH service providers that carry one local signal in a market to carry all the other local signals from that market ("carry one, carry all" rule). The CAB notes that Echostar carries all local television stations serving 174 designated local markets, which collectively cover more than 98 % of all U.S. TV households; while DIRECTV offers local-into-local to 150 markets covering more than 94 % of all American television households.

51. There is, therefore, no doubt that the regulatory measures put in place in the U.S. have helped to ensure that the vast majority of local television stations are able to reach all of their local populations thanks to DTH carriage. By requiring carriage of local stations into their local market, the Commission would achieve the same results as what has been achieved in the U.S., namely of (i) ensuring Canadian viewers have access to local programming in their local markets and (ii) supporting the capacity of Canadian private local stations to monetize the programming rights that they have acquired for their local market.

52. In light of these considerations, the CAB reiterates the fundamental principle that local television services must be carried into local markets. Thus in order to ensure the viability of local television services and foster access of viewers to their local programming sources in the

digital world, the Commission must mandate the carriage by all DTH providers of all local television to DTH subscribers located within the Grade B contour of the station.

2.3 The onus is on DTH services to demonstrate they lack the necessary capacity

53. DTH providers have systematically invoked the argument that they lack the necessary capacity and that it would be unreasonable to require carriage of all local television services. Yet, they have somehow found capacity to carry large numbers of foreign services, especially American OTA and cable channels, even though these services combined generate limited viewing share in Canada.

54. The CAB has analyzed the service line up of both DTH carriers. This analysis shows the high level of duplication of US OTA services offered by these distributors, as well as a significant number of channels dedicated to foreign programming (such as adult channels) neither of which contribute in any meaningful manner to the fulfillment of the objectives of the Broadcasting Act.

	Shaw Direct	**Bell TV**
OTA US Stations	25	20
US Superstations	6	5
Specialty US	25	18
Specialty Other Foreign	4	6
Adult PPV	9	5
Sports PPV	31*	55*
Exempted Services	6	1
Total	106	110
Number of Duplicate of US Channels	27**	28**
Number of Duplication including exempted services	30	28

*For Shaw Direct: 17 channels for NHL Centre Ice (6 in HD), 14 channels for NFL Sunday Ticket; for Bell TV: 14 channels for NHL Centre Ice (4 in HD), 20 channels for NFL Sunday Ticket (6 in HD) and 19 channels for MLB Extra Innings (6 in HD)
**For Shaw Direct: 15 OTA US stations (10 in HD and 5 redundant analogue services), 5 HD specialty services duplicating 5 analogue services, one (1) HD Superstation channel duplicating an analogue service, 6 HD channels for Sports PPV duplicating analogue PPV channels. There are further 3 channels duplicating an exempted service – The Frame on Shaw Direct; For Bell TV: 10 HD signals duplicating 10 analogue OTA US signals, one (1) specialty HD US service duplicating an analogue service, one (1) HD superstation signal duplicating an analogue one, and 16 HD PPV Sports channels duplicating analogue signals

55. According to the CAB analysis, there are a minimum of almost 30 channels currently occupied by US services that are duplicates of existing US channels. This capacity could be made available to local private television services (currently not carried) for carriage in their local markets. If one adds to that the number of channels devoted to adult content, the number of channels that

could be made available for carriage of Canadian local channels could increase to 36 on Shaw Direct and 33 on Bell TV. Moreover, both DTH service providers, that are claiming lack of channel capacity, devote a significant portion of space on their transponders to carry a plethora of sports PPV offerings; more than 30 in the case of Shaw Direct and a whopping 55 channels for Bell TV.

56. We believe that allocating some of these channels to local private television services would serve the objectives of the Broadcasting Act without unduly reducing choices for DTH subscribers.

57. The CAB understands that DTH service providers will oppose such a measure. It is interesting to note that in the U.S. also DTH service providers have resisted the introduction of reasonable rules and regulations relating to the carriage of local broadcast signals by claiming capacity limitations. Yet, at virtually every juncture when such rules and regulations have been imposed, the claimed capacity limitations have not materialized or have been surmounted.

58. The CAB notes that the DTH capacity reports that the CRTC released on July 30th do not shed any light on the DTH licensees' claims about capacity shortages in 2011. There is simply not enough useful data in either Shaw Direct or the Bell TV abridged report to allow an outsider to make an informed determination. Hence, it is CAB's view that such claims cannot be accepted at face value. The CAB therefore believes that the onus should be put on DTH service providers to prove that they lack the capacity to carry all local Canadian television signals in their local market.

