



PETER MURDOCH

Vice-President -- Media

9 January 2008

By Hand to the CRTC

Mr. Konrad von Finckenstein
Chairman
CRTC
Ottawa, ON
K1A 0N2

Dear Mr. Chairman,

Re: **Contraventions of station licences held by CanWest MediaWorks Inc.**

1. CEP acknowledges receipt of the Reply from CanWest MediaWorks (CanWest) dated 12 December 2007, in response to CEP's Complaint to the CRTC of 9 November 2007. Our Response to CanWest's Reply follows; we have provided copies to CanWest and to Commissioner Michel Arpin.
2. As the Commission may recall, CEP's Complaint addressed the plans announced by CanWest at the beginning of October 2007 to have four Broadcast Centres operated by the company's employees assume the program production and control of CanWest's local television stations. At the heart of our Complaint is the fact that CanWest's plans violate the CRTC decisions that set out the terms and conditions of the licences granted to CanWest to operate its local television stations.
3. CanWest's Reply has not provided evidence that refutes our Complaint. It has not allayed our serious concerns about the negative effects of its Broadcast Centre plans on local television stations' status, control over their programs and employment levels. It is particularly telling that for the most part, the Reply simply asserts that CanWest is complying with its licences. Unfortunately, since assertions do not constitute evidence, the serious questions we have raised about CanWest's Broadcast Centres remain unanswered – although CanWest has now publicly explained its position that it considers itself free to ignore the commitments it makes to the Commission during CRTC public hearings, unless each commitment is transformed into a condition of licence.

4. Since

- CanWest has not provided evidence that answers the specific serious issues raised in our Complaint,
- CanWest is proceeding with its four Broadcast Centres (repackaged in the Reply as the “Digital News Project”),¹
- CanWest is proceeding with its plans to transform its originating local stations into news bureaux serving one or more Broadcast Centres,
- CanWest has eliminated all its local television stations’ master control rooms, thereby removing local program production capacity
- CanWest has removed all programming and scheduling decision-making authority from local stations but for local commercial and promotional insertions,
- CanWest has not rescinded its decision to lay off two hundred or more of its staff,
- and since, as CanWest itself explains, Canadians cannot rely on CanWest to keep its publicly-stated commitments,

CEP strongly believes it is clearly in the best interests of all parties concerned that the CRTC proceed with an expedited public hearing to determine whether CanWest is now or will shortly be in breach of its licence terms, commitments and conditions of licence.

5. Only a public hearing held now or in the very near future will enable CanWest to answer the serious questions raised by its planned actions, to explain its actions and to answer the public’s concerns not only about local programming reductions, but also the economic impact of its announced job cuts. These issues are not simply important to Canadians or to employees, but to Parliament, which specifically requires in subsection 3(1)(d)(iii) that the broadcasting system “serve the needs and interests, and reflect the circumstances and aspirations” of Canadian men and women through “ the employment opportunities arising out of its operations”.
6. Delaying such an inquiry until late 2009 or 2008 will enable CanWest to complete its plans without any regulatory review, throwing into doubt the CRTC’s ability to properly administer Parliament’s broadcasting policy for Canada, weakening our broadcasting system, and – not incidentally – allowing hundreds of broadcasting employees to be laid off on the heels of more than 550 other Canadian media jobs lost in the past twenty-four months.²

¹ Reply, at paragraph 2.

² In 2006, CHUM cut 281 jobs and Quebecor cut 120 jobs; in 2007 CTV cut 23 jobs, CBC cut 41 positions, Corus cut 53 jobs and TQS cut 40 jobs.

CanWest's Reply Does not Rebut CEP's Complaint

7. CEP's complaint addressed seven regulatory issues raised by CanWest's announced plans. For convenience, these issues are summarized below, along with CanWest's Reply and our response.

a ***if CanWest shifts control over its local stations' program productions to the Broadcast Centres without the CRTC's approval of an amendment to the terms of its licences, CanWest will be operating in breach of those terms***

CanWest's Reply: Paragraphs 29 to 42 address the issue of the Broadcast Centres' assumption of control over individual stations' local news.

Footnote 3 of paragraph 29 notes that "the Broadcast Centre may occasionally be required to 'fill in' the national and/or international segments of a particular newscast 'on the fly' due to due to [sic] the nature of live production and unforeseen timing events."

In paragraphs 30 to 32, CanWest quotes but does not reply to CEP's Complaint.

In paragraph 33, CanWest denies that its Broadcast Centres will control material decisions about newscasts' content and presentation. Specifically, CanWest asserts that "all material decisions regarding the content and presentation of the newscast (with the exception of set design) will continue to occur at the local level, as will the local newsgathering element" (original underlining excluded). CanWest provides no evidence to support this assertion.

In paragraphs 34 and 35, CanWest quotes from its press release and Q&A document.

In paragraph 36, CanWest asserts that "the local news team is in charge of the newscast. The Broadcast Centres offer support (perhaps a "first draft" of some suggested national or international stories; or, as noted elsewhere in this Reply, and on an infrequent and needs-only basis, the technical ability to "fill in" national and/or international stories), but the decision-making is in local hands...." CanWest provides no factual evidence to support this assertion.

In paragraph 37, CanWest asserts that local newsgathering functions will remain at the local station level. CanWest offers no specific factual evidence to support its assertion.

Finally, at paragraph 38, CanWest presents 7 points "for clarity": each CanWest "station will retain a local news-gathering force" and will provide live shots; local stations' News Directors "will decide which local stories will be covered, ... aired, and in what sequence", as well as the national and international stories to air and their sequence; local stations' News Directors may ask Master Control operators in Calgary to interrupt their local stations' programming, and the local stations' "news team and/or News Director ... will continue to have significant latitude in determining the composition of the news team (on air; and supporting staff)."

