



## Broadcasting Order CRTC 2012-689

PDF version

Route reference: 2012-368

Ottawa, 19 December 2012

### **New exemption order respecting certain programming undertakings that would otherwise be eligible to be operated as Category B services, and amendments to the *Exemption order respecting certain third-language television undertakings***

*The Commission issues a new exemption order for specialty Category B services that serve not more than 200,000 subscribers and that operate under an approved nature of service. The new exemption order is set out in Appendix 1 to this document.*

*In addition, the Commission amends the Exemption order respecting certain third-language television undertakings. The amended exemption order is set out in Appendix 2 to this document.*

### **Background**

1. The licensing framework for Category B services, originally set out in Public Notice 2000-171 and subsequently updated in Broadcasting Public Notice 2004-24 and affirmed in Broadcasting Public Notice 2008-100, permits such services to be competitive with each other, but not with Category A or Category C services.<sup>1</sup> Competitiveness is assessed through the licensing process and regulated through the imposition of “nature of service” conditions of licence. A given service’s nature of service consists of four elements: (1) a narrative description of the service and its programming; (2) the program categories from which the service may draw programming (for example, professional sports or drama); (3) limitations on the types of programming the service may broadcast or on the program categories from which the service may draw programming (for example, a maximum of 5% live

---

<sup>1</sup> In regard to pay television and specialty services, the Commission distinguishes between Category A, Category B and Category C licensed services. Category A services (formerly known as Canadian analog and Category 1 pay television and specialty services) are Canadian pay television and specialty services with access rights (i.e., broadcasting distribution undertakings are required to offer these services to subscribers, although specific terms of distribution may still be negotiated), each of which offers programming from its own individual protected genre (i.e., only one service is permitted to operate in each genre). Category B services are Canadian pay television and specialty services that do not compete with Category A services. They have minimal regulatory requirements, but also have no access rights. Category C services are services operating in particular genres that have been opened to competition (i.e., multiple services may all offer the same genre of programming). For the purposes of the present notice, the term “Category B service” encompasses both Category 2 digital services and Category B services, unless a distinction between the two is necessary.

sports programming per broadcast month); and (4) the language or languages in which the service broadcasts programming. In the case of an ethnic service, the nature of service may also include a designation of the service as “general interest” or “niche.”

2. Third-language Category B services are Category B services that broadcast no less than 90% of their programming in languages other than English or French.<sup>2</sup> As set out in Broadcasting Public Notice 2005-104 and as amended by the *Exemption order respecting certain third-language television undertakings*, set out in Broadcasting Public Notice 2007-33, the Commission has adopted an open-entry approach to these third-language services, with a view to increasing the diversity of programming available to underserved third-language ethnic communities.
3. The Commission currently exempts from licensing third-language pay and specialty services that do not broadcast 40% or more of their third-language programming in one of the six languages of the Category A ethnic services<sup>3</sup> (i.e., Cantonese, Greek, Hindi, Italian, Mandarin or Spanish). Furthermore, all general-interest, third-language services for which 40% or more of the programming broadcast is in those languages are subject to a “buy-through” requirement. According to this requirement, distributors must package the relevant Category A service with any general-interest Canadian or non-Canadian service in the same language. This obligation is designed to support ethnic specialty Category A services in satisfying their higher regulatory obligations in regard to the broadcast of and spending on Canadian programming.
4. Due to concerns over the regulatory burden and inefficiency of the licensing process for Category B services, the Commission decided to examine the feasibility of exempting certain of these services, as well as of expanding the current exemption order for third-language services. In the Commission’s view, these changes would, at a minimum, greatly reduce the Commission’s workload as well as the administrative burden placed on these services. The Commission therefore issued Broadcasting Notice of Consultation 2012-368, in which it called for comments on the above matters. In that notice, the Commission set out a proposed exemption order for Category B services that serve a number of subscribers under a certain threshold and that operate under an approved nature of service. In addition, it proposed amendments to the current exemption order respecting certain third-language television undertakings.
5. In response to Broadcasting Notice of Consultation 2012-368, the Commission received comments from Corus Entertainment Inc. (Corus), Bell Media Inc. (Bell Media), Rogers Communications Partnership (Rogers), Télévision Sex-Shop inc., a pay television Category B service (TSS), MTS Inc. and Allstream Inc. (collectively, MTS Allstream) (MTS), Astral Media Inc. (Astral), Bragg Communications Inc., operating as Eastlink (Eastlink), Teletatino

---

<sup>2</sup> The Commission notes that programming services for which the programming is broadcast in Aboriginal languages are not treated as third-language services.

<sup>3</sup> Asian Television Network (South Asian languages, predominantly Hindi), Fairchild (Cantonese), Odyssey (Greek), Talentvision (Mandarin), Teletatino (Spanish and Italian)

Network Inc. (Teletatino), the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ), the Independent Broadcast Group (IBG), TELUS Communications Company (TELUS), Score Television Network Ltd. (Score), Fairchild Television Ltd. (Fairchild), Asian Television Network International (ATN) and GlassBox Television Inc. (GlassBox). In addition, replies to those comments were received from TSS, Corus, Rogers, Astral and MTS. The Commission has taken into consideration all of these comments and replies in making the determinations set out below. The public record for this proceeding is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings."

