



Broadcasting Decision CRTC 2015-187

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Reference: Part 1 application posted on 16 September 2014

Ottawa, 13 May 2015

Hubbard Broadcasting Inc.
Minneapolis, Minnesota

Application 2014-0938-4

Removal of KSTP-TV Minneapolis from the *List of non-Canadian programming services authorized for distribution*

*The Commission **denies** an application by Hubbard Broadcasting Inc. to remove the non-Canadian conventional television station KSTP-TV Minneapolis from the List of non-Canadian programming services authorized for distribution.*

Application

1. Hubbard Broadcasting Inc. (Hubbard Broadcasting) filed an application to remove its non-Canadian conventional television station KSTP-TV Minneapolis, Minnesota, from the *List of non-Canadian programming services authorized for distribution* (the List). KSTP-TV is an ABC affiliate broadcasting from St. Paul, Minnesota.
2. In support of its application, Hubbard Broadcasting indicated that KSTP-TV's signal is not available for direct reception in Canada. The applicant also stated that it could not confirm whether it had obtained all the necessary rights for distribution in Canada or whether it exercised preferential or exclusive programming rights in relation to the distribution of its KSTP-TV programming in Canada. Moreover, Hubbard Broadcasting argued that the feed being retransmitted in Canada may be a feed specifically modified for Canada, in violation of the *Copyright Act*.
3. Hubbard Broadcasting also claimed that it had received complaints from Canadian viewers regarding signal quality issues, including technical problems with closed captioning at times when the station did not experience technical issues with its broadcast feed. The applicant stated its objection to any unauthorized modifications to its signal, including simultaneous substitution, commercial insertion practices and altering or eliminating closed captioning.
4. Finally, the applicant cited a lack of due process, given that it was not notified or consulted when KSTP-TV was added to the List. It stated that it had never agreed to be sponsored by a Canadian party to have the station distributed in Canada and that it does not have an affiliation agreement in place with any party to cover the terms of distribution for KSTP-TV in Canada. However, it indicated that it remains open to

discussions with any Canadian party interested in appropriately sponsoring KSTP-TV or any of its other television stations for distribution in Canada under appropriate terms and agreements, at which time it would secure all the rights necessary for retransmission in Canada.

History of KSTP-TV

5. In Decision 1998-17, following a public process initiated by Public Notice 1997-102, the Commission authorized the distribution of KSTP-TV and WFTC-TV (FOX) by the former satellite relay distribution undertaking Canadian Satellite Communications Inc. (Cancom), as well as the addition of these stations to the List. It did not receive any interventions in the proceeding leading to that decision. Given that Cancom was already distributing the Minneapolis signals KARE-TV (NBC) and WCCO-TV (CBS), the addition of KSTP-TV and WFTC-TV completed the package of U.S. network signals originating from the Central time zone.
6. In Broadcasting Decision 2011-749, following the publication of a Part 1 application for public comment, the Commission authorized the distribution of KSTP-TV on the basic service of Shaw's cable system in Thunder Bay, Ontario, by condition of licence. The Commission received only interventions in support of the application.

Regulatory framework

7. Canadian broadcasting distribution undertakings (BDUs) are prohibited by the *Broadcasting Act* and the *Broadcasting Distribution Regulations* (the Regulations) from carrying any programming undertaking not authorized by the Commission by regulation, exemption order or condition of licence. The distribution of non-Canadian programming undertakings is authorized by way of the List. Pursuant to the Regulations and the Exemption order for BDUs under 20,000 subscribers, all BDUs are permitted to carry programming undertakings on the List. The Commission also authorizes the distribution of specific non-Canadian television stations by BDUs through conditions of licence.
8. There are two types of programming undertakings on the List: non-Canadian television stations (e.g., the U.S. 4+1 stations¹) and non-Canadian pay and specialty programming services. This distinction is reflected in the Regulations, which include definitions of “non-Canadian programming service”, “non-Canadian television station” and “station.”
9. Before 2011, the *Lists of eligible satellite services for distribution on a digital basis* (the Lists) were segregated into various sections.² In Broadcasting Regulatory Policy 2011-399, the Commission consolidated the sections into a single list and harmonized

¹ This refers to the set of signals that provide the programming of the four U.S. commercial networks (CBS, NBC, ABC, FOX) and the non-commercial PBS network

² These sections concern analog services, services for digital distribution only, services for direct-to-home distribution only and services with packaging requirements.

the general notes, which included programming rights and non-exclusivity requirements set out in its policies relating to the addition of pay and specialty services. Prior to this harmonization, non-Canadian television stations were listed in a section of the Lists to which these particular requirements did not apply.