CEP's Response: The Reply offers no evidence to refute CEP's Complaint.

CEP's Complaint did not state that stations would lose their local newsgathering capacity, but that they would lose their decision-making and production capacity because CanWest's Broadcast Centres will now have final control over CanWest stations' local newscasts and emergency interruptions. CanWest itself explicitly states that this represents a change from its stations' current licences in its "Q&A Announcement itself". It explains how local stations will no longer deal with non-local content:

How does this change the role of local stations?

With the new technology, local stations will focus 100% on local news acquisition and processing. National and International stories will be produced in the Broadcast Centres; however, National and International content will be available for browsing at all stations which will allow producers in the local markets to view such content before dropping it into run downs.

(underlining and bold font added)

Although CanWest states at paragraph 33 that "all material decisions regarding the content and presentation of the newscast" will be made by local stations, CanWest has not denied its Q&A statement that "[a]t the start of the newscast, **we will go to air with staff in the Broadcast Centre controlling all playback from the server and all "live" elements of the broadcasts.**..." (bold font, italics and underlining added). CanWest's Reply re-confirms this point at paragraph 34: "All content will be delivered to Broadcast Centre and packaged into a program format for air." The Reply describes this again at paragraph 48: "**The Broadcast Centre will digitally deliver packaged materials back to local station infrastructure;** and local station transmitters and/or direct fibre feeds to BDUs from the local station will deliver the programs to the public" (bold font and underlining added). Bullet 1 of paragraph 35, notes that Broadcast Centre producers – not local stations' producers – will determine whether a local "program needs national or international content to fill it out": clearly CanWest is replacing the news producers at local stations who make editorial decisions about local newscasts' content with news producers at broadcast centres who will make these editorial decisions instead. Bullet 3 of paragraph 38 reconfirms that the Broadcast Centres and not local stations will determine which national and international stories to cover on a daily basis.

Although CanWest states at paragraph 38 that "[t]he News Director at the local station (or local designate) will decide which national stories will be aired, and in what sequence", the evidence from CIRB proceedings dealing with CanWest is that local news directors do not have the authority to interrupt nationally scheduled programming – which comprises virtually all of these stations' broadcast schedules.

The fact is that CanWest is laying off the producers and writers at its stations who make the material decisions about the local stations' newscasts. At CIHF-TV, for example, more than two-thirds (68%) of the station's 28-person News Unit is being eliminated. Producers and editors are among these positions:

3

See Reply at paragraph 34.

- 2 News Producers
- 2 News Editors
- 1 Line Producer
- 6 Production Assistants (PT/Casual)
- 2 Reporters
- 1 reporter (PT/Casual)
- 1 Photojournalist
- 1 Writer
- 1 Writer (PT/Casual)
- 1 Technical Director
- 1 Audio Operator
- 1 Chyron Operator
- 1 Broadcast Operator
- 1 Studio Camera Operator
- 1 ENG Camera Operator, and
- 1 ENG Supervisor.

Local stations have no control over news team composition at the Broadcast Centres.

In brief, CanWest's Reply confirms what CEP's Complaint stated: that the only *material* decisions about the content and presentation of the newscasts that remain with local television stations is the decision about which local staff will be assigned to cover local stories, and which technical producer will set up any "live shots". **All other editorial and production decisions will be made elsewhere because, very simply, CanWest's own stations lack the technical means to alter their own signal, have no authority to alter the programming content they receive and are losing the staff who now make material decisions at the CanWest stations.**

To summarize, nothing in CanWest's response contradicts CEP's original Complaint that material control over CanWest's local stations' newscasts no longer lies with CanWest's local television stations but with producers and other staff at four unlicensed Broadcast Centres. The Broadcast Centres will have some "latitude in determining the composition of the news team (on-air; and supporting staff)",⁵ they will design local newscasts' sets, they will operate the virtual set generators, they will control local newscasts' cameras and microphone levels, they will decide what non-local stories to cover, they will decide whether and what non-local content to include, they will make the decisions about local newscasts' final program format, and they will produce the actual "physical assemblage of news run-downs"⁶ *i.e.*, assemble local television stations' newscasts. This shift in control is entirely contrary to the terms of the original licence applications for these stations and CanWest's most recent renewal applications.

⁴ See Reply at paragraph 34.

⁵ At paragraph 38, bullet 7, the Reply notes that local stations will have "significant latitude in determining the composition of the news team (on-air; and supporting staff)", leaving the inference to be drawn that at least some latitude in this decision-making process will now fall elsewhere.

⁶ See Reply at paragraph 33.

CanWest's local stations have indeed relinquished full responsibility and control over their local newscasts, contrary to the terms of these licences as set out in CanWest's applications for renewal granted by the CRTC.

CEP submits that a public hearing constitutes the most transparent and accountable way for the CRTC to determine whether CanWest is in compliance with the terms of its television licences, or whether an amendment to those licences is required because CanWest, as its own Reply establishes, is transforming its originating television stations into newsgathering bureaux.

b ***if CanWest originates the local news programs of CHEK-TV, CHCA-TV and CHCH-TV from its Broadcast Centres without the CRTC's approval of an amendment to these stations' conditions of licence which require these stations to originate local news, CanWest will be operating in breach of those conditions***

CanWest's Reply: Paragraphs 19 to 21 address the “handful of COLs that relate to local and news-related programming”.

