



Broadcasting Order CRTC 2009-340

Route reference: 2009-2-2

Ottawa, 11 June 2009

Pelmorex Communications Inc.
Across Canada

*Application 2007-1751-4, received 3 December 2007
Public Hearing in the National Capital Region
31 March 2009*

Mandatory distribution order for The Weather Network and MétéoMédia

*The Commission, by majority decision, **approves** the application by Pelmorex Communications Inc. (Pelmorex) for a mandatory distribution order under section 9(1)(h) of the Broadcasting Act requiring all direct-to-home satellite distribution undertakings as well as all Class 1 broadcasting distribution undertakings (BDUs) to distribute The Weather Network and MétéoMédia on the digital basic service. The mandatory distribution order will be effective 1 September 2010 and expire 31 August 2015.*

In accordance with the commitment made in its application, Pelmorex will act as a national aggregator and distributor of emergency alert messages, which will be delivered using non-proprietary technology and available free-of-charge to BDUs on a voluntary basis.

The present decision does not preclude the implementation of a national emergency alerting system, including reverse 9-1-1, by Public Safety Canada. Further, Public Safety Canada may decide to incorporate Pelmorex's aggregation and distribution services into a full national emergency alerting system, or to arrange to have these functions fulfilled independently.

A dissenting opinion by Vice-Chairman of Telecommunications, Len Katz, is attached.

Introduction

1. At a public hearing commencing 31 March 2009 in the National Capital Region, the Commission considered an application by Pelmorex Communications Inc. (Pelmorex) requesting a mandatory distribution order on the digital basic service for its national English- and French-language specialty programming undertakings known, respectively, as The Weather Network and MétéoMédia, pursuant to section 9(1)(h) of the *Broadcasting Act* (the Act). Pelmorex made a commitment that, if it were granted the proposed mandatory distribution order, it would act as a national aggregator and distributor of emergency alert messages, which would be delivered using non-proprietary

technology and available free-of-charge to broadcasting distribution undertakings (BDUs) on a voluntary basis.

2. Pelmorex stated that it would maintain the same monthly wholesale rate of \$0.23 per subscriber that it currently charges for the distribution of the two services on analog basic in both anglophone and francophone markets. It also stated that, without mandatory distribution, it would not have the financial stability required to maintain the quality of its programming services and perform the emergency alerting functions proposed in its application.
3. In Broadcasting Public Notice 2007-20 dated 28 February 2007, which resulted from a previous proceeding concerning emergency alerting, the Commission removed regulatory obstacles to the provision of emergency alerts to Canadians. It stated that if, in two years' time, it became apparent that a voluntary approach is not adequate, it might consider additional measures to ensure that Canadians receive timely warnings of imminent perils.
4. In Broadcasting Notice of Consultation 2009-2-2, the Commission noted the continued absence of a national emergency alert system in Canada. In the circumstances, the Commission indicated its willingness to consider Pelmorex's application for mandatory carriage as part of the digital basic service. The Commission further stated that it might consider granting mandatory carriage for a limited period of time.
5. The Commission received written interventions in connection with this application, and numerous parties made presentations at the public hearing. The Commission has carefully reviewed and considered the submissions of the interveners and the applicant's response. The public record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Mandatory distribution on digital basic

6. The Weather Network and MétéoMédia are currently dual status services with respect to analog distribution; each service must be distributed as part of the basic service on analog unless Pelmorex consents in writing to its distribution as a discretionary service. Since dual status designations do not apply to digital distribution and given the ongoing migration from analog to digital distribution, Pelmorex is expected to lose most of the benefits related to its dual status designation in the near to medium term. As outlined in Broadcasting Public Notice 2008-100, most of this transition will have taken place by 1 September 2011. The mandatory distribution order requested by Pelmorex would ensure the continued carriage of The Weather Network and MétéoMédia on digital basic.
7. In the Digital Migration Framework (Broadcasting Public Notice 2006-23), the Commission indicated that it was prepared to entertain, on an exceptional basis, applications for digital basic status via mandatory distribution orders under section 9(1)(h) of the Act, and set out the criteria by which it would assess such applications. The Commission stated that any applicant seeking mandatory carriage on digital basic needed to provide, among other things, evidence demonstrating the exceptional importance of its service to the achievement of the objectives of the Act.

