



Broadcasting Notice of Consultation CRTC 2009-732

Ottawa, 30 November 2009

Call for comments on proposed revisions to the criteria used to assess applications for mandatory distribution pursuant to an order under section 9(1)(h) of the *Broadcasting Act*

In this notice, the Commission calls for comments on proposed revisions to the criteria used in assessing applications for mandatory distribution pursuant to an order under section 9(1)(h) of the Broadcasting Act. The deadline for the receipt of comments is 1 March 2010.

Introduction

1. The Commission has received applications for the mandatory distribution of programming services as part of the digital basic service, pursuant to an order under section 9(1)(h) of the *Broadcasting Act* (the Act). Before it considers these or other applications for mandatory distribution pursuant to section 9(1)(h) of the Act, the Commission considers it appropriate to revise the criteria used to assess such applications. In this notice, the Commission sets out its revisions to the criteria, which it proposes to strengthen, and invites parties to comment on them.

Context

2. In Broadcasting Public Notice 2006-23 (the Digital Migration Framework), the Commission noted that there may be certain services for which basic carriage could be justified in a digital environment and that it was prepared to entertain, *on an exceptional basis*, applications for mandatory distribution on the digital basic service via distribution orders under section 9(1)(h) of the Act (emphasis added). The distribution of such services as part of the basic service ensures that these services have access to a reasonably reliable revenue stream, thereby enabling them to meet meaningful programming obligations. In the Digital Migration Framework, the Commission set out the criteria to be used in assessing whether a programming service should be granted mandatory distribution.
3. Following the publication of the criteria, the Commission held a public hearing in March 2007 in order to consider twelve applications for mandatory distribution on digital basic. In Broadcasting Decision 2007-246, the Commission designated four services for mandatory distribution.
4. In Broadcasting Public Notice 2008-100, the Commission announced a number of changes to the regulatory frameworks for broadcasting distribution undertakings (BDUs) and discretionary programming services, most of which will be implemented by way of amendments to the relevant regulations on 31 August 2011.

5. As it indicated in Broadcasting Public Notice 2008-100, the Commission acknowledges the need for more flexibility in the digital environment for both distributors and consumers. The Commission recognizes that in the digital environment, consumers expect greater flexibility in being able to choose services to which they wish to subscribe, while distributors are under pressure to offer the most attractive and competitive basic service possible. Furthermore, the Commission notes that the ongoing transition of the broadcasting system to the digital environment requires considerable financial investments and resources on the part of Canadian broadcasters and distributors.
6. It should be noted that a distribution order resulting from this framework does not override any other application of section 9(1)(h) of the Act or apply to programming services that already benefit from mandatory carriage pursuant to other regulations.
7. In light of the current regulatory, economic and technical context, the Commission considers it necessary to review the criteria it uses in assessing applications for mandatory distribution of programming services on the basic service pursuant to section 9(1)(h) of the Act, before examining any new proposals.

Mandatory distribution on the basic service pursuant to section 9(1)(h) of the Act

8. The Act provides the Commission with the authority to order the mandatory distribution of a given service under whatever terms it considers appropriate. Specifically, section 9(1)(h) of the Act states that:
 9. (1) Subject to this Part, the Commission may, in furtherance of its objects,
 - (h) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.
9. The Commission has used the 9(1)(h) provision of the Act sparingly. It has generally used this section to require that certain services be distributed as part of the basic service. Currently, there are eight services that must be offered by BDUs on the basic service pursuant to 9(1)(h) orders: TVA, APTN, CPAC and VoicePrint must be offered on both the analog and digital basic services; The Accessible Channel, CBC Newsworld (in French-language markets), Le Réseau de l'information (RDI) (in English-language markets) and Avis de recherche (by BDUs serving Quebec subscribers only) must be offered on the digital basic service.
10. In addition, the Commission recently approved an application by Pelmorex Communications Inc. (Pelmorex) for a mandatory distribution order under section 9(1)(h) of the Act requiring the distribution of The Weather Network and MétéoMédia on the digital basic service, effective 1 September 2010 until 31 August 2015 (Broadcasting Order 2009-340). Given the rapidly evolving broadcasting landscape, the Commission found that it was appropriate to issue a mandatory distribution order for a

limited time. When the mandatory distribution order expires, Pelmorex would have to file an application to renew its 9(1)(h) status, should it wish to do so.

