



Broadcasting Notice of Consultation CRTC 2010-860

PDF version

Route reference: 2010-41

Additional references: 2010-41-1, 2010-41-2, 2010-861

Ottawa, 19 November 2010

Call for applications for licences to operate a French-language general interest pay television service

The Commission calls for applications to operate a French-language general interest pay television service subject to certain conditions. A dissenting opinion by Commissioner Michel Morin is attached.

1. In Broadcasting Regulatory Policy 2010-861, also issued today, the Commission concluded that TVA Group Inc. had not demonstrated that the criteria set out in Broadcasting Public Notice 2008-100 have been met, nor has it demonstrated that opening up the general interest pay services genre to competition in the French-language market would offer more diversity to consumers.
2. In that regulatory policy, the Commission also indicated that a second French-language pay television service could be viable, provided that it does not compete directly with Super Écran, the existing pay television service.
3. Accordingly, the Commission hereby calls for applications by all parties wishing to obtain a broadcasting licence to operate a French-language national general interest pay television undertaking.
4. Interested parties must submit an application to the Commission no later than **30 May 2011**.
5. It should be noted that, in making this call for applications, the Commission has not reached any conclusion with respect to the licensing or access privileges of any such service at this time.
6. Applicants will therefore be required to provide evidence clearly demonstrating demand and a market for the proposed service. Though the service will be authorized to broadcast feature films, it must be complementary to Super Écran. The Commission considers that there exists a significant repertoire of quality content that is not currently broadcast by Super Écran and that could allow a second general interest pay television service to support itself and add diversity for the consumer and the broadcasting system.

7. Without restricting the scope of the issues to be considered, each applicant must address the following:
 - The contribution that the proposed service will make to achieving the objectives of the *Broadcasting Act*, particularly with respect to the production and exhibition of programming that makes maximum use of Canadian creative talent and other Canadian resources.
 - The means by which the applicant intends to promote the availability of Canadian programming on its service. This could include, for example, the use of promotional channels and the establishment and use of navigational systems.
 - The manner in which the applicant intends to add to the diversity of the Canadian broadcasting system through its programming and to reflect Canada's cultural diversity, including official language minority communities.
 - A description of the nature of the programs that would be offered by the service. Particular attention should be paid to the diversity that the service would add for the consumer and the broadcasting system.
 - The distribution agreements and the packaging proposed for the delivery of the service to subscribers.
 - An analysis of the markets involved with estimates of subscribers and potential audiences, taking into account the results of any survey undertaken, as well as the impact on existing pay television undertakings.
 - Evidence as to the availability of financial resources consistent with the requirements established in the financial projections of the applicant's business plan. In this respect, any applicant may request from the Commission the document entitled *Documentation Required by the Commission to Support the Availability of an Applicant's Proposed Financing*.
8. The Commission also reminds applicants that they must comply with the eligibility requirements set out in the *Direction to the CRTC (Ineligibility of Non-Canadians)*, SOR/97-192, 8 April 1997, as amended by SOR/98-1268, 15 July 1998, as well as in the *Direction to the CRTC (Ineligibility to Hold Broadcasting Licences)*, SOR/85-627, 27 June 1985, as amended by SOR/97-231, 22 April 1997.
9. The Commission will announce at a later date the time and place of the public hearing for considering the applications received, as well as the locations where they may be examined by the public. The public will also be given the opportunity to comment on any application by submitting written interventions to the Commission.
10. Notice of each application will also be published in newspapers of general circulation within the area to be served.

Related documents

- *Refusal to open up the French-language general interest pay television services genre to competition in the French-language market*, Broadcasting Regulatory Policy CRTC 2010-861, 19 November 2010
- *Call for comments on opening up the general interest pay services genre to competition in the French-language market and on proposed conditions of licence for competing Canadian general interest pay services in the French-language market*, Broadcasting Notice of Consultation CRTC 2010-41, 27 January 2010
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory policy*, Broadcasting Public Notice CRTC 2008-100, 30 October 2008

Dissenting opinion of Commissioner Michel Morin

In the absence of a majority vote by the twelve CRTC commissioners concerning the application by TVA Group Inc. to operate a new pay television service, the Commission has chosen not to introduce competition for the benefit of consumers and open up the genre to competition, but rather to issue a call for applications for licences for a new French-language general interest specialty pay service that will add “diversity.”

This approach constitutes an exception for the French-language market. Never before has the Commission proposed “diversity” as a licensing condition for a general interest pay television service in the English-language market, which includes two competitive general interest pay television services in most areas of the country.

