Broadcasting Decision CRTC 2009-258

Route reference:
Broadcasting Public Notice 2008-108

Ottawa, 8 May 2009

Evanov Communications Inc., on behalf of a corporation to be incorporated
Winnipeg, Manitoba

Application 2008-1456-8, received 27 October 2008

Use of frequency 106.1 MHz by the new commercial FM radio station in Winnipeg

By majority decision, the Commission approves an application by Evanov Communications Inc., on behalf of a corporation to be incorporated, to operate its new English-language commercial FM radio station in Winnipeg at 106.1 MHz (channel 291C1) with an effective radiated power of 40,000 watts.

A dissenting opinion by Commissioner Suzanne Lamarre is attached.

Introduction

1. The Commission received an application by Evanov Communications Inc., on behalf of a corporation to be incorporated (Evanov) to operate its new English-language commercial FM radio programming undertaking in Winnipeg at 106.1 MHz (channel 291C1) with an effective radiated power (ERP) of 40,000 watts. The applicant had originally proposed to operate its new station at 104.7 MHz (channel 284B) with an average ERP of 6,500 watts.

2. The applicant filed this application further to the Commission’s direction in Licensing of new radio stations to serve Winnipeg, Manitoba, Broadcasting Decision CRTC 2008-195, 21 August 2008. In that decision, the Commission stated that it would only issue a licence for this station provided that the applicant submitted, within three months of the date of that decision, an amendment to its application proposing the use of another FM frequency and technical parameters that are acceptable to both the Commission and the Department of Industry (the Department).

3. The Commission received one comment in connection with this application from Native Communication Inc. (NCI). The intervention and the applicant’s reply to the comment can be found on the Commission’s website at www.crtc.gc.ca under “Public Proceedings”.

Canada
Commission’s analysis and determinations

4. In its intervention, NCI, licensee of CICY-FM Selkirk, expressed concerns over Evanov’s chosen frequency, which is third adjacent to CICY-FM. NCI stated that the new Evanov station has the potential to cause signal interference in the South Winnipeg area to its Selkirk station. NCI urged Evanov to consider an alternate frequency and failing that, to commit to correcting any interference between the two frequencies.

5. In its reply, Evanov committed to meeting the Department’s requirements as they relate to third adjacent channels by correcting any interference on these channels in a timely and cost-effective manner.

6. The Commission notes that it is the responsibility of the parties involved and of the Department to resolve any interference issues. The Commission also notes that the Department has deemed this application conditionally technically acceptable. The Commission is satisfied with Evanov’s commitment to resolve any interference caused by the new service on third adjacent frequencies.

Conclusion

7. In light of the above, the Commission, by majority decision, approves the application by Evanov Communications Inc., on behalf of a corporation to be incorporated to operate its new English-language commercial FM radio programming undertaking in Winnipeg at 106.1 MHz (channel 291C1) with an ERP of 40,000 watts.

8. The Department has advised the Commission that, while this application is conditionally technically acceptable, it will only issue a broadcasting certificate when it has determined that the proposed technical parameters will not create any unacceptable interference with aeronautical NAV/COM services.

9. The Commission reminds the applicant that pursuant to section 22(1) of the Broadcasting Act, no licence may be issued until the Department notifies the Commission that its technical requirements have been met and that a broadcasting certificate will be issued.

10. The Commission also reminds the applicant that it will only issue the licence, and the licence will only be effective once the applicant has satisfied the Commission, with supporting documentation, that an eligible Canadian corporation has been incorporated in accordance with the application in all material respects, and that the applicant has informed the Commission in writing that it is prepared to commence operations.

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.
Dissenting Opinion of Commissioner Suzanne Lamarre

1. I have read the decision of the majority of my colleagues, and although I have the greatest respect for their opinion, I am unable to agree with them.

2. In my opinion, Evanov Communications Inc. (hereinafter “the applicant” or “ECI”) has been unable to show that its application 2008-1456-8, as submitted on 27 October 2008, meets the relevant objectives of the Broadcasting Act. My opposition to ECI’s application stems from its choice of inappropriate technical parameters, the implementation of which would disturb the balance of the broadcasting system in the Winnipeg market. I wish to point out that my opposition in no way calls into question the relevance and quality of the programming that ECI intends to air in Winnipeg, for which it obtained the Commission’s approval on 21 August 2008, following a public hearing held in Winnipeg on 3 and 4 June 2008.

