



Broadcasting Public Notice CRTC 2007-33

Ottawa, 30 March 2007

Exemption order respecting certain third-language television undertakings

In this public notice, the Commission exempts from the requirements of Part II of the Broadcasting Act and any regulations made thereunder, certain television programming undertakings that provide programming services in third-languages to broadcasting distribution undertakings for distribution on a digital basis.

Introduction

1. Section 9(4) of the *Broadcasting Act* (the Act) states:

The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

2. In *Call for comments on a proposed exemption order respecting certain third-language television undertakings*, Broadcasting Public Notice CRTC 2006-151, 22 November 2006 (Public Notice 2006-151), the Commission sought comments on a proposed exemption order that would exempt from regulation certain television programming undertakings that provide programming services in third languages and would be licensed as third-language ethnic Category 2 pay and specialty services. The Commission was of the view that such an approach would serve to encourage and expedite the entry of new Canadian third-language services and contribute to greater diversity in the broadcasting system.
3. The proposed exemption order reflected the approach set out in *Revised approach for the consideration of broadcasting licence applications proposing new third-language ethnic Category 2 pay and specialty services*, Broadcasting Public Notice CRTC 2005-104, 23 November 2005 (Public Notice 2005-104). In Public Notice 2005-104, the Commission established an open entry approach to third-language ethnic Category 2 pay and specialty services, defined as those services that devote at least 90% of their program schedules to programming in languages other than English or French. To ensure that this new approach would not have an undue negative impact on the existing analog ethnic specialty services (the analog services) and on the ability of those services to meet their more stringent Canadian program exhibition and spending requirements, the Commission determined that a third-language ethnic Category 2 service that is a general interest service, and that proposes to broadcast 40% or more of its program schedule in the

language of any of the analog services (i.e., Cantonese, Greek, Hindi, Italian, Mandarin, or Spanish), would be subject to a buy-through requirement. This means that a broadcasting distribution undertaking (BDU) wishing to distribute such a Category 2 service would be authorized to do so only to subscribers who also subscribe to the corresponding analog service. The Commission defined a general interest service as one that, unlike a niche service, offers programming from a broad spectrum of program genres and categories.

4. The Commission's proposed exemption order set out in Public Notice 2006-151 contemplated exempting those third-language services that broadcast less than 40% of their programming in the languages of the analog services, subject to programming and distribution criteria that essentially mirror the licensing framework for third-language ethnic Category 2 services.
5. The Commission received comments from the Canadian Association of Broadcasters (CAB), Rogers Cable Communications Inc. (Rogers) and Ethnic Channels Group Limited (ECGL). ECGL holds licences and authorities for third-language Category 2 services.
6. After considering the submissions, the Commission considers that the key issues are as follows:
 - means to ensure compliance with the terms of the exemption order;
 - impact of advertising on exempt services;
 - use of the secondary audio programming (SAP) channel; and
 - possible exemption of additional category 2 services.

Ensuring compliance with the exemption order

7. The CAB and ECGL expressed concern about the Commission's ability to ensure compliance with the exemption order and certain provisions of the Act. The Commission notes that the exemption criteria include provisions to address this concern. Specifically, criterion 6 requires the undertaking to identify itself on-air so that interested parties know how to contact the service. Criteria 10 and 11 require the undertaking to maintain tapes and to respond to any inquiry the Commission may have, which could include queries about compliance with ownership and/or programming requirements.
8. The Commission also notes that the high standard provision set out in the Act applies to all undertakings, whether licensed or exempt. Further, by virtue of criterion 8, exempt third-language undertakings must abide by sections 3 and 3.1 of the *Specialty Services Regulations, 1990*, which prohibit the broadcast of anything in contravention of the law, abusive comment, obscene or profane language or pictorial representation, or false or

misleading news. Criterion 9 further requires that the exempt undertaking adhere to the Commission's standard programming codes, including those addressing violence, adult content and sex-role stereotyping. In light of these provisions the Commission considers that the exemption order provides the means for the Commission to ensure compliance with the exemption order and the provisions of the Act, other than those provisions from which the undertaking is exempt.

Impact of advertising on exempt services

9. The CAB expressed concern about the impact of permitting the exempt undertakings to broadcast up to six minutes of local advertising. It noted that, in the case of exempt services, there is no provision for interveners to raise concerns in specific cases as is the case in the approach applied under Public Notice 2005-104.
10. The Commission notes that since the adoption of the open entry licensing framework set out in Public Notice 2005-104, the Commission has not denied any requests for local advertising from third-language applicants, despite opposing interventions. In every case, the Commission has determined that there would not be a significant impact on analog or Category 1 services. This is due in large part to the limited size of the third-language marketplace and the distribution environment in which Category 2 services operate. The Commission is of the view that the impact of permitting exempt third-language services to broadcast up to six minutes of local advertising will be minimal.

