



## Broadcasting Decision CRTC 2019-21

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Ottawa, 28 January 2019

**TELUS Communications Inc.**  
Alberta and British Columbia

*Application 2017-0998-2, received 20 October 2017*

### **Terrestrial broadcasting distribution undertakings in Alberta and British Columbia – Licence amendment, deletion and exemption of licensed service areas**

*The Commission **denies** the application by TELUS Communications Inc. to amend its regional broadcasting licences for various terrestrial broadcasting distribution undertakings in British Columbia and Alberta by deleting six licensed areas.*

#### **Application**

1. TELUS Communications Inc. (TELUS) filed an application to amend its regional broadcasting licences for various terrestrial broadcasting distribution undertakings (BDUs) by deleting the following licensed areas:
  - Prince George, British Columbia
  - Terrace, British Columbia
  - Vernon, British Columbia
  - Penticton, British Columbia
  - Grande Prairie, Alberta
  - Fort McMurray, Alberta
2. TELUS submitted that each of these undertakings meets the exemption criteria set out in Broadcasting Orders 2009-544 and 2017-320 insofar as it provides substantial community programming to its subscribers that is specific to the service area and has fewer than 20,000 subscribers.

#### **Background**

3. In Broadcasting Decision 2018-267, which renewed TELUS's regional BDU licences for Alberta and British Columbia, the Commission made a number of findings regarding TELUS's community programming, including the following:
  - in general, TELUS is not distributing on-demand community programming in a way that meets the dual objectives of citizen access and community reflection set out in Broadcasting Regulatory Policy 2016-224 (the Community Television Policy);

- in particular, the sample logs submitted by TELUS in the licence renewal proceeding for Lethbridge and Medicine Hat, Alberta, and Vernon, British Columbia, indicated that very little original programming was produced in those service areas and that of the limited number of programs that were produced, even fewer would qualify as local or access programming given that very few of the programs originated from members of the communities or focused on events specific to each local community; and
  - almost all individuals who were granted access during the 2015-2016 broadcast year were either members of the creative sector or independent producers who had production experience or who otherwise had access to the broadcasting system.
4. As a result, the Commission renewed TELUS's licences for a shortened term and directed the licensee to provide a report within the first three months of the new licence term on the measures it intended to take to ensure improved citizen access and community reflection, including coverage of local events.<sup>1</sup>

### **Regulatory framework**

5. Section 9(4) of the *Broadcasting Act* (the Act) provides that the Commission shall exempt classes of undertakings from certain requirements of the Act where it is satisfied that compliance with those requirements would not further the broadcasting policy objectives set out in section 3(1) of the Act.
6. In Broadcasting Public Notice 2008-100, the Commission announced that BDUs operating in both small and large markets under a single regional licence would be permitted to determine whether there would be greater benefits to continuing to operate in all markets as a single undertaking under a single licence or to conducting their operations in smaller markets in such a way that those operations would constitute discrete operations eligible for exemption.
7. In Broadcasting Order 2009-544, the Commission set out the criteria that a BDU is to meet in order to "carve out" a service area as a separate, exempt undertaking from a regional licence (the carve-out criteria). Specifically, the Commission will consider carve-out applications if a BDU in that service area:
- a) has separate head-end facilities;
  - b) distributes one or more unique priority (local and/or regional) television stations as part of its basic service in that area that are not offered as part of the basic service in other service areas in which the BDU operates under the same regional licence; or

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<sup>1</sup> While the Commission has recently received the licensee's report, this decision does not address that report, and any necessary follow-up will be undertaken separately.

- c) offers substantial community programming to its subscribers that is specific to that service area.
8. The Commission determined that the provision of a community channel specific to a particular service area would be sufficient to meet criterion (c). In the case of a BDU that distributes community programming on an on-demand basis, such as TELUS, it must demonstrate that it spends 5% or more of the gross broadcasting revenues derived from the licensed area on community programming specific to that area.