59. That said, the CAB notes for instance that Shaw Direct indicates at page 5 of its capacity report that *"Star Choice is currently working towards the implementation of MPEG 4 compression and is in the development stage. We anticipate deployment of MPEG 4 before [ABRIDGED]. Once implementation, MPEG 4 is expected to double transponder capacity/data throughput from [ABRIDGED]."* (emphasis added) Hence, the CAB believes that should there be legitimate capacity limitations, such problem could be solved over time.

60. The CAB notes that on August 18, 2009 FreeHD Canada announced that it had filed an application with the CRTC seeking to provide a national direct-to-home (DTH) satellite TV service and a wholesale programming distribution service for Canadian programmers. If approved, FreeHD Canada promises to carry all of the approximate 100 local television stations and provide Canadians a free local program package of 15 to 20 channels from within their respective region. FreeHD Canada also promises to provide an "all access package" offering up to 150 Canadian pay and specialty channels at a competitive price.

61. FreeHD Canada's chairman and CEO David Lewis, claims that FreeHD is the solution to the local into local dilemma and as such has gone public about the application in the hopes of participating in the "digital transition and OTA discussions." The CAB does not have a position vis-à-vis the FreeHD offering at this time but observes that if FreeHD is technically able to deliver all local stations into their respective home markets, like Dish and DirectTV then it begs the question as to what prevents Shaw Direct and Bell TV from doing the same.

62. For all the reasons noted above, the CAB recommends that the Commission mandate the carriage by <u>all</u> DTH service providers of all local private television signals (French, English and Third language) for carriage on the basic service and offered to DTH subscribers located within the Grade B contour of the station.

63. The CAB is fully aware that carriage of HDTV signals requires up to 5 to 6 times more transponder capacity than carriage of SD signals. With this in mind, and to take into account potential capacity issues related to its recommendation, the CAB considers that the full implementation of carriage of all local television services into their local market on both Shaw Direct and Bell TV should be completed over a three year period not exceeding the end of calendar year 2012.

64. To this end, the CAB further <u>recommends</u> that DTH service providers be required to file, within 60 days of the Commission's determination in the current proceeding, a detailed plan indicating how they will implement the carriage of all remaining local television stations into their local market before 31 December, 2012.

65. The CAB recommends also that the Commission clearly indicate in its decision that the 2012 deadline cannot be used by DTH service providers as a pretext to remove smaller market stations currently carried on their service to make room for major markets stations currently not distributed by either Shaw Direct or Bell TV or both service providers.

66. The CAB notes that Shaw Direct currently devote 151 channels to Pay TV and category A and B Canadian specialty services; likewise, there are 180 channels currently devoted by Bell TV to the carriage of Canadian Pay and specialty programming services. <u>The CAB strongly believes that the mandatory carriage of all local television signals into their local markets by all DTH services providers must not be made to the detriment of these Canadian discretionary services. To this end, the CAB further recommends that the Commission also clearly state in its decision that compliance with mandated carriage of all local television services cannot be met at the expense of carriage of currently carried licensed Canadian pay and specialty services</u>.

3.0 The integrity of the broadcaster signal must be formally recognized

67. In BNC 2009-411, the Commission correctly notes that the distribution of non-Canadian conventional signals throughout the broadcasting system poses a challenge to maintaining the integrity of the Canadian program rights markets. It seeks comment as to whether additional measures, beyond priority carriage and simultaneous substitution, are required to protect the broadcasters' signal integrity.

68. The CAB is encouraged that the Commission recognizes the fundamental importance of protecting the integrity of the broadcaster signal. This is a central issue, one that the Commission has grappled with from the early 1970s, with the importation of US network signals by cable within the same time zone, to the 1990s with the introduction of DTH services and the further extension of US network signals from other time zones, to the new challenges posed today with the transition to digital OTA transmissions.

69. The CAB submits that there are three specific matters that require attention by the Commission in this proceeding.

3.1 The eligibility criteria for HD simulcast

70. The eligibility criteria for HD simulcast adopted by the Commission establish that a Canadian broadcaster is entitled to simultaneous substitution over a non-Canadian signal only if the quality of the Canadian signal is at least as good as that of the non-Canadian station broadcasting the identical programming. The rule as it stands now defines "quality of signal" as it relates to the transmission of the over-the-air signal, meaning that a Canadian broadcaster signal must be transmitted by an HD transmitter to trigger simultaneous substitution of a program available on a US HD station carried by a BDU, even though, logically, what matters is the nature of the signal (HD or SD) the BDU distributes to the subscriber.