Use of the Secondary Audio Programming (SAP) Channel

11. The CAB expressed concern that services that make significant use of the SAP channel to provide programming accompanied by English or French language translations might have a negative impact on existing analog or Category 1 English- or French-language services. The Commission acknowledges this concern and will amend the exemption order so that a program that is accompanied by SAP in either English or French will not be counted as a third-language program for the purposes of this exemption order.
12. The Commission is satisfied that this provision will ensure that new exempt third-language undertakings do not have an undue negative impact on English- and French-language analog and Category 1 services, and that they are indeed focused on serving third-language ethnic audiences. The Commission notes that third-language services that wish to provide programming accompanied by English or French on the SAP channel may still apply for a licence under the framework set out in Public Notice 2005-104.

Possible exemption of other category 2 services

13. Rogers submitted that the Commission should establish an exemption order for all Category 2 services, which would permit such services to launch and operate for six months, after which time, they would be required to apply for a licence. The Commission is of the view that Rogers' recommendation falls outside the scope of the present proceeding and would be more appropriate for discussion in a proceeding with a broader mandate.

Other matters

Parties raised three other matters, which are addressed below.

Access to dispute resolution

14. ECGL expressed concern that exempt undertakings would not be able to avail themselves of the Commission's dispute resolution mechanisms. The Commission notes that, under section 12(2) of the *Broadcasting Distribution Regulations*, exempt programming undertakings are permitted to refer disputes with BDUs concerning carriage to the Commission.

Determining if a third-language service is general interest

15. The CAB raised concerns about the ability of the Commission and interested parties to assess the extent to which a proposed service is a niche or general interest service, for the purposes of the buy-through requirement described in paragraph 3 above. The Commission notes that, under the framework set out in Public Notice 2005-104, this distinction is only relevant in the context of services broadcasting more than 40% in the languages of the five analog services. Under this exemption order, such services will not be exempt and will still be required to apply for a licence under the licensing framework set out in Public Notice 2005-104.

Terms of criterion 5(b)

16. The CAB recommended that, if the Commission were to proceed with the exemption order, it should clarify the intent of criterion 5(b). Criterion 5(b) is designed to limit the potential negative impact of exempt services on the five analog ethnic specialty services and states that exempt services must broadcast less than 40% of their programming in any of the six languages of those services, namely: Cantonese (Fairchild), Greek (Odyssey), Hindi (Asian Television Network), Mandarin (Talentvision), Italian or Spanish (Telelatino).
17. The CAB submitted that the 40% should apply to the total amount of time a service may broadcast in any combination of those languages, to prevent a situation in which a service may broadcast 39% in each of two languages – (e.g. Spanish and Italian or Cantonese and Mandarin) – making it directly competitive with one of the analog services.
18. The Commission notes that nothing in the current licensing approach to third-language services would prevent a service from proposing to offer 39% Spanish and 39% Italian (or 39% Cantonese and 39% Mandarin) and still be approved without any requirement that it be packaged with the corresponding analog service. The Commission is of the view that there is no reason to apply a different approach to exempt third-language services.

Conclusion

19. The Commission is of the view that exempting certain third-language services as provided under the exemption order is an appropriate application of its obligation under section 9(4) of the Act. Further, the Commission is confident that this approach will expedite the entry of Canadian third-language services into the market by greatly reducing the delay that results from the Act's requirement that all applications for new licences be considered at a public hearing.
20. Accordingly, the Commission will proceed with the exemption order, amended as discussed above to address concerns about the potential impact of the use of the SAP channel. The Commission therefore exempts from regulation those television programming undertakings that provide programming services in third-languages to broadcasting distribution undertakings for distribution on a digital basis as provided under the exemption order set out in the appendix to this notice.
21. The Commission notes that its standard practice is to review exemption orders from time to time. In that context, the Commission notes that it would be prepared to review the third-language exemption order if there were evidence that exempt third-language services are having an undue negative impact on existing analog or Category 1 specialty or pay services, or if there is any evidence of patterns of non-compliance with the terms of the exemption order. Further, such periodic reviews would provide an opportunity for the Commission to assess the continued appropriateness of the exemption order and its criteria.

