



# Broadcasting Decision CRTC 2022-223 and Broadcasting Order CRTC 2022-224

PDF version

Reference: Part 1 licence renewal application posted on 7 June 2021

Ottawa, 18 August 2022

**OUTtv Network Inc.**  
Across Canada

*Public record: 2019-1026-6*

## **OUTtv – Licence renewal, and granting of must-offer status in English-language markets**

### **Summary**

The Commission **renews** the broadcasting licence for the English-language discretionary service OUTtv from 1 September 2022 to 31 August 2027.

The Commission **denies** certain conditions of distribution requested by the licensee, specifically, the must-offer status in both official-language markets along with packaging and pricing terms. However, in recognition of the important role that the service plays in the broadcasting system and its contributions to diversity in programming, the Commission grants the licensee, on an exceptional basis, a must-offer status for its service OUTtv in English-language markets from 1 March 2023 to 31 August 2026.

Further, the Commission expects the licensees of broadcasting distribution undertakings (BDU) to include the service OUTtv in pre-assembled or thematic packages, consistent with its theme, programming and language and with the highest penetration rates.

A dissenting opinion by Commissioner Claire Anderson is attached.

### **Application**

1. The Commission has the authority, pursuant to subsection 9(1) of the *Broadcasting Act* (the Act), to issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1) of the Act.

2. OUTtv Network Inc. (OUTtv Network) filed an application to renew the broadcasting licence for the national, English-language discretionary service OUTtv, which expires 31 August 2022.<sup>1</sup>
3. In addition, OUTtv Network requested a distribution order pursuant to paragraph 9(1)(h) of the Act in order to benefit from certain conditions of distribution that aim to ensure its service is more widely distributed by broadcasting distribution undertakings (BDUs). The requested conditions of distribution are set out below.

## Background

4. In the years prior to the Commission's policy determinations set out in Broadcasting Regulatory Policies 2015-86 and 2015-96, pay and specialty services designated as Category A services were licensed on the basis of one service per genre (i.e., genre exclusivity). Category A services were required to provide programming of a specific nature with programs drawn from specific program categories or relating to certain topics. While Category A services were subject to more stringent regulatory obligations, they also benefitted from certain access rights.
5. As a Category A service, OUTtv benefitted from certain access rights. Specifically, licensed BDUs operating in English-language markets were required to distribute this service to their subscribers according to the pricing and packaging arrangements agreed to with the licensee (must-offer status).
6. In March 2015, the Commission issued Broadcasting Regulatory Policies 2015-86 and 2015-96, setting out policy determinations from its review of the television regulatory framework. In the proceeding leading to these policies, the Commission's policy objectives included ensuring that Canadians could choose only the discretionary services they wanted and ensuring a fair playing field where all discretionary services could compete with each other. To achieve these policy objectives, the Commission eliminated the genre exclusivity policy and phased out access privileges for Category A services as their licences were renewed.
7. In the case of OUTtv, its licence initially expired on 31 August 2020. Consequently, since 1 September 2020, OUTtv has no longer benefited from mandatory distribution by licensed BDUs in English-language markets.
8. In Broadcasting Regulatory Policy 2015-96, the Commission introduced new measures to support independent services, namely the Wholesale Code, set out in the appendix to Broadcasting Regulatory Policy 2015-438, and the "1:1 ratio" set out in subsection 19(3) of the *Broadcasting Distribution Regulations*. Pursuant to subsection 19(3), vertically-

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<sup>1</sup> The original licence expiry date for the service was 31 August 2020. The Commission administratively renewed the licence from 1 September 2020 to 31 August 2021 in Broadcasting Decision 2020-242 and from 1 September 2021 to 31 August 2022 in Broadcasting Decision 2021-286.

integrated licensed BDUs must offer an independent English-language service for each related or owned English-language service they distribute.<sup>2</sup>

## **Interventions**

9. The Commission received several interventions in support of the present application from LGBTQ2 advocacy organizations,<sup>3</sup> content producers, artists, individuals and allies of the LGBTQ2 communities, who emphasized the crucial role that OUTtv plays in the broadcasting system.
10. BCE Inc. (BCE), Rogers Communications Canada Inc. (Rogers) and the Canadian Media Producers Association (CMPA) filed interventions in comment, and the Aboriginal Peoples Television Network Incorporated (APTN) and the Forum for Research and Policy in Communications (FRPC) filed interventions in support. These interventions will be addressed below.

## **Issues**

11. After examining the record for this application in light of applicable policies and regulations, the Commission considers that it must examine the following issues:
  - the requested conditions of distribution;
  - the Canadian programming expenditure requirement;
  - tangible benefits;
  - apparent non-compliance; and
  - the length of the licence term.

## **Requested conditions of distribution**

12. In general, the licensee wishes for its service OUTtv to be more widely distributed by BDUs. To that end, it requested that the Commission impose a broadcasting order pursuant to paragraph 9(1)(h) of the Act to require that OUTtv be given must-offer status in both language markets and be offered by all BDUs, whether licensed or exempt.
13. In addition, the licensee proposed that the order set out certain packaging terms for OUTtv. Specifically, it requested that if a BDU offers a pre-selected, discretionary general interest programming package including English-language programming services with different themes (known as a “pre-selected package”), OUTtv must be included in the pre-selected package with a penetration rate of more than 50%, or, if there is no such

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<sup>2</sup> The same 1:1 ratio applies to French-language services.

<sup>3</sup> In the context of the present proceeding, interveners and the licensee used the expression “LGBTQ2+”. In the present decision, to standardize the reference to this community, the Commission has used the expression “LGBTQ2” (lesbian, gay, bisexual, transgender, queer and two-spirit), the acronym currently used by the Government of Canada Privy Council Office for the official title of the [LGBTQ2 Secretariat](#).

pre-selected package, it must be included in the pre-selected package with the highest penetration rate.