71. While the intent of this rule was to encourage Canadian broadcasters to build digital OTA facilities so as to be in a position to benefit from simultaneous substitution over HD non-Canadian programs, it has had the perverse effect of sanctioning the distribution in Canada of programming for which the non-Canadian broadcaster does not hold Canadian rights.

72. At the same time, the Canadian broadcaster who has purchased *exclusive* exhibition rights in Canada cannot fully exploit those rights because of the criteria used by the Commission to authorize simultaneous substitution. In essence, the Commission's rule has lowered the value of the program rights acquired by Canadian broadcasters. This has had a significant economic implication for Canadian broadcasters at a time they can least afford any further loss of revenues.

73. In Broadcasting Regulatory Policy 2009-545 the Commission maintained that Canadian broadcasters should be obligated to acquire the rights to and air the HD version of any programming in order to be entitled to substitution over HD versions aired on U.S. signals. The Commission suggested that it would examine whether direct feed version should be entitled to simultaneous substitution in the context of the November 16, 2009 hearing. In the end however, the Commission choose to maintain the signal quality requirements.

74. The CAB submits that the Commission's determination once again fails to acknowledge that programming rights purchased by Canadian broadcasters should take precedence over foreign programming that, by a historical regulatory omission, have been allowed to air in Canada. The benefits to Canadian broadcasters of the programming rights they purchase should never be conditional or tradable.

75. Accordingly, it is the CAB's view that the Commission should change, as an outcome of the current proceeding, the eligibility criteria for the provision of HD simultaneous substitution. The rule continuance undermines the value of programming rights purchased by Canadian broadcasters. The rationale for the rule can no longer be premised on encouraging the construction of digital OTA facilities – this is a totally unrelated issue. In its place, the CAB recommends that the Commission adopt the simple principle that provision by a Canadian

broadcaster of an HD feed is necessary to trigger simultaneous substitution of an HD US program from US HD signal made available to the subscriber by a BDU.

3.2 Program deletion of identical non-simultaneous programs on US signals

76. Current simultaneous substitution rules apply to identical programming broadcast on out-of-market stations, provided that it is broadcast simultaneously with the programming on the local channel. There is no mechanism that protects a local broadcaster from identical programming that is not simultaneously broadcast, whether on a station from the same time zone or on a station from a distant time zone. In the case of the former, the current simultaneous substitution rule effectively forces a Canadian broadcaster to schedule its non-Canadian program according to the schedule of the US station carrying the same program, in order to maximize audience.

77. Even if the loss of scheduling flexibility is deemed an acceptable consequence of the simultaneous requirement, there are times when a Canadian broadcaster simply cannot air a given program simultaneously – for example when it holds the rights to two programs that air simultaneously in the US, where a US broadcaster unilaterally reschedules a program, or where a US broadcaster reschedules programs for the express purpose of avoiding simulcast by the Canadian border station.

78. Canadian broadcasters require full regulatory protection for the exclusive programming rights that they purchase. The integrity of the broadcasters' signal requires establishment and enforcement of a program deletion rule. Specifically, the CAB recommends that as a result of the current proceeding BDUs be mandated to black out a program broadcast on a U.S. signal in a market where a local Canadian broadcaster holds the exclusive rights to exhibit that program and broadcasts that program within the same broadcast week.

79. Broadcasters require the implementation and enforcement of a rule requiring program deletion of U.S. signals in markets where local Canadian broadcasters hold the exclusive rights to exhibit a program. Such a rule would go a long way to fully protecting the integrity of a broadcaster's signal, and would effectively hand scheduling power back to *Canadian* broadcasters.

80. In the alternative, the CAB recommends that the Commission mandate non-simultaneous substitution where the advertising of the broadcaster with the programming rights is inserted in to the program run on the U.S. signal. While this is technically feasible, many parties prefer not to be obligated to insert the advertising due to the often short turnaround timeframes permitted.

3.3 Program substitution of HD programming in local markets

81. As part of the discussion of the digital transition rollout plan, the Commission will examine whether a Canadian broadcaster who offers a local HD signal for BDU distribution without building an OTA transmitter will be entitled to claim simultaneous substitution (and/or program deletion) privileges against identical programming broadcast on out-of-market stations.

82. In this context, it has been suggested by some that the obligation for program substitution might be triggered in markets where there is no OTA transmitter only if a specified amount of local programming is required.