In taking this approach, the Commission is moving away from the objective criteria that it purposefully retained in Broadcasting Public Notice 2008-100, such as the popularity and profitability of the service. In my opinion, it is these criteria that should be prioritized – even applied exclusively – for the issuance of a general interest pay television licence.

By issuing this call for licence applications, the Commission is strengthening, for the French-language market alone, the regulatory arsenal that could favour, if not ensure for the foreseeable future, the monopolistic position of Super Écran, which has been the only general interest pay television service offered by all broadcasting distribution undertakings (BDUs) in the French-language market for over 25 years.

The objectives of the *Broadcasting Act* would be better served by an affordable, competitive service

From the outset, this decision concerning a service the main purpose of which is to distribute rather than to produce content has seemed to me to contravene one of the primary objectives of the *Broadcasting Act* (the Act), which refers in subparagraph 3(1)(t)(ii) to the “affordable rates” for which BDUs must strive. This case concerns a specialty broadcasting service that essentially and by its very nature distributes content – which moreover is mostly foreign – and not a service that produces Canadian content as called for by the Act. In light of this, the Commission should have prioritized consumer interests, which would have been served by “affordable rates.” It seems to me that the attempt to introduce a “diversity” criterion by the back door for a general interest pay television service is a measure doomed to fail. How can the regulator work against the mainstream when consumers are impatiently awaiting the latest Hollywood blockbuster from a specialty service? Realistically, the concept of “diversity” is not compatible with the definition of a general interest pay service.

In a context where Canadian content promotion is not the primary aim of the service, I think the Commission had no choice but to allow the market to offer competitive rates to subscribers. To achieve this, absent the means to regulate discretionary service rates, the Commission needed to foster the emergence of competitive services. It is a well-known fact that nothing ensures the best price for consumers like competition between services with the same purpose. Our broadcasting system is confronted by competitive offerings that continue to grow outside its control.

In fact, thanks to new platforms and high-speed Internet access, people no longer need to be one of the eleven million subscribers to the Canadian broadcasting system to be able to access cultural, television and film content. All you need is an Internet connection! Sony's Playstation Video Store (for Playstation 3), Microsoft's Zune Video Marketplace (for Xbox 360), Netflix (compatible with both of the aforementioned consoles as well as computers) and Apple TV all enable users to legally download movies and television shows using distribution platforms that are not regulated by the Commission. To this first, non-exhaustive list, we could add Blink.TV and the consoles Boxee and Roku with Google TV and Amazon TV.

To sustain the system, the Commission should at least ensure that licensees within our broadcasting system can propose services that compete against these new platforms over which it has no influence. This is a considerable challenge. As opposed to our distributors – Super Écran (607,000 subscribers), TMN (1,152,000 subscribers), Movie Central (953,000 subscribers) and Super Channel (264,000 subscribers) – Apple, Sony, Microsoft and Netflix are not required to broadcast or subsidize Canadian content production.

Let's not hide our heads in the sand! Let's help the Canadian system face the challenge of this new, slowly emerging and unregulated competition. For the sake of our country, our artists, our producers and our directors, let's make sure that competitive offerings are available on traditional, regulated platforms at the best prices. The time for defence is past: it's time for offence! In sum, it is imperative that we recognize that a "blitzkrieg" of movie production offerings is in progress and that a purely defensive strategy risks harming the Canadian broadcasting system in the short term.

Super Écran: a true success story, now safe from competition!

In the call for applications just released, the Commission does not stop at a simple "diversity" criterion: it specifically asks, in paragraphs 2 and 6, that the service "not compete directly with Super Écran" and be "complementary to Super Écran." It is now clear that the Astral monopoly – which devotes 90% of its programming schedule to recent feature-length films (mostly foreign) – will be well protected under Commission's wing.

And yet, when the first pay television service was launched in 1982, the Commission indicated its preference for competition among several general interest services, which are, by their very nature, more akin to distribution services. However, the recession in the early 1980s soon forced the Commission to moderate its ambitions for a competitive regime for general interest pay television.

After over 25 years with a protected market, I think that the adoption of new criteria that further reinforce Astral's position is a step back. This new strategy will deprive Francophone viewers of a second choice at the best price, all in the name of "diversity," "complementarity" and the necessity "not [to] compete directly with Super Écran." At the same time, Astral Media Inc. will continue to ride the success of Hollywood blockbusters and sleep easy with its general interest pay television service. Given the protectionist philosophy of the Commission majority, one question comes immediately to my mind: will this new

service be so different and complementary that it, too, will be guaranteed “exclusivity” for another 25 years?

