August 2, 2005

Mr. Alex Himelfarb
Clerk of the Privy Council and
Secretary to the Cabinet
Langevin Block
80 Wellington Street
Ottawa, Ontario K1A 0A3

Pursuant to subsection 28(1) of the *Broadcasting Act*, and on behalf of our respective organizations, we hereby file the attached Petition to the Governor in Council requesting to set aside Broadcasting Decisions CRTC 2005-246 and CRTC 2005-247.

Your consideration of this matter is most appreciated.

Yours sincerely,

Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)
American Federation of Musicians (Canada) (AFM)
Canadian Auto Workers (CAW)
Canadian Conference of the Arts (CCA)
Canadian Film and Television Production Association (CFTPA)
Canadian Independent Record Production Association (CIRPA)
Canadian Labour Congress (CLC)
Communications, Energy & Paperworkers Union (CEP)
Directors Guild of Canada (DGC)
Friends of Canadian Broadcasting (FCB)
National Campus & Community Radio Association (NCRA/ANREC)
Society of Composers, Authors and Music Publishers (SOCAN)
Songwriters Association of Canada (SAC)
United Steel Workers (USW)
Writers Guild of Canada (WGC)

cc:
The Honourable Liza Frulla, Minister of Canadian Heritage
Ms. Diane Rhéaume, Secretary General, CRTC
Canadian Satellite Radio Inc.
Sirius Canada Inc.

PETITION TO HER EXCELLENCY THE GOVERNOR IN COUNCIL

IN THE MATTER OF BROADCASTING DECISIONS CRTC 2005-246 and CRTC 2005-247 June 16, 2005

IN THE MATTER OF Broadcasting Decisions CRTC 2005-246 ("Decision 2005-246") and CRTC 2005-247 ("Decision 2005-247"), dated June 16, 2005, of the Canadian Radio-Television and Telecommunications Commission (the "Commission"); and

IN THE MATTER OF a Petition to Her Excellency the Governor in Council in virtue of section 28 of the *Broadcasting Act* (the "Act"), and any other applicable laws, for an order to set aside the granting of the applications by Canadian Satellite Radio Inc. ("CSR") and Sirius Canada Inc. ("Sirius Canada") for broadcasting licences to carry on satellite radio undertakings in Canada.

PETITION OF

- Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)
- American Federation of Musicians (Canada) (AFM)
- Canadian Auto Workers (CAW)
- Canadian Conference of the Arts (CCA)
- Canadian Film and Television Production Association (CFTPA)
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- Directors Guild of Canada (DGC)
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- Society of Composers, Authors and Music Publishers (SOCAN)
- Songwriters Association of Canada (SAC)
- United Steel Workers (USW)
- Writers Guild of Canada (WGC)

> This country must be assured of complete control of broadcasting from Canadian sources, free from foreign interference or influence. Without such control, radio broadcasting can never become a great agency for communication of matters of national concern and for the diffusion of national thought and ideals, and without such control it can never be the agency by which national consciousness may be fostered and sustained and national unity still further strengthened.
>
> The Right Honourable Richard Bedford Bennett
> Former Prime Minister of Canada (1930-1935)

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PETITION

1. The Petitioners hereby petition Her Excellency the Governor in Council pursuant to subsection 28(1) of the Act, and any other applicable laws, and respectfully request that the Governor in Council make an order setting aside Decisions 2005-246 and 2005-247. Copies of these decisions and Public Notice 2005-61 are attached for reference as Appendices I, II, and III.

2. The specific relief sought is with respect to the Commission's decisions to grant broadcasting licences for both CSR (Decision 2005-246) and Sirius Canada (Decision 2005-247) to provide satellite radio services in Canada, referred to in the respective decisions as "satellite subscription radio undertakings".

IDENTITY OF THE PETITIONERS

3. The petitioners represent the interests of songwriters, musical composers, radio dramatists, performing and recording artists, music publishers, producers of sound recordings, citizen watchdog groups, labour organizations, and local community broadcasters. The petitioners represent all sectors of the creative communities and a variety of interests representing Canadians in general, primarily in English Canada. The petitioners directly and indirectly represent millions of Canadians and contribute significantly to the growth of the Canadian economy including the cultural industries.

4. Many of the petitioners have individually appeared before the Commission as interveners in both the CSR and Sirius Canada licence hearings and have presented their concerns to the Commission, both orally and in writing, regarding the licensing of satellite radio undertakings.

5. During the hearings, some of the petitioners had requested the Commission to delay the issuance of licences until a fully transparent and public consultative hearing could be held by the Commission to study and receive recommendations for policy guidelines for the introduction of satellite radio in Canada.

6. The decision by the Commission to issue licences to CSR and Sirius Canada introduces a completely new method of distribution of musical recordings and other radio programming and it is one that will have a significant and long-term impact on Canadian broadcasting, the music and recording industries, performers, composers, and other creators. The Commission has failed to take into consideration that it was licensing Canadian services, rather than North American services, that must adhere to the tenets of the Act in Canada.

IDENTITY OF THE SATELLITE SERVICES

7. Canadian Satellite Radio Inc. is partially owned and controlled by John Bitove, a Canadian citizen and resident, in partnership with XM Satellite Radio Inc. ("XM"), an American owned and operated company. CSR proposed to offer elements of the American service of XM and a minimum number of Canadian-produced channels across Canada on a subscription basis. Under the terms of the agreement between XM and CSR, XM would make four among 101 audio channels available to CSR to provide two all-Canadian music channels, one in English and one in French, an English-language comedy channel, and a French-language news/talk channel.

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

9. The minimum licence conditions the Commission has required of CSR and Sirius Canada are as follows:
    a. at least eight original channels produced in Canada, with a maximum of nine foreign channels able to be offered for each Canadian channel;
    b. at least 85% of the musical selections and spoken word programming broadcast on the Canadian channels must be Canadian;
    c. at least 25% of the Canadian channels must be in the French language (minimum of three);
    d. at least 25% of the musical selections on the Canadian channels must be new Canadian musical selections; and
    e. a further 25% of the selections must be by emerging Canadian artists.
    f. The licensees must also contribute at least 5% of their gross annual revenues to initiatives for the development of Canadian talent, such as FACTOR or MusicAction funds that assist the development of new musical artists. These contributions will be allocated equally to the development of English and French-language talent.

EXECUTIVE SUMMARY

10. The petitioners ask the Governor in Council to exercise its powers under subsection 28(1) of the Broadcasting Act to set aside Decisions 2005-246 and 2005-247 because these decisions derogate from the attainment of the objectives of the broadcasting policy as set out in subsection 3(1) of the Act.

11. The Commission's decisions allow CSR and Sirius Canada to offer national multi-channel subscription radio services in Canada, of which 90% of the content is produced by Americans and packaged in the United States to be delivered by American satellite facilities directly to Canadians. These decisions represent an historical low point in Canadian content broadcasting regulation, where the Commission has sanctioned wholesale dumping of foreign cultural products and services.

12. Parliament surely could not have intended that the Commission would interpret subsection (3)(1)(f) of the Act, which requires the predominant use by Canadian broadcasting undertakings of Canadian creative and other resources unless impracticable, as justification to license the CSR and Sirius Canada services, which are subject to the business plans of their respective American partners and are composed of predominantly foreign programming.

13. The Commission has also erred by considering that the relative size of the Canadian market vis-à-vis the American market factored into the idea that the predominant use by Canadian broadcasting undertakings of Canadian creative and other resources was impracticable for CSR and Sirius Canada. Canada has always been a smaller market than the U.S., and this fact is not grounds for deviation from the Act.

14. The Commission should not have acted as if it is empowered by the Act to trade off availability of a foreign-supplied service to all Canadians against predominant use of Canadian creative and other resources.

15. Rather than achieve the objectives of the Act, a perverse result of the Commission's decision is that it will only serve to ghettoize Canadian programming, and in particular music programming. The majority of the CSR and Sirius Canada services offer genre-specific music channels and, therefore, by requiring that such Canadian music be played only on the few Canadian-produced channels, the Commission has, in effect, reduced Canadian music to just another genre in a multi-channel universe.

16. On the few Canadian-produced channels on both the CSR and Sirius services, Canadian content music is available in a multi-genre block format that must compete for an already established audience drawn to the single-genre American music channels on the same services. This can be expected to greatly reduce the incentive to listen to Canadian programming, which is inconsistent with the Commission's mandate, which is to apply the broadcasting policy above all else.

17. The Commission's assertion that Canadian recording artists will benefit from exposure to an American audience is an unrealistic and unsupported notion that, at best, is an issue that is entirely outside its mandate as a regulator of Canadian broadcasting. It was improper for the Commission to consider this issue when it was granting licences to CSR and Sirius Canada.

18. If allowed to stand, these decisions create a slippery slope precedent that will come back to the Commission again when terrestrial Canadian radio undertakings seek equal treatment to lower Canadian content levels, thereby jeopardizing decades of public policy effort to ensure there is space for Canadian audio and audio-visual programming in the broadcast system. If allowed to stand, this negative precedent would be used by other broadcast licence applicants using new technologies, such as video-to-cell phone content delivery and others yet to come to market.

19. The Commission has failed to require the satellite licensees to make any adequate commitment to French-language programming, in direct contradiction to established precedent and broadcast policy.

20. Nor has any visible, specific, or enforceable commitment been made to multicultural, ethnic minority or Aboriginal programming, which is contrary to both the government's cultural diversity objectives and to broadcasting policy.

21. The decisions also directly contradict Canada's commitment to and support of the UNESCO convention on cultural diversity, behind which Canada has been a driving force.

22. While the Commission may have satisfied itself that the licensees were financially controlled by Canadians, it granted these licences regardless of strong evidence that, in terms of both programming and delivery, the CSR and Sirius Canada services will effectively be controlled by foreign interests. In no sense do either CSR or Sirius Canada control programming on the vast majority of the channels on the service under the meaning of the Radio Regulations, 1986 ("the Regulations") or subsections 3(1)(a) and 3(1)(h) of the Act.

23. The Commission has placed unjustifiable weight on the issue of stamping out a so-called satellite radio "grey market' in Canada. This extraneous issue presented by the applicants was supported by "little quantitative evidence", as the Commission recognized in its decision. The Commission should not have considered such an argument in granting broadcast licences to CSR and Sirius Canada.

24. As publicly stated, the business plans of the American partners of CSR and Sirius Canada are to compete for audiences with American terrestrial radio. The Commission should have held a policy hearing to examine the impact of satellite radio on the Canadian market prior to a licensing hearing, as requested by many interveners in the process of the licence hearings for CSR and Sirius Canada. Owing to its failure to do so, the Commission has licensed these multi-channel satellite services without consideration of the impact on terrestrial radio, the Canadian creative community, or the music industry, a major supplier of product to these entities.

25. While there are benefits to the introduction of subscription radio services in Canada, including bringing new multi-channel service to rural and remote areas and automobiles and other vehicles, these benefits do not outweigh the gravity of such derivation from long-standing policy that has ensured that Canadians have the opportunity to experience their own culture and identity on the broadcast system.

26. For these reasons, outlined below in detail, the petitioners ask the Governor in Council to set aside Decisions 2005-246 and 2005-247.

CANADIAN CONTENT AND PROGRAMMING

27. Subsection 5(1) of the Act states that the Commission "shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2)." The use of the word "shall" in this section means that the Commission must implement the broadcasting policy in section 3(1). The Commission's decision to deviate from this instruction in the CSR and Sirius Canada licences is contrary to subsections 3(1)(b), (d), (e), and (f) of the Act set out below:

> 3(1)(b) "the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;"
>
> 3(1)(d) "the Canadian broadcasting system should
>
> i. serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
> ii. encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,"
>
> 3(1)(e) "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;"
>
> 3(1)(f) "each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;"

28. Subsection 3(1)(b) of the Act is very clear that Canadian programming is the central component of the broadcasting policy. Canadian programming, the expression of national identity, and cultural sovereignty are to be maintained and enhanced in the broadcasting system, which uses radio frequencies that are public property.

29. Subsection 3(1)(d) sets the goals of the broadcasting system that are to enrich all aspects of Canadian society by encouraging expression of Canadian talent, creativity, opinions, analysis, and ideas that reflect who we are as Canadians, what we want to be, and how we see the world around us.

30. Subsections 3(1)(e) and (f) set out how the goals of the broadcasting policy are to be attained and are the obligations that the Commission must impose to carry out its mandate in section 5 of the Act.

31. As noted above, the mandate of the Commission is to implement the broadcasting policy and to regulate the broadcasting system as follows:

    > Objects
    > 5(1) Subject to this Act and the Radiocommunication Act and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).
    >
    > Regulatory policy
    > 5(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner…

    The Commission is obligated to always observe the broadcasting policy over its mandate to regulate the broadcasting system in a flexible manner as follows:

    > Conflict
    > 5(3) The Commission shall give primary consideration to the objectives of the broadcasting policy set out in subsection 3(1) if, in any particular matter before the Commission, a conflict arises between those objectives and the objectives of the regulatory policy set out in subsection (2).

32. The predominant use of Canadian resources is a guiding principle of the broadcasting policy and one that is pre-eminent in the mandate of the Commission. Subsection 3(1)(e) requires that each element of the broadcast system "shall contribute in an appropriate manner to the creation and presentation of Canadian programming". This requirement is not optional, as evidenced by the use of the word "shall", and is only qualified by the phrase "in an appropriate manner", which relates to how various elements of the broadcasting system contribute to the creation and presentation of Canadian programming.

33. The Commission is to ensure the obligation to maximize the use of Canadian resources in subsection 3(1)(f), which is also compulsory because of the use of the word "shall". Even if there are no resources available to provide a subscription audio service to "all Canadians", this does not permit the Commission to ignore the compulsory requirements of subsection 3(1)(f).

34. The Commission has wrongly determined that the structure, programming, and operations of CSR and Sirius Canada render it impracticable that they make predominant use of Canadian creative resources. The facts on which the Commission has based its decision in relation to subsection 3(1)(f) do not apply to the exception that allows licensees to make less than predominant use of Canadian creative resources in the creation and presentation of programming. Both the CSR and Sirius Canada services feature programming that is predominantly created in the U.S. and that will make little or no use of Canadian creative resources.

35. The intention of Parliament was surely not that subsection 3(f) would be invoked by the Commission to allow the licensing of broadcast undertakings in Canada which are predominantly comprised of foreign programming. Subsection 3(1)(f) requires that "the nature of the service provided by the undertaking" must be what makes predominant use of Canadian creative resources impracticable. The Commission has noted the many substantive policy concerns expressed by a variety of interveners in both the CSR and Sirius Canada decisions, and has largely dismissed these concerns in Broadcasting Public Notice CRTC 2005-61 ("Public Notice 2005-61"), which was published as an introduction to the decisions. A copy of Public Notice 2005-61 is attached for reference as Appendix III.