14. The licensee proposed that if a BDU does not offer pre-selected packages, OUTtv must be included in the highest penetration theme package offered by the BDU consistent with its theme, programming and language.
15. OUTtv Network also proposed a penetration-based rate card for the packaging of the service in both language markets. According to the rate card, the more the service is offered in high penetration packages, the lower the wholesale rate. For packages with a penetration rate between 50% and 59%, the wholesale rate would be \$0.20 per subscriber in English-language markets. The licensee also proposed that licensees of BDUs in French-language markets pay half the wholesale rates of the English-language market based on the penetration rate.
16. If the Commission approves the requested conditions of distribution, the licensee proposed that OUTtv be subject to more stringent conditions of licence than those generally imposed on discretionary services. In general, the licensee proposed to maintain certain requirements currently imposed on OUTtv (e.g., requirements relating to the nature of the service, the broadcast of Canadian content and Canadian programming expenditures [CPE]), and to add requirements relating to spending on programs of national interest (PNI), independent production, and the broadcast of news and information.
17. In support of the requested conditions of distribution, the licensee stated that OUTtv is the only service of which the entirety of its programming targets the traditionally marginalized LGBTQ2 communities. It added that the requested conditions of distribution would give visibility to issues relating to these communities, thereby increasing general empathy towards them in order to achieve true equality and acceptance.
18. According to the licensee, the current protections in the Wholesale Code, including the packaging rules and ratios for independent services, are not sufficient. Specifically, the licensee stated that despite its efforts, OUTtv continues to be marginalized by most BDUs and is experiencing an overall decline in subscriber numbers and revenues.
19. Although the licensee's application sought must-offer status, and not mandatory distribution on the digital basic service, the licensee provided justifications to demonstrate how its application meets the criteria for assessing applications for mandatory distribution on the digital basic service set out in Broadcasting Regulatory Policy 2010-629. In general, in order to demonstrate that its service is of exceptional importance to the achievement of the objectives of the Act, the licensee stated that the reflection of Canada's LGBTQ2 communities on television has a direct impact on the enrichment of Canada's cultural, political and social fabric (subparagraph 3(1)(d)(i) of the Act). It added that OUTtv provides unique programming that targets and reflects the diverse LGBTQ2 communities, and thus reflects Canadian attitudes, opinions and values (see subparagraph 3(1)(d)(ii)). The licensee argued that the reflection of LGBTQ2

communities on screen is directly related to the equal rights of men and women as set out in the Act (subparagraph 3(1)(d)(iii)). Further, the licensee indicated that the service is readily adaptable to scientific and technological change, having, among other things, launched the OUTtvGo streaming platform in 2016 and collaborated with online platforms for the distribution of its programming (see subparagraph 3(1)(d)(iv)).

20. Furthermore, the licensee indicated that OUTtv makes an outstanding contribution to Canadian expression at this time, and that it would continue to do so under the proposed conditions of licence. It stated that the proposed requirements would be significantly higher than those currently imposed on large ownership groups and on other independent services renewed in recent years.
21. The licensee also indicated that it makes a significant contribution to original first-run Canadian programming, both in terms of the volume of programs presented and the level of spending on them. In this regard, it noted that it must commission several original programs for its service since there are few services in the world that offer the same type of programming from which it could acquire previously produced programs.
22. The licensee noted that in Broadcasting Decision 2000-456, the decision regarding the issuance of the licence to PrideVision (the predecessor to OUTtv), the Commission recognized that the service would contribute “to increased diversity in the Canadian broadcasting system by providing programming that is of specific interest to the gay and lesbian community, which is currently an under-served and under-represented audience.” The licensee stated that the requested conditions of distribution would allow it to continue to meet these objectives and contribute to the diversity of the broadcasting system.
23. According to the licensee, there is a need, given the exceptional nature of the target audience, for the programming offered by OUTtv. In support of this argument, the licensee referred to studies that demonstrate the need for LGBTQ2 programming and for access to a service dedicated to serving LGBTQ2 communities. Specifically, the licensee referred to the [LGBT+ Realities Survey](#) commissioned by the Jasmin Roy Foundation, which highlights the importance of the reflection of LGBTQ2 communities on screen and the role of the media in normalizing LGBTQ2 identities. In addition, the licensee indicated that 84% of respondents to a study it commissioned supported the inclusion of OUTtv in larger and more affordable entertainment packages.
24. The licensee stated that the requested conditions of distribution would generate more subscription and advertising revenues and would allow it to meet its proposed conditions of licence. In addition, the licensee stated that the requested conditions of distribution are necessary because of the nature of OUTtv’s programming and the current distribution environment in Canada.

#### **Nature of OUTtv’s programming**

25. The licensee submitted that OUTtv provides diverse programming that aims to break down stereotypes and addresses the realities of the LGBTQ2 communities. It stated that pursuing this mandate, however, means sacrificing a level of mainstream popularity in

favour of authenticity and inclusiveness. For this reason, it proposed both entertainment and original documentary programming that brings the LGBTQ2 experience into Canadian homes.

26. In addition, the licensee noted that the Commission recognizes that programming services targeting vulnerable groups in society require direct support through regulation, and sometimes, through mandatory distribution. Thus, the licensee stated that OUTtv, as a service that serves a distinctive and vulnerable minority audience, should benefit from wider distribution.
27. The licensee added that OUTtv's profitability has declined significantly since the 2015-2016 broadcast year, despite the fact that it continues to make investments in original Canadian programming. Should the requested conditions of distribution be denied, the licensee argued that its programming would be more targeted to a mainstream audience.