In Paragraph 19 CanWest restates these conditions for four stations, and asserts that it has exceeded its obligations under these conditions and will continue to respect the conditions in the future. CanWest offers no specific factual evidence to support its assertion.

In paragraph 20, CanWest repeats that it has adhered to its conditions of licence and will continue to do so. CanWest offers no specific factual evidence to support this claim.

In paragraph 21, CanWest assures “all interested parties that the hours-specific COLs as currently constituted have been, and will continue to be respected.” CanWest offers no specific factual evidence to support this assertion.

In paragraphs 22 to 29 CanWest denies that it has any obligation to provide audiences with either live or original news programs.

CEP's Response: CanWest's assertions of compliance and over-compliance simply do not constitute actual evidence of compliance. It is particularly surprising that CanWest relies on assertions instead of providing evidence, since CanWest's computer-generated weekly logs leave it well-placed to quantify precisely how much 'news' its stations are offering to Canadians.

Consider local newscasts. An important issue in this complaint is the amount of CanWest local stations' programming that actually consists of news. We therefore reviewed the program logs of one of CanWest's television stations, CHCH-TV Hamilton, for the same day in October 2001 and October 2007 (see Appendix 1 of this Response).

According to the CHCH-TV program log for Monday, October 1, 2001, its early evening newscast (*CH News At Six*) lasted one hour and 1 minute, and contained just over 11 minutes of advertising, promos and public service announcements.

That is, 81.9% of the hour-long newscast consisted of news, while the remaining 18.1% of the program consisted of non-news elements.

Six years later, on Monday, October 1, 2007, the same station's early evening newscast (*CH News at Six*) was more than a third shorter at 38 minutes and 42 seconds, and contained over 8 minutes of advertisements and promotional elements. In other words, 77.2% of the newscast consisted of news, while 22.8% consisted of non-news elements. Between 2001 and 2007, non-news elements of the CHCH-TV newscast increased by 3.7 percentage points, or 20%.

Even if we assume that during a week CanWest really is carrying more hours of news than its condition of licence requires (which we do not assume to be true since CanWest has presented no supporting evidence), the simple fact is this: advertising, promotional identifications and public service announcements now make up proportionately more of this "news" than compared to seven years ago. It is not just misleading but factually wrong for CanWest to assert that it is carrying more "news" than before. CanWest's own logs show its stations are carrying less news overall because it has replaced news with advertising and other non-news content. CanWest is therefore depriving Canadians in the area served by CHCH-TV of actual news about the events and issues that are important to them, contrary to its licence renewal applications and their commitments of previous years.

Finally, with respect to paragraphs 22 to 29 of the Reply, CEP is somewhat surprised that CanWest believes it is free to offer newscasts that except for the first original broadcast consist entirely of repeat content. Is CanWest saying this is what it actually committed to broadcast its 2001 licence renewal applications?

Given the lack of evidence submitted by CanWest to support its claim that it is in compliance with its conditions of licence, given CanWest's clear intention to proceed in its present, non-compliant course of action, CEP submits that a public hearing is the most transparent and accountable mechanism for Canadians and the CRTC to assess the degree to which CanWest is or is not in compliance with its conditions of licence. Of course, the CRTC may also move instead to enforce section 33 of the *Act*:

Every person who contravenes or fails to comply with any condition of a licence issued to the person is guilty of an offence punishable on summary conviction.

c ***If CanWest moves origination of the local news programs of its stations with commitments for local news to the Broadcast Centres without the CRTC's approval of an amendment to those commitments, CanWest will be operating in breach of its commitments***

CanWest's Reply: Although this part of CanWest's Reply consumes more than a page, it does not address the fact that by shifting origination of its local news programs to four Broadcast Centres without CRTC approval, CanWest will be operating in breach of its licence commitments.

Instead, CanWest begins by arguing at paragraph 12 that “the appropriate venue for any discussion of our local/regional programming-related commitments” is during its licence renewal proceedings, which may take place in late 2008 or early 2009.

At paragraph 13 CanWest then asserts that it has “honoured our local/regional programming commitments throughout the current licence term”. CanWest offers no specific factual evidence to support its assertion.

Next, at paragraph 14, CanWest summarizes its hour-based local/regional programming commitments.

At paragraph 15, CanWest claims that it “will continue to honour these commitments.” Claims of compliance do not constitute evidence of compliance.

In paragraph 16, CanWest notes generally that it has “a handful of other licence-specific news-related commitments or expectations”, and asserts that it “can confirm” that it is respecting these commitments and expectations “at this time”, and will continue to respect these. CanWest offers no specific factual evidence to support its assertion.

At paragraph 17, CanWest reiterates its argument from paragraph 12 that it would prefer to discuss its commitments during the 2008/2009 licence renewal proceedings. CanWest then asserts that evidence of its commitment to local news comes from BBM Spring 2007 audience ratings for its Local/Regional News outside of Global Quebec, and from its “well-known support of *Global National with Kevin Newman...*” Information about audience levels does not constitute specific factual evidence of compliance with licensing commitments.

At paragraph 18, CanWest asserts that its “total spending on local news throughout our operations has actually increased slightly since 2002”, and that its “spending on local news alone accounted for nearly 1/4 of our total programming expenditures.” Unless these commitments were framed in terms of expenditures, information on spending levels does not constitute evidence of compliance with licensing commitments.

At paragraph 49, CanWest states its view that “new technologies are behind many of the challenges now facing the [Canadian broadcasting] sector ... and many of the possible solutions to those challenges (e.g. efficient sharing of content, multicasting).”