36. In Public Notice 2005-61, which introduces Decisions 2005-246 and 2005-247, the Commission states:

> "...the proposed satellite radio services consist of a specialized format… using satellite technology that cannot be replicated in Canada due to the limited size of the market, and is the only way to establish a Canadian-controlled service that will reach all Canadians".

37. The rationale the Commission follows is that due to the relative size of the Canadian market vis-à-vis the U.S., that the American partners of CSR and Sirius Canada already carry extensive multi-channel services for the American market, and that there is limited bandwidth available for Canadian services, then therefore, the Commission concludes,

> "…the nature of these Canadian satellite subscription radio services renders the predominant use of Canadian creative and other resources impracticable".

However, the relative size of the Canadian market vis-à-vis the American market is not the rationale behind subsection 3(1)(f), or a factor that should drive the Commission not to require the predominant use of Canadian creative and other resources. Put another way, the fact that the Canadian market is smaller is not a reason that supports a finding that CSR and Sirius Canada be required to only "make the greatest practicable use of" Canadian resources. The only factor that stands out in the Commission's reasoning that leads to the conclusion of impracticability is the commercial considerations of the American partners of CSR and Sirius Canada, and that is clearly not a proper reason to find the predominant use of Canadian creative and other resources impracticable.

.

38. Parliament could never have intended that subsection 3(1)(f) would be interpreted as the Commission has so done. This subsection was never intended, nor should it be interpreted, to protect commercial interests, especially not those of corporations headquartered in a foreign territory. Never before has the Commission permitted such a wholesale dumping of foreign produced programming in a multi-channel service licensed to use Canadian airwaves.

39. The Commission has also described the service referred to concerning the provisions of subsection 3(1)(f) by reference to the specific technology and content proposed by the satellite licensees. By doing so, the Commission has framed the issue of the nature of the service in such a way that it leads to a finding of "impracticability". This approach would arrive at perverse results such that every time an application that involves a new or proprietary technology that is controlled by a non-Canadian, the applicant would be able to avoid the "predominant use" requirement. This is an extremely dangerous precedent that the Commission has proposed to set in the CSR and Sirius Canada decisions.

40. The service is not the configuration that is being specifically proposed by an applicant; it is the result or product that is broadcast to the Canadian public pursuant to the licence being sought. Therefore, the question should not be whether it is "impracticable" to deliver the precise services that are being proposed by CSR and Sirius Canada with a "predominant use of Canadian creative and other resources in the creation and presentation of programming". Rather, the Commission should have

considered whether it was "practicable" to deliver similar types of content on a wireless basis, while making predominant use of Canadian resources instead of American pre-packaged programming.

41. The fact that the signals in the CSR and Sirius Canada services are offered over satellite and for a subscription fee would not classify these services as a specialized format. These services more accurately represent a different means of signal distribution and a different business model, but not any innovative new format.

42. Limiting the application of subsection 3(1)(f) by adding a requirement that subscription radio services should be available to "all Canadians" involves a trade-off by the Commission of a substantial amount of Canadian content and control in order to ensure that there is a service that is accessible to all Canadians. That kind of trade-off is not a condition or quid pro quo contemplated by subsection 3(1) or elsewhere in the broadcasting policy that justifies and legitimizes the Commission's decision in this regard.

43. The inability of CSR and Sirius Canada to rely on the "practicability test" afforded by subsection 3(1)(f) of the Act creates a conundrum for the Commission as it attempts to develop a framework for such licences. The (satellite) technology is cost-prohibitive for a Canadian content solution, yet the limited satellite space available for Canadian stations on the foreign services ensures that there will not be a predominance of Canadian services, as mandated by the Act.

44. The Canadian content obligations that the Commission has imposed on the CSR and Sirius Canada are significantly lower than those applied to terrestrial radio broadcasters, television broadcasters and specialty services. They are substantially lower than the requirements for pay audio services – the type of broadcasting undertaking most similar to subscription satellite radio and that utilize the same multi-channel platform. In Public Notice CRTC 1995-218, which introduced the licences for four pay audio services, the Commission noted the following in regard to the licence obligations for Canadian produced programming:

> "Furthermore, the condition of licence specifies that, in no case, may subscribers to a pay audio service be offered a package of pay audio channels in which non-Canadian pay audio channels are predominant."

45. At minimum, pay audio services can only link one non-Canadian channel with each Canadian channel they distribute (both existing services currently only provide Canadian channels) and they must ensure that, as a whole, 30% of musical selections on Canadian-produced channels considered together must be Canadian. By contrast, the Commission has required that the CSR and Sirius Canada satellite services can link nine foreign channels for every one Canadian channel and, taken as a whole, only 8.5% of the musical selections across the service must be Canadian. Overall, the Canadian programming content required in the CSR undertakings is only 10% of all programming available on its service. The Sirius Canada programming, like that of CSR, features a level of Canadian content of only 10% or less, which is far below that required by the Regulations for conventional radio broadcast undertakings. By comparison, the vast majority of conventional radio broadcast undertakings are required by the Regulations to program a minimum of 35% Canadian musical content.

46. Further, the Canadian channels on the CSR services are to be programmed on a 'grid' system that will provide different genres of music at different times of the day, while the Sirius Canada service will rebroadcast two CBC terrestrial radio channels and two new music channels – one French and one English – that will feature emerging and independent Canadian artists, presumably drawn from different genres. In contrast, the American-produced channels both on CSR and Sirius Canada are exclusively programmed based on genres of music, so as to appeal to many different niche audiences.

Therefore not only are there a minimal number of Canadian channels offered by CSR and Sirius Canada, but these channels are to be programmed in a way that will make them less attractive and less competitive among these subscription services that are designed to cater to niche audiences with a wide range of choice over many channels.

47. Perversely, by virtue of these decisions, the Commission is ensuring that few subscribers will be exposed to Canadian content on the few Canadian-programmed channels offered by CSR and Sirius Canada. Mixed genres on a single channel, albeit on an all-Canadian channel, are not an effective way to expose Canadian music for obvious reasons – the Canadian channels are not genre-specific but merely Canadian-specific open format. Music fans of a specific genre will not seek out the undifferentiated Canadian channels to hear their favourite musical genre, but will instead seek the differentiated foreign channels. In effect, the Commission's approach both ghettoizes Canadian music and legitimizes the dumping of foreign programming on Canadian airwaves.

48. While all of the Canadian channels may be available on the satellite operated by an American partner, this is no reason to assume that users will pick the few channels that have Canadian content. As stated above, because the Canadian channels are segregated, this effectively reduces Canadian music and other content to being a genre in and of itself. Therefore, there are absolutely no guarantees that Americans, or Canadians for that matter, will choose any of the available Canadian channels. The claim by Sirius Canada and CSR that they will increase exposure of Canadian talent in the U.S. is far from established, and, in any case, it exceeds the relevant considerations and the mandate of the Commission.

49. Requiring specialty channels devoted to distinctly Canadian music rather than integrating Canadian music into the mainstream of programmed popular music and other genre-based channels available on the entire system is inherently anti-competitive and dismissive of national creativity. It is also clearly contrary to the Canadian broadcasting policy and objectives that have been established over decades. Merely adding on a few Canadian content channels is a token gesture of appearing to adhere to the broadcasting policy. Canadian musical talent would be much better served if it were integrated into the mainstream of the programming that is the core of these satellite radio services, but unfortunately, this option has been effectively foreclosed by the Commission's decisions in the case of CSR and Sirius Canada.

50. Further, the Canadian music and other content that both CSR and Sirius Canada are required to provide as a condition of licence will be segregated from the existing pre-packaged American programming produced and provided by the American partners of these licensees. The effect is that Canadian programming of Canadian music and other content would be kept from the mainstream of programming as if it were confined to a cultural ghetto. The segregation of the Canadian channels reduces the possibility of Canadians hearing their own performers and music and creates an environment that marginalizes new talent, rather than providing an opportunity for it to gain mass appeal, as intended by the Act. This cultural segregation is driven by the business models of the respective American partners of CSR and Sirius Canada.

51. Despite the Commission's token gesture of exposure for new Canadian talent, there is an injustice in these particular decisions to Canadian songwriters, musicians, and performers – whose talent is relegated to the segregated channels – that runs counter to one of the central tenets of the Act. In a very passionate and eloquent letter to "The Toronto Star" (July 19, 2005), Tom Barlow, a Canadian recording artist, explained that these decisions would not benefit Canadian artists or the Canadian public. A copy of this letter is attached as Appendix V.

52. Requiring the satellite radio services to minimally increase the number of Canadian programmed channels, as the Commission has done, is merely a token gesture. In this regard the Commission has sought what appears to be an "easy solution", that flaunts both the Act and long-established public policy, the result of which is to gravely unbalance the broadcasting system and the values and principles that form the basis of the broadcasting policy under the Act.

53. In the CSR and Sirius Canada decisions, the Commission has abandoned a well thought out and constructed broadcasting policy established over many years that requires the use of Canadian content in Canadian radio and television undertakings. As a result, opportunities for Canadians to hear the creations of their songwriters and performing artists on the CSR and Sirius Canada services will be minimal and Canadian creative resources will certainly not be predominant as required by the Act. With these decisions, the Commission has radically revised how it will apply broadcasting policy in future licence applications, and these decisions can only encourage Canadian radio and television stations to request "equal treatment". This would spell the end to broadcasting policies and in particular content requirements developed over the past thirty years or more.

FRENCH-LANGUAGE PROGRAMMING

54. The Commission has not required that CSR and Sirius Canada make a significant enough commitment to French-language programming. Subsection 3(1)(d)(iii) of the Act states that the Canadian broadcasting system should:

    " . . . Through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society . . ."

55. The Commission has only required that CSR and Sirius Canada ensure a minimum of three of their initial eight Canadian-produced channels be in French, and thereafter not less than 25% of the Canadian produced channels be in the French language. This is, without a doubt, extremely detrimental to a major component of Canadian society.

56. Approximately 23% percent of the Canadian population identifies French as their mother tongue, and it is spoken around the country. CSR and Sirius Canada intend to provide national services; however, only 10% of their channels will be Canadian-produced, and at the outset less than 4% of their channels will be in the French language. This is not acceptable. This derogates from the aims and objectives of the Act.

57. By requiring such a small percentage of French-language channels, the Commission has effectively disenfranchised Canadians looking for a French-language alternative and has encouraged them to abandon French-language media for English-language options on the American-programmed channels. Applying either scenario means it is likely that very few subscribers will actually listen to the French-language Canadian artists featured on the CSR or Sirius Canada services.

CULTURAL DIVERSITY

58. The Commission has not required that CSR or Sirius Canada make an adequate commitment to programming that reflects Canada's multicultural reality nor programming that meets the needs of Canada's Aboriginal peoples and ethnic minorities.

59. The Commission did not impose specific requirements on CSR or Sirius Canada with respect to multilingual programming or programming for Canada's Aboriginal peoples and minority ethnic groups; instead, it merely encouraged them to promote channels targeted to specific cultural groups. Satellite radio, by its nature, is an effective way of delivering programming for Canada's ethno-cultural communities and Aboriginal peoples. This is not to say that there will not be multilingual programming on CSR and Sirius Canada; CSR planned a Canadian-produced multicultural and multilingual channel as part of an addition of planned channels in five years, while Sirius Canada indicated that it would include Aboriginal artists on its music channel of emerging and independent Canadian artists. There may yet be other multicultural channels, but these could come almost exclusively from the U.S., thereby adversely affecting Canada's ethnic broadcasters. It will be extremely difficult for Canadian creators and producers to access American programmers who are located at a substantial distance from their Canadian market and who are programming for the American market. This places our communities at a very substantial disadvantage and derogates from the values of subsection 3(1)(d)(iii) of the Act.

60. Finally, it is important to note that Decisions 2005-246 and 2005-247 run counter to the principles that the government has been working so diligently for in its efforts to help establish an international treaty for the protection of cultural diversity, sponsored by UNESCO. Canada is a leader in this process, with the stated objective of ensuring a diversity of voices are heard in the future, both in Canada and around the world. One of the aims of the proposed UNESCO diversity treaty is to establish international norms that recognize that countries have a sovereign right to protect and nurture their own cultures. The UNESCO treaty, while still in the drafting stage, nevertheless maintains the principles of cultural sovereignty and supports such legislative and regulatory tools as content quotas to achieve these principles. This objective has received the support of the Prime Minister and key Ministers in the Cabinet.

61. It is surprising and disturbing that the Commission would choose to render a decision that runs counter to a long-standing government initiative to achieve an international treaty designed so that sovereign states can preserve their own culture. The CSR and Sirius Canada decisions invite dumping of foreign programming content in Canada with little justification other than to satisfy a business plan perceived on future market demands for satellite radio delivery that requires technology that is not yet widely available to the public. These decisions undo the keystone to broadcasting regulation, protection of Canadian content, and set a very dangerous precedent not only domestically but also internationally. Canada will be seen as abrogating in its own domestic cultural policies to satisfy American corporate interests, which is against the very principles that it is supporting internationally.

OWNERSHIP AND CONTROL: CSR AND SIRIUS CANADA ARE EFFECTIVELY CONTROLLED BY FOREIGN INTERESTS

62. All licensed Canadian broadcasters are required to control their programming at all times. They must control and decide the content of programs and execute these decisions on a daily basis.

63. The Commission has not adhered to the broadcasting policy that requires broadcast undertakings to control programming. In licensing the CSR and Sirius Canada services, the Commission has contravened the Act in several areas.

64. Subsection 3(1)(a) of the Act states that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians", and subsection 3(1)(h) states that "all persons who are licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast".

65. The vast majority of satellite radio channels offered by both CSR and Sirius Canada are down-linked from an American satellite and consist of American programming, programmed by American programmers for an American audience. In no sense do CSR or Sirius Canada control this programming within the meaning of the Regulations or subsections 3(1)(a) and 3(1)(h) of the Act.

66. While the Commission may have been satisfied that these licensees fulfill the requirements regarding financial control as a condition of licence, it has not followed the broadcasting policy that requires that broadcasting undertakings shall retain ultimate control and responsibility for programming, particularly with regard to section 3 of the Regulations and subsection 3(1)(a) and 3(1)(h) of the Act.

67. In effect, the Commission has licensed American satellite broadcasters to operate directly in Canada. This is a significant derogation from broadcasting policy and in direct contravention of both the spirit and intent of the Act. Never before has the broadcasting regulator made a decision of such negative magnitude. Had such a decision been made at the introduction of new technology in the past, there would not be any Canadian broadcasters or national broadcasting alternative, or a Canadian cable system, Canadian pay audio services, or Canadian specialty television channels. If this decision is not set aside and reversed, it will be difficult for a truly Canadian service to develop and compete once these services become operational.

