



Broadcasting Decision CRTC 2007-2

Ottawa, 4 January 2007

Alliance Atlantis Broadcasting Inc. and Astral Broadcasting Group Inc., partners in a general partnership carrying on business as Historia and Séries+, s.e.n.c.

Across Canada

Astral Broadcasting Group Inc.

Across Canada and Eastern Canada

TELETOON Canada Inc.

Across Canada

Applications 2006-0606-4; 2006-0611-3; 2006-0607-2; 2006-0608-0; 2006-0609-8; 2006-0610-6; 2006-0673-3; 2006-0770-8; 2006-0672-5

Broadcasting Public Notice CRTC 2006-96

28 July 2006

Historia, Séries+, Canal Vie, VRAK-TV, Ztélé, Canal D, Super Écran, Teletoon/Télétoon and MPix – Licence amendments

*In this decision, the Commission **approves** the applications by Alliance Atlantis Broadcasting Inc. and Astral Broadcasting Group Inc., partners in a general partnership carrying on business as Historia and Séries+, s.e.n.c., Astral Broadcasting Group Inc. and TELETOON Canada Inc. to amend the broadcasting licences for the national, specialty programming undertakings Historia, Séries+, Canal Vie, VRAK-TV, Ztélé, Canal D and Teletoon/Télétoon, for the national, pay television programming undertaking Super Écran, and for the regional, pay television programming undertaking MPix, in order to allow each service to make itself available in high definition format.*

*The licensees are subject to a **condition of licence** whereby not less than 95% of the video and audio components of the upgraded and analog versions of the service shall be the same, exclusive of commercial messages and of any part of the service carried on a subsidiary signal. All of the programming making up the 5% allowance shall be provided in high definition format.*

The applications

1. The Commission received applications by Alliance Atlantis Broadcasting Inc. and Astral Broadcasting Group Inc., partners in a general partnership carrying on business as Historia and Séries+, s.e.n.c., Astral Broadcasting Group Inc. (Astral) and TELETOON Canada Inc. (Teletoon) to amend the broadcasting licences for the national, specialty

programming undertakings Historia, Séries+, Canal Vie, VRAK-TV, Ztélé, Canal D and Teletoon/Télétoon, for the national, pay television programming undertaking Super Écran, and for the regional, pay television programming undertaking MPix, in order to allow each service to make itself available in high definition (HD) format.

2. In accordance with *Regulatory framework for the licensing and distribution of high definition pay and specialty services*, Broadcasting Public Notice CRTC 2006-74, 15 June 2006 (Public Notice 2006-74), the applicants stated that the programming on the analog services and on the upgraded services would be comparable, that is to say, not less than 95% of the video and audio components would be the same, exclusive of commercial messages and of any part of the service carried on a subsidiary signal. Further, all programming making up the 5% allowance would be provided in HD.

Interventions

3. The Commission received comments by the Fédération des Coopératives de câblodistribution du Québec (FCCQ), DERYtelecom, Canadian Cable Systems Alliance Inc. (CCSA), Rogers Cable Communications Inc. (Rogers) and Canadian Satellite Communications Inc. (Shaw Broadcast Services) regarding the applications.¹ All of the interventions focused on the transport of the applicants' services from their facilities to the head-ends of cable broadcasting distribution undertakings (BDUs) and, in particular, the transport of these services to smaller, rural and remote BDUs.
4. In its intervention, the FCCQ stated that it would oppose the applications unless the applicants were required to provide the HD versions of their services, at their own cost, to the head-ends of each FCCQ member.²
5. DERYtelecom submitted that the applicants' decision not to ensure the delivery of their HD services will have a negative impact on cable BDUs that do not operate in or around Montréal. It requested that the Commission require the operators of HD services to transport their signals to Canadian BDUs in order to make HD services available to all Canadians, including those in rural areas.
6. For its part, the CCSA noted that the majority of its member companies receive television programming services from one of the two licensed satellite relay distribution undertakings (SRDUs), Bell ExpressVu LLP or Shaw Broadcast Services. The CCSA explained that the established industry practice for the delivery of standard definition (SD) television programming has been for the pay and specialty programming undertakings to arrange for the uplink of their services to the satellite of one or both SRDUs. The BDUs then negotiate the terms of access to these services with the SRDUs.