3. In light of the documents that the applicant submitted in support of its application and given the opposing intervention submitted on 11 December 2008 by Native Communication Inc. (hereinafter “the intervener” or “NCI”) as well as the applicant’s reply to this intervention, I would, for the reasons set out herein:
   - deny the applicant’s choice of frequency;
   - deny the power increase requested by the applicant;
   - direct the applicant to submit, within 180 days from the date of this decision, new technical parameters that would be acceptable to both the Commission, according to the criteria established below, and Industry Canada; and
   - immediately extend by one year the deadline to implement the undertaking, given the unusual situation arising from the unavoidable delays caused by these denials.

4. At the outset, I wish to warn the reader that what follows is detailed. The importance of the issue prevented me from writing any less. I thus invite those who may find such an analysis tiresome to go directly from this introduction to the conclusion, and I hope that by first reading the ending, they will find an incentive to read what led to such a conclusion.

Background

5. One cannot ignore the particular context surrounding ECI’s application. On 21 August 2008, the Commission approved the applicant’s initial application (2008-0060-9) to offer its programming in the Winnipeg market. Given that it approved, at the same time, two applications that proposed the use of the same frequency, the

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1 Broadcasting Decision CRTC 2008-195.
Commission directed ECI to submit new technical parameters within a specific timeframe. And this was done. My discussion concerns these new technical parameters, whose validity I am challenging.

6. It is worth quoting the excerpts from this decision that refer to ECI’s obligation to amend the technical parameters of its initial application:

**Summary – Broadcasting Decision 2008-195**
The Commission approves in part the application by Evanov Communications Inc., on behalf of a corporation to be incorporated, for a broadcasting licence to operate a new English-language commercial FM radio station to serve Winnipeg. Within 90 days of the date of this decision, the applicant must submit an amendment to the application proposing the use of an FM frequency other than 104.7 MHz (channel 284B) that is acceptable to both the Commission and the Department of Industry. [Emphasis added]

**Paragraph 32 – Broadcasting Decision 2008-195**
The application by Evanov proposing the use of the frequency 104.7 MHz was technically mutually exclusive with the application by NCI, which proposed the use of the same frequency. The Commission considers that the service proposed by NCI would make better use of that frequency than would the service proposed by Evanov. The Commission notes that alternative frequencies have been identified as being capable of serving the Winnipeg radio market. Accordingly, Evanov will be required to identify an alternative frequency to operate its proposed service. [Emphasis added]

7. It must be noted that the Commission had already made clear that an approval by Industry Canada in itself would be insufficient for the parameters to be considered acceptable, and that the Commission, for its part, had to be satisfied with the applicant’s new choice. From this, we can surmise that the Commission already considered that an approval by Industry Canada would not entirely guarantee that the Commission’s objectives are fulfilled.

**Legislative and regulatory framework**

8. Industry Canada and the Commission have distinct but complementary roles in the process of granting broadcasting licences. Briefly, Industry Canada ensures optimized management of broadcasting frequencies, a limited resource, while the Commission’s ensures that all citizens have access to quality diversified programming.
9. Industry Canada’s mandate flows from the *Radiocommunication Act*\(^2\) and from the regulations, rules and procedures adopted under this statute. In this case, the specific provisions that apply are section 5 of the *Radiocommunication Act* and subsections C-1.6-1 to C-1.6-4 of Industry Canada’s *Broadcasting Procedures and Rules, Part 3* (hereinafter *BPR-3*).

10. The Commission’s mandate flows from the *Broadcasting Act*.\(^3\) In analyzing any application, the Commission must ensure that the objectives of the *Broadcasting Act* are fulfilled. The list of objectives is long, and in the decisions that it makes, the Commission must constantly seek to reach a balance among some of these objectives. In this case, the objectives that should concern us primarily are the following, taken from section 3:

\[(d)\] the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(ii) encourage the development of Canadian expression by *providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity*, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view, [Emphasis added]

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, [Emphasis added]

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\(^3\) *Broadcasting Act*, S.C. 1991, c. 11.
(i) the programming provided by the Canadian broadcasting system should

(i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes, [Emphasis added]

(ii) be drawn from local, regional, national and international sources,

(iii) include educational and community programs,

(iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, [Emphasis added]