In 2008, in a sincere move toward deregulation following the 2007 Dunbar-Leblanc report, the Commission proposed a range of criteria for opening up the protected, “one service-per-genre” universe to competition. In Public Notice 2008-100, the Commission established five criteria to determine the ability of a genre to sustain competition: economic health, popularity, programming availability, genre diversity and “other consequences” (a poorly defined catch-all category). Need I explain that this was a list of criteria? The Commission never said that all five criteria had to be met simultaneously for the genre to be opened up and a competitive service launched.

It is in these circumstances that the Commission was asked to make a decision on TVA Group’s proposal. A positive response would have meant the deregulation of the general interest pay television genre and the end of Astral Media’s monopoly in the French-language market. Ciné-TVA had left no doubt about its willingness to meet demand and broadcast blockbusters to compete with Super Écran.

Because a distribution service was at issue, the Commission should have established that only objective and measureable criteria, such as economic health and genre popularity, could be used to free up the protected genre of general interest pay television in the French-language market. The call for applications reveals the divided opinion of the Commission, which refuses to grant a new licence for a general interest pay service and which introduces even more specific criteria than those set out in Public Notice 2008-100. Not only are the other criteria (diversity, programming availability and negative consequences) still present, but Notice of Consultation CRTC 2010-860 specifies that the service must not compete directly with Super Écran and must be complementary to it. When I arrived at the Commission in 2007, the *Regulatory Guide to Canadian Television (2006)* was 1,128 pages long. Today in 2010 it has 1,361 pages. At this rate, it will have more than 2,000 pages in 2020. Is that deregulation and transparency?

In my humble opinion, Astral’s service has all the attributes of a mature service; the genre could be opened up to competition for the benefit of consumers.

First, let’s acknowledge that the pay television service offered by Super Écran is very popular in Quebec; it saw an increase of 125,000 subscribers over the past five years. According to the latest statistics for 2009-2010, its market share is 4.1% in the French-language Quebec market, just below the discretionary sports service RDS and the three conventional television services in the Francophone market (TVA – 25.5%; SRC – 12.5%; V – 7.4%; RDS – 5.9%). As shown in the table below, the English-language general interest services only garnered, collectively, a 1.5% market share in the English-language market.

	Market share	Number of subscribers	Total revenue in millions	PBIT in millions	PBIT percentage
Super Écran	4.1% ¹	607,000	\$61.7	\$20.9	33.9%
TMN ²	1.0%	1,152,000	\$122.7	\$28.1	23.0%
HBO Canada ³	0.3%	-	-	-	-
Movie Central	0.2%	953,000	\$96.9	\$20.2	20.9%
Super Channel+	0.0%	264,000	\$13.9	\$-60.5	-434.8%

Is it any surprise that the profits generated by the Astral pay television service were proportionally much greater (33.9%) than those of English-language services elsewhere in the country? Since the Commission refused to grant a second licence for a pay television service in the French-language market in 2006, the revenues and profits of Astral Media's specialty service have only grown, to the profit of Astral shareholders alone! In fact, Super Écran's profits have nearly doubled in five years, from \$12 to almost \$21 million. Taken alone, this pay television service from the Astral Group (the rate for which is comparable to that of English-language distributor chains) accounted for half of the profits, i.e. \$42.1 million, of TVA Group (TVA, LCN, Argent, Mystère, Prise 2 and Casa). In the period from 2004-2005 to 2008-2009, Astral's specialty service saw an average annual growth of nearly 7% in revenue and over 6% in the number of subscribers.

In short, Super Écran is very profitable, with a profit before interest and taxes level of nearly 34%, which is by far the highest in the country for a general interest pay TV service. As I mentioned above, this service – which still has exclusive agreements with Canadian and American distributors – would have been in an excellent position to face competition from Ciné-TVA. The task was a daunting one for TVA Group, which was asking the Commission to prohibit Astral, by condition of licence, from making exclusive distribution contracts with producers for the next three years, which essentially boiled down to asking the Commission to intervene in private contracts to clear the way for Quebecor Group. In my opinion, deregulation goes hand in hand with minimal intervention from the regulator. In other words, the Commission should not get involved in private contracts. Historically, this has also been

¹ BBM Canada, PPM, share of hours tuned, All Canada excluding Quebec Francophone market, all persons 2+, Monday to Sunday, 2a-2a, 2009-2010 (31 August 2009 to 29 August 2010).