### **Commission's analysis and decisions**

6. Under section 9(4) of the *Broadcasting Act* (the Act), the Commission shall exempt broadcasting undertakings where compliance with licensing requirements "will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) [of the Act]." In this regard, the Commission noted in Broadcasting Notice of Consultation 2012-368 that Category B services that serve a number of subscribers under a certain threshold and that operate under an approved nature of service may continue to contribute to the quality and diversity of programming available to Canadians and to the broadcasting system as exempt undertakings.
7. As set out under section 5(2)(g) of the Act, the Canadian broadcasting system should be regulated and supervised in a flexible manner that, among other things, "is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings." In this regard, in Broadcasting Notice of Consultation 2012-368, the Commission acknowledged that for smaller Category B services, licensing can impose significant financial and regulatory burdens, and that the current licensing process for Category B services is inefficient and needlessly time-consuming.
8. Based on the record of this proceeding, the Commission continues to be of the view that the work involved in processing applications for new Category B services is wasteful and inefficient, for both the Commission and the broadcasting industry as a whole. The process involved is laborious, with only a relatively small number of authorized services actually launching. The process is also inefficient as it takes between six and nine months to process applications for such services, largely due to the requirement set out in the Act that applications for new broadcasting licences be considered at a public hearing. As a result, the licensing process continues to pose a significant hurdle to parties wishing to offer new Category B services, which ultimately limits the diversity of programming and programming sources available to Canadian viewers.
9. In light of these facts, the Commission considers that the continued licensing of certain smaller Category B services, under an approved nature of service, would not contribute in a material manner to the implementation of the objectives of the Act. Therefore, the Commission will exempt from licensing certain Category B services, as discussed below, pursuant to section 9(4) of the Act. The Commission considers

that such an exemption will have a number of benefits for both broadcasters and the Commission, and is likely to increase the diversity of Canadian programming and programming sources for Canadians by removing regulatory barriers to entry for new services.

#### **Proposed exemption of “small” Category B services**

10. In regard to the proposed exemption of “small” Category B services, the Commission considers that the issues to be addressed relate to the following:
  - whether pay television Category B services should be eligible for exemption;
  - the appropriate subscriber threshold for exempting Category B services, as well as possible alternative mechanisms;
  - concerns relating to vertical integration; and
  - other specifics of the exemption order (relating specifically to programming, ownership, the application of accessibility requirements, and reporting requirements).

#### ***Eligibility of pay television Category B services***

11. The current licensing framework for pay television Category B services requires applicants to propose appropriate levels of Canadian content and of Canadian programming expenditures (CPE).<sup>4</sup> This differs from the current licensing framework for specialty Category B services, which imposes on those services a standard requirement relating to the broadcast of Canadian content (15% of the broadcast year, ramping up to 35% of the broadcast year) and which does not impose an obligation relating to CPE. Under the proposed exemption order, pay television Category B services would also be subject to a requirement to broadcast higher levels of Canadian content.

#### **Interventions**

12. Astral opposed the exemption of pay television services, arguing that it would set up completely different rules between licensed and exempt pay television services and would therefore result in the possibility that such services would compete with each other. It argued that not only would exempt pay television services have a greater requirement to broadcast Canadian content than has generally been imposed on licensed pay television services, they would have no obligations relating to CPE, unlike licensed services. It further argued that the proposed exemption order would allow such services to advertise, which is prohibited in the *Pay Television Regulations, 1990* for licensed pay television Category B services. Astral

---

<sup>4</sup> The standard conditions of licence for specialty Category B services and pay television Category B services are set out in Appendices 1 and 2, respectively, to Broadcasting Regulatory Policy 2010-786-1.

recommended instead a lighter regulatory regime for small Category B services, where, for example, the Commission would dispense with logging and/or reporting requirements.

13. Corus also opposed the exemption of pay television services, stating that without a public hearing to assess the potential impact of a new service, there would be no way to determine whether, on balance, the introduction of a new pay television service would yield a net benefit to the system. It argued that the migration of even a small number of subscribers from its pay television Category A services to an exempt pay television service would have a significant impact on its continued ability to meet its programming obligations. It stated, however, that should the Commission proceed with the proposed exemption order, it should impose a threshold of 20,000 subscribers on exempt pay television services.
14. TSS acknowledged the above-noted potential differences between licensed and exempt pay television Category B services, but argued that the increased requirements relating to the broadcast of Canadian content would be worth the considerable reduction in administrative and financial burdens.

#### Replies

15. TSS acknowledged Astral's concerns and indicated that, provided the Commission lightened the regulatory burden for small pay television services (which it qualified as services with no more than 50,000 subscribers), the mechanism did not matter. It specifically sought to be relieved of the requirement to submit logs, annual reports (other than subscriber numbers) or audited financial reports, and of the requirements relating to accessibility.
16. Corus and Astral repeated their above-noted concerns in their replies. Astral further noted that all of the comments and proposed changes in the intervention phase suggest that exemption is not the best route for pay television services, and recommended instead a lighter regulatory approach.
17. MTS submitted that Corus's position has merit. It argued that should the Commission continue to require the licensing of pay television Category B services, this should not represent a significant regulatory hurdle or be overly burdensome administratively, given the limited number of services involved.