68. At the hearings for both CSR and Sirius Canada, the Commission had before it evidence that de facto control and ownership of these channels clearly rests in the U.S.:

    a. CSR and Sirius Canada are dependent on their American partners for all of the programming on 95% of the channels they intended to provide.

    b. CSR and Sirius Canada will rely entirely on the satellites owned and operated by their American partners to distribute their proposed services – including the Canadian-produced channels. The Commission actually highlighted this dependence as the reason why CSR and Sirius Canada could not offer more Canadian-produced channels.

    c. CSR and Sirius Canada cannot provide their proposed services without the proprietary technology they are licensing from their American partners. If one of the two providers were to cease operating in the U.S., their Canadian partner could not provide service.

    d. Following the release of the decisions, both CSR and Sirius Canada indicated that they would first need to seek the approval of their partners before confirming that they would be able to deliver the number of Canadian-produced channels the Commission required.

69. The Commission, however, chose not to conclude that the satellite licensees were effectively controlled by their American partners on the basis that CSR and Sirius Canada control the authorization of Canadian subscribers and that they committed to not broadcast any programming in contravention of the law. This is not the correct test for control.

70. Programming undertakings must be in control of the programming, including the content that they broadcast, at all times. At minimum, they must be able to conform to CRTC requirements, such as

with Canadian content levels. As licensed, for 90% of the channels they would carry, CSR and Sirius Canada do not have this ability – they can only remove entire channels of programming after the fact.

71. Based on the Governor in Council's direction to the Commission prohibiting the granting of a broadcasting licence to a non-Canadian interest, control means "control in fact". Control of 90% of the content that CSR and Sirius Canada intend to provide has been effectively delegated to their American partners and is not "control in fact".

72. Further, the Commission has not specified under what class of licence a "satellite subscription radio undertaking" falls. While it appears that the Commission considers this new type of licence to be a programming undertaking, rather than a broadcast distribution undertaking (BDU), it also shares a number of characteristics with a "network".

73. The Act defines a "network" as "any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person."

74. In Public Notice CRTC 1989-2, the Commission noted that the "definition of 'network' in the Act implies that broadcasters may delegate control over part or all of a program or program schedule to another party, that is a licensed network operator." The Act requires any person operating a broadcasting undertaking, including a network, to have a licence, unless otherwise exempt. The type of network arrangement the CSR and Sirius Canada have with their American partners is not exempt from licensing because XM and Sirius are not eligible to hold a broadcasting licence as they are non-Canadian entities.

GREY MARKET

75. CSR and Sirius Canada raised the issue of the grey market in satellite usage within Canada as an argument supporting their respective applications. The Commission itself noted in its decision that "there was little quantitative evidence submitted as to the number of Canadians who are subscribing to the American satellite radio services via the grey market". Both CSR and Sirius Canada cited their American partners' agreement to attempt to repatriate grey market users.

76. Satellite is a line of sight technology. Without terrestrial repeaters, straight satellite technology has unreliable coverage in urban centres, where approximately 80% of Canadians live, and consequently, where most of the automobile use will occur by commuters. Grey market users might get coverage on the highway, but once back in the city, coverage becomes patchy and unreliable, and often unavailable indoors (23% of radio listening is day-time "at work"). Some American XM and Sirius channels are not to be carried on the Canadian services, so there is still a potential for a grey market. Therefore, while some rural users might want to avail themselves of the grey market, it is inappropriate to conclude that this is a factor that would be relevant to the Commission's decisions in the CSR and Sirius Services.

77. Moreover, Canadian content requirements in the television distribution and programming sectors are higher. There is a lot to protect, and therefore, grey and black markets have significant impact. By contrast, the CSR and Sirius Canada services contain minimal amounts of Canadian content. The duplication between the satellite services in the U.S. and the proposed Canadian services is significant. This is very different from the channels featured on cable or direct-to-home satellite systems that must contain at least a majority of Canadian programming services. In other words, although CSR and

Sirius Canada may indeed argue that a grey or black market for XM or Sirius services could begin to grow, they do not appear to offer anything so significant to the Canadian broadcasting system as to warrant protection from this incursion.

IMPACT ON CONVENTIONAL RADIO

78. Despite the designation of the satellite radio services as subscription-based, CSR proposed to broadcast an average of six minutes per hour of national advertising. The Commission permitted the satellite radio licensees to distribute a maximum of six minutes per hour of national commercial messages. The Commission is wrong, however, to speculate that the revenue from this amount of advertising will not have a significant impact on existing radio stations, even if restricted only to national advertisers.

79. The ambition of the American satellite radio entities is transformative, not evolutionary, i.e. the replacement of terrestrial radio. XM President Hugh Panero has spoken publicly about his company's ambition to attract tens of millions of subscribers; and Sirius CEO Mel Karmazin recently told "The Los Angeles Times":

    "There was a time when both companies thought of each other as the enemy. That's not my viewpoint today. Our real competition is terrestrial radio."

80. Permitting national advertising on the subscription services could have a long-term impact on conventional radio, as this could divert national advertisers away from this market. Conventional radio would be required to rely more on local advertising, which would reduce revenues at a time when these broadcasters claim they will be most vulnerable in a fragmented market. Competition for advertising revenues will also affect conventional broadcasters' ability to compete, which would encourage them to ask for equal treatment by lower Canadian content requirements on a par with satellite radio to remain competitive in the radio marketplace. Glenn O'Farrell, President and CEO of the Canadian Association of Broadcasters, greeted the Commission's June 16th decision with the following statement:

    "Subscription radio will compete for audiences, and consequently will have an impact on conventional radio in Canada."

81. Additionally, reducing terrestrial broadcasters' financial capacity has negative impact on their capacity to finance copyright and neighbouring rights obligations that compensate the creators of Canadian programming. As the newly-licensed satellite broadcasters siphon audiences and advertising revenue from Canadian conventional radio, they will deprive the Canadian services of revenues needed to finance copyright and neighbouring rights payments to Canadian creators and rights holders.

82. As for the campus and community radio sector, as well as for developmental, instructional, and closed circuit stations, and in some cases, French-language and Native undertakings, subsection 3(1)(b) of the Act describes the Canadian broadcasting system as "comprising public, private and **community** elements" (emphasis added). If satellite radio providers intend to be replacing terrestrial broadcasters, as they claim to be in the U.S., then they should be held to a standard similar to a BDU, such as cable or direct broadcast satellite (DBS), or simply considered a BDU. Just as cable television regulations require cable providers to redistribute all local FM stations, satellite radio providers should be ordered to present services that respond more directly to subsection 3(1)(b), and so should present programming from public, private and community sources. Although both will be broadcasting almost one hundred channels of content, CSR and Sirius Canada have not and cannot make any significant commitment to community media programming among their selections.

PROGRAM LOGS

83. The Commission is also requiring, by condition of licence, that the CSR and Sirius Canada services maintain sequential lists of all musical selections played on each channel they distribute for a period of four weeks from the date of broadcast, and forward these lists to the Commission upon request, along with a notarized attestation of their accuracy. There is no obligation to maintain program logs. Canadian rights owners cannot effectively seek redress concerning the American-produced content if there are no requirements for logs on this part of the service.

NEW TECHNOLOGIES

84. The Act addresses the need to adapt to technology as follows:

    3(1)(d)(iv) "the Canadian broadcasting system shall be readily adaptable to scientific and technological change."

85. This provision of the Act is very important, especially in times of rapid changes in technology. The Commission last held hearings in 1999 to attempt to define its role as regulator in an environment of not only new technologies but also new business models that have developed to take advantage of advances in "new media". The Commission determined that it would not attempt to license "new media" at that time, but would revisit the issue of technological change in 2004. The Commission has not called for a hearing to address new technologies and new media issues. As addressed above, pay audio services provide a very similar service to that of satellite radio, albeit with different technology. The lack of clear policy direction is evident in the very dramatic difference and inconsistent way the Commission has chosen to license satellite radio.

86. Accordingly, the Commission has not established policies to adapt to technological change, and has chosen instead to address each licensee that utilizes a new technology in an ad hoc manner. This is the case with the CSR and Sirius Canada decisions. As many participants in the satellite radio public hearing process have noted, the Commission should have considered such a transformational technology as satellite radio inside a policy framework prior to a licensing process.

87. The Commission has, with the CSR and Sirius Canada decisions, contributed to a disturbing trend – decisions driven by technological determinism rather than by a coherent policy developed in an open and transparent consultative process. A detailed policy discussion has been patently lacking and this constitutes a major flaw for both the content of the decision and the way it was reached.

88. The Commission has noted in the introduction to the broadcasting decisions for the licensing of new satellite and terrestrial subscription radio undertakings that the Departments of Industry and Canadian Heritage acknowledged the need to clarify the satellite use policy; they proposed the following addition to the existing policy:

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

89. The exception that the Departments of Industry and Heritage have proposed is to distribute Canadian programming services and not the massive use of pre-packaged programming services purchased from American-based partners of CSR and Sirius Canada. The Commission's ad hoc approach has

had a contrary result. Through these decisions, the Commission, and not the Departments of Canadian Heritage and Industry, is determining government policy for the use of satellite radio services in Canada that constitute dumping American programmed foreign content in Canada. The Society of Composers, Authors and Music Publishers of Canada (SOCAN), one of the petitioners herein, wrote to the Director General of the Telecommunications Policy Branch of Industry Canada to register its concerns over the decision to make regulatory changes that permit the licensing of satellite services such as those of CSR and Sirius Canada (November 24, 2004). A copy of this letter is attached as Appendix IV.

90. Correct interpretation should be given to subsection 3(1)(d)(iv) – that the "system shall be readily adaptable to scientific and technological change". This subsection should not be interpreted to mean any service that purports to operate from a technology that reflects scientific or technological change must automatically be accepted and licensed; adaptability to scientific and technological change must be understood in the light of the new technological solutions that respect the requirements of the existing broadcasting policy. The principles set forth in the Canadian broadcasting policy must prevail over unknown technical factors, something the Commission has failed to achieve in these decisions.

91. The Commission further stated in the introduction to these decisions that "retransmission of existing radio stations would be a questionable use of this limited resource." Thus, the Commission has chosen to forego the Canadian content levels of 35% that are observed by the majority of existing radio stations in exchange for less than 10% Canadian content overall for the CSR and Sirius Canada services. The Commission has also chosen to ignore that when accepting arguments for lower Canadian content levels for specialty channels, there will be an upcoming review of the commercial radio, in which the issue of genre percentages is expected to feature prominently.

92. Both the Commission and the government must be proactive in identifying approaches that are compatible with all of the policy set forth by Parliament in the Act to allow the Canadian broadcasting system to remain "readily . . . adaptable to scientific and technological change." In order to conform to the existing broadcasting policy, the Commission would have had to set out the general policy applicable to that type of services after holding a policy public hearing on the matter.

93. The Commission failed entirely to address the issue of requiring licensees to guarantee that adequate copy protection measures are in place to prevent the illegal use of intellectual property, protect Canada's cultural industries, and encourage the development of Canadian talent, despite the reasoned arguments backed by evidence that were presented by the music industry, the supplier of the majority of content to be broadcast over the services.

94. Without ensuring the adoption of adequate copy protection measures, the Commission has, in effect, left the door open to potential rampant theft of intellectual property. Because of the CD-quality digital music feed, the threats to the economic stability of the Canadian music industry through inadequate copy protection on satellite radio services are much greater than any currently existing unauthorized peer-to-peer network. The gravity of the effect this could potentially have on the development of new and emerging Canadian talent cannot be underestimated.

CONCLUSION

95. The petitioners respectfully request, for all of the foregoing reasons, that their Petition be granted, and that Her Excellency the Governor in Council make an Order pursuant to Section 28 of the Act, and any other applicable laws, setting aside Decisions 2005-246 and 2005-247.

96. In addition, the petitioners request that should Decisions 2005-246 and 2005-247 be sent back to the Commission for reconsideration, the Commission must be charged to observe and fully address the following:

    a. that the Canadian music industry is an integral part of the Canadian broadcasting system and that the Canadian content requirements for musical programming in the Regulations must be observed for satellite radio undertakings available in Canada, including French-language programming, multilingual programming, and programming for Canada's Aboriginal peoples and minority ethnic groups;

    b. that predominant use of Canadian creative and other resources is applicable in the creation and presentation of programming offered to Canadians by "satellite radio undertakings";

    c. that programming intended for Canadian audiences be controlled by Canadian satellite radio undertakings;

    d. that the impact on Canadian cultural industries, and in particular the Canadian music industry, must be considered when satellite radio broadcasting or any other new technologies are introduced into the Canadian broadcasting system; and

    e. that the local and community radio sector is an integral part of the Canadian broadcasting system and must be taken into consideration regarding the licensing of satellite radio undertakings.

97. All of which is respectfully submitted this 2nd day of August, 2005

Broadcasting Decision CRTC 2005-246

Ottawa, 16 June 2005

Canadian Satellite Radio Inc.
Across Canada

Application 2003-1081-3
Public Hearing in the National Capital Region
1 November 2004

Satellite subscription radio undertaking

The Commission ***approves*** *the application by Canadian Satellite Radio Inc. (CSR) for a broadcasting licence to carry on a satellite subscription radio undertaking, subject to the conditions of licence set out in the appendix to this decision.*

CSR is wholly-owned by John Bitove, who is a citizen and resident of Canada.

By condition of licence, the licensee must provide a minimum of eight original Canadian-produced channels at the beginning of operations, and may distribute, to any Canadian subscriber, a maximum of nine non-Canadian-produced channels for each original Canadian-produced channel that it distributes. A minimum of 85% of the musical selections broadcast on all Canadian-produced channels, considered together, must be Canadian selections.

The licensee must also, by condition of licence, distribute a minimum of three French-language original Canadian produced channels at the beginning of operations and, at any time, not less than 25% of the original Canadian-produced channels offered by the undertaking must be French-language channels. A minimum of 65% of all category 2 (popular music) vocal musical selections broadcast on each French-language channel must be French-language selections.

The CSR application was one of three applications for subscription radio undertakings considered at the 1 November 2004 public hearing. The Commission's general approach to these applications is set out 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, of today's date (Public Notice 2005-61).*

CSR must provide written confirmation, within 150 days of this decision, that it accepts the terms and conditions set out in this decision and in the licensing framework set out in Public Notice 2005-61, including any necessary revisions to its agreements with its American partner. Failure to provide such confirmation within the required timeframe shall render this decision null and void.

Overview of the application

1. The Commission received an application by Canadian Satellite Radio Inc. (CSR) for a broadcasting licence to carry on a satellite subscription radio undertaking.