83. The CAB urges the Commission to reject such a linkage in its consideration of this issue. The policy rationale for program substitution – namely, to protect exclusive programming rights sold to Canadian broadcasters – is totally unrelated to the objective of providing local programming. The CAB acknowledges the importance of local programming within the Canadian broadcasting system, but the provision of local programming should not be linked to mechanisms to protect program rights.

84. Moreover, there are significant practical implications such as the treatment of rebroadcast transmitters. Global's Ottawa and London transmitters, for example, are rebroadcasters of Toronto; they might be precluded from exercising substitution under the type of linkage rule that has been suggested unless the Commission clarified that the provision of local programming on the originating transmitter triggered substitution privileges on all of the rebroadcast transmitters as well.

85. In summary the CAB reiterates that the value of programming rights purchased by Canadian broadcasters should not be diminished by regulation that continues to ascribe a greater protection to foreign signals. The integrity of the programming rights purchased by Canadian broadcasters are the bedrock of their revenues and touchstone of their success. The CAB is accordingly encouraged that the regulator seeks, by way of this proceeding, to implement measures to protect the integrity of the Canadian broadcasters' signals and in doing so, the CAB recommends that they give due consideration to the measures identified above.

4.0 Disruptive Regulation and other trends impacting pay and specialty services

86. Broadcasting Notice of Consultation 2009-411 will determine the regulatory modalities and conditions of licence that may be applied under a potential group-license approach. Such a group licensing approach, if adopted, will be implemented at the 2010 English language and 2011 French language broadcaster license renewals. The group-licensing approach presumes that if risk is spread across multiple television properties it is diminished and obligations, if shared, are less onerous.

87. On or before August 31, 2011, the regulatory landscape upon which the pay and specialty services sector constructed financial success will change. Beginning August 31, 2011, pay and specialty services will enjoy fewer regulatory protections that allow them to succeed financially and meet their Canadian content expenditure and exhibition obligations. Evidently, once regulatory support is weakened or removed, some pay and specialty services may fail resulting in a loss of diversity of voices.

88. Below is a discussion of the regulatory measures that will take effect on or before August 31, 2011 that risk impacting Canadian pay and specialty services significantly, permanently and irreversibly. Also discussed are other peripheral trends, such as declines in advertising revenues and viewing to non-regulated platforms, that risk augmenting the impact of disruptive regulatory measures in both the short and long term

Impactful Regulatory Measures

4.1 Local Avails

89. In paragraph 148 of Broadcasting Public Notice 2008-100 the Commission noted that "in certain circumstances, revenues from the sale of advertising in the local availabilities of non-Canadian specialty services could provide a net benefit to the Canadian broadcasting system." It determined, however, in paragraph 151 that it did not have sufficient record to accurately assess the costs and potential revenues associated with exploiting new forms of advertising. Accordingly the Commission initiated Broadcasting Public Notice 2008-102 wherein it sought the detailed plans that licensees may have to exploit new forms of advertising.

90. In the proceeding initiated by Broadcasting Public Notice 2008-102 (BNC 2008-102) broadcasters unanimously opposed the Commission's proposal to permit BDUs to sell advertising in commercial avails. Granting access to local avails will result in a redistribution of an already shrinking revenue source from Canadian broadcasters to BDUs and non-Canadian programming services with no appreciable net benefit to the Canadian broadcasting system.

91. It is worth noting that in paragraph 54 of Broadcasting Regulatory Policy 2005-88, the Commission recognized that permitting the sale of commercial advertising in the local availabilities would negatively impact both specialty and conventional television services that rely on advertising. In paragraph 56 of the same decision the Commission concluded that permitting BDUs to sell advertising in local avails "would result in broadcasters competing with BDUs and, indirectly, with U.S. satellite programming services, for local advertising revenues. This, in turn, would weaken the protection that currently surrounds the advertising revenues of local and regional television stations, and thus their ability to meet their Canadian programming commitments, including local programming." The Commission accordingly rejected the CCTA's application on the grounds that it failed to demonstrate a "clear and substantial net benefit to the Canadian broadcasting system justifying a change to its long standing policy respecting local availabilities.