11. The Commission’s denial of an application whose technical parameters were previously approved by Industry Canada is neither a disavowal of Industry Canada’s jurisdiction nor interference in its jurisdiction where this denial is driven by the objectives of the Broadcasting Act. More importantly, not to at least consider this possibility would negate the very foundation of the Commission’s public consultation process and constitute a denial by the Commission to exercise its own jurisdiction in regard to monitoring the broadcasting system. As we have learned from caselaw, the Commission’s decision would then become ultra vires.4

12. To clarify, I would add that the reverse is not true. In other words, even if the Commission were acting to fulfill the objectives of the Broadcasting Act, it could not disregard a technical denial by Industry Canada and grant a broadcasting licence in spite of such a denial. Sections 5(1) and 22 of the Broadcasting Act, along with sections 5 and 6 of the Radiocommunication Act, confer exclusive authority on the Minister of Industry to determine acceptable standards for interference. Consequently, if Industry Canada concludes that its standards have not been met, the Commission may not approve the application. Since my purpose here is not to discuss that issue, I will limit my discussion to the framework established by the argument presented in paragraph 11.

13. Furthermore, in the great majority of cases, the parameters approved by Industry Canada will also be perfectly acceptable to the Commission. This should not surprise us. It would be a matter of great concern if the reverse were true.

14. Nevertheless, we should not deny or be surprised that situations do occur where simple adherence to Industry Canada’s standard is not necessarily sufficient to fulfill the Commission’s mandate. In my opinion, the facts that concern us in this case place us in just such a situation. Given the Commission’s duty to show due diligence in examining such applications, these situations require more than pure and simple acceptance, on these conditions alone, of Industry Canada’s approval.

15. Before we examine the details of the ECI application, I thus must clarify how the Commission, in my opinion, should analyze a situation to arrive at a sound decision when the technical parameters approved by Industry Canada appear to be incompatible with the objectives of the *Broadcasting Act*.

**Review criteria**

16. An application that will cause interference with the reception of another broadcasting licensee’s existing protected signal\(^5\) is *prima facie* contrary to the objectives of the *Broadcasting Act*. The purpose of granting new licences is to increase the programming offering, thereby benefiting the public, as set out in the objectives of Canadian broadcasting policy. It would therefore be paradoxical, to say the least, to grant a licence that would be to the detriment of the public’s reception of an incumbent’s signal. The burden of proof to the contrary rests with an applicant. Industry Canada’s technical approval, conditional or not, is obviously an important part of such evidence. This approval in itself, however, is not always sufficient evidence.

17. It would be very ill advised on the part of the Commission to consider only the issue of interference where Industry Canada has made a favourable decision concerning the technical parameters of the application. In such circumstances, the Commission must strike a fair balance between the interests of the parties, namely the applicant(s) and incumbent(s), and the public, since, as outlined in paragraph 10 above, under the *Broadcasting Act*, its duty is to ensure that the broadcasting system provides a variety of programming sources.

18. Where the Commission has before it a technical proposal that will cause interference with the reception of an incumbent’s existing protected signal, and where in addition, but not necessarily, the incumbent in question is challenging the applicant’s proposal, it thus becomes imperative that the applicant provide convincing evidence that, in this particular case, the proposal is a possible reasonable, if not the only, solution for the Commission to be able to make a decision with full knowledge of the facts.

19. Such evidence must not be limited to an assertion by the applicant, however sincere, to that effect. To be valid, this evidence, which involves both engineering and economic considerations, should include, in particular:

\(^5\) Protected signal means the whole area included within the perimeter of the protected contour, as defined in paragraph C-1.1.19 of the *BPR-3*. 
• a list of other possible solutions;

• a critical analysis of the feasibility of implementing these other solutions, including, in particular, their impact on incumbents;

• a comparative analysis of the efficiency of the proposed solution and that of the other solutions;

• a comparative analysis of the costs of the proposed solution and the costs of the other solutions, including, in particular, the foreseeable costs correction that will be generated by the proposed solution;

• the reasons cited for setting aside the other possible solutions; and

• details of an action plan for implementing measures that will minimize and/or correct any impairments to the reception integrity of any incumbent’s existing protected signal.

20. Obviously, providing such evidence will have a cost, and I am perfectly aware of this. However, the same may be said for every aspect of every broadcasting licence application filed with the Commission! What logical basis could there be for avoiding or setting aside a detailed engineering and economic analysis if that analysis is necessary to prove that an application is being made in line with the objectives of the *Broadcasting Act*? How is such a requirement different in nature from the requirement that every applicant provide convincing evidence that there is a demand, in the target market, for the programming that it wants to provide? Or the requirement that its business plan be feasible? Or that the proposed programming will contribute to fulfilling the objectives of the *Broadcasting Act*, by being, for example, of service to the local population?