Finally, at paragraphs 50 to 59, CanWest offers a number of reasons as to why it has now abrogated the commitment it made to the CRTC in 2001 with respect to individual stations’ financial performance.

CEP’s Response: CanWest has not refuted CEP’s Complaint that by moving origination of its programs from its television stations to Broadcast Centres, CanWest will be operating in breach of these stations’ commitments to originate local newscasts.

The simple fact is that these stations will no longer create, make decisions about and assemble their own local newscasts, but will instead rebroadcast local news

packages assembled by and received from distant Broadcast Centres. Nor does CanWest's response alter the fact that originating CanWest's local stations' newscasts from four Broadcast Centres requires a CRTC-approved amendment to the stations' licences to permit the stations' local news to be originated by the Broadcast Centres.

To accept CanWest's argument that licence commitments may only be reviewed when licences are being renewed specifically ignores the first part of the CRTC's statement in CRTC, *Letter to CHUM Limited Re: Non-compliance with conditions of licence re local programming: CKAL-TV Calgary; CKEM-TV Edmonton; and CKVU-TV Vancouver, (20 April 2007)*: "... the Commission expects licensees to fulfill their commitments throughout the licence term ...". In this case, CEP's Complaint has established why CanWest's actions place it in breach of its commitments, and CanWest has not offered any evidence to rebut this charge.

Accepting CanWest's argument that licence commitments may only be reviewed when licences are being renewed ignores the broad authority granted by Parliament to the CRTC under section 12 of the *Act*, to investigate non-compliance of virtually any kind, at any time:

12. (1) Where it appears to the Commission that

(a) **any person has failed to do any act or thing that the person is required to do pursuant to this Part or to any regulation, licence, decision or order made or issued by the Commission under this Part, or has done or is doing any act or thing in contravention of this Part or of any such regulation, licence, decision or order, or**

(b) the circumstances may require the Commission to make any decision or order or to give any approval that it is authorized to make or give under this Part or under any regulation or order made under this Part, **the Commission may inquire into, hear and determine the matter.**

[Mandatory orders]

(2) The Commission may, by order, require any person to do, forthwith or within or at any time and in any manner specified by the Commission, any act or thing that the person is or may be required to do pursuant to this Part or to any regulation, licence, decision or order made or issued by the Commission under this Part and may, by order, forbid the doing or continuing of any act or thing that is contrary to this Part or to any such regulation, licence, decision or order.

....

It would also ignore the very explicit authority granted to the CRTC to investigate licensee behaviour before licence terms end, under section 9(1)(c) and to "amend any condition of a licence ... **where five years have expired** since the issuance or renewal of the licence, on the Commission's own motion"

If the CRTC only enforced its decisions and licensee commitments when licences were renewed – say, every seven years or now, due to other factors, every eight years – the Commission would clearly not be supervising Canadian broadcasting as Parliament intended. The CRTC's administration of Canada's broadcasting legislation would fall into disrepute. This might serve some broadcasters' interests,

but surely fails to serve the public's interest in a properly-regulated broadcasting system that meets Parliament's objects on a continuing rather than intermittent basis.

The Reply makes several claims about CanWest's news expenditures. If CanWest is relying on its past expenditure levels, CEP requests that CanWest produce the evidence of its annual returns for each of its over-the-air television programming undertakings for 2002, 2003, 2004, 2005, 2006 and 2007, so that the basis of CanWest's assertion may be assessed. If CanWest decides not to produce this information, neither CanWest nor the CRTC should be entitled to rely on it since CEP will not be in a position to assess the validity of CanWest's claim, thereby conferring to CanWest an unfair advantage. With respect, CEP also considers that the CRTC should be entitled to draw an adverse inference from non-disclosure by CanWest.

CanWest's examples in paragraph 49 of new technologies ("efficient sharing of content, multicasting") actually support CEP's position that the CRTC must investigate CanWest's Broadcast Centres plans. In each of these cases of new technology, the CRTC did not ignore the use of such technologies but instead after public consultation developed regulatory approaches to assure itself that its licensees use these technologies appropriately and in service of Parliament's broadcasting legislation. This is true for content sharing⁷ and multicasting⁸ alike. And if, as the Reply purports to claim in paragraph 54, it is relevant that CanWest's most profitable stations have become less profitable, it is surely also relevant to

⁷ For temporary networks, see for example CRTC, *Temporary Networks*, CRTC Circular no. 258 (Ottawa, 23 April 1980); for television networks, see for example CRTC, *Policy Respecting Television Networks*, Public Notice CRTC 1989-2 (Ottawa, 10 January 1989), in which the Commission identifies delegation of control in particular terms of editorial control: "In television, it is common for the local licensee to retain the power to decide whether or not to broadcast a program, but having decided to broadcast, the licensee does not have the power to edit or alter the program's editorial content. In such a case, the Commission could consider that the local licensee has delegated editorial control to a network operator." The Commission then notes that it will not consider a network to exist if two conditions obtain: first, a news distributor must undertake not all but only "some degree of pre-screening and editing" and second, "where the station is not bound by a formal agreement to broadcast the program". Hence, when a station is bound to broadcast a program that is pre-screened and edited in its entirety (through program assembly and packaging) by a third party – as in the CanWest Broadcast Centres situation at hand – the situation *prima facie* constitutes a network. Networks require licences.