92. Even if BDUs commit to provide a percentage of derived revenues to support Canadian programming, whether to the CMF or to promote independently owned Canadian programming, the net loss to linear broadcasters risks being substantial and enduring. The potential modification to the Commission's long standing policy on the sale of local availabilities represents a significant shift without the benefit of understanding the full economic impact to either the conventional or the specialty sector. Changes to regulatory measures that have supported or otherwise not disadvantaged linear services allowing them to earn reasonable revenues for their services will have irreversible consequences. The Commission's examination of group-based obligations accordingly should not be done absent a decision on whether BDUs

will be permitted to sell advertising in local availabilities as to do so will fail to take account of the significant drop in available revenues necessary for linear television services to meet expenditure obligations.

4.2 VOD

93. In paragraph 143 of Broadcasting Public Notice 2008-100 the Commission surmised that new forms of advertising represented new revenue opportunities for all parties and the Canadian broadcasting system in general but that it would require cooperation between broadcasters and BDUs. The Commission determined that it would establish a working group to develop best practices to guide arrangements between broadcasters and BDUs regarding the selling of advertising inventory and the sharing of costs and revenues and that such working group would be convened following a decision regarding the VOD regulatory framework.

94. In the proceeding initiated by Broadcasting Notice of Consultation 2008-101, the BDUs argued strenuously in favour of light to no regulation of VOD offerings on the grounds that such offerings compete with other on demand services offered on unregulated platforms. Similarly, BDUs argued that they should not be required to obtain their program rights from Canadian rights holders, that advertising limits should be removed and that the Commission should refrain from arbitrating revenue and cost sharing negotiations with broadcasters. Broadcasters, on the other hand, were unanimous that VOD programming should be acquired from licensed Canadian broadcasters or Canadian rights holders, that it would be inappropriate to mirror exhibition or expenditure requirements of the linear platform. Finally, broadcasters argued in favour of regulated access to the VOD platform something BDUs noted should be left to negotiation.

95. It is obvious that VOD is becoming an increasingly important part of the Canadian broadcasting system. It provides greater flexibility to, and is more and more popular with, the Canadian public.

96. Yet, broadcasters have a legitimate and increasingly pressing concern that BDUs will use the VOD platform and the liberties afforded in paragraph 111 of Public Notice 2008-100 permitting non-Canadian packages to allow back-door entry of non-Canadian programming to the detriment of the Broadcasting system as a whole. Therefore it is essential that the Commission adopt a regulatory framework that ensure that VOD complements service offerings provided by Canadian linear television services and put in place appropriate safeguards that will prevent BDUs from using VOD as a back door entry for foreign services.

4.3 Specialty Services Packaging Changes

97. One of the most significant changes that will take place in 2011 that will permanently and irreversibly transform the pay and specialty services sector is the migration to digital platforms. The migration means that BDUs will have unprecedented flexibility to design market and deliver smaller customized packages. This will be significantly impacting to pay and specialty services that, to date, have enjoyed high penetration (i.e. the old analog services in particular). In a digital

framework, pay and specialty services risk getting much lower penetration which means much lower revenues (both subscription and advertising), lower profitability and lower contributions to Canadian programming.[15]

98. Further aggravating matters are the Commission's vague definition of what constitutes a package. Despite ordering BDUs to offer Category A specialty services as part of a package before offering them on a standalone basis, it remains unclear whether the packages constructed by the BDUs will be sufficiently interesting to Canadians to generate adequate revenues for specialty services to allow them to meet their regulatory expenditure obligations.

99. In addition, in BPN 2008-100, the Commission determined that preponderance in individual packages was unnecessary if an overarching preponderance rule were in place. The Commission accordingly eliminated the 1:1 and 5:1 linkage rules that required BDUs to package Canadian discretionary services with non-Canadian discretionary services. The Commission reasoned that must carry Canadian services on basic services, access rights for Category A services and an overall preponderance would be sufficient to ensure that subscribers would receive 50+1% of Canadian services. It further determined that certain non-Canadian packages could in fact add to the diversity of services offered to subscribers. The Commission based its decision to allow non-Canadian packages on the grounds that parties failed to provide any compelling evidence that a significant problem would arise from the absence of a preponderance rule for individual packages and that "any non-Canadian packages that may be offered will not harm Canadian discretionary programming services."

100. The Commission's decision to allow non-Canadian packages "to add diversity of services" means that 52 Category B services risk facing direct competition from non-Canadian sources to secure carriage by BDUs. The Commission's decision means that 67%[16] viewership to Canadian services will diminish, money that would otherwise support the Canadian broadcast system will be paid to non-Canadians and existing Category B services who find themselves without carriage will potentially exit the market causing a loss of diversity and a loss of investment and employment in Canada. The potential for harm to discretionary services is significant.