2. CSR is owned and controlled by John Bitove, a citizen and resident of Canada. A Memorandum of Agreement (MOA) dated 7 August 2003 was entered into on behalf of John Bitove, CSR, its parent companies and XM Satellite Radio Inc. (XM), an American corporation. Pursuant to the MOA, options have been granted to XM to acquire an ownership interest in the proposed licensee, CSR and/or its parent companies, all of which are controlled by John Bitove. The options would enable XM to acquire either

   a) 33% of the shares of Canadian Satellite Radio Holdings Inc. (CSRH), the parent company of CSR;

   b) 16.66% of the shares of CSRH and 20% of the licensee, CSR.

3. If option a) is exercised, the licensee would establish an independent programming committee to comply with the *Direction to the CRTC (Ineligibility of Non-Canadians)* under which neither CSRH nor its directors would be permitted to influence the programming decisions of CSR. The structure of the independent programming committee would be subject to prior approval by the Commission.

4. The applicant indicated that the undertaking would deliver a package of radio channels to subscribers for a basic monthly fee of $12.99.

5. CSR originally proposed to offer four Canadian-produced channels. These channels would include an English-language and a French-language music channel that would offer only Canadian musical selections, as well as an English-language comedy channel and a French-language news and talk channel. CSR further proposed to offer 97 channels provided by XM, one of two companies that provides satellite radio service in the United States.

6. At the hearing, CSR indicated that it would launch its service with a fifth Canadian-produced channel that would offer multicultural and multilingual programming and would add three more Canadian-produced channels by the end of its fifth year of operation, if additional satellite bandwidth were available from XM. It further advised that the number of programming channels originating from its American partner had increased to 122.

7. CSR also stated that 1,872 hours of original programming per year, or 36 hours per week of "lateral programming" would be broadcast on the channels originating from XM. The applicant defined lateral programming as Canadian-produced programs that feature Canadian artists. CSR also estimated that Canadian selections currently represent approximately 2.5% of all musical selections broadcast on XM's music channels. CSR made a commitment that, if licensed, it would ensure that 7% of all new musical selections added to the playlists of XM channels each week would be Canadian selections.

8. CSR originally committed to spend $4.1 million on Canadian talent development (CTD) initiatives in its first licence term. This commitment was increased in May 2004 to $19.75 million and, at the hearing, CSR committed to a minimum contribution of 4% of projected revenues and not less than $1.2 million per year. CSR also stated that, if it were unable to launch the three additional Canadian-produced channels, it would increase its CTD contributions by 1% of revenues in the fifth year of operation for each of the three channels. The applicant proposed to allocate its CTD contributions equally between initiatives for the development of Canadian English- and French-language talent.

9. The CSR application was one of three applications for subscription radio undertakings considered at the 1 November 2004 public hearing. The Commission's general approach to these applications, including a licensing framework for satellite subscription radio undertakings, is set out 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, of today's date (Public Notice 2005-61).

Interventions

10. The Commission received more than 300 interventions in support of this application. Interventions raising concerns and addressing policy issues associated with the licensing of satellite subscription radio undertakings are discussed in Public Notice 2005-61.

The Commission's analysis and determinations

Canadian channels

11. CSR originally proposed to offer the following four Canadian-produced channels at the beginning of operations.

12. *Laugh Canada*: The primary goal of Laugh Canada would be to showcase Canadian comedy. The channel would be a collaborative effort of CSR and CTV's Comedy Network, which would supply Laugh Canada with about half of the programming broadcast on the channel and provide access to its archives of the work of Canadian stand-up comedians. The applicant

indicated that at least 70% of the spoken word broadcast by the channel would be Canadian, and that at least 50% all Canadian spoken word would consist of original comedy programming.

13. *Canal À Propos*: This channel would feature French-language spoken word programming and would target listeners aged 18-34. About half of the programming would be acquired from the conventional radio station CKAC Montréal. The rest of the programming would be produced by CSR and would provide information from the different regions of Canada. Some open-line programming would be included in the schedule.

14. *Northern Lights:* This English-language channel would showcase Canadian music in up to fifty different genres. Less than 60% of the musical selections in any broadcast week would come from category 2 (popular music). Not less than 52% of all musical selections broadcast on the channel in any broadcast week would consist of musical selections that were released in Canada in the six months prior to broadcast.

15. *Lumières Nordiques:* This French-language music-oriented channel would focus primarily on Canadian music. Less than 60% of the musical selections broadcast during each broadcast week would come from category 2. CSR indicated that at least 65% of the vocal musical selections broadcast on the channel each broadcast week would be French-language selections, and at least 80% of the musical selections aired during each broadcast week would be Canadian selections. Not less than 52% of all musical selections broadcast on the channel in any broadcast week would consist of musical selections that were released in Canada in the six months prior to broadcast.

16. At the hearing, CSR committed to launch its service with a fifth Canadian-produced channel offering multicultural and multilingual programming, and to add three more Canadian-produced channels by the end of its fifth year of operation if additional satellite bandwidth is available from XM.

17. In Public Notice 2005-61, the Commission set out a framework under which it would licence satellite subscription radio undertakings. In Public Notice 2005-61, the Commission indicated that it considered that the number of Canadian channels proposed by the applicants for satellite subscription radio undertakings at the 1 November 2004 public hearing was not sufficient, and that it was inappropriate for such undertakings to rebroadcast existing radio services in their entirety. Consequently, the Commission indicated that it would require licensees of such undertakings, including CSR, to distribute a minimum of eight original Canadian-produced channels from the outset of operations. An "original Canadian-produced channel" is defined as a channel produced in Canada that consists of programming not less than 50% of which is produced for and broadcast for the first time on that channel. The Commission further indicated that a satellite subscription radio undertaking would be permitted to distribute to any Canadian subscriber a maximum of nine non-Canadian produced channels for each original Canadian-produced channel that it distributes, and that no subscriber would be permitted to receive a package of channels where original Canadian-produced channels constituted less than 10% of the channels received. **Conditions of licence** to this effect are set out in the appendix to this decision. As well, the Commission indicated that it expects at least 60% of the original Canadian-produced channels distributed by satellite subscription radio undertakings to be music channels.

18. In accordance with the licensing framework set out in Public Notice 2005-61, the Commission is also imposing **conditions of licence** requiring CSR to devote a minimum of 85% of the total musical selections broadcast on all Canadian-produced channels, considered together, to Canadian selections, and to devote a minimum of 85% of the total spoken word programming broadcast on all Canadian-produced channels, considered together, to Canadian spoken word programming. These conditions are also set out in the appendix to this decision.

19. The Commission also acknowledges CSR's commitment that 7% of all new musical selections added to the playlists of XM channels each week will be Canadian selections, and intends to review CSR's success in fulfilling this commitment when the licence renewal for CSR is considered.

French-language channels

20. As indicated above, the applicant originally proposed to offer two French-language channels. Canal À Propos would be devoted to spoken word programming. CSR proposed that at least 65% of the vocal musical selections broadcast each week on the other French-language service, Lumières Nordiques, would be devoted to French-language vocal musical selections, a level that is the same as that required of French-language conventional radio stations.

21. In Public Notice 2005-61, the Commission determined that it was appropriate to require each satellite subscription radio undertaking to distribute a minimum of three French-language original Canadian-produced channels from the outset of operations and to require that not less than 25% of the original Canadian-produced channels are French-language original Canadian-produced channels. **Conditions of licence** to this effect are set out in the appendix to this decision.

22. Further, in accordance with the licensing framework set out in Public Notice 2005-61, the Commission is imposing a **condition of licence** requiring the licensee to ensure that at least 65% of the category 2 vocal musical selections broadcast on each Canadian-produced French-language channel during each week are French-language selections. This **condition of licence** is also set out in the appendix to this decision.

New Canadian music and emerging talent

23. CSR submitted that one of the benefits of approving its application is that its proposed undertaking would provide exposure for new Canadian music that receives little or no airplay on conventional radio stations. CSR made commitment that at least 52% of all musical selections distributed on its Northern Lights and Lumières Nordiques channels would be selections released in the previous six months.

24. In Public Notice 2005-61, the Commission stated that it considered that it was appropriate to require each satellite subscription radio undertaking to ensure that, between 6 a.m. and midnight each week on each Canadian music channel, a minimum of 25% of the musical selections broadcast will be new Canadian musical selections, and a minimum of 25% will be Canadian selections by artists who have not had a musical selection that has reached a position on one or more of the charts identified in the list set out in Circular 445, 14 August 2001, as may be amended from time to time. A **condition of licence** to this effect is set out in the appendix to this decision.

25. For the purposes of this condition, a "new Canadian musical selection" is a Canadian selection that has been released in the 6 months prior to the date that the musical selection is broadcast. The Eastern time zone will be used when determining compliance with this condition of licence. The licensee will also be responsible for specifying on the music lists it provides to the Commission, the release date of all musical selections it broadcasts.

Canadian talent development

26. The applicant proposed to allocate its CTD expenditures of $19.75 million over the first seven years as follows:

Initiatives to support Canadian English-language artists

- Fund to Assist Canadian Talent on Recored (FACTOR) ($6,300,000)
- CTD coordinator ($525,000)
- Canadian Independent Music Awards ($420,000)
- Indie Pool – support for independent recording artists ($420,000)
- US showcases for Canadian artists ($700,000)
- Talent contest ($525,000)
- Canadian radio – development of student talent ($210,000)
- Scholarships ($70,000)
- CARAS Band-Aid – instruments for school music programs ($140,000)
- CSR theatre and spoken word events ($140,000)
- Comedy initiatives ($1,120,000)

Initiatives to support Canadian French-language artists

- MusicAction ($6,300,000)
- Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) – support for the annual Gala ($420,000)
- New music concert series ($535,000)
- Talent contest ($525,000)
- Theatre and spoken word initiatives ($175,000)
- French-language radio – development of student talent ($280,000)
- Scholarships ($350,000)
- CARAS Band-Aid – instruments for school music programs ($140,000)
- Encoding of CDs to facilitate on-line sales ($140,000)
- US showcases for French-language artists ($350,000)

27. In addition, the applicant committed, at the hearing, to spend $400,000 per year on two international showcases of French-language Canadian artists.

28. At the hearing, CSR also indicated that it would also be "favourably inclined to designate community and campus radio stations as eligible third party participants to CTD funding."

29. The Commission considers that CSR has proposed valuable initiatives for CTD. However, in accordance with the licensing framework for satellite subscription radio undertakings set out in Public Notice 2005-61, the Commission requires the applicant to contribute 5% of gross annual revenues to CTD, with 50% of the total contribution allocated to the development of Canadian French-language talent and 50% allocated to the development of Canadian English-language talent. **Conditions of licence** to this effect are set out in the appendix to this decision.

30. Given that CSR proposed to devote only 4% of gross revenues to CTD, the Commission requires the applicant to file for approval by the Commission, before it commences operations, a plan setting out all initiatives for CTD that it will undertake in order to fulfil the 5% requirement. Further, the Commission is imposing a **condition of licence** that requires CSR to file a report on the fulfilment of its CTD commitments with each annual return. This condition is set out in the appendix to this decision.

Advertising and local programming

31. CSR indicated that it would not broadcast local programming, including local advertising, on its Canadian-produced channels, but proposed to broadcast six minutes per hour of national advertising.

32. In Public Notice 2005-61, the Commission indicated that it considered it appropriate to require satellite subscription radio undertakings not to broadcast any programming that targets a particular geographic community, including local commercial messages. However, the Commission determined that it would allow such undertakings to broadcast up to six minutes of national commercial messages per hour on each channel. **Conditions of licence** to this effect are set out in the appendix to this decision.

Adherence to regulations and industry codes

33. CSR committed to be accountable for the content of all programming broadcast on all Canadian-produced and non-Canadian-produced channels distributed by the proposed undertaking. It undertook not to broadcast anything in contravention of the law, any abusive comment, or any obscene or profane language. CSR also committed to adhere to the Canadian Association of Broadcasters' (CAB) *Sex-role Portrayal Code for Television and Radio Programming* and the *Broadcast Code for Advertising to Children.*

34. CSR further indicated that it would designate channels intended for mature audiences as "XL channels" in order that listeners may easily identify channels that may carry potentially offensive programming.

35. In accordance with the licensing framework for satellite subscription radio undertakings set out in Public Notice 2005-61, the Commission will require CSR, by **condition of licence**, to adhere to relevant provisions of the *Radio Regulations, 1986*, as well as to the CAB *Sex-role Portrayal Code for Television and Radio Programming* and the *Broadcast Code for Advertising to Children.* It will also require CSR to maintain program logs for all Canadian-produced

channels, logger tapes for all Canadian-produced channels and any non-Canadian-produced channels that the Commission may designate from time to time, and music lists for all channels that it distributes.

36. The Commission directs CSR to file, within 150 days of the release of this decision, internal guidelines for dealing with complaints from listeners for the Commission's approval. Once these guidelines have been approved, the Commission expects the applicant to apply these guidelines to the consideration of any complaint that is received.

37. The Commission also expects CSR to adhere to the Commission's *Policy regarding open-line programming*, Public Notice CRTC 1988-213, 23 December 1988.

Employment equity

38. At the public hearing, CSR made a commitment to develop an employment equity policy. The Commission expects CSR to file this plan with the Commission.

39. In accordance with *Implementation of an employment equity policy*, Public Notice CRTC 1992-59, 1 September 1992, the Commission encourages the licensee to consider employment equity issues in its hiring practices and in all other aspects of its management of human resources.

Cultural diversity

40. The Commission expects CSR to reflect the cultural diversity of Canada in its programming, and encourages it to promote those channels that are targeted to specific cultural groups.

Conclusion

41. The Commission **approves** the application by Canadian Satellite Radio Inc. and, consistent with the approach set out in Public Notice 2005-61, will issue a broadcasting licence to carry on a satellite subscription radio undertaking. The licence will expire on 31 August 2011 and will be subject to the **conditions of licence** set out in the appendix to this decision.

42. The Commission notes that, while CSR will provide national service by satellite, it has also proposed to establish a number of terrestrial transmitters to fill in areas where coverage is deficient. The Commission's approval of the terrestrial transmitters is based on the technical submissions filed with the application. The applicant must also obtain technical certification from the Department of Industry (the Department) on the basis of requirements set out in Annex 1 of the Department's letter to the Commission and copied to the applicant entitled *Issuance of technical broadcasting certificates for applications authorized to provide subscription radio services*, 21 September 2004. CSR must also provide the Commission with a copy of all technical submissions, including coverage maps, that it sends to the Department.

43. The Commission reminds the applicant that, pursuant to section 22(1) of the *Broadcasting Act*, no licence may be issued until the Department notifies the Commission that its technical requirements have been met, and that a broadcasting certificate will be issued.

