



Broadcasting Decision CRTC 2012-694

PDF version

Route reference: 2012-475-2

Additional references: 2012-212, 2012-212-1 and 2012-475

Ottawa, 20 December 2012

CHMZ-FM Radio Ltd.
Tofino, British Columbia

Application 2011-1071-7, received 12 July 2011
Public hearing in the National Capital Region
7 November 2012

CHMZ-FM Tofino – Acquisition of assets

*The Commission **approves** the application by CHMZ-FM Radio Ltd. for authority to acquire from McBride Communications & Media Inc. and Umeek Human Resources Development Inc., partners in West Island Radio Enterprises General Partnership, the assets of the English-language commercial radio station CHMZ-FM Tofino, British Columbia, and for a new broadcasting licence to continue the operation of the station.*

The application

1. The Commission received an application by CHMZ-FM Radio Ltd. (CHMZ Radio) for authority to acquire from McBride Communications & Media Inc. (McBride Communications) and Umeek Human Resources Development Inc. (Umeek HRD) (collectively, the licensees), partners in West Island Radio Enterprises General Partnership (WIRE GP), the assets of the English-language commercial radio programming undertaking CHMZ-FM Tofino, British Columbia, and for a new broadcasting licence to continue the operation of the undertaking under the same terms and conditions as those in effect under the current licence.¹
2. McBride Communications is wholly-owned and controlled by Matthew G. McBride.
3. Umeek HRD is equally owned by E. Richard Atleo, Marlene Atleo, Shawn Atleo and Nancy Atleo, and is controlled by these four shareholders.
4. CHMZ Radio is wholly-owned and controlled by Mr. McBride.

¹ The broadcasting licence for this station was administratively renewed from 1 September 2011 to 31 December 2012 as a result of Broadcasting Decisions 2011-556-1, 2012-164 and 2012-456.

Background

5. On 1 February 2011, Mr. McBride, on behalf of WIRE GP, filed an application (2011-0306-9) to renew the broadcasting licence for CHMZ-FM. As a result of outstanding ownership issues regarding the assets of CHMZ-FM, CHMZ Radio filed the present application to address a situation of apparent non-compliance resulting from an apparent change in the ownership and control of CHMZ-FM without the Commission's prior approval. The Commission notes that this application was initially announced in Broadcasting Notice of Consultation 2012-212 and was to be considered at a public hearing to be held on 7 June 2012.
6. On 8 May 2012, Umeek HRD filed an intervention opposing the present application on the basis that it continued to have an interest in the assets of CHMZ-FM and that Mr. McBride was not entitled to unilaterally acquire such assets. Consequently, in Broadcasting Notice of Consultation 2012-212-1, the Commission withdrew the present application from the 7 June 2012 public hearing. Consideration of this application was subsequently scheduled for a 7 November 2012 public hearing, as announced in Broadcasting Notice of Consultation 2012-475-2.

Current situation

7. As indicated in Broadcasting Notices of Consultation 2012-212 and 2012-475-2, it appeared that the effective control of CHMZ-FM may have been changed without the Commission's prior approval. Consequently, the licensees may have been in non-compliance with section 11(4)(a) of the *Radio Regulations, 1986* (the Regulations), which requires licensees to obtain the Commission's prior approval in respect of any act that would result in a change by whatever means of the effective control of an undertaking.
8. In Broadcasting Notice of Consultation 2012-475-2, the Commission further stated that it may discuss at the public hearing whether the licensees have been in non-compliance with section 10.1 of the Regulations, which specifies that except as otherwise provided pursuant to a condition of its licence, a licensee shall own and operate its transmitter, and with the condition of CHMZ-FM's broadcasting licence stipulating that the station must be operated in fact by the licensees themselves. The Commission also stated in that notice that it may discuss whether the licensees have been in non-compliance with section 9(2) of the Regulations relating to the filing of annual returns and with section 15(2) of the Regulations relating to contributions to Canadian content development (CCD).
9. Finally, in Broadcasting Notice of Consultation 2012-475-2, the Commission required McBride Communications and Umeek HRD to attend the public hearing to show cause why the Commission should not take further regulatory measures to ensure compliance with the relevant regulatory obligations.
10. As indicated above, the Commission received an intervention in opposition to the application from Umeek HRD. This intervention was subsequently withdrawn at the public hearing as a settlement agreement was entered into by the licensees. The public

record for this application is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Commission's analysis and decisions

11. After examining the application in light of applicable regulations and policies, the Commission considers that the issues it must address in its determinations are the following:
- the licensees' compliance with regulatory obligations regarding ownership and control of CHMZ-FM;
 - the licensees' compliance with requirements relating to CCD contributions;
 - the licensees' compliance with the requirement to file annual returns; and
 - the application of the Commission's tangible benefits policy.

Compliance with regulatory obligations regarding ownership and control of CHMZ-FM

12. At the hearing, both McBride Communications and Umeek HRD contended that they have continued to be in compliance with the relevant ownership and control requirements since the undertaking commenced operations. However, the written record of the proceeding does not support such a contention. According to Mr. McBride, CHMZ Radio was incorporated on 7 June 2007. Since that date, CHMZ Radio has been acting as the operating agency for CHMZ-FM. Further, in a letter dated 8 June 2007, Umeek HRD's solicitor informed the Commission that the company and its principal were no longer involved in the operations of CHMZ-FM and WIRE GP. Finally, the Settlement and Release Agreement, dated 23 October 2012, entered into by McBride Communications and Umeek HRD (the Settlement agreement) includes an acknowledgment that McBride Communications has carried on the business since 1 June 2007, the date on which Umeek HRD gave notice to McBride Communications that it intended to dissolve WIRE GP and cease participation in the relevant business.

13. The Commission notes, however, that the application for transfer of assets filed by CHMZ Radio seeks to rectify any situation of non-compliance with the ownership and control obligations associated with CHMZ-FM. The Commission therefore considers that any future uncertainty regarding the ownership and control of CHMZ-FM has been resolved by the execution of the Settlement agreement. It further notes that Umeek HRD no longer opposes the acquisition proposed by CHMZ Radio given the settlement agreement entered into by the licensees. Consequently, and in light of the specific circumstances giving rise to the present situation, the Commission is satisfied that no further regulatory measures are required in this regard.

Compliance with requirements relating to Canadian content development contributions

14. In Broadcasting Notice of Consultation 2012-475-2, the Commission noted that the licensees may have failed to comply with section 15(2) of the Regulations relating to CCD contributions, for the 2008-2009 and 2009-2010 broadcast years, as well as with

CHMZ-FM's condition of licence relating to Canadian talent development² (CTD) contributions, for the 2005-2006 and 2007-2008 broadcast years. Specifically, it appears that the licensees had a CTD contribution shortfall of \$400 for each of the 2005-2006 and 2007-2008 broadcast years and a CCD contribution shortfall of \$500 for each of the 2008-2009 and 2009-2010 broadcast years.

15. At the hearing, Mr. McBride indicated that all outstanding CCD obligations had been fulfilled and that a receipt demonstrating the relevant CCD contributions to FACTOR was submitted to the Commission on 31 August 2011.
16. The Commission acknowledges the licensees' efforts to fulfill the above-noted shortfalls. Nevertheless, the Commission finds the licensees in non-compliance with CHMZ-FM's condition of licence relating to CTD contributions and with section 15 of the Regulations. However, in light of CHMZ Radio's stated commitment to respecting its CCD obligations in the future, the Commission considers that no further regulatory measures to ensure compliance in this regard are required. The Commission reminds CHMZ Radio that, going forward, it must make payments in the amount specified in section 15 of the Regulations, and that these payments must be made in full by the end of each broadcast year (i.e., 31 August).

Compliance with the requirement to file annual returns

17. In Broadcasting Notice of Consultation 2012-475-2, the Commission indicated that the licensees may have failed to comply with section 9(2) of the Regulations, which relates to the filing of annual returns. Specifically, CHMZ-FM's annual returns for the 2005-2006 and 2006-2007 broadcast years, which were due by no later than the 30 November following each of those broadcast years, were filed late, on 11 December 2006 and 8 January 2008, respectively. In addition, the station's annual return for the 2010-2011 broadcast year did not appear to include financial statements for that broadcast year as of the date of filing.
18. At the hearing, Mr. McBride stated that the non-compliances regarding the late filing of annual returns had been previously addressed with Commission staff and that he took full responsibility for that non-compliance. However, he challenged the alleged failure to file the 2010-2011 financial statements on the grounds that the Data Collection System employed by the Commission indicated that no further documents were to be filed, and because the system did not permit any further submissions in this regard. Mr. McBride suggested that a technical error may have been responsible for the Commission having not received the 2010-2011 financial statements.
19. The Commission notes that Mr. McBride took full responsibility for the late filing of CHMZ-FM's annual returns. It further notes that Mr. McBride may have experienced a technical problem during the filing of the financial statements. Nevertheless, it is the responsibility of the licensees of radio stations to ensure that all information is

² As set out in Broadcasting Public Notice 2006-158, the Commission replaced the expression "Canadian talent development" with "Canadian content development".

properly filed. Further, Commission staff had previously advised Mr. McBride that the relevant financial statements remained outstanding. Consequently, the Commission finds the licensees to be in non-compliance with section 9(2) of the Regulations for the 2005-2006, 2006-2007 and 2010-2011 broadcast years.

20. In light of Mr. McBride's commitment to respecting the licensees' obligations relating to the filing of annual returns, the Commission considers that no further regulatory measures are necessary to ensure the licensees' compliance in this regard. The Commission reminds the licensees that small radio, television and distribution undertakings can call the Single Point of Contact helpline, a service that aims to assist licensees with their regulatory obligations, at the following number: 1-866-781-1911.

Application of the Commission's tangible benefits policy

21. Because the Commission does not solicit competing applications for authority to transfer the ownership or control of radio, television and other programming undertakings, the onus is on the applicant to demonstrate that the benefits proposed in the application are commensurate with the size and nature of the transaction (see Public Notice 1998-41 and Broadcasting Public Notice 2006-158). In this regard, the Commission notes that CHMZ Radio requested an exemption to the tangible benefits policy on the grounds that the change in control was unanticipated and that the business was not profitable as of June 2007. The applicant confirmed, however, that should the Commission consider that an exemption is not warranted, it would provide a tangible benefits package equivalent to 6% of the value of the transaction, which conforms to the requirement set out by the Commission in Broadcasting Public Notice 2006-158.
22. As set out in Public Notice 1993-68, the Commission does not systematically grant an exemption to stations in the first five years of operation. Further, the Commission's practice has been to deny exemptions for unprofitable undertakings in their first years of operation. However, the Commission notes that Mr. McBride involuntarily acquired effective *de facto* control of the undertaking as a result of the unanticipated dissolution of WIRE GP. Furthermore, Mr. McBride assumed the financial obligations of the partnership, which allowed CHMZ-FM to remain on air. Under these exceptional circumstances, the Commission is of the view that an exemption to its tangible benefits policy is warranted in the present case.

Conclusion

23. In light of the above, the Commission **approves** the application by CHMZ-FM Radio Ltd. for authority to acquire from McBride Communications & Media Inc. and Umeek Human Resources Development Inc., partners in West Island Radio Enterprises General Partnership, the assets of the English-language commercial radio programming undertaking CHMZ-FM Tofino, British Columbia.

24. The Commission reminds CHMZ Radio that it must remain in compliance at all times with the Regulations, and that it expects CHMZ Radio to seek prior approval for any future act, agreement or transaction that directly or indirectly would result in the change of control of CHMZ-FM.
25. The Commission has considered an appropriate licence term in light of Broadcasting Information Bulletin 2011-347, in which it announced a revised approach for dealing with radio stations found in non-compliance. In that information bulletin, the Commission noted in particular that each instance of non-compliance would be evaluated in light of factors such as quantity, recurrence and seriousness of the non-compliance. It also noted that it would consider the circumstances leading to the non-compliance in question, the licensee's arguments, and the measures taken to rectify the situation.
26. In the Commission's view, the licensees now understand the gravity of the situation surrounding CHMZ-FM and the inadequacy of their compliance with the Regulations and the station's conditions of licence. The Commission expects that CHMZ Radio will commit to improving the performance in this regard over the course of the next licence term.
27. Consistent with its revised approach for dealing with non-compliance by radio stations set out in Broadcasting Information Bulletin 2011-347, and taking into account the measures taken by the licensees to ensure future compliance with the regulatory obligations relating to CHMZ-FM, the Commission considers that a short licence term for CHMZ-FM is appropriate. Accordingly, upon surrender of the broadcasting licence currently issued to McBride Communications & Media Inc. and Umeek Human Resources Development Inc., the Commission will issue a new licence to CHMZ-FM Radio Ltd. for CHMZ-FM, which will expire on 31 August 2016. This short-term licence will allow for an earlier review of CHMZ Radio's compliance with the Regulations and with its conditions of licence. The licensee shall adhere to the **conditions of licence** set out in Broadcasting Regulatory Policy 2009-62.
28. Finally, the Commission requires CHMZ Radio to file within 30 days of the date of this decision an executed copy of its amended by-laws.

Secretary General

Related documents

- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2012-475, 5 September 2012, as amended by *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2012-475-2, 14 September 2012
- *Various radio programming undertakings – Administrative renewals*, Broadcasting Decision CRTC 2012-456, 28 August 2012

- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2012-212, 10 April 2012, as amended by *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2012-212-1, 28 May 2012
- *Administrative renewals*, Broadcasting Decision CRTC 2012-164, 20 March 2012
- *Administrative renewals*, Broadcasting Decision CRTC 2011-556, 31 August 2011, as corrected by *Administrative renewals – Corrections*, Broadcasting Decision CRTC 2011-556-1, 23 September 2011
- *Conditions of licence for commercial AM and FM radio stations*, Broadcasting Regulatory Policy CRTC 2009-62, 11 February 2009
- *Commercial Radio Policy 2006*, Broadcasting Public Notice CRTC 2006-158, 15 December 2006
- *Commercial Radio Policy 1998*, Public Notice CRTC 1998-41, 30 April 1998
- *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1993-68, 26 May 1993

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