² TMN and Movie Central are only available on a regional basis. Their audience share, relative to the English-language market as a whole, must therefore be considered together.

³ HBO Canada is a multiplexed channel that distributes TMN and Movie Central.

⁴ BBM Canada, PPM, share of hours tuned, Quebec Francophone market, all persons 2+, Monday to Sunday, 2a-2a, 2009-2010 (31 August 2009 to 29 August 2010).

the Commission's position. Astral would have had plenty of time to get the measure of its new competitor.

Despite these exceptional financial results (which would be the envy of many distributors), a survey conducted in 2007 on behalf of Quebecor Group showed that 78% of the service's subscribers would like to see the introduction of a new service to compete with Super Écran. The Commission should have taken this information into account.

If the popularity and economic health criteria were determining factors in opening up news and sports services to competition in 2008, why add today new specific criteria for a pay television service of which the main purpose is not to create content, but simply to distribute it? Based on the data above, how could anyone doubt the service's economic health or its popularity in the French-language market? These are the criteria that should have led the Commission to deregulate the general interest pay television genre and introduce competition once and for all in the general interest French-language pay television genre.

As to the third, fourth and fifth criteria (programming availability, genre diversity and other consequences), though they are useful, they should not be determining factors for a general interest pay television service that meets the popularity and economic health criteria. How could the availability of recent foreign films be appropriately evaluated in advance, as it were? How could thresholds be established for sufficient inventory, particularly for a general interest service as opposed to a discretionary scientific programming service, for example? If we let the market speak, the proposed programming and rates will do the rest. It is not the regulator's place to try to wrap its head around an offering that is as huge and, in the end, as unpredictable as that of the blockbusters that are the most in demand by consumers and that are the bread and butter of general interest pay television specialty services.

With regard to the diversity criterion set out in Public Notice 2008-100, is the Commission afraid (to use its own expression) that everyone will rush to the mainstream? Why not let the market make the decisions regarding general interest services like this one? If the two pay television services were in competition, they could easily distinguish themselves by targeting specific niches that subscribers are seeking, such as European, Indian or Korean productions. To be honest, I fail to see how diversity would be lessened by the existence of two general interest services, especially when one takes into account the lion's share that the current Astral service gives to major American film productions.

In short, diversity, program availability and "other consequences" are essentially subjective criteria that are difficult to measure over time, whereas economic health and genre popularity are purely objective criteria. It is these last two criteria that the Commission should have used to form its opinion, move forward and finally open the pay television genre in the interest of consumers and the Canadian broadcasting system.

Let's be pragmatic: set rules for competition to benefit Canadian content

When the Commission deregulated sports and national news services in 2008, it described all the candidates for deregulation as “strong,” “healthy” and “highly popular.” What is the difference between those candidates and the pay television service at issue in today’s decision? Doesn’t this French-language service have all of these characteristics, making it an ideal candidate for deregulation of the genre?

If the Commission is not prepared to open the genre for a distribution service that makes a living mainly off Hollywood productions, I fail to see how it can deregulate more specialized genres that carry more Canadian content.

If the Commission had opted to move forward, I feel it would have been well advised to ensure that the two competitive services still have access rights relative to BDUs. I certainly recognize that that is not quite consistent with a policy of across-the-board deregulation (after all, why attain the nirvana of the free market all at once?). In this particular case, I am of the view that it is counter-productive to elevate to the status of dogma the policy set out in Broadcasting Public Notice 2008-100 that deregulated competitive services will no longer have the access rights characteristic of the Canadian broadcasting system. One step at a time. In the first place, let’s be sure we have services that will compete against one another. Let’s be pragmatic: deregulating one service per genre is a first step. And for a first step, consumers can only wish that there will be two pay television services and that they can subscribe to them. One will understand that the French-language market is not at all like the North American English-language market; it has its own characteristics, most notably its small size: barely 6 million as against 27 million. Under the circumstances, it is essential that services be available to all viewers in this small market. Simply put, Super Écran must retain access to the Videotron platform, because Videotron represents over 60% of the BDUs in the Quebec French-language market.

In my view, the Commission must foster competition without however abandoning its mission of structuring competition in the interest of consumers, who expect that they will be given access to two services instead of one and that they will be allowed to subscribe to the one they prefer or to both if they are substantially different. Naturally, the cost of supplying content to general interest pay television services is very high in comparison with discretionary services. We should let these businesses carry on with business, but we should also assure them that they will be able to reach all subscribers. The world’s most regulated broadcasting system cannot be deregulated overnight.