#### **Current distribution environment in Canada**

28. OUTtv Network argued that in the current market, vertically integrated entities have an advantage because they control the distribution of their programming services themselves, unlike independent services such as OUTtv that must negotiate their distribution terms with BDUs. The licensee noted that these entities can leverage their negotiating power to maintain or improve the carriage fees and wholesale rate, and increase their profit margins.
29. The licensee stated that Broadcasting Regulatory Policies 2015-86 and 2015-96, which were intended to provide consumers with more choice and rely more on market forces, have made things more difficult for independent services. It added that while there are measures in place to support independent services, these are not sufficient to ensure adequate reflection of disadvantaged minority groups and their participation in the Canadian broadcasting system.
30. The licensee explained that BDUs rarely offer independent services in high-penetration packages, even with a reduced wholesale rate. It noted that greater market penetration does, however, help to build brand recognition, increase the number of subscribers and increase advertising sales of these services.
31. Moreover, the licensee argued that the introduction of new distribution services creates new opportunities for Canadian advertisers, resulting in a decline in subscribers and revenues for independent services. It also argued that BDUs are seeking to offer packages that include access to content on linear services and online platforms, and sometimes move away from smaller services.
32. According to OUTtv Network, linear television remains the most important distribution platform for the service in terms of audience and revenues. In order to maintain its revenues on this platform, the licensee indicated that it is essential to offer its service to at least 50% of the Canadian population. It added that it also needs to participate in online platforms should they become the dominant players in the broadcasting system over the next decade.

## **Interventions**

33. All interveners recognized the important role of OUTtv in the broadcasting system. Some interveners, including the FRPC and APTN, expressly supported the requested conditions of distribution.
34. For its part, Rogers supported the proposed must-offer status but, like BCE, opposed the proposed packaging and pricing terms. Rogers and BCE argued that approval of such terms would set an important precedent since no service with must-offer status benefits from OUTtv Network's proposed packaging terms. Rogers and BCE added that these terms would run counter to the Commission's policy decisions in Broadcasting Regulatory Policies 2015-86 and 2015-96 with respect to consumer choice and packaging flexibility for BDUs. Finally, they argued that these terms would prevent BDUs from negotiating with OUTtv Network on the basis of fair market value of the service.
35. BCE indicated that in accordance with the new packaging rules, BDUs have the choice of offering discretionary services in small custom packages or in small pre-assembled packages. It added that some BDUs only offer custom packages and therefore would not be able to control OUTtv's level of penetration if the proposed terms were approved.
36. Rogers argued that the proposed conditions of licence for the service do not justify the requested conditions of distribution. In its view, OUTtv Network should have compared the proposed conditions of licence to those imposed on services that receive mandatory distribution on the digital basic service.
37. The CMPA supported OUTtv's must-offer status, subject to certain conditions. In the CMPA's view, if such status is granted, CPE requirements as well as PNI expenditure requirements should be based on the service's historical expenditure thresholds. In addition, should the must-offer status be approved, the CMPA proposed that the Commission require the licensee to file an annual production report, as described in Broadcasting Information Bulletin 2019-304.

## **OUTtv Network's reply**

38. In response to the interventions, OUTtv Network stated that it is contradictory for Rogers and BCE to recognize the importance of its service in the broadcasting system while marginalizing it on their platforms. In regard to Rogers and BCE's argument that the approval of the requested conditions of distribution would run counter to the Commission's policies, the licensee submitted that the Wholesale Code states that minimum penetration, revenue or subscription levels may be granted to independent discretionary services. It added that the Commission has granted must-offer status to other services, such as ARTV and national news services. In addition, the licensee considered that its proposals take into account the packaging structures offered by individual BDUs while providing them with the flexibility and incentives necessary to ensure the broad distribution of OUTtv.
39. OUTtv Network disagreed with Rogers's argument that OUTtv's proposed conditions of licence are not sufficient to justify the requested conditions of distribution. The licensee

stated that it did not request distribution on the digital basic service and that it would not have access to the same level of resources as the digital basic services that benefit from 100% penetration. Specifically, it noted that should the requested conditions of distribution be approved, OUTtv's anticipated revenues would be significantly lower than those of services offered on the digital basic service, which are subject to more stringent requirements. In addition, the licensee stated that the service has not been profitable for several years and that it would not be prudent to set the CPE threshold too high at a time when the service is experiencing financial challenges.

40. Nevertheless, the licensee expressed the view that its proposal for PNI expenditures is appropriate since the proposal exceeds that of the major English-language groups and other services distributed on the digital basic service. The licensee also agreed to file an annual production report if the requested conditions of distribution are approved, as proposed by the CMPA.

#### **Commission's analysis**

41. The licensee wishes to obtain different conditions of distribution to ensure the viability of its service, namely:

- a must-offer status; and
- more advantageous packaging and pricing terms.

42. In the following sections, the Commission first examines the possibility of granting only a must-offer status, and then considers the packaging and pricing terms.

#### ***Must-offer status***

43. The Commission notes that, unlike for applications for mandatory distribution on the digital basic service, there are no criteria for assessing applications to grant must-offer status to a service. As noted above, in the absence of criteria for obtaining the requested conditions of distribution, the licensee has used the criteria for assessing applications for distribution on the digital basic service set out in Broadcasting Regulatory Policy 2010-629 to justify its request.

44. The Commission agrees with the licensee and the interveners that OUTtv plays an important role in the Canadian broadcasting system as it is the only service in Canada that targets LGBTQ2 communities with all of its programming. OUTtv responds to the needs and interests of these communities and contributes to raising greater awareness and understanding by all Canadians. In addition, OUTtv Network invests significantly in original first-run productions, thereby ensuring the reflection of LGBTQ2 communities in television programming while contributing to the diversity of programming available to Canadians. The licensee also uses independent producers who identify with LGBTQ2 communities. The Commission considers that the service contributes directly to fulfilling objectives of the Act by providing a unique contribution that targets and reflects the LGBTQ2 communities.

