



Broadcasting Decision CRTC 2009-229

Route reference :

Broadcasting Public Notice 2008-119

Ottawa, 27 April 2009

MTS Allstream Inc.

Winnipeg and surrounding areas and Brandon, Manitoba

Application 2008-1273-6, received 23 September 2008

Extension of licensed area and licence amendments

*The Commission **approves** the application by MTS Allstream Inc. to extend the licensed area of its terrestrial broadcasting distribution undertaking serving Winnipeg and surrounding areas, in order to include Brandon, Manitoba. The Commission **approves** the addition of a **condition of licence** relieving the licensee from the requirement of section 17 of the Broadcasting Distribution Regulations to distribute CKX (CBC) Brandon provided that the signal is distributed in Brandon.*

*The Commission **approves** amendments to the licensee's current conditions of licence in order to recognize the licensee's expenditures on local expression in Brandon. However, the Commission **denies** the licensee's request for authorization to accrue the 5% of gross annual revenues derived from broadcasting activities in Brandon during the first two years of operation of its service in that locality, during which time Brandon community programming would not be provided.*

Introduction

1. The Commission received an application by MTS Allstream Inc. (MTS) to extend the licensed area of its terrestrial broadcasting distribution undertaking (BDU) serving Winnipeg and surrounding areas, Manitoba, which operates under a Class 1 regional broadcasting licence, in order to include Brandon, Manitoba. MTS also requested the addition of a condition of licence that would relieve it from the requirement of section 17 of the *Broadcasting Distribution Regulations* (the Regulations) to distribute CKX (CBC) Brandon, provided that the signal is distributed in Brandon.
2. In Broadcasting Decision 2007-86, the Commission authorized MTS to provide an outlet for local expression as part of the service offered by its regional video-on-demand (VOD) programming undertaking. As permitted by section 29 of the Regulations for BDU licensees with more than 20,000 subscribers in the licensed area, the Commission also authorized MTS, by condition of licence, to allocate to its VOD-based outlet for local expression in Winnipeg and surrounding areas up to 2% of the gross annual revenues derived from the broadcasting activities of its terrestrial BDU serving Winnipeg and surrounding areas and to reduce its required annual 5% contribution to independent Canadian program production funds by a corresponding percentage.

3. As part of the present application, MTS requested an amendment to that condition of licence in order to allow it to offer a similar VOD-based outlet for local expression in Brandon. MTS submitted that its subscriber base in Brandon is expected to be less than 20,000. It requested, as permitted by section 29 of the Regulations for BDU licensees with fewer than 20,000 subscribers in a licensed area, to be allowed to allocate the total 5% of gross annual revenues derived from broadcasting activities in Brandon to the funding of its proposed VOD-based outlet for local expression. MTS also asked to be allowed to cross-subsidize up to a maximum of 20% of the total contribution to the local expression applicable for the Winnipeg and surrounding areas licensed area, for programming produced in other licensed areas, for programming produced outside the licensed areas, or for programming covering provincial events. Finally, MTS sought authority to accrue the 5% of gross annual revenues derived from broadcasting activities in Brandon during the first two years of operation of its service in that locality during which time Brandon community programming would not be provided. These funds would be directed to local expression programming for Brandon commencing in the third year of operation. MTS argued that this would enable it to accumulate a sufficient amount of money to fund VOD-based community programming for Brandon.
4. The Commission received an intervention by Westman Communications Group (Westman) that commented on aspects of this application. Westman owns a Class 1 cable BDU serving Brandon. Its cable BDU in Brandon offers a community programming channel.

Commission's analysis and determinations

Extension of the authorized service area

5. With respect to the concerns raised by Westman regarding whether this proposal should be considered as an extension to the licensed area of MTS' existing undertaking or as a new licence to be added under MTS' regional licence, the Commission notes that it has adopted a flexible approach in licensing BDUs applying within the context of the regional licensing framework. Accordingly, the Commission is satisfied that MTS' proposal to extend the licensed area of its Winnipeg and surrounding areas undertaking to encompass Brandon does not conflict with established CRTC practices and policies and is consistent with its competitive, open-entry approach to licensing BDUs.