Pelmorex's proposal

8. In its application, Pelmorex described the numerous enhancements it has introduced to its weather programming services since 2006. Pelmorex has nearly doubled Canadian locations for which it produces and broadcasts daily weather forecasts and tripled government road safety camera feeds available for broadcast. It has begun offering new services including air quality health indices and interactive forecasts as well as ultraviolet, pollen and lightning reporting services, some of which rely on information gathered using Pelmorex's own proprietary technology.
9. As an enhancement to its programming services, Pelmorex proposed to make alerts available on a voluntary basis to any BDU, broadcaster or other media outlet that chooses to distribute them. These alerts, which would be the same as those distributed on The Weather Network and MétéoMédia, would use standards and protocols accepted by Canadian public authorities to aggregate, verify and distribute alerts from municipal, provincial and federal governments.
10. Pelmorex noted that The Weather Network and MétéoMédia have transmitted weather alert messages since they were launched in 1988 and that alerts are an essential part of its services. It further submitted that the Commission had previously amended the nature of service condition of licence for The Weather Network and MétéoMédia to permit them to distribute all types of alerts as an enhancement to their services.

Emergency alerting in Canada

11. After assuming the lead role in the development of a national public alerting system in 2008, Public Safety Canada indicated that it planned to release a request for proposal to build an aggregation and distribution centre for the proposed system.¹ The Commission has not received any information that funding, federal or otherwise, has been announced for the establishment of a national emergency alert system. The Commission further notes that a request for proposal has not been released.
12. As part of this process, Pelmorex noted that no funds were identified for national emergency alerting in the federal budget tabled in January 2009. Pelmorex also filed letters from the provincial alerting authorities in Ontario and Quebec indicating that no funding has been approved or appropriated for emergency alerting.

Commission's analysis and determinations

Assessment of Pelmorex's application

13. Under the present proposal, The Weather Network and MétéoMédia will offer programming that provides up-to-date local, regional and national weather and safety information as well as emergency alerts to ensure that Canadians receive timely warnings of imminent perils. The Commission considers that Pelmorex's services, which will be available 24 hours a day and seven days a week, will make a unique contribution to

¹ *Status Report to the CRTC on the Participation of the Broadcast Industry*, dated 16 January 2009

public safety, thereby safeguarding Canada's social and economic fabric and fulfilling section 3(1)(d)(i) of the Act. Further, Pelmorex's services currently feature 100% Canadian content and will continue to do so, thereby making a significant contribution to the development of Canadian expression.

14. The Commission finds that Pelmorex has demonstrated that its business plan and implementation of its specific commitments to detailed local forecasting and alerting are dependent upon receipt of broad national distribution on the digital basic service. The Commission further considers that Pelmorex's maintenance of its existing wholesale rate at \$0.23 per subscriber in both anglophone and francophone markets will ensure that its services remain affordable.
15. In the view of several interveners, the emergency alerts proposed by Pelmorex are alphanumeric and thus not "programs" or "broadcasting" as defined by the Act. These interveners contended that Commission therefore does not have jurisdiction over these emergency alerts.
16. The Commission has considered similar arguments in the two earlier cases where it dealt with other applications by Pelmorex for mandatory carriage of emergency alerts. In Decision 2001-123 and Broadcasting Public Notice 2007-20, the Commission concluded that the emergency alerts to be distributed with Pelmorex's weather services would be essentially connected to, and an enhancement of, the main programming services. Further, in Decision 2007-72, the Commission amended Pelmorex's nature of service condition of licence to permit it to distribute emergency alerts. In the present case, given that the contents of the messages in the alerts are to be the same as those delivered on Pelmorex's programming services, the Commission is satisfied that the emergency alerts to be distributed by the licensee are essentially connected to, and an enhancement of, the main programming services and subject to the Commission's jurisdiction.
17. Based on the foregoing, the Commission determines that the applicant has demonstrated that its services are of exceptional importance in fulfilling the objectives of the Act and meet the criteria for mandatory distribution outlined in the Digital Migration Framework. Accordingly, the Commission considers it appropriate to grant Pelmorex mandatory distribution on digital basis of The Weather Network and MétéoMédia on all Class 1 BDUs and direct-to-home (DTH) satellite undertakings.