## **Process**

9. TELUS filed the current application while a proceeding to consider licence renewal applications for certain BDUs, including TELUS in Alberta and British Columbia, was ongoing (see Broadcasting Notice of Consultation 2017-160).
10. In a decision letter of 19 January 2018, the Commission suspended its consideration of the current application pending a decision in that licence renewal proceeding. In doing so, the Commission noted that issues relating to TELUS's community programming were under consideration in the context of the licence renewal proceeding and that it would not be appropriate to consider the substance of the application to exempt certain licensed areas prior to making determinations on the matters raised in that proceeding.
11. On 9 August 2018, TELUS filed a procedural request for the Commission to issue a decision on the current application on an expedited basis in light of the issuance of Broadcasting Decision 2018-267.
12. On 28 August 2018, the Commission denied this request, indicating that it wished to provide TELUS with the opportunity to submit additional information related to the community programming produced in each of the licensed areas where it seeks to operate an exempt undertaking before deciding on the application.
13. On the same date, Commission staff wrote to TELUS requesting additional information specific to the 2016-2017 broadcast year for the systems that the licensee is seeking to carve out and invited TELUS to provide any additional information that might be relevant to the Commission's consideration of the application. TELUS responded on 5 September 2018.
14. Following this reply, Commission staff issued one further request for information on 11 September 2018, to which TELUS responded on 18 September 2018.
15. In a letter of 15 October 2018, TELUS reiterated its request that its application be addressed immediately.

## **TELUS's reply**

16. TELUS provided program grids detailing the community programs produced during the 2016-2017 broadcast year in each of the six licensed areas.

17. In its additional filings, TELUS maintained that it offered substantial community programming during the 2016-2017 broadcast year specific to the six service areas that it wants to carve out from its regional licences. It argued that there was ample evidence of this contained in the program grids it provided for each of these systems.
18. TELUS further submitted that carve-out criterion (c) is a simple spending requirement for on-demand community programming, not a qualitative test of the types of programming produced. It argued that the Commission's analysis that led to the approval of past carve-out applications by Cogeco and Rogers in Broadcasting Decisions 2010-532 and 2013-206 rested entirely on proof that each licensee had spent 5% or more of its gross broadcasting revenues derived from each service area on community programming specific to that area.
19. TELUS added that the Commission had never expressed concerns with respect to its community programming prior to the issuance of Broadcasting Decision 2018-267 and argued that new standards should not be applied retroactively to its current application as additional criteria to determine whether it was eligible for exemption. TELUS also submitted that the concerns expressed by the Commission in Broadcasting Decision 2018-267 were not substantiated by the detailed information provided for each system for the 2016-2017 broadcast year and challenged many of the Commission's conclusions in Broadcasting Decision 2018-267, in some cases using similar arguments to those raised in the licence renewal proceeding. In particular, according to TELUS:
  - its community programming largely originates from people or focuses on events specific to each local community and is reflective of the communities in which it is produced, and the address of the producer is not the most indicative measure to assess whether a program should be considered local;
  - its propensity to favour quality over quantity cannot properly be held against it as part of the assessment of its application as the Commission never provided guidance on its expectations with regard to the ratio of funding and community programming produced; and
  - until the issuance of Broadcasting Decision 2018-267, it was unaware that the level of experience of its producers was a cause of concern.
20. With respect to the last point, TELUS noted that the Commission stated in Broadcasting Decision 2018-263 that, for the purposes of the licence renewal proceeding, it would not disqualify the specific programs originating with media professionals during the previous licence term, but that going forward those would generally not be considered access programming.
21. Finally, TELUS submitted that it was being subjected to asymmetrical treatment due to the fact that its main competitor, Shaw Communications Inc. (Shaw), has service area-specific BDU licences that can be revoked in favour of exemption simply by showing that it has fewer than 20,000 subscribers in a given area, whereas TELUS

must also meet one of the carve-out criteria. TELUS reiterated its position in its letter of 15 October 2018 following the publication of Broadcasting Decision 2018-390, in which the Commission revoked Shaw's licence in Lethbridge, Alberta.