10. The Commission has not added a non-Canadian television station to the List(s) since 2000 and has never published a policy specific to the addition of non-Canadian television stations to the List(s). The Commission assesses applications for the addition of non-Canadian television stations on a case-by-case basis, premised on the achievement of the policy objectives set out in section 3(1) of the *Broadcasting Act*, namely, to serve the public interest of Canadians and contribute to the provision of programming drawn from local, regional, national and international sources.
11. Since the mid-1980s, the Commission's main focus has been the development of a policy that determines under what circumstances it will add a specialty or pay service to the List(s) in line with section 3(1) of the *Broadcasting Act*. As of the 1990s, this policy has included the following requirements: a Canadian sponsor, a letter of consent from the non-Canadian programming service, assurances with respect to the clearance of relevant rights and a commitment to not obtain exclusive rights.

Interventions

12. The Commission received interventions in opposition to the application from Shaw and Bruce Hyer, MP, Thunder Bay-Superior North. Hubbard Broadcasting replied to Shaw's intervention. The public record for this application can be found on the Commission's website at www.crtc.gc.ca or by using the application number provided above.

Intervention by Shaw

13. Shaw submitted that KSTP-TV should not be removed from the List because this would undermine the achievement of the objectives set out in sections 3(1) and 5(2) of the *Broadcasting Act* by depriving Thunder Bay viewers of a programming choice for which there is a strong demand. It added that KSTP-TV's distribution benefits consumers in Thunder Bay, given the strong community of interest between Minneapolis and Thunder Bay, as opposed to the previously distributed signals from Detroit.
14. Further, Shaw claimed that KSTP-TV's signal is available over the air and is therefore subject to the retransmission regime. Under this regime, KSTP-TV and other U.S. broadcasters are entitled to be remunerated through retransmission royalties paid based on a tariff approved by the Copyright Board of Canada. Shaw indicated that it remunerates program rights holders for its retransmission of their programming in distant signals, in full compliance with requirements of section 31 of the *Copyright Act*. It added that KSTP-TV's application appears to be premised on an objective to establish a right to retransmission consent, which does not exist under the *Copyright Act* and is outside the Commission's jurisdiction.

15. Shaw also submitted that there was no need to notify or consult with KSTP-TV or to require KSTP-TV's consent when it was added to the List, given that its retransmission in Canada is legal pursuant to section 31 of the *Copyright Act*. By contrast, applications to add non-Canadian specialty services require consultation since their distribution in Canada must be premised on an agreement with the programmer, with the retransmission regime being non-applicable in those instances.
16. Finally, Shaw submitted that it does not modify KSTP-TV's signal, other than for purposes authorized by the *Broadcasting Act* and the Regulations, which include the implementation of simultaneous substitution.

Intervention by Bruce Hyer

17. Mr. Hyer opposed the application, making similar arguments to Shaw with respect to KSTP-TV and other Minneapolis network affiliates being much better suited for distribution in Thunder Bay than the previously available Detroit signals, despite the difference in time zones.
18. He also submitted that the applicant erroneously indicated a need to secure rights necessary for retransmission in Canada, which is not the case under the *Copyright Act*, and mischaracterized simultaneous substitution as constituting an unauthorized alteration of its signal.
19. Mr. Hyer added that the underlying purpose of the applicant's request appears to be an attempt to secure compensation for the distribution of its over-the-air service in Canada.