45. In light of the above and the outstanding contributions that OUTtv makes to the broadcasting system, the Commission considers that it is in the public interest and consistent with the policy objectives of the Act to grant must-offer status to OUTtv. The Commission considers that this would be an appropriate means of ensuring that the service is available to Canadians.
46. As noted above, the licensee wishes for the must-offer status to apply to both licensed and exempt BDUs operating in both language markets. In regard to exempt BDUs, the Commission considers that the public record does not contain sufficient information to assess the impact of must-offer status on small exempt BDUs and subscribers in regard to the potential benefits to the service. In addition, the Commission notes that BDUs operating in French-language markets have never been required to distribute OUTtv, even when the service had Category A status. The Commission therefore considers that it would not be appropriate to grant OUTtv access rights that are more favourable than those that the service had as a Category A service. Accordingly, the Commission considers that the must-offer status for OUTtv should only apply to licensed BDUs operating in English-language markets.
47. In light of the above, the Commission grants must-offer status in regard to the distribution of the service OUTtv by licensed terrestrial and direct-to-home BDUs operating in English-language markets. The must-offer status for OUTtv in English-language markets will be effective from **1 March 2023** to **31 August 2026**. Subscribers in English-language markets should therefore have access to OUTtv as soon as possible and by no later than 1 March 2023. This will give licensed BDUs that do not currently distribute OUTtv sufficient time to do so. Given the uncertainties of the current regulatory framework affecting independent services, the Commission considers that a must-offer status in effect until 31 August 2026 is an appropriate measure. The Broadcasting Order is set out in Appendix 2 to the present decision.

***Packaging and pricing terms***

48. In general, the Commission notes that the packaging and pricing terms requested by OUTtv Network would result in increases in subscriber numbers and total revenues. While these terms would be beneficial to OUTtv, the Commission considers that their approval would run counter to the Commission's long-standing practice regarding commercial agreements of not regulating rates for programming services. Specifically, the Commission indicated in Broadcasting Public Notice 2006-23 that it will cease to regulate the wholesale rates of all discretionary services, except those services that are part of the digital basic service. Moreover, such approval would not respect the spirit of the decisions in Broadcasting Regulatory Policies 2015-86 and 2015-96 and would set an important precedent.
49. As noted by BCE and Rogers, the packaging and pricing terms for discretionary services must be negotiated between BDUs and licensees of programming service. The Commission does not interfere with commercial arrangements between BDUs and programming services, except for services that are part of a digital basic service or following a dispute resolution process.

50. However, the Wholesale Code contains provisions on packaging and pricing arrangements, which are intended to strike a balance of power in negotiations between BDUs and programming services, particularly independent services.
51. To this effect, clause 9 of the Wholesale Code states that “[a]n independent programming service shall, unless the parties agree otherwise, be included in the best available pre-assembled or theme package consistent with its theme, programming and language.” Given the exceptional importance of OUTtv to the achievement of the objectives of the Act, the Commission considers it appropriate to set out the following expectation:
- The Commission expects broadcasting distribution undertakings to include the OUTtv programming service in pre-assembled or thematic packages, consistent with its theme, programming and language and with the highest penetration rates.
52. In addition, the Commission encourages BDUs to treat the OUTtv programming service fairly and to avoid withdrawing the service, imposing punitive or retaliatory measures, imposing unreasonable rates, significantly altering the packaging or otherwise substantially reducing the wholesale payment for the service.
53. In light of the above, the Commission **denies** the packaging and pricing terms proposed by OUTtv Network. However, as noted above, the Commission has set out an expectation and an encouragement with respect to the packaging and fair treatment of the service, which apply to all licensed and exempted BDUs operating in both language markets.

#### **Canadian programming expenditure requirement**

54. Paragraphs 3(1)(e) and 3(1)(s) of the Act state that each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming and that private networks and programming undertakings should, to the extent consistent with the financial and other resources available to them, contribute significantly to the creation and presentation of Canadian programming. Consistent with this aspect of the broadcasting policy and its authority under subsection 9(1) of the Act, the Commission has imposed conditions of licence, including CPE requirements, requiring programming undertakings to contribute in various ways to the creation of Canadian programming.
55. During the current licence term, OUTtv was subject to a 40% CPE requirement set out in condition of licence 4(a) in Appendix 3 to Broadcasting Decision 2013-468. The licensee proposed a CPE requirement of 25% of the previous broadcast year’s gross revenues in the event that all requested conditions of distribution are denied.
56. The Commission’s current practice is to set CPE thresholds for discretionary services on a case-by-case basis, based on historical expenditure levels, with a minimum of 10%. Due to the size and resources of independent services such as OUTtv, the Commission’s practice is generally not to set CPE requirements for these services that are higher than those for larger ownership groups that may benefit from greater synergies. Accordingly, the Commission does not generally set a CPE threshold higher than 30% for independent services.

57. The Commission notes that over the past five broadcast years, OUTtv has exceeded its CPE requirements. Further, while a higher CPE level would be beneficial to the Canadian broadcasting system, the Commission notes that OUTtv has not been profitable for the past five broadcast years. The Commission therefore considers that it would not be appropriate to impose a CPE level higher than that of the major ownership groups on a service that is not profitable and that, based on the projections provided, could not be profitable in the next licence period even if the Commission were to grant it must-offer status.
58. In light of the above, the Commission sets out OUTtv's minimum annual CPE requirement at 25%. Such a requirement is consistent with the Commission's general practice. Further, it would ensure that the licensee makes a significant contribution to the production of Canadian programming, while allowing it the flexibility to operate in a competitive environment as an independent discretionary service.
59. The broadcasting policy set out in subsection 3(1) of the Act also provides that the Canadian broadcasting system should reflect the linguistic duality of Canada and the special place of Indigenous Peoples within Canadian society (subparagraph 3(1)(d)(iii)).
60. The Commission considers that it would be appropriate to adopt an incentive to encourage the reflection of Indigenous Peoples in the broadcasting system. Specifically, the licensee will receive a 50% credit towards its CPE requirements for expenditures on Canadian programming produced by Indigenous producers, up to a maximum (expenses plus credit) of 10% of the licensee's overall CPE requirement when combined with the credit discussed below regarding official language minority community (OLMC) reflection. Only programming costs counting towards CPE as defined in Public Notice 1993-93 will be considered eligible for the credit.
61. The Commission is also of the view that a similar credit could encourage greater onscreen reflection of OLMCs in the broadcasting system. Consequently, the licensee will receive a 25% credit against its CPE requirements for expenditures on Canadian programming produced by OLMC producers, up to a maximum (expenses plus credit) of 10% of the licensee's overall CPE requirement when combined with the credit discussed above regarding Indigenous reflection. Once again, only programming costs counting towards CPE as defined in Public Notice 1993-93 will be considered eligible for the credit. Further, the OLMC producer must be an independent producer as defined by the Commission and (i) if in the province of Quebec, the original language of the production must be English or (ii) if outside of the province of Quebec, the original language of the production must be French.
62. Accordingly, **conditions of licence** reflecting these determinations are set out in Appendix 1 to this decision.

