



**Canadian
Association of
Broadcasters**

**L'Association
canadienne des
radiodiffuseurs**

May 13, 2005

Via E-mail

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Ms. Rhéaume:

RE: Broadcasting Public Notice CRTC 2005-29: Application # 2004-1571-2 by Bell ExpressVu Limited Partnership

1. The Canadian Association of Broadcasters (CAB) – the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services including private television and radio stations, networks, and specialty, pay and pay-per-view television services – is pleased to submit this intervention with respect to the above-noted application by Bell ExpressVu Limited Partnership (ExpressVu).
2. ExpressVu is requesting authority to distribute on a part-time basis via partial and/or omnibus channels the unique local programming of Canadian conventional television stations that it does not already distribute in their entirety. For the reasons detailed below, the CAB **opposes** the ExpressVu application.
3. From the consumer's point of view, ExpressVu's proposal to uplink only the locally originated programming of conventional stations is a half-measure. From the broadcaster's point of view, it represents the selective distribution of only the local elements of a station's programming in order to compete with cable for subscribers, but without cable's obligation to carry the full program schedule, including the advertising that supports those expensive local programs.
4. Section 7 of the *Broadcasting Distribution Regulations* prohibits the alteration or curtailment of broadcasters' programming by broadcasting distribution undertakings (BDUs), except in a very few narrowly defined circumstances. A key consideration supporting this general prohibition is the recognition that a program schedule is a complete whole in which some parts support

others creatively and economically. To allow BDUs to pick and choose among programs would destroy the integrity of both the program concept and the business plans – business plans that attempt to support the local programming of television broadcasters who are already severely impacted by DTH and the infringement on program rights resulting from the importation of distant signals into local markets.

5. Furthermore, the uplinking of the locally originated programming of television stations would do nothing to address the underlying concerns of local broadcasters whose signals are not distributed by ExpressVu. In particular, it would not solve the competitive imbalance that arises when one local station in a given market receives DTH carriage while another station in the same market does not.
6. In our September 25, 2003 interventions concerning ExpressVu's and Star Choice's licence renewal applications, the CAB filed an analysis of the impact of DTH on local television stations not carried by DTH¹. This analysis demonstrated how the impact of non-carriage is exacerbated in a situation where a local television station does not receive DTH carriage while competitors are offered as part of the DTH services. As noted in the CAB's intervention, "[i]n such a situation, the local station cannot be competitive in its home market when its competitors are receiving DTH carriage and it is not."
7. For this reason, in its interventions to the ExpressVu and Star Choice licence renewal applications the CAB urged the Commission to adopt a "**carry one, carry all**" policy respecting the DTH distribution of local television stations serving a given market.
8. In its March 2004 decisions on the DTH licence renewal applications, the Commission chose not to implement such an approach, citing concerns about "the current practical limits on available capacity." Instead, the Commission invited the DTH licensees to consider the use of omnibus and partial channels to provide the local programming of stations whose signals are not distributed in their entirety, as a means of providing access to local programming and conserving satellite capacity. This application by ExpressVu is a direct response to that invitation.
9. With regard to the capacity concerns noted by the Commission and used by ExpressVu as justification for the omnibus channel approach, the CAB has not seen conclusive evidence to support the assumption that there is insufficient capacity now or in the future to increase the distribution of local stations. The CAB acknowledges that there will be new capacity demands in the future for the distribution of high definition services, and these demands will have to be addressed by means of additional satellite facilities and continuing technological advances in compression and modulation techniques.

¹ *Impact of DTH: the Relationship between "Hours Tuned" and Growth in Satellite*, Strategic Inc., September 22, 2003.

10. It is not at all evident, however, that the relatively limited amount of capacity that would need to be dedicated to the carriage of local stations not currently distributed would be a significant factor in the ability of ExpressVu to meet those future demands.
11. As noted above, the use of omnibus channels to provide the local programming of television stations not otherwise distributed is not a solution to the fundamental issue of non-carriage. In the past year since the DTH renewal decisions were issued, the adverse impact of DTH on local television stations not enjoying DTH distribution has continued to increase as viewing of DTH-delivered distant signals has grown. In the CAB's view, the only appropriate solution to the current unbalanced situation remains immediate implementation of a "carry one, carry all" policy, followed by the uplinking of any remaining local television stations not carried. This would create an equitable local carriage framework between DTH, cable and multipoint distribution systems, and would ensure that all BDU subscribers could directly access their local television stations, irrespective of their choice of service provider.
12. Accordingly, the CAB submits that the Commission should **deny ExpressVu's proposal** to distribute on partial or omnibus channels the locally originated programming of stations not currently carried. Furthermore, the Commission should **direct ExpressVu to make immediate plans to distribute in their entirety all local television stations serving markets where one or more other local stations are already distributed by ExpressVu.** Once ExpressVu implements the "carry one, carry all" carriage regime, it should also be expected to **uplink any remaining local television stations as soon as possible.**
13. If the Commission should nevertheless conclude that consideration of an omnibus channel approach may be warranted, notwithstanding the significant concerns identified in this intervention, the CAB submits that any authorization of **partial** or omnibus channels to distribute locally originated programming should be subject to certain explicit conditions.
14. First, as acknowledged in its application, ExpressVu must obtain the prior written consent of a **local** television station before distributing its programming. The principle of prior written consent is fundamental for the following reasons:
 - (i) the local TV broadcaster must have control over the use of its signal to address potential rights issues raised by the distribution of locally originated programming outside of its local market;
 - (ii) the local broadcaster must be able to negotiate the detailed terms or restrictions respecting the carriage of its locally originated programming; e.g. carriage of all or part of its local programming, carriage of local programming simultaneous with its over-the-air broadcast or on a delayed basis, DTH channel designation and identification, etc.; and
 - (iii) the local broadcaster must be able to negotiate appropriate considerations, including financial compensation, for the carriage of any part of its programming.

15. Second, the Commission should specify that the distribution of partial or omnibus channels as proposed by ExpressVu is an interim measure only, subject to review at an early date with respect to the satellite capacity available to carry additional local stations in their entirety. Specifically, omnibus channels should not be authorized past August 12, 2006, the date on which ExpressVu's current conditions of licence mandating the carriage of certain local television stations expire.
16. Third, ExpressVu should be directed to prepare a plan for the distribution of all local television stations, commencing no later than August 12, 2006.
17. Fourth, the Commission should attach a condition of licence specifying that any authorization of omnibus channels to distribute locally originated programming must not be used by ExpressVu as a rationale to reduce the carriage of local television stations already distributed on a full-time basis.
18. And finally, the Commission should confirm by condition of licence that ExpressVu would be responsible for all costs related to the uplinking of locally originated programming to be distributed on the partial or omnibus channels.
19. The CAB appreciates the opportunity to participate in this proceeding.

Yours sincerely,



David Keeble
Senior Vice-President
Policy & Regulatory Affairs

cc: Bell ExpressVu Limited Partnership (cfrank@expressvu.com)

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