



Broadcasting Order CRTC 2010-168

Route reference : 2009-411

Ottawa, 22 March 2010

Reference to the Federal Court of Appeal – Commission’s jurisdiction under the *Broadcasting Act* to implement a negotiated solution for the compensation for the fair value of private local conventional television signals

In A group-based approach to the licensing of private television services, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010, the Commission set out its determinations with respect to a group-based approach to the licensing of private local television services, including the determination that a value for program distribution regime is necessary to ensure the fulfillment of the policy objectives set out in section 3 of the Broadcasting Act (the Act). However, the Commission did not determine the legal issue as to whether it has the jurisdiction under the Act to implement a negotiated solution for compensation for the fair value of private local conventional television signals. Consequently, the Commission determined that it would refer the matter to the Federal Court of Appeal. Accordingly, in this order, the Commission refers this question to the Court for hearing and determination and requests disposition of the matter on an expedited basis.

Introduction

1. Section 3(2) of the *Broadcasting Act* (the Act) states that the Canadian broadcasting system constitutes a single system that is to be regulated by a single independent public authority, the Canadian Radio-television and Telecommunications Commission. Section 5(1) of the Act requires the Commission to “regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) of the Act.”
2. The Commission is given broad powers under the Act to fulfill its mandate, including the power to issue broadcasting licences on such conditions as it deems appropriate for the implementation of the broadcasting policy set out in section 3(1) of the Act and to require broadcasting distribution undertakings (BDUs) to carry, on such terms and conditions as it deems appropriate, programming services specified by the Commission. The Commission is also given the power by section 10 of the Act to make regulations respecting a number of subjects including: the carriage of any foreign or other programming services by distribution undertakings; the resolution, by way of mediation or otherwise, of any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertaking; and such other matters as it deems necessary for the furtherance of its objects.

3. In fulfilling this mandate, the Commission has created a comprehensive regulatory regime to ensure that each part of the broadcasting industry contributes to the fulfillment of the policy objectives in the Act. For example, the Commission has:
 - imposed a series of obligations on programming undertakings, including quotas for the exhibition of, or expenditure on, Canadian programming;
 - constructed rules regarding what programming services BDUs are required or permitted to distribute, including a requirement that certain BDUs distribute local television stations and other services as part of the basic package provided to all customers (i.e., mandatory carriage);
 - mandated wholesale fees for the distribution of particular specialty services, with a rate that is, in some cases, set by the Commission or, in other cases, negotiated between the parties; and
 - created a system to protect the exclusive broadcast rights of local television stations in their markets by requiring a BDU to delete a programming service it distributes that is comparable to that of the local television station (i.e., program deletion) and, in some circumstances, substitute the comparable programming of the local television station being broadcast simultaneously over the deleted signal (i.e., simultaneous substitution).
4. The Commission applies these existing regulatory obligations to a different extent in different circumstances in a manner that is fluid and continues to adapt to changing circumstances. For example, the Commission has permitted parties, by conditions of licence, to negotiate alternative solutions to the program deletion obligations, which have been incorporated into the regulatory regime.

The Proceeding

5. In *Policy proceeding on a group-based approach to the licensing of television services and on certain issues relating to conventional television*, Broadcasting Notice of Consultation CRTC 2009-411, 6 July 2009 (as revised by Broadcasting Notice of Consultation CRTC 2009-411-3, 11 August 2009), the Commission initiated a proceeding to examine a group-based approach to the licensing of television services, including an examination of whether or not a negotiated solution for the compensation for the fair value of local conventional television signals is appropriate. In the course of the proceeding, the Commission received 289 comments addressing these issues. The Commission also received approximately 12,000 comments as part of a campaign organized by Rogers Communications Inc.
6. Among the issues raised during the proceeding was whether the Commission has the jurisdiction under the Act to implement a negotiated solution for compensation for the fair value of private local conventional television signals. BDUs presented a legal

opinion that such a regime would establish a new copyright in the signals of private local television stations and is therefore *ultra vires* the powers of the Commission. Local television stations presented legal opinions that such a regime falls within the Commission's jurisdiction under the Act to supervise and regulate the broadcasting system.