### **Tangible benefits**

63. In an administrative letter dated 25 November 2016, the Commission approved an application by OUTtv Network to change its effective control. The Commission expected

the licensee to make a financial contribution of \$120,354, divided equally over seven broadcast years, as follows:

- Canada Media Fund (CMF): \$96,285;
- Ryerson University – Masters of Media Production Program – OUTtv Award: \$8,023;
- Centre for Digital Media – Master of Digital Media Program – OUTtv Award: \$8,023; and
- Concordia University – Queer Media Database Canada-Quebec: \$8,023.

64. In a letter dated 17 September 2020, Commission staff informed the licensee that there were shortfalls for the 2016-2017 to 2018-2019 broadcast years and asked the licensee to submit proof of payment for the contributions. In reply, the licensee attached proof of payment for the requested broadcast years. In addition, it argued that due to financial challenges, it was unable to distribute the contributions equally. The licensee also stated that he did not make any contribution to Ryerson University since it has not awarded any Masters of Media Production scholarships since 2016, but that it paid all required contributions to Concordia University and the Centre for Digital Media.
65. The licensee added that it intended to pay \$20,000 to the CMF by 31 August 2021 and that it would pay the full balance of the tangible benefits by the end of the 2022-2023 broadcast year.
66. The Commission notes that the licensee filed proof of payment in a timely manner for the 2020-2021 broadcast year and has made \$60,000 in contributions to CMF and all required contributions to Concordia University and the Centre for Digital Media. The Commission is confident that the licensee will file proof of payment in the future. The Commission also notes the licensee's commitment to pay the full balance of tangible benefits by the end of the 2022-2023 broadcast year. In this regard, the Commission notes that the licensee will be required to make a total contribution of \$44,308 (\$36,285 to the CMF and \$8,023 to Ryerson University) by 31 August 2023.
67. If Ryerson University (now known as Toronto Metropolitan University) does not award a Masters of Media Production scholarship in the 2021-2022 and 2022-2023 broadcast years, the licensee is permitted make an equivalent contribution to another eligible project.

### **Apparent non-compliance**

#### **Annual returns**

68. Paragraph 10(1)(i) of the Act states that the Commission may, in furtherance of its objects, make regulations requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify.

69. Pursuant to this authority, the Commission adopted subsection 8(1) of the *Specialty Services Regulations, 1990*, which was replaced by subsection 9(1) of the *Discretionary Services Regulations* on 1 September 2017. Pursuant to these subsections, licensees are required to file with the Commission, by 30 November of each year, their annual returns, including financial statements, for the previous broadcast year.
70. In a letter dated 17 September 2020, based on Commission records, Commission staff informed the licensee that its financial statements for the 2015-2016 broadcast year, as well as its annual return and financial statements for the 2016-2017 broadcast year, were filed late.
71. OUTtv Network indicated that at timing of the filing of the annual return for the 2015-2016 broadcast year, it was undergoing a change in ownership, which delayed the preparation of the financial statements. However, it stated that its preliminary financial statements were filed in a timely matter with the annual return. In regard to the annual return and financial statements for the 2016-2017 broadcast year, the licensee stated that they were filed in a timely manner, but that it had to refile the documents following a request for clarification from the Commission.
72. The Commission notes that although the licensee underwent a change in ownership during the 2015-2016 broadcast year, it still filed its financial statements one year late.
73. In regard to the 2016-2017 broadcast year, the Commission notes that the original filing date was not properly reflected in its system and that the licensee did file its annual return and financial statements on time.
74. In light of the above, the Commission finds the licensee is in non-compliance with subsection 8(1) of the *Specialty Services Regulations, 1990* with respect to the filing of annual returns for the 2015-2016 broadcast year. However, the Commission finds that the licensee is in compliance with subsection 9(1) of the *Discretionary Services Regulations* for the 2016-2017 broadcast year.
75. Given that no issues related to the filing of annual returns have been raised since the 2015-2016 broadcast year, the Commission considers that no corrective measures are required.

#### **Closed captioning**

76. During the current licence term, the licensee was required to close caption 100% of English- and French-language programs broadcast during the broadcast day, as set out in condition of licence 4 in Appendix 1 to Broadcasting Regulatory Policy 2011-443.
77. According to the information contained in the program logs filed by the licensee, it did not close caption all of its programming in the 2013-2014 and 2014-2015 broadcast years.
78. The licensee noted that during OUTtv's last licence renewal, it informed the Commission that a large portion of the programs acquired were from independent producers with

small budgets who did not have the financial resources to provide closed captioning. It added that since 2015, all content broadcast by the service is close captioned, despite the significant costs involved.

79. The Commission is satisfied by the licensee's explanation and notes the steps it has taken to comply with the closed captioning requirements. Moreover, the licensee has been in compliance with this requirement since 2015.
80. In light of the above, the Commission finds the licensee in non-compliance with condition of licence 4 set out in Appendix 1 to Broadcasting Regulatory Policy 2011-443 for the 2013-2014 and 2014-2015 broadcast years. However, the Commission considers that there is no need to impose corrective measures since the licensee has since complied with its requirements.