44. The licence for this undertaking will only be issued when:

a) the applicant has informed the Commission in writing that it is prepared to commence operations; and

b) the applicant has filed, to the Commission's satisfaction, copies of all final and binding agreements (the Agreements) between John Bitove, CSR, its parent companies and XM. The Agreements include, but are not limited to, the programming agreement, trademark agreement and licence agreement.

45. The undertaking must be operational at the earliest possible date and in any event no later than 24 months from the date of this decision, unless a request for an extension of time is approved by the Commission before 16 June 1007. In order to ensure that such a request is processed in a timely manner, it should be submitted at least 60 days before this date.

Confirmation required

46. CSR must provide written confirmation, within 150 days of this decision, that it accepts the terms and conditions set out in this decision and in the licensing framework set out in Public Notice 2005-61, including any necessary revisions to its agreements with its American partner. Failure to provide such confirmation within the required timeframe shall render this decision null and void.

Secretary General

This decision is to be appended to the licence. It 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

Appendix to Broadcasting Decision CRTC 2005-246

Conditions of licence for the satellite subscription radio undertaking licensed to Canadian Satellite Radio Inc.

1 (a) The licensee shall provide a national satellite subscription radio undertaking consisting of original Canadian-produced channels and non-Canadian channels. The licensee is authorized to distribute the services of XM Satellite Radio Inc. in accordance with the terms of the conditions of licence set out below.

(b) The licensee shall distribute a minimum of eight original Canadian-produced channels.

(c) The licensee may distribute, to any Canadian subscriber, a maximum of nine non-Canadian-produced channels for each original Canadian-produced channel that it distributes.

(d) In no case may a subscriber receive a package of channels where original Canadian-produced-channels constitute less than 10 percent of total channels received.

For purposes of this condition of licence, an "original Canadian-produced channel" is a channel produced in Canada that consists of programming not less than 50% of which is produced for and broadcast for the first time on that channel.

2. The licensee shall, in a week, devote a minimum of 85% of the total musical selections broadcast on all Canadian-produced channels, considered together, to Canadian selections as defined in section 2.2(2) of the *Radio Regulations, 1986*.

3. The licensee shall, in a week, devote at least 85% of the total spoken word programming broadcast on all Canadian-produced channels, considered together, to Canadian spoken word programming.

For purposes of this condition of licence "Canadian spoken word programming" means programming other than musical selections or commercial messages that is produced in Canada and where a Canadian is the primary performer or speaker.

4. (a) The licensee shall distribute a minimum of three French-language original Canadian-produced channels.

(b) Not less than 25% of the original Canadian-produced channels distributed by the licensee shall consist of French-language original Canadian-produced channels.

For purposes of this condition of licence, an "original Canadian-produced channel" is a channel produced in Canada that consists of programming not less than 50% of which is produced for and broadcast for the first time on that channel.

5. The licensee shall, during a week, on each French-language channel, devote 65% or more of its vocal musical selections from content category 2 to musical selections in the French language and schedule them in a reasonable manner throughout each day.

6. The licensee shall devote, between 6 a.m. and midnight each week on each Canadian music channel, a minimum of 25% of the musical selections broadcast to new Canadian musical selections, and a minimum of 25% of the musical selections broadcast to Canadian selections by artists who have not had a musical selection that has reached a position on one or more of the charts identified in the list set out in Circular 445, 14 August 2001, as may be amended from time to time.

For the purposes of this condition of licence, a "new Canadian musical selection" is a Canadian selection that has been released in the 6 months prior to the date that the musical selection is broadcast. The Eastern time zone will be used for purposes of determining compliance with this condition of licence. The licensee will also be responsible for specifying on the music lists it provides to the Commission, the release date of all musical selections it broadcasts.

7. (a) During each broadcast year, the licensee shall contribute a minimum of 5% of gross revenues from its satellite subscription radio undertaking to eligible third parties directly connected to the development of Canadian musical and other artistic talent or other initiatives approved by the Commission. For purposes of this condition of licence, "eligible third parties" shall have the definition set out in Contributions by radio stations to Canadian talent development – A new approach, Public Notice CRTC 1995-196, 17 November 1995, as amended from time to time by the Commission.

(b) Fifty per cent of the licensee's total annual contribution to Canadian talent development shall be allocated to initiatives for the development of Canadian French-language talent, and fifty percent shall be allocated to initiatives for the development of Canadian English-language talent.

(c) The licensee shall file a report on the fulfilment of its commitments with respect to Canadian talent development with each annual return. The report shall set out the initiatives that the licensee has supported, the amount spent on each initiative, as well as the total amounts devoted to initiatives for the development of French-language and English-language talent.

8. The licensee shall not broadcast any original local programming on a Canadian-produced channel. For the purposes of this condition of licence "original local programming" means programming produced by the licensee for broadcast on the satellite subscription radio undertaking that targets a particular geographic community and includes, but is not limited to, commercial messages, news, weather and traffic information.

9. The licensee shall broadcast no more than six minutes of national commercial messages during any clock hour on any Canadian-produced channel. For purposes of this condition of licence a "national commercial message" is a commercial message that is purchased at a national rate and receives national distribution on the service.

10. The licensee shall adhere to sections 3, 4, 6,10.1 (with respect to its terrestrial transmitters) and 11 of the *Radio Regulations*, *1986*.

11. The licensee shall adhere to the guidelines on gender portrayal set out in the Canadian Association of Broadcasters' (CAB) *Sex-Role Portrayal Code for Television and Radio Programming,* as amended from time to time and approved by the Commission. The application of the foregoing condition of licence will be suspended as long as the licensee is a member in good standing of the Canadian Broadcast Standards Council.

12. The licensee shall adhere to the provisions of the CAB's *Broadcast Code for Advertising to Children*, as amended from time to time and approved by the

Commission.

13. The licensee shall, for each Canadian-produced channel, adhere to the provisions of sections 8(1), (2), (3), (4), (5) and (6) of the *Radio Regulations, 1986*.

14. The licensee shall, for any non-Canadian-produced channel that may be identified by the Commission from time to time, adhere to the provisions of sections 8(5) and (6) of the *Radio Regulations, 1986.*

15. (1) For the purposes of this condition of licence,

"Canadian musical selection" means a musical selection that meets the criteria set out in subsection 2.2(2) of the *Radio Regulations, 1986*.

(2) On or before November 30 of each year, the licensee shall submit to the Commission a statement of accounts, on the annual return of broadcasting licensee form, for the year ending on the previous August 31.

(3) For any Canadian-produced channel, the licensee shall, at the request of the Commission, submit for any period specified by the Commission in its request

(a) the information required by the most recent Station Self-assessment Report form issued by the Commission; and

(b) a list of the musical selections in the order in which they are broadcast by the licensee during that period that includes the title and performer of each musical selection and a legend that identifies

(i) any Canadian musical selection,

(ii) any instrumental selection,

(iii) any category 3 musical selection within the meaning of Public Notice CRTC 1991-19 of 14 February 1991 entitled *Implementation of the FM Policy* and published in the Canada Gazette Part I on 23 February 1991, and

(iv) the language of the musical selection, where the musical selection is not an instrumental selection.

(4) For any non-Canadian produced channel, the licensee shall, at the request of the Commission, submit for any period specified by the Commission in its request, the following information for each musical selection broadcast:

(i) the name of the artist;

(ii) the name of the album from which the musical selection is taken and the number of the track;

(iii) the year that the musical selection was released; and

(iv) the version of the track, where multiple versions exist

(5) At the request of the Commission, the licensee shall provide the Commission with a response to any inquiry regarding the licensee's programming, ownership or any other matter within the Commission's jurisdiction that relates to the

licensee's undertaking.

16. For the purposes of all the conditions of licence set out above, the terms "broadcast day," "broadcast week," "commercial message," "content category," "content subcategory," "ethnic program," "licensed," and "musical selection," shall have the meaning set out in section 1 of the *Radio Regulations, 1986.* "Day" means the total number of hours devoted to broadcasting for a period beginning at 12:00 in the forenoon and ending at midnight of the same day. "Week" means seven consecutive days beginning on Sunday.

Date Modified: 2005-06-16

Broadcasting Decision CRTC 2005-247

Ottawa, 16 June 2005

SIRIUS Canada Inc.
Across Canada

Application 2003-1885-9
Public Hearing in the National Capital Region
1 November 2004

Satellite subscription radio undertaking

*The Commission **approves** the application by SIRIUS Canada Inc. (Sirius Canada) for a broadcasting licence to carry on a satellite subscription radio undertaking, subject to the conditions of licence set out in the appendix to this decision.*

Upon licensing, Sirius Canada will be owned by the Canadian Broadcasting Corporation, Standard Radio Inc. and Sirius Satellite Radio Inc., an American corporation.

By condition of licence, the licensee must provide a minimum of eight original Canadian-produced channels at the beginning of operations, and may distribute, to any Canadian subscriber, a maximum of nine non-Canadian-produced channels for each original Canadian-produced channel that it distributes. A minimum of 85% of the musical selections broadcast on all Canadian-produced channels, considered together, must be Canadian selections.

The licensee must also, by condition of licence, distribute a minimum of three French-language original Canadian-produced channels at the beginning of operations and at any time, not less than 25% of the original Canadian-produced channels offered by the undertaking must be French-language channels. A minimum of 65% of all category 2 (popular music) vocal musical selections broadcast on each French-language channel must be French-language selections.

The Sirius Canada application was one of three applications for subscription radio undertakings considered at the 1 November 2004 public hearing. The Commission's general approach to these applications is set out 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, of today's date (Public Notice 2005-61).*

Sirius Canada must provide written confirmation, within 150 days of this decision, that it accepts the terms and conditions set out in this decision and in the licensing framework set out in Public Notice 2005-61, including any necessary revisions to its agreements with its American partner. Failure to provide such confirmation within the required timeframe shall render this decision null and void.

Overview of the application

1. The Commission received an application by SIRIUS Canada Inc. (Sirius Canada) for a broadcasting licence to carry on a satellite subscription radio undertaking.

2. Upon licensing, Sirius Canada would be owned by the Canadian Broadcasting Corporation (CBC), Standard Radio Inc. (Standard) and Sirius Satellite Radio Inc. (Sirius), an American corporation. Pursuant to a Shareholder Agreement dated 6 July 2004, it was agreed that, upon approval of the application, the CBC would become a shareholder with a 40% voting interest. As a result, Standard would also hold a 40% voting interest and the remaining 20% would be held by Sirius.

3. Pursuant to a Licensing and Service Agreement (LSA) between Sirius and Sirius Canada dated 6 July 2004, Sirius has agreed to provide certain elements of operations such as

programming and technology as well as a number of services and licences to Sirius Canada in exchange for an increased level of non-voting interest in Sirius Canada. Sirius may also earn additional licence fees if gross revenues reach a certain threshold per month. The Commission is satisfied that the LSA does not provide a level of influence to Sirius that would be sufficient to jeopardize Sirius Canada's ability to hold a licence.

4. The applicant indicated that the undertaking would deliver a package of radio channels to subscribers for a basic monthly fee of $12.95.

5. Sirius Canada originally proposed to distribute the CBC's existing Radio One and La Première Chaîne radio services, two new channels (one in English and one in French) produced by the CBC, and 74 American channels provided by Sirius, one of two companies that provides satellite radio service in the United States.

6. Subsequent to the submission of its application, Sirius Canada proposed to add a fifth Canadian-produced channel that would be programmed by Standard. At the hearing, Sirius Canada indicated that it would add three more Canadian-produced channels to its service when it has 300,000 subscribers or if additional satellite capacity becomes available from Sirius. It further advised that the number of programming channels originating from its American partner had increased to 120.

7. Sirius Canada committed to contribute 5% of the revenues of its service to Canadian talent development (CTD), submitting that this level of funding was consistent with the general standard adopted for broadcasting distribution undertakings set out in the *Broadcasting Distribution Regulations*. Based on its revenue projections for the first licence term, this percentage commitment would represent $21.5 million over 7 years in contributions to CTD initiatives. The applicant also proposed to allocate its CTD contributions equally between initiatives for the development of Canadian English- and French-language talent.

8. The Sirius Canada application was one of three applications for subscription radio undertakings considered at the 1 November 2004 public hearing. The Commission's general approach to these applications, including a licensing framework for satellite subscription radio undertakings, is set out 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, of today's date (Public Notice 2005-61).

Interventions

9. The Commission received more than 300 interventions in support of this application. Interventions raising concerns and addressing policy issues associated with the licensing of satellite subscription radio undertakings are discussed in Public Notice 2005-61.

The Commission's analysis and determinations

Canadian channels

10. Sirius Canada proposed to offer the following five Canadian-produced channels at the beginning of operations.

11. *Radio One*: Sirius Canada would rebroadcast the CBC's existing English-language Radio One service. Approximately 80% of Radio One's service consists of spoken word programming with the remainder made up of music. By condition of licence, the CBC must ensure that at least 50% of all category 2 (popular music) and at least 20% of all category 3 (special interest music) musical selections broadcast on Radio One during each broadcast week are Canadian selections.[1]

12. *La Première Chaîne*: Sirius Canada would rebroadcast the CBC's existing French-language La Première Chaîne radio service. Like Radio One, La Première Chaîne is oriented to spoken word programming. With respect to music programming, the CBC must, by condition of licence, ensure that at least 50% of all category 2 (popular music) and at least 20% of all category 3 (special interest music) musical selections broadcast on La Première Chaîne during each broadcast month are Canadian selections.[2]

13. *Radio Three*: Radio Three would be a new English-language music-oriented channel based on an existing Internet service offered by the CBC. Radio Three would be aimed at young adults, and would showcase new and upcoming Canadian musicians, artists, writers and creators. Sirius Canada indicated that a minimum of 75% of the category 2 and at least 50% of the category 3 musical selections broadcast on Radio Three each week would be Canadian selections.

14. *Bandeàpart:* Bandeàpart would be a new French-language music-oriented channel produced by the CBC that would be dedicated to new music, emerging talent and youth-oriented programming. Sirius Canada indicated that a minimum of 65% of the category 2 and at least 50% of category 3 musical selections broadcast each week on Bandeàpart would be Canadian selections.

15. *The Wave*: This new English-language channel would be produced by Standard and would feature only Canadian musical selections. The Wave would focus on emerging and independent Canadian artists, including Aboriginal artists.

16. Sirius Canada further stated that it would add three more Canadian-produced channels to its service when it has 300,000 subscribers, or if additional capacity becomes available, one of which would be a French-language channel.

