

Filed Electronically

September 26, 2005

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
1 Promenade du Portage
Les Terrasses de la Chaudière
Hull, Quebec
K1A 0N2

Dear Ms. Rhéaume:

**Re: Application by CHUM Limited to Amend Certain of the Conditions of
Licence Imposed in Broadcasting Decision CRTC 2005-248**

Further to the letter of intent that was filed with the Commission on September 21, 2005, this is an application by CHUM Limited ("CHUM") to amend the following Conditions of Licence of its terrestrial subscription radio undertaking approved in Broadcasting Decision CRTC 2005-248:

- Condition of Licence No. 1, which limits the number of channels CHUM can offer to 50 and requires that they all be produced in Canada;
- Condition of Licence No. 3, which states that only 10% of the programming on any of CSRC's channels can consist of programming that was originally broadcast on a licensed AM or FM station;
- Condition of Licence No. 4 relating to the amount of Canadian musical selections that must be broadcast on each of the service's channels; and
- Condition of Licence No. 8 prohibiting the service from broadcasting any commercial messages.

I. Background

On June 16, 2005, the Commission approved an application by CHUM, on behalf of a corporation or partnership to be established, for a broadcasting licence to operate a terrestrial subscription radio undertaking to be known as CHUM

Subscription Radio Canada (“CSRC”). At the same time, the Commission also approved two applications for satellite subscription radio undertakings (the “Satellite Licensees”).¹

Throughout this process, CHUM has maintained that it would likely only be in a position to launch its service if all subscription radio undertakings were licensed on an equitable basis consistent with historic regulatory precedent. As outlined in Broadcasting Public Notice CRTC 2005-61 (“Public Notice 2005-61”), which introduces the decisions, the Commission chose to impose different regulatory requirements on CHUM’s service from those operated by the Satellite Licensees. For example, while the channels on the CHUM service must all be produced in Canada, respect the Canadian content requirements in the *Radio Regulations* and not sell advertising, the Satellite Licensees are subject to a less onerous regulatory framework.

A number of parties, including CHUM, appealed the satellite licence decisions to the Governor-in-Council. However, on September 9, 2005, the Governor-in-Council decided to uphold these decisions.

In light of the Governor-in-Council’s decision and given the discrepancy between the conditions under which CHUM’s service is licensed to operate and those that apply to the Satellite Licensees, CHUM is requesting that the Commission amend certain of the Conditions of Licence imposed in Broadcasting Decision CRTC 2005-246. The flexibility these amendments will provide would place CHUM in a better position to develop and implement a workable business plan for CSRC.

In fact, the Commission might be interested to know that, in cooperation with UBS, CHUM is currently conducting an Industry Canada authorized experimental trial in the GTA in which we are broadcasting 72 channels of crystal clear audio using existing DAB compression standards, but over an “ultra wide band” transmitter that operates in a 10 MHz spectrum band equivalent to that allotted to us. We are confident that, with or without the utilization of advances in compression technology, we will be technically in a position to offer on the order of 100 channels of subscription radio service in numerous markets in Canada within a relatively short time frame.

II. Condition of Licence No. 1

Condition of Licence No. 1 currently states that CSRC “shall distribute 50 audio channels, all of which must be produced in Canada.”

While this condition is very restrictive, the Satellite Licensees have been given the authority to “package” nine foreign channels with each Canadian channel

¹ Broadcasting Decision CRTC 2005-246 and Broadcasting Decision 2005-247.

they provide. Moreover, they have no restrictions on the number of channels they can offer.

(a) 1:1 Linkage is Consistent With Past Commission Precedent and Section 3(1)(f) of the Broadcasting Act

At the oral hearing, CHUM stated that it would be in a position to produce all of its channels in Canada and meet the Canadian content requirements set out in the *Radio Regulations* (the “Regulations”) on each one if it were the only service licensed. However, the Commission licensed three separate services. Moreover, two of these services are allowed to source 90% of their channels from outside of Canada. These channels have no obligations relating to Canadian programming, nor are they subject to the regulatory purview of the Commission.

The flexibility the Satellite Licensees have been granted relating to the number of foreign channels they can offer gives them a significant competitive advantage over CSRC as these providers can access attractive foreign-produced channels at no incremental cost, given their arrangements with the two U.S.-based satellite radio operators. Moreover, the fact that these channels can carry any programming they want, while CSRC must meet strict regulatory obligations relating to Canadian programming puts CHUM’s service at an even greater competitive disadvantage.