Relief from the requirement to distribute CKX (CBC) Brandon in Winnipeg and surrounding areas

6. Section 17(1) of the Regulations lists, in order of priority, the television programming services that must be distributed as part of the basic service of Class 1 and Class 2 BDUs. These programming services include local, over-the-air television stations. Section 17(2) of the Regulations states that these services must be distributed on a channel beginning with the basic band. Under the Regulations, a "local television station" is defined as a licensed television station that has a Grade A official contour that includes any part of the licensed area or has, if there is

no Grade A official contour, a transmitting antenna that is located within 15 kilometres of the licensed area.

7. CKX Brandon is an English-language television station affiliated with the Canadian Broadcasting Corporation (CBC). Since CKX has a Grade A official contour that includes a part of MTS' proposed licensed area, it meets the definition of a local television station in Brandon and is entitled to priority carriage in the entire licensed area of MTS' undertaking, that is, in both the currently licensed area of Winnipeg and surrounding areas and in the proposed extension of Brandon.
8. The Commission notes that MTS confirmed that it would distribute CKX in Brandon. The Commission further notes that the licensee of CKX Brandon did not intervene in opposition to the relief sought by the applicant. The Commission therefore finds that it would be appropriate to grant MTS the relief requested with respect to the distribution of CKX (CBC) Brandon.

Funding and provision of an outlet for local expression in Brandon

9. While not opposing MTS' proposal to establish a VOD-based outlet for local expression in Brandon, Westman submitted that MTS operates a Class 1 BDU serving more than 20,000 subscribers. Westman contended that, under section 29 of the Regulations, MTS should be allowed to devote only 2% of its gross broadcasting revenues to the proposed outlet for local expression and be required to direct the remainder to an approved independent Canadian program production fund. Westman further argued that, as a BDU serving over 20,000 subscribers that does not distribute its own community programming and operates in the same licensed area as another BDU that does distribute a community channel, MTS is required by section 29 of the Regulations to contribute 2% of its gross revenues derived from broadcasting activities in each broadcast year to Westman's community programming channel in Brandon.
10. Westman opposed MTS' proposal to accrue the financial contribution to its proposed outlet for local expression in Brandon for two years on the grounds that no other BDU has been granted such an advantage. In Westman's view, if MTS cannot provide its outlet for local expression upon implementation of its service in Brandon, its contribution should be divided between an approved independent Canadian program production fund and Westman's community channel in Brandon.
11. In response, MTS reiterated that its subscriber base in Brandon would be less than 20,000. MTS further maintained that Westman's community channel is not an independent community television programming undertaking and therefore is not entitled to a portion of MTS' gross broadcasting revenues in Brandon pursuant to section 29 of the Regulations. MTS contended that its proposal to accrue its contribution for the first two years of operation would "facilitate the creation and exhibition of some locally-produced, locally-reflective community programming for Brandon, consistent with the Commission's current community programming policy" and ensure the money would directly benefit MTS' subscribers once the outlet for local expression is launched.