7. In *A group-based approach to the licensing of private television services*, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010 (Broadcasting Regulatory Policy 2010-167), the Commission set out its determinations regarding the proceeding on a group-based approach to private local television licensees, including the determination that a negotiated solution for the compensation for the fair value of private local conventional television programming services is necessary for the fulfillment of the policy objectives set out in section 3 of the Act. The Commission also provided the following outline of how such a regime would function:
 1. Licensees of private local television stations would choose whether i) they will negotiate with BDUs for the value of the distribution of their programming services, failing which they will be able to require deletion of the programming they own, or for which they have the exhibition rights, from all signals distributed in their market, or ii) they will continue to benefit from existing regulatory protections.
 2. Licensees of private local television stations would make their choice by a date set by the Commission, and this choice would be valid for a fixed term of three years.
 3. If a licensee of a private local television station chose option i):
 - a) It would forego all existing regulatory protections related to the distribution of local television signals by BDUs, whether imposed by regulation or by condition of licence, including mandatory distribution and priority channel placement on analog basic, and simultaneous substitution.
 - b) BDUs would be required, at the request of private local television stations, to delete any program owned by the licensee of that local television station or for which it has acquired exclusive contractual exhibition rights.
 - c) Deletions would be exercised against the signal of any programming undertaking distributed by the BDU, whether foreign or domestic, affiliated or not, including that of the private local television station making the request.
 - d) It could negotiate with a BDU for a fair value in exchange for the distribution of its programming service in lieu of the deletion rights set out in b) and c). This compensation could be monetary, non-monetary (e.g., simultaneous or non-simultaneous substitution, carriage arrangements, marketing and promotion), or both, and could be negotiated on an individual station basis or as part of a broader negotiation with entire ownership groups.

- e) Parties to the negotiation would be given a fixed period after the date on which the licensee of a private local television station chose option i) to conclude negotiations, during which the existing regulatory protections would continue to apply. This period which could be shortened or extended by agreement between the parties.
 - f) The Commission would minimize its involvement in the terms and conditions of the resulting agreements, intervening only in cases where there is evidence parties are not negotiating in good faith, and would consider acting as arbitrator only where both parties make a request.
4. If the licensee of a private local television station chose option ii), all regulatory protections for private local television stations in force at the time the choice is made, and as amended during the term in which that choice is valid, would remain in force. These would include, where provided by regulation or by condition of licence: mandatory carriage, priority channel placement on analog basic, program deletion, simultaneous or non-simultaneous substitution, and any payments to individual stations or funds approved by the Commission in lieu of these obligations, including payments for carriage of distant signals as provided for in Broadcasting Public Notice 2008-100.
8. In Broadcasting Regulatory Policy 2010-167, the Commission did not determine the legal issue as to whether or not it has the jurisdiction under the Act to implement such a regime. Rather, the Commission stated that it would refer the matter to the Federal Court of Appeal for determination. Consequently, the decision to implement the regime will only be concluded after the Court has ruled on this reference.
9. With respect to its determination to refer this matter to the Federal Court of Appeal, the Commission stated the following in its regulatory policy:

There is, however, a significant potential impediment to the implementation by the Commission of this market-based resolution. In response to Broadcasting Notice of Consultation 2009-411, the Commission was presented with two legal opinions, both worthy of consideration. One submitted that the Commission had the requisite authority to introduce a regime of broadcast regulation that would have the effect of requiring appropriate negotiation, such as those described above, between broadcasters and BDUs; the other took the position that BDUs have a continuing right to disseminate the broadcaster's over-the-air signal without negotiation or remuneration by virtue of the provisions of the *Copyright Act*.

While the Commission has found that it is necessary to provide the licensees of private local television stations with the right to negotiate a fair value for the distribution of their programming services by BDUs, it

recognizes that there is a valid dispute between parties over the Commission's legal authority to impose such a regime. Therefore, given the importance of the question to the ability of the Commission to ensure that the objectives of the Act are met, and the continuing need for certainty in dealing with the approaching group licensing renewals, the Commission has decided to refer the question of its jurisdiction to the Federal Court of Appeal (the Court). The Commission will request disposition of the issue on an expedited basis.

Order

10. Pursuant to section 18.3 and section 28(2) of the *Federal Courts Act*, the Commission therefore orders that the following question of law be referred to the Federal Court of Appeal for hearing and determination and requests disposition of the matter on an expedited basis:

Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

Procedure

11. The Commission expects to receive directions on procedure from the Federal Court of Appeal. The Court's directions on procedure will be available at the Court, and copies can be obtained from the Commission on request.

Secretary General

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>.