### **Commission's analysis and decision**

22. The Commission has applied the discrete operation test based on the information provided by TELUS. This information detailed the community programming produced in the 2016-2017 broadcast year for each of the areas that TELUS has applied to carve out of its regional licences and specified that certain programs are available online, which in certain cases allowed complementary information about the programs to be accessed.
23. In applying the discrete operation test, the Commission has engaged in an analysis of the nature and origin of the programming at issue in the application.
24. The Commission does not consider that its approach in this case represents a novel, qualitative test for a carve-out. Rather, the policy has always required that the applicant demonstrate that (1) a certain monetary threshold has been met in terms of programming expenditures and (2) the expenditures have gone towards programming of the appropriate type (i.e. community programming specific to a service area).
25. The Commission is of the view that a thorough assessment of this programming is appropriate given the findings made in Broadcasting Decision 2018-267. The Commission does not consider that this constitutes a retroactive application of a new Commission policy. On the contrary, it would be inappropriate to artificially ignore the findings of Broadcasting Decision 2018-267 where relevant, particularly as these findings were made with respect to the licensee's previous licence term and the information that TELUS has submitted in support of its carve-out application concerns one of the broadcast years within that licence term. TELUS was given an explicit opportunity to respond to these findings in the context of this application.
26. Further, in its consideration of this application, the Commission has relied on its well-established practice of taking a licensee's general conduct with respect to existing obligations and policies into account. Generally speaking, the Commission will be disinclined to grant a licensee relief from its current regulatory responsibilities where it is in non-compliance with those responsibilities or acting inconsistently with key Commission policies. The Commission generally considers that any such issues should be resolved prior to relief being granted.<sup>2</sup>
27. Finally, the Commission is mindful that the onus of establishing that it would be appropriate to grant an exemption in respect of a given service area lies on TELUS.

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<sup>2</sup> For instance, in Broadcasting Decision 2018-267, the Commission denied TELUS's request for conditions of licence that would have provided the licensee with greater flexibility relating to its community programming due in part to the Commission's serious concerns regarding the licensee's conduct with respect to this type of programming.

### **Discrete operation test – Programs not specific to an area**

28. The Commission is of the view that certain programs produced by TELUS raise concerns similar to those expressed regarding the community programming of another licensee in Broadcasting Decision 2015-31. More specifically, the Commission considers that certain programs, though of high quality, do not deal with subject matters specific to the service areas or were not produced in areas served by TELUS.

#### **Penticton and Vernon**

29. TELUS claimed expenses in both Penticton and Vernon for programs entitled *Tatshenshini River* and *Safety to Nome*. TELUS explained that these productions were produced by members of one of those communities, feature members of the Okanagan community and relate to mountain biking, a popular sport in many communities in British Columbia.

30. Under the circumstances, the Commission does not consider that TELUS has established that these programs should be considered community programming specific to either of the service areas. In this regard, the Commission noted in Broadcasting Decision 2015-31 that programs tailored to serve the interests of multiple communities or to serve the interests of an entire province should not be considered specific to a service area. The Commission further notes that TELUS indicated that these programs were produced in Yukon and Alaska respectively. TELUS has no undertakings in these areas, which are hundreds of kilometres away from the service areas for which they were claimed.

31. Accordingly, the Commission has excluded the above-noted programs' budgets from the eligible expenses to be counted towards the 5% expenditure threshold. Deducting the expenses claimed for these productions brings TELUS under the 5% threshold in both areas.

32. Based on all of the above, the Commission considers that TELUS does not meet criterion (c) for Penticton and Vernon as it has not demonstrated that it spent 5% of its revenues on community programming specific to these areas in the 2016-2017 broadcast year.

#### **Terrace and Prince George**

33. The budget for a program entitled *Trickle* was split between the areas of Terrace and Prince George. TELUS stated that the program was filmed "across northern British Columbia" in areas that include the "Kitimat range of coastal mountains" near Terrace and Prince George and described the program in part as "a waterborne journey showcasing our recreational human connection to water in the Skeena River watershed." In the Commission's view, the information filed by TELUS does not provide sufficient evidence that the program is specific to either service area.