#### Commission's analysis and decision

18. In the process leading up to the establishment of standard conditions of licence for Category B services, the Commission had considered no longer licensing pay television Category B services, largely because the new distribution regime meant that the most significant regulatory difference between pay television and specialty services was the absence of advertising on the former. However, interveners to that proceeding made compelling arguments that program rights and "premium" distribution are negotiated differently for pay television services and that licensing them separately continued to make sense. Nevertheless, the Commission indicated

that applicants for pay television Category B services would have to demonstrate why a pay television service licence would be more appropriate than a specialty service licence, especially since nothing prevents a specialty service from pricing and marketing itself as a premium, advertising-free service. In regard to these two types of service, the Commission notes that there has been some confusion in the industry with respect to the distinctions between them.

19. The Commission further notes that the number of applications for pay television Category B services approved by the Commission has been quite low. More precisely, since 2000, the Commission has authorized only 27 such services, as compared to 1,058 specialty Category B services during the same period. Further, of the 27 authorized pay television Category B services, only 10 have launched.
20. In regard to the “two-tiered licensing system” covering larger and smaller pay television Category B services, which was proposed by certain parties, the Commission considers that such a system could entail substantial changes to existing licences and to various Commission regulations. The Commission sees little merit in making such changes for the small group of licensees that might benefit from the proposed system, particularly since licensees of small pay television services may also choose to apply for their licences to be revoked and operate instead as specialty services under the new exemption order set out in Appendix 1 to this document.
21. In light of all of the above, the Commission considers that it would not be appropriate at this time to exempt pay television Category B services from licensing. Accordingly, persons wishing to operate such services are to continue to apply for broadcasting licences to do so. Through that process, the Commission will be able to assess whether a licence is truly necessary to operate such a service.

#### ***Subscriber threshold and alternative mechanisms***

22. In Broadcasting Notice of Consultation 2012-368, the Commission set out three possible thresholds for exemption: 20,000, 100,000 or 200,000 subscribers. It indicated that at those levels, 42, 48 and 50 currently licensed Category B services, respectively, could be eligible for exemption. In that notice, the Commission also set out how such exemptions would be administered, for example, when an increase in the number of subscribers for an exempted undertaking results in the chosen threshold being exceeded.

#### **Interventions**

23. Parties that commented on this issue generally supported a threshold of 200,000 subscribers. For its part, Score supported a “very limited” threshold, but did not specify the number. In addition, Rogers specifically supported the detailed mechanisms for administering exemptions set out in Broadcasting Notice of Consultation 2012-368.
24. ADISQ argued that, due to the relative sizes of the linguistic markets in which such services operate, the thresholds should be different for services operating in English

(a higher threshold) and in French (a lower threshold). For its part, Astral recommended a lighter regulatory regime for smaller services, in lieu of exemption, proposing that such services be subject to less onerous conditions of licence, or that the obligation to file program logs or annual reports be removed.

25. Bell Media expressed concerns regarding the Commission's ability to monitor compliance relating to a service's nature of service and its broadcast of Canadian content. In this regard, it recommended that exempt undertakings be required to apply for a licence 90 days following their launch. It also noted that such an approach would render moot the issue of an appropriate exemption threshold.

#### Replies

26. In its reply to the comments received, Astral stated that the combined impact of all of the comments received supported its conclusion that exemption was not the most appropriate approach. For its part, TSS supported a lighter regulatory regime, as proposed by Astral, as a means of reducing the regulatory burden. Finally, Rogers raised concerns regarding the approach proposed by Bell Media.

#### Commission's analysis and decisions

27. The Commission agrees with the majority of interveners that exempting specialty Category B services that serve less than a certain subscriber threshold is the correct approach. In regard to those parties that proposed reducing regulatory requirements for Category B services without exempting these services, the Commission considers that while this approach could reduce the regulatory burden associated with holding a broadcasting licence, it would not address concerns over the regulatory barriers, the administrative burden and delays associated with submitting Category B applications, or over the Commission's workload in treating these applications, particularly when so few launch. For these reasons and those discussed above, the Commission considers exemption to be a more appropriate approach in this situation.
28. As to the method of exemption, exempting Category B services until launch, as proposed by Bell Media, would address a number of the concerns relating to administrative burden and procedural delays, at least for those services that do not launch. It would also afford the Commission the opportunity to address any concerns over compliance monitoring in regard to ownership, nature of service and the broadcast of Canadian content, among other things, once a service is licensed and launched. It would not, however, bring about a reduction in the regulatory burden for existing services, and would only bring about a temporary reduction in the regulatory burden for new services.
29. In regard to different thresholds for English-language and French-language services, the Commission acknowledges that the two linguistic markets are different, but notes as well that there are very few French-language Category B services in operation. In this regard, the Commission considers it important to encourage the launch and sustainability of new French-language Category B services so as to increase the

availability and diversity of French-language programming throughout Canada, including in official language minority communities (OLMCs). Contrary to ADISQ's proposal, this objective would be better served by a threshold for French-language services higher than what it proposed, which would permit such services to launch and remain exempt longer. Accordingly, the Commission will apply the same threshold for exempt English-language and French-language Category B services.

30. In light of the comments received and given the relatively small difference in the number of current Category B services that would be eligible for exemption at the various proposed thresholds, the Commission considers the 200,000 subscriber threshold to be the most reasonable. This approach will provide the greatest benefits in terms of reducing the administrative burden placed on licensees, for both new and existing services, as well as the burden placed on Commission resources.

