



Broadcasting Regulatory Policy CRTC 2011-59

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Standard requirements for video-on-demand undertakings

This policy establishes standard conditions of licence, expectations and an encouragement that will apply to new video-on-demand undertakings, including services under consideration by the Commission whose applications have not been published as of the date of this policy. The Commission also intends to apply these requirements to existing licensees at their licence renewal.

Introduction

1. In Broadcasting Notice of Consultation 2010-702, the Commission called for comments on a set of standard conditions of licence, expectations and an encouragement for video-on-demand (VOD) undertakings. The Commission considered this appropriate in light of Broadcasting Regulatory Policy 2010-190 (the VOD Policy), in which it introduced regulatory mechanisms that it intended to apply to VOD undertakings primarily through conditions of licence. The Commission further considered that this would make the renewal process more streamlined and efficient and would allow it to develop simplified application forms for VOD undertakings.
2. Included in the list of proposed requirements were the standard conditions of licence and expectations concerning accessibility of programming. In Broadcasting and Telecom Regulatory Policy 2009-430 (the Accessibility Policy), the Commission stated its intention to impose such conditions on programming undertakings at their licence renewal. In the VOD Policy, the Commission noted that it intended to explore accessibility issues further with VOD undertakings at their licence renewal. However, the Commission considered that the process initiated by its call for comments on standard requirements would also provide an appropriate forum to address these issues.
3. The Commission received comments from various licensees of VOD undertakings, as well as from FreeHD Canada and Astral Media Inc. (Astral). The public record for this proceeding can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Commission's analysis and determinations

4. After examining the record of the proceeding, the Commission considers that the issues to be addressed in its determinations are:

- the definition of “gross annual revenue” for the purpose of calculating a VOD undertaking’s contribution to Canadian independent production funds;
- the competition of subscription VOD (SVOD) packages with Canadian linear discretionary services;
- the limits on advertising;
- the prohibition relating to the acquisition of exclusive program rights;
- the introduction of a reverse onus provision;
- the obligation to remit to rights holders of Canadian feature films 100% of revenues earned from the exhibition of these films; and
- the implementation of the Accessibility Policy.

Definition of “gross annual revenue” for the purpose of calculating the contribution to a Canadian independent production fund

5. Under the current licensing framework for VOD undertakings (Public Notice 2000-172), each VOD licensee is required to contribute a minimum of 5% of the annual gross revenues earned by its undertaking to an existing Canadian program production fund administered independently of this undertaking or to the Canada Media Fund. If a VOD service is affiliated with a broadcasting distribution undertaking (BDU), for the purpose of calculating its financial support for independent production, the VOD service’s gross annual revenue is deemed to be 50% of the total VOD associated retail revenues received from customers by the related BDU distributing the service. This requirement has been implemented through the imposition of conditions of licence on individual VOD undertakings (e.g. Decisions 2000-733 to 2000-736).
6. In the VOD Policy, the Commission stated that it would eliminate the approach whereby a VOD service’s gross annual revenue is deemed to be 50% of a BDU’s total retail revenues. The Commission set out a simplified condition of licence to that effect in its call for comments.
7. Bell Aliant Regional Communications, Limited Partnership and Bell TV (Bell), Cogeco Cable Inc. (Cogeco), MTS Allstream (MTS), Quebecor Media Inc. (Quebecor), Rogers Communications Inc. (Rogers) and Shaw Communications Inc. (Shaw) opposed the proposed condition. Parties appeared to interpret the condition as prescribing that the VOD undertaking’s revenue would be deemed to be 100% of the related BDU’s retail revenue. Parties argued that this would result in a double counting of revenues for contribution purposes and an increase in contribution payments. As a result, most parties requested that the Commission maintain the current approach.
8. The Commission acknowledges that no direction was given in the VOD Policy or in the call for comments about the transfer of revenues between VOD undertakings and related BDUs and that there appears to be a need for such direction. The Commission