21. To be very frank, not only do I see no logic in absolving an applicant of the requirement of the kind described in paragraph 19, but I also think that with the current scarcity of FM frequencies in most Canadian urban markets combined with the sometimes aggressive creativity of certain applicants or their audacious consultants regarding the technical rules and established principles of sound spectrum management, the Commission must show greater vigilance in considering the proposed solutions.

22. There are also a number of benefits to providing such evidence. In the course of its research, the applicant may realize that another approach would meet its needs just as effectively, or perhaps more so, and would be a better investment of the applicant’s resources. The applicant might also discover innovative solutions that would lead to a better use of the frequencies available, a sought-after benefit that the Commission takes into account in examining applications.

23. It is not up to the Commission to convince itself, by filling in the gaps in applications by means of studies conducted by its own staff, that the criteria described in paragraphs 18 and 19 above are being respected. On the one hand, such studies would not be admissible
evidence and would not be available to the public for comment. On the other hand, there is a well-known rule to the effect that evidence required to convince the Commission to approve an application must be provided by the applicant, not by the Commission.

24. Finally, instead of providing the requested evidence, the applicant could always conclude an agreement with any incumbent that might experience the interference described earlier.

The application filed by ECI

25. With regard to the application filed by ECI, we will base our analysis on the criteria we have established above, taking into account the documents submitted by the applicant, the intervener and Industry Canada, and also in light of existing situations and principles that the Commission, in its role as a specialized administrative tribunal, has the duty to consider when carrying out its mandate.

26. **We must therefore answer the following questions:**

1) Will the proposed parameters cause interference to the protected signal of an incumbent?

2) Has ECI provided convincing evidence that the proposed solution is a possible reasonable, if not the only, solution?

3) Considering the answers obtained in 1) and 2), does the application comply with the Commission’s requirement that the amended technical parameters be to its satisfaction?

**1) Will the proposed parameters cause interference to the protected signal of a broadcasting licensee?**

27. The answer to this question is “yes.”

28. Industry Canada’s rules recognize that interference exists between two frequencies that are 600 kHz apart (known as third adjacent frequency) since these rules clearly address such situations. Noting this interference and following the rules stated in subsection C-1.6 of the *BPR-3*, Industry Canada added a condition to its technical acceptance of ECI’s proposed parameters to protect the NCI signal, CICY-FM. The condition reads as follows:

The proposed undertaking is third adjacent to CICY-FM on channel 288C1 in Selkirk, MB. The applicant will be responsible to remedy complaints of third adjacent channel interference within his 100dBu contour which is situated between CICY-FM’s 80dBu and 54dBu contours.
29. In recent years, the experience of several consultants and broadcasters in markets where the broadcasting spectrum is congested clearly shows that the risk of such interference exists and must be neither neglected nor minimized. This risk becomes almost a certainty if the two signals are not transmitted from the same site, as is the case here.

30. The method stipulated in the BPR-3 for correcting this situation puts the incumbent at a disadvantage in all cases. In fact, the method does not eliminate the interference zone. The interference is there permanently, and this zone is irremediably lost if the applicant’s transmission parameters remain unchanged. What the method provides for is the implementation of ad-hoc corrective action for listeners who complain about this interference, with the result that only listeners who are already tuning to the incumbent’s station can benefit from this correction. This correction usually involves replacing a receiver for the affected listener.

31. But what happens to the incumbent’s potential for increasing its audience? This potential is, for all intents and purposes, eliminated in the interference zone because any potential new listener will first have to own an efficient receiver that is immunized against this type of interference in order to tune in to the incumbent’s signal.

2) Has ECI provided convincing evidence that the proposed solution is a possible reasonable, if not the only, solution?

32. Given the evidence on the record, the answer to this question is “no.”

33. Indeed, Industry Canada has deemed ECI’s proposed parameters to be conditionally technically acceptable. This technical approval therefore means that the said parameters meet the objectives of the Radiocommunication Act and the specifications of the BPR-3, and we must take this approval into account to a certain extent. The extent to which we take the approval into account, however, should end where the objectives of the Broadcasting Act are no longer being fulfilled.