Applicant's reply

20. Hubbard Broadcasting replied that KSTP-TV does not receive any remuneration for its distribution in Thunder Bay, under copyright or otherwise. It challenged Shaw to provide the Commission with the exact amount that it has paid to date under the compulsory licence fee for distribution of the station and the corresponding percentage of Canadian viewing of KSTP-TV for these amounts. Hubbard Broadcasting argued that the Regulations provide the originators of Canadian distant signals the right to consent to their retransmission and stated that it is unfair, discriminatory and contrary to Article 2006 of the *Canada-US Free Trade Agreement* (the Agreement) to deny U.S. stations the same right.
21. In addition, the applicant claimed that there are no Canadian viewing statistics available to support KSTP-TV's alleged demand in Northern Ontario and requested that the Commission require Shaw to immediately disclose all relevant technical details on how it is capturing and importing KSTP-TV. It further alleged that its station's multicast signal is not being simultaneously retransmitted in full to Shaw's subscribers, which constitutes an unauthorized modification of the KSTP-TV signal in retransmission. Finally, it argued that the Commission's policy on authorizing signals on the List makes no distinction between over-the-air and specialty services.

Commission's analysis

22. The issues raised by Hubbard Broadcasting relating to the retransmission regime, agreed upon by Canada and the U.S. in the Agreement and implemented through section 31 of the *Copyright Act*, including retransmission, broadcast rights and compensation, and equal treatment, lie outside the Commission's mandate under the *Broadcasting Act*. The addition of a station to the List does not authorize a BDU to infringe copyright, nor is it an endorsement that a BDU is or will be acting consistent with the *Copyright Act*. It simply permits a BDU to carry a station in compliance with the *Broadcasting Act*. Therefore, the copyright issues raised by the applicant are more properly addressed in another forum.
23. The requirements set out in the general notes relating to programming rights and non-exclusivity requirements only pertain to non-Canadian specialty and pay services, which have been the primary focus of Commission policy relating to the List. Since the retransmission regime applies to U.S. television stations, these requirements are not relevant to these stations on the List. The Commission intends to draw attention to this fact in the general notes.
24. The Commission also considers that the applicant's arguments concerning due process and fairness are without merit. As with any interested person, it received notice of the relevant applications through the publication of the application. Non-Canadian specialty services not subject to the retransmission regime receive additional notice given the need for Canadian BDUs to enter into agreements to distribute the signals.
25. Finally, the Commission is of the view that the distribution of KSTP-TV in Canada benefits the Canadian broadcasting system by increasing programming diversity and catering to a shared community of interest. As such, it finds that removal of the station would impact many Canadian consumers currently enjoying its programming and that the continued distribution of KSTP-TV is consistent with the achievement of the policy objectives. The Commission also notes its general authority to authorize non-Canadian stations for distribution by BDUs.

Conclusion

26. In light of all of the above, the Commission **denies** the application by Hubbard Broadcasting Inc. to remove the non-Canadian conventional television programming undertaking KSTP-TV Minneapolis, Minnesota, from the *List of non-Canadian programming services authorized for distribution*.

Other matters

27. In making its arguments that its service should be removed from the List, Hubbard Broadcasting raised complaints with respect to the alteration of its signal by Shaw. However, its complaints concerning alteration to perform simultaneous substitution and the failure to distribute a multicast signal do not raise any legitimate issues, as these activities are permitted or even required pursuant to the *Broadcasting Act* and the Commission's regulations.
28. While the applicant's complaint that its signal was altered by removing closed captioning, if proven, would constitute a violation of the *Broadcasting Act*, the current record does not include sufficient evidence to determine unauthorized alteration of its signal.

Secretary General

Related documents

- *Terrestrial broadcasting distribution undertaking serving Thunder Bay – Licence amendment*, Broadcasting Decision CRTC 2011-749, 6 December 2011
- *List of non-Canadian programming services authorized for distribution*, Broadcasting Regulatory Policy CRTC 2011-399, 30 June 2011
- *Addition of KSTP (ABC) and WFTC (FOX)*, Decision CRTC 1998-17, 30 January 1998
- Public Notice CRTC 1997-102, 25 July 1997