



## Broadcasting Decision CRTC 2007-49

Ottawa, 2 February 2007

### **High Fidelity HDTV Inc., on behalf of a corporation to be incorporated Across Canada**

*Application 2006-0863-0*

*Public Hearing in the National Capital Region*

*14 November 2006*

### **Eureka! HD – Category 2 specialty service**

*In this decision, the Commission **approves** an application for a broadcasting licence to operate a new Category 2 specialty programming undertaking.*

#### **The application**

1. The Commission received an application by High Fidelity HDTV Inc., on behalf of a corporation to be incorporated (High Fidelity), for a broadcasting licence to operate a national, English-language Category 2<sup>1</sup> high definition (HD) specialty programming undertaking to be known as Eureka! HD.
2. The applicant proposed to offer a service that would consist of specialty programming exploring issues related to science and technology.
3. All of the programming would be drawn from the following categories set out in item 6 of Schedule I to the *Specialty Services Regulations, 1990*: 1 News; 2(a) Analysis and interpretation; 2(b) Long-form documentary; 3 Reporting and actualities; 5(b) Informal education/Recreation and leisure; 7(c) Specials, mini-series or made-for-TV feature films; 7(d) Theatrical feature films aired on TV; 7(e) Animated television programs and films; 7(f) Programs of comedy sketches, improvisations, unscripted works, stand-up comedy; 7(g) Other drama; 10 Game shows; 11 General entertainment and human interest; 12 Interstitials; 13 Public service announcements; and 14 Infomercials, promotional and corporate videos.
4. The applicant proposed that in each year of the licence term, 100% of the programming of Eureka! HD would be broadcast in HD format.

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<sup>1</sup> The Category 2 services are defined in *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000.

## **Interventions**

5. The Commission received an intervention in opposition to the application by Rogers Cable Communications Inc. (Rogers) and comments by 2953285 Canada Inc. (2953285 Canada) and Astral Television Networks (Astral), a division of Astral Broadcasting Group Inc. Rogers also opposed the six other applications by High Fidelity for national, English-language Category 2 HD services considered in this proceeding.

### **Rogers**

6. Rogers, the licensee of cable broadcasting distribution undertakings serving customers in Ontario, New Brunswick, Newfoundland and Labrador, questioned the Commission's policy of including unlaunched Category 2 services in its application of the competitiveness test for assessing requests to add foreign English- and French-language services to its lists of eligible satellite services (the Lists), as set out in Public Notice CRTC 2000-173.<sup>2</sup> Under that policy, the Commission precludes the addition of a foreign service that can be considered either totally or partially competitive with any Canadian specialty or pay television services whose licence applications have been approved by the Commission, including launched and unlaunched Category 2 services.
7. Rogers argued that the approval of all High Fidelity's applications would result in the applicant's occupying a wide range of programming genres. Rogers further contended that High Fidelity could take up to five years to implement these services, thus preventing the addition of any similar non-Canadian programming services to the Lists for that period and depriving Canadians of diversity and choice in digital programming services. Finally, Rogers submitted that the Commission should reconsider its policy framework governing Category 2 services before granting additional licences to High Fidelity.

### **2953285 Canada**

8. 2953285 Canada is the licensee of Discovery Channel, a Category 1 specialty service. 2953285 Canada indicated that the genre of programming the applicant proposes to offer is already provided in analog and HD formats by Discovery Channel, which offers programming dedicated to the exploration of science, technology, nature, the environment and adventure. 2953285 Canada submitted that "if the 'look and feel' of a proposed service is similar to that of an existing pay or specialty service, this must be taken into account in determining whether it is [...] competitive."
9. 2953285 Canada also submitted that HD is not a genre and that a service should not be licensed on that basis alone.

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<sup>2</sup> *Call for proposals to amend the lists of eligible satellite services through the inclusion of additional non-Canadian services eligible for distribution on a digital basis only*, Public Notice CRTC 2000-173, 14 December 2000.

## **Astral**

10. Astral operates The Movie Network and MPix, two English-language pay television programming undertakings that provide general interest theatrical movie-based services in eastern Canada. Astral noted that under the Commission's licensing framework for new specialty and pay services, "the Commission has, in authorizing Category 2 applications, established restrictions on certain proposed services to ensure that they will not be directly competitive with existing pay, specialty and Category 1 digital channels." Astral proposed that Eureka! HD be subject, by condition of licence, to a 15% limitation on programs from category 7(d).

## **Applicant's response**

11. In response to Rogers' intervention, High Fidelity maintained that the policy issues raised by Rogers are beyond the scope of its application for the proposed Category 2 service. High Fidelity added that Rogers' request should be addressed in the context of the Commission's review of the regulatory framework for discretionary services announced in *CRTC 3-Year Work Plan 2006-2009*, 28 April 2006 (the 3-Year Work Plan).
12. With regard to 2953285 Canada's submission, High Fidelity noted that the Commission approved applications for Discovery Science Channel and Canadian Science Channel,<sup>3</sup> Category 2 services that, according to the applicant, proposed essentially the same nature of service as that being proposed for Eureka! HD.
13. High Fidelity submitted that 2953285 Canada does not want the Commission to apply the standard criteria (i.e., the nature of the service, the genre of programming, the language of operation and the target audience) in assessing whether Eureka! HD, as proposed, could be directly competitive with an existing pay or specialty service or with any Category 1 service, but rather wants the Commission to adopt a more subjective "look and feel" standard that would make it impossible for future Category 2 pay or specialty television service applicants to know if their proposed television services are competitive with existing analog television services. High Fidelity also stated that the fact that Eureka! HD will be an all-HD television service should be a positive factor in the Commission's decision.
14. Finally, in response to Astral's intervention, High Fidelity indicated its willingness to accept a condition of licence requiring that not more than 15% of all programming be drawn from category 7(d).

