



## Broadcasting Decision CRTC 2007-147

Ottawa, 22 May 2007

**Rogers Broadcasting Limited**  
Across Canada

*Application 2006-0453-9, received 18 April 2006*  
*Public Hearing in the National Capital Region*  
*27 March 2007*

### **New national pay audio programming undertaking**

*The Commission **approves** an application by Rogers Broadcasting Limited for a broadcasting licence to operate a new national pay audio programming undertaking.*

### **Background**

1. The Commission received an application by Rogers Broadcasting Limited (Rogers) for a broadcasting licence to operate a new national pay audio programming undertaking to be called Rogers Pay Audio. Rogers is a wholly-owned subsidiary of Rogers Media Inc., which in turn is a wholly-owned subsidiary of Rogers Communications Inc., a corporation ultimately controlled by Edward S. Rogers.
2. Due to their discretionary nature, the Commission has adopted an open-entry approach to the licensing of pay audio programming undertakings. The Commission reiterated this approach in the licence renewal decisions for the pay audio programming services Galaxie and Max Trax, as set out in Broadcasting Decision 2002-391 and Broadcasting Decision 2002-392. In so doing, the Commission also codified a licensing framework through a number of conditions of licence applied to the licensees of such services.
3. The Commission first announced the present application in Broadcasting Notice of Public Hearing CRTC 2006-9, 31 August 2006, as part of the 30 October 2006 Public Hearing held in Regina, Saskatchewan. The application was then withdrawn by the Commission from the Regina Public Hearing and rescheduled for the 27 March 2007 Public Hearing.
4. Rogers initially proposed a service comprised of 30 audio channels in a number of formats. Specifically, 60%-70% of the proposed service's audio content would consist of pop, rock, dance and easy listening music, 5%-10% of oldies music, 5%-10% of ethnic music, 5%-10% of programming directed to children, and 15% of specialty music, including classical, world beat and jazz. The applicant proposed a Canadian content level that would mirror the Canadian content requirements set out in section 2.2 of the *Radio Regulations, 1986* (the Radio Regulations) rather than the minimum of 35% weekly Canadian musical selections for Canadian-produced pay audio channels, considered

together, that is generally required of the licensees of pay audio undertakings. Rogers also requested permission to broadcast spoken word programming and indicated that there was a possibility for future multi-platform distribution of its proposed service. Finally, with regard to Canadian content development (CCD), Rogers initially proposed to devote 4% of the proposed undertaking's annual gross revenues to the Radio Starmaker Fund (75%) / Fonds RadioStar (25%).

5. Subsequent to Broadcasting Notice of Public Hearing CRTC 2006-9, the Commission received interventions in connection with the application from CKUA Radio Network (CKUA), the Canadian Independent Record Production Association (CIRPA), the Canadian Broadcasting Corporation (CBC), and l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo (l'ADISQ). Following the issuance of Broadcasting Notice of Public Hearing CRTC 2007-1, 25 January 2007, the Commission received an intervention expressing general support for the application from the Canadian Society for the Recording Arts, a further intervention from the CBC, and an intervention from Corus Entertainment Inc. (Corus).
6. The majority of interveners were of the view that Rogers had sought a departure from the current pay audio regulatory framework outlined in the above-noted licence renewal decisions for Galaxie and Max Trax, notably with respect to the broadcast of Canadian content and spoken word programming. The interveners stressed the need for a uniform licensing regime for all pay audio services. CIRPA and l'ADISQ also questioned Rogers' plan for allocating its CCD commitments to the Radio Starmaker Fund. CIRPA asked that the Commission direct Rogers to make a commitment to the Foundation to Assist Canadian Talent on Recordings (FACTOR) equal to or greater than the applicant's commitment to Starmaker.

### **Commission's analysis and determinations**

7. In response to the various comments made by interveners, Rogers offered a number of amendments to its original proposal with respect to CCD, Canadian content, the linkage of Canadian- and non-Canadian-produced channels, and spoken word programming in order to comply with all existing regulatory requirements for pay audio services. Specifically, Rogers committed to ensuring that, among other things:
  - a minimum of 35% of the musical selections broadcast each week on the proposed undertaking's Canadian-produced pay audio channels, considered together, would be Canadian selections;
  - a minimum of 25% of all its Canadian-produced pay audio channels, other than those consisting entirely of instrumental music or of music entirely in languages other than English or French, would devote each week a minimum of 65% of vocal music selections from category 2, as defined in the Radio Regulations, to musical selections in the French language;

- at no time would subscribers be offered a service where foreign-produced channels predominate and a maximum of one non-Canadian pay audio channel would be packaged or linked with each Canadian-produced pay audio channel; and
  - the broadcast of spoken word programming would be limited to programming directed to children and to segments identifying musical selections or promoting the service.
8. In addition, in response to the Commission's recently released *Commercial Radio Policy 2006*, as set out in Broadcasting Public Notice 2006-158, Rogers amended the targets for its CCD contributions in order to bring them in line with the current policy. Specifically, of the 4% gross annual revenues Rogers proposed to contribute to CCD, 50% (or 2% of its gross revenues) would be equally divided between FACTOR and MusicAction, while the remainder (a further 2% of gross revenues) would be devoted to funding Canadian Music Week to support music education programs and emerging artist showcases.
  9. The Commission notes that the above-noted initiatives are consistent with the list of eligible initiatives identified in Broadcasting Public Notice 2006-158. The Commission is also satisfied that Rogers' application, as amended, conforms to the current licensing framework for pay audio services.
  10. The Commission notes that l'ADISQ in its intervention opposed the application based on its preoccupations with the linkage rules and the Canadian content, CCD and French-language channel levels in effect under the Commission's current licensing framework for pay audio services. The Commission also notes that CKUA reiterated its concerns over the potential impact of the licensing of pay audio services on community radio stations such as itself. The Commission considers, however, that it has addressed these issues in Broadcasting Decision 2002-391 and Broadcasting Decision 2002-392 and that they should not be revisited as part of this proceeding.
  11. In its intervention, Corus also indicated some concern that only the CBC's pay audio service Galaxie would qualify as distributable under section 24(2) of the *Broadcasting Distribution Regulations* (the BDU Regulations), which states that if a Class 1 licensee distributes in a licensed area the programming service of a pay audio programming undertaking of which the licensee or an affiliate, or both, controls 30% or more of the total shares issued and outstanding, the licensee shall also distribute in the licensed area the programming service of at least one third party pay audio programming undertaking. Specifically, Corus was concerned that approval of this application could create a situation of undue competitive disadvantage for Corus's pay audio service Max Trax in view of a declaration made by the Commission in Public Notice 1997-150. There the Commission set out a number of circumstances that could constitute instances of undue preference or disadvantage under section 9 of the BDU Regulations, one of which was "[t]he distribution by a Class 1 licensee or by a DTH licensee of the programming service of a pay audio programming undertaking in which a similar type of distribution

