



## Broadcasting Decision CRTC 2006-615

Ottawa, 3 November 2006

**Bell ExpressVu Limited Partnership**  
Across Canada

### **Distribution of satellite subscription radio services by direct-to-home broadcasting distribution undertakings**

*In this decision, the Commission finds that satellite subscription radio (SSR) undertakings are not programming undertakings and that the licensees of direct-to-home broadcasting distribution undertakings, in the absence of a specific condition of licence allowing such distribution, do not have authority under section 39 of the Broadcasting Distribution Regulations to distribute the programming of SSR undertakings.*

#### **The issue**

1. On 2 March 2006, Commission staff received a letter from the Canadian Broadcasting Corporation (CBC) seeking clarification regarding carriage of satellite subscription radio (SSR) services by broadcasting distribution undertakings (BDUs). In the letter, the CBC stated that it had learned that one or both of the licensed direct-to-home (DTH) BDUs were considering distributing SSR services to their subscribers. The CBC was of the view that such distribution was not permissible under section 39 of the *Broadcasting Distribution Regulations* (the Regulations), and sought Commission direction on the issue.
2. The two licensed DTH BDUs are Bell ExpressVu Limited Partnership<sup>1</sup> ((ExpressVu) and Star Choice Communications Inc. (Star Choice). There are also two licensed SSR undertakings. They are operated by Canadian Satellite Radio Inc. (CSR), and Sirius Canada Inc. (Sirius). The Commission licensed these SSR services in *Canadian Satellite Radio Inc. - Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-246, 16 June 2005 (Decision 2005-246), and *SIRIUS Canada Inc. - Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-247, 16 June 2005 (Decision 2005-247).
3. Section 39 of the Regulations), which applies to DTH BDUs, reads, in part, as follows:

Except as otherwise provided under a condition of its licence, a licensee may distribute

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<sup>1</sup> Bell ExpressVu Inc. (the general partner), and BCE Inc. and 4119649 Canada Inc. (partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership

(a) the programming service of any licensed programming undertaking, other than a television pay-per-view service [...]

4. On 2 March 2006, Commission staff sent letters to ExpressVu and Star Choice in which it asked whether it was the intent of these BDUs to distribute SSR services, and sought their comments regarding their authority to carry such services. By letter dated 8 March 2006, ExpressVu confirmed that it had not yet begun to distribute SSR services, but expressed the view that such distribution would be permissible under section 39 of the Regulations. Star Choice responded by letter dated 8 March 2006 that it had no plans to distribute an SSR service as part of its DTH service and that it was aware of its regulatory obligations.
5. In a letter dated 10 March 2006, Commission staff sought further comments from the CBC, ExpressVu, Star Choice, CSR and Sirius. The CBC confirmed its position that the undertakings operated by Sirius and CSR were not programming undertakings, but rather a new type of undertaking, or in the alternative, BDUs. As a consequence, the CBC was of the view that DTH BDUs are not entitled to distribute SSR services.
6. In a letter dated 20 March 2006, ExpressVu submitted that SSR undertakings were indeed programming undertakings, and noted that the Commission itself had referred to SSR undertakings as a form of radio programming undertaking 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 (Public Notice 2003-68).
7. Submissions dated 20 March 2006 were also received from CSR and Sirius supporting ExpressVu's interpretation of the nature of their services. Sirius stated that "if the Commission does not think that Sirius does what this definition [of programming undertaking] describes, Sirius would welcome an explanation as well as a right of reply to such an explanation." CSR, for its part, stated that "we respectfully disagree with the submission from the CBC in that the satellite radio services are most certainly 'licensed programming undertakings' and to suggest otherwise is mere sophistry."
8. On 12 April 2006, Commission staff issued an opinion regarding DTH BDU carriage of SSR services. The letter indicated that each of Sirius and CSR was licensed as a new type of broadcasting undertaking, namely a satellite subscription radio undertaking, and that they were not licensed as "programming undertakings" nor can they be considered to be "programming undertakings" within the meaning of the Regulations or the *Broadcasting Act* (the Act). Thus, section 39 of the Regulations did not authorize DTH undertakings to distribute SSR services. Commission staff concluded that "BDUs must obtain an amendment to their conditions of licence in order to distribute either the Sirius or CSR satellite radio services."