Length of the mandatory distribution order

18. The Commission asked Pelmorex to comment on the possibility of granting The Weather Network and MétéoMédia a mandatory distribution order under section 9(1)(h) for a limited time. Pelmorex responded that, in its view, there is no need for a time-limited mandatory distribution order. However, Pelmorex argued that, if the Commission wished to issue an order on that basis, the most appropriate time to review an order would be at the end of a seven-year licence term for The Weather Network and MétéoMédia, i.e. 2017.²

² Broadcasting Decision 2009-145 renewed the licence for The Weather Network and MétéoMédia administratively, from 31 August 2009 to 31 August 2010.

19. Given the rapidly evolving broadcasting landscape, the Commission finds that it is appropriate to issue a mandatory distribution order for a limited time. The mandatory distribution order will be effective 1 September 2010 in order to allow the Commission to review Pelmorex's progress toward implementing its proposed emergency alerting system in the context of consideration of the licence renewal for its services. The mandatory distribution order will expire 31 August 2015, in order to allow the Commission to evaluate the impact of the changes in the broadcasting environment on Pelmorex's services. If at that time, Pelmorex wants to renew its 9(1)(h) status, it would have to file an application to that effect. Such an application, if forthcoming, would allow the Commission to evaluate the impact of changes in the broadcasting environment on Pelmorex's services in effect at that date and re-evaluate the need for the emergency alerting system discussed in this decision.

Accessibility of emergency alert messages

20. The Commission notes that sign language is the primary means of communication for many constituents of the deaf and hard of hearing community, as indicated in an intervention by the Centre québécois de la déficience auditive. As the Commission has insufficient information regarding the costs of producing, or the technical ability to display, alerts using sign language, it considers that a requirement to produce alerts in this format is premature. However, the Commission encourages all stakeholders to develop systems that facilitate the production and display of alerts in sign language.
21. In Broadcasting Public Notice 2007-20, the Commission indicated that emergency alert messages must be made available to persons with visual impairments in an equally timely fashion. The Commission maintains its expectation that all alert messages contain audio information indicating the urgency and basic nature of the imminent threat without having to rely on a secondary source of information. The Commission intends to discuss the measures by which this expectation can be implemented in the context of Pelmorex's licence renewal in 2010.

Conclusion

22. In light of all the above, the Commission, by majority decision, **approves** the application by Pelmorex Communications Inc. for a mandatory distribution order under section 9(1)(h) of the *Broadcasting Act* requiring all DTH satellite distribution undertakings as well as all Class 1 BDUs to distribute The Weather Network and MétéoMédia on the digital basic service. The terms and conditions of the mandatory distribution order, which will be effective 1 September 2010 and expire 31 August 2015, are set out in the appendix to this document.
23. The Commission will specify the terms of its review of Pelmorex's progress in implementing the proposed emergency alerting system in the Broadcasting Notice of Consultation that will be issued in 2010 regarding the licence renewal of The Weather Network and MétéoMédia.

24. The Commission emphasizes that participation by broadcasters and BDUs in Pelmorex's emergency alerting system will be voluntary. The Commission also notes that the present decision does not preclude the implementation of a national emergency alerting system, including reverse 9-1-1, by Public Safety Canada. Further, Public Safety Canada may decide to incorporate Pelmorex's aggregation and distribution services into a full national emergency alerting system, or to arrange to have these functions fulfilled independently.
25. The Commission **expects** Pelmorex to file evidence by 14 September 2009, demonstrating that it has put in place an operational governance structure for its proposed alert aggregation and distribution system. The Commission will not be a member of the Governance Board nor will it participate as, or accept observer status.
26. The Commission **expects** Pelmorex to implement its emergency alerting system by 11 June 2010.
27. The Commission puts Pelmorex on notice that the Commission intends to impose the following requirements as conditions of licence in the context of the licence renewal for The Weather Network and MétéoMédia, to be effective 1 September 2010.
 - Emergency alerts shall include audio information indicating the urgency and basic nature of the imminent threat without having to rely on a secondary source of information.
 - The alerts distributed on the alert aggregation and distribution system and on The Weather Network and Météomédia shall be identical, including audio components.
 - The membership of the Governance Board of the alert aggregation and distribution system shall include at least one English-language broadcaster and one French-language broadcaster as well as one distributor that serves an anglophone market and one distributor that serves a francophone market.