34. Note the following:

- the position expressed in paragraph 16: “An application that will cause interference with the reception of another broadcasting licensee’s existing protected signal is prima facie contrary to the objectives of the Broadcasting Act.”;

- Broadcasting Decision 2008-195 specified that the proposed frequency had to satisfy both Industry Canada and the Commission. The Commission’s role is to assess the appropriateness of the parameters in terms of the objectives of the Broadcasting Act, and these objectives are different from the obligations governing Industry Canada;
• at the time of the Winnipeg public hearing in June 2008, the applicant did not identify 106.1 MHz as an alternative frequency, but rather indicated that it had identified three frequencies available in Winnipeg, namely 106.3 MHz, 104.7 MHz and 88.7 MHz; ⁶

• at the time of the Winnipeg public hearing, the applicant argued that each of these three frequencies would enable it to implement, without changes, the business plan it had submitted to the Commission at that time; and

• at the time of the Winnipeg public hearing in June 2008, the frequency 106.3 MHz received conditional technical approval. This approval had been obtained by Newcap Inc. for power considerably greater than that requested by ECI, and there is no reason to believe that anything has changed in this regard.

35. The Commission could therefore legitimately expect ECI to apply for frequency 106.3 MHz and not frequency 106.1 MHz, as was the case. In light of this, one could have then expected the applicant to make the effort to justify or at the very least explain the reason for this change. Of all the documents on the public record, we found only one passage that came close to, without actually being, an explanation. This passage is found in the applicant’s engineering brief and reads as follows:

The last remaining vacant allotment for Winnipeg, CH292C, is known to be hampered by NAV/COM interference concerns. It is therefore proposed to replace it with CH291C1. NAVCAN has precleared the frequency at a power level of 50 kW ERP. ⁷ [Emphasis added]

36. This statement, which is not accompanied by any analysis, study, NAVCAN correspondence or any other documents, leaves me perplexed – first of all, because the statements and conclusions contained in an engineering brief must be based on objective, verifiable and verified data and facts, and nothing of this nature was provided in this case; secondly, because the source of the “knowledge” to which the engineering brief alludes is not identified; and lastly, because this statement and its corollary, namely that the CH291C1 allotment (or frequency 106.1 MHz) is more compatible with NAV/COM frequencies than the CH292C allotment (or frequency 106.3 MHz), are inconsistent with several other documents found on the public record of the June 2008 public hearing and of this application.

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⁶ Transcripts of proceedings before the Canadian Radio-television and Telecommunications Commission. Subject: Competing radio applications and other broadcasting applications, Winnipeg, Manitoba, Vol. 1, 3 June 2008, paragraph 496.

⁷ teknyx Limited, Engineering Brief for a New FM Station in Winnipeg, Manitoba, applicant Evanov Communications Inc. OBCI, 23 October 2008, section 2. The frequency equivalents are as follows: 292: 106.3 MHz; 291: 106.1 MHz.
37. These documents, that is, the technical approvals of frequency 106.3 MHz for Newcap Inc. in 2007,\textsuperscript{8} of 104.7 MHz for ECI in 2008 for its initial application,\textsuperscript{9} and of 106.1 MHz for ECI,\textsuperscript{10} all include a condition regarding compatibility with NAV/COM frequencies, a condition that is perfectly identical in all cases and that reads as follows:

Since the Department [of Industry]'s analysis has indicated a potential for interference to aeronautical NAV/COM services in the area, technical acceptability is conditional upon satisfactory resolution of any interference to these services revealed by special monitoring during on-air trials. The applicant will be apprised of on-air testing conditions following a favourable decision by the CRTC. [Emphasis added]

38. Industry Canada imposes this standard condition on numerous applications to ensure compatibility between the broadcasting service and that of aeronautical communications. Moreover, the Commission reiterates this condition in its own decisions in recognition and in support of the powers of Industry Canada. This condition, as I emphasized previously, indicates that interference problems will be revealed thanks to “special monitoring during on-air trials”. The applicant cannot claim to have knowledge of this interference problem without having gone on air.

39. The use of frequency 106.1 MHz as proposed by ECI is therefore neither more nor less compatible with NAV/COM frequencies than that of frequency 106.3 MHz proposed a year ago by Newcap Inc. While it is true that the parameters submitted by Newcap Inc. are not perfectly identical to those submitted in this application\textsuperscript{11} and that the comparison then is limited, one fact cannot be ignored: frequency 106.3 MHz can be operated in Winnipeg in a manner that is conditionally acceptable for Industry Canada, subject to on-air trial to verify compatibility with NAV/COM frequencies. The requirements are the same as those imposed for the operation of frequency 106.1 MHz. There is therefore no acceptable rationale for preferring the use of frequency 106.1 MHz over frequency 106.3 MHz.