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<sup>3</sup> See *Discovery Science Channel*, Decision CRTC 2000-550, 24 November and 14 December 2000, and *Canadian Science Channel – Category 2 specialty service*, Broadcasting Decision CRTC 2002-264, 4 September 2002.

## Commission's analysis and determinations

15. In *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000, the Commission implemented a competitive, open-entry approach to licensing Category 2 services. While the Commission does not consider the impact that a Category 2 service might have on an existing Category 2 service, it does seek to ensure that Category 2 services do not compete directly with any existing pay or specialty television service, including any Category 1 service.
16. In *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000, and *Corrected Appendix 2*, Public Notice CRTC 2000-171-1, 6 March 2001 (Public Notice 2000-171-1), the Commission adopted a case-by-case approach in determining whether a proposed Category 2 service should be considered directly competitive with an existing pay or specialty service, including any Category 1 service. The Commission examines each application in detail, taking into consideration the proposed nature of service and the unique circumstances of the genre in question.
17. The Commission notes that, as indicated by the applicant, the Commission has previously approved applications for new Category 2 undertakings devoted to science and technology. The Commission is of the view that although the type of programming proposed by the applicant would overlap to some extent with that of Discovery Channel, it would not be directly competitive with the analog specialty service given that Discovery Channel's genre also includes nature, the environment and adventure.
18. The Commission also notes that in response to Astral's intervention the applicant indicated that it would abide by a 15% limitation on category 7(d) programming. The Commission is imposing a **condition of licence** to that effect, as set out in the appendix to this decision.
19. Finally, while the Commission has noted the concerns raised by Rogers, the Commission finds that these issues are not directly relevant to its consideration of the present application. As announced in the 3-Year Work Plan, the Commission intends to review the framework for discretionary services and is of the view that the matters raised in Rogers' intervention may be more appropriately discussed in that context.
20. In light of the above, the Commission is satisfied that the application is in conformity with all applicable terms and conditions announced in Public Notice 2000-171-1. Accordingly, the Commission **approves** the application by High Fidelity HDTV Inc., on behalf of a corporation to be incorporated, for a broadcasting licence to operate the national English-language Category 2 high definition specialty programming undertaking Eureka! HD.

21. The Commission reminds the applicant that if it wishes to enter at any time into an agreement with non-Canadian independent producers regarding the supply of programming or the use of a licence trademark, it must comply at all times with the *Direction to the CRTC (Ineligibility of non-Canadians)*, P.C. 1997-486, 8 April 1997, as amended by P.C. 1998-1268, 15 July 1998 (the Direction). Accordingly, the Commission has imposed a **condition of licence**, as set out in the appendix to this decision, that requires the licensee to file, for the Commission's prior review, a copy of any programming supply agreement or licence trademark agreement it intends to enter into with a non-Canadian party, in order to ensure that the licensee complies at all times with the Direction.
22. The licence will expire 31 August 2013 and will be subject to the **conditions** set out in Public Notice 2000-171-1, as well as to the **conditions** set out in the appendix to this decision.

### **Issuance of the licence**

23. A licence will be issued once the applicant has satisfied the Commission, with supporting documentation, that the following requirements have been met:
  - an eligible Canadian corporation has been incorporated in accordance with the application in all material respects;
  - the applicant has entered into a distribution agreement with at least one licensed distributor; and
  - the applicant has informed the Commission in writing that it is prepared to commence operations. The undertaking must be operational at the earliest possible date and in any event no later than 36 months from the date of this decision, unless a request for an extension of time is approved by the Commission before 2 February 2010. In order to ensure that such a request is processed in a timely manner, it should be submitted at least 60 days before that date.

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 2007-49

### Conditions of licence

1. The licence will be subject to the conditions set out in *Introductory statement – Licensing of new digital pay and specialty services – Corrected Appendix 2*, Public Notice CRTC 2000-171-1, 6 March 2001.
2. The licensee shall provide a national, English-language Category 2 high definition specialty programming service that will consist of specialty programming exploring issues related to science and technology.
3. The programming shall be drawn exclusively from the following categories set out in item 6 of Schedule I to the *Specialty Services Regulations, 1990*, as amended from time to time:
  - 1 News
  - 2 (a) Analysis and interpretation
  - (b) Long-form documentary
  - 3 Reporting and actualities
  - 5 (b) Informal education/Recreation and leisure
  - 7 (c) Specials, mini-series or made-for-TV feature films
  - (d) Theatrical feature films aired on TV
  - (e) Animated television programs and films
  - (f) Programs of comedy sketches, improvisations, unscripted works, stand-up comedy
  - (g) Other drama
  - 10 Game shows
  - 11 General entertainment and human interest
  - 12 Interstitials
  - 13 Public service announcements
  - 14 Infomercials, promotional and corporate videos
4. No more than 15% of all programming broadcast during the broadcast week shall be drawn from category 7(d).
5. In order to ensure that the licensee complies at all times with the *Direction to the CRTC (Ineligibility of non-Canadians)*, P.C. 1997-486, 8 April 1997, as amended by P.C. 1998-1268, 15 July 1998, the licensee shall file, for the Commission's prior review, a copy of any programming supply agreement and/or licence trademark agreement it intends to enter into with a non-Canadian party.

For the purposes of the conditions of this licence, including condition of licence no. 1, *broadcast day* refers to the 24-hour period beginning each day at 6 a.m., or any other period approved by the Commission.