has examined the parties' request to maintain the current approach. For the purpose of calculating the annual contribution requirement to Canadian independent production funds, the Commission considers that it would be appropriate to maintain its current approach and continue to deem the VOD service's revenue to be 50% of the VOD associated retail revenue received by the related BDU distributing the service. For instance, if a BDU collects \$10 from a subscriber for a VOD program, then \$5 would be considered VOD revenues for the purpose of calculating the related VOD undertaking's 5% contribution. By contrast, if a VOD service receives revenue from an unrelated BDU, the VOD licensee will make a 5% contribution payment on such revenue, it being noted that such arrangements are negotiated. VOD undertakings are expected to report annually 100% of the revenue received from related BDUs as well as other sources.

9. For the purpose of this condition of licence, the VOD service is a related service if the BDU distributing the service or any of its shareholders controls more than 10% of the total shares issued and outstanding of the service. This definition is consistent with that set out in the *Broadcasting Distribution Regulations* and in Broadcasting Public Notice 2008-100.
10. Accordingly, in the appendix to this policy, the Commission has revised the proposed condition of licence to include the above-noted clarifications.

Competition of subscription video-on-demand packages with Canadian linear discretionary services

11. In the VOD Policy, the Commission determined that it would introduce a condition of licence prohibiting a VOD undertaking from offering: (a) a non-Canadian SVOD package that is directly competitive with a Canadian linear pay or specialty service (i.e. a Category A, B or C service)¹ or (b) a Canadian SVOD package that is directly competitive with a genre-protected Canadian linear pay or specialty service (i.e. a Category A service). This condition would not apply to an on-demand version of a Canadian linear service. Accordingly, in its call for comments, the Commission proposed a condition to this effect.
12. Cogeco, Quebecor, Rogers and Shaw argued that monitoring all Canadian services for competitiveness would represent a significant administrative burden. Bell and Quebecor submitted that the onus should be on the linear service that provides the content to the VOD undertaking to ensure that the resulting SVOD package is not competitive with a linear Category A service. Finally, Astral requested that the Commission clarify the condition of licence by stating that broadcasters are allowed to extend their own linear services into SVOD packages.

¹ Category A services are currently known as Category 1 and analog pay and specialty services, while Category B services are currently known as Category 2 services. Category C services are services that provide programming in genres that the Commission has opened up to competition.

13. The Commission considers that ensuring that non-Canadian SVOD packages are not directly competitive with Canadian linear discretionary services and that Canadian SVOD packages are not directly competitive with genre-protected Canadian linear discretionary services would not constitute a significant burden. Of primary consideration would be Category A services, of which there are 67. [A list of these Category A services and all licensed Category B services](#) is available on the Commission's website, with references to their licensing decisions.
14. In addition, as the Commission noted in the VOD Policy, the licensee of a linear service may apply for a VOD licence if it wishes to offer and exercise responsibility for an on-demand version of its service. Absent such a licence, the Commission will hold VOD undertakings responsible for the content on SVOD channels provided by a linear service. Accordingly, VOD undertakings will be responsible for ensuring that the SVOD packages they offer are not competitive with any linear Category A service.
15. However, the Commission sees merit to Astral's request for clarification to specify that the prohibition does not apply to on-demand extensions of linear services. Accordingly, the Commission has amended the condition of licence set out in the appendix to reflect the proposed change.

Limits on advertising

16. In the VOD Policy, the Commission decided to allow VOD licensees to advertise in programming acquired from licensed Canadian broadcasters. Accordingly, in the call for comments, the Commission set out new conditions of licence concerning advertising.
17. Shaw requested authorization for VOD services to broadcast public service announcements (PSAs) from federal, provincial and municipal governments, as well as public service organizations. Quebecor suggested some clarifications to the first proposed condition concerning advertising. For instance, Quebecor requested that the verb "included" used in the proposed condition be replaced with the phrase "inserted by the licensee" to indicate when VOD licensees are authorized to insert new advertising.
18. The Commission notes that PSAs are defined in Public Notice 1999-205 as programs (category 13) and are no longer considered advertising. As there are no restrictions on the program categories from which VOD services may draw their programming, they may broadcast PSAs, but not count them as advertising.
19. The Commission considers that Quebecor's revisions to the first proposed condition concerning advertising provide useful clarifications. Accordingly, the condition of licence set out in the appendix reflects the proposed changes.