⁸ See CRTC, *Call for comments on a proposed policy framework for the distribution of digital television services*, Broadcasting Public Notice CRTC 2002-32 (Ottawa, 12 June 2002) at ¶41, where the CRTC asserts its regulatory jurisdiction over multicasting:

In Public Notice 2002-31, the Commission announced that, as a matter of policy, it would consider applications for licences to broadcast multicast services on a case-by-case basis. It added that it would be predisposed to license new services in preference to those that would merely duplicate the services of existing over-the-air television stations, or those of specialty or pay television undertakings. Consistent with this approach, the Commission considers that case-by-case consideration should also be given to applications by BDUs proposing the distribution of multicast services. Further, the Commission would be predisposed to grant authority to distribute multicast services that are new services. Distribution options could include mandatory carriage, optional carriage, or no carriage. This approach would prevent the duplication that would result from the distribution of low definition digital versions of existing analog services and limit any potential disruption of contracts between BDUs and the providers of pay and specialty television services.

....

recall that the CRTC's 2007 over-the-air television policy addressed private broadcasters' profit concerns: not only has the CRTC decided to forbear from regulating non-traditional advertising, but it will eliminate advertising time restrictions beginning in September 2009.

Finally, with respect to paragraphs 50 to 59, CEP notes that by offering four separate excuses⁹ for CanWest's breach of its 2001 commitment, **CanWest effectively admits that it has breached its cross-station financial support commitment.** Even if CanWest wishes at paragraph 53 to reframe its clear commitment in 2001 (quoted below, for the Commission's convenience) as one that CanWest would now prefer only to accept "to some degree" the simple fact is that seven years ago CanWest explicitly assured the CRTC without qualification that it would fulfill its commitments concerning its television stations regardless of any individual station's unprofitable financial position:

... as a national broadcaster ... it's one of our contributions to the Canadian broadcasting system that **we will continue to operate these stations and provide the local programming commitments we have in our applications during the licence term, even though they continue to be running at a loss.**

...

... **it is our philosophy that there will be in certain markets at certain times stations that don't contribute positively to the group.**

...

It's our view that, you know, **the cost structure that we have in those stations presently is the cost structure required to maintain a current level of local programming in those markets.**¹⁰

(bold font and underlining added)

The CRTC double-checked its understanding of CanWest's commitment: the hearing's Chairperson asked, "So is Global committed then to keeping all the stations going that are there now?", and CanWest's representative specifically said "Yes, we are."¹¹ Nevertheless, as our Complaint stated and as CanWest's own Reply now admits at paragraph 57, CanWest's stations have "instituted cuts in staff levels" and have "changed station operations", contrary to CanWest's hearing commitment.

Since the CRTC's decision to renew CanWest's licences was based to some or even a great extent on CanWest's 2001 public hearing commitment, CEP believes that a public hearing is also the most appropriate – and most accountable – way for Canadians to understand and express their views of, CanWest's new plans for its television stations. A public hearing will also enable Canadians in general, and in particular those living in the areas served by CanWest's stations, to assess

⁹ Reply at paras. 51-52 – spending has not yielded desired audience; at para. 53 – higher-than-originally-anticipated operating losses; at para. 54, lower-than-desired profit levels; and at para. 55 lower-than-desired EBITDA.

¹⁰ CRTC, *Broadcasting Applications: TV Renewals - CTV/Global Across Canada*, (Vol. 2) Transcript of Proceedings (Hull, 18 April 2001) at para. 2480.

¹¹ *Ibid.*, at paras. 2492-2493.

CanWest's claims that it "has spent tens of millions of dollars on local news ... in the current licence term."¹²

d ***If CanWest reduces the quantity and quality of local content in the stations' local news programs without the CRTC's approval of this reduction and continues to solicit local advertising in the areas served by these stations, CanWest will be operating in breach of the CRTC's local advertising policy***

CanWest's Reply: The Reply address local advertising in paragraphs 66 to 70.

At paragraph 66 CanWest incorrectly recasts CEP's Complaint. Where the Complaint said that reducing local news quality and content will place CanWest in breach of the CRTC's local advertising policy, the Reply states the Complaint said that the establishment of the Broadcast Centres means CanWest stations should not be allowed to solicit or accept local advertising.

At paragraph 67, CanWest notes that two of its stations cannot broadcast local advertising because they are licensed as regional stations.

At paragraph 68, CanWest misstates CEP's Complaint, and again introduces a fallacious argument (*argumentum ad crumenam*) by linking its local news expenditures to local newscast decision-making.

At paragraph 69 CanWest says it is "perplexed" by CEP's local advertising argument, incorporates a red herring by fallaciously claiming that CEP underestimates its own members' contributions, and claims it will adhere to its licence commitments, conditions of licence and obligations without providing any evidence to support this claim.

At paragraph 70 CanWest dismisses the Oil Springs re-broadcaster issue by a fallacious and misleading claim that CEP is disparaging CanWest's own local station activities "and the communities" where CanWest operates.

CEP's Response: CanWest has not denied the grounds CEP raised in this local advertising issue. Specifically, CanWest has not denied that by transferring decision-making authority over local newscasts to the Broadcast Centres, by having the Broadcast Centres assemble local stations' final local newscasts, and by having local stations simply rebroadcast the newscasts assembled by the Broadcast Centres, CanWest is shifting program origination capacity from local stations to four Broadcast Centres without the CRTC's prior authorization.

If the Commission intends to permit local newsgathering bureaux that no longer have the ability or authority to originate their own local newscasts to continue to collect local advertising revenues, it should first allow the public to comment on what will be a fundamental change in its policy for local advertising. After all, many broadcasters doubtless maintain small newsgathering staffs across the country which contribute to different newscasts – and all of these broadcasters would surely appreciate the opportunity to enjoy local sales income without having to make the local originating station investments.

¹²

Reply, at para. 51.