11. In Broadcasting Order 2009-542, the Commission also approved an application by La Magnétothèque for a mandatory distribution order under section 9(1)(h) of the Act requiring the distribution of its service on the basic service (analog and digital) in French-language markets. This mandatory order took effect 1 October 2009.

Proposed criteria for mandatory distribution on digital basic

12. Before considering further applications pursuant to section 9(1)(h) of the Act, the Commission is proposing to strengthen the criteria used in assessing whether a programming service should be granted such status. The proposed revisions focus on the assessment of the exceptional importance of a programming service. In addition, in light of the dynamism of the sector, the rapid technological change and the increasing availability of alternative platforms for distribution, the Commission is concerned with granting indefinite orders. Accordingly, as set out in the proposed revisions, applicants would be required to include evidence to support their proposed timeframe for the mandatory distribution of the service.
13. The proposed revisions to the criteria are set out below **in bold**.

In the Commission's view, the composition of the digital basic service should be informed by the policy objectives of the *Broadcasting Act*, with a view to ensuring that subscribers have access to a basic service that, among other things:

- serves to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
- is varied and comprehensive, providing a balance of information and entertainment programming, at an affordable cost;
- is drawn from local, regional, national and international sources;
- includes educational and community programs; and
- reflects and contributes to Canada's linguistic duality and ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society.

Any applicant submitting an application seeking mandatory distribution on the digital basic service needs to demonstrate that its programming service meets the following criteria:

- the applicant must provide evidence demonstrating the exceptional importance of its service to the achievement of the objectives of the Act;

- the applicant must demonstrate that having digital basic status will enable its service to contribute in meaningful ways to fulfilling the policy objectives of the Act:

In particular, the applicant must

- a. **provide evidence** that the programming of its service makes a significant contribution to Canadian expression and reflects Canadian attitudes, opinions, ideas, values and artistic creativity; **in other words, the applicant must demonstrate that the contribution it intends to make to Canadian expression and reflection exceeds that normally made by a Category A service,¹ thus justifying its exceptional status under a 9(1)(h) order;**
- b. **provide evidence** as to how the programming of its service contributes, **in an exceptional manner**, to the overall objectives for the basic service, as summarized above, and how it specifically contributes to one or more objectives of the Act, such as: Canadian identity and cultural sovereignty; ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society; service to and the reflection and portrayal of persons with disabilities; or linguistic duality (in the case of French-language services, this objective could be achieved, for example, through commitments to produce programming both inside and outside Quebec);
- c. **provide evidence that the service is making meaningful commitments to original Canadian programming in terms of exhibition and expenditures; in other words, the applicant must demonstrate that the commitments it intends to make to Canadian programming through exhibition and expenditures justify its exceptional status under a 9(1)(h) order;**
- d. **provide evidence of additional programming diversity that the service will bring to the basic service, i.e., the applicant must demonstrate that its programming would contribute to a diversity of voices on the basic service and that the programming is not in any way currently provided on the basic service;**

¹ As set out in Broadcasting Public Notice 2008-100, the amended *Broadcasting Distribution Regulations* will refer to services with access rights as Category A services as of 31 August 2011.