Prohibition relating to the acquisition of exclusive program rights

20. VOD undertakings are subject to most of the provisions of the *Pay Television Regulations, 1990* by condition of licence. Section 6.1(2) of the *Pay Television Regulations, 1990* states that a licensee shall be considered to have given itself an undue preference if it distributes a pay-per-view program for which it has acquired exclusive or other preferential rights. In the proceeding that led to the VOD Policy, some parties questioned whether this section applied to VOD undertakings. To resolve that uncertainty, the Commission stated that it intended to impose a prohibition on the acquisition of exclusive program rights as a condition of licence for VOD undertakings. The Commission set out a condition of licence to that effect in its call for comments.
21. Quebecor argued that the negotiation of program exclusivity is part of television broadcasting and that the prohibition concerning the acquisition of exclusive program rights hinders competition with unregulated on-demand services such as Netflix or AppleTV. Quebecor also requested a transition period to comply with this requirement. Astral sought an exception for SVOD packages that are extensions of linear services.
22. The Commission notes that Quebecor's arguments question the merits of the policy, not the wording of the condition of licence, as was the purpose of this proceeding. The Commission further notes that the prohibition concerning exclusive program rights has been in place for many years and that the decision to impose it as a condition of licence was reached at the end of a public proceeding in which parties had a chance to intervene. Accordingly, the Commission determines that no changes should be made to the proposed condition of licence.
23. In addition, the Commission considers that an exception such as that sought by Astral, if applied generally, could open the door for entities that control both a VOD service and a linear programming service to give themselves an undue preference by providing the programming of their linear service in an SVOD package on an exclusive basis to a related undertaking. As such, the Commission finds that to grant a general exception would be inappropriate at this time.

Introduction of a reverse onus provision

24. In Broadcasting Public Notice 2008-100, the Commission noted that most undue preference allegations had been filed by programming undertakings against BDUs and that in most cases BDUs were in sole possession of key information without which complainants could not fully argue their cases. The Commission therefore introduced a reverse onus provision for BDUs. In the VOD Policy, the Commission determined that a reverse onus provision would also be appropriate for VOD undertakings. Accordingly, in the call for comments, the Commission proposed a condition of licence stating that in any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that has given the preference or subjected the person to the disadvantage.

25. Quebecor opposed the requirement, stating that no other programming service is subject to this condition, while Rogers considered it to be unnecessary. TELUS Communications Company supported the condition.
26. In the VOD Policy, the Commission noted that, like BDUs, VOD undertakings control access to their platform, including information on why some program suppliers might gain access and others not. The Commission remains of the view that VOD undertakings, all of which are currently controlled by related BDUs, should be subject to a reverse onus provision. Accordingly, the Commission determines that no change should be made to the proposed condition of licence, which is set out in the appendix to this policy.

Obligation to remit to rights holders of Canadian feature films 100% of revenues earned from the exhibition of these films

27. VOD services are currently required to remit to rights holders of Canadian feature films 100% of the revenues earned from the exhibition of these films. In the VOD Policy, the Commission decided to retain this requirement to maintain the flow of revenues to Canadian feature film rights holders. Further, to offset the losses to VOD undertakings and ensure that there is no disincentive for the offering or promotion of Canadian feature films, the Commission allowed VOD undertakings to exclude the amount remitted to Canadian feature film rights holders as revenue for the purpose of calculating their contributions to Canadian production funds. The Commission proposed a condition of licence to this effect in its call for comments.
28. MTS opposed this condition, stating that the VOD service would lose money for every film aired, even if it were allowed to subtract exhibition revenues from gross revenues for the purpose of calculating its contribution to Canadian programming.
29. The Commission notes that this requirement has existed for many years and that it has not had a significant negative impact on VOD licensees. The Commission further notes that it had already acknowledged the concern raised by MTS in the VOD Policy and that it determined to maintain the requirement because VOD undertakings provided no evidence to indicate how much money was involved or the magnitude of their loss. MTS has provided no further evidence. Accordingly, the Commission determines that no change should be made to the proposed condition of licence, which is set out in the appendix to this policy. The Commission also reminds VOD licensees that they are subject to an obligation to include all new Canadian feature films in their inventory.

