



## Broadcasting Order CRTC 2009-660

Route reference: 2009-330

Ottawa, 22 October 2009

### **Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings**

*In this broadcasting order, the Commission amends the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197) in order to revise the definition of “new media broadcasting undertaking,” to introduce an undue preference provision for new media broadcasting undertakings, and to introduce a reporting requirement for such undertakings.*

*As a result of the amendment to the definition of “new media broadcasting undertaking,” the Commission **revokes** the Exemption order for mobile television broadcasting undertakings, set out in Broadcasting Public Notice 2007-13.*

#### **Introduction**

1. In Broadcasting Notice of Consultation 2009-330, the Commission called for comments on proposed amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197) (the New Media Exemption Order). Specifically, the Commission proposed a description of “new media broadcasting undertaking” through which it would:
  - expand its definition of “new media broadcasting undertaking” to encompass all Internet-based and mobile point-to-point broadcasting services;
  - introduce an undue preference prohibition on new media broadcasting undertakings; and
  - introduce a requirement for new media broadcasting undertakings to report to the Commission, upon request, information relevant to their operations.
2. The Commission received various submissions in regard to the proposed amendments. These submissions are available on the Commission’s website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under “Public Proceedings.”
3. The Commission sets out below details relating to each of the proposed amendments, as well as its determinations on each of the proposals.

## Definition of “new media broadcasting undertaking”

4. The current definition of “new media broadcasting undertaking,” set out in the New Media Exemption Order, reads as follows:

New media broadcasting undertakings provide broadcasting services delivered and accessed over the Internet, in accordance with the interpretation of “broadcasting” set out in Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, *Report on New Media*, 17 May 1999.

5. In Broadcasting Notice of Consultation 2009-330, the Commission proposed a description of “new media broadcasting undertaking” that would include the following definition of that type of undertaking:

The undertaking provides broadcasting services, in accordance with the interpretation of “broadcasting” set out in *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999, that are:

- a. delivered and accessed over the Internet; or
- b. delivered using point-to-point technology and received by way of mobile devices.

6. Certain parties submitted that the definition of “new media broadcasting undertaking” should specifically include undertakings involved in the distribution of broadcasting content in new media, including those facilitating access to such content (such as Internet Service Providers, or ISPs), as this would more accurately reflect the increasing number of stakeholders involved in broadcasting in new media.

7. Various parties also submitted that the proposed definition would, in effect, nullify the Exemption order for mobile television broadcasting undertakings (the Mobile Television Exemption Order), set out in Broadcasting Public Notice 2007-13, and suggested that, to avoid regulatory confusion, the Mobile Television Exemption Order be revoked.

8. The Commission considers the proposed definition to be broad enough to encompass a full range of new media broadcasting undertakings, whether they exercise programming or distribution functions. Further, as indicated in Broadcasting Regulatory Policy 2009-329 (the 2009 New Media Policy), the question of whether ISPs, in whole or in part, are broadcasting undertakings subject to the *Broadcasting Act* (the Act) when they provide access to broadcasting content has been referred to the Federal Court of Appeal (the Court) (see Broadcasting Order 2009-452). As such, whether ISPs are subject to the New Media Exemption Order will not be determined until a decision is rendered by the Court. The Commission therefore considers any amendment that would specifically include ISPs to be premature.

9. Accordingly, the Commission considers it appropriate to amend the definition of “new media broadcasting undertaking” as proposed in Broadcasting Notice of Consultation 2009-330.
10. The Commission notes that the intent behind the proposed definition was to provide regulatory clarity. The proposed amendment, in effect, blends the existing definitions of “new media broadcasting undertaking” and “mobile television broadcasting undertaking.” As a result, the Commission considers it appropriate to revoke the Mobile Television Exemption Order.

### **Undue preference provision for new media broadcasting undertakings**

11. In its proposed description of “new media broadcasting undertaking,” the Commission further proposed the following undue preference provision:

The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

12. Certain parties submitted that it is inappropriate for an undertaking that is exempt from regulation to have to comply with an undue preference provision, and that the competitive environment is sufficient to guarantee against the giving of an undue preference in the broadcasting in new media environment.
13. Several parties raised concerns with respect to the application of the undue preference provision, stating that the Commission must allow it to be applied on a case-by-case basis and in a manner similar to other platforms, rather than in a manner more onerous or intrusive to new media activities than to traditional broadcasting activities. In particular, parties urged that caution be exercised so as not to interfere with exclusive distribution arrangements between content providers and distributors.
14. Certain parties also requested assurances that the onus of establishing the existence of a preference and/or disadvantage will fall on the complainant, and only then will the Commission require that the party giving the preference or subjecting the person to the disadvantage demonstrate that any preference or disadvantage is not undue.
15. The Commission notes that, pursuant to subsection 9(4) of the Act, it can impose such terms and conditions on exempt broadcasting undertakings as it determines appropriate.

16. The Commission further notes that the wording of the undue preference provision is similar to that found in other broadcast regulations, and that the latter have not interfered on traditional platforms with the sorts of exclusive distribution agreements parties expressed a desire to protect. The Commission expects that it will apply the proposed undue preference provision in a manner consistent with similar provisions elsewhere in the broadcasting system.
17. With respect to the burden of proof, as noted in paragraph 64 of the 2009 New Media Policy:

The Commission considers that allegations of undue preference in the new media broadcasting environment should be subject to the same reverse onus provision as elsewhere in the broadcasting system. The party alleged to have engaged in preferential behaviour will generally be in the best position to provide information on its own practices. Once the complainant has established the existence of a preference or disadvantage, the onus should shift to the allegedly infringing party to demonstrate that its actions were not undue.