12. In Public Notice 1997-25, the Commission emphasized its intention “to give all terrestrial distributors the opportunity to present innovative proposals for providing outlets for local expression within the purview of the [*Broadcasting Act*].” Moreover, in Public Notice 1997-150, the Commission invited terrestrial distributors wishing to provide an outlet for local expression, other than a community channel, to present their proposals to the Commission.
13. The Commission finds that, while Brandon would be part of the Winnipeg and the surrounding areas licence, for the purpose of determining the appropriate level of contribution permitted to the production of community programming, Brandon would constitute a separate licensed area within a single undertaking. Since MTS will have fewer than 20,000 subscribers in Brandon, the Commission is of the view that it is appropriate to allow MTS to allocate up to 5% of its revenues in Brandon to its community programming service. Given the limited potential subscribership and the fact that MTS would be a new entrant in this market, this authorization would provide more contributions to support the community programming service. MTS would still be allowed to allocate only 2% of its gross annual revenues derived from its broadcasting activities in the Winnipeg and surrounding areas since the number of subscribers in that licensed area exceeds 20,000.
14. Further, the Commission also finds reasonable MTS’ proposal to reallocate, depending on program submissions and program needs, up to 20% of the funds that would otherwise be allocated to local expression in the Winnipeg and surrounding areas licensed area to programming produced in other licensed areas, for programming produced outside the licensed areas or for programming covering provincial events. As proposed by MTS, this approach would ensure that each community receives an appropriate share of expenditures on local expression. The Commission notes that it has approved similar proposals by TELUS Communications Inc. and 1219823 Alberta ULC in partnership with TELUS Communications Inc. in TELE-MOBILE Company, partners in a general partnership carrying on business as TELUS Communications Company (Broadcasting Decision 2008-135) and by Saskatchewan Telecommunications (Broadcasting Decision 2006-490).
15. In Public Notice 2008-100, the Commission announced its intention to review its policies regarding community-based media in 2009. That review will encompass discussions regarding the funding of community programming. Further, in Broadcasting Notice of Consultation 2009-173, the Commission called for comments on a proposed exemption order for terrestrial BDUs serving fewer than 20,000 subscribers. In the circumstances, the Commission considers that it is not appropriate at this time to depart from its current policy regarding funding of an outlet for local expression. Moreover, in the Commission’s view, the condition of licence proposed by the licensee provides sufficient flexibility for MTS to access to funds to produce community programming for Brandon without the need to accrue its contribution for two years before providing community programming in Brandon.

Conclusion

16. In light of all the above, the Commission **approves** the application by MTS Allstream Inc. to extend the licensed area of its terrestrial broadcasting distribution undertaking serving Winnipeg and surrounding areas in order to include Brandon.
17. The Commission **approves** the addition of a **condition of licence** relieving the licensee from the requirement of section 17 of the *Broadcasting Distribution Regulations* to distribute CKX (CBC) Brandon provided that the signal is distributed in Brandon.
18. The Commission also **approves** amendments to the licensee's current conditions of licence recognizing its expenditures on local expression in Brandon. However, the Commission **denies** the licensee's request for authority to accrue the 5% of gross annual revenues derived from broadcasting activities in Brandon during the first two years of operation of its service in that locality to provide funding to its proposed outlet for local expression.
19. The terms, **conditions of licence** and expectation for MTS' Class 1 regional BDU are set out in the appendix to this decision.

Secretary General

Related documents

- *Call for comments on a proposed exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Notice of Consultation CRTC 2009-173, 1 April 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory Policy – Broadcasting* Public Notice CRTC 2008-100, 30 October 2008
- *Licence amendments related to the funding and provision of an outlet for local expression*, Broadcasting Decision CRTC 2008-135, 30 June 2008
- *Licence amendments relating to the funding and provision of an outlet for local expression*, Broadcasting Decision CRTC 2007-86, 16 March 2007
- *Licence amendments related to the funding and provision of an outlet for local expression*, Broadcasting Decision CRTC 2006-490, 8 September 2006
- *Policy framework for community-based media*, Broadcasting Public Notice CRTC 2002-61, 10 October 2002

- *Broadcasting Distribution Regulations*, Public Notice CRTC 1997-150, 22 December 1997
- *New regulatory framework for broadcasting distribution undertaking*, Public Notice CRTC 1997-25, 11 March 1997

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 2009-229

Terms, conditions of licence and expectation for the Class 1 regional terrestrial broadcasting distribution undertaking serving Winnipeg and surrounding areas and Brandon, Manitoba

Terms

The operation of this undertaking is regulated pursuant to the *Broadcasting Distribution Regulations* and all related policies.

