



## Broadcasting Decision CRTC 2004-312

Ottawa, 3 August 2004

**TEN Broadcasting Inc.**  
Across Canada

*Application 2003-1905-5*  
*Public Hearing in the National Capital Region*  
*17 May 2004*

### **10 Gay Adult – Category 2 specialty service**

*In this decision, the Commission **approves** the operation of a new Category 2 specialty television service.*

#### **The application**

1. The Commission received an application by TEN Broadcasting Inc. (TEN Broadcasting), for a broadcasting licence to operate a national, English-language Category 2<sup>1</sup> specialty television service to be known as 10 Gay Adult.
2. The applicant proposed to offer a service that would consist exclusively of adult programming for the gay community and that would consist of full-length feature films, documentaries and other adult entertainment. The applicant indicated that it would adhere to its own policy on adult programming, as filed with its application. The Commission considers it appropriate that the applicant should be subject to a **condition of licence** that it adhere to that policy. The text of the condition of licence is set out in the appendix to this decision.

#### **The interventions**

3. The Commission received two interventions in opposition to this application, both from parties involved with PrideVision, a Category 1 specialty television service which provides programming of specific interest to the gay and lesbian community. The two interventions were submitted by PrideVision Inc. (Pride) and 6166954 Canada Inc. (William Craig). At the time of the filing of the interventions, Pride was the licensee of PrideVision, and William Craig had filed an application for authority to acquire the assets of PrideVision from Pride. In *PrideVision – Acquisition of assets*, Broadcasting Decision CRTC 2004-191, 28 May 2004, the Commission approved William Craig's application.

---

<sup>1</sup> The Category 2 services are defined in *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000.

### **The intervention by the former licensee of PrideVision**

4. In its intervention, Pride outlined the programming orientation of its service and its conditions of licence as described in *PrideVision – a new specialty channel*, Decision CRTC 2000-456, 14 December 2000 (Decision 2000-456). The intervener stated that it had had a difficult launch, since broadcasting distribution undertakings (BDUs) had not wanted to place PrideVision in programming packages with other category 1 services. Today PrideVision has approximately 21,000 subscribers nationwide, but is generally only available on a stand-alone basis.
5. Pride submitted that TEN Broadcasting's proposal for the programming of 10 Gay Adult would be directly competitive with PrideVision's Category 1 service, stating that TEN Broadcasting proposes a service that "will immediately cannibalize the already small and potential audience of PrideVision, given the relatively small size of the Canadian gay and lesbian community".
6. Pride added that its main audience is not the Canadian gay and lesbian community, but rather only a minority of that community that is willing to pay to receive PrideVision as a stand-alone service. The small potential audience has resulted in low subscribership and a difficult financial situation for PrideVision.

#### *The programming*

7. With respect to programming on the proposed new service, Pride stated that the applicant's description of the service is "gay adult programming". Pride argued that there is no content category titled "adult programming", and that, since TEN Broadcasting proposes to broadcast programming drawn from the same content categories as PrideVision, there is significant potential for 10 Gay Adult to broadcast programming that duplicates that of PrideVision.
8. PrideVision indicated that it currently airs "gay adult" programming almost exclusively during its overnight schedule, and that that programming attracts an audience three to nine times larger than other programming. The intervener further stated that PrideVision's overnight programming is a driver of both subscriptions and viewership. Pride argued that its adult programming is one of the few profitable genres broadcast on PrideVision, and to face direct competition in that area would be unacceptable.

#### *The financial impact*

9. Pride stated that, in 2003, PrideVision had 21,418 subscribers and that its financial situation is highly precarious, with a total loss of over \$11 million during the broadcast years 2002 and 2003. The intervener further stated that, despite the investment of more than \$16 million by the owners of PrideVision, the service's subscriber base remains fragile.

### **The intervention by the new licensee of PrideVision**

10. William Craig submitted that, in applying the test of competitiveness, the Commission should find that 10 Gay Adult will compete for the same target audience currently served by PrideVision, with more than 10% of its programming drawn from the same or similar genres. Craig stated that the potential for fiscal harm to PrideVision is beyond question, and that if TEN Broadcasting's application were approved, it would result in a material and detrimental change to the business prospects of PrideVision.
11. The intervener argued that approval of TEN Broadcasting's application would introduce a direct competitor for PrideVision, one with less onerous requirements than those placed on PrideVision, especially with respect to the exhibition of and expenditure on Canadian programming. William Craig requested that the Commission deny the TEN Broadcasting application on the basis that it does not meet the Commission's licensing requirements for a Category 2 specialty service.

### **The applicant's reply**

12. In reply to the interventions, TEN Broadcasting stated that its proposed service, offering explicit gay adult programming would differ significantly from the widely-based programming content offered by PrideVision, which in its view, was never intended to be a Category 1 explicit gay adult entertainment channel. Further, in *Amendment to the condition of licence pertaining to PrideVision's nature of service*, Decision CRTC 2001-743, 3 December 2001, the Commission approved an application for the addition of three programming categories to be offered by PrideVision, namely Category 4 Religion, Category 8(a) Music and dance and Category 8(c) Music video programs, further emphasizing the general interest nature of the PrideVision service. The applicant noted that a level of 10% of duplication is used by the Commission as a threshold, over which an application could be considered to be directly competitive with another.
13. TEN Broadcasting indicated that 10 Gay Adult would only be directly competitive with PrideVision if the Commission agrees that the current widely-based programming for the gay, lesbian, bisexual and transgendered communities offered by PrideVision should be significantly dependent upon the broadcast of explicit gay adult programming.
14. With respect to Pride's claim that PrideVision had lost \$16 million since its licence was granted, TEN Broadcasting stated that, in its opinion, PrideVision has simply not been successful in market penetration or audience acceptance, and has made no attempt to improve or change its programming. TEN Broadcasting submitted that PrideVision's difficulties in developing a programming format that would appeal to the wide interests of the gay, lesbian, bisexual and transgendered communities it is licensed to serve should not be addressed by turning the service into a gay adult service.