¹ Shaw Broadcast Services' comments were only with regard to the applications pertaining to Canal Vie, VRAK-TV, Ztélé, Canal D, Teletoon/Télétoon, Super Écran and MPix.

² The FCCQ's membership includes over 65 cable BDUs in rural and northern Quebec.

7. The CCSA submitted that, instead of negotiating uplink arrangements for their HD services with the SRDUs, pay and specialty programming undertakings have been leaving all the arrangements for the transport of their services to the cable BDUs. Furthermore, the CCSA claimed that recent affiliation agreements proposed by the operators of pay and specialty services have included obligations that cable BDUs source HD signals directly from the services' operations centres. While the CCSA acknowledged that the transport of HD services involves additional costs, it argued that transferring all of these costs to cable BDUs is unfair and unwarranted, particularly for smaller, independent cable BDUs that operate under greater financial constraints and are located farther from major urban centres where pay and specialty programming undertakings are located. According to the CCSA, this would mean that the cost of receiving HD services, and the resulting fees charged to subscribers, will be greater for non-urban cable BDUs than for urban cable BDUs and direct-to-home (DTH) satellite BDUs with which the non-urban cable BDUs compete.
8. To promote equal access to HD programming at fair prices, the CCSA requested that the applicants' licences, as well as the licences of all parties applying for an amendment to provide HD services or for a new HD-transitional licence, include a condition requiring pay and specialty programming undertakings to arrange the uplink of their services with SRDUs. The CCSA submitted that, alternatively, the Commission should at least express a clear expectation to this effect.
9. Similarly, Rogers submitted that the pay and specialty programming undertakings do not intend to bear the costs of uplinking HD services to SRDUs and, instead, expect cable BDUs that wish to distribute their HD services to arrange for transport from the service's point of origin. According to Rogers, such arrangements would involve significant costs for cable BDUs serving rural and remote areas, including the areas of New Brunswick and Newfoundland and Labrador that Rogers serves.
10. Rogers noted that, in *Introductory statement to Broadcasting Decisions CRTC 2004-129 and 2004-130, which renew the licences of the ExpressVu and Star Choice direct-to-home satellite distribution undertakings*, Broadcasting Public Notice CRTC 2004-19, 31 March 2004 (Public Notice 2004-19), the Commission stated the following:

With respect to the Cancom [Shaw Broadcast Services] SRDU, the Commission has generally considered that it is the responsibility of specialty services to deliver their signals to cable head-ends. It considers it appropriate that the uplink costs of specialty services to an SRDU be borne by the specialty services.

Rogers requested that the Commission clarify the obligations of pay and specialty programming undertakings with respect to the transport of their HD services, whether these HD services are offered under an amendment to their current licences or under a new HD-transitional licence.