While CHUM believes that we would be justified in requesting 9:1 linkage on the basis of competitive equity, we are not convinced that this is necessarily appropriate. Instead, CHUM is requesting that the Commission amend CSRC’s licence to allow the distribution of one non-Canadian channel for every Canadian channel that is offered. This is consistent with our statement at the hearing last November that if all three applicants were licensed, all should be required to ensure that at least 50% of their channels are Canadian. In addition, we note that such an approach would be consistent with how the Commission has treated other similar broadcasting undertakings in the past. For example, pay audio services are subject to the following condition of licence:

A maximum of one non-Canadian pay audio channel may be packaged or linked with each Canadian-produced pay audio channel. In no case may subscribers of the pay audio service be offered a package of pay audio channels in which foreign-produced channels predominate. The licensee must provide the Commission, upon request, with a complete list of all non-Canadian pay audio channels distributed on its service.

Moreover, Section 6(2) of the *Broadcasting Distribution Regulations* requires broadcasting distribution undertakings (“BDUs”) to ensure that:

. . . in respect of each of analog and digital technology, that a majority of the video and audio channels received by a subscriber are devoted to the distribution of Canadian programming services, other than the programming distributed on program repeat channels.

Finally, the proposed amendment would be entirely consistent with Section 3(1)(f) of the *Broadcasting Act* (the "Act"), which requires that broadcasting undertakings make predominant use of Canadian creative and other resources in the creation and presentation of programming.

If the Commission is prepared to grant CHUM the ability to distribute non-Canadian channels, we would, of course, be prepared to commit to the same record keeping requirements regarding those channels as the Satellite Licensees are currently subject to.

(ii) *Limiting the Number of Channels CSRC can Offer Places CHUM at a Disadvantage*

In addition to the ability to import foreign channels, limiting CSRC to 50 channels when the Satellite Licensees have no such limitations will further impair CSRC's potential to become viable. In order to be able to offer a comparable service, CSRC must be able to offer a similar number of channels. The 50-channel service that was approved only reflected the minimum offering CHUM was contemplating for CSRC. In fact, by the time of the hearing last November, it was evident that given the spectrum allotted by Industry Canada, a 100-channel service is entirely feasible.

Authorizing CHUM to deliver a service with no fixed mandated number of channels would ensure competitive equity, give consumers greater choice and Canadian artists greater exposure. As a consequence, CHUM submits that it would be inappropriate to restrict the number of channels CSRC offers.

III. Condition of Licence No. 3

Condition of Licence No. 3 states that:

A maximum of 10% of the programming distributed each week on a French-language or English-language channel may consist of programming that was originally broadcast on licensed A.M. or F.M. stations.

In contrast, up to 50% of each of the Satellite Licensees' Canadian channels can consist of programming that was originally aired by another broadcaster. Moreover, the Satellite Licensees have no restrictions relating the programming on 90% of their channels.

Based on the foregoing, CHUM submits that it would be equitable to amend Condition of Licence No. 3 so that CSRC is subject to the same requirements relating to original content as the Satellite Licensees.

IV. Condition of Licence No. 4

Condition of Licence No. 4 currently reflects the requirements in the *Regulations* relating to Canadian programming. In contrast, the Satellite Licensees only have requirements relating to Canadian content on 10% of their channels.

CHUM submits that in order to be competitive with services whose channels consist almost entirely of unregulated foreign content, CSRC must have some flexibility relating to its Canadian content obligations. Consequently, CHUM proposes the following approach – instead of “per channel” levels of Canadian music, CSRC will calculate its Canadian content obligations on average across all of its Canadian channels. In other words, while some channels may have lower than 35% Canadian musical selections, others will exceed this percentage. This is the approach the Commission has used for pay audio and we believe it is appropriate in the present circumstance.

V. Condition of Licence No. 8

Condition of Licence No. 8 prohibits CSRC from broadcasting any commercial messages. In contrast, the Satellite Licensees are allowed to air six minutes of national advertising per hour on their Canadian channels. In addition, given the fact that the Commission does not have regulatory authority relating to the Satellite Licensees’ foreign-produced channels, they can air as much advertising of any type as they want on those channels.

During the deficiency process, we indicated that we would be prepared to not solicit local advertising assuming all applicants were subject to the same restriction. Furthermore, at the hearing, we noted that under an equitable licensing scenario, CHUM would be prepared to not broadcast any advertising material.

CHUM did not expect that the Satellite Licensees would be authorized to broadcast commercial messages. By prohibiting CHUM from broadcasting advertising, the Commission has given the Satellite Licensees two potential streams of revenue, whereas CSRC only has one. This is clearly an unfair advantage. Consequently, CHUM submits that CSRC should be able to broadcast the same amount of advertising as its competitors.