### ***Concerns relating to vertical integration***

#### Interventions

31. Eastlink, MTS and TELUS recommended that the wording of the exemption order be amended to apply the relevant aspects of the vertical integration framework set out in Broadcasting Regulatory Policy 2011-601 and implemented via Broadcasting Regulatory Policy 2012-407 and Broadcasting Order 2012-409. In this regard, they noted that the same concerns apply equally to both exempt and licensed undertakings. For its part, IBG recommended that the Commission confirm that all the relevant aspects of the vertical integration framework apply equally to both classes of services.
32. TSS recommended that the exemption order apply only to independent services, noting that the large broadcasting groups have the means to deal with the costs associated with obtaining and holding a licence, even where individual services may have a low number of subscribers. In addition, it argued that permitting large broadcasting groups to copy existing nature of service definitions and to benefit from a lighter regulatory approach would only contribute to greater concentration of ownership and restricted diversity of voices.
33. GlassBox recommended that the Commission ensure that the proposed exemption order does not disadvantage independent programming services. In this regard, it noted that independent services would still have to negotiate carriage, whereas vertically-integrated entities can launch services at any time. As such, it further recommended that exempt undertakings be required to identify the person who controls the service and to name any related broadcasting distribution undertaking(s) (BDU). It also recommended the introduction of a requirement that vertically-integrated entities that launch exempt undertakings distribute the independent licensed Category B service operating under the same nature of service.
34. IBG recommended that the Commission should examine the broader issue of why so few Category B services launch, given that they can be an important source of diversity in the broadcasting system and are often proposed by smaller independent broadcasters.



## Replies

35. In regard to the comment by GlassBox, Rogers did not oppose its first recommendation (the naming of the owner and related BDUs), but opposed the second (the distribution of all exempt undertakings with the same nature of service). It argued that this would have the effect of creating an additional “buy-through” requirement. Rogers further argued that the existing vertical integration safeguards are sufficient to address GlassBox’s concerns. For its part, MTS stated that it had no objections to GlassBox’s amendments, noting that they were consistent with the additions proposed by the BDUs.

## Commission’s analysis and decisions

36. In the Commission’s view, the amendments recently made to the *Pay Television Regulations, 1990* and the *Specialty Services Regulations, 1990* to implement the vertical integration framework should also apply to exempt specialty Category B services. Accordingly, the Commission has included, in the exemption order, provisions relating to the vertical integration framework that are comparable to those that apply to licensed services.
37. The Commission notes that in Broadcasting Notice of Consultation 2012-368 it contemplated that amendments would be made to the *Broadcasting Distribution Regulations* to ensure that protections afforded to licensed services would continue to apply to exempt undertakings. The Commission stated that changes to the *Broadcasting Distribution Regulations* would come into effect before services would be eligible to operate under the exemption order.
38. In regard to issues raised in the comments received, the Commission considers that applying the exemption order only to independent services, as proposed by TSS, would be too heavy-handed. In addition, the Commission considers that GlassBox’s proposed linkage rule would be unduly cumbersome, particularly since the Commission has already proposed that the 3:1 linkage rule in the *Broadcasting Distribution Regulations* be revised to apply to any exempt Category B services (i.e., for each related licensed or exempt Category B service a BDU carries, it will have to carry three unrelated Category B services, one of which must be an independent service). Nevertheless, the Commission considers that GlassBox’s proposal relating to additional information requirements has merit, and has included a provision in this regard in the exemption order.
39. In regard to IBG’s proposal that the Commission examine the broader issues and challenges related to launching Category B services, the Commission considers that this proposal lies outside the scope of the present proceeding.

### ***Other specifics of the exemption order***

#### Programming (nature of service) obligations

40. Rogers expressed concern over the Commission's statement that services would be permitted to select a different nature of service definition from any approved Category B service at any time. It recommended that this element of the exemption order be removed in order to prevent an exempt undertaking from making unilateral changes to its programming service. Rogers submitted that such unilateral changes would be unfair to subscribers and BDUs, especially if they represented a complete change of programming genre.
41. ADISQ proposed that the obligation to respect an existing nature of service should include any other related programming conditions, obligations, expectations or encouragements.
42. Finally, IBG proposed that the Commission establish standard programming levels for certain program categories, as it did in Broadcasting Public Notice 2008-100.
43. The Commission acknowledges Rogers' concern. However, programming changes are unlikely to be of the "night-and-day" variety, but rather a shift from one nature of service to another within the same general programming genre. In the Commission's view, such shifts should not be prevented, nor should they require the launch of a separate service. In general, the Commission considers that this is a matter best left to commercial negotiation between the broadcaster and the BDU. In this regard, the Commission notes that there is no regulatory obligation for a BDU to carry a particular Category B service that may change its nature of service.
44. In regard to ADISQ's proposal, the Commission considers that adherence to pre-approved nature of service definitions is sufficient, especially since exempt undertakings are, by definition, smaller players. Should a service reach sufficient size so as to require that it apply for a broadcasting licence, additional obligations can be imposed if they are deemed necessary by the Commission.
45. Finally, in regard to IBG's proposal, the Commission considers that adherence to pre-approved nature of service definitions is sufficient.