40. What I also find puzzling is that ECI has requested a substantial power increase in its new application. While a maximum power of 10 kW was adequate for the implementation of its business plan in June 2008, the applicant is requesting, in addition to frequency 106.1 MHz, a 400% power increase over that approved in Broadcasting Decision 2008-195.

\textsuperscript{11} Mainly regarding the details of the transmission site and the antenna radiation pattern.
41. In that decision, the Commission asked the applicant to choose another frequency. There was no mention of a change in power. That being said, some flexibility is usually necessary when there is a change in frequency. It may prove necessary to change the power at the same time, for example, to prevent or overcome an interference situation, or to compensate for a change of site due to a limited choice of frequencies. Which is it in this case?

42. The choice of site remains the same, and the applicant raised no interference issues that could explain such a change. The only explanation provided is in the passage of the engineering brief quoted in paragraph 35, namely, that NAVCAN preauthorized a power level of 50 kW from the site proposed for the use of frequency 106.1 MHz, which led the applicant to request 40 kW given a limitation caused by the protection granted to a U.S. licensee. Should I conclude that NAVCAN dictates to the applicant the power that is compatible with its business plan? I fail to see the logic behind this.

43. Even assuming the possibility of incompatibility between the applicant’s use of frequency 106.3 MHz and NAV/COM frequencies, which, I stress, was not demonstrated by the applicant, other options were open to it to accommodate both NAV/COM frequencies and that of the incumbent, NCI. Faced with this situation, the applicant could have considered, in order to effectively operate frequency 106.3 MHz, one or a combination of the following options, among others:

- change its choice of transmission site;
- reduce the effective radiated power;
- amend the radiation pattern and/or the height and/or the tilt and/or the polarization of its antenna;
- contact NAVCAN to coordinate and, if possible, amend the affected NAV/COM frequencies.

44. Why could the applicant not choose frequency 106.3 MHz? Why is the applicant requesting a power increase? These questions remain unanswered.

45. Given all the elements raised and the noted lack of numerous explanations that were essential to support its application, the applicant failed to demonstrate that its power and frequency choices constituted a reasonable solution, let alone the only reasonable solution possible for the implementation of its new station in Winnipeg.

3) Considering the answers obtained in 1) and 2), does the application comply with the Commission’s requirement that the amended technical parameters be to its satisfaction?

46. The answer to this question, in my opinion, is clearly “no.”
47. There will be interference with the reception of an incumbent’s protected signal, yet the applicant provided no evidence to show that the proposed parameters are necessary. No explanation or simple insinuation is given regarding alternative solutions that are less harmful to the reception of incumbents’ signals.

48. Let it be very clear that my comments in no way call into question Industry Canada’s rules. With regard to and in line with these rules, I believe that operating a new frequency that will be third adjacent to that of an incumbent should be a last resort. To ensure that the objectives of the *Broadcasting Act* are respected, this last resort should be justified by the applicant and be accompanied not only by a commitment to Industry Canada to remedy interference complaints, but also by explanations, for the benefit of the Commission, regarding the manner in which the effect of this interference on incumbents’ signals will be minimized, if not eliminated.

49. What is at stake here, therefore, is not limited to compliance with the rules enacted pursuant to the *Radiocommunication Act*, but extends to the continuous availability of the different broadcasting services already established, hence to the diversity objective of the *Broadcasting Act*. Moreover, without making it a deciding factor in itself, it should be pointed out that NCI, the incumbent at risk in this case, contributes in a unique way to the achievement of the objectives of the *Broadcasting Act* in terms of Native programming and reflection.

50. The lack of evidence to support the application is also aggravated by the opportunity the applicant missed to provide at least a partial explanation of its choice in reply to NCI’s intervention.

**NCI’s intervention and the applicant’s reply**

51. NCI expressed its opinion clearly, stating that it preferred frequency 106.3 MHz and expected that it would be chosen. I fully agree with NCI that the choice of frequency 106.3 MHz should be imposed in the absence of evidence to support the contrary.