34. With respect to how the budget was divided between both areas, the Commission notes that the expenses claimed in each location are disproportionate: while the total duration of the program was split in half between the two systems, TELUS claimed only a minor portion of the budget for half of the duration of the program in Terrace, but claimed almost all of the budget for the other half of the program in Prince George. Had the budget been split proportionately, as in the case of the duration, the expenditures claimed for Prince George would have fallen well below the 5% threshold. TELUS offered no justification for this disparity.
35. The only other program that TELUS indicated was produced for Terrace was *The Angel of Cassiar*. TELUS argued that the production was specific to Terrace.<sup>3</sup> However, TELUS's own submission indicates that this program focuses on a story that is broadly relevant to all of Northern British Columbia. Therefore, as in the case of *Trickle*, the Commission considers that TELUS has not established that the program is specific to the Terrace community.
36. *Ride North*, another program included on the list for Prince George, depicts the adventures of cyclists from Prince George, as well as from other communities in British Columbia and foreign countries, during a week of mountain biking on trails that run through multiple communities in British Columbia, including Prince George. The program was claimed as an access production, but the producer is based in Vancouver rather than Prince George. TELUS has not established to the Commission's satisfaction that this production is specific to Prince George.
37. Accordingly, the Commission has excluded the above-noted programs' budgets from the eligible expenses to be counted towards the 5% expenditure threshold for Prince George, bringing TELUS under this threshold.
38. Finally, based on the Commission's analysis, the licensee did not produce any programming specific to Terrace during the 2016-2017 broadcast year. While TELUS argued that it spent well over 5% of its yearly revenues from this system on training opportunities and outreach, the Commission considers that these expenditures should not count towards the 5% threshold as a licensee cannot be considered to have satisfied criterion (c) in respect of a service area such as Terrace where no community programming specific to the area has been produced in a given year.
39. As such, the Commission considers that TELUS does not meet criterion (c) for Terrace and Prince George as it has not demonstrated that it spent 5% of its revenues on community programming specific to these areas in the 2016-2017 broadcast year.

**Discrete operation test – Programs that do not constitute community programming**

40. Community programming is defined in the *Broadcasting Distribution Regulations* (the Regulations) as programming that is produced:

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<sup>3</sup> Cassiar, British Columbia, is located hundreds of kilometres from Terrace.

(a) by the licensee in the licensed area or by members of the community served in the licensed area;

(b) by the licensee in another licensed area or by the members of the community served in that other licensed area and that is relevant to the community referred to in paragraph (a);

(c) by another licensee in a licensed area or by the members of the community served in that licensed area and that is relevant to the community referred to in paragraph (a); or

(d) by a person licensed to operate a network for the purpose of producing community programming for distribution by the licensee on a community channel.

This definition includes community access television programming and local community television programming.

41. The Commission notes that TELUS indicated that VICE was associated with the production of a program and related virtual reality project entitled *Fort McMurray Post-Fire (VICE) + VR*. TELUS stated that this program was available online. When accessed, each of the four episodes list it as a Vice Media<sup>4</sup> production and the credits list this company as an executive producer. While this program is clearly specific to the Fort McMurray area, the Commission has concerns that a large, professional production company appears to have been closely involved in its production.<sup>5</sup> In the Commission's view, TELUS has not established that this production should be considered community programming as defined in the Regulations.
42. Accordingly, the Commission has excluded this program's budget from the eligible expenses to be counted towards the 5% expenditure threshold. Deducting the expenses claimed for this production brings TELUS under this threshold in Fort McMurray.
43. As such, the Commission considers that TELUS does not meet criterion (c) for Fort McMurray in that it has not demonstrated that it spent 5% of its revenues on community programming in that community in the 2016-2017 broadcast year.

#### **Other concerns**

##### ***Community outreach and volunteer training expenditures***

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<sup>4</sup> Vice Media is a North American digital media and broadcasting company owned in part by The Walt Disney Company and A&E Networks.

<sup>5</sup> The Commission has similar concerns with regard to another above-noted production, *Tatshenshini River* (also available online according to TELUS), whose credits indicate that it is a Red Bull Media House production. Red Bull Media House is a globally distributed multi-platform media company specializing in sports, lifestyle programming, music and games.

44. The information provided by TELUS indicates that the licensee's expenditures relating to volunteer training and community outreach vary widely between licensed areas. While the Commission recognizes that specific challenges in community outreach may arise with respect to each location, TELUS claimed expenses relating to workshops and social media campaigns common to many of the six locations, with cost allocations that vary greatly from one location to another. TELUS has neither provided details regarding these divergences, nor a rationale for its disproportionate training and outreach expenditures across the six systems that it is seeking to exempt. While not necessarily problematic on its own, this kind of variance becomes more concerning when considered together with the other issues discussed in this decision.

***Community Television Policy objectives***

45. The information filed as part of TELUS's application does not alleviate the Commission's concerns with regard to the licensee's community television operations raised in Broadcasting Decision 2018-267. Rather, it further highlights some of these concerns and the need for remedial action on the part of the licensee.