101. Significant changes are also on the 2011 horizon for packaging specialty services in official language minority communities. The requirement to distribute only 1 Category A or B minority language service for every ten majority language service means in some areas a potential significant drop in minority language service to some communities because there was no requirement to grandfather services. The significant potential loss of specialty services was raised as a concern in the proceeding initiated by Broadcasting Notice of Public Hearing 2008-12, *Review of English and French-language broadcasting services in English and French linguistic minority communities in Canada.*

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[15] In 2008 private pay and specialty services contributed over $880 million according to the 2009 Communications Monitoring report (excludes CBC/SRC owned and operated services).
[16] Based on BBM EM Stats Cards, Fall 2008.

102. In the Commission's *Report to the Governor-in-Council on English and French Language broadcasting services in English and French linguistic minority language communities*,[17] the Commission noted that "communities should have the opportunity to subscribe to all the French-language services offered by a BDU as simply, efficiently and cost-effectively as possible and that BDUs should consider grouping all the French-language services in their digital offering into a single package as an attractive business opportunity." The Commission reasoned that, in a digital universe, creating a package of French language services would place a minor additional burden on BDUs. The Commission nevertheless refrained from ordering such a package.

103. Finally, the move to digital carriage only in 2011 means that specialty services that do not convert from analogue to digital risk being placed in a smaller package once the mirroring rules are eliminated. This coupled with the Commission's decision "to add non-Canadian diversity of voices" and the likeliness of much smaller packages will precipitate a net loss of revenues to the specialty sector in particular and the Canadian broadcasting system as a whole.

4.4 <u>Elimination of Mandated Wholesale Rates</u>

104. In paragraph 117 of Broadcasting Public Notice CRTC 2006-23 the Commission determined that a regulated basic wholesale rate would be appropriate for services that the Commission mandates for basic carriage on a digital basis via a 9(1)(h) order. For other services, however, it determined that wholesale rates will be set via negotiations between the parties. The Commission went on to note that during the transition period to the digital migration framework, the Commission would expect the licensees of services that are mandated for carriage on digital basic to ensure that their wholesale rate on digital reflects their analog wholesale rate.

105. In denying specialty services a regulated wholesale rate, the Commission was persuaded by the BDUs argument that "must carry" status places BDUs at a disadvantage in carriage negotiations. BDUs maintained that the Commission's dispute resolution mechanisms should remain available for use in cases where wholesale rate negotiation between a BDU and must carry service proves unsuccessful.

106. The Commission has removed an important tool from Canadian pay and specialty services that was an element necessary to successful negotiations with the BDUs. Absent a regulated wholesale rate Category A Canadian specialty services have no guarantee of any subscription revenue because the regulatory sanctioned value of the service has been removed. This vulnerability is only amplified in a digital environment where it remains to be seen how packages will be constructed and by the soon to be mandated requirement that Category A pay and specialty services make their signal available to BDUs.[18] Devalued specialty services will have no choice but to resort to the advertising market to make up for lost revenues.[19] These revenues will

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[17] Copy available at http://www.crtc.gc.ca/eng/BACKGRND/language/ol0903-lo0903.htm

[18] Paragraph 79 of Broadcasting Public Notice 2008-100.
[19] Pay television services cannot resort to the advertising market to generate advertising revenue.

be at the expense of conventional television services. Lower revenues earned by pay and specialty services, regardless if they are part of a larger ownership group, will mean reduced capacity to meet expenditure obligations.

4.5 The Impact of BDU Exemptions

107. In Broadcasting Order 2009-544 the Commission set out the terms and conditions that will govern the exemption of terrestrial BDUs serving fewer than 20,000 subscribers. The amended exemption order is intended to replace the two existing exemption orders for terrestrial BDUs, one for BDUs with fewer than 2,000 subscribers and the other for BDUs with 2,000 to 6,000 subscribers. In Broadcasting Order 2009-544, the Commission generally refrained from modifying the substance of its proposed exemption order as set out in Broadcasting Notice of Consultation 2009-173. Among the many modifications requested by broadcasters in general and the CAB in particular was the retention of access rights for pay and specialty services. Instead the Commission determined in paragraph 19 of Broadcasting Order 2009-544 that the preponderance of Canadian programming services to each subscriber was sufficient to protect Canadian pay and specialty services and ensure that subscribers are offered a wide range of such services. The Commission further indicated that it was "unlikely" that BDUs would reduce distribution of pay and specialty services due to competitive pressures from DTH BDUs.