## ExpressVu's request for a Commission ruling

9. In a letter dated 25 May 2006, ExpressVu disagreed with the opinion of Commission staff and asked for a Commission ruling on the issue. In particular, ExpressVu requested that the Commission make the following findings:
  - a) that the term “programming undertaking”, as used in section 39(a) of the Regulations, has the same meaning as that set out in section 2 of the Act;
  - b) that SSR undertakings, and more particularly those satellite subscription radio undertakings licensed in Decisions 2005-246 (CSR, also known as XM Canada) and 2005-247 (Sirius), are properly considered to be “programming undertakings”, as defined in section 2 of the Act; and
  - c) that ExpressVu is accordingly authorized by section 39(a) of the Regulations and the terms of its existing licence to distribute the services licensed in Decisions 2005-246 and 2005-247.
10. ExpressVu submitted that the term “programming undertaking”, as used in the Regulations, has the same meaning as defined in section 2 of the Act. ExpressVu referred to section 16 of the *Interpretation Act*, which states:

Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.
11. ExpressVu also argued that, when examining the plain language of the definition of a “programming undertaking”, the CSR and Sirius services can be nothing other than a “programming undertaking”, as defined at section 2 of the Act, which reads as follows:

“programming undertaking” means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus.
12. ExpressVu argued that the undertakings operated by CSR and Sirius fit all three characteristics of a programming undertaking: (a) SSR services are undertakings for the transmission of programs; (b) they can be transmitted either directly (i.e., from a satellite to a consumer's receiver) or by radio waves or other means of telecommunication, or indirectly (i.e., from a satellite to a BDU to a consumer's receiver) through a distribution undertaking; and (c) they do so in order to provide their respective programming services to the public by means of broadcasting receiving apparatus (i.e., car or home-based receivers or conventional television sets). Thus, concluded ExpressVu, by reason of the definition of the Act, SSR services must unequivocally be considered programming undertakings.

13. ExpressVu also submitted that, even if the Commission did intend to create a new class of undertaking, it does not have the jurisdiction to do so. ExpressVu drew a distinction between the “types” of broadcasting undertakings defined in section 2 of the Act and the “classes” of licences that the Commission may establish pursuant to section 9(1)(b) of the Act. ExpressVu argued that the Commission cannot alter the Act’s defined nature of an undertaking that a broadcaster operates. For example, ExpressVu stated that a BDU, as defined in the Act, cannot be rendered a different type of undertaking, ignoring the plain statutory definition, simply because the Commission issues it a licence that omits the word “distribution”. ExpressVu concluded that the name given to a licence cannot override the plain meaning of the definitions set out in an Act of Parliament.

#### **Reply comments**

14. The CBC filed a response on 26 May 2006 that disagreed with ExpressVu’s argument. The CBC submitted that the opinion letter issued by Commission staff properly reflected the nature of the licence awarded to Sirius and CSR.

#### **Commission’s analysis**

15. As noted by ExpressVu, the definition of a “programming undertaking” is contained in section 2 of the Act. The use of the term “programming undertaking” set out in the Regulations has the same meaning as that set out in the definition found in section 2 of the Act. Indeed, as stipulated in section 16 of the *Interpretation Act*, when a term is defined in the governing statute, that term need not be defined in a subordinate instrument, such as regulations.
16. The Commission notes that the central issue in the present matter is whether, as suggested by ExpressVu, the SSR undertakings operated by CSR and Sirius are “programming undertakings”. If they are “programming undertakings”, then ExpressVu and any other licensed DTH undertaking would be authorized to distribute their programming services under the terms of section 39 of the Regulations, quoted above. On the other hand, under section 39 of the Regulations, if the SSR undertakings are not “programming undertakings”, ExpressVu would not be permitted to distribute their services, except as otherwise provided under a condition of its licence.
17. As ExpressVu noted in its 20 March 2006 submission, when the Commission issued Public Notice 2003-68, it called “for applications for a broadcasting licence to carry on a multi-channel subscription radio programming undertaking.”
18. In response to this call, Sirius submitted an application dated 18 December 2003 to “provide Canadian audiences with a new satellite digital audio distribution service.” Sirius proposed that “the new undertaking be licensed as a new type of distribution undertaking – a Satellite Audio Broadcasting Distribution Undertaking.”
19. CSR submitted an application dated 12 April 2003 “for a licence to provide satellite audio distribution undertaking services in Canada.” CSR explained that “this category of undertaking has not previously been identified by the CRTC regulations as a specific

class of licence.” CSR stated in its application that “the Commission’s powers to create new classes of licences and to license undertakings which do not fit within previously defined categories is well defined by virtue of the provisions of section 9 of the *Broadcasting Act*.”