The licence will expire 31 August 2015.

Conditions of licence

1. The licensee is authorized to distribute, on a discretionary basis, the satellite to cable programming undertaking Manitoba Jockey Club Inc.
2. The licensee is relieved from the requirement of section 17 of the *Broadcasting Distribution Regulations* that it distribute CKX (CBC) Brandon, Manitoba provided that the signal is distributed in Brandon.
3. The licensee is authorized to distribute, at its option, WCCO-TV (CBS) and KARE-TV (NBC) Minneapolis, Minnesota, WDAZ-TV (ABC) Grand Forks, North Dakota, KMSP-TV (FOX) Minneapolis, Minnesota or WUHF-TV (FOX) Rochester, New York, and KFME-TV (PBS) Fargo, North Dakota, as part of the basic service at each community served. Alternatively, for each network signal, the licensee may distribute the signal of a different affiliate of the same network located in the same time zone as that of the licensed area and included in the *Lists of eligible satellite services*, as amended from time to time.
4. The licensee is authorized to distribute the following signals on a digital discretionary basis:
 - any of the distant Canadian television signals set out in the *List of Part 3 eligible satellite services*; and
 - a second set of signals that provides the programming of the four U.S. commercial networks (CBS, NBC, ABC, FOX) and the non-commercial PBS network (hereafter referred to as the U.S. 4+1 signals).

The distribution on a discretionary basis on the licensee's digital service of a second set of U.S. 4+1 signals and distant Canadian signals is subject to the provision that, with respect to such signals, the licensee adhere to the requirements regarding non-simultaneous program deletion set out in section 43 of the *Broadcasting Distribution Regulations* (the Regulations). The Commission

may suspend the application of this provision, with respect to the signals to be distributed, upon its approval of an executed agreement between the licensee and broadcasters. Such an agreement must deal with issues related to the protection of program rights arising in connection with the discretionary carriage of a second set of U.S. 4+1 signals and distant Canadian signals solely on the licensee's digital service.

The Commission reminds the licensee that the requirements set out in section 30 of the Regulations regarding simultaneous substitution apply also in the case of U.S. 4+1 signals and distant Canadian signals.

5. The licensee is authorized to receive, directly through its own facilities, at its option, any of the distant Canadian signals and U.S. 4+1 signals that are otherwise required to be received from a licensed satellite relay distribution undertaking. The licensee is not authorized to use any facilities other than its own for the reception of these signals. This condition does not authorize the licensee to provide these services to any other licensed or exempt distribution undertaking.
6. The licensee is authorized to distribute, at its option, the audio programming service of any licensed satellite subscription radio undertaking on a digital basis. The distribution of satellite subscription radio signals is subject to the following provisions:
 - (i) Subject to the exception outlined in (ii), the licensee may not count the signals of conventional radio programming undertakings for the purpose of fulfilling the preponderance requirement set out in section 6(2) of the *Broadcasting Distribution Regulations* (the Regulations) unless a subscriber is already receiving 40 channels of one or more licensed pay audio programming undertakings.
 - (ii) A licensee is entitled to count the signals of conventional radio programming undertakings that a licensee is required to distribute under section 22 of the Regulations for the purpose of fulfilling the preponderance requirement set out in section 6(2) of the Regulations.
 - (iii) The Canadian-produced channels offered by the satellite subscription radio undertaking are deemed to be "Canadian programming services" for the purposes of section 6(2) of the Regulations.
7. The licensee may, at its option, insert certain promotional material as a substitute for the "local availabilities" (i.e., non-Canadian advertising material) of non-Canadian satellite services. At least 75% of these local availabilities must be made available for use by licensed Canadian programming services for the promotion of their respective services, for the promotion of the community channel and for unpaid Canadian public service announcements. A maximum of 25% of the local availabilities may be used to provide subscribers with information regarding customer service and channel

realignments, and for the promotion of discretionary programming services and packages, cable FM service, additional cable outlets and non-programming services, including Internet and telephone services.

