

Update

Communications

November 3, 2008

CRTC Releases New Regulatory Frameworks for Broadcasting Distribution Undertakings and Discretionary Programming Services

In a major decision released on October 30, 2008 (the “Decision”), the Canadian Radio-television and Telecommunications Commission (the “CRTC” or “Commission”) announced its revised regulatory frameworks for broadcasting distribution undertakings (“BDUs”) and discretionary programming services. The Commission also announced some significant changes to the regulatory framework for over-the-air (“OTA”) television broadcasters. The key elements of the Commission’s Decision are summarized below.

Unless otherwise noted, the new policies are **applicable to digital services** and will take effect on **31 August 2011**, to be consistent with the date OTA television in Canada must switch from analog to digital transmission.

Regulatory Framework for Broadcasting Distribution Undertakings

- **Basic services rates continue to be deregulated:** The Commission rejected the proposals for the re-regulation of basic service rates, as it was satisfied that BDU competition will be sufficient to ensure that rates are affordable.
- **Changes to the basic line-up:** The *Broadcasting Distribution Regulations* (the “BDU Regulations”) will be amended to make minor changes to the priority services that must be distributed on the basic service of terrestrial BDUs. Direct-to-home (“DTH”) undertakings will be required to distribute, within each province: one television station per province

from each of the major ownership groups (CBC English, CBC French, Canwest, CTV, Rogers, TQS and TVA); one independently-owned local television station per province; the provincial educational programming service, within the appropriate jurisdiction; and services mandated for distribution on the basic service pursuant to an order under section 9(1)(h) of the Act.

- **Access rights retained for English- and French-language services:** The Commission has retained guaranteed distribution (access rights), in the digital environment, for Canadian analog and Category 1 pay and specialty services, now referred to as “Category A” services. The existing Category 2 digital specialty services and any new services that the Commission may choose to license without access rights are now referred to as “Category B” services.
- **New 1:10 access rules for minority-language services:** As of 31 August 2011, the existing minority-language access rules for terrestrial BDUs will be replaced with a single rule stipulating that all licensed terrestrial BDUs be required to distribute 1 minority-language Category A or Category B service, where licensed, for every 10 majority-language services they distribute. DTH undertakings will continue to be required to distribute all Category A services.
- **Moratorium lifted on mandatory carriage specialty services:** The Commission will be prepared to entertain applications for new Category A services filed on or before 1 April 2010, with a view to issuing decisions in advance of 31 August 2011. For guaranteed access to be granted, applicants will have to clearly demonstrate that the proposed service is both unique and of sufficient importance to subscribers. Applications will be assessed, in part, on an objective test based on the model proposed by Commission Morin at the hearing.
- **Existing preponderance rule maintained:** BDUs must continue to ensure, in respect of each of analog and digital technology, that a majority of the video and audio channels received by a subscriber are devoted to the distribution of Canadian programming services (other than the programming distributed on program repeat channels).

- **Effective 31 August 2011, most of the packaging rules will be eliminated and left to the discretion of the BDU, with the exception of the following:**
 - Category A services must be offered as part of a package before offering them on a stand-alone basis.
 - BDUs serving French-language markets must offer a discretionary package containing all French-language Category A services (excluding those services that may be mandated for distribution on basic).
 - Non-Canadian third-language services can only be offered in a package with Canadian ethnic/third-language services in the same language(s) if one exists, in a ratio of 1 Canadian service to up to 3 non-Canadian services.
 - The existing digital migration mirroring requirements, which require that cable BDUs offer the same packages on a digital basis as they do on an analog basis, will be eliminated.
 - Packaging rules for adult services, single-point-of-view religious services and account stacking remain unchanged.
 - **New forms of advertising available to BDUs:** The BDU Regulations will be amended to allow BDUs to insert targeted advertising in programming with the broadcaster's consent. The Commission is calling for comments on permitting BDUs to advertise in the local availabilities of non-Canadian services. **Comments are due 15 January 2009.**
 - **Reverse onus adopted for BDUs, but not for programming services:** The BDU Regulations will be amended as soon as possible to institute a reverse onus requirement for BDUs in allegations of undue preference or undue disadvantage. A complainant will be required to demonstrate that a preference and/or disadvantage exists, at which point the BDU would then be required to demonstrate that its actions are not undue.
 - **Three methods of dispute resolution now available (i.e., staff-assisted mediation, final offer arbitration, and expedited CRTC hearing):** No later than 1 April 2009, the Commission will issue an information bulletin setting out in detail the procedural steps to be followed and the time limitations that will apply to each of the three methods.
 - **Exemption for all terrestrial BDUs with less than 20,000 subscribers and a single class of licence for all others:** The CRTC will exempt, under a single exemption order to be issued for comment by 1 April 2009, all terrestrial BDUs serving fewer than 20,000 subscribers in a market, including cable, DSL and MDS undertakings. A single class of licence will be introduced for all remaining BDUs.
 - **Audit access:** In an effort to reduce ongoing problems with respect to obtaining audit access to BDU information, the Commission will amend the BDU Regulations to require BDUs to permit audit access by programming services.
 - **Call for comments on VOD regulatory framework:** The Commission is calling for comments on a proposed regulatory framework for video-on-demand ("VOD") undertakings. **Comments are due 29 January 2009.**
- ### Regulatory framework for pay and specialty programming undertakings
- **Current competitiveness test for the authorization of non-Canadian services to be maintained:** The CRTC will retain the competitiveness test, taking into account both the extent and the significance of any overlap between a proposed non-Canadian service and any existing Canadian service. However, the CRTC will no longer take into consideration unlaunched Category 2 (now Category B) services when assessing the competitiveness of non-Canadian services, unless such a service presents evidence that its launch is imminent.
 - **Immediate open-entry for non-Canadian news services:** Absent clear evidence, as determined by the CRTC, that a non-Canadian news service will violate Canadian regulations, the CRTC will be predisposed to authorize non-Canadian news services for distribution in Canada to increase editorial diversity in the system, effective immediately.
 - **Introduce competition where a genre can sustain it:** The CRTC will introduce competition in those genres where it is convinced that a competitive environment will not significantly reduce either the diversity of services available to viewers or their contribution to the creation of Canadian programming. The onus will be on the new entrant to convince the Commission. Criteria to be considered