108. The CAB notes that the Commission's determination in Broadcasting Order 2009-544 is inconsistent with its finding in Broadcasting Public Notice 2008-100 that a market oriented approach not supersede other objectives such as fostering diverse programming choices and support for Canadian services. Specifically the Commission noted:

> *The Commission considers that the issue of access rights is fundamental to any regulatory framework for the digital world. Removing most access requirements would unquestionably result in a simpler, more flexible and more market-oriented approach. However, such a market-oriented approach must not come at the expense of other objectives, in particular those that foster diverse programming choices and support Canadian services through the production and acquisition of Canadian programming. [emphasis added]*

109. The CAB reiterates the position first articulated in the proceeding leading to Public Notice 2008-100 and in response to Broadcasting Notice of Consultation 2008-173, that the elimination of access rules for cable BDUs with fewer than 20,000 subscribers, particularly because it includes BDUs operated by the top four MSOs, will allow exempt BDUs to threaten removal of an existing service or non-carriage of a new service as a lever to negotiate lower affiliation payments. The inevitable result is lower revenues for discretionary services and lower expenditures on Canadian programming. Small independent specialty services are particularly vulnerable in this regard because of their lack of negotiating power.

110. Loss of access by specialty and pay services to BDUs serving up to 25% of all cable subscribers will significantly detract from Canadian pay and specialty services' ability to meet their expenditure obligations. Relying on market forces will not ensure distribution and accordingly is not a guarantee of revenue to Canadian pay and specialty services or the system as a whole.

4.6 Asymmetrically applied Standard Authorizations

111. In paragraph 234 of Broadcasting Public Notice 2008-100 the Commission decided that it would reduce the necessity for duplicative applications by more than one BDU on the same issue by using standard authorizations. Standard authorizations would be used when one BDU requests something not contemplated in the BDU regulations to apply the authorization to all BDUs by way of a condition of license allowing for incorporation by reference. In Broadcasting Regulatory Policy CRTC 2009-546 the Commission adopted general authorizations that will apply to both licensed and exempt BDUs.

112. The full effect of the impact of standard authorizations is not measurable at this time. To date, however the Commission has granted requests from BDUs to individually deviate from the regulatory obligations. A request is typically granted or denied following a review that takes into account the facts of the market and the impact of programmers in the market. Extending the permitted divergence to all BDUs absent a proceeding to consider the impact on market players or the facts of each market amounts to back-door policy making that risks having significant detrimental impact on all linear service providers resulting in a tangential impact on their ability to meet their regulatory obligations.

4.7 Prohibition against Withholding Signals during a Dispute

113. In Broadcasting Regulatory Policy 2009-543 the Commission adopted new and/or revised regulations for pay television, specialty services as well as television services and BDUs. Among the changes made to the Pay Television regulations and the Specialty Services regulations was the prohibition against withholding a programming service during a dispute. While the Commission correctly limited the prohibition to services that are must carry services, the Commission refrained from adopting a comparable requirement requiring BDUs to make their services available on the same terms and conditions during a dispute as it did before a dispute. This omission leaves pay and specialty service providers vulnerable to disadvantageous changes being made to their carriage arrangements during a dispute.

114. The Commission should have due regard to the negotiating position of programming services and the elements that otherwise assist their ability to obtain sufficient value for their signals. Failure to create a balanced playing field places Canadian pay and specialty services at greater risk of being devalued with consequential impacts to their revenue potential and ability to meet regulatory obligations.

5.0 Other trends impacting current and future pay and specialty revenues

5.1 Who is profitable - the specialty sector or the individual services?

115. According to the Commission's statistical information and financial summaries for the specialty services sector, specialty services enjoyed a solid financial performance in 2008 with total revenues growing 7% from $2.18 billion in 2007 to $2.34 billion in 2008. PBIT for the sector as a whole however, dropped from 23.7% in 2007 to 23.4% in 2008. The drop in profitability has many asking, whether the sector has reached a plateau and is now turning a corner. Adding to the impact is the ever increasing number of specialty services licensed to operate which now stand at 150[20] up from 105 in 2004.

116. Viewed on an average per service basis, the revenue growth and profitability picture is much different. Of the 60 Category A specialty services and the 52 Category B specialty services owned by private broadcasters that reported revenues, more than 25% were unprofitable in 2008. Of those services that were profitable, 38% were only barely[21] profitable. Growth in both revenues and profits per service/unit was below the growth experienced for the sector as a whole.