17. In Public Notice 2005-61, the Commission set out a framework under which it would license satellite subscription radio undertakings. In Public Notice 2005-61, the Commission indicated that it considered that the number of Canadian channels proposed by the applicants for satellite subscription radio undertakings at the 1 November 2004 public hearing was not sufficient, and that it was inappropriate for such undertakings to rebroadcast existing radio services in their entirety. Consequently, the Commission indicated that it would require licensees of such undertakings, including Sirius Canada, to distribute a minimum of eight original Canadian-produced channels from the outset of operations. An "original Canadian-produced channel" is defined as a channel produced in Canada that consists of programming not less than 50% of which is produced for and broadcast for the first time on that channel. Consequently, it will be necessary for Sirius Canada to ensure that at least 50% of the programming on the channels on which it originally proposed to distribute Radio One and La Première Chaîne qualifies as original Canadian programming. The Commission further indicated that a satellite subscription radio undertaking would be permitted to distribute, to any Canadian subscriber, a maximum of nine non-Canadian produced channels for each original Canadian-produced channel that it distributes, and that no subscriber would be permitted to receive a package of channels where original Canadian-produced channels constituted less than 10% of the channels received. **Conditions of licence** to this effect are set out in the appendix to this decision. As well, the Commission indicated that it expects at least 60% of the original Canadian-produced channels distributed by satellite subscription radio undertakings to be music channels.

18. In accordance with the licensing framework set out in Public Notice 2005-61, the Commission is also imposing **conditions of licence** requiring Sirius Canada to devote a minimum of 85% of the total musical selections broadcast on all Canadian-produced channels, considered together, to Canadian selections, and to devote a minimum of 85% of the total spoken word programming broadcast on all Canadian-produced channels, considered together, to Canadian spoken word programming. These conditions are also set out in the appendix to this decision.

French-language channels

19. As indicated above, the applicant originally proposed to offer two French-language channels, both produced by the CBC. In *Licences for CBC French-language television and radio renewed for a seven-year term*, Decision CRTC 2000-2, 6 January 2000, the Commission stated that it expected the CBC to ensure that at least 85% of the vocal musical selections broadcast each month on La Première Chaîne are French-language vocal music selections, and to limit English-language vocal music selections, which must be Canadian, to 5% of all vocal musical selections broadcast. With respect to the other French-language service, Bandeàpart, Sirius Canada proposed that at least 75% of the vocal selections broadcast each week would be devoted to French-language vocal selections. Sirius Canada further indicated that at least 67% of the French-language musical selections broadcast on Bandeàpart would

be Canadian selections.

20. As noted above, Sirius Canada indicated that it would also offer a third French-language channel.

21. In Public Notice 2005-61, the Commission determined that it was appropriate to require each satellite subscription radio undertaking to distribute a minimum of three French-language original Canadian-produced channels from the outset of operations, and to require that not less than 25% of the original Canadian-produced channels are French-language original Canadian-produced channels. **Conditions of licence** to this effect are set out in the appendix to this decision.

22. Further, in accordance with the licensing framework set out in Public Notice 2005-61, the Commission is imposing a **condition of licence** requiring the licensee to ensure that at least 65% of the category 2 vocal musical selections broadcast on each Canadian-produced French-language channel during each week are French-language selections. This **condition of licence** is also set out in the appendix to this decision.

New Canadian music and emerging talent

23. Sirius Canada submitted that one of the benefits of approving its application is that its proposed undertaking would provide exposure for new Canadian music that receives little or no airplay on conventional radio stations.

24. In Public Notice 2005-61, the Commission stated that it considered that it was appropriate to require each satellite subscription radio undertaking to ensure that, between 6 a.m. and midnight each week on each Canadian music channel, a minimum of 25% of the musical selections broadcast will be new Canadian musical selections, and a minimum of 25% will be Canadian selections by artists who have not had a musical selection that has reached a position on one or more of the charts identified in the list set out in Circular 445, 14 August 2001, as may be amended from time to time. A **condition of licence** to this effect is set out in the appendix to this decision.

25. For the purposes of this condition, a "new Canadian musical selection" is a Canadian selection that has been released in the 6 months prior to the date that the musical selection is broadcast. The Eastern time zone will be used when determining compliance with this condition of licence. The licensee will also be responsible for specifying on the music lists it provides to the Commission, the release date of all musical selections it broadcasts.

Canadian talent development

26. Sirius Canada proposed to devote 5% of gross annual revenues to CTD. Based on the applicant's projections, this would amount to approximately $21.5 million over seven years. Sirius Canada further indicated that it would guarantee that at least $1.2 million was spent on CTD during the first two years of operations, when revenues would be lower. The applicant indicated that it would split its annual expenditures on CTD equally between initiatives supporting Canadian English-language talent and initiatives supporting Canadian French-language talent as set out below.

27. The applicant proposed to allocate its commitment to devote 5% of gross annual revenues to CTD expenditures as follows:

FACTOR and MusicAction

28. Sirius Canada proposed to allocate 2.5% of gross annual revenues, or half of its proposed CTD contribution, equally between Fund to Assist Canadian Talent on Record (FACTOR) and MusicAction. This contribution would be earmarked to assist Canadian artists in building an international profile through touring and other means. Sirius Canada considered that this emphasis would complement the nature of the Sirius undertaking, which would be receivable across North America and therefore provide exposure of Canadian artists in the United States as well as in Canada.

Artist support fund

29. Sirius Canada proposed to allocate 2.5% of gross annual revenues, or half its proposed CTD contribution, to an "artist support fund." This fund would support a "CTD coordinator" initiative and a "travel and talent costs for Canadian artists" initiative.

30. It proposed to hire a CTD coordinator who would live in New York City. This coordinator would promote new Canadian artists and their recordings to Sirius staff in the United States, and coordinate appearances by Canadian artists on Sirius channels that originate in the US.

31. Sirius Canada would support travel and talent costs for Canada artists by funding:

- travel and talent costs to send Canadian artists to Sirius studios for performances on Sirius channels;
- showcases in New York City for Canadian artists with two such showcases in each of the first three years of operation, and four showcases beginning in year 4; and
- a national talent hunt for Canadian musical talent, with winners receiving a recording contract, and the resulting CD would being played on Sirius channels.

32. At the hearing, Sirius Canada indicated that it would also allocate money to support Canadian campus and community radio.

33. The Commission considers that Sirius Canada has proposed valuable initiatives for CTD. In the licensing framework for satellite subscription radio undertakings set out in Public Notice 2005-61, the Commission stated that it would require such undertakings to contribute 5% of gross annual revenues to CTD, with 50% of the total contribution allocated to the development of Canadian French-language talent and 50% allocated to the development of Canadian English-language talent. **Conditions of licence** to this effect are set out in the appendix to this decision.

34. Further, the Commission is imposing a **condition of licence** that requires Sirius Canada to file a report on the fulfilment of its CTD commitments with each annual return. This condition is set out in the appendix to this decision.

Advertising and local programming

35. Sirius Canada indicated that it would not broadcast original local programming on its Canadian-produced channels, nor did it plan to carry any commercial messages on those channels.

36. In Public Notice 2005-61, the Commission indicated that it considered it appropriate to require satellite subscription radio undertakings not to broadcast any programming that targets a particular geographic community, including local commercial messages. However, the Commission determined that it would allow such undertakings to broadcast up to six minutes of national commercial messages per hour on each channel. **Conditions of licence** to this effect are set out in the appendix to this decision.

Adherence to regulations and industry codes

37. Sirius Canada committed to be accountable for the content of all programming broadcast on all Canadian-produced and non-Canadian-produced channels distributed by the proposed undertaking. It undertook not to broadcast anything in contravention of the law, any abusive comment, or any obscene or profane language. Sirius Canada also committed to adhere to the Canadian Association of Broadcasters' (CAB) *Sex-role Portrayal Code for Television and Radio Programming.*

38. Sirius Canada further indicated that it would consider offering a "Family Plan" package to subscribers, which would exclude programming considered to be adult in nature.

39. In accordance with the licensing framework for satellite subscription radio undertakings set out in Public Notice 2005-61, the Commission will require Sirius Canada, by **condition of licence**,

to adhere to relevant provisions of the *Radio Regulations, 1986*, as well as to the CAB *Sex-role Portrayal Code for Television and Radio Programming* and the *Broadcast Code for Advertising to Children.* It will also require Sirius Canada to maintain program logs for all Canadian-produced channels, logger tapes for all Canadian-produced channels and any non-Canadian-produced channels that the Commission may designate from time to time, and music lists for all channels that it distributes.

40. The Commission directs Sirius Canada to file, within 150 days of the release of this decision, internal guidelines for dealing with complaints from listeners for the Commission's approval. Once these guidelines have been approved, the Commission expects the applicant to apply these guidelines to the consideration of any complaints that are received.

41. The Commission also expects Sirius Canada to create a designation that will be used to identify any channels that broadcast potentially offensive content. In the event that Sirius Canada should decide to broadcast open line programming, the Commission expects it to adhere to the Commission's *Policy regarding open-line programming*, Public Notice CRTC 1988-213, 23 December 1988.

Employment equity

42. In accordance with the applicant's commitments, the Commission expects initiatives for Sirius Canada to be included in the employment equity plan in place for the CBC.

43. In accordance with *Implementation of an employment equity policy*, Public Notice CRTC 1992-59, 1 September 1992, the Commission encourages the licensee to consider employment equity issues in its hiring practices and in all other aspects of its management of human resources.

Cultural diversity

44. The Commission expects Sirius Canada to reflect the cultural diversity of Canada in all of its programming, and encourages it to promote those channels that are targeted to specific cultural groups.

Conclusion

45. The Commission **approves** the application by SIRIUS Canada Inc. and, consistent with the approach set out in Public Notice 2005-61, will issue a broadcasting licence to carry on a satellite subscription radio undertaking. The licence will expire on 31 August 2011 and will be subject to the **conditions of licence** set out in the appendix to this decision.

46. The Commission notes that, while Sirius Canada will provide national service by satellite, it has also proposed to establish a number of terrestrial transmitters to fill in areas where coverage is deficient. The Commission's approval of the terrestrial transmitters is based on the technical submissions filed with the application. The applicant must also obtain technical certification from the Department of Industry (the Department) on the basis of requirements set out in Annex 1 of the Department's letter to the Commission and copied to the applicant entitled *Issuance of technical broadcasting certificates for applications authorized to provide subscription radio services*, 21 September 2004. Sirius Canada must also provide the Commission with a copy of all technical submissions, including coverage maps, that it sends to the Department.

47. The Commission reminds the applicant that, pursuant to section 22(1) of the *Broadcasting Act*, no licence may be issued until the Department notifies the Commission that its technical requirements have been met, and that a broadcasting certificate will be issued.

48. The licence for this undertaking will be issued when :

a) the applicant has informed the Commission in writing that it is prepared to commence operations; and

b) the applicant has filed, to the Commission's satisfaction, an amended

Shareholder Agreement with the CBC, Standard and Sirius as registered shareholders of Sirius Canada.

49. The undertaking must be operational at the earliest possible date and in any event no later than 24 months from the date of this decision, unless a request for an extension of time is approved by the Commission before 16 June 2007. In order to ensure that such a request is processed in a timely manner, it should be submitted at least 60 days before this date.

Confirmation required

50. Sirius Canada must provide written confirmation, within 150 days of this decision, that it accepts the terms and conditions set out in this decision and in the licensing framework set out in Public Notice 2005-61, including any necessary revisions to its agreements with its American partner. Failure to provide such confirmation within the required timeframe shall render this decision null and void.

Secretary General

This decision is to be appended to the licence. It 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

Appendix to Broadcasting Decision CRTC 2005-247

Conditions of licence for the satellite subscription radio undertaking licensed to SIRIUS Canada Inc.

1. (a) The licensee shall provide a national satellite subscription radio undertaking consisting of original Canadian-produced channels and non-Canadian channels. The licensee is authorized to distribute the services of Sirius Satellite Radio Inc. in accordance with the terms of the conditions of licence set out below.

(b) The licensee shall distribute a minimum of eight original Canadian-produced channels.

(c) The licensee may distribute, to any Canadian subscriber, a maximum of nine non-Canadian-produced channels for each original Canadian produced channel that it distributes.

(d) In no case may a subscriber receive a package of channels where original Canadian-produced channels constitute less than 10 percent of total channels received.

For purposes of this condition of licence, an "original Canadian-produced channel" is a channel produced in Canada that consists of programming not less than 50% of which is produced for and broadcast for the first time on that channel.

2. The licensee shall, in a week, devote a minimum of 85% of the total musical selections broadcast on all Canadian-produced channels, considered together, to Canadian selections as defined in section 2.2(2) of the *Radio Regulations, 1986*.

3. The licensee shall, in a week, devote at least 85% of the total spoken word programming broadcast on all Canadian-produced channels, considered together, to Canadian spoken word programming.

For purposes of this condition of licence "Canadian spoken word programming" means programming other than musical selections or commercial messages that is produced in Canada and where a Canadian is the primary performer or speaker.

4. (a) The licensee shall distribute a minimum of three French-language original Canadian-produced channels.

(b) Not less than 25% of the original Canadian-produced channels distributed by the licensee shall consist of French-language original Canadian-produced channels.

For purposes of this condition of licence, an "original Canadian-produced channel" is a channel produced in Canada that consists of programming not less than 50% of which is produced for and broadcast for the first time on that channel.

5. The licensee shall, during a week, on each French-language channel, devote 65% or more of its vocal musical selections from content category 2 to musical selections in the French language and schedule them in a reasonable manner throughout each day.

6. The licensee shall devote, between 6 a.m. and midnight each week on each Canadian music channel, a minimum of 25% of the musical selections broadcast to new Canadian musical selections, and a minimum of 25% of the musical selections broadcast to Canadian selections by artists who have not had a musical selection that has reached a position on one or more of the charts identified in the list set out in Circular 445, 14 August 2001, as may be amended from time to time.

For the purposes of this condition of licence, a "new Canadian musical selection" is a Canadian selection that has been released in the 6 months prior to the date that the musical selection is broadcast. The Eastern time zone will be used for purposes of determining compliance with this condition of licence. The licensee will also be responsible for specifying on the music lists it provides to the Commission, the release date of all musical selections it broadcasts.

7. (a) During each broadcast year, the licensee shall contribute a minimum of 5% of gross revenues from its satellite subscription radio undertaking to eligible third parties directly connected to the development of Canadian musical and other artistic talent or other initiatives approved by the Commission. For purposes of this condition of licence, "eligible third parties" shall have the definition set out in *Contributions by radio stations to Canadian talent development – A new approach*, Public Notice CRTC 1995-196, 17 November 1995, as amended from time to time by the Commission.

(b) Fifty per cent of the licensee’s total annual contribution to Canadian talent development shall be allocated to initiatives for the development of Canadian French-language talent, and fifty percent shall be allocated to initiatives for the development of Canadian English-language talent.

(c) The licensee shall file a report on the fulfilment of its commitments with respect to Canadian talent development with each annual return. The report shall set out the initiatives that the licensee has supported, the amount spent on each initiative, as well as the total amounts devoted to initiatives for the development of French-language and English-language talent.

