



Broadcasting Decision CRTC 2011-550

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Route reference: 2011-188

Ottawa, 31 August 2011

Astral Media Radio (Toronto) Inc., and 4382072 Canada Inc., partners in a general partnership carrying on business as Astral Media Radio G.P.
Calgary, Alberta

Application 2011-0294-6, received 15 April 2011
Public hearing in the National Capital Region
17 May 2011

CIBK-FM Calgary – Licence renewal

*The Commission **renews** the broadcasting licence for the English-language commercial radio station CIBK-FM Calgary from 1 September 2011 to 31 August 2013. This short-term licence renewal will allow for an earlier review of the licensee's compliance with the Radio Regulations, 1986.*

Introduction

1. The Commission received an application by Astral Media Radio (Toronto) Inc. and 4382072 Canada Inc., partners in a general partnership carrying on business as Astral Media Radio G.P. (Astral), to renew the broadcasting licence for the English-language commercial radio programming undertaking CIBK-FM Calgary, which expires 31 August 2011.
2. In Broadcasting Notice of Consultation 2011-188, the Commission stated that the licensee was in apparent non-compliance with section 15 of the *Radio Regulations, 1986* (the Regulations), which relates to Canadian content development contributions (CCD). The Commission further noted that in Broadcasting Decision 2007-342, CIBK-FM was granted a four-year short term renewal, until 31 August 2011, due to the licensee's non-compliance with its condition of licence relating to contributions to Canadian talent development. Canadian talent development is now known as CCD and will be referred to as such throughout the remainder of this decision.
3. The Commission called the licensee to a hearing to inquire into these matters. At the hearing, the Commission expected the licensee to show cause as to why a mandatory order should not be issued requiring the licensee to comply with section 15 of the Regulations.
4. The Commission received interventions in support of this application from Bell Media Inc. (Bell Media) and Rogers Broadcasting Limited (RBL), two companies that also operate commercial radio stations. The views of the interveners are

discussed later in this decision. The complete record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Commission's analysis and determinations

5. After examining the application in light of applicable regulations and policies, the Commission considers that the issues to be addressed in its determinations relate to the following:

- compliance with conditions of licence as they relate to CCD for the 2007-2008 and 2008-2009 broadcast years;
- compliance with the Regulations related to basic annual CCD contributions for the 2009-2010 broadcast year; and
- filing complete annual returns.

Compliance with conditions of licence relating to Canadian content development for the 2007-2008 and 2008-2009 broadcast years

6. For the 2007-2008 and 2008-2009 broadcast years, CIBK-FM was subject to the following conditions of licence:

In the 2007-2008 and 2008-2009 broadcast years, the licensee shall make direct expenditures of at least \$660,000 per broadcast year on the following initiatives:

Initiative	Amount of contribution
Developing Urban Stars	\$390,000
Urbanet.com Web site	\$25,000
Carifest	\$25,000
Prairie Music Week	\$25,000
FACTOR	\$100,000
Designated Group Fund	\$50,000
CTD coordinator	\$45,000

7. The Commission notes that, in the 2007-2008 and 2008-2009 broadcast years, the licensee contributed \$36,000 and \$33,000, respectively, to the Designated Group Fund rather than the required minimum amount outlined above. Furthermore, Astral contributed \$262,014 to Developing Urban Stars in 2008-2009 instead of the required \$390,000 minimum amount.

8. Further, the licensee's total CCD contribution in 2008-2009 was \$53,468 lower than the required minimum annual amount of \$660,000. The Commission notes, however,

that the licensee expended \$714,324 in 2007-2008, and that its total expenditures for both 2007-2008 and 2008-2009 amounted to \$1,320,856. This exceeds by \$856 the total amount required for the 2007-2008 and 2008-2009 broadcast years combined.