#### Ownership provisions

46. IBG proposed that exempt undertakings be required to file "information generally required by the Commission to establish that the operator of the undertaking is eligible to be licensed by the Commission," and that such information be made available to the public. It indicated that it is not proposing that the Commission conduct a prior review of this ownership information before the launch of new exempt undertakings, but only that the information is made available for public examination and comment.

47. The Commission is concerned that the submission of such information and its posting on its website could be interpreted as approval by the Commission. Further, the Commission notes that such information is not required of other exempt undertakings.
48. As noted by Rogers, the Commission included the new standard provision regarding program delivery agreements in the new exemption order for small specialty Category B services, but not in the proposed amended exemption order respecting third-language services. It submitted that this provision should either appear in both exemption orders, or not appear in either of them.
49. In light of the above, and given that it does not examine such documents for exempt undertakings, the Commission has removed this provision from the proposed exemption order.

#### Application of the accessibility requirements

50. IBG and TSS proposed that the accessibility requirements should not apply to exempt undertakings. They noted the considerable expense associated with meeting those requirements relative to the potential revenue and limited resources of services with a limited number of subscribers. IBG argued that such obligations could effectively serve as a barrier to entry, and noted that when a service reaches the threshold, normal licensing requirements would apply.
51. The Commission considers that its requirements relating to accessibility, set out in Broadcasting and Telecom Regulatory Policy 2009-430, are part of the “cost of doing business,” and notes that such requirements are now imposed on all television services. Further, since exempt specialty Category B services may compete directly with licensed specialty Category B services, it would be competitively unfair if their obligations were significantly different. In addition, any exceptions to the accessibility provisions could be perceived by the disability community as a “step back” and would be contrary to the Commission’s clearly articulated accessibility policy.
52. The Commission notes that various expectations as well as an encouragement relating to accessibility set out in Appendix 1 to Broadcasting Regulatory Policy 2010-786-1 are applicable to licensed Category B services. In regard to exempt specialty Category B services, the Commission has imposed only the accessibility obligations set out in Broadcasting and Telecom Regulatory Policy 2009-430. Nevertheless, operators of such services are encouraged to make every effort to provide reasonable accommodations and improve services for persons with disabilities in a manner consistent with the Commission’s expectations and encouragement relating to accessibility set out in Appendix 1 to Broadcasting Regulatory Policy 2010-786-1.

## Reporting requirements

53. Following consultation with Statistics Canada, the Commission considers that exempt specialty Category B services should be required to file certain statistical information on an annual basis in order to permit the Commission to obtain data for its own reports, including the *Communications Monitoring Report*, and to satisfy the requirements of its Memorandum of Understanding with Statistics Canada. Accordingly, the Commission intends to prepare a “short-form” or simplified annual return to obtain the necessary information from these exempt undertakings. The Commission notes that these reporting requirements are consistent with its current approach to exempt BDUs, which are also required to submit simplified annual returns under the applicable exemption order.

## Third-language services

54. The Commission notes that all parties that commented specifically on this proposal opposed the expansion of the *Exemption order respecting certain third-language television undertakings*, and raised issues relating in particular to the appropriateness of expanding the scope of that exemption order to include services that operate (over 40%) in the languages of the five ethnic Category A services, and to the application of requirements related to the loudness of commercial messages.

## ***Appropriateness of expanding the exemption order***

55. IBG, ATN, Fairchild and Teletino submitted that the licensing of services that broadcast over 40% of their programming in one of the languages of the five ethnic Category A services continues to be an important aspect of the framework for third-language services. Specifically, they noted that the licensing process is essential to the administration of the buy-through requirements set out in section 27 of the *Broadcasting Distribution Regulations* since those requirements only apply to “general-interest” services. They further noted that the licensing process permits an assessment as to whether a service is “general-interest” or “niche,” and thus whether the buy-through requirements apply. They submitted that, absent a licensing decision, it would be difficult for BDUs to verify whether the buy-through requirements should apply, which would create regulatory uncertainty. Fairchild also submitted that the number of applications filed under the existing third-language licensing framework is quite small and, therefore, that the objective of “lowering the regulatory burden aimed [at] by the Amendment is far outweighed by the potential regulatory harm it would cause the ethnic Category A services.”
56. In the Commission’s view, third-language services that do not meet the criteria for exemption under the exemption order for third-language services (i.e., those services that broadcast over 40% of their programming in one of the six languages of the five ethnic Category A services) could potentially fall under the new *Exemption order respecting certain programming undertakings that would otherwise be eligible to be operated as Category B services*. In this case, such services would be required to abide by the nature of service conditions of licence of an approved third-language

specialty Category B service. For third-language services, these conditions of licence already specify whether the service is general interest or niche, as well as the proportion of each specific language in which the service broadcasts, thus addressing any concerns about whether the buy-through requirement would apply. The Commission considers that this would address the concerns expressed by those who commented on the appropriateness of expanding the exemption order respecting third-language services while still reducing the number of applications received for broadcasting licences to operate new third-language services.

57. Accordingly, the Commission does not consider it appropriate to expand the exemption order respecting third-language services as proposed in Broadcasting Notice of Consultation 2012-368. Third-language services that are willing to adhere to an approved nature of service, which includes restrictions in regard to language in which the programming is broadcast as well as an identification of being either a general-interest or niche service, would be eligible to operate under the new exemption order for small specialty Category B services.