Secretary General

Related documents

- *Administrative renewals*, Broadcasting Decision CRTC 2009-145, 17 March 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Public Notice CRTC 2008-100, 30 October 2008

- *Pelmorex emergency alert service*, Broadcasting Decision CRTC 2007-72, 28 February 2007
- *Emergency alert services*, Broadcasting Public Notice CRTC 2007-20, 28 February 2007
- *Digital migration framework*, Broadcasting Public Notice CRTC 2006-23, 27 February 2006
- *Proposal for an “All Channel Alert” system – Denied*, Decision CRTC 2001-123, 23 February 2001

This document 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 Distribution Order CRTC 2009-340

Terms and conditions for distribution of the specialty television programming services of Pelmorex Communications Inc. (Pelmorex) known as The Weather Network and Météomédia by persons licensed to carry on certain types of broadcasting distribution undertakings

The Commission hereby orders, pursuant to section 9(1)(h) of the *Broadcasting Act*, persons licensed to carry on broadcasting distribution undertakings of the types identified in paragraph (a) below to distribute The Weather Network and Météomédia programming services, as directed below, to all digital subscribers as part of the digital basic service, effective 1 September 2010 until 31 August 2015, on the following terms and conditions:

- a) This Order applies to direct-to-home (DTH) distribution licensees as well as to Class 1 broadcasting distribution licensees. These licensees are collectively referred to in this Order as distribution licensees.
- b) A Class 1 licensee operating in an anglophone market must distribute The Weather Network to all digital subscribers as part of the digital basic service.
- c) A Class 1 licensee operating in a francophone market must distribute Météomédia to all digital subscribers as part of the digital basic service.
- d) A DTH distribution licensee must distribute, on a national basis, The Weather Network to subscribers who subscribe to an English-language or bilingual basic service package.
- e) A DTH distribution licensee must distribute, on a national basis, Météomédia to subscribers who subscribe to a French-language or bilingual basic service package.
- f) A distribution licensee is authorized to increase the basic monthly fee to be paid by its subscribers by no more than the amount authorized under the terms of Pelmorex's licence.

For the purposes of this Order, the terms "basic service," "Class 1 licensee," "DTH distribution undertaking," "licensed", "francophone market", "anglophone market" and "programming service" shall have the same meaning as that set out in the *Broadcasting Distribution Regulations*, as amended from time to time.

Dissenting opinion of Vice-Chairman of Telecommunications Len Katz

I respectfully disagree with the conclusion reached by my colleagues in this matter. While I strongly support my colleagues' desire to have a National Public Alerting System (NPAS) at the earliest possible time, I cannot support the award of a mandatory distribution order under section 9(1)(h) of the *Broadcasting Act* (the Act) requiring all DTH satellite distribution undertakings as well as all Class 1 broadcasting distribution undertakings (BDUs) to distribute The Weather Network (TWN) and MétéoMédia (MM), on the digital basic service.

This is not the first time that Pelmorex has been before the Commission seeking a mandatory distribution order. Indeed, in Broadcasting Decision 2007-246, the Commission rendered a majority decision on a similar Pelmorex application, stating:

In the Commission's view, while weather information is an important topic to Canadians, such programming is readily available in every Canadian community through conventional over-the-air television services on the basic service as well as certain specialty services, through radio and through sources outside of the broadcasting system, such as print media and the Internet. As such, the Commission considers that the Weather Network and MétéoMédia are not of exceptional importance in the fulfillment of the objectives of the Act and, consequently, should not be granted mandatory distribution on digital basic.