9. When questioned at the hearing on the measures put in place to ensure future compliance with its regulatory obligations, Astral indicated that it has revamped and streamlined its CCD payment and approval process and now regularly consults with Commission staff concerning CCD projects.
10. The licence for CIBK-FM Calgary was awarded as part of a competitive process in which contributions to CCD were considered. As part of its application to obtain the broadcasting licence, the licensee proposed both the amounts and the initiatives for CCD that were imposed in the condition of licence set out above.¹ When Astral later purchased the station, it agreed to the condition of licence.²
11. Although Astral did exceed the total expenditures for the 2007-2008 and 2008-2009 broadcast years combined, it nevertheless failed to meet its obligations by failing to contribute the correct total annual amount for the 2008-2009 broadcast year. Moreover, for both years, it failed to contribute the total required amounts to certain required initiatives, specifically the Designated Group Fund and the Developing Urban Stars initiatives. In addition, Astral increased its contribution towards the salary of a CCD coordinator by \$15,000 for the 2008-2009 broadcast year despite never having formally applied to the Commission to amend its conditions of licence.
12. As a part of the competitive process noted above, the Commission permitted the licensee, as an extraordinary measure, to devote \$45,000 per year from its contributions toward the employment of a CCD coordinator to manage these initiatives and to ensure compliance.
13. Accordingly, the Commission finds that the licensee was in non-compliance with its conditions of licence for each of these broadcast years. However, given that the licensee exceeded the total required amount for the two years combined, the Commission will not require the licensee to make additional payments related to the conditions of licence.

Compliance with the *Radio Regulations, 1986* related to basic annual Canadian content development contributions for the 2009-2010 broadcast year

14. Under the provisions of section 15 of the Regulations, Astral was required to make a basic annual CCD contribution for the 2009-2010 broadcast year based on the previous year's revenues of CIBK-FM.
15. Of its contributions, Astral devoted \$10,348 to concerts at private venues for which tickets were distributed exclusively to station contest winners and, as such, were not open to the general public. Specifically, the events were a Kardinal Offishall concert,

¹See Decision 2001-172.

² See Broadcasting Decision 2007-359.

a Barenaked Ladies concert, and the “Mountain Mayhem” concert. The Commission placed Astral on notice in a letter before the hearing and in discussions during the hearing that these initiatives appeared to be self-serving, that is, of benefit to the licensee itself, and thus were ineligible as CCD contributions.

16. Astral was of the view that the contributions should be deemed eligible, noting that the events supported Canadian artists. The interveners, Bell Media and RBL, supported this position, submitting that the Commission has never issued any statement indicating that CCD expenditures made to promotional events for station listeners are ineligible.
17. Additionally, Astral was of the view that the Commission’s preliminary view was tantamount to a new policy interpretation and that the Commission should have called for comments on this interpretation prior to its adoption. Further, on a procedural matter, Astral considered that in accordance with section 57 of the *CRTC Rules of Practice and Procedure* (the Rules), the Commission was obligated to disclose to Astral the documents on which it relies, given that this hearing related to the possible issuance of a mandatory order.
18. The Commission notes that the Regulations define “eligible initiative” as an initiative that is considered to be eligible for CCD funding as indicated in Broadcasting Public Notice 2006-158 (the Commercial Radio Policy).
19. The Commercial Radio Policy states that CCD contributions should be dedicated to initiatives that will provide high quality audio content for broadcast. All CCD initiatives must involve direct expenditures, and must be allocated to the support, promotion, training and development of Canadian musical and spoken word talent, including journalists. The Commission also provided a non exhaustive list of initiatives and categories of initiatives, in addition to FACTOR and MUSICACTION, that it considers to be eligible for CCD funding.

Eligibility

20. As indicated above, Astral provided funding to three contentious concert initiatives in the 2009-2010 broadcast year. These concerts were held at private venues where tickets were distributed exclusively to station listeners and access was not granted to the general public. The Kardinal Offishall concert was held in support of Astral’s rebranding of CIBK-FM in Calgary. The remaining events, which were only open to station contest winners, were held outside of Calgary in Kanaskis and Vancouver respectively.
21. The Commission has been clear in past decisions regarding the nature of CCD initiatives. In particular, the Commission notes its determinations in Broadcasting Decision 2007-359, in which it approved the purchase of the assets of Standard Radio Inc. (which included CIBK-FM) by Astral. In that decision, the Commission noted that CCD initiatives should involve third parties, *should not be self serving*, (emphasis added) and should be incremental, that is, over and above the normal cost of doing business.