52. The applicant’s choices are not innocuous. The risk of interference with the reception of NCI’s protected signal is greater if frequency 106.1 MHz is chosen rather than frequency 106.3 MHz. Moreover, an effective radiated power of 40 kW will create a wider interference zone than an effective radiated power of 10 kW, and the interference will then, in a certain section of this zone, be more difficult to correct. It is with good reason that NCI alerted the Commission by intervening. The intervener’s comments regarding the applicant’s proposal can be summarized as follows:

1. The applicant should have provided, under *BPR-3*, a copy of its engineering brief, with a letter, to NCI.

2. The applicant should have requested frequency 106.3 MHz, and not frequency 106.1 MHz, since it had already identified the former as an alternative frequency.
3. In 1996, when it applied for 105.5 MHz, the frequency currently occupied by CICY-FM, NCI had recognized that frequency 106.3 MHz might one day be used.

4. The risk of interference with the reception of the CICY-FM signal is substantial and the applicant should be obliged by the Commission to correct it.

53. On the first point, the intervener is mistaken. While such a requirement used to exist for situations like this one, and one may wish in certain respects that it still existed, this is not the case. On points 2 to 4, I completely agree with the intervener since, unlike most of my colleagues, I am not satisfied with the applicant’s commitments to Industry Canada. On the contrary, I am concerned and the applicant’s response is a major source of my concern.

54. The applicant’s response is as brief as it is disconcerting. Regarding the first and third points raised by the intervener, the applicant replied as follows:

   ECI has consulted with our broadcasting engineer […], who informs us there is no need to advise incumbent broadcasters of our intention to use a third adjacent signal, and that Industry Canada treats third and fourth adjacencies in the same manner. In any event, Industry Canada has also ruled our application to be technically acceptable.

55. The first sentence of this quotation is accurate, but it is also inadequate. Firstly, regarding Industry Canada’s equal treatment of third and fourth adjacent frequencies, it is important to point out that this does not mean that the result is the same in the field. While Industry Canada’s rules simplify matters here by not having a separate rule for each case, they cannot bend the laws of physics. It has been observed many times that, in most situations, the risk of interference between distant frequencies of 800 kHz (fourth adjacent) is much lower than that between distant frequencies of 600 kHz (third adjacent).

56. If Industry Canada offers what could be described as overprotection for fourth adjacent frequencies, that is its choice. But this does not change the fact that these situations are less problematic for an incumbent than those involving third adjacent frequencies. The applicant should have acknowledged this.

57. The intervener admitted in its intervention that it already recognized, when it submitted its application in 1996, the interference problems that the possible operation of frequency 106.3 MHz in Winnipeg could cause to its station. This was a clear overture on the part of NCI toward ECI, an overture that unfortunately went unheeded since the applicant does not even raise this comment in its response.

58. Lastly, this was a golden opportunity for the applicant to justify to the Commission its change of position (still unexplained to this day) regarding its choice of frequency identified during the public hearing, to convince the Commission that this choice was
compatible with the objectives of the Broadcasting Act and to reassure the intervener, as well as the Commission, that the proposed solution had been analyzed and carefully thought out, that it was acceptable under the circumstances and that it would be implemented with the least possible harm to the intervener. The applicant instead took refuge behind Industry Canada’s approval without realizing that the objectives of the Broadcasting Act, which the Commission must consider, are also at stake.

59. Regarding the measures necessary to correct the interference that NCI will experience, ECI refers us back again to Industry Canada’s requirement. While the condition set by Industry Canada, cited in paragraph 28, establishes the result (correct interference situations identified by complaints), it does not prescribe any terms, leaving them to ECI’s discretion. As the old saying so aptly puts it, “the devil is in the details.” What will these terms be?

60. In its intervention, NCI explains, at length and in detail, the extent of the reception problems it anticipates if ECI’s application is approved. In response to NCI’s serious concerns, the applicant indicated that “ECI submits it is committed to meeting the requirements set out by Industry Canada as they relate to interference on Third Adjacent channels. ECI will correct any such interference (if there is found to be any) in the most timely and cost-effective manner possible.” [Emphasis added]

61. This part of the applicant’s response is very disturbing for several reasons. Firstly, the innuendo, in brackets and underlined above, minimizes almost to the point of denying the risk of interference – interference nevertheless ascertained many times in actual fact.