undertaking has an ownership interest of 30% or more, where the licensee is not distributing an independently-owned pay audio service delivered to its head end in a format that is technically compatible with the licensee's method of signal distribution. The Commission considers, for example, two cable companies and their affiliates, or two telephone companies and their affiliates, to be of similar type."

12. The Commission notes that under the access rule in subsection 24(2) of the BDU Regulations, if Rogers were to distribute its own proposed pay audio service, it would also be required to distribute the programming of at least one third party pay audio programming undertaking. Currently, Max Trax is a third party as defined in subsection 24(2). As for the list of circumstances in Public Notice 1997-150 that could raise instances of undue preference under section 9 of the BDU Regulations, the Commission notes that findings of undue preference are made on a case-by-case basis and depend on each scenario and set of facts.
13. In light of all the above, the Commission **approves** the application by Rogers Broadcasting Limited for a broadcasting licence to operate the new national pay audio programming undertaking Rogers Pay Audio. The terms and **conditions of licence** of the new undertaking are set out in the appendix to this decision.
14. Because this licensee is subject to the Employment Equity Act and files reports concerning employment equity with Human Resources and Skills Development Canada, its employment equity practices are not examined by the Commission.

#### **Related documents**

- *Broadcasting Distribution Regulations*, Public Notice CRTC 1997-150, 2 May 1997.
- *Licence renewal for Galaxie*, Broadcasting Decision CRTC 2002-391, 29 November 2002.
- *Licence renewal for Max Trax*, Broadcasting Decision CRTC 2002-392, 29 November 2002.
- *Commercial Radio Policy 2006*, Broadcasting Public Notice CRTC 2006-158, 15 December 2006.

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 2007-147

### Terms and conditions of licence

#### Terms

##### Issuance of the broadcasting licence to operate a new national pay audio programming undertaking

The licence will expire 31 August 2013 and will be subject to the **conditions** set out below.

#### Conditions of licence

1. The licensee shall ensure that a minimum of 35% of the musical selections broadcast each broadcast week on Canadian-produced pay audio channels, considered together, are Canadian.
2. The licensee shall ensure that a minimum of 25% of all Canadian-produced pay audio channels, other than those consisting entirely of instrumental music or of music entirely in languages other than English or French, devote each week a minimum of 65% of vocal music selections from category 2, as defined in the *Radio Regulations, 1986*, to musical selections in the French language.
3. The licensee shall ensure that a maximum of one non-Canadian pay audio channel is packaged or linked with each Canadian-produced pay audio channel. In no case shall subscribers of the pay audio service be offered a package of pay audio channels in which foreign-produced channels predominate. The licensee shall provide the Commission, upon request, with a complete list of all non-Canadian pay audio channels distributed on its service.
4. The licensee shall not broadcast commercial messages.
5. The licensee shall not broadcast spoken word programming, except for purposes of musical selections identification and promotion of the service and in programming directed to children.
6. The licensee shall adhere to the provisions contained in sections 3 and 11 of the *Radio Regulations, 1986*, as amended from time to time.
7. The licensee shall adhere to the guidelines on gender portrayal set out in the Canadian Association of Broadcasters' *Sex-Role Portrayal Code for Television and Radio Programming*, as amended from time to time.

8. The licensee shall maintain sequential lists of all recordings played on each pay audio channel with designations for Canadian musical selections and for French-language vocal music. These lists shall be kept by the licensee for a minimum of four weeks and forwarded to the Commission upon request, along with a notarized attestation of the lists' accuracy.
9. The licensee shall not distribute any non-Canadian pay audio channel that includes commercial messages or that includes spoken word programming, except for purposes of musical selections identification and promotion of the service and in programming directed to children.
10. The licensee shall contribute each year a minimum of 4% of the gross annual revenues earned by its pay audio service to eligible third parties associated with Canadian content development in the following manner:
  - 1% of gross revenues to be devoted to FACTOR;
  - 1% of gross revenues to be devoted to MusicAction; and
  - 2% of gross revenues to be devoted to Canadian Music Week to support music education programs and emerging artists showcases.

The definitions of "Canadian," "commercial message," and "broadcast week" set out in section 2 of the *Radio Regulations, 1986* (the Regulations), as may be amended from time to time, the definition of "spoken word" set out in *Revised content categories and subcategories for radio*, Public Notice CRTC 2000-14, 28 January 2000, as may be amended from time to time, and the definition of "Canadian musical selection" set out in subsection 2.2(2) of the Regulations shall apply to these conditions and the licensee with the necessary changes.