Implementation of the Accessibility Policy

30. To implement its Accessibility Policy, the Commission proposed standard conditions of licence and expectations concerning accessibility of VOD programming in its call for comments.
31. Cogeco stated that implementing the accessibility requirements may not be realistic at this time. Specifically, on the issue of closed captioning, Cogeco noted that the

Commission requires that all programs from all program categories be closed captioned. According to Cogeco, this does not constitute an efficient allocation of resources, as this requirement could apply to adult, music or karaoke content. Further, in Cogeco's view, to implement a monitoring system would inevitably lead to an increase in costs and would require additional resources.

32. As regards adherence to obligations, the Commission notes that the requirements of its Accessibility Policy have been developed through considerable consultation. Further, requirements for VOD services are consistent not only with the Accessibility Policy but also with section 3(1)(p) of the *Broadcasting Act* and human rights legislation. These requirements reflect the long-standing Commission position that "reasonable accommodation" is the cost of doing business.
33. With respect to requests for flexibility, the Commission notes that applicants may propose alternative accessibility commitments, with specific, detailed financial evidence to justify exceptions, in the context of individual applications.
34. Accordingly, the Commission determines that no change should be made to the overall approach to the accessibility of programming or to the standard accessibility conditions of licence, expectations and encouragement which are set out in the appendix.

Conclusion

35. The Commission has appended to this policy standard conditions of licence, expectations and an encouragement for VOD undertakings. These requirements will apply to new VOD undertakings, including services under consideration by the Commission whose applications have not been published as of the date of this policy. The Commission also intends to apply these requirements to existing licensees at their licence renewal.

Secretary General

Related documents

- *Call for comments on standard requirements for video-on-demand undertakings*, Broadcasting Notice of Consultation CRTC 2010-702, 23 September 2010
- *Regulatory framework for video-on-demand undertakings*, Broadcasting Regulatory Policy CRTC 2010-190, 29 March 2010
- *Accessibility of telecommunications and broadcasting services*, Broadcasting and Telecom Regulatory Policy CRTC 2009-430, 21 July 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory Policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008

- *New video-on-demand services*, Decisions CRTC 2000-733 to 2000-736, 14 December 2000
- *Introductory statement to Decisions CRTC 2000-733 to 2000-738: Licensing of new video-on-demand and pay-per-view services*, Public Notice CRTC 2000-172, 14 December 2000
- *Definitions for new types of priority programming; revisions to the definitions of television content categories; definitions of Canadian dramatic programs that will qualify for time credits toward priority programming requirements*, Public Notice CRTC 1999-205, 23 December 1999

Appendix to Broadcasting Regulatory Policy CRTC 2011-59

Standard conditions of licence, expectations and encouragement for VOD undertakings

Conditions of licence

1. The licensee shall adhere to the *Pay Television Regulations, 1990*, as amended from time to time, with the exception of sections 3(2)(d), 3(2)(e), 3(2)(f), 4 and 6.1.
2. Except as authorized by the Commission, the programming undertaking shall be operated in fact by the licensee itself.
3. The licensee shall ensure that at all times:
 - (a) not less than 5% of the English-language feature films in the inventory available to subscribers are Canadian;
 - (b) not less than 8% of the French-language feature films in the inventory available to subscribers are Canadian;
 - (c) the feature film inventory includes all new Canadian feature films that are suitable for video-on-demand exhibition and that meet the approved *Industry Code of Programming Standards and Practices Governing Pay, Pay-Per-View and Video-On-Demand Services*; and
 - (d) not less than 20% of all programming other than feature films in the inventory available to subscribers is Canadian.
4. The licensee shall ensure that not less than 25% of the titles promoted each month on its barker channel are Canadian titles.
5. The licensee shall contribute 5% of its gross annual revenues to an existing Canadian program production fund administered independently of its undertaking.