- e. **provide evidence demonstrating that there is a widespread demand among the intended audience for the proposed service, including surveys of the prospective audience, and a description of the target audience in terms of size and composition; in other words, in addition to demonstrating that the programming is not currently provided on the basic service, the applicant must show that a meaningful demand exists for the proposed service to be available;**
 - f. **provide evidence that its business plan and implementation of its specific commitments are dependent on receipt of broad national distribution on the digital basic service; in other words, the service would be either not viable or not in a position to meet its programming commitments without mandatory distribution on basic;**
 - g. **provide evidence of the likely impact of the proposed wholesale rate on the price of the basic package and of its widespread acceptability to Canadians;**
 - h. **provide evidence as to why the service must be made available to Canadians through traditional broadcasting distribution undertakings, given the availability of other technological means for distributing content;**
 - i. **provide evidence to support the applicant's proposed timeframe during which its service should have exceptional status under an order pursuant to section 9(1)(h) of the Act; and**
- **the applicant must provide the score the service would obtain, based upon the Revised Morin Model (Appendix 3 to Broadcasting Public Notice 2008-100), set out in the appendix to this notice.**
 - **If the applicant is of the view that one or more of the criteria are not applicable to its case, then the applicant must provide a detailed explanation as to why.**

Call for comments

14. The Commission calls for comments on the above proposed criteria that will be used in assessing whether a programming service should be granted mandatory distribution pursuant to an order under section 9(1)(h) of the Act. The Commission invites comments on the wording of the proposed amendments. The Commission will accept comments that it receives on or before **1 March 2010**. The comments received will be considered

in establishing the new criteria to be used in the assessment of current and future applications for mandatory distribution.

15. The Commission cannot be held responsible for postal delays and will not notify a party whose comment is received after the deadline. The comment will not be considered by the Commission and will not be part of the public file. The Commission will not formally acknowledge comments. It will, however, fully consider all comments, and they will form part of the public record of the proceeding, provided that the procedures for filing set out below have been followed.

Future applications pursuant to section 9(1)(h) of the *Broadcasting Act*

16. Once the Commission has adopted new criteria to assess applications for mandatory distribution pursuant to section 9(1)(h) of the Act, it intends to provide programming services with an opportunity to file applications for 9(1)(h) status and to amend or resubmit applications already filed. The Commission may then proceed with a public hearing to consider these applications.
17. However, in light of the significant changes affecting the broadcasting system noted above and given the exceptional nature of granting distribution orders pursuant to section 9(1)(h) of the Act, it is not the Commission's intent to consider applications for mandatory distribution on the digital basic service on a routine basis.
18. Rather, the Commission is of the view that, once it has considered the applications in the manner proposed above, it may be appropriate to provide the industry with an opportunity to adjust to the new digital and regulatory environment before accepting any further applications for mandatory distribution on the digital basic service.
19. Moreover, given the circumstances described above, the Commission is also of the view that the exceptional status of all programming services offered on the basic service pursuant to section 9(1)(h) of the Act should be reviewed at licence renewal.

Procedure for filing comments

Interested parties can file their comments to the Secretary General of the Commission in **only one** of the following formats:

by using the
[\[Broadcasting interventions/comments form\]](#)

by mail to
CRTC, Ottawa, Ontario K1A 0N2

or

by fax at
819-994-0218

The Commission advises those who file and serve by electronic means to exercise caution when using e-mail for service of documents or notification, as it may be difficult to establish that service has occurred.

Parties must ensure that, before initiating service through electronic mode, they will be able to satisfy the Commission, upon request, that service of the notification was completed.

Submissions longer than five pages should include a summary.

Each paragraph of the submission should be numbered. In addition, where the comment is filed by electronic means, the line *****End of document***** should be entered following the last paragraph of the document, as an indication that the document has not been damaged during electronic transmission.

Important notice

All information that parties provide as part of this public process, except information granted confidentiality, whether sent by postal mail, facsimile, e-mail or through the Commission's website at www.crtc.gc.ca, becomes part of a publicly accessible file and will be posted on the Commission's website. This information includes personal information, such as full names, e-mail addresses, postal/street addresses, telephone and facsimile numbers, and any other personal information parties provide.

The personal information that parties provide will be used and may be disclosed for the purpose for which the information was obtained or compiled by the Commission, or for a use consistent with that purpose.