20. It is clear from the above that, when CSR and Sirius responded to the call by submitting applications, they did not view themselves as proposing programming undertakings, but rather, as proposing a new type of distribution undertaking or an entirely new type of undertaking not previously defined by the Commission.
21. This issue emerged again at the hearing, where the applicants suggested to the Commission that SSR services shared characteristics of both a programming undertaking and a distribution undertaking. At one point, when asked by the Commission how its proposed undertaking should be licensed, counsel for CSR stated: “We are applying for satellite, subscription, radio or audio distribution undertaking ... We are not suggesting that the terms ‘distribution undertaking’ not be used to describe the undertaking.”
22. Later on in the hearing, Sirius was invited to comment on the possibility that certain duties and obligations of BDUs might be incompatible with the applicant’s plans. The applicant’s counsel responded as follows: “We think we should be a BDU with conditions of licence, some focused directly on the undertaking itself as a BDU and some directed towards the nature of the programming channels that we have been asking you to authorize us to carry, the Canadian programming channels.”
23. In its licensing decisions, the Commission authorized each of CSR and Sirius “to carry on a satellite subscription radio undertaking.” The Commission did not use the term “programming undertaking” or the term “distribution undertaking” when describing the licences to be issued.
24. In *Introduction to Broadcasting Decisions CRTC 2005-246 to 2005-248: Licensing of new satellite and terrestrial subscription radio undertakings*, Broadcasting Public Notice CRTC 2005-61, 16 June 2005 (Public Notice 2005-61), which accompanied the licensing decisions, the Commission indicated that it was licensing these services on the understanding that:
  - the programming of CSR and Sirius 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;
  - the undertakings would have a direct relationship with their subscribers in that the “new radio undertakings would provide a package of radio channels to subscribers for a monthly fee,” and
  - the programming of CSR and Sirius would be delivered primarily by satellite, with terrestrial transmitters as required to fill in gaps in coverage.

25. The Canadian content obligations set out in Decisions 2005-246 and 2005-247, including the determination of the number of channels that were to be Canadian channels, were predicated on a finding that the CSR and Sirius services were to be very particular in nature. The determination of the Commission in those decisions not to characterize the undertakings as either “programming undertakings” or “distribution undertakings” is consistent with the particular nature of the services in question and the Commission’s rationale for licensing expressed in these decisions and the accompanying Public Notice 2005-61. In the Commission’s view, it is clear that, had it intended to license these services as programming undertakings, it would have used the term “programming” when describing them. This was not done.
26. In terms of the definitions contained in the Act, the Commission agrees with CSR and Sirius that their SSR undertakings have the characteristics of a programming undertaking. The Commission is also satisfied that they have the attributes of a distribution undertaking, as defined in section 2 of the Act. In this regard, SSR undertakings receive and retransmit broadcasting. Moreover, as discussed at the 1 November 2004 Public hearing, some of the devices used to receive the signals of SSR services are portable, thus enabling the broadcasting of SSR undertakings to be retransmitted to permanent or temporary residences or dwelling units. In the circumstances, given the hybrid nature of these services, the Commission considers that defining SSR undertakings uniquely as programming undertakings would not accurately describe or encapsulate their activities.
27. The Commission notes, moreover, that the definition of “broadcasting undertaking” set out in section 2 of the Act is as follows:

“broadcasting undertaking” includes a distribution undertaking, a programming undertaking and a network.
28. The use of the term “includes” in the definition of “broadcasting undertaking” indicates that the undertakings enumerated in the list are not the only types of undertaking that can be defined as broadcasting undertakings. In addition, the Commission agrees with CSR that the Commission has the authority to create and issue a new class of undertaking. This is consistent with section 5(2)(c) of the Act, which provides that “the Canadian broadcasting system should be regulated and supervised ... in a flexible manner that is readily adaptable to scientific and technological change.”

### **Commission’s conclusion**

29. As previously stated, the 12 April 2006 staff opinion was to the effect that each of CSR and Sirius was licensed as a satellite subscription radio undertaking, that being a new type of undertaking that is not a programming undertaking. The above analysis leads the Commission to the same conclusion.

30. It is thus the Commission's determination that, since CSR and Sirius are satellite subscription undertakings, as distinct from "programming undertakings", DTH providers do not have the authority under section 39 of the Regulations to distribute the CSR and Sirius programming, in the absence of a specific condition of licence allowing such distribution.

Secretary General

*This decision is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*