For the purpose of this condition:

- a) if the video-on-demand service is a “related service,” “gross annual revenues” shall be 50% of the total video-on-demand associated revenues received from customers of the broadcasting distribution undertaking distributing the service;
- b) if the video-on-demand service is not a “related service,” “gross annual revenues” shall be the total amount received from the broadcasting distribution undertaking(s) distributing the video-on-demand service; and
- c) a “related service” means one in which the broadcasting distribution undertaking distributing the video-on-demand service or any of its shareholders owns, directly or indirectly, 10% or more of the equity of the video-on-demand service.

6. (a) The licensee shall remit to the rights holders of all Canadian feature films 100% of revenues earned from the exhibition of these films. The licensee will be permitted to exclude the amount remitted to Canadian feature film rights holders as revenue for the purpose of calculating the contribution to a production fund required under condition of licence 5.

(b) Notwithstanding paragraph (a), some Canadian feature films may be the subject of a negotiated revenue-sharing agreement between the licensee and the rights holder of Canadian feature films. Any revenues retained by the video-on-demand licensee with respect to such Canadian feature films shall be included as gross broadcasting revenues for the purposes of calculating the contribution to a production fund required under condition of licence 5.
7. The licensee is prohibited from offering: (a) a non-Canadian subscription video-on-demand (SVOD) package that is directly competitive with a Canadian linear pay or specialty service or (b) a Canadian SVOD package that is directly competitive with a genre-protected Canadian linear pay or specialty service, unless the package is an on-demand extension of this Canadian linear pay or specialty service.
8. The licensee shall not include as part of its video-on-demand offering any program containing a commercial message except under the following circumstances:
 - (a) the commercial message
 - (i) is inserted by the licensee in a program that is obtained from a Canadian programming undertaking that is not a related Canadian programming undertaking;
 - (ii) is inserted by the licensee in a program that is obtained from a related licensed Canadian programming undertaking that has acquired the right to broadcast the program on its linear Canadian programming service(s);
 - (iii) was already included in a program previously broadcast in Canada by a non-Canadian programming service authorized for distribution in Canada; or
 - (iv) is included in the licensee's community programming in accordance with subsections 27(1)(g), 27(1)(h) and 27(1)(i) of the *Broadcasting Distribution Regulations* (where applicable);
 - (b) if the commercial message is included in a program by virtue of 8(a)(i), 8(a)(ii) or 8(a)(iv), the program's inclusion as part of the video-on-demand offering must be the subject of a written agreement entered into with the programming undertaking that owns the rights to the program; and
 - (c) the commercial message complies with the *Broadcast Code for Advertising to Children*, as amended from time to time and approved by the Commission.

For the purpose of this condition of licence, the term “related Canadian programming undertaking” means a Canadian programming undertaking of which the licensee and/or an affiliate controls more than 10% of the total shares issued and outstanding.

9. The licensee may broadcast a commercial message directly or indirectly advertising an alcoholic beverage only if:
 - (a) the sponsor is not prohibited from advertising the alcoholic beverage by the laws of the province in which the commercial message is broadcast;
 - (b) the commercial message is not designed to promote the general consumption of alcoholic beverages; and
 - (c) the commercial message complies with the *Code for Broadcast Advertising of Alcoholic Beverages* published by the Commission on 1 August 1996.

Paragraph (b) does not prohibit industry, public service or brand preference advertising.