### **Licence term**

81. Since 2010, the Commission's general practice has been to grant five-year licence terms to television programming undertakings. Given that the licensee has taken the appropriate steps to rectify its non-compliance and comply with its regulatory requirements, the Commission finds that it is appropriate to renew the broadcasting licence for OUTtv for a period of five years.

### **Conclusion**

82. In light of all of the above, the Commission **renews** the broadcasting licence for the national, English-language discretionary service OUTtv from 1 September 2022 to 31 August 2027. The terms and **conditions of licence** are set out in Appendix 1 to this decision.
83. The Commission is also issuing a broadcasting order pursuant to paragraph 9(1)(h) of the Act to require licensed BDUs operating in English-language markets to offer OUTtv to their subscribers from 1 March 2023 to 31 August 2026. This Broadcasting Order is set out in Appendix 2 to this decision.

Secretary General

### **Related documents**

- *Various discretionary services – Administrative renewals*, Broadcasting Decision CRTC 2021-286, 13 August 2021
- *OUTtv – Administrative renewal*, Broadcasting Decision CRTC 2020-242, 6 August 2020
- *Production Report to be completed annually by large English- and French-language ownership groups*, Broadcasting Information Bulletin CRTC 2019-304, 29 August 2019
- *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
- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015
  - *Let's Talk TV – 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
  - *Let's Talk TV – The way forward – Creating compelling and diverse Canadian programming*, Broadcasting Regulatory Policy CRTC 2015-86, 12 March 2015
  - *Various independent pay and specialty Category A services – Licence renewals*, Broadcasting Decision CRTC 2013-468, 30 August 2013
  - *Amended exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers – Implementation of the regulatory framework relating to vertical integration and other amendments*, Broadcasting Order CRTC 2012-408, 26 July 2012
  - *Standard conditions of licence, expectations and encouragements for specialty and pay television Category A services*, Broadcasting Regulatory Policy CRTC 2011-443, 27 July 2011
  - *Criteria for assessing applications for mandatory distribution on the digital basic service*, Broadcasting Regulatory Policy CRTC 2010-629, 27 August 2010
  - *Digital migration framework*, Broadcasting Public Notice CRTC 2006-23, 27 February 2006
  - *PrideVision – a new specialty channel*, Decision CRTC 2000-456, 14 December 2000
  - *The reporting of Canadian programming expenditures*, Public Notice CRTC 1993-93, 22 June 1993

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

## Appendix 1 to Broadcasting Decision CRTC 2022-223

### Terms, conditions of licence, expectations and encouragements for the national, English-language discretionary service OUTtv

#### Terms

The licence will expire 31 August 2027.

#### Conditions of licence

1. The licensee shall adhere to the standard conditions of licence for discretionary services set out in Appendix 2 of *Standard requirements for television stations, discretionary services, and on-demand services*, Broadcasting Regulatory Policy CRTC 2016-436, 2 November 2016, and to the conditions set out in the broadcasting licence for the undertaking.
2. The licensee shall, in each broadcast year, devote at least 25% of the undertaking's previous broadcast year's gross revenues to the acquisition of or investment in Canadian programs.
3. Subject to condition 4, the licensee may claim, in addition to its expenditures on Canadian programming:
  - a) a 50% credit against its Canadian programming expenditure requirement for expenditures made on Canadian programming produced by an Indigenous producer and claimed as Canadian programming expenditures during that broadcast year; and
  - b) a 25% credit against its Canadian programming expenditure requirement for expenditures made on Canadian programming produced by an official language minority community producer and claimed as Canadian programming expenditures during that broadcast year. The licensee may claim the credit if:
    - i) the programming is produced in the province of Quebec and the original language of production is English; or
    - ii) the programming is produced outside the province of Quebec and the original language of production is French.
4. The licensee may claim the credits calculated in accordance with condition 3 until the expenditures on Canadian programming produced by Indigenous producers and by official language minority community producers, including the credits, reach a combined maximum of 10% of the undertaking's Canadian programming expenditure requirement.
5. In regard to Canadian programming expenditures:

- a) In each broadcast year of the licence term, excluding the final year, the licensee may expend an amount on Canadian programming that is up to 5% less than the minimum required expenditure for that year calculated in accordance with condition of licence 2; in such case, the licensee shall expend in the next broadcast year of the licence term, in addition to the minimum required expenditure for that year, the full amount of the previous year's under-expenditure.
  - b) In each broadcast year of the licence term, excluding the final year, in which the licensee expends an amount for that year on Canadian programming that is greater than the minimum required expenditure, the licensee may deduct that amount from the minimum required expenditure for that year in one or more of the remaining years of the licence term.
  - c) Notwithstanding paragraphs a) and b) above, during the licence term, the licensee shall expend on Canadian programming, at a minimum, the total of the minimum required expenditures calculated in accordance with condition of licence 2.
6. In the two years following the end of the licence term ending on 31 August 2022, the licensee shall report and respond to any Commission enquiries relating to the expenditures on Canadian programming made by the licensee for the licence terms ending on 31 August 2020, 31 August 2021 and 31 August 2022.

## **Definitions**

For the purposes of these conditions of licence:

**Indigenous producer** means an individual who self-identifies as Indigenous, which includes First Nations, Métis and Inuit, and is a Canadian citizen or resides in Canada, or an independent production company in which at least 51% of the controlling interest is held by one or more individuals who self-identify as Indigenous and are Canadian citizens or reside in Canada. For the purposes of the definition of “independent production company,” a “Canadian company” includes a production company in which at least 51% of the controlling interest is held by one or more individuals who self-identify as Indigenous and reside in Canada.

**Official language minority community (OLMC) producer** means a company that meets the definition of “independent production company” and for which, if operating in the province of Quebec, the original language of production must be English, or, if operating outside the province of Quebec, the original language of production must be French.

## **Clarification for OLMC producer**

To be considered an OLMC producer in Canada, a production company must:

- if it produces original programming in English, have its head office in Quebec and be owned and operated by a resident of Quebec;

- if it produces original programming in French, have its head office outside Quebec and be owned and operated by a resident from outside Quebec.