A CRTC public hearing offers the most transparent and accountable way to assess such a fundamental shift in CRTC policy, and CanWest's current and future compliance with that policy.

e ***If CanWest transfers its local television stations' programming responsibilities and production capacity to the Broadcast Centres without the CRTC's prior approval, its local stations will be effectively operating as rebroadcasting transmitters, contrary to the terms and conditions under which CanWest's stations were licensed***

CanWest's Reply: At paragraph 44 CanWest writes that “[t]o suggest that our local stations, and their respective local news teams, are mere rebroadcasters of ‘another party’s programming’ demonstrates a lack of understanding of our stated plans. We do not see how the CEP could have come to this conclusion given the materials it has attached to its own complaint. The local programming on each CanWest station will be distinct from the content on other stations.”

CEP's Response: CanWest's answer does not respond to the rebroadcasting issue of CEP's Complaint, and provides no evidence to refute our complaint. Contrary to the company's assertion that local stations have control over their respective content, CanWest's local stations have no programming staff and make no decisions about their own programming. These stations do not even decide when their local news goes air. All programming decisions for CanWest's television stations come from Toronto and for all intents and purposes are identical for all stations.

CanWest's own materials (attached to our Complaint) state that it will remove each television station's control room,¹³ with the result that each station will receive a complete, pre-assembled “local” newscast from one of four Broadcast Centres and which each station will then transmit to the public or BDUs in the communities it services.¹⁴ Based on current broadcasting legislation and policy, if a local station does not originate its own programming but merely transmits the content it receives from elsewhere, that station is operating as a rebroadcasting transmitter.

Since CanWest's own materials have created the confusion perceived by CanWest, CEP considers that a CRTC public hearing offers CanWest the opportunity to explain its stated plans, and to answer questions from the Commission and interveners.

¹³ Complaint, Appendix 1, “Broadcast Operations Announcement – Q&A”, “Technical Questions”: “How can we do a newsroom without a control room?”

¹⁴ Complaint, Appendix 1, “Broadcast Operations Announcement – Q&A”, “Technical Questions”: “Operationally, how will a newscast be produced?": “Prior to the newscast air time the network feeds will be switched up. This will result in the station cameras being fed back to the Broadcast Centre. ... Programme feeds and preview feeds will be fed back from the Broadcast Centre to the remote station.”

f ***If CanWest's stations yield control over any part of their program schedules to Broadcast Centres that are not licensed as network operators, CanWest will be operating in breach of the Act, the CRTC's Television Regulations, 1987 and its CRTC conditions of licence***

CanWest's Reply: The Reply addresses network operations at paragraphs 44 to 48.

At bullet 1 of paragraph 44 CanWest denies that its local stations “have relinquished responsibility and control over their respective content” but offers no evidence to support this denial.

At paragraph 45 CanWest describes our Complaint as consisting of “spurious regulatory arguments”.

At paragraph 46, CanWest claims that local stations retain control over their local newscasts and that it will respect and follow all of its commitments and conditions of licence. CanWest offers no evidence to support this claim.

At paragraph 47, CanWest asserts that its plans are supported by “sections of the *Act*”, that it can “think of no justification” for an expedited public hearing process under section 12(1)(b) of the *Act*, and sets out its view that an expedited public hearing process by the CRTC “would incorrectly make assumptions about future events, ignore the realities of our intentions and actions, and suggest that we are in some what not going to honour our conditions of licence sometime in the future.”

Finally, at paragraph 48 CanWest says that it is confused:

48. We are confused by the suggestion that the Broadcast Centres may somehow require a broadcast licence. The *Act* defines a programming undertaking as ‘an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus.’ The CEP’s interpretation would imply that the Broadcast Centres have set up transmitters around the country and/or supply content directly to the BDUs. That is certainly not the case. The Broadcast Centres will digitally deliver packaged materials back to local station infrastructure, and local station transmitters and/or direct fibre fees to BDUs from the local stations will deliver the programs to the public. The mere fact that an entity is involved in the chain of events that lead up to the eventual distribution to the public does not, of course, mean that that entity is a programming undertaking. By extension, the CEP’s logic would mean that the building originating a foreign news feed from, say, Beirut or the Congo would require a programming undertaking licence.”

CEP’s Response: CanWest's Reply provides no evidence to refute the network-control issue of our Complaint, but rather offers denials unsubstantiated by evidence, *argumentum ad hominem*, and an attack on the integrity of the CRTC’s public hearing process .

Insofar as control is concerned, it is particularly telling that the Reply denies that its local stations “have relinquished responsibility and control over their respective content”, but expressly contradicts this denial elsewhere:

- CanWest is moving decisions about local stations' production elements ranging from camerawork, lighting, microphone levels, to virtual set generators to the Broadcast Centres (paragraph 3);
- local stations may decide what local news stories to cover, but the Broadcast Centres will decide what non-local news stories to cover (paragraph 3, bullets 1 and 2) and indeed whether a local news "program needs national or international content to fill it out" (paragraph 35, citing CanWest's Q&A);
- the "Broadcast Centres will digitally deliver packaged materials back to local station infrastructure; and local station transmitters and/or direct fibre feeds to BDUs from the local station will deliver the programs [from the Broadcast Centres] to the public" (paragraph 48), and
- CanWest is moving decision-making about the final local newscasts' content ("physical assemblage of news run-downs") to the Broadcast Centres (paragraph 33).

Given this evidence from the Reply itself, just how is "the local news team ... in charge of the newscast" as the Reply argues at paragraph 36? At best, the Reply makes it clear that it is transforming its local originating stations into news bureaux: local news team may still gather local news, but the Broadcast Centres will make all other decisions.