Documents received electronically or otherwise will be put on the Commission's website in their entirety exactly as received, including any personal information contained therein, in the official language and format in which they are received. Documents not received electronically will be available in PDF format.

The information that parties provide to the Commission as part of this public process is entered into an unsearchable database dedicated to this specific public process. This database is accessible only from the web page of this particular public process. As a result, a general search of the Commission's website with the help of either its own search engine or a third-party search engine will not provide access to the information that was provided as part of this public process.

The Commission encourages interested parties to monitor the public examination file and the Commission's website for additional information that they may find useful when preparing their comments.

Examination of documents

A list of all comments will be available on the Commission's website. An electronic version of all comments submitted will be accessible from this list. To access the list, select "Lists of interventions/comments" under "Public Proceedings" from the Commission's website.

The public may examine public comments and related documents at the following Commission offices during normal business hours.

Location of Commission offices

Toll-free telephone: 1-877-249-2782

Toll-free TDD: 1-877-909-2782

Les Terrasses de la Chaudière
Central Building
1 Promenade du Portage, Room 206
Gatineau, Quebec
J8X 4B1
Tel.: 819-997-2429
Fax: 819-994-0218

Regional offices

Metropolitan Place
99 Wyse Road
Suite 1410
Dartmouth, Nova Scotia
B3A 4S5
Tel.: 902-426-7997
Fax: 902-426-2721

205 Viger Avenue West
Suite 504
Montréal, Quebec
H2Z 1G2
Tel.: 514-283-6607

55 St. Clair Avenue East
Suite 624
Toronto, Ontario
M4T 1M2
Tel.: 416-952-9096

Kensington Building
275 Portage Avenue
Suite 1810
Winnipeg, Manitoba
R3B 2B3
Tel.: 204-983-6306
TDD: 204-983-8274
Fax: 204-983-6317

2220 – 12th Avenue
Suite 620
Regina, Saskatchewan
S4P 0M8
Tel.: 306-780-3422

10405 Jasper Avenue
Suite 520
Edmonton, Alberta
T5J 3N4
Tel.: 780-495-3224

580 Hornby Street
Suite 530
Vancouver, British Columbia
V6C 3B6
Tel.: 604-666-2111
TDD: 604-666-0778
Fax: 604-666-8322

Secretary General

Related documents

- *Mandatory distribution order and licence amendment for La Magnétothèque*, Broadcasting Order CRTC 2009-542, 31 August 2009
- *Mandatory distribution order for The Weather Network and Météomédia*, Broadcasting Order CRTC 2009-340, 11 June 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008
- *Diversity of voices* – Regulatory policy, Broadcasting Public Notice CRTC 2008-4, 15 January 2008

- *New digital specialty described video programming undertaking; Licence amendments; Issuance of various mandatory distribution orders*, Broadcasting Decision CRTC 2007-246, 24 July 2007
- *Digital migration framework*, Broadcasting Public Notice CRTC 2006-23, 27 February 2006

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 Notice of Consultation CRTC 2009-732

Revised Morin Model²

(the numbers set out in the example below are for illustration purposes only)

In the calculation below, the following values have been assigned:

1. One point is assigned for each percentage of the broadcast day required by condition of licence to be Canadian content.
2. One point is assigned for each hour per week of original Canadian programming (averaged over the year).
3. One point is assigned for each hour per week of high definition content (averaged over the year).
4. One point is assigned for each percentage of the gross revenue of the broadcaster to be spent in a year on Canadian programming.
5. One point is assigned for each cent in the wholesale fee per subscriber paid to the broadcaster by the broadcasting distribution undertaking.

Proposed contribution to Canadian content

Overall Canadian content	60	%
Original Canadian programs	8	hours per week (averaged over the year)
High definition content	12	hours per week (averaged over the year)
Total Canadian content score	80	
plus: Proposed Canadian program expenditure	40	%
minus: Proposed wholesale fee	25	cents per subscriber per month
equals: Final score (80 + 40 – 25)	95	points

² Taken from Appendix 3 to Broadcasting Public Notice 2008-100.