## The Commission's analysis and determination

15. In *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000, the Commission implemented a competitive, open-entry approach to licensing Category 2 services. In *Introductory statement - Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000, the Commission adopted a case-by-case approach in determining whether a proposed Category 2 service should be considered directly competitive with an existing pay, specialty or Category 1 service, although the Commission does not consider the impact that a new Category 2 service might have on an existing Category 2 service. The Commission examines each application in detail, taking into consideration the proposed nature of service and the unique circumstances of the genre in question.
16. The Commission notes the broad programming services offered by PrideVision. In the description of the nature of service for PrideVision, as set out in Decision 2000-456, the Commission noted that “PrideVision will provide a national English-language specialty television service dedicated to programming of specific interest to the gay and lesbian community. At the hearing, PrideVision explained that programming targeting this community is primarily, but not necessarily exclusively, that which involves gay, lesbian, bisexual or trans-gendered characters. PrideVision also proposes to include other types of programming that would appeal to this community.”
17. The Commission further noted that “PrideVision will bring added diversity to the Canadian broadcasting system by providing a unique service with the potential to create understanding and reduce stereotyping of a significant portion of Canadian society. The programming will also be of interest and relevance to viewers who are not members of the gay and lesbian community, but who are interested in or connected to that community through family, friends or the workplace. PrideVision will offer programming from a wide variety of categories, but its perspective will be one not currently found on mainstream television in Canada, ensuring that PrideVision will be an innovative complement to existing services.”
18. In Public Notice 2000-6, the Commission set out its expectation that Category 2 services would include services offering niche programming to particular audiences, services that provide multiple viewing opportunities for particular types of programming, and services that repackage existing programming in creative ways. To that end, the Commission encourages choice and diversity of programming services by licensing Category 2 services on an open-entry basis so long as the services meet basic criteria. These services must be prepared to take on the risk of launching on a digital-only basis since they will not have guaranteed distribution.

19. In the Commission's view, the applicant's proposed service would not be directly competitive with any Category 1 specialty services, analog pay or specialty service. Specifically, the Commission is of the view that the proposal by TEN Broadcasting to limit its nature of service to focus primarily on gay adult programming would be sufficiently specific so as to ensure that it not provide direct competition to the more broadly-based programming service offered by PrideVision.
20. Based on its examination of this application, the Commission is satisfied that it is in conformity with all applicable terms and conditions announced in *Introductory statement – Licensing of new digital pay and specialty services – Corrected Appendix 2*, Public Notice CRTC 2000-171-1, 6 March 2001 (Public Notice 2000-171-1). Accordingly, the Commission **approves** the application by TEN Broadcasting Inc. for a broadcasting licence to operate the national English-language Category 2 specialty television service to be known as 10 Gay Adult.
21. The Commission notes that the service offered by 10 Gay Adult is subject to the terms and conditions of the Shareholders Agreement dated 6 June 2003, between LFP Video Inc., Stuart Duncan and TEN Broadcasting, and to the Canadian Agreement, also dated 6 June 2003, between the same parties.
22. The licence will expire 31 August 2010, and will be subject to the conditions set out in Public Notice 2000-171-1, as well as to the **conditions of licence** set out in the appendix to this decision.

### **Issuance of the licence**

23. A licence will be issued once the applicant has satisfied the Commission, with supporting documentation, that the following requirements have been met:
  - the applicant has entered into a distribution agreement with at least one licensed distributor; and
  - the applicant has informed the Commission in writing that it is prepared to commence operations. The undertaking must be operational at the earliest possible date and in any event no later than 36 months from the date of this decision, unless a request for an extension of time is approved by the Commission before 3 August 2007. In order to ensure that such a request is processed in a timely manner, it should be submitted at least 60 days before that date.

Secretary General

*This decision is to be appended to the licence. It is available in alternative format upon request, and may also be examined at the following Internet site: <http://www.crtc.gc.ca>*

## Appendix to Broadcasting Decision CRTC 2004-312

### Conditions of licence

1. The licensee shall provide a national, English-language Category 2 specialty television service devoted exclusively into adult programming for the gay community, including full-length feature films, documentaries and other adult entertainment formats such as animation or short features.
2. The programming must be drawn exclusively from the following categories, as set out in Schedule I to the *Specialty Services Regulations, 1990*, as amended from time to time:
  - 2 (b) Long-form documentary
  - 5 (b) Informal education/Recreation and leisure
  - 7 (a) Ongoing dramatic series
  - 7 (c) Specials, mini-series, made-for-TV feature films
  - 7 (d) Theatrical feature films aired on television
  - 7 (e) Animated television programs and films
  - 11 General entertainment and human interest
  - 12 Interstitials
3. The service must only be distributed at the specific request of the subscriber. Distributors are not permitted to package 10 Gay Adult in such a way that subscribers are obligated to purchase it in order to purchase any other programming service, other than an adult programming service. Distributors are required to take measures to fully block the reception of both the audio and video portions of 10 Gay Adult to subscribers that request it not to be receivable in their home, in either unscrambled or scrambled analog form.
4. The licensee shall adhere to Section D.3 of the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, Broadcasting Public Notice CRTC 2003-10, 6 March 2003.
5. The licensee shall adhere to its internal policy for adult programming as filed with the Commission.

For the purposes of the conditions of this licence, *broadcast day* refers to the 24-hour period beginning at 6:00 a.m. each day.