To return to our Complaint, CanWest's own materials state that its Broadcast Centres will be 'producing newscasts for multiple locations from a single control room'.¹⁵ In answer to the question, "Operationally, how will a newscast be produced?", CanWest clearly describes a process in which CanWest's television stations are simply 'remote stations' that transfer all of their content to the Broadcast Centres, which then feed the final assembled content back to the 'remote stations':

- **Over the course of the day, edited stories will be file transferred from the stations to the Broadcast Centres.**
- ...
- Prior to the newscast air time the network feeds will be switched up. This will result in the station cameras being fed back to the Broadcast Centre. ...
- ...
- **The camera, lights, mike levels, etc. will all be controlled from the Broadcast Centres.**
- The virtual reality generators will reside in the Broadcast Centres and **the only thing being fed from the remote stations will be the positioning data.**
- **Programme feeds and preview feeds will be fed back from the Broadcast Centre to the remote station.**¹⁶

[bold font added]

¹⁵ Complaint, Appendix 1, "Broadcast Operations Announcement – Q&A", "Technical Questions": "Technically, what is happening?", bullet 3.

¹⁶ Complaint, Appendix 1, "Broadcast Operations Announcement – Q&A", "Technical Questions": "Operationally, how will a newscast be produced?"

In its paragraph 48 of the Reply, CanWest argues at that “[t]he mere fact that an entity is involved in the chain of events that lead up to the eventual distribution to the public does not, of course, mean that that entity is a programming undertaking.”

Let us follow CanWest’s argument to its logical conclusion. Let us suppose the CRTC licensed a television undertaking to originate five hours daily of local news programming in, say, Hamilton (similar to CanWest’s CHCH-TV). The Hamilton station begins operations. Every day the station assigns stories, and assembles a local newscast in its newsroom comprising local stories that it has gathered along with its selections from the national and international news items that news distributors make available to it. Finally, the Hamilton station broadcasts its five hours of news from its master control room to the local community and to BDUs.

Now suppose it is discovered that the Hamilton station’s master control room has been eliminated, that all five hours of its news are being assembled in Beirut or the Congo centres, that the Hamilton stories make up only part of the final newscasts, that the Beirut or Congo centres decide what non-Hamilton stories to include in the newscast, and that the Hamilton station is simply retransmitting the final, assembled package of ‘original five hours daily of local news programming’ that it received from Beirut or the Congo to the public or through fibre feeds, to Canadian BDUs.

Even if CanWest apparently believes this would constitute full compliance with Canadian broadcasting law because the Beirut or Congolese centres are merely ‘involved in the chain of events that lead up to the eventual distribution to the public’, CEP does not.

g *If CanWest’s television stations receive a programming service from third party Broadcast Centres, and redistribute this programming for reception by the public without alteration, CanWest’s stations will be acting as unlicensed broadcasting distribution undertakings, in breach of section 3 of the CRTC’s Broadcasting Distribution Regulations.*

CanWest’s Reply: At bullet 3 of paragraph 44 CanWest disagrees that its stations “have somehow turned themselves into broadcasting distribution undertakings (BDUs)”.

CEP’s Response: The BDU issue our Complaint raised is whether CanWest’s local television stations are acting as unlicensed broadcasting distribution undertakings contrary to the *Broadcasting Distribution Regulations*. Section 3 of the *Regulations* states that “[a] licensee shall not distribute programming services except as required or authorized under its licence or these Regulations”, section 1 defines a “programming service” to be “a program that is distributed by a licensee” and section 7 prohibits BDUs from altering or deleting “a programming service”.

We do not understand CanWest’s disagreement with this part of our Complaint, since the Reply itself at paragraph 48 explicitly describes how CanWest’s local television stations will only be relaying the programs that the Broadcast Centres deliver to them: “[t]he Broadcast Centre will digitally deliver packaged materials back to local station infrastructure; and local station transmitters and/or direct fibre feeds to BDUs from the local station will deliver the programs to the public.” It is

telling that at no point does CanWest's Reply state that local stations will have the authority to edit or change the programs that they receive from the Broadcast Centres. Since they will have neither the technical capacity nor the authority to alter these programs, CanWest's local stations clearly resemble BDUs more than originating television stations – even if the programming service they distribute consists only of the pre-assembled local newscast they receive from a Broadcast Centre.

The most transparent and accountable mechanism for resolving such a clear difference over the same facts is, we submit, a CRTC public hearing.

8. To conclude, CanWest's Reply has not “shed further light on the Digital News Project” and it has not “clarified some of the more salient aspects of the transition to digital” in CanWest's newsrooms.¹⁷ CanWest's Reply does not allay legitimate and serious concerns about substantial changes in the direction and control of CanWest's television programming undertakings. Nor has CanWest's Reply altered the fact that the substantial operational changes it has announced – changes that required distribution of a 5-page internal “Q&A” document, will “change the role of local stations”, and mean the layoff of two hundred Canadians – required and still require prior CRTC approval.
9. CanWest is removing from its local television stations the only vestige of local control that remained, namely their newscasts.
10. CEP again submits that it is critical for the CRTC to proceed immediately with a public hearing to assess CanWest's announced plans. In keeping with the timelines used in 1991¹⁸ when the CBC restructured its programming services, we suggest that the Commission hold a public inquiry in January 2008.
11. Our Complaint presented eight reasons why the Commission should hold such a public inquiry. First, if the CRTC waits until late 2008 or early 2009 to address these issues in renewal proceedings, CanWest will have already implemented its plans, will be operating in breach of its CRTC licences and licensing decisions and will likely claim that insurmountable financial hurdles prevent a return to the past. Second, if the CRTC allows CanWest's plans to proceed, they will throw into turmoil the careers and lives of 200 employees in Canada's broadcasting system, surely unfair given the CRTC's prompt deregulatory acts in the past to prevent or limit financial harm to private broadcasters. Third, allowing CanWest to lay off 200 or more staff weakens the broadcasting system, contrary to section 3(1)(d)(i) of the *Act*. Fourth, allowing CanWest to collect local advertising revenues when it has in fact reduced local stations' ability to present local programming, violates the Commission's local advertising policy. Fifth, CanWest's Broadcast Centres will be acting as an unlicensed programming network without benefit of a licence application or related commitments

¹⁷ Reply, at para. 71.