Implementation

22. Under exemption criterion 3, exempt third-language television programming undertakings are required to file certain information with the Commission. In the case of a new undertaking, such information is to be filed with the Commission when the undertaking is ready to commence operations. Exempt undertakings are also expected to advise the Commission promptly of any changes to this information. The Commission will publish a list of exempt services and make this list, together with the above information, available to the public on its website.
23. With respect to the distribution of these services by BDUs, as set out in Public Notice 2006-151, the Commission will amend the *Broadcasting Distribution Regulations* to specify that exempt third-language programming undertakings will be counted for the purposes of the requirement of section 18(14) of these regulations. Section 18(14) currently specifies that BDUs must distribute five unrelated Category 2 services for every related Category 2 service that they distribute. The Commission will also make amendments to the distribution and linkage rules to specify that the requirements imposed on BDUs choosing to offer third-language general-interest non-Canadian services under paragraphs 17 and 28 of the *Distribution and linkage requirements for*

Class 1 and Class 2 licensees, Broadcasting Public Notice CRTC 2006-135, 20 October 2006 and paragraph 10 of *Linkage requirements for direct-to-home (DTH) satellite distribution undertakings*, Broadcasting Public Notice CRTC 2006-134, 20 October 2006, also apply to the distribution of exempt third-language television programming undertakings. The Commission notes that an exempt undertaking will have to demonstrate that it falls within the parameters of those rules, for example, by providing the BDU with a current program schedule.

24. The Commission will refer to the *Specialty Services Regulations, 1990* or the *Broadcasting Distribution Regulations* to assist in its interpretation of any matter arising from any ambiguity with respect to the exemption order, its application, or its definitions.

Secretary General

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Appendix to Broadcasting Public Notice CRTC 2007-33

Exemption order respecting third-language television programming undertakings

By this order, pursuant to subsection 9(4) of the *Broadcasting Act*, the Commission exempts from the requirements of Part II of the Act and any regulations made thereunder, those persons carrying on broadcasting undertakings of the class defined by the criteria set out below.

Purpose

The purpose of these television programming undertakings is to provide programming services in third languages to broadcasting distribution undertakings for distribution on a digital basis.

Description

1. The Commission would not be prohibited from licensing the undertaking by virtue of any Act of Parliament or any direction to the Commission by the Governor in Council.
2. The undertaking meets all technical requirements of the Department of Industry (the Department) and has acquired all authorizations or certificates prescribed by the Department.
3. The undertaking files information with the Commission specifying: the name of the service provider, the name under which the service operates, the broadcasting distribution undertaking(s) that distribute the service, the service's contact information, including mailing address, telephone number, fax number, email address, and website, and the operating language(s) of the service. In the case of a new undertaking, the above information is filed with the Commission when the undertaking is ready to commence operations.
4. The undertaking provides its programming service only to broadcasting distribution undertakings that distribute the service to subscribers solely on a digital basis.
5. Of the programming broadcast by the undertaking in each calendar week:
 - (a) at least 90% of the programming on the main channel is in languages other than English, French, or a language of the Aboriginal peoples of Canada;
 - (b) at least 90% of any programming on the secondary audio programming channel is in a language other than English or French;

- (c) less than 40% is in any of the languages of Cantonese, Greek, Hindi, Italian, Mandarin or Spanish; and
 - (d) not less than 15% of all programs qualify as a Canadian program in accordance with the criteria established by the Commission in *Certification for Canadian programs – A revised approach*, Public Notice CRTC 2000-42, 17 March 2000, as amended from time to time.
6. The undertaking broadcasts at least one self-identifying notice per day, during a period of peak viewing, providing the name of the service and information on how viewers or other interested parties may contact its operator.
 7. The undertaking does not broadcast more than twelve (12) minutes of advertising material during each clock hour, of which no more than six (6) minutes may consist of local advertising.
 8. The undertaking's programming complies with sections 3, 3.1 and 6 of the *Specialty Services Regulations, 1990*.
 9. The undertaking's programming complies with section D.3 (Adult programming) of the *Industry code of programming standards and practices governing pay, pay-per-view and video on demand services*, the Canadian Association of Broadcasters' (CAB) *Sex-role portrayal code for television and radio programming*, the CAB's *Broadcast code for advertising to children*, and the CAB's *Voluntary code regarding violence in television programming*, as amended from time to time and approved by the Commission.
 10. The undertaking retains a clear and intelligible audio-visual recording of all of its programming for a period of four weeks following the date of broadcast, and shall provide this to the Commission on such terms as the Commission may request.
 11. At the request of the Commission, the undertaking provides the Commission with a response to any inquiry that relates to the undertaking.