



Broadcasting Decision CRTC 2008-251

Ottawa, 4 September 2008

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

Across Canada

Application 2008-0284-4, received 21 February 2008

Public Hearing in the National Capital Region

7 July 2008

Canada HD Network – 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 Canada HD Network, a national English-language Category 2 specialty service that would offer high definition (HD) programming 24 hours per day, seven days a week, using the 1080i or 720p format or a superior format. The service would be a general interest television service providing programming from a variety of genres.
2. 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.
3. In the present case, the Commission received opposing interventions from Astral Television Networks (Astral), a division of Astral Broadcasting Group Inc., CTVglobemedia Inc. (CTVgm), the Canadian Association of Broadcasters (CAB), Score Media Inc. (The Score), and Canwest Media Inc. (Canwest), as well as a comment from Rogers Media Inc. (Rogers).
4. After considering the positions of the applicant and the interveners, the Commission finds that the issue to be determined in its evaluation of this application is whether the proposed service would be directly competitive with existing Category 1 or analog pay or specialty services.

Would the proposed service be directly competitive with existing Category 1 or analog pay or specialty services?

Interventions

5. Astral submitted that the proposed service would be competitive with both The Movie Network and MPix and potentially all other licensed Canadian pay and specialty services. It was therefore of the view that High Fidelity has not met the requirements set out in the Commission's policy with respect to Category 2 services. Specifically, Astral stated that the applicant has failed to meet the requirements of Broadcasting Public Notice 2004-24, which obliges applicants for Category 2 services to identify all existing specialty and pay services that could be considered partially competitive with the service they are proposing and to demonstrate why the proposed service should not be considered directly competitive. Astral added that the applicant's claim that Canada HD Network would not be directly competitive with any existing analog pay and specialty services because these are narrowcast or niche-oriented services while Canada HD Network would be a general interest service is in direct contradiction with the policy underlying the licensing of Category 2 services.
6. CTVgm submitted that approval of the application would result in the licensing of a service that competes with existing analog and Category 1 digital specialty services, contrary to the Commission's policies relating to genre exclusivity. CTVgm also expressed concern regarding the applicant's general interest nature of service and its assertion that Canada HD Network should not be subject to any kind of programming restrictions. CTVgm submitted that the proposal to offer 100% high-definition programming is simply not enough to truly distinguish the proposed service from existing pay, specialty and Category 1 digital channels.
7. The CAB stated that the Commission has defined specialty services so as to exclude the kind of general interest service being proposed and that the applicant has failed to demonstrate, as required, that its proposed service would not be competitive with existing licensed services. Consequently, the CAB submitted that licensing the proposed service would be contrary to long-standing Commission policies. Further, the CAB asserted that the applicant failed to provide sufficient justification for the Commission to grant an exception to its policies and that, accordingly, the application should be denied.
8. The Score stated that the failure of the applicant to satisfactorily articulate a niche or area of specialization should in and of itself be sufficient grounds for denial. Further, it was of the view that a differentiation based on mere technical distinctions is unacceptable and that the Commission has not treated new technologies as a differentiator in applying its 'one-to-a-genre' test. In short, The Score argued that the application should be denied unless the proposed service's nature of service could be successfully reconstructed so as to narrow the focus of the service to a specific niche.

9. Canwest submitted that the application should be denied, stating that the applicant has proposed no niche, no target audience, no genre and no programming category restrictions. Canwest submitted that the applicant's argument that the programming of Canada HD Network would be similar to, but substantially better than, the programming of HDNet is a non-issue because the eligibility of a foreign service to be added to the lists of eligible satellite services is not relevant to the competitiveness test applicable to proposed Category 2 services. Canwest added that it is the applicant's responsibility to demonstrate non-competitiveness with domestic services, that the applicant's proposed service runs directly counter to current policies, and that if approved the proposed service would be in a position to compete freely and head-to-head against any analog or Category 1 specialty service and yet would have far lower Canadian content obligations and no Canadian programming expenditure requirements.
10. Rogers commented that the applicant should be required to re-file its application and provide a definition of the undertaking's nature of service and appropriate programming limitations.

Applicant's reply

11. In its reply, High Fidelity agreed to accept a condition of licence stipulating that no more than 15% of the programming broadcast in each month would be drawn from any one program category. It also proposed not to draw programming from category 4 (Religion).¹

Commission's analysis and determination

12. The Commission notes that High Fidelity stated in its application that it was seeking the same programming flexibility for Canada HD Network as was accorded to the non-Canadian service HDNet when the Commission approved the application by the Canadian Cable Telecommunications Association for the addition of HDNet to the lists of eligible satellite services (the Lists) in Broadcasting Public Notice 2006-75. In that notice, the Commission stated:

...with respect to the suggestion that, if HDNet is added to the digital lists, Canadian broadcasters should be permitted to operate general interest HD specialty services, the Commission notes that there is nothing to prevent a potential applicant from applying for a licence to operate a general interest HD specialty service. The Commission would consider any such application on its merits and in the light of its generally applicable policies and practices.

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

13. The Commission finds that the applicant's position that the programming of Canada HD Network would be similar to the programming of HDNet and should therefore also be approved is a non-issue since the eligibility of a foreign service to be added to the Lists is not relevant to the competitiveness test applicable to proposed Category 2 services.
14. The Commission has considered the current application in the context of its current policies and practices and also in the context of today's rapidly changing environment. In light of the increasing availability of HD programming in Canada today, the Commission is of the view that the conditions that existed at the time of the authorization of HDNet no longer apply. Further, any new requests to add non-Canadian services to the Lists, including general interest HD services, would remain subject to the Commission's competitiveness test and would be examined in the context of the market as it currently exists.
15. With respect to the technical format of Canada HD Network, as noted by several interveners, 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 speciality services. The Commission's competitiveness test is based on programming and not on technical format.
16. Accordingly, the Commission has concluded, on the basis of the proposed service's extremely broad nature of service definition, that Canada HD Network does not meet the Commission's competitiveness policy and would be competitive with existing Canadian Category 1 and analog pay and specialty channels, contrary to the Commission's policies relating to genre exclusivity and its long-standing definition of specialty services. Specifically, the Commission is of the view that defining the service as 'general interest' is too broad and runs contrary to the Commission's policies respecting specialty services, which, by definition, should be targeted to a more specific and narrow niche, whether it be a specific programming genre or target audience. Further, the Commission finds that the 15% limitation on all categories proposed by the applicant in its reply to interveners is not sufficient in and of itself to prevent the service from changing its programming emphasis in the future so as to become competitive with one or more Category 1 or analog pay or specialty services.
17. Based on the foregoing, 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 programming undertaking to be known as Canada HD Network.

Secretary General

Related documents

- *Addition of HDNet to the lists of eligible satellite services for distribution on a digital basis*, Broadcasting Public Notice CRTC 2006-75, 15 June 2006
- *Revised procedures for processing applications for new digital Category 2 pay and specialty television services*, Broadcasting Public Notice CRTC 2004-24, 8 April 2004
- *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>.