117. The broadcast advertising market is contracting and there are predictions that this contraction will continue even after the current economic slowdown has abated. According to TVB, specialty TV advertising revenues for the first nine months of the 2008-2009 broadcast year are down 2 % compared to the same period last year.

118. The pay services sector had better results in 2008. Generally speaking most pay services were profitable in 2008 and only a couple of pay services were only barely profitable.

5.2 Migration of Viewing and Advertising to Unregulated Platforms

119. While most experts agree that alternative unregulated platforms represent both opportunities and challenges for regulated broadcasters, it is undeniable that these platforms contribute to viewing fragmentation. This in turn impact on the broadcasting industry business model that rely on achieving critical mass of viewers.

120. According to comScore, Canadians are some of the most avid viewers of online video in the world. According to a study released in February 2009, the average Canadian online video viewer spent 10 hours viewing videos[22] in February, up 53 percent from their average viewing time last year. Ofcom reports[23] that 22% of surveyed Canadians watched or downloaded long form video content such as a feature film or a complete television program.

[20] Table 4.3.1 of the CRTC 2009 Communications Monitoring Report.
[21] Defined as having a PBIT margin of 20.0 % or lower.
[22] An average of 150 videos per viewer.
[23] Ofcom International Communications Market 2008.

121. Based on BBM TV EM fall 2008 statistics, the CAB estimates that approximately ¼ of video viewing in Canada goes to unregulated platforms. Recent research is beginning to show a tipping point where customers are no longer complementing their viewing with online video viewing but rather that up to 20% of online video viewers are watching less TV because of their time spent watching online videos.[24]

122. The increase to online viewing is enabled by Canada's high broadband penetration which is available to 94% of the Canadian population. 9.57 million Canadians purchase broadband service.[25] Penetration of broadband services (which enables Canadians to watch (unregulated) online video), in fact exceeds the penetration of digital BDU service which is required to access certain Canadian diginets.

123. Advertisers are following eyeballs. According to the TVB, ad spend on the Internet was 8.7% in 2007. PwC projects that this will grow to 20.0% by 2013.[26] 45% of US survey respondents recently indicated that ads in online videos are as acceptable as ads in TV shows. Monetizing viewing on the Internet however is a significant challenge for Canadian broadcasters as was discussed at length at the Commission's New Media Hearing. Revenues from pre-roll advertising of content on broadcasters' website are negligible relative to advertising revenues from their traditional platforms. Monetization therefore represents an increasing challenge moving into the future.

124. Research is showing that Canadians will continue to consume professional and non-professional content on the Internet and that as they do more,, advertisers will follow leaving traditional broadcasters including specialty services with potentially less advertising revenue to maintain their operation and meet their regulatory obligations.

125. In sum, it would be imprudent for the Commission to maintain any assumptions regarding the financial capacity of pay and specialty services to meet or even exceed current regulatory exhibition and/or expenditure obligations. There are too many significant regulatory and market changes at the door or on the horizon that will impact the pay and specialty service businesses as they currently exist. The Commission cannot reasonably rely on historical financial performance data when making new policy determinations. Prior to mandating any Canadian programming expenditure requirements, it is incumbent on the Commission to have due regard to the financial facts as they exist in the present but also as they may change in response to not only the Commissions' 2011 regulatory framework but also to the rapidly evolving market realities impacting television services. In other words, **the Commission cannot rely on financial results achieved under a specific "more protected regulatory environment" to determine requirements for the future given that it has enacted an whole new set of rules creating a whole new regulatory environment, the outcomes of which are yet to unfold**.

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[24] Frank N. Magid Associates, Magid Media Futures 2009: Opportunities in online video June 2009.

[25] http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html

[26] PwC, *Global Entertainment and Media Outlook, 2009-2013*.

7.0 Conclusion

126. In conclusion, the CAB's recommendations are summarized as follow:

- that the Commission eliminate the "one signal per province" policy established in PN 2008-100 and mandates carriage of all local television signals (French, English and third language local television services) on each DTH service provider for distribution in their local markets;
- That DTH providers file a detailed plan on carriage of all local signals;
- That the programming rights purchased by Canadian broadcasters not be conditional or diminished by regulation;
- That the Commission give due consideration to the forthcoming regulatory and market changes that will specifically impact the pay and specialty services business model.

127. The CAB appreciates the opportunity to provide its comments in this proceeding and wishes to appear at the November 16, 2009 hearing that will be held in Gatineau.

Sincerely,

Originally signed by:

Pierre-Louis Smith
Vice-President, Policy and Chief Regulatory Officer

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