#### ***Application of requirements relating to the loudness of commercial messages***

58. In Broadcasting Regulatory Policy 2012-273, the Commission announced that it had made amendments to various regulations so as to require the broadcasting industry to adopt measures to ensure that by 1 September 2012 commercial messages and regular programming are broadcast at an even volume. These amendments are set out in Broadcasting Order 2012-274 (see Appendix 2 to Broadcasting Regulatory Policy 2012-273). In Broadcasting Notice of Consultation 2012-368, the Commission proposed the inclusion in the exemption order respecting third-language services of a provision relating to the loudness of commercial messages.
59. IBG proposed that the new loudness standards should not apply to exempt third-language services, arguing that it would create a burden for these services that is unnecessary as well as disproportionate to their size.
60. The Commission notes that when it set out its policy relating to controlling the loudness of commercial messages, it did not contemplate any exceptions to that policy. The Commission therefore does not consider it appropriate to adopt IBC's proposal. Accordingly, a provision relating to controlling the loudness of commercial messages has been included in the amended exemption order respecting third-language services.

#### **Implementation**

61. In order to implement the new *Exemption order respecting certain programming undertakings that would otherwise be eligible to be operated as Category B services*, it is necessary for the Commission to make various amendments to the *Broadcasting Distribution Regulations*. Accordingly, the Commission will issue shortly a notice of consultation seeking comments on relevant amendments to the Regulations. Once the Commission has made its determinations in regard to the above, it will issue a

regulatory policy setting out the finalized amendments to the *Broadcasting Distribution Regulations*. The Commission notes that the new exemption order, set out in Appendix 1 to this document, will come into effect on the same day as the above-noted amendments to the *Broadcasting Distribution Regulations* are made.

62. Any licensee of an existing specialty Category B service that wishes to apply to have its licence revoked may submit an application, using “My CRTC Account” beginning on the day on which the above-noted amendments to the *Broadcasting Distribution Regulations* and the *Exemption order respecting certain programming undertakings that would otherwise be eligible to be operated as Category B services* come into effect. When a licensee submits such an application, it will be required to register its service as an exempt undertaking and provide the information required in sections 4a) and b) of the exemption order. The Commission notes that any information submitted to the Commission through the registration process, with the exception of subscriber numbers, may be posted on the Commission’s website. Further, simplified annual return data submitted pursuant to section 4d) of the exemption order will be held in confidence in the same manner as for annual returns submitted by licensed services.
63. Any new undertaking that wishes to avail itself of the exemption order will also be permitted to register its service using “My CRTC Account” beginning on the date on which the above-noted amendments to the *Broadcasting Distribution Regulations* and the *Exemption order respecting certain programming undertakings that would otherwise be eligible to be operated as Category B services* come into effect, following the procedure outlined above, provided that the service intends to begin operations within 30 days of that date.
64. The Commission will maintain a list on its website of all registered undertakings operating under the new exemption order. Pursuant to section 4 of the new exemption order, a service must be registered with the Commission in order to be eligible to operate under the exemption order. Unlicensed undertakings that do not appear on the Commission’s list will not be eligible for exemption and may not be distributed by BDUs.

## **Conclusion**

65. In light of all of the above, the Commission adopts the *Exemption order respecting certain programming undertakings that would otherwise be eligible to be operated as Category B services*, as set out in Appendix 1 to Broadcasting Notice of Consultation 2012-368, with certain amendments relating specifically to the inclusion of a provision relating to the vertical integration framework; the inclusion of a provision relating to the identity of the person in control of the undertaking, if different from the owner, and of any related BDUs; the deletion of the provision requiring the submission of program delivery agreements; and certain housekeeping items. As noted in paragraphs 18 to 21 above, and for the reasons set out in those paragraphs, the Commission considers it appropriate at this time to exclude from that exemption order pay television Category B services.

66. The Commission notes that ethnic/third-language services willing to adhere to an already approved nature of service, including the proportion of languages in which the programming is broadcast and the identification as either general interest or niche, would be eligible to operate under the new exemption order for specialty Category B services.
67. In addition, the Commission does not consider it appropriate at this time to expand the exemption order respecting third-language services as proposed in Appendix 2 to Broadcasting Notice of Consultation 2012-368. However, it has included a provision regarding the loudness of commercial messages, for the reasons set out in paragraphs 58 to 60 above.
68. As noted above, in Appendix 1 to the present document, the Commission sets out the new *Exemption order respecting certain programming undertakings that would otherwise be eligible to be operated as Category B services*. In Appendix 2, it sets out the amended *Exemption order respecting certain third-language television undertakings*.