22. In the Commission's view, self-promotion is a regular cost of doing business. It is reasonable to expect that a commercial broadcaster will seek to advertise both itself generally and changes to its brand to its listeners and market in the most efficient and attention attracting method as possible. Public advertising on billboards and in other media is one method. Events such as the Kardinal Offishall concert and closed events reserved for loyal listeners and other VIPs are another. The Commission considers that these other means of self-promotion and all related expenses to these events are part of the cost of doing business. In the Commission's view, payment to artists and other entertainment is ancillary to the primary purpose of the event, which is the promotion of the station itself.
23. Instead, the Commission expects that, when CCD contributions are devoted to musical artists, the money must be spent, first and foremost, to support and promote the artists themselves. The Commission also expects that concerts involving these artists will be open and accessible to the general public. The Commission does not prohibit stations from advertising themselves at these publicly accessible events, however, and has not imposed such restrictions.
24. The Commission notes that licensees many, at all times, consult with the Commission in cases involving any perceived ambiguity. It is the licensee's responsibility to demonstrate to the Commission that CCD initiatives meet the eligibility criteria as set out in the Commercial Radio Policy. In the case of the initiatives described above, the Commission is not satisfied that Astral has met these criteria and, in this light, the Commission does not consider these concerts to be eligible for CCD funding.

Policy interpretations

25. Following extensive public processes, the Commission creates policies that help it properly regulate and supervise the Canadian broadcasting system and implement the general broadcasting policy objectives as set out in section 3(1) of the *Broadcasting Act* (the Act). The Commission, in its function as an administrative tribunal, interprets its policies and applies them, along with various regulations, in the adjudication of proceedings that lead to the issuance, renewal, amendment, suspension or revocation of broadcasting licences.
26. The decisions that flow from these proceedings are made public as are the Commission's interpretations and implementations of its policies. In this regard, the Commission made it very clear in Broadcasting Decision 2007-359 that CCD contributions are not to be self serving and are to be incremental to the cost of doing business. It reiterated this determination in Broadcasting Decision 2010-972, in which it renewed the licence for CHBN-FM. This decision addressed initiatives that were deemed ineligible after Commission review. The Commission is therefore satisfied that it has acted in a transparent fashion with respect to the present context and in a manner commensurate with its expertise.

Procedural fairness

27. In response to Astral's allegations regarding the application of section 57 of the Rules, the Commission notes that this section can be found under Part 3 of the Rules,

which is entitled *Rules applicable to certain broadcasting applications* and, more specifically, under the title *Proceeding under section 12 of the Broadcasting Act*.

28. The Commission considers that section 57 of the Rules does not apply in the context of a hearing to renew a licence, even in cases where the licensee must show cause as to why a mandatory order under section 12 of the Act should not be issued. In accordance with section 56 of the Rules, the Commission considers that section 57 applies only in cases where the hearing is a proceeding *initiated by the Commission* (emphasis added) to inquire, hear and determine a matter under section 12 of the Act. It is under those specific circumstances that a licensee must be given access to all documents relied on by the Commission because it may otherwise not have access to the evidence that it needs to prepare for the hearing. In the Commission's view, this is quite different from a licence renewal hearing, even one where it is necessary for a licensee to show cause as to why a mandatory order should not be imposed, where licensees are in communication with the Commission and its staff and have a record available to them well in advance of the hearing.
29. In fact, the Commission notes that, as part of the proceeding that led to this decision, the record shows that through correspondence, Astral was provided with notice as to the information that was going to be relied upon at the hearing. The Commission is therefore of the view that Astral's rights to natural justice were maintained.
30. In light of all of the above, the Commission determines that Astral is in non-compliance with section 15 of the Regulations. The Commission therefore requires the licensee, by **condition of licence**, to make a total payment of \$10,111 to eligible CCD initiatives. Proof of eligibility and proof of payment relating to this expenditure must be filed with the Commission by no later than 30 September 2011. The amount of \$10,111 takes into account an overpayment to other initiatives in the amount of \$237 for the 2009-2010 broadcast year.