Despite the recent successes of Canadian films, notably in the French-language market, the two main parties concerned indicated that there are not enough French-language Canadian movies to keep two services going. This is a major objection, if we want to comply with Canadian content requirements (25% over the day and 30% in the evening).

TVA Group therefore proposed a compromise: require both services to carry all appropriate Canadian films and prohibit Astral from signing exclusive content distribution deals for the first three years after the service is launched. To be sure, the launch would have needed to be postponed for a few years, given the exclusive contracts that Astral has already signed.

However, in my view this temporary measure – whereby both services could offer virtually identical Canadian content for three years – would have added credibility to the arrival of the new player, and it would have been quite attractive for Canadian content. I feel that this proposal by TVA Group warranted further consideration.

Conclusion

A few months ago we heard that in the second trimester, for the first time in the history of pay television in the United States, 200,000 subscribers cancelled their subscription. Given the state of the U.S. economy (where pay television rates are also declining for the first time) and the number of subscribers there (100 million), it would be perilous to see this as an irreversible general trend. But still, this “first” opens the door to a more widespread move away from conventional blockbuster distribution services by consumers, particularly in the case of young families. As a regulator, we must view this as a cautionary tale: consumers must never be taken for granted and that applies both to price and to service.

While the Canadian system has evolved until now within a highly protectionist framework, comforted by the soothing assurance of “one channel per genre” with the objective of showcasing Canadian content, the increasing penetration of new distribution technologies represents a serious threat to its future, particularly the future of a general interest pay television service.

Indeed, given the emergence of new distribution platforms and the conditions prevailing in the French-language market, the Commission should have opened the general interest pay TV genre to competition (as it has done already in the English-language market). It could have approved the application by TVA Group subject to certain conditions, rather than initiating another proceeding aimed at creating a service that is to be distinct and not in direct competition with the service that Super Écran has been providing for over 25 years. Opening up the genre and allowing competition between two general interest pay television services would have better served the interests of consumers and of the system.

For these reasons, I have registered this dissenting opinion – the thirteenth since I was appointed in August 2007. In these 13 dissenting opinions (listed below), I have in all cases attempted to argue the necessity of fostering a competitive environment within the Canadian broadcasting system. Over the short term and the long term, I feel competition is essential if the Canadian distribution and broadcasting system is to be enhanced.

Previously published dissenting opinions:

- *Criteria for assessing applications for mandatory distribution on the digital basic service*, Broadcasting Regulatory Policy CRTC [2010-629](#), 27 August 2010
- *Community television policy*, Broadcasting Regulatory Policy CRTC [2010-622](#), 26 August 2010
- *AUX TV – Category 2 specialty service*, Broadcasting Decision CRTC [2010-223](#), 21 April 2010

- [*The implications and advisability of implementing a compensation regime for the value of local television signals: A report prepared pursuant to section 15 of the Broadcasting Act*](#), 23 March 2010
- *Reconsideration of Broadcasting Decision 2008-222 pursuant to Orders in Council P.C. 2008-1769 and P.C. 2008-1770*, Broadcasting Decision CRTC [2009-481](#), 11 August 2009
- *Video-on-demand service*, Broadcasting Decision CRTC [2008-366](#), 23 December 2008
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory Policy*, Broadcasting Public Notice CRTC [2008-100](#), 30 October 2008
- *Licensing of new radio stations to serve Ottawa and Gatineau*, Broadcasting Decision CRTC [2008-222](#), 26 August 2008, corrected by *Licensing of new radio stations to serve Ottawa and Gatineau – Correction*, Broadcasting Decision CRTC [2008-222-1](#), 28 August 2008
- *Change in the effective control of TQS inc. and licence renewals of the television programming undertakings CFJP-TV Montréal, CFJP-DT Montréal, CFAP-TV Québec, CFKM-TV Trois-Rivières, CFKS-TV Sherbrooke, CFRS-TV Saguenay and of the TQS network*, Broadcasting Decision CRTC [2008-129](#), 26 June 2008
- [*CRTC Report to the Minister of Canadian Heritage on the Canadian Television Fund*](#) (Appendix 2), announced in [*The CRTC presents its report on the Canadian Television Fund*](#), News Release, 5 June 2008
- *Licensing of new radio stations to serve Kelowna, B.C.*, Broadcasting Decision CRTC [2008-62](#), 14 March 2008
- *CIGR-FM Sherbrooke – Acquisition of assets*, Broadcasting Decision CRTC [2007-435](#), 24 December 2007