Secretary General

#### **Related documents**

- *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, Broadcasting Order CRTC 2012-409, 26 July 2012
- *Amendments to various regulations – Implementation of the regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2012-407, 26 July 2012
- *Call for comments on exempting from licensing pay television and specialty Category B services with a limited subscriber base, and on amendments to the Exemption order respecting third-language television programming undertakings*, Broadcasting Notice of Consultation CRTC 2012-368, 6 July 2012
- *Amendments to various regulations and an exemption order to implement measures to control the loudness of commercial messages*, Broadcasting Regulatory Policy CRTC 2012-273 and Broadcasting Order CRTC 2012-274, 8 May 2012
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011
- *Standard conditions of licence, expectations and encouragements for Category B pay and specialty services – Corrected Appendices 1 and 2*, Broadcasting Regulatory Policy CRTC 2010-786-1, 18 July 2011

- *Accessibility of telecommunications and broadcasting services*, Broadcasting and Telecom Regulatory Policy 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
- *Exemption order respecting certain third-language television undertakings*, Broadcasting Public Notice CRTC 2007-33, 30 March 2007
- *Revised approach for the consideration of broadcasting licence applications proposing new third-language ethnic Category 2 pay and specialty services*, Broadcasting Public Notice CRTC 2005-104, 23 November 2005
- *Revised procedures for processing applications for new digital Category 2 pay and specialty television services*, Broadcasting Public Notice CRTC 2004-24, 8 April 2004
- *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000



## **Appendix 1 to Broadcasting Order CRTC 2012-689**

### **Exemption order respecting certain programming undertakings that would otherwise be eligible to be operated as Category B services**

By this order, pursuant to subsection 9(4) of the *Broadcasting Act* (the Act), the Commission exempts from the requirements of Part II of the Act and any regulations made thereunder, those persons carrying on broadcasting undertakings of the class defined by the criteria set out below.

#### **Purpose**

The purpose of these specialty programming undertakings is to provide programming services that operate under an approved nature of service for distribution on a digital basis.

#### **Description**

1. For the purpose of this order, the terms “broadcast year” and “evening broadcast period” have the same meaning as that set out in the *Television Broadcasting Regulations, 1987*. The terms “advertising material,” “Canadian program,” “program” and “program delivery agreement” have the same meaning as that set out in the *Specialty Services Regulations, 1990*. For the purpose of this order, any specialty programming undertaking exempt under this order shall be designated as a Category B service as defined in the *Broadcasting Distribution Regulations*.
2. The Commission would not be prohibited from licensing the undertaking by virtue of any Act of Parliament or any direction to the Commission by the Governor in Council.
3. The undertaking provides its programming service only to broadcasting distribution undertakings (BDUs) that distribute the service to subscribers solely on a digital basis. The total number of such subscribers served by the undertaking, collectively by all BDUs, does not exceed 200,000. Once exempt, the undertaking does not have more than 210,000 subscribers for a period of more than three consecutive months.
4. In regard to the filing of information with the Commission:
  - a) The undertaking files information with the Commission specifying: the name of the service provider and the owner or owners (i.e., the person who controls the service provider, if different from the service provider), the name under which the service operates, the service’s contact information, including mailing address, telephone number, fax number, email address, and website, the name of any broadcasting distribution undertaking to which the service is related, and the operating language(s) of the service.

In the case of a new undertaking, the above information is filed with the Commission at least 30 days before the service is first distributed.

b) The undertaking files with the Commission an attestation that it will adhere to the complete nature of service of a Category 2 or Category B service approved by the Commission. This attestation must identify the Commission decision in which the complete nature of service was approved. “Complete nature of service” means any narrative description, list of programming categories from which the undertaking may draw programming, any limitations on programming from these categories, the language(s) in which the undertaking broadcasts programming, and any designation as a “niche” or “general interest” service, all of which are included in a single Commission decision.

c) The undertaking updates with the Commission the information and attestation required under (a) and (b) above prior to making any change.

d) By 30 November of each year, the undertaking submits to the Commission all information required as part of the simplified annual return for such undertakings.

5. In regard to Canadian content:

a) Not less than 35% of all programs broadcast in each broadcast year and in the evening broadcast period qualify as Canadian programs.

b) Notwithstanding (a) above, if the undertaking is in its first year of operation, it devotes not less than 15% of the broadcast year and of the evening broadcast period to the broadcast of Canadian programs.

c) Notwithstanding (a) above, if the undertaking is in its second year of operation, it devotes not less than 25% of the broadcast year and of the evening broadcast period to the broadcast of Canadian programs.

6. The undertaking does not broadcast more than twelve (12) minutes of advertising material during each clock hour.

7. The undertaking’s programming complies with sections 3, 3.1 and 6 of the *Specialty Services Regulations, 1990*.

8. The undertaking’s programming complies with section D.3 (Adult programming) of the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, as well as with the *Equitable Portrayal Code*, the *Broadcast code for advertising to children*, and the *Violence Code*, as amended from time to time and approved by the Commission.

9. The undertaking captions 100% of the English- and French-language programs broadcast over the broadcast day, consistent with the approach set out in *A new*

*policy with respect to closed captioning*, Broadcasting Public Notice CRTC 2007-54, 17 May 2007.