Filing complete annual returns

31. Section 9(2) of the Regulations provides that, on or before 30 November of each year, a licensee shall submit to the Commission a statement of accounts, on the annual return of broadcasting licensee form, for the broadcast year ending on the previous 31 August. The annual return form requires a statement of accounts, financial statements, and information relating to CCD, including proof of payment and proof of eligibility.
32. The Commission notes that the annual returns for the three broadcast years audited by Commission staff were incomplete in that they variously did not include details relating to CCD initiatives, proof of payment for CCD contributions, and proof of eligibility of CCD initiatives. This information is essential to the Commission in monitoring a licensee's compliance with its regulatory obligations. Furthermore, Astral provided multiple revisions to its returns throughout the process, including the day of the hearing, and information received was filed in a disorganized fashion.
33. The Commission expects licensees to file complete annual returns together with all required appendices and supporting documentation. Moreover, as noted above, the

Commission requires that this information be filed by no later than 30 November of each year.

34. Astral's returns were not complete when filed as evidenced by the additional information filed throughout this process up until the hearing. This practice, going forward, is not acceptable. Accordingly, the Commission places Astral on notice that continued failure to file complete and orderly annual returns may cause further findings of non-compliance. The Commission will closely monitor the licensee in this regard during the coming licence term.

Conclusion

35. In Broadcasting Information Bulletin 2011-347, the Commission announced a revised approach to dealing with radio stations found in non-compliance. The Commission noted in particular that each instance of non-compliance will be evaluated in light of factors such as the quantity, recurrence and seriousness of the non-compliance. The Commission also noted that it will consider the circumstances leading to the non-compliance in question, the licensee's arguments, and the measures taken to rectify the situation.
36. The Commission also indicated that the possible sanctions include the following: short-term licence renewal, imposition of conditions of licence, mandatory orders, non-renewal or suspension of the licence.
37. The Commission reiterates the importance it places on a licensee's observance of its regulatory obligations and its conditions of licence, and views any non-compliance as a very serious matter. In the present case, the Commission is satisfied with the licensee's explanation of the circumstances surrounding its current non-compliances and the measures outlined by the licensee to ensure future compliance with its regulatory obligations. Accordingly, the Commission does not consider it necessary to issue a mandatory order pursuant to section 12(2) of the Act requiring the licensee to comply with any section of the Regulations or its conditions of licence.
38. However, in accordance with its revised practice regarding radio non-compliance set out in Broadcasting Information Bulletin 2011-347, the Commission considers that a short-term renewal period for CIBK-FM would be appropriate. Accordingly, the Commission **renews** the broadcasting licence for the English-language commercial radio programming undertaking CIBK-FM Calgary from 1 September 2011 to 31 August 2013. This short-term renewal will allow for an earlier review of the licensee's compliance with its conditions of licence and with section 15 of the Regulations, which relate to CCD contributions. The licence will be subject to the **conditions of licence** set out in the appendix to this decision.

Employment Equity

39. Because the licensee is subject to the *Employment Equity Act* and files reports concerning employment equity with the Department of Human Resources and Skills Development, its employment equity practices are not examined by the Commission.

Secretary General

Related documents

- *Revised approach to non-compliance by radio stations*, Broadcasting Information Bulletin CRTC 2011-347, 26 May 2011
- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2011-188, 16 March 2011
- *CHBN-FM Edmonton – Acquisition of assets*, Broadcasting Decision CRTC 2010-972, 23 December 2010
- *Acquisition of assets*, Broadcasting Decision CRTC 2007-359, 28 September 2007
- *CIBK-FM Calgary – Licence renewal*, Broadcasting Decision CRTC 2007-342, 30 August 2007
- *Commercial Radio Policy 2006*, Broadcasting Public Notice CRTC 2006-158 , 15 December 2006
- *Three new radio stations to serve Calgary*, Decision CRTC 2001-172, 12 March 2001

**This decision is to be appended to the licence.*

Appendix to Broadcasting Decision CRTC 2011-550

Term and conditions of licence for the English-language commercial radio programming undertaking CIBK-FM Calgary

Term

The licence will expire 31 August 2013.

Conditions of licence

1. The licence will be subject to the conditions set out in *Conditions of licence for commercial AM and FM radio stations*, Broadcasting Regulatory Policy CRTC 2009-62, 11 February 2009.
2. The licensee shall devote, in each broadcast week, a minimum of 40% of its musical selections from content category 2 (Popular Music) to Canadian selections broadcast in their entirety.
3. The licensee shall contribute \$10,111 to an eligible initiative relating to the Canadian content development shortfall discussed in this decision. Proof of eligibility and proof of payment relating to this expense must be filed with the Commission by no later than 30 September 2011.