11. Shaw Broadcast Services stated its understanding that Astral has agreed to enter into negotiations with cable BDUs regarding the distribution of some of its HD services, but that Astral's basic position is that BDUs must arrange to transport these services from their point of origin in Montréal to their head-ends. According to Shaw Broadcast Services, if pay and specialty programming undertakings are allowed to transfer these costs to BDUs, BDUs outside of urban centres may not be able to offer the same range of services as those in urban centres and could be placed at a competitive disadvantage. This disadvantage will be exacerbated if the transitional HD version of a service becomes permanent and is granted mandatory carriage rights.
12. With respect to Astral's applications specifically, Shaw Broadcast Services also submitted that minority French-language communities that are not served by a BDU in or near Montréal could be denied the applicants' services if cable BDUs are responsible for the transport of HD services from the source to their head-ends.
13. Furthermore, Shaw Broadcast Services noted that, although cable BDUs are not required to distribute HD versions of pay and specialty services offered under licence amendments, the programming genre of these services is protected from foreign and domestic HD services for a period of up to three years following such a licence amendment or until such time as they receive a new HD-transitional licence. During these three years, BDUs that may not be able to afford the terms proposed by the applicants are precluded from seeking competitive alternatives.
14. Shaw Broadcast Services noted that, in Public Notice 2006-74, the Commission stated that, during the term of a new HD-transitional licence or during the interim amendment phase, "the financial and programming obligations of the analog or SD service will apply to the corresponding HD version." In Shaw Broadcast Services' view, given that the Commission currently expects pay and specialty programming undertakings to deliver their analog and SD services to BDU head-ends, it would be appropriate for these undertakings to be required to transport their HD services to BDU head-ends as well. Shaw Broadcast Services recommended that Astral's and Teletoon's applications only be approved "subject to the extension of the existing requirement" that pay and specialty programming undertakings deliver their services to cable BDUs.

Applicants' reply

15. The applicants were of the view that the interveners' request that the pay and specialty programming undertakings be obligated to bear the costs of transporting their HD services to the cable BDU head-ends was unreasonable. According to the applicants, the interveners' arguments for such an obligation were based on incorrect interpretations of various Commission determinations. For instance, with respect to Rogers' argument that the Commission stated in Public Notice 2004-19 that it generally considered it the responsibility of pay and specialty programming undertakings to deliver their services to cable head-ends, the applicants maintained that the Commission made this statement in a different context. Specifically, Public Notice 2004-19 related to the licensing of DTH BDUs, and the competitive advantages that one DTH BDU might have over the other in relation to their respective SRDU services. Furthermore, the applicants pointed out that,

consistent with the Commission's findings in *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61, 11 November 2003 (Public Notice 2003-61), and in Public Notice 2006-74, the Commission's ultimate conclusion in Public Notice 2004-19 was that it did "not consider it necessary or appropriate to intervene in current contractual provisions related to the uplink fees for specialty services."

16. The applicants indicated that the interveners' request is therefore inconsistent with the Commission's conclusion in Public Notice 2004-19, as well as with the principle that the terms and conditions of the distribution of HD services be negotiated between BDUs and programming undertakings, as set out in Public Notice 2006-74.
17. The applicants also submitted that, in response to "the Commission's urgent call to accelerate the transition to high definition," they made significant capital investments in equipment and upgrades despite the fact that they do not anticipate additional revenue from the distribution of the HD versions of their services. The applicants' business models do not include the costs of the transmission of these services to cable head-ends. According to the applicants, such costs would be so prohibitive that they would render the current business models non-viable and unduly delay the launch of these HD services.
18. Moreover, the applicants noted that, according to Public Notice 2006-74, cable BDUs are not required to carry the HD versions of services authorized under a licence amendment. In their view, they have already assumed the financial risks inherent in making HD services available without any guarantee that BDUs will distribute them. In this context, the applicants argued that the current regulatory framework, which leaves the terms of distribution – including, in their view, the transport of these services – to negotiation between the parties, is appropriate.

Commission's analysis and determinations

19. In Public Notice 2003-61 and Public Notice 2006-74, the Commission stated that it would authorize the licensee of a Canadian pay or specialty service to make available an upgraded version of its service, by means of an amendment to the licence of the existing service, for a term of three years.
20. The Commission considers that these applications are consistent with the framework for such licence amendments set out in Public Notice 2006-74.
21. Accordingly, the Commission **approves** the applications by Alliance Atlantis Broadcasting Inc. and Astral Broadcasting Group Inc., partners in a general partnership carrying on business as Historia and Séries+, s.e.n.c., Astral Broadcasting Group Inc. and TELETOON Canada Inc. to amend the broadcasting licences for the national, specialty programming undertakings Historia, Séries+, Canal Vie, VRAK-TV, Ztélé, Canal D and Teletoon/Télétoon, for the national, pay television programming undertaking Super Écran, and for the regional, pay television programming undertaking MPix, in order to allow each service to be available in the HD format.