VI. CHUM's Other Obligations Remain Appropriate

As discussed, the amendments proposed above will place CHUM in a better position to develop and implement a workable business plan for CSRC so that the service will be able to compete with the services offered by the Satellite Licensees. These amendments will not, however, put CHUM on a completely level playing field with the Satellite Licensees. For example, even if this application is approved, the Satellite Licensees will still be able to still offer many fewer Canadian-produced channels and French-language channels than CHUM. Given these key differences between the services, CHUM submits that it would not be appropriate for the Commission to impose on CSRC certain of the other Conditions of Licence that the Satellite Licensees are subject to, specifically, their obligations concerning Canadian talent development ("CTD").

The Satellite Licensees currently must devote 5% of their annual revenues to eligible CTD initiatives, while CHUM is required to devote 2% of its revenues to CTD. At the hearing, the Commission questioned why CHUM's service shouldn't be required to spend the same amount on CTD as the Satellite Licensees. In response, CHUM noted that its service would be making a much greater contribution to Canadian artists through airplay than its competitors. Moreover, it would have much higher programming expenses given the vastly greater number of Canadian channels it intends to provide. The Commission accepted this rationale at that time and, as discussed below, it remains appropriate today.

If CHUM's proposed amendments are authorized, it will still offer significantly more Canadian channels than the Satellite Licensees and producing these channels will still be capital intensive. For example, if all licensed subscription radio undertakings offer 100-channel services, Canadians will only be able to access 10 Canadian-produced channels on each of the satellite services, while CSRC will provide at least 50 Canadian-produced channels. Moreover, each of CSRC's Canadian-produced channels will feature an attractive mix of music from Canadian and international artists, ensuring Canadian artists get heard, while the Satellite Licensees' Canadian-produced channels will "ghettoize" Canadian music. As CHUM noted through the licensing process, it is unlikely that the listening to the Canadian channels produced by the Satellite Licensees will be material.

Based on the foregoing, it is evident that CHUM will make a much broader contribution to the development of Canadian talent than just dollars. Consequently, CHUM submits that its current Condition of Licence relating to CTD should not be amended.

VII. Proposed Changes

Based on the foregoing, CHUM submits that Conditions of Licence Nos. 1, 3, 4 and 8 be replaced with the following and Nos. 11 and 12 be added:

1. *A maximum of one non-Canadian audio channel may be packaged or linked with each Canadian-produced audio channel. In no case may subscribers to the licensee's service be offered a package of audio channels in which foreign-produced channels predominate. The licensee must provide the Commission, upon request, with a complete list of all non-Canadian audio channels distributed on its service.*
3. *A maximum of 50% of the programming distributed each week on any of the licensee's Canadian-produced audio channels may consist of programming that was originally broadcast on licensed A.M. or F.M. stations.*
4. *A minimum of 35% of the musical selections broadcast each week on the licensee's Canadian-produced audio channels, considered together, must be Canadian.*
8. *The licensee shall broadcast no more than six minutes of national commercial messages during any clock hour on any Canadian-produced channel. For purposes of this condition of licence a "national commercial message" is a commercial message that is purchased at a national rate and receives national distribution on the service.*
11. *In addition to the requirements in Condition of Licence No. 9, the licensee shall, for any non-Canadian-produced channel that may be identified by the Commission from time to time, adhere to the provisions of sections 8(5) and (6) of the Radio Regulations, 1986.*
12. *For any non-Canadian produced channel, the licensee shall, at the request of the Commission, submit for any period specified by the Commission in its request, the following information for each musical selection broadcast:*
 - (i) *the name of the artist;*
 - (ii) *the name of the album from which the musical selection is taken and the number of the track;*
 - (iii) *the year that the musical selection was released; and*
 - (iv) *the version of the track, where multiple versions exist.*

In addition, Condition of Licence No. 11 would become No. 13 and should be revised as follows:

13. *For the purposes of all of the conditions of licence set out above, the terms "A.M. station," "broadcast day," "broadcast*

week," "Canadian musical selection", "commercial message," "content category," "content subcategory," "ethnic program," "F.M. station," "licensed," "montage," and "musical selection," shall have the meaning set out in section 1 of the Radio Regulations, 1986. All times shall be determined according to the Eastern time zone.

CHUM firmly believes that the flexibility these amendments will provide will allow us to fully consider a number of different launch scenarios for CSRC – including a more limited rollout and/or a more niche service offering – in an effort to arrive at a business plan under which the service is viable. While CHUM cannot guarantee that approval of these proposed amendments will permit CHUM to launch CSRC, it is clear that such approval will give CHUM much greater opportunity to do just that, and to do so on a timely basis.

We trust that filing this application at this time will enable the Commission to consider our application concurrently with its consideration of the pending applications by the Satellite Licensees to amend certain of their Conditions of Licence.

Should the Commission require any additional information, we would be pleased to provide it on request.

Sincerely,



Peter Miller
Vice President, Planning & Regulatory Affairs
Radio & Television
CHUM Limited

c.: Nick Ketchum, CRTC