### **Expectations**

The standard expectations applicable to this licensee are set out in Appendix 2 of the *Standard requirements for television stations, discretionary services, and on-demand services*, Broadcasting Regulatory Policy CRTC 2016-436, 2 November 2016.

### **Encouragements**

The standard encouragements applicable to this licensee are set out in Appendix 2 of the *Standard requirements for television stations, discretionary services, and on-demand services*, Broadcasting Regulatory Policy CRTC 2016-436, 2 November 2016.

## Appendix 2 to Broadcasting Decision CRTC 2022-223

### Broadcasting Order CRTC 2022-224

#### Distribution of the programming service OUTtv by licensed broadcasting distribution undertakings

1. Pursuant to paragraph 9(1)(h) of the *Broadcasting Act*, the Commission **orders** licensees of broadcasting distribution undertakings to distribute the programming service OUTtv in Anglophone markets, effective 1 March 2023, under the following terms and conditions:
  - a. This order applies to all licensed distribution undertakings, including terrestrial and direct-to-home (DTH) distribution undertakings. The licensees of these undertakings are collectively referred to in this order as distribution licensees.
  - b. This order does not apply to exempt distribution undertakings serving more than 2,000 subscribers, as defined in *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.
  - c. Notwithstanding the foregoing, distribution licensees are not required to distribute the OUTtv programming service under this order unless the licensee or a third party:
    - i) ensures the transmission of the service to each broadcasting distribution undertaking's head end located within the area for which it is licensed or to a satellite uplink centre located within that area or to another location agreed upon between the broadcasting distribution undertaking and the service; and
    - ii) bears the costs of the transmission.
  - d. This order shall take effect on 1 March 2023 and expire on 31 August 2026.

For the purpose of this order, the terms “Anglophone market,” “licensed,” “terrestrial distribution undertaking,” “DTH distribution undertaking” and “programming service” shall have the same meanings as those set out in the *Broadcasting Distribution Regulations*, as amended from time to time.

#### **Expectation**

The Commission expects the licensees of distribution undertakings to include the OUTtv programming service in pre-assembled or thematic packages, consistent with its theme, programming and language and with the highest penetration rates.

#### **Encouragement**

The Commission encourages licensees of distribution undertakings to treat the OUTtv programming service fairly and to avoid imposing punitive or retaliatory measures, imposing

unreasonable rates, significantly altering the packaging or otherwise substantially reducing the wholesale payment for the service.

## Dissenting opinion by Commissioner Claire Anderson

I have read the decision of my colleagues. I agree with the decision to grant “must-offer” status to OUTtv. However, where my colleagues set an **expectation** that broadcasting distribution undertakings (BDUs) include the OUTtv service in pre-assembled or thematic packages consistent with its theme, programming and language (packages) and with the highest penetration rates, I would have made it **mandatory** that BDUs include the OUTtv service in packages with the highest penetration rates.

Additionally, I would **require** that BDUs treat OUTtv fairly and avoid withdrawing the service, imposing punitive or retaliatory measures, imposing unreasonable rates, significantly altering the packaging or otherwise substantially reducing the wholesale payment for the service, because it furthers the objectives of the *Broadcasting Act* (the Act), and in particular subparagraphs 3(1)(d)(i) to (iii) and 3(1)(t)(iii).<sup>4</sup>

In the majority decision, the Commission focuses on the consumer choice objectives of Broadcasting Regulatory Policy 2015-96 (BRP 2015-96); however, BRP 2015-96 at paragraph 61 also noted the importance of supporting a diverse range of programming made by Canadians, including that provided by independent services.

In BRP 2015-96, the Commission acknowledged that promoting consumer choice may have an effect on programming services and non-vertically integrated BDUs:

63. ...in this competitive environment, it becomes even more important to ensure a fair playing field in order to foster continued diversity and innovation within the system.

64. The fair conduct of negotiations is key to achieving this intended outcome. Specifically, the negotiation of fair and reasonable terms allows BDUs to compete more equitably in the retail market with other BDUs and online content providers.

**Programmers must also be able to negotiate fair and reasonable terms for their services in order for them to continue to create and show programming of high quality and value to Canadians** (emphasis mine)...

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<sup>4</sup> 3(1) It is hereby declared as the broadcasting policy of Canada that

(d) the Canadians broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming...

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights...

3(t) distribution undertakings

(ii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services.

Later in that decision, the Commission noted that it would be phasing out access privileges for Category A discretionary services, and that some services may not survive this phase-out.<sup>5</sup> In light of these concerns, clauses 7 to 10 of the Wholesale Code<sup>6</sup> address unequal bargaining power; two of which are particularly relevant to the issue at hand:

9. An independent programming service shall, unless the parties agree otherwise, be included in the best available pre-assembled or themed package consistent with its theme and programming; and

10. A programming service shall be given comparable marketing support by the BDU as is given to similar or related services.

Broadcasting Regulatory Policy 2015-438 (BRP 2015-438) clarified the term “best available package” at paragraph 85:

In regard to the term “best available package,” the Commission stated in Broadcasting Decision 2012-672 that “the differing penetration levels of packages should not be sufficient in and of itself to sustain a finding of undue preference or disadvantage.” The Commission maintains the view that “best available package” does not necessarily mean most highly penetrated, as this interpretation would run counter to consumer choice objectives set out in Broadcasting Regulatory Policy 2015-96. **That said, in a given case, it may be found that the “best available package” within which an independent programming service must be placed is the most highly penetrated, if this interpretation is shown to strike the appropriate balance between the objectives of diversity of voices and consumer choice** (emphasis mine).

In acknowledgement of this clause and the exceptional importance of OUTtv to the achievement of the objectives of the Act, the majority decision imposes the following non-binding expectation:

The Commission **expects** broadcasting distribution undertakings to include the OUTtv service in pre-assembled or thematic packages, consistent with its theme, programming and language and with the highest penetration rates (emphasis mine).