8. The licensee shall not broadcast any original local programming on a Canadian-produced channel. For the purpose of this condition of licence "original local programming" means programming produced by the licensee for broadcast on the satellite subscription radio undertaking that targets a particular geographic community and includes, but is not limited to, commercial messages, news, weather and traffic information.

9. The licensee shall broadcast no more than six minutes of national commercial messages during any clock hour on any Canadian-produced channel. For purposes of this condition of licence a "national commercial message" is a commercial message that is purchased at a national rate and receives national distribution on the service.

10. The licensee shall adhere to sections 3, 4, 6,10.1 (with respect to its terrestrial transmitters) and 11 of the *Radio Regulations*, *1986*.

11. The licensee shall adhere to the guidelines on gender portrayal set out in the Canadian Association of Broadcasters’ (CAB) *Sex-Role Portrayal Code for Television*

and Radio Programming, as amended from time to time and approved by the Commission. The application of the foregoing condition of licence will be suspended as long as the licensee is a member in good standing of the Canadian Broadcast Standards Council.

12. The licensee shall adhere to the provisions of the CAB's *Broadcast Code for Advertising to Children*, as amended from time to time and approved by the Commission.

13. The licensee shall, for each Canadian-produced channel, adhere to the provisions of sections 8(1), (2), (3), (4), (5) and (6) of the *Radio Regulations, 1986*.

14. The licensee shall, for any non-Canadian-produced channel that may be identified by the Commission from time to time, adhere to the provisions of sections 8(5) and (6) of the *Radio Regulations, 1986.*

15. (1) For the purposes of this condition of licence,

"Canadian musical selection" means a musical selection that meets the criteria set out in subsection 2.2(2) of the *Radio Regulations, 1986*.

(2) On or before November 30 of each year, the licensee shall submit to the Commission a statement of accounts, on the annual return of broadcasting licensee form, for the year ending on the previous August 31.

(3) For any Canadian-produced channel, the licensee shall, at the request of the Commission, submit for any period specified by the Commission in its request

(a) the information required by the most recent Station Self-assessment Report form issued by the Commission; and

(b) a list of the musical selections in the order in which they are broadcast by the licensee during that period that includes the title and performer of each musical selection and a legend that identifies

(i) any Canadian musical selection,

(ii) any instrumental selection,

(iii) any category 3 musical selection within the meaning of Public Notice CRTC 1991-19 of 14 February 1991 entitled *Implementation of the FM Policy* and published in the Canada Gazette Part I on 23 February 1991, and

(iv) the language of the musical selection, where the musical selection is not an instrumental selection.

(4) for any non-Canadian produced channel, the licensee shall, at the request of the Commission, submit for any period specified by the Commission in its request, the following information for each musical selection broadcast:

(i) the name of the artist;

(ii) the name of the album from which the musical selection is taken and the number of the track;

(iii) the year that the musical selection was released; and

(iv) the version of the track, where multiple versions exist.

(5) At the request of the Commission, the licensee shall provide the Commission with a response to any inquiry regarding the licensee's programming, ownership or any other matter within the Commission's jurisdiction that relates to the licensee's undertaking.

16. For the purposes of all the conditions of licence set out above, the terms "commercial message," "content category," "content subcategory," "ethnic program," "licensed," and "musical selection," shall have the meaning set out in section 1 of the *Radio Regulations, 1986.* "Day" means the total number of hours devoted to broadcasting for a period beginning at 12:00 in the forenoon and ending at midnight the same day. "Week" means seven consecutive days beginning on Sunday.

Footnotes:

[1] See *Licences for CBC English-language television and radio renewed for a seven-year term*, Decision CRTC 2000-1, 6 January 2000.

[2] See *Licences for CBC French-language television and radio renewed for a seven-year term*, Decision CRTC 2000-2, 6 January 2000.

Date Modified: 2005-06-16

Broadcasting Public Notice CRTC 2005-61

Ottawa, 16 June 2005

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

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

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

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

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

Background

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

2. Consistent with the procedures generally followed by the Commission in such cases, it called for applications from other parties wishing to seek authority to carry on such an undertaking, or some other form of subscription radio undertaking. The Commission subsequently gazetted three applications for licences to carry on subscription radio services, distributed by satellite and/or terrestrial transmitters for direct reception by subscribers. These applications were considered at a public hearing in the National Capital Region, which commenced on 1 November 2004.

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

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

The applications

Canadian Satellite Radio Inc.

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

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

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

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

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

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

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

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

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

SIRIUS Canada Inc.

14. Upon licensing, SIRIUS Canada Inc. (Sirius Canada) would be owned by three corporations, with the Canadian Broadcasting Corporation (CBC) and Standard Radio Inc. (Standard) each

holding a 40% voting interest, and Sirius Satellite Radio Inc. (Sirius), an American corporation, holding a 20% voting interest. Sirius Canada originally proposed to distribute the CBC's existing Radio One and La Première Chaîne radio services, two new channels (one in English and one in French) produced by the CBC, and 74 US channels provided by Sirius, the other company that provides a satellite radio service in the US.

15. Subsequent to the filing of its application, Sirius Canada proposed to add a fifth Canadian-produced channel that would be programmed by Standard, and, at the hearing, the applicant indicated that it would add three more Canadian-produced channels to its service when it has 300,000 subscribers, or if additional satellite capacity becomes available. It further advised that the number of programming channels that would originate from its US partner had increased to 120.

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

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

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

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

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

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

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

Catharines/Niagara (Ontario), Winnipeg (Manitoba), Saskatoon and Regina (Saskatchewan), Calgary and Edmonton, later expanded to include Red Deer and other cities between Calgary and Edmonton (Alberta), and Victoria, and the Fraser Valley (British Columbia).

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

Interventions

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

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

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

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

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

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

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

29. SOCAN, CIRPA and the CMPA submitted that new subscription radio services should be

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

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

31. In its intervention, ADISQ submitted that the issues raised in this process should have been addressed at a separate policy hearing before the applications for subscription radio services were considered. ADISQ stated that appropriate Canadian content levels and the promotion of Canadian artists are essential to ensure a balanced Canadian broadcasting system, and that these applications risk upsetting the fragile balance that currently exists. At the hearing, ADISQ stated that the level of French-language vocal musical selections proposed by both satellite applicants was unacceptable, and that contributions to CTD cannot replace the broadcast of musical works. It reiterated that, under the Act*,* undertakings have obligations in terms of both contribution and presentation, not contribution or presentation.

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

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

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

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

36. Corus proposed a formula whereby one Canadian channel would be added for every new foreign channel added beyond the first service offer of 100 channels, until an overall ratio of one Canadian channel to 10 foreign channels is reached. Corus also contended that satellite radio could have a significant impact on conventional radio and pay audio services since the new satellite services would result in a loss of listeners to these services and would impact advertising revenues for conventional radio stations even if the satellite radio services do not sell any advertising. Corus argued that the current regulatory requirements for conventional radio stations and pay audio services must be examined to ensure that these services can

compete and survive in the face of competition from satellite radio.

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

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

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

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

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

Applicants' replies

42. In response to the interventions opposing their applications, both CSR and Sirius Canada submitted that, under the terms of section 3(1)(f) of the Act, the maximum or predominant use of Canadian resources is not required in circumstances where the nature of the service is such that it is not practicable to require the undertaking to make maximum or predominant use of Canadian resources. According to these applicants, such circumstances may include situations where the content or format of the service is specialized or in a language other than English or French, but it is not limited to those situations.

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

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

45. These applicants also submitted that the Commission granted flexibility when it licensed pay-

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

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

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

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

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

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

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

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

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

terrestrial repeaters located in Canada, since such repeaters are owned by CSR; and

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

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

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

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

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

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

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

58. In response to the interveners who questioned the applicants' claims regarding the extent and potential threat of the satellite radio grey market, CSR stated that there was abundant evidence that a grey market is growing extremely quickly in Canada. The applicant attributed this to extensive advertising by XM and Sirius in US media that are received in Canada. CSR also noted that more than two-thirds of respondents (68%) to its marketing survey indicated that government opposition to satellite radio in Canada would not stop them from subscribing. The applicant also cited a national survey conducted by General Motors in Canada in January 2004 that indicates 2% of respondents already subscribe to satellite radio.

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

The Commission's analysis and determinations

60. In addition to the objective set out in section 3(1)(f) of the Act, regarding the use of Canadian creative and other resources by each broadcasting undertaking, the broadcasting policy for

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

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

Satellite subscription radio undertakings

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

- it would increase the diversity and comprehensiveness of programming choices available to Canadians;
- it would cover the entire country, bringing new services to rural and remote areas where radio options are often quite limited;
- it would increase exposure and monetary support for Canadian musicians, particularly new and emerging artists; and
- it would offer Canadian radio listeners multi-channel services in their cars and other vehicles, using a proven technology that is being deployed south of the border.

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

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

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

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

66. As regards the impact of satellite services on existing licensed radio and pay audio services, the Commission notes that no quantitative evidence was presented to indicate that this new

form of radio service would have a significant negative impact on either. In this regard, the Commission notes that the licensed broadcasters who intervened did not oppose the licensing of the proposed undertakings, but argued only that the new services should contribute adequately to the Canadian broadcasting system and should be prohibited from distributing local programming and commercial messages. As regards pay audio, the Commission notes that the licensees of both existing Canadian pay audio undertakings appeared at the hearing in supporting roles. CBC, the licensee of the Galaxie pay audio service, appeared as an applicant in connection with the Sirius Canada proposal. Corus, the licensee of the Max Trax pay audio service, appeared with CSR in support of its application.

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

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

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

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

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

71. The Commission finds that approval of the CSR and Sirius Canada applications, subject to those conditions of licence, and to the terms and conditions set out below will serve the public interest and contribute to the fulfilment of the objectives for the Canadian broadcasting system set out in the Act. It further finds that the mechanisms proposed by CSR and Sirius Canada will ensure that the proposed undertakings are effectively controlled by the licensees.

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

Licensing framework for satellite subscription radio undertakings

The appropriate ratio of Canadian to non-Canadian channels

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

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

Original Canadian-produced channels

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

Full-time Canadian-produced channels

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

The appropriate number of Canadian-produced channels

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

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

Music channels

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

Canadian content

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

81. The Commission has therefore imposed a condition of licence requiring each licensee to ensure that a minimum of 85% of the musical selections broadcast each week on the Canadian-produced channels, considered together, are Canadian. This condition will therefore be applied to the Canadian-produced channels as a whole. The Commission notes that Canadian content obligations for conventional radio stations are a minimum of 35% for popular music and 10% for special interest music. Assuming a 50-50 mix of popular and special interest music, the 85% requirement will result in five Canadian-produced music channels providing the number of Canadian musical selections broadcast by approximately 27 conventional radio stations.

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

French-language programming

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

Canadian talent development contributions

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

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

Support for new Canadian music and emerging talent

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

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

Restrictions on local programming and local advertising

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

Restrictions on national advertising

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

Adherence to the Regulations and Industry Codes

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

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

Restriction on video

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

Grey market subscribers

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

Proposed amendment to the satellite use policy

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

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

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

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

Terrestrial subscription radio undertakings

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

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

98. The Commission acknowledges the applicant's position that it is unlikely that the Canadian

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

Secretary General

This document 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

Date Modified: 2005-06-16

APPENDIX IV: Summary of Petitioners

Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) is a national organization of professional performers working in the English-language recorded media in Canada. ACTRA represents the interests of 21,000 members across Canada - the foundation of Canada's highly acclaimed professional performing community for over sixty years.
625 Church Street, Suite 300, Toronto, Ontario, M4Y 2G1, (416) 489-1311, www.actra.ca
Stephen Waddell, National Executive Director, ned@actra.ca

American Federation of Musicians (Canada) (AFM) is the largest organization in the world representing the interests of professional musicians.
75 The Donway West, Suite 1010, Don Mills, Ontario, M3C 2E9, (416) 391-5156, www.afm.org
Bobby Herriot, Vice President from Canada, bobherriot@afm.org

Canadian Auto Workers (CAW) is the largest private sector union in Canada.
205 Placer Court, Toronto, Ontario, M2H 3H9, (416) 497-4110, www.caw.ca
Peggy Nash, Assistant to the President, pnash@caw.ca

Canadian Conference of the Arts (CCA) is the national forum for the arts and cultural community in Canada.
801 – 130 Albert Street, Ottawa, Ontario, K1P 5G4, (613) 238-3561, www.ccarts.ca
Andrew Terris, Interim National Director, andrew.terris@ccarts.ca

Canadian Film and Television Production Association (CFTPA) is a non-profit trade association representing almost 400 film, television and interactive media companies across the country.
151 Slater Street, Suite 605, Ottawa, Ontario, K1P 5H3, (613) 233-1444, www.cftpa.ca
Guy Mayson, President, mayson@cftpa.ca

Canadian Independent Record Production Association (CIRPA) is the trade organization representing the independent sector of the Canadian music and sound recording industry. CIRPA is the collective voice of independent music in English-speaking Canada.
30 St. Patrick Street, 2nd Floor, Toronto, Ontario, M5T 3A3, (416) 485-3152, www.cirpa.ca
Brian Chater, President, brian@cirpa.ca

Canadian Labour Congress (CLC) is the largest democratic and popular organization in Canada with over three million members. The Canadian Labour Congress brings together Canada's national and international unions, the provincial and territorial federations of labour and 137 district labour councils.
2841 Riverside Drive, Ottawa, Ontario, K1V 8X7, (613) 521-3400, www.canadianlabour.ca
Barb Byers, Executive Vice-President, bbyers@clc-ctc.ca

Communications, Energy & Paperworkers Union (CEP) is one of Canada's largest unions, representing just about every type of worker, from coast to coast to coast, including journalists, radio, and TV broadcasters.
301 Laurier Avenue West, Ottawa, Ontario, K1P 6M6, (613) 230-5200, www.cep.ca
Peter Murdoch, National Vice President, Media, pmurdoch@cep.ca

Directors Guild of Canada (DGC) is a national labour organisation that represents over 3,800 key creative and logistical personnel in the film and television industry covering all areas of direction, design, production, and editing.
111 Peter Street, Suite 402, Toronto, Ontario, M5V 2H1, (416) 482-6640, www.dgc.ca
Pamela Brand, National Executive Director & CEO, pbrand@dgc.ca

Friends of Canadian Broadcasting (FCB) is an independent, Canada-wide, non-partisan voluntary organization supported by 60,000 households whose mission is to defend and enhance the quality and quantity of Canadian programming in Canada's audio-visual system. FRIENDS is not affiliated with any broadcaster or political party.
200/238 – 131 Bloor Street West, Toronto, Ontario, M5S 1R8, (416) 968-7496, www.friends.ca
Ian Morrison, Spokesperson, ian@friends.ca

National Campus and Community Radio Association (NCRA/ANREC) is the not-for-profit national association of organizations and individuals dedicated to increasing the effectiveness and cultivating the role of the campus and community radio sector in Canada.
325 Dalhousie, Suite 230, Ottawa, Ontario, K1N 7G2, (613) 321-1440, www.ncra.ca
Melissa Kaestner, National Coordinator, office@ncra.ca

Society of Composers, Authors and Music Publishers (SOCAN) is a performing rights organization (PRO) that licenses the public performance and telecommunication of the world's repertoire of copyright-protected musical works in Canada and then distributes royalties to its members and affiliated international societies.
41 Valleybrook Drive, Toronto, Ontario, M3B 2S6, (416) 445-8700, www.socan.ca
Paul Spurgeon, Vice President – Legal Services & General Counsel, spurgeonp@socan.ca

Songwriters Association of Canada (SAC) is the only national arts service organization dedicated exclusively to Canadian composers, lyricists and songwriters.
26 Soho Street, Suite 340, Toronto, Ontario, M5T 1Z7, (416) 961-1588, www.songwriters.ca
Catharine Bird, Executive Director, catharine@songwriters.ca

United Steelworkers (USW) is everybody's union. Their members work in nearly every industry and in every job imaginable, in all regions of the country.
234 Eglinton Avenue East, 8th Floor, Toronto, Ontario, M4P 1K7, (416) 487-1571, www.uswa.ca
Roger Falconer, Department Head – Organizing and Strategic Campaigns, rfalconer@uswa.ca

Writers Guild of Canada (WGC) is a national association representing more than 1,800 writers working in film, television, radio, and multimedia production in Canada.
366 Adelaide Street West, Suite 401, Toronto, Ontario, M5V 1R9, www.wgc.ca
Maureen Parker, Executive Director, m.parker@wgc.ca

TORONTO STAR
www.thestar.com

Jul. 19, 2005. 01:00 AM

Radio ruling will hurt our artists

TOM BARLOW

Over the past few weeks I have followed closely the media coverage regarding applications to the CRTC for satellite radio licences in Canada.