46. For instance, the record of this proceeding indicates that TELUS produced very little original programming in the service areas at issue during the 2016-2017 broadcast year. No more than nine programs in any given service area, and in one case as few as two programs, were produced. This includes co-productions across multiple service areas. Moreover, of the limited number of programs, very few qualify as access programming. Consequently, while many of the programs may be of high quality, this situation is detrimental to citizen access to the broadcasting system, as well as community reflection.

47. In this regard, the Regulations define "community access television program" as "programming produced by an individual, group or community television corporation residing within the licensed area of a cable distribution undertaking." Notwithstanding TELUS's arguments to the contrary, the Commission considers that the address of access producers is a simple and objective method for determining residence and thus whether a given program should qualify as access in a given service area.

48. For multiple service areas, including Grande Prairie, TELUS has categorized programs as access programming despite the fact that the producers reside outside those service areas. The Commission considers that such programs cannot be considered genuine opportunities for community members to access the broadcasting system. Moreover, given the minimal amounts of programming and access opportunities described above, the Commission considers that TELUS did not foster a greater diversity of voices as envisioned by the Community Television Policy.

49. Finally, the issues surrounding access programming could potentially lead to other concerns. For example, under section 32(2) of the Regulations, licensees must devote at least 50% of all direct programming expenses in a broadcast year to access

programming.<sup>6</sup> The fact that many programs designated as access by TELUS do not qualify as access programming could have a significant impact on its ability to satisfy this requirement.

## Conclusion

50. In light of all the above, the Commission finds that TELUS has not met exemption criterion (c) set out at paragraph 7 of this decision in Prince George, Terrace, Vernon, Penticton and Fort McMurray. As a consequence, those service areas do not meet the discrete operation test and are not eligible for carve-out.
51. Further, the Commission is of the view that in general the community programming distributed by TELUS in the six licensed areas at issue did not meet the key policy objectives of citizen access and community reflection set out in the Community Television Policy.
52. Given the above and the significance of the concerns raised by TELUS's community programming operations, the Commission considers that it would not be appropriate to grant the licensee a carve-out with respect to any of the communities requested, including Grande Prairie, at this time. Accordingly, the Commission **denies** TELUS's application to amend its regional broadcasting licences for various terrestrial BDUs by deleting the above-noted licensed areas.
53. Once TELUS has addressed the Commission's concerns regarding its community programming, it may file a new application seeking to delete these undertakings from its regional licences based on its new programming.

Secretary General

## Related documents

- *Terrestrial broadcasting distribution undertaking serving fewer than 20,000 subscribers – Revocation of licence*, Broadcasting Decision CRTC 2018-390, 4 October 2018
- *TELUS – Licence renewal for various terrestrial broadcasting distribution undertakings*, Broadcasting Decision CRTC 2018-267, 2 August 2018
- *Renewal of licences for various terrestrial broadcasting distribution undertakings that will expire in August 2018 – Introductory decision*, Broadcasting Decision CRTC 2018-263, 2 August 2018

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<sup>6</sup> At section 32(1), "direct programming expense" is defined as an expenditure for the production or acquisition of programming, including (a) expenditures on volunteer training and volunteer program development and community outreach, but excluding expenditures related to technology, sales, promotion and administration as well as general expenses; and (b) expenditures related to the acquisition of programming produced by community-based digital undertakings, community-based low-power television stations or community television corporations.

- *Revised exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Regulatory Policy CRTC 2017-319 and Broadcasting Order CRTC 2017-320, 31 August 2017
- *Renewal of the broadcasting licences for terrestrial broadcasting distribution undertakings that will expire in May 2018* – Notice of hearing, Broadcasting Notice of Consultation CRTC 2017-160, 18 May 2017
- *Policy framework for local and community television*, Broadcasting Regulatory Policy CRTC 2016-224, 15 June 2016
- *Complaint by Independent Community TV against Videotron G.P. and its community channel MAtv*, Broadcasting Decision CRTC 2015-31, 4 February 2015
- *Licence amendments, deletion and exemption of licensed service areas and revocation of licences*, Broadcasting Decision CRTC 2013-206, 30 April 2013
- *Community television policy*, Broadcasting Regulatory Policy CRTC 2010-622, 26 August 2010
- *Deletion and exemption of licensed service areas under a broadcasting licence*, Broadcasting Decision CRTC 2010-532, 30 July 2010
- *Exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Order CRTC 2009-544, 31 August 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008