Respectfully, in light of OUTtv’s best estimated penetration rates and financial trajectory, I believe that the majority decision does not provide adequate regulatory protection to this integral service, the importance of which was reiterated by several interveners:

As someone who grew up as a gay child in the very isolated region of Fort McMurray in northern Alberta, I spent a lot of time as a youth struggling to find my identity. I was different, I was unique. The LGBTQ+ community is a vibrant, special, talented, loving, and supportive community, but it can also be a marginalized, lonely, and targeted community. It is a collective of individuals who challenge societal normalities, and the

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<sup>5</sup> BRP 2015-96 at paragraph 97.

<sup>6</sup> Appendix to Broadcasting Regulatory Policy 2015-438 (BRP 2015-438).

results are often met with confusion, hate, anger and a multitude of other reactions from those who simply do not understand.

OUTtv is a necessary and welcomed platform in the ongoing fight for equality and education. Not only does this network provide countless hours of world class programming created for and, often, by LGBTQ+ creatives, it is also a platform to showcase this diverse community to the general population. The content distributed by OUTtv is not just engaging entertainment, it provides a thought-provoking examination into various facets of the LGBTQ+ community which is not available anywhere else. OUTtv is a network [that] has shown myself and countless others that it is okay to be different. It is okay to be unique. It is okay to push your personal boundaries, and explore your sexuality, your gender identity, your attractions, and your overall being. This platform is a vital part of Canadian culture and our television landscape...

Another intervenor commented:

... It's imperative that a service like OUTtv be offered, easily available and included in basic packages for a wide accessibility in order to not only serve queer people who have been persecuted, arrested, discriminated against and ripped from the pages of history and sex education courses in schools - but also to educate, enlighten, and provide direct access to non-LGBTQ Canadians. Access, proximity, and conversation are proven components of dismantling systemic discrimination and injustices...

I note that the Commission has issued orders under paragraph 9(1)(h) for the mandatory distribution of other services. For instance, in the Aboriginal Peoples Television Network's (APTN) license renewal,<sup>7</sup> the Commission noted that APTN is the only Canadian television service dedicated to and produced by Aboriginal peoples, and that it is vitally important that this service be available to all Canadians.<sup>8</sup>

In that decision, the Commission noted that a paragraph 9(1)(h) order was suitable to further the objectives of subparagraph 3(1)(d)(iii) of the Act, as APTN "serves the needs and interests, and reflects the circumstances and aspirations of Canadian men, women and children. **This includes equal rights...** (emphasis mine)."

OUTtv is the only service to provide programming for, by and about the LGBTQ2+ community. The LGBTQ2+ is a historically marginalized group, which is even more apparent by the fact that

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<sup>7</sup> Broadcasting Decision CRTC 2018-340 (also see Broadcasting Regulatory Policy CRTC 2013-372)

<sup>8</sup> APTN confirmed its support of the 9(1)(h) order for OUTtv in its intervention:

It is, frankly, an indictment of our system that such a critical service achieves, as OUTtv reports in its application, only 8% penetration across Canadian BDUs. This is unacceptable. In Canada's market, this level of penetration is wholly inadequate for such an important service with a critical social mandate. This is why we support OUTtv's request to be offered in more widely available general interest or theme packages – though still on a discretionary basis. Of these, we believe that wider distribution on pre-selected general packages would be the most appropriate form of distribution for OUTtv's service. It should be widely available and easily discoverable by Canadians.

It is false to think that Canadians have programming "choice" when services that offer distinctive viewpoints and are targeted specifically to historically disadvantaged communities are marginalized within the system itself. This is clearly the case with OUTtv. It is time to correct this obvious deficiency.

this group has not been specifically mentioned by the Act (although I believe the discussion of “equal rights” highlighted above applies to the LGBTQ2+ community).

Additionally, the evidence on the record from OUTtv, APTN and Canadians speaks volumes about the necessity of the service to **all** Canadians, similar to the Commission’s reasoning in issuing a paragraph 9(1)(h) order to APTN.

Given that paragraph 85 of BRP 2015-438 (outlined above) notes that

... in a given case, it may be found that the “best available package” within which an independent programming service must be placed is the most highly penetrated, if this interpretation is shown to strike the appropriate balance between the objectives of diversity of voices and consumer choice

I think this is one such case where the service is deserving of being placed in the most highly penetrated package, in order to ensure the continued provision of LGBTQ2+ programming to both the LGBTQ2+ community, and Canadians, at large.

While I would not set a rate on the service at this point, I would make it **mandatory** that BDUs treat OUTtv fairly and avoid withdrawing the service, imposing punitive or retaliatory measures, imposing unreasonable rates, significantly altering the packaging or otherwise substantially reducing the wholesale payment for the service, in order to respect the objectives of the Act and in order to ensure this important service continues to be available to Canadians and to people worldwide.<sup>9</sup>

In light of the fact that I would not impose a set rate at this time, I would impose Canadian Programming Expenditure requirements in the same manner as set out in the majority decision.

## **Application**

OUTtv argues that the terms should apply to all BDUs who serve over 2,000 subscribers, as persons in smaller markets should also have access to LGBTQ2+ services—and I tend to agree.

In my dissenting opinion on a procedural matter regarding the Canadian Broadcasting Corporation’s license renewal,<sup>10</sup> I noted that not all Commission processes are equally accessible to interested persons. While that case dealt with marginalized groups, the same rings true for smaller entities who may have access to fewer resources. For that reason, exempt BDUs serving over 2,000 subscribers may wish to commence a Commission proceeding to address any difficulty that this decision may have on that particular BDU.

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<sup>9</sup> See subparagraphs 3(1)(d)(i) to (iii).

<sup>10</sup> [Broadcasting Decision 2022-165](#), and more specifically, [Broadcasting – Commission Letter to Gretchen King \(CMAC\) \[Community Media Advocacy Centre\] – dated 9 April 2021](#)