I have two concerns. First, that the licences have been granted to corporations outside of Canada and, second, that longstanding successful Canadian content protections have been brushed aside.

As a Canadian artist I feel that satellite technology offers unprecedented opportunities.

With virtually unlimited channels, listeners will be able to have a myriad of choices not currently available via commercial radio's increasingly narrow play lists. Artists who had no hope of radio play will suddenly have access to national exposure.

This can only strengthen and invigorate the music community with both artists and listeners reaping mutual benefits.

But why throw out or radically dilute Canadian content rules? Putting Canadian content into CanCon-only channels will ghettoize and marginalize artists.

The fundamental question here is: Is there such a thing as Canadian culture?

If there is not, then there can be no argument for jealously guarding it.

But if being a Canadian is more than just an accident of geography, if we have our own stories, our own unique insights and our own method of conveying those insights through music, then we must passionately protect our art and artists or risk becoming homogenized into nothingness.

We have seen the devastating effect of erasing a people's culture in indigenous populations around the globe. People lose their centres and are unable to define themselves.

There can be no mistake that we see the world profoundly differently than our neighbours do.

We may listen to many of the same bands and enjoy some of the same music but we are more than northern Americans. The Tragically Hip, Sam Roberts, and K-OS are all successful Canadian acts who inspire our nation but don't resonate to nearly the same degree in the U.S.

Is this because they are inferior? Obviously not. But I challenge a single American programmer to tell me who Bill Barilko is.

It is not the role of American corporations to protect Canadian culture, yet we are handing those very corporations the veins through which our culture flows.

Twenty years ago, if you had asked a rock radio listener if they wished to hear Bon Jovi or some unknown local band called the Tragically Hip, no doubt the Hip would not have been chosen. But CanCon rules gave the Hip a turn at bat. That's all the rules do, they give us a chance to compete. The recent CRTC decisions have threatened to take us out of the game.

This attack on Canadian culture has been made in the name of choice. I find the irony profoundly disturbing.

Here we have an American economic/political structure that has protected and fostered opaque, monolithic, monopolies at every level of the music business, from radio to live performance, trumpeting the consumer's right to choose.

All the Canadian listener will have earned is the right to never hear the next great uniquely Canadian voice. They will have been effectively denied their right to choose.

Tom Barlow *is an independent Canadian recording artist who has been nominated for a Juno Award three times.*

SOCAN

Society of Composers, Authors and Music Publishers of Canada

Société canadienne des auteurs, compositeurs et éditeurs de musique

C. PAUL SPURGEON
Vice President, Legal Services & General Counsel
Vice-président, Services juridiques et Chef du contentieux

November 24, 2004

Director General
Telecommunications Policy Branch
Industry Canada
300 Slater Street
Ottawa, Ontario
K1A 0C8

Sent Via E-mail: wireless @ic.gc.ca

Dear Sirs:

RE: PART I CANADA GAZETTE NOTICE DGTP-007-04 DATED OCTOBER 21, 2004 PROPOSED CLARIFICATION TO THE GOVERNMENT SATELLITE - USE POLICY FOR THE DELIVERY OF BROADCASTING SERVICES

On behalf of the *Society of Composers, Authors and Music Publishers of Canada* ("SOCAN"), I am writing in response to the above-captioned Canada Gazette Notice regarding a proposed clarification to the Government Satellite-use Policy for the Delivery of Broadcasting (the "Notice").

SOCAN is a not–for–profit Canadian organization that represents composers, lyricists, songwriters and publishers of musical works from across Canada and around the world.

On behalf of our approximately 25,000 active Canadian members, and members of affiliated societies around the world, we administer *performing rights* in music and lyrics. The performing right is that part of copyright which gives owners of musical works the sole right to perform in public or broadcast their works, or to authorize others to do so in return for royalty payments.

On behalf of our members, SOCAN grants blanket licences to users of music who pay us copyright royalties in accordance with tariffs set by the Copyright Board of Canada. When Canadian music is performed in Canada, the royalties stay at home. When foreign music is performed in Canada, the royalties leave the country.

Since the livelihood of our Canadian members depends on effective Canadian Content policies, SOCAN has always been extremely interested in Canada's broadcasting policies.

We are therefore very concerned about any regulatory changes that would allow foreign-owned satellites to dump foreign broadcasting signals, as is, into the Canadian market. It is for this reason that we are writing to express our strong opposition regarding the amendments proposed by officials from the Department of Canadian Heritage and Industry Canada (the "Departments"), and the process by which this proposal is being developed. Our preliminary submissions are presented under the following headings:

41 Valleybrook Drive, Toronto, ON M3B 2S6 416.445.8700 416.442.3831 1.800.55.SOCAN www.socan.ca

1. The Departments' "clarification" constitutes a fundamental policy change
2. There is no credible evidence to support such a fundamental policy change
3. The "clarification" is contrary to the Parliamentary intent of the *Broadcasting Act* and the *Telecommunications Act*
4. Procedural Fairness concerns

1. THE DEPARTMENTS' "CLARIFICATION" CONSTITUTES A FUNDAMENTAL POLICY CHANGE

We understand that the Departments propose to change the following provision from the ***Statement on the Utilization of Fixed Satellite Service Facilities for Broadcasting Services***, which has been in effect since June 14, 1995 and was reconfirmed as of March 1, 2000, as follows:

> *In this context, where a Canadian broadcasting undertaking wishes to use foreign satellite facilities, the Canadian policy concerning the use of satellite facilities for direct reception of broadcasting services by the public should be interpreted as follows:*
>
> - *the undertaking should make use of Canadian satellite facilities to carry all Canadian programming services but may use either Canadian or non-Canadian satellite facilities to carry foreign originated services that are intended primarily for foreign audiences and are authorized, in whole or in part, for distribution by the CRTC; and*
> - ***<u>under no circumstances should an undertaking use exclusively foreign satellites for the distribution of its services to Canadians.</u>*** *However, in the case of emergencies leading to lack of availability of Canadian or foreign satellite facilities, back-up agreements would be utilized.*
>
> (emphasis added)

Under the guise of a "clarification", the Departments propose to fundamentally alter the underlined provisions by substituting the following policy:

> *In exceptional circumstances, where no Canadian satellite facilities are available, or likely to be available in a reasonable time frame, to accommodate specialized satellite delivery of a broadcasting service to the public e.g.*

satellite radio services including vehicular reception, the use of foreign satellite facilities is permitted to distribute Canadian programming services

Shifting the policy from an outright ban ("under no circumstances") to a vaguely defined "exceptional circumstances" test ("where no Canadian satellite facilities are available or likely to be available in a reasonable time frame") cannot be characterized as a "clarification" of the 2000 policy. Rather, it is a fundamental policy change that requires a far more transparent and fair public policy formulation process than the Notice envisions.

2. THERE IS NO CREDIBLE EVIDENCE TO SUPPORT SUCH A FUNDAMENTAL POLICY CHANGE

This policy change appears to be in response to a letter from the Canadian Radio-television and Telecommunications Commission (the "CRTC") dated October 17, 2003, regarding an application the CRTC received to establish a broadcasting undertaking to provide a Canada-wide subscription satellite digital radio service (the "CRTC Letter"), which stated:

> *The applicant is proposing to use the facilities of XM Radio Inc., which is licensed to provide a satellite digital audio radio service (SDARS) in the United States, and a series of terrestrial repeaters. It is proposed that subscribers to this proposed broadcasting service would be receiving Canadian and US originated programming services via existing US satellites and the proposed terrestrial repeaters in Canada.*

An Appendix to the CRTC Letter provides "facts" and "arguments" raised by the applicant. Interested parties must have an opportunity to submit these "facts" and "arguments" to full public scrutiny before the Departments proceed with fundamental policy changes.

For example, the Appendix to the CRTC Letter contains the following statement:

> *The opening of the U.S. DBS [Direct Broadcast Satellite] market to services beamed from Canadian Direct Broadcast satellites marks a significant change in U.S. satellite policy. We believe this event should be a catalyst for reciprocal action in respect of SDARS service to Canadians from a U.S. broadcast satellite.*

SOCAN is extremely concerned that the Departments propose to make fundamental changes to Canadian telecommunications policy on a "reciprocal" basis with the United States when Canada is in the middle of multilateral services negotiations proceeding under the auspices of the World Trade Organization ("WTO").

Before providing further submissions, SOCAN hereby requests that the Departments provide a full response to the following question:

1. ***What impact will the Departments' unilateral reciprocal action have on Canada's WTO negotiating strategy where rights and obligations are not negotiated on a reciprocal basis, but rather on a National Treatment and Most Favoured Nation ("MFN") basis?***

2. ***What impact will the Departments' unilateral reciprocal action have on Canada's exclusion under the General Agreement on Trade in Services ("GATS") regarding telecommunications services supplied for the transmission of services regulated under the Broadcasting Act?***

In addition, the Appendix to the CRTC Letter contains the following statement:

> *Even if regulatory and satellite approvals were obtainable, construction and operational launch of an SDARS satellite fleet cannot be accomplished prior to 2010. Grey market services would proliferate in the Canadian marketplace prior to that date if no Canadian company were authorized to offer SDARS service.*

If Canadian satellite facilities could be available in 5 years, SOCAN fails to understand how this would not satisfy the Departments' proposed "likely to be available in a reasonable time frame" test. The bald assertion regarding grey market services must be subject to further public scrutiny, particularly in light of the limited number of subscribers that SDARS companies have achieved in the United States market.

Before providing further submissions, SOCAN hereby requests that the Departments provide a full response to the following questions:

3. ***What does the Departments' proposed wording "likely to be available in a reasonable time frame" mean?***

4. ***What is the evidence regarding the current SDARS "grey market" and its growth over the next 5 years?***

5. ***Why has Canada not sought from the International Telecommunication Union (ITU) a country broadcasting satellite allocation to develop its own satellite radio facilities in the S-band (2320-2345 MHz) [see Paragraph 8 of Notice]?***

6. ***If the CRTC grants the CHUM application, how will this affect the Departments' assessment of the "exceptional circumstances" test?***

SOCAN looks forward to receiving the Departments' response to the foregoing 6 questions so that we may further comment.

3. THE "CLARIFICATION" IS CONTRARY TO THE PARLIAMENTARY INTENT OF THE *BROADCASTING ACT* AND THE *TELECOMMUNICATIONS ACT*

Parliament has enacted statutes that make it clear that a "Made in Canada" approach should be used by Canadian broadcasting and telecommunication services. The Canadian Content provisions of the *Broadcasting Act* are explicit. Under the heading "Broadcasting Policy for Canada", Paragraph 3(1)(f) of the *Broadcasting Act* states:

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

As SOCAN recently advised the CRTC, the initial satellite radio applications that it is considering involve 179 channels. Of these, 171 channels will be imported, as is, from the United States. On the other hand, only 8 of these 179 channels – or less than 5% – will be produced in Canada.

SOCAN is concerned that the Departments' proposal to make a "clarification" which would allow the satellite radio applications to proceed would run afoul of the *Broadcasting Act* for at least two reasons. First, by only providing 8 Canadian channels out of a total of 179 channels, these applications do not satisfy the requirement that maximum use be made of Canadian creative resources. Second, the applications have not discharged the onus of establishing why satellite radio renders the use of Canadian Content impracticable.

In addition, Subsection 7(e) of the *Telecommunications Act* states:

> *It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives... to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;*

SOCAN submits that the proposed "clarification" flies in the face of Parliament's intent under both the *Broadcasting Act* and the *Telecommunications Act*. The fundamental changes proposed by the Departments require Parliamentary approval and cannot be made by unelected officials.

4. PROCEDURAL FAIRNESS CONCERNS

The Departments' proposed changes raise fundamental questions. As stated above, before SOCAN can provide further comments, we require the Departments' response to the foregoing 6 questions.

In the meantime, given that the Departments' proposed changes raise public policy issues that are as important as those raised by proposals to change Canadian foreign ownership rules in the telecommunications sector, SOCAN is hereby requesting that the ***House of Commons Standing Committee on Canadian Heritage*** hold hearings on this issue on an expedited basis so that all interested parties may have a full opportunity to be heard.

We look forward to hearing from you and to providing further submissions before any decisions are taken.

Yours sincerely,

CPS/jmc/jb

cc. Hon. Liza Frulla, P.C.
Minister of Canadian Heritage
Fax: (613) 995-6404

Hon. David Emerson, P.C.
Minister of Industry
Fax: (613) 943-0219

Hon. Sarmite Bulte, P.C.
Parliamentary Secretary to the Minister of Canadian Heritage
Fax: (613) 995-1629

Marlene Catterall, M.P.
Chair
House of Commons Standing Committee on Canadian Heritage
Fax: (613) 996-9880