10. The licensee shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceedings before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that has given the preference or subjected the person to the disadvantage.
11. The licensee shall not acquire exclusive rights for any of the programming offered on its programming service.
12. The licensee shall caption 100% of the English- and French-language programs in its inventory, consistent with the approach set out in *A new policy with respect to closed captioning*, Broadcasting Public Notice CRTC 2007-54, 17 May 2007.
13. The licensee shall adhere to the quality standards on closed captioning developed by the television industry’s working groups, as amended from time to time and approved by the Commission.
14. The licensee shall have a monitoring system in place to ensure that for any signal that is closed captioned, the correct signal is captioned, the captioning is included in its broadcast signal and this captioning reaches the distributor of that signal in its original form. “Original form” means, at a minimum, that the captioning provided by the licensee reaches the distributor unaltered, whether it is passed through in analog or in digital, including in high definition.
15. The licensee shall adhere to the *Equitable Portrayal Code*, as amended from time to time and approved by the Commission. However, the application of the foregoing condition of licence will be suspended if the licensee is a member in good standing of the Canadian Broadcast Standards Council.

16. The licensee shall adhere to the *Pay television and pay-per-view programming code regarding violence*, as amended from time to time and approved by the Commission. However, the application of the foregoing condition of licence will be suspended if the licensee is a member in good standing of the Canadian Broadcast Standards Council.
17. The licensee shall adhere to the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, as amended from time to time and approved by the Commission. However, the application of the foregoing condition of licence will be suspended if the licensee is a member in good standing of the Canadian Broadcast Standards Council.
18. The licensee shall maintain for a period of one year and submit to the Commission upon request a detailed list of the inventory available on each file server. The list must identify each program by programming category and by country of origin and indicate the period of time that each program was on the server and available to subscribers.

Expectations

1. The Commission expects the licensee to make its program offering available to the maximum extent possible to customers in both official languages.
2. If captions are available, the Commission expects the licensee to provide viewers with a captioned version of all advertising, sponsorship messages and promos offered in its programming.
3. The Commission expects the licensee to acquire and make available described versions of programming, where possible, and to ensure that its customer service responds to the needs of persons with a visual impairment, as set out in *Accessibility of telecommunications and broadcasting services*, Broadcasting and Telecom Regulatory Policy CRTC 2009-430, 21 July 2009.
4. The Commission expects the licensee to:
 - display a standard described video logo and air an audio announcement indicating the presence of described video before the broadcast of each described program; and
 - make information available regarding the described programs that it will broadcast.
5. The Commission expects the licensee to provide an audio description of all programming that provides textual or graphic information, including programming broadcast on the barker channel.
6. If the licensee broadcasts adult programming, the Commission expects the licensee to provide its proposed internal policy on adult programming at least one

month prior to the implementation of the service, as required by the Commission in *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, Broadcasting Public Notice CRTC [2003-10](#), 6 March 2003. The Commission further expects that any future changes made by the licensee to its internal policy on adult programming will be submitted for Commission approval prior to their implementation.

7. Where applicable, the Commission expects the licensee to adhere to its internal policy on adult programming once reviewed and approved by the Commission.
8. The Commission expects the licensee to endeavour through its programming and employment opportunities to reflect the presence in Canada of ethnocultural minorities, Aboriginal peoples and persons with disabilities. The Commission further expects the licensee to ensure that the on-screen portrayal of such groups is accurate, fair and non-stereotypical.
9. In accordance with *Implementation of an employment equity policy*, Public Notice CRTC 1992-59, 1 September 1992 (Public Notice 1992-59):
 - if the licensee has 100 or more employees, it is subject to the *Employment Equity Act*.
 - if the licensee has between 25 and 99 employees, the Commission expects the licensee to have in place an employment equity plan that addresses the equitable representation of the four designated groups (women, Aboriginal peoples, persons with disabilities and visible minorities), as set out in Public Notice 1992-59 and in *Amendments to the Commission's Employment Equity Policy*, Public Notice CRTC 1997-34, 2 April 1997. In implementing its employment equity plan, the Commission further expects the licensee to:
 - ensure that the details of the licensee's employment equity policies are communicated to managers and staff;
 - assign a senior level person to be responsible for tracking progress and monitoring results; and
 - dedicate financial resources to the promotion of employment equity in the workplace.

Encouragement

The Commission encourages video-on-demand undertakings to share aggregate information on viewing of video-on-demand programs with broadcasters if such information is available.