It is appropriate that the basis for review in this case should begin with an analysis of the new issues presented by the applicant.

Pelmorex presented evidence that:

- (i) economic circumstances have changed and a reduction in local coverage may decrease the availability of local weather information from other broadcasters;
- (ii) due to recessionary pressures, some Canadians may no longer be able to purchase discretionary tiers and, as a result, could lose access to Pelmorex's services if TWN/MM are removed to such tiers; and that
- (iii) it has added new and expanded services such as air quality health indices, lightning strike data, mosquito and black fly forecasts and interactive forecasts for international destinations; and
- (iv) it is prepared to enhance its programming services with the addition of an Alert Aggregation and Distribution System (AADS), a major component of the National Public Alerting System.

The first three reasons cited by Pelmorex do not cause me to alter the conclusions reached by the Commission in Broadcasting Decision 2007-246.

This leaves the one remaining distinction, that being its enhancement to its programming services. Pelmorex has proposed to make alerts available on a voluntary basis to any BDU, broadcaster or other media outlet that chooses to distribute them. These alerts, which would be the same as those distributed on TWN/MM, would use standards and protocols accepted by Canadian public authorities to aggregate and distribute alerts from municipal, provincial and federal governments.

In reaching their decision, the Majority indicated that the emergency alerts to be distributed by the licensee are “essentially connected to, and an enhancement of, the main programming services and therefore subject to Commission jurisdiction.”

The evidence also showed that this service can be offered as a free standing product. Indeed, much discussion revolved around the timeline for the introduction of such a service by Public Safety Canada. In addition, other private companies came forward with offers to provide such a stand-alone service.

So it begs the question: Should the commitment by Pelmorex to provide the AADS at what it claims to be fully underwritten by Pelmorex alone, be justification to provide it with mandatory distribution on digital basic?

Again, in this case, I say no.

Firstly, the AADS will have the ability to be a stand-alone application and can therefore be appended to any related programming service. I do not believe the Commission should create a precedent whereby a profitable programming undertaking is permitted to link two services together in order to achieve mandatory carriage where the underlying service alone (representing the substantive element of the service) does not qualify for such mandatory distribution.

In this case, the evidence indicated that during the five-year mandatory carriage period, TWN/MM would be guaranteed greater than \$260 million in revenue while the cost of developing and maintaining AADS over the same period is under \$12 million. In my view, the majority decision is tantamount to awarding Pelmorex with the right to operate a highly profitable NPAS without the rigours of a public tender and the costs of which are ultimately born by all Canadian BDU subscribers.

Secondly, from a financial perspective, I believe that contrary to Pelmorex’s assertions, TWN/MM will be funding AADS from consumer revenue. I base this on a comparison of its own submissions in this application relative to the previous application filed by Pelmorex in Broadcasting Notice of Public Hearing 2007-1-1, where in return for mandatory carriage, Pelmorex was prepared to reduce the monthly rate for the service from \$0.23 to \$0.20 by 2010. This \$0.03 monthly reduction translates into \$3.8 million annually when one considers there are 10.7 million subscribers today paying for this service and \$19 million over the five-year mandatory carriage period granted in today’s decision. In comparison, the record of this proceeding indicates that the capital costs to develop AADS by TWN/MM is approximately \$2 million over the first two years and \$2 million annually in operating costs for a total of \$12 million over the same five-year period. As a result, Pelmorex seems to benefit from a further \$7.0M in revenues – all

coming from the additional \$0.03 per month per subscriber that Pelmorex proposed to retain under this application rather than reducing the rate as was proposed under the previous application, where Pelmorex did not offer to construct and maintain a NPAS. The only conclusion I can reach therefore is that Pelmorex has chosen to fund the enhancement from the \$0.03 that it had proposed to decrease in return for a mandatory distribution order in 2007.

Pelmorex stated that its proposal to function as the aggregator and network distributor of alert messaging would require “the financial certainty and stability of on-going widespread carriage to TWN/MM on basic”. Pelmorex went on to state that “without 9(1)(h) status, BDU’s would migrate TWN/MM to discretionary tiers resulting in reductions in subscribers and advertising revenue”.