8. The licensee shall be subject to the following conditions of licence as an exception to the requirements set out in section 29 of the *Broadcasting Distribution Regulations* (the Regulations):

- If the licensee has 20,000 or more subscribers in the licensed area of a broadcasting distribution undertaking (BDU) on 31 August of the previous broadcast year and distributes programming that qualifies as local expression on a video-on-demand service or a pay-per-view service, the licensee shall make, in each broadcast year, a contribution to Canadian programming of not less than the greater of:
 - a) 5% of its gross revenues derived from broadcasting activities in the licensed area in the year, less any contribution to local expression made by the licensee in the licensed area in that year, and
 - b) 3% of its gross revenues derived from broadcasting activities in the licensed area in the broadcast year.
- If the licensee has 20,000 or more subscribers in the licensed area of a BDU on 31 August of the previous broadcast year and does not distribute programming that qualifies as local expression on a video-on-demand or pay-per-view service, and if a community programming undertaking is licensed in the licensed area, the licensee shall make, in each broadcast year, a contribution of not less than:
 - a) 3% of its gross revenues derived from broadcasting activities in the broadcast year to Canadian programming, and
 - b) 2% of its gross revenues derived from broadcasting activities in the licensed area in the broadcast year to the community programming undertaking.
- If the licensee has fewer than 20,000 subscribers in the licensed area of a BDU on 31 August of the previous broadcast year and distributes programming that qualifies as local expression on a video-on-demand or pay-per-view service, the licensee shall make, in each broadcast year, a contribution of not less than 5% of its gross revenues derived from broadcasting activities in the licensed areas in the year to Canadian programming, less any contribution to local expression made by the licensee in the licensed area in that year.

- If the licensee has fewer than 20,000 subscribers in the licensed area of a BDU on 31 August of the previous broadcast year and does not distribute programming that qualifies as local expression on a video-on-demand or pay-per-view service, and if a community programming undertaking is licensed in the licensed area, the licensee shall make, in each broadcast year, a contribution of 5% of its gross revenues derived from broadcasting activities in the licensed area in the broadcast year to the community programming undertaking.
- If the licensee does not distribute programming that qualifies as local expression on a video-on-demand or pay-per-view service, and if no community programming undertaking is licensed in the licensed area, the licensee shall make, in each broadcast year, a contribution of not less than 5% of its gross revenues derived from broadcasting activities in the licensed area in the year to Canadian programming.

For the purposes of calculating the licensee's contribution to local expression for the Winnipeg and surrounding areas licensed area, the licensee may include the contributions to local expression made for programming produced in other licensed areas, for programming produced outside the licensed areas, or for programming covering provincial events, up to a maximum of 20% of the total contribution to the local expression applicable for the Winnipeg and surrounding areas licensed area.

For the purpose of this condition of licence:

“video-on-demand service” means the video-on-demand programming undertaking authorized in *Video-on-demand service for Manitoba*, Broadcasting Decision CRTC 2003-590, 21 November 2003, as amended from time to time;

“contribution to local expression” means the eligible expenses for local expression made in accordance with *New regulatory framework for broadcasting distribution undertakings*, Public Notice CRTC 1997-25, 11 March 1997, as amended from time to time;

“local expression” refers to programming that qualifies as local expression in accordance with the conditions of licence applicable to the programming service; and

“contribution to Canadian programming” shall have the meaning as set out in section 29(1) of the Regulations.

Expectation

The Commission expects the licensee to calculate its required contribution to Canadian programming based on the gross revenues derived from its broadcasting activities by ascribing, to the portion of these gross revenues that consists of payment for a broadcasting service distributed within a bundled package, a dollar value equal to that which would be earned from subscribers, if the service was taken on a stand-alone, list price basis. The licensee shall accord similar treatment for broadcasting services offered on a free or discounted basis, whether bundled or not.