¹⁸ The CBC announced reductions in its services on 5 December 1990; the CRTC wrote the CBC on 14 December 1990; the CBC filed applications to amend its licences on 11 January 1991; the CRTC issued a Notice of Public Hearing on 25 January 1991, and the CRTC's public hearing of the CBC's applications began 18 March 1991 – just over 3 months after the CBC's first announcement. CRTC, *Canadian Broadcasting Corporation*, Decision CRTC 91-423 (Ottawa, 28 June 1991)

and obligations to the broadcasting system. Sixth, the CRTC's failure to act will allow other broadcasters to centralize their broadcasting operations, again without benefit of licence applications or commitments to the broadcasting system. Seventh, CanWest stands to benefit the most from a public hearing, to explain how its actions and plans meet its licences, serve local communities and are in the public interest. Eighth, a full and open public inquiry will enable all parties – including the communities, employees and other broadcasters affected by CanWest's decision – to assess, question and if necessary challenge the information and arguments proffered by CanWest, and thereby enable the CRTC to reach a fully informed determination in this matter.

12. CEP submits that an expedited CRTC hearing process is precisely what is demanded by the Commission's own operating principles of transparency, fairness, predictability and timeliness, as represented by its Secretary-General in the Minister of Canadian Heritage's 2006-2007 Departmental Performance Report for the CRTC:

Four principles will govern the Commission's management of the regulatory process in the coming years:

...

Transparency means that the Commission will be as open as possible in our dealings with all the stakeholders, as far as the law permits. Everyone should see exactly what we are doing, and why, so that they understand how we function and how they can interact with us.

Fairness means that every matter that comes before us shall be handled with well-established, even-handed procedures that will lead us to a well-considered outcome.

Predictability means that when we make decisions, we will follow a clear direction and will be consistent. And if we depart from our direction, we have to explain why, and specify whether this departure is an exception or a change in course.

Timeliness is a concept that means we should make our decisions as quickly as we can in a responsible manner.¹⁹

13. CEP was startled by CanWest's assertion that a public hearing process under section 12(1)(b) "would incorrectly make assumptions about future events, ignore the realities of our intentions and actions, and suggest that [CanWest is] in some what not going to honour our COLs in the future" (¶47).
14. CEP does not understand why an expedited CRTC hearing process would prevent CanWest from placing its assumptions about future events on the record, from describing the "realities" of its intentions and actions, and from offering evidence to establish how it will honour its conditions of licence – and other terms of its licences – in the future. Our original Complaint showed that in a parallel case involving the CBC, the CRTC moved promptly to institute a public hearing process. As we said before,

¹⁹ Treasury Board of Canada Secretariat, online: tbs-sct.gc.ca <<http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/rtc/rtc01-eng.asp>>.

CEP considers “that an inquiry is the most reasonable way for the CRTC to proceed at this time, not only to enable CanWest to explain its actions, but also to ensure that Canadians, affected local communities, CanWest's competitors and other interested parties understand, may assess and have the opportunity to comment on CanWest's actions. A public inquiry is the most transparent and accountable way to enable the CRTC to determine whether CanWest's plans are in full compliance with the *Broadcasting Act, 1991*, the CRTC's decisions, regulations and policies, and with the terms and conditions of CanWest's broadcasting licences.”

15. CanWest's Broadcast Centres plan has raised many genuine issues and extremely serious concerns about this licensee's compliance with all of its conventional television licences. CEP submits that CanWest's acts and planned acts are contrary to the *Broadcasting Act, 1991*, and contrary to the current terms and conditions of CRTC decisions about the CanWest and Global television stations. In very short order these plans will reduce employment in this sector, diminish the quality and quantity of news available to local communities, and – if allowed to proceed – represent a fundamental shift away from the way Canadian broadcasting undertakings now serve Canadian communities. Despite its many assertions and misleading arguments, CanWest's Reply has not offered any evidence to refute these concerns. These issues remain unresolved.
16. CEP therefore again requests that the CRTC hold an inquiry pursuant to section 12(1)(b) of the Act to consider CanWest's actions in relation to this licensee's possible contravention of the CRTC decisions relating to those licences. We believe this is the most reasonable and transparent course of action to pursue given the clear differences between our Complaint and CanWest's Reply.
17. Should you have any questions, please do not hesitate to let me know.

Sincerely yours,



Peter Murdoch
Vice-President, Media

PM/dpl.cope.343

cc. The Honourable Josée Verner
Minister of Canadian Heritage, Status of Women and Official Languages

²⁰ Treasury Board of Canada Secretariat, online: [tbs-sct.gc.ca <http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/rtc/rtc01-eng.asp>](http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/rtc/rtc01-eng.asp).

Commissioner Michel Arpin
CRTC
Ottawa, ON
K1A 0N2

CanWest MediaWorks Inc.
1450 Don Mills Rd.
Don Mills, Ontario
M3B 3R5