While I certainly agree that having 9(1)(h) status eliminates this risk, I believe that the Commission should rely on the marketplace to the fullest extent possible and only intervene as a last option. In this case, it would appear that the Commission is intervening in advance of any market solution being pursued. In my view, this approach is inconsistent with Broadcasting Decision 2004-198-1 which denied a request by The Sports Network, Talk TV and Le Réseau des sports for an order under section 9(1)(h) of the Act. In that decision, the Commission considered that “the ongoing commercial relationship between programmers and distributors should properly be the subject of negotiations between the parties, who are well equipped to respond to the exigencies of the marketplace.”

In the same decision, the Commission also stated the following:

At the same time, consistent with its view that it should only intervene in the negotiation process as a last resort, the Commission considers that it should generally issue an order under 9(1)(h) to maintain the status quo only where it is satisfied that, in the absence of such an order, the attainment of the objectives set out in the Act would clearly be compromised. Irreparable harm to a licensed programming service would, in the Commission’s view, be a pertinent factor in making such a determination.

In my view, Pelmorex did not present a compelling case that such irreparable harm would occur in the absence of a 9(1)(h) order.

Moreover, in *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Public Notice CRTC 2008-100, the Commission strengthened the *Broadcasting Distribution Regulations* by introducing a reverse onus provision in regards to disputes relating to undue preference between a programming undertaking and a BDU.

Consequently, should at some time in the future, TWN/MM receive notice that it is being moved to a tier, I believe the first remedy would be to have the “harm” overcome by way of compensation. To rule now that a profitable programming undertaking with a PBIT margin in the 25% range needs to be “protected” by a mandatory carriage ruling is, at best, premature and furthermore removes any ability to allow market forces to prevail.

TWN/MM earned a profit before interest and tax (PBIT) margin of 29.5% in 2008 and has not seen any erosion in its revenue in the last five years. In fact, its PBIT has grown commensurate with the growth in BDU revenue resulting in a compounded annual growth rate of 13.6% over the last five years.

Finally, Pelmorex claimed that there is significant risk to its future without the mandatory order. With a PBIT margin in the 19%-25% range forecasted in 2009 and 2010, and the cost of the NPAS forecasted to amount to some 4% of forecast revenues, I believe that Pelmorex should be seeking to strengthen its relationship with its loyal and committed viewers and supporters by investing in the NPAS without having to rely on a mandatory distribution order.

Turning to the proposed service introduction date, Pelmorex filed a list of dependencies on third parties which could cause delay in the introduction of its AADS. According to Pelmorex, the failure to resolve these dependencies “could result in bottlenecks or delays to the launch of its AADS”. On closer examination, these issues are related to matters of critical importance including “liability issues, roles and responsibilities as between Pelmorex and authorized government users” that would have to be agreed to by a Public Alerting Governance Board (the Board).

Recognizing that this Board will have representation from federal, provincial and territorial government departments or agencies including, I would suspect, Public Safety Canada themselves, as well as Industry and Pelmorex senior executives, I have serious reservations that agreement can be reached within the six-month timeframe which Pelmorex has assumed in order to meet the proposed date to operationalize the system.

To its credit, Pelmorex also filed a very detailed Gantt chart itemizing some 205 tasks that are required prior to the AADS being introduced. Many of these tasks are contingent on the Board reaching resolution on critical issues including those listed above. While Pelmorex has identified these tasks and the associated risks, I believe that the same level of co-operation will be required by the federal, provincial and territorial representatives as would be required if the initiative were to be coordinated and/or financed (wholly or partially) by Public Safety Canada directly.

Indeed, evidence presented during the proceeding indicated that Public Safety Canada had completed the Planning and Design phase of the NPAS project and was ready to initiate the Development phase and that there were as many as 22 parties that had expressed an interest in pursuing the tender.

As a result, while I wholeheartedly agree that an effective NPAS is in the public interest and should be introduced in the shortest time possible, I do not believe the application merits a mandatory distribution order under section 9(1)(h) of the Act, nor am I persuaded that Pelmorex will be able to introduce such a service by June 2010 or any sooner than Public Safety Canada could introduce an equivalent service.