62. Secondly, the expression “in the most timely and cost-effective manner possible” raises more questions than it answers, given the reply as a whole. If the applicant doubts the possibility of interference, how will it be ready to deal with it as soon as possible? The “most […] cost-effective manner” refers to whom and what: the lowest cost for the applicant or for the incumbent? How will the waiting time of NCI’s listeners and the temporary loss of this audience be accounted for? What solutions will be proposed? Can the possible solutions go as far as a change of frequency, a change of site or taking its signal off the air temporarily? At what amount does the applicant evaluate the correction measures, in both the best and worst case scenarios? What impact will these measures have on its business plan, in both the best and worst case scenarios?

63. Thirdly and lastly, the difference in tone between the public hearing in June 2008 and this reply could not be greater.

64. At the public hearing, in response to a question from Vice-Chairman Katz on the same subject of third adjacent frequencies, an open, conciliatory and cooperative tone transpires from the reading of the written transcript. The applicant even recognizes

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12 The frequency 104.7 MHz initially requested by the applicant was also third adjacent with a licensee other than NCI.
13 Transcript of proceedings before the Canadian Radio-television and Telecommunications Commission. Subject: Competing radio applications and other broadcasting applications, Winnipeg, Manitoba, Vol. 1, 3 June 2008, paragraphs 494 to 498.
implicitly therein that, after going on air, it could change frequency or even sites, if necessary.

65. Here, the applicant minimizes the risks and does not make an effort to reassure the intervener or take note of its concerns. While the intervener asks the applicant to revise its choice of frequency prior to going on air to prevent a problematic situation, it gets a categorical refusal in response.

66. What happened to ECI’s spirit of cooperation and conciliation between its initial application, which prescribed a third frequency adjacent to that of another incumbent, and its current application, which is third adjacent to NCI? The fact that this question has to be asked only strengthens my already firm conviction that the technical parameters proposed in this application are not acceptable.

**Conclusion**

67. **Considering:**

- the lack of evidence on the record that the use of frequency 106.3 MHz would be more problematic in terms of compatibility with NAV/COM frequencies than that of frequency 106.1 MHz;

- the lack, notwithstanding the above, of any technical evidence to support the application showing that the choice requested was one, if not the only, reasonable possible solution;

- the failure to demonstrate the necessity of the proposed parameters, including the requested power increase;

- the applicant’s reply to NCI’s intervention, which minimizes almost to the point of denying the risk of interference to the intervener’s existing signal;

**Noting:**

- the lack of evidence that the applicant has already established a specific action plan to fulfill the condition of its technical approval from Industry Canada;

- the lack of evidence that the applicant has evaluated the financial impact for itself and the effect that the proposed choice could have on the intervener;

**Recognizing:**

- the good faith shown by the applicant throughout the approval process for its licence application for the Winnipeg market;
I maintain my opinion that the applicant missed a golden opportunity here to demonstrate not only that it was protecting its own interests – for which I in no way fault it – but also that it was able to clearly integrate these interests into the dynamic of preserving the objective quality of the broadcasting system, quality to which it should logically subscribe since it operates as an incumbent in several Canadian markets.

68. On these grounds, as well as for all of the reasons detailed above, I would deny the choice of frequency and the change of technical parameters, including the power increase, requested by ECI. I believe that an approval under these circumstances runs counter to the objectives of the *Broadcasting Act*, which I am mandated to implement.

69. During the Commission’s discussions regarding this proceeding, I was unfortunately unable to convince a sufficient number of my colleagues of the soundness of my position. However, I have optimistically laid out my position since it may - at least we should all hope so - convince ECI to try to do better in terms of the criteria and in light of the possible alternative solutions presented in paragraph 43 above.

70. Indeed, with the relative security provided by both Industry Canada’s conditional technical approval and the Commission’s majority decision, could ECI not consider the other technical possibilities before going ahead with that now approved, knowing that the latter would nonetheless constitute a last resort position? Yes, there would be a cost for ECI to act in this manner. But I respectfully submit that there will also be a cost, which according to the evidence on the record has not been evaluated, in moving forward with the proposed choice. In any event, it seems to me that it is always preferable to prevent interference situations between broadcasting services rather than correct them.

71. Such efforts on ECI’s part would benefit, in particular, the citizens of Winnipeg and its surrounding areas and, I am deeply convinced, would help preserve the objective quality of the entire broadcasting system.

72. If ECI were to choose this course of action and required an extension of the deadline currently provided for the implementation of its new broadcasting station in Winnipeg, it would be my pleasure and duty to support it in its efforts.