10. Consistent with *Accessibility of telecommunications and broadcasting services*, Broadcasting and Telecom Regulatory Policy CRTC 2009-430, 21 July 2009, as amended from time to time, the undertaking:
  - a) ensures that advertising, sponsorship messages and promos in the English and French languages are closed captioned by no later than the fourth year of operation under the present exemption order;
  - b) adheres to the quality standards on closed captioning developed by television industry working groups, as amended from time to time and approved by the Commission; and
  - c) implements a monitoring system ensuring 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 undertaking reaches the distributor unaltered, whether it is passed through in analog or in digital, including in high definition.
11. The undertaking provides audio description for all the key elements of Canadian information programs, including news programming. For the purposes of this provision, “audio description” refers to announcers reading aloud the key textual and graphic information that is displayed on the screen during information programs.
12. The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.
13. The undertaking offers its programming service for distribution as part of a package with other programming services unless it also makes its programming service available on a stand-alone basis.
14. Once ready to launch, the undertaking makes itself available for distribution by all licensed broadcasting distribution undertakings or operators of exempt distribution undertakings, despite the absence of a commercial agreement.
15. If there is a dispute between the undertaking and the licensee of a licensed broadcasting distribution undertaking or the operator of an exempt distribution undertaking, concerning the carriage or terms of carriage of programming originated by the undertaking, one or both of the parties to the dispute may refer

the matter to the Commission for dispute resolution as provided for in *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009, as may be amended from time to time.

16. In regard to a dispute, pursuant to section 15 above:

a) During any dispute between the undertaking and a person licensed to carry on a broadcasting distribution undertaking or the operator of an exempt distribution undertaking concerning the carriage or terms of carriage of programming originated by the undertaking or concerning any right or obligation under the *Broadcasting Act*, the undertaking continues to provide its programming services to the distribution undertaking at the same rates and on the same terms and conditions as it did before the dispute.

b) For the purposes of subsection (a), a dispute exists from the moment that written notice of the dispute is provided to the Commission and served on the other undertaking that is party to the dispute and ends when an agreement settling the dispute is reached by the concerned undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.

17. The undertaking ensures that every commercial message that it broadcasts complies with the technical requirements set out in *ATSC Recommended Practice A/85: Techniques for Establishing and Maintaining Audio Loudness for Digital Television*, published by the Advanced Television Systems Committee Inc., as amended from time to time and approved by the Commission.

18. The undertaking retains a clear and intelligible audio-visual recording of all of its programming for a period of four weeks following the date of broadcast, and provides this to the Commission on such terms as the Commission may request.

19. At the request of the Commission, the undertaking provides the Commission with a response to any inquiry that relates to the undertaking.

## **Appendix 2 to Broadcasting Order CRTC 2012-689**

### **Exemption order respecting certain third-language television undertakings**

By this order, pursuant to subsection 9(4) of the *Broadcasting Act* (the Act), the Commission exempts from the requirements of Part II of the Act and any regulations made thereunder, those persons carrying on broadcasting undertakings of the class defined by the criteria set out below.

#### **Purpose**

The purpose of these television programming undertakings is to provide programming services in third languages to broadcasting distribution undertakings for distribution on a digital basis.

#### **Description**

1. The Commission would not be prohibited from licensing the undertaking by virtue of any Act of Parliament or any direction to the Commission by the Governor in Council.
2. In regard to the filing of information with the Commission:
  - a) The undertaking files information with the Commission specifying: the name of the service provider and the owner or owners (i.e., the person who controls the service provider, if different from the service provider), the name under which the service operates, the service's contact information, including mailing address, telephone number, fax number, email address, and website, and the operating language(s) of the service. In the case of a new undertaking, the above information is filed with the Commission at least 30 days before the service is first distributed.
  - b) The undertaking updates with the Commission the information required under (a) above prior to making any change.
3. The undertaking provides its programming service only to broadcasting distribution undertakings that distribute the service to subscribers solely on a digital basis.
4. Of the programming broadcast by the undertaking in each calendar week:
  - a) at least 90% of the programming on the main channel is in languages other than English, French, or a language of the Aboriginal peoples of Canada;
  - b) at least 90% of the programming on the secondary audio programming channel is in a language other than English or French;

- c) less than 40% of the programming is in any of the languages of Cantonese, Greek, Hindi, Italian, Mandarin or Spanish; and
  - d) not less than 15% of all programs broadcast qualify as Canadian programs in accordance with the criteria established by the Commission in *Certification for Canadian programs – A revised approach*, Public Notice CRTC 2000-42, 17 March 2000, as amended from time to time.
5. The undertaking broadcasts at least one self-identifying notice per day, during a period of peak viewing, providing the name of the service and information on how viewers or other interested parties may contact its operator.
  6. The undertaking does not broadcast more than twelve (12) minutes of advertising material during each clock hour, of which no more than six (6) minutes may consist of local advertising.
  7. The undertaking's programming complies with sections 3, 3.1 and 6 of the *Specialty Services Regulations, 1990*.
  8. The undertaking's programming complies with section D.3 (Adult programming) of the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, as well as with the *Equitable Portrayal Code*, the *Broadcast code for advertising to children*, and the *Violence Code*, as amended from time to time and approved by the Commission.
  9. The undertaking ensures that every commercial message that it broadcasts complies with the technical requirements set out in *ATSC Recommended Practice A/85: Techniques for Establishing and Maintaining Audio Loudness for Digital Television*, published by the Advanced Television Systems Committee Inc., as amended from time to time and approved by the Commission.
  10. The undertaking retains a clear and intelligible audio-visual recording of all of its programming for a period of four weeks following the date of broadcast, and provides this to the Commission on such terms as the Commission may request.
  11. At the request of the Commission, the undertaking provides the Commission with a response to any inquiry that relates to the undertaking.
  12. The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage.