



Broadcasting Decision CRTC 2015-502

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Reference: 2015-103

Ottawa, 12 November 2015

Ontario French-Language Educational Communications Authority Province of Ontario

Application 2015-0099-2, received on 19 January 2015

TFO – Must-offer order

*The Commission **denies** the application by the Ontario French-language Educational Communications Authority to be granted a must-offer order pursuant to section 9(1)(h) of the Broadcasting Act requiring all licensed terrestrial broadcasting distribution undertakings (BDUs), as well as direct-to-home satellite distribution undertakings, to offer the French-language educational television service TFO in French- and English-language markets across the country.*

Having carefully examined the application in light of the objectives set out in relevant policies and regulations, as well as the decisions and measures fostering choice for Canadians and flexibility for BDUs resulting from the Let's Talk TV proceeding, the Commission considers that the request is not justified.

Introduction

1. The Ontario French-language Educational Communications Authority (Groupe Média TFO) filed an application requesting that all Class 1 and Class 2 terrestrial broadcasting distribution undertakings (BDUs) and direct-to-home (DTH) satellite distribution undertakings be required to offer the French-language educational television service TFO in English- and French-language markets pursuant to an order under section 9(1)(a) of the *Broadcasting Act* (the Act). Groupe Média TFO stated that it was not proposing the mandatory distribution of TFO as part of the entry-level service, but rather as a discretionary service.
2. Groupe Média TFO noted that the Commission had always encouraged it to distribute TFO outside Ontario, as evidenced by Decision 97-573 and the *Report to the Governor in Council on English- and French-language broadcasting services in English and French linguistic minority communities in Canada*.
3. The licensee indicated that maintaining and expanding its reach were issues of concern given the difficulties in initiating and concluding distribution agreements with broadcasting distribution undertakings (BDUs) in several regions home to

Francophone communities. In the English-language markets, many large BDUs do not offer TFO.

4. Groupe Média TFO noted that according to the 2011 Census, nearly 10 million people in Canada are proficient in French, of whom 700,000 live in the Western provinces (with a further 200,000 of these speaking French at home). It stated that it would be in the interest of these communities to have access to TFO's educational television service.
5. As a small broadcaster, Groupe Média TFO considered itself to be at a disadvantage in relation to vertically integrated distributors. It asked that the Commission restore a fair balance of power between it and distributors through a distribution order, adding that such action would benefit negotiations and pave the way toward better serving the interests of official language minority communities (OLMCs).
6. The licensee added that the proposed model, namely a must-offer status, would not entail an increase in the cost of basic service since subscribers would be free to decide whether or not they want access to the service. The model would give distributors the flexibility to determine where, how and at what the price the service would be marketed following negotiations with TFO.
7. In its application, Groupe Média TFO stated that since it was not seeking mandatory distribution on the basic service, it had not provided specific justification regarding the criteria announced in Broadcasting Regulatory Policy 2010-629. The licensee nevertheless demonstrated the value of its educational, cultural and community programming in the service of the Canadian Francophonie and how it contributes to fulfilling the objectives of the Act. Groupe Média TFO submitted that its service plays a unique educational role, encourages the development of Canadian expression and contributes to linguistic duality and cultural diversity, which includes improving the services offered to OLMCs.

Interventions

8. The Commission received over 700 interventions regarding the application. The public record for this proceeding can be found on the Commission's website at www.crtc.gc.ca or by using the application number provided above.

Supporting interventions

9. The Ontario Minister Responsible for Francophone Affairs, the Commissioner of Official Languages and the French Language Services Commissioner of Ontario supported Groupe Média TFO's application to extend the reach of TFO.
10. Many organizations defending the interests of French-language OLMCs, including the Assemblée communautaire fransaskoise, the Fédération des communautés francophones et acadienne du Canada, the Société de l'Acadie du Nouveau-Brunswick and the Association des francophones du Nord-Ouest de l'Ontario, also supported Groupe Média TFO's application, as did other

organizations such as Canadian Parents for French, TV5 Québec Canada, independent producers working in Quebec OLMCs and the Alliance des producteurs francophones du Canada.

11. Finally, over 700 individuals expressed their support for the application.

Opposing interventions

12. Bell TV, Bragg Communications Incorporated (Eastlink) and Rogers Communications Partnership (Rogers) opposed the application. They noted that the Commission recently established a new regulatory framework in Broadcasting Regulatory Policy 2015-96 to give Canadians more choice and ensure that they have access to a diverse range of content. That framework allows distributors to choose the French-language discretionary services that best meet the needs of their customers. They further noted that TFO's signal is already distributed throughout Canada and submitted that a mandatory distribution order is an extraordinary and exceptional measure that should be used sparingly.
13. Eastlink and Rogers noted that the Commission reviewed its regulatory framework for the distribution of services to OLMCs and decided not to make any major changes to it, noting that the public record of the proceeding indicated that the current regulatory measures meet OLMC needs across Canada. They added that the Commission had already put in place appropriate and effective regulatory measures to ensure that Francophones in OLMCs have access to programming services in their language. Eastlink submitted that OLMCs already had access to a wide variety of French-language programming services and that the Commission did not need to intervene further by requiring the distribution of TFO or any other French-language service.
14. Eastlink and Rogers further noted that the Commission indicated in Broadcasting Regulatory Policy 2015-96 that it would authorize BDUs to distribute one out-of-province educational service in each official language as part of the entry-level service and that this measure would ensure greater distribution of educational television services across the Canada without constraining BDUs' flexibility.
15. Rogers expressed the view that Groupe Média TFO did not demonstrate that its service warrants the exceptional regulatory measure requested or that without it TFO would be incapable of fulfilling either its programming mandate or its specific obligations. Rogers noted that according to the service's 2012-2013 annual report, TFO generated approximately \$3 million in subscriber revenues, demonstrating that, BDUs make sure their customers have access to TFO when there is a strong demand for the service.
16. Rogers added that Groupe Média TFO did not define the barriers it claimed to face in its negotiations with BDUs to extend TFO's distribution in Western Canada. Rogers expressed the view that if there was demand for the service in the West, market

forces would compel BDUs to work with Groupe Média TFO to make its service available to their customers.

17. Rogers further noted that TFO cannot compare itself to services such as TV5/Unis or ARTV that were granted mandatory distribution orders, because unlike those services TFO has neither a specific role nor special programming requirements to serve OLMCs outside Ontario. According to Rogers, Groupe Média TFO should have filed its application when the Commission was considering other similar applications.¹ Rogers further noted that TFO is funded mainly by Ontario taxpayers and submitted that it would be inappropriate for consumers from elsewhere in Canada to have to financially support an educational service dedicated to a single province.
18. Finally, Eastlink submitted that the distribution industry was very competitive and that if there were a demand for TFO's programming, BDUs would have no choice but to distribute it.

Groupe Média TFO's reply

19. Groupe Média TFO noted that only large communications companies opposed the application, two of which are vertically integrated and dominant in media sectors such as TV distribution.
20. Groupe Média TFO expressed the view that although the Commission had opened the door to the distribution of an out-of-province educational service as part of a BDU's entry-level service offering, this constituted an option for distributors, not an obligation. It submitted that such an option, with a random adoption rate, could not be a valid substitute for its request for must-offer status.
21. In response to Rogers' arguments, Groupe Média TFO placed on the public record the results of a web survey carried out by Ipsos in April 2015 to determine the interest of Canadians living in the Atlantic and Western provinces in TFO. Groupe Média TFO submitted that the results of the survey clearly showed that there was an interest in TFO and in subscribing to the service across the country. It added that the decision to be able to subscribe to the service should belong to the consumer, not the distributor.
22. Groupe Média TFO submitted that in the absence of regulatory measures, BDUs have limited interest in serving Canadian Francophones and Francophiles living outside Quebec.

Commission's analysis and decisions

23. After examining the application in light of applicable policies and regulations, the Commission considers that the issues it must address are the following:

¹ See Broadcasting Regulatory Policy 2013-372.

- whether the applicant has sufficiently justified its request in light of the criteria set out in Broadcasting Regulatory Policy 2010-629; and
- whether existing mechanisms for outreach support are sufficient and appropriate.

Regulatory framework

24. In Broadcasting Regulatory Policy 2010-629, the Commission set out a new approach to assessing applications for mandatory distribution on the digital basic service pursuant to section 9(1)(h) of the Act. That policy states that any applicant wishing to obtain mandatory distribution on the digital basic service must in its application:

- demonstrate the exceptional importance of its service to the achievement of the objectives of the Act; and
- demonstrate that having mandatory carriage on the digital basic service will enable its service to contribute in meaningful ways to fulfilling the policy objectives of the Act. In particular, the applicant must:
 - provide evidence that the programming of its service makes an exceptional contribution to Canadian expression and reflects Canadian attitudes, opinions, ideas, values and artistic creativity. Specifically, the applicant must demonstrate that the contribution it intends to make to Canadian expression and reflection significantly exceeds that normally made by a Category A service, thus justifying its exceptional status under a 9(1)(h) order.
 - provide evidence as to how the programming of its service contributes, in an exceptional manner, to the overall objectives for the digital basic service, as summarized above, and how it specifically contributes to one or more objectives of the Act, such as Canadian identity and cultural sovereignty; ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society; service to and the reflection and portrayal of persons with disabilities; or linguistic duality, including improved service to OLMCs.
 - provide evidence that the service is making exceptional commitments to original, first-run Canadian programming in terms of exhibition and expenditures. Specifically, the applicant must demonstrate that the commitments it intends to make to original, first-run Canadian programming through exhibition and expenditures justify its exceptional status under a 9(1)(h) order. An “original, first-run program” is defined as the “original exhibition of a program that has not been distributed by another broadcasting undertaking licensed by the Commission.”

- provide evidence, such as surveys of the prospective audience, demonstrating that there is extraordinary need among the intended audience for the proposed service.
 - provide evidence that its business plan and implementation of its specific commitments are dependent on receipt of broad national distribution on the digital basic service, given the availability of other technological means for distributing content, and that the service would not be able to fulfill its programming commitments without mandatory distribution on the basic service.
 - provide evidence of the likely impact of the proposed wholesale rate on the price of the basic package to consumers and of its widespread acceptability to Canadians.
 - provide evidence to support the proposed timeframe during which its service should have exceptional status under an order pursuant to section 9(1)(h) of the Act.
25. Moreover, as a federal institution, the Commission must take into consideration the objectives set out in section 41 of the *Official Languages Act* when examining and applying existing policies.

Justification regarding the criteria set out in Broadcasting Regulatory Policy 2010-629

26. Groupe Média TFO did not request mandatory distribution on the basic service, but rather must-offer status across the country. A comparable application was examined by the Commission under the framework set out in Broadcasting Regulatory Policy 2013-372. As a result of that examination, it approved an application by the Canadian Broadcasting Corporation (CBC) on behalf of ARTV inc. for an order granting the French-language specialty service ARTV “must-offer” status (specifically, access rights to the digital service of terrestrial BDUs in English-language markets).
27. In its application, the CBC had underscored an important contradiction in the regulatory framework, namely that ARTV’s role was to serve French-language OLMCs (i.e. ARTV is required by condition of licence to devote at least 20% of its annual budget to the production of original Canadian productions outside Quebec), but that the service was not being offered in many English-language markets.
28. The Commission considered that ARTV’s exceptional contribution to Canadian programming produced outside Quebec and the reflection of artistic activities in OLMCs justified granting this service access rights in English-language markets across the country.
29. With respect to TFO, although the Commission recognizes the quality of its educational programming and the fact that this service fosters the transmission and

development of the French language, some elements put forward by Groupe Média TFO and the circumstances surrounding the present application create a different situation from that which led to the Commission's approval of the CBC's application.

30. To begin with, Group Média TFO requested to extend TFO's distribution across the entire country, including in the province of Quebec, where there is already a French-language educational broadcaster.
31. Next, TFO is a French-language service dedicated first and foremost to the Ontario population and funded for the most part by the Ontario provincial government. As an educational service, it benefits from mandatory distribution on the basic service in its originating province.
32. Further, unlike ARTV, TFO is subject to neither a condition of licence regarding the production of original Canadian programs outside the originating province nor a condition of licence requiring it to serve OLMCs outside Ontario. Moreover, Groupe Média TFO had the opportunity in its reply to propose new conditions of licence in this regard in order to address concerns of certain opposing interveners, but did not do so.
33. In light of the above and the criteria set out in Broadcasting Regulatory Policy 2010-629, the Commission concludes that Groupe Média TFO has not sufficiently justified its request for must-offer status for its service across the country pursuant to section 9(1)(h) of the Act. As a provincial educational broadcaster, it will however continue to benefit from mandatory distribution in Ontario.

Existing mechanisms for outreach support

34. Groupe Média TFO's application rests primarily on the fact that as a small broadcaster, it is disadvantaged and is therefore seeking to re-establish a fair balance of power between itself and distributors through a must-offer order. However, the Commission considers that several regulatory mechanisms are already in place to ensure this fair balance of power during the negotiation of the service's distribution across the country. These mechanisms aim, among other things, to ensure a diverse offering of French-language services so that the French-language OLMCs across Canada are well served.
35. For example, in Broadcasting Regulatory Policy 2015-96, which followed from the Let's Talk TV proceeding, the Commission announced that it would require all licensed BDUs to offer to their subscribers, by no later than March 2016, an entry-level service that includes, among other things, all provincial and territorial educational services that must be distributed by terrestrial BDUs and DTH undertakings pursuant to sections 17 and 46 of the *Broadcasting Distribution Regulations*.

36. Broadcasting Regulatory Policy 2015-96 sets out clauses permitting all licensed BDUs to request a condition of licence authorizing them to distribute as part of the entry-level service one out-of-province educational service in each official language in provinces or territories where there is no designated educational service. This measure allows for a greater distribution of educational television services across Canada without limiting BDUs' flexibility. It could also have a positive impact on OLMCs in both linguistic markets since Canadians would have access to more quality programming in the language of their choice, including programming intended for children and youth.
37. The Commission also announced in that policy that it would implement a strengthened Wholesale Code to frame the relationships between BDUs and programming undertakings in the wholesale market. That code has since been set out in the appendix to Broadcasting Regulatory Policy 2015-438.
38. The Wholesale Code includes provisions that aim to ensure that independent programming services can negotiate fair and reasonable terms for their distribution, based on fair market value. The Commission considers that the Wholesale Code could be a useful tool for Groupe Média TFO in its negotiations with BDUs outside Ontario.
39. In light of the above and given that new mechanisms to foster the availability of French-language services to OLMCs have just been put into place, the Commission finds that it would not be appropriate to approve Groupe Média TFO's application.

Conclusion

40. In light of all of the above, the Commission **denies** the application by the Ontario French-Language Educational Communications Authority to be granted, pursuant to section 9(1)(h) of the Act, a must-offer order requiring all licensed terrestrial BDUs and all DTH satellite distribution undertakings to offer the French-language educational television service TFO in English- and French-language markets across Canada.

Secretary General

Related documents

- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015
- *A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015
- *Applications for mandatory distribution on cable and satellite under section 9(1)(h) of the Broadcasting Act*, Broadcasting Regulatory Policy CRTC 2013-372, 8 August 2013

- *Criteria for assessing applications for mandatory distribution on the digital basic service*, Broadcasting Regulatory Policy CRTC 2010-629, 27 August 2010
- *Licence amendment*, Decision CRTC 97-573, 2 October 1997