As such, the Commission confirms that, consistent with existing practice and procedure, the complainant has the initial burden of establishing a preference. Specific wording to that effect is unnecessary, as the proposed language is consistent with other undue preference provisions applying to areas within the Commission's jurisdiction.

18. Accordingly, the Commission considers it appropriate to introduce into the New Media Exemption Order the undue preference provision as proposed in Broadcasting Notice of Consultation 2009-330.

### **Reporting requirement for new media broadcasting undertakings**

19. Finally, in its proposed description of "new media broadcasting undertaking," the Commission proposed to add the following reporting requirement:

The undertaking submits such information regarding the undertaking's activities in broadcasting in new media, and such other information that is required by the Commission in order to monitor the development of broadcasting in new media, at such time and in such form, as requested by the Commission from time to time.

20. The proposed reporting requirement was supported by several parties, some of whom also emphasized the need to treat audio and audio-visual data distinctly; the value of revenue, expense and traffic pattern data; and the need for the data to be collected on an annual basis. Other parties, however, questioned the validity of any data provided, absent any clear reporting standards or methodologies.

21. Parties urged the Commission to minimize the administrative burden of any reporting requirement, by seeking data that undertakings would be likely to collect in any event through the normal course of business. Moreover, certain parties raised the issue of fairness with respect to those from whom the Commission would seek data, submitting that it would be inappropriate to single out licensed broadcasting undertakings from traditional platforms for this administrative burden.
22. Certain parties proposed that the Commission should collect data from all stakeholders in the broadcasting in new media environment, including ISPs. It was also proposed that the Commission should enforce its conditions of exemption only against undertakings that solicit advertising or subscribers in Canada, and not pursue others legally distributing content in a non-commercial context.
23. In addition, some parties argued that a future proceeding on reporting and measurement cannot proceed until the Court has issued its decision concerning ISPs, as participants will not know to whom any proposed reporting requirements may apply.
24. The Commission notes that, as indicated in the 2009 New Media Policy, specific details concerning measurement and reporting will be explored through a future public process. Details with respect to the type of data to be requested and from whom such data will be requested will be subject to comment and input from the industry.
25. That being said, the Commission notes that, pending a decision by the Court, information will not be sought from ISPs in their role of providing access to broadcasting content in new media. It would therefore be premature to consider what reporting requirements might apply to ISPs in any public proceeding prior to the Court's determination. Nevertheless, the need to collect data that is relevant and meaningful to the Commission is of utmost importance, and the Commission sees no merit in delaying a proceeding to explore the reporting requirements for those new media undertakings that are subject to the New Media Exemption Order.
26. Accordingly, the Commission considers it appropriate to introduce into the New Media Exemption Order the requirement proposed in Broadcasting Notice of Consultation 2009-330 for new media broadcasting undertakings to submit to the Commission, upon request, information relevant to their operations.

## **Conclusion**

27. In light of all of the above, the Commission hereby amends the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197), as proposed in Broadcasting Notice of Consultation 2009-330. The amended exemption order is set out in the appendix to the present broadcasting order.

28. As a result of the amendment to the definition of “new media broadcasting undertaking,” the Commission **revokes** the Exemption order for mobile television broadcasting undertakings, set out in Broadcasting Public Notice 2007-13.

Secretary General

**Related documents**

- *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers*, Broadcasting Order CRTC 2009-452, 28 July 2009
- *Call for comments on proposed amendments to the Exemption order for new media broadcasting undertakings*, Broadcasting Notice of Consultation CRTC 2009-330, 4 June 2009
- *Review of broadcasting in new media*, Broadcasting Regulatory Policy CRTC 2009-329, 4 June 2009
- *Exemption order for mobile television broadcasting undertakings*, Broadcasting Public Notice CRTC 2007-13, 7 February 2007
- *Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197, 17 December 1999
- *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999

*This document 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 Order CRTC 2009-660**

### **Amended Exemption order for new media broadcasting undertakings (Appendix A to *Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197, 17 December 1999)**

#### **Exemption order for new media broadcasting undertakings**

The Commission is satisfied that compliance with Part II of the *Broadcasting Act* (the Act) and applicable regulations made thereunder by the class of broadcasting undertakings described below will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the Act.

Therefore, pursuant to subsection 9(4) of the Act, the Commission exempts persons who carry on, in whole or in part in Canada, broadcasting undertakings of the class consisting of new media broadcasting undertakings, from any or all of the requirements of Part II of the Act or of a regulation thereunder.

#### **Description of a new media broadcasting undertaking**

1. The undertaking provides broadcasting services, in accordance with the interpretation of “broadcasting” set out in *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999, that are:
  - a. delivered and accessed over the Internet; or
  - b. delivered using point-to-point technology and received by way of mobile devices.
2. The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.
3. The undertaking submits such information regarding the undertaking’s activities in broadcasting in new media, and such other information that is required by the Commission in order to monitor the development of broadcasting in new media, at such time and in such form, as requested by the Commission from time to time.