include: economic health of the services in a genre; popularity of the genre; the availability of programming within a genre; diversity within a genre; and other consequences that might result from relaxing genre exclusivity. Once a genre has been opened for competition, standard rules will apply to all services within the genre (i.e. nature of service, Canadian programming obligations), there will be no access rights and no regulated wholesale fee. However, these services will continue to have genre protection vis-à-vis Category B and non-Canadian services.

- **Immediate competition for mainstream sports and mainstream national news:** The Commission has decided to open up these two genres for competition and has called for comments on the proposed nature of service and contribution requirements for mainstream sports and mainstream national news services. **Comments are due on 1 December 2008.** Applications for competitive news and sports services, as well as applications from the existing licensees to amend their licences will be accepted once the Commission has approved final conditions of licence for such services.
- **Category A services can draw programming from all programming categories, with a 10% limit on some:** To ensure that services do not morph into other established programming genres and become directly competitive with other Category A services, the CRTC will establish a standard limitation of 10% of the broadcast month for the most popular categories: long-form documentaries, professional sports, drama and comedy, theatrical feature films, animated programs, and music video clips and programs. Where a licensee is currently permitted to broadcast more than these standard limitations, it may continue to do so.
- **Current restrictions on advertising limits for Category A and Category B services are maintained:** The CRTC is concerned that the potential negative consequences of permitting specialty services to increase the amount of advertising outweigh any advantages.

Policies relating to OTA television undertakings

- **BDUs must obtain broadcaster's consent prior to distribution of distant signal and negotiate payment for retransmission:** The BDU Regulations will be amended to provide that all licensed BDUs must obtain the consent of OTA

licensees prior to distributing their local stations in a distant market. OTA licensees will be permitted to negotiate payment from BDUs for the retransmission of their local stations as distant signals. However, BDUs that operate under an exemption order will not require consent from the broadcaster. Should the parties be unable to reach a mutually satisfactory agreement, the Commission is prepared to offer its dispute resolution services on a final offer basis.

- **No fee for carriage:** The Commission did not grant the broadcasters' request for fee for carriage. Instead, the Commission chose to implement a new local programming improvement fund, as described below.
- **DTH Fund will be retained:** The DTH Fund, which is designed to compensate independently-owned small market broadcasters for damage resulting from the impact of DTH distant signals, will be retained.
- **Second set of U.S. 4+1 signals:** The CRTC will authorize BDUs to make a second set of U.S. 4+1 signals available to the subscriber, only when that subscriber also receives at least one signal, originating from the same time zone as the U.S. signals, of each large multi-station Canadian broadcasting group. Any disputes regarding the distribution of a second set of U.S. 4+1 signals will be subject to the Commission's policies regarding dispute resolution.
- **Simultaneous substitution:** The CRTC reminds parties that its policies and regulations with respect to simultaneous substitution remain in effect, will continue into the digital environment, and will apply to HD signals in accordance with the framework elaborated in Broadcasting Public Notice CRTC 2003-61.
- **Local Programming Improvement Fund (LPIF) established:** The required contribution to Canadian programming by licensed BDUs will be increased from 5% to 6% of gross revenues derived from broadcasting activities. The additional 1% (estimated to be approximately \$60 million in the first year) will be directed to a new fund designed to improve the quality of local programming in non-metropolitan markets.

One third of LPIF funding will be allocated to broadcasters operating in smaller French-language markets and two thirds to those operating in English-language markets.

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The fund will be made available to both public and private broadcasters for stations serving markets in which the official language of the station (i.e., English or French) is less than one million. Accordingly, stations in the metropolitan markets of Vancouver, Calgary, Edmonton, Toronto, anglo-phone Ottawa-Gatineau, and Montréal do not qualify for funding. The Commission will consider whether community broadcasters should have access to the LPIF in the context of its review of the community media policy framework.

In order to qualify for LPIF funding, stations must be providing a local programming service that, as of 30 October 2008, includes original local news. LPIF funding must be incremental to the station's current expenditures on local programming. It may be used to produce additional original local programming or to invest in improvements to the quality of existing local programming, with priority given to local news and public affairs programming.

The Canadian Association of Broadcasters is to develop a detailed plan for the administration of the LPIF (including the appointment of an independent third party administrator), which will be overseen by a panel to be comprised of three Commissioners. The CRTC intends to implement the LPIF as soon as possible through an amendment to the BDU Regulations, so that funding is available for the 2009/2010 broadcast year. The Commission will conduct a comprehensive review of the LPIF following its third year of operation.

If you would like to know more about the Decision or have any questions with respect to the foregoing, please do not hesitate to contact:

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