



Broadcasting Decision CRTC 2008-249

Ottawa, 4 September 2008

High Fidelity HDTV Inc., on behalf of a company to be incorporated Across Canada

*Application 2008-0360-3, received 5 March 2008
Public Hearing in the National Capital Region
7 July 2008*

Diversion HD – Category 2 specialty service

*The Commission **denies** an application for a broadcasting licence to operate a new
Category 2 specialty programming undertaking.*

Introduction

1. High Fidelity HDTV Inc., on behalf of a company to be incorporated (High Fidelity), filed an application for a broadcasting licence to provide Diversion HD, a national, English-language Category 2 specialty service that would predominantly feature post-pay exhibition window, non-independent feature films that span all genres and related content such as interview, analysis and “behind the scenes” programs. The applicant stated that the service would also include post-pay exhibition window general-interest and entertainment programs for a broad audience. All of the programming would be in high definition (HD) format.
2. The applicant indicated that at least 90.01% of the feature films broadcast on the proposed service in each broadcast month would be post-pay exhibition window, non-independent feature films. The applicant further indicated that at least 50% of the programming broadcast in each broadcast month would be drawn from program category 7(d) Theatrical feature films aired on TV, and that no more than 15% of the programming broadcast in each broadcast month would be drawn from any one program category other than program category 7(d).¹
3. The Commission has 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 Category 1 or analog pay or specialty television 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. Where appropriate, in setting conditions of licence, the Commission prevents or limits the broadcast of specific types of programming to ensure that the service is not nor will become directly competitive with any existing Category 1 or analog pay or specialty television service.

¹ Program categories for Category 2 specialty services are set out in item 6 of Schedule 1 to the *Specialty Services Regulations, 1990*, as amended from time to time.

4. The Commission received interventions in opposition to this application from Astral Television Networks (Astral), the Canadian Association of Broadcasters (CAB), CTVglobemedia Inc. (CTVgm) and Score Media Inc. (Score), as well as a comment from Rogers Media Inc. (Rogers). The interventions and the applicant's replies to the interventions can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
5. After examining the application, the interventions and the applicant's replies to the interventions, the Commission considers that the primary issue arising from this application relates to whether the proposed service would be directly competitive with existing Category 1 or analog pay or specialty services.

Would Diversion HD be directly competitive with existing Category 1 or analog pay or specialty services?

6. In their interventions, Astral, the CAB and CTVgm submitted that the proposed service would be competitive with existing Category 1 or analog pay or specialty services. The CAB further submitted that the proposed service would be inconsistent with the Commission's long-standing definition of "specialty" service.
7. Astral, echoing concerns expressed by CTVgm, Rogers and Score in their interventions, argued that, given the proposed nature of service, Diversion HD would essentially be a general interest movie-based service. Astral further argued that the proposed service would therefore be directly competitive with the pay television programming undertaking known as MPix. In addition, Astral contended that the applicant failed to meet the requirements of Broadcasting Public Notice 2004-24, which requires applicants for Category 2 services to identify all existing specialty and pay services that could be considered partially competitive with the proposed service and to demonstrate why the proposed service should not be considered directly competitive with such services. Finally, Astral noted that although the Commission recently granted an exception to its policy that generally precludes the licensing of a service that directly competes with existing pay or specialty services by granting a new licence for an English-language movie-based pay service,² it has denied other such applications.
8. In reply to the interventions, High Fidelity argued that the proposed service would not be competitive with MPix since Diversion HD, by not being restricted to film and film-related content, would air more diversified programming than MPix. The applicant also indicated that the proposed service would not broadcast movies from the same exhibition window as services such as The Movie Network and MPix, which, in its view, would prevent the same movie from airing simultaneously on its service and on these existing pay services. Finally, the applicant submitted that Diversion HD would not be competitive with existing film-based pay channels since it would, by its very nature, need to be supported by advertisers and would thereby be more affordable to subscribers.

² See Broadcasting Decision 2006-193.

9. High Fidelity further stated that, should the Commission deem it necessary, it would be prepared to amend its proposed nature of service and conditions of licence as follows:
- by adding the following sentence to the condition of licence relating to Diversion HD's nature of service:

The Diversion HD service will also include post-pay exhibition window general-interest and entertainment programs for a broad audience that are ancillary to a post-pay exhibition window feature film-based service.
 - by removing program categories 6(a) Professional sports and 6(b) Amateur sports; and
 - by increasing the minimum required amount of category 7(d) programming from "at least 50%" to "at least 70%."
10. Finally, the applicant noted that, although technology cannot be invoked as a distinguishing genre of programming, the proposed service should be considered favourably by the Commission since the programming would be in HD format.

Commission's analysis and determinations

11. Although the applicant argued that the proposed service would be a Category 2 specialty service, and that being supported by advertisers and thereby being more affordable to consumers would distinguish it from pay services, the Commission considers that this is insufficient to make the service non-competitive with a pay service operating in a similar genre.
12. The Commission notes the modifications put forward by High Fidelity in its replies to the interventions. However, notwithstanding these modifications, the Commission considers that the applicant proposed a very broad and unrestrictive nature of service and failed to offer sufficient safeguards to ensure that the proposed service would not be competitive with existing pay services such as MPix.
13. Furthermore, as noted by the applicant, technology can not be invoked as a distinguishing genre of programming. Although one of the Commission's objectives is to promote the transition of the Canadian broadcasting system to digital and HD technology, the fact that the proposed service would broadcast in HD is insufficient to prevent it from being competitive with existing Category 1 or analog pay or specialty services.
14. Accordingly, the Commission considers that the proposed Category 2 service would compete directly with existing Category 1 or analog pay or specialty services.

Conclusion

15. In light of all of the above, the Commission **denies** the application by High Fidelity HDTV Inc., on behalf of a company to be incorporated, for a broadcasting licence to operate a national, English-language Category 2 specialty service to be known as Diversion HD.

Secretary General

Related documents

- *Applications for new pay television services*, Broadcasting Decision CRTC 2006-193, 18 May 2006
- *Revised procedures for processing applications for new digital Category 2 pay and specialty services*, Broadcasting Public Notice CRTC 2004-24, 8 April 2004
- *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000
- *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000

This decision 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>.