22. In Public Notice 2006-74, the Commission stated that:

Those services that are authorized to offer HD programming by way of licence amendment will remain subject to the requirement initially imposed in Public Notice 2003-61 that the programming on the analog or SD service and on the upgraded service be comparable, that is, not less than 95% of the video and audio components must be the same. Further, the Commission will require that all of the programming making up the 5% allowance be provided in HD.

23. The licensee is therefore subject to the following **condition of licence**:

The licensee is authorized to make available for distribution, for a period of three years from the date of this decision, a version of its service in high definition format, provided that not less than 95% of the video and audio components of the upgraded and analog versions of the service are the same, exclusive of commercial messages and of any part of the service carried on a subsidiary signal. All of the programming making up the 5% allowance shall be provided in high definition format.

24. With regard to the suggestion of the interveners that the Commission impose a condition of licence requiring the applicants to deliver their signals to distributors, the Commission notes that, while it has frequently made the statement that pay and specialty services are responsible for the delivery of their signals to cable head-ends, this statement of policy has never been expressed as a regulation or a condition of licence. Further, the policy was developed and first articulated in an environment where virtually all specialty services were “must-carry” services (at least for Class 1 BDUs). This is to say that the policy predates the licensing of services, such as Category 2 services, whose distribution is entirely at the discretion of the BDU.

25. The services at issue here are of a status similar to Category 2 services in that their distribution is authorized but not required.³ Further, in Public Notice 2006-74, the Commission made it clear that the distribution of upgraded HD services authorized by way of licence amendment, which are not required to provide minimum levels of HD content, would have to be negotiated between programmers and BDUs. The Commission considers that, with respect to “must-carry” signals, it is a reasonable *quid pro quo* to expect programmers to deliver their signals to cable head-ends, in light of the BDU’s obligation to distribute those signals. In the Commission’s view, arguments for making the programmer responsible to deliver the signal are much less compelling with respect to signals such as these, where distribution is totally at the discretion of the BDU.

³ Category 2 services, like analog/SD pay or specialty services, generally pay the costs of the transport of their signals to cable BDUs.

26. Furthermore, the Commission notes the applicants' concerns that the costs associated with the transport of the HD services to all BDUs would be significant and that a requirement for them to absorb such costs could cause them not to proceed with the launch of the HD versions of their services.
27. With respect to the interveners' argument that small and remote cable BDUs will be at a competitive disadvantage compared to DTH satellite BDUs, the Commission notes that, to the extent that the DTH BDUs choose to distribute these HD services to DTH customers, there is a possibility that the DTH providers will also make the services available to cable BDUs through their uplink businesses. Alternatively, BDUs may be able to explore ways to share the costs of transporting these signals to their head-ends.
28. In light of all of the above, the Commission does not consider it appropriate to impose a condition of licence requiring the applicants to deliver their services to distributors.
29. Nevertheless, with respect to the CCSA's concern that recent affiliation agreements proposed by the operators of pay and specialty services have included obligations that cable BDUs source HD signals directly from the services' operations centres, the Commission notes that, if the BDU and the programming service are unable to resolve their differences as to such matters, the dispute resolution procedures set out in sections 12 to 15 of the *Broadcasting Distribution Regulations* are available. In this regard, section 12.(2) provides that:

12.(2) If there is a dispute between the licensee of a distribution undertaking and the licensee of a programming undertaking or the operator of an exempt programming undertaking concerning the carriage or terms of carriage of programming, including the wholesale rate, originated by the programming undertaking, one or both of the parties to the dispute may refer the matter to the Commission for dispute resolution.

Secretary General

This decision is to be appended to each 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>