



Broadcasting Public Notice CRTC 2005-104

Ottawa, 23 November 2005

Revised approach for the consideration of broadcasting licence applications proposing new third-language ethnic Category 2 pay and specialty services

This public notice outlines the revised approach that the Commission will follow when considering broadcasting licence applications proposing new third-language ethnic Category 2 pay and specialty services. The purpose of the revised approach is to expand the diversity and the range of Canadian television services available to underserved third-language ethnic communities.

Background

1. In *Improving the diversity of third-language television services – A revised approach to assessing requests to add non-Canadian third-language television services to the lists of eligible satellite services for distribution on a digital basis*, Broadcasting Public Notice CRTC 2004-96, 16 December 2004 (Public Notice 2004-96), the Commission adopted a more open-entry approach to the addition of non-Canadian, third-language, general interest services to the lists of eligible satellite services for distribution by broadcasting distribution undertakings (BDUs) on a digital basis (the digital lists). A general interest service is one that, unlike a niche service, offers programming from a broad spectrum of program genres and categories. The Commission announced that, under its revised approach, requests for the addition of non-Canadian, third-language, general interest services to the digital lists would generally be approved, subject to new distribution and linkage requirements aimed at minimizing the potential negative impact on Canadian third-language ethnic services.
2. In Public Notice 2004-96, the Commission stated that, in light of the more open-entry approach it would take in its consideration of requests to add non-Canadian third-language services to the digital lists, it might also be appropriate to modify the approach it takes when considering broadcasting licence applications proposing new third-language ethnic Category 2 pay and specialty services. Accordingly, the Commission issued *Call for comments on a proposed new approach to the consideration of applications for Canadian third-language ethnic Category 2 pay and specialty services*, Broadcasting Public Notice CRTC 2005-17, 25 February 2005 (Public Notice 2005-17).
3. In Public Notice 2005-17, the Commission noted that its current approach to the consideration of an application proposing a new Category 2 service includes an examination of whether the service would compete directly with any Category 1 or analog specialty or pay television service. Under the approach outlined in Public Notice 2005-17, the Commission proposed that it no longer assess the potential competitiveness

of a proposed third-language ethnic Category 2 service with existing analog third-language ethnic specialty services. The Commission called for comment on an approach whereby, in place of such an assessment, it would generally approve an application for a licence for a third-language ethnic Category 2 service provided that the proposed service satisfies the following criteria:

- The service qualifies as a third-language ethnic programming service. Consistent with the approach adopted for non-Canadian services in Public Notice 2004-96, the Commission proposed to define a third-language ethnic programming service as one that provides at least 90% of its programming in languages other than English and/or French. For the purpose of making this calculation, a program accompanied by secondary audio programming (SAP) or subtitles in English and/or French would not be counted as a third-language program.
 - The service meets the minimum licensing criteria for Category 2 services; in particular, it would be required to broadcast minimum levels of Canadian content and comply with the Commission's ownership requirements.
4. In Public Notice 2005-17, the Commission also noted that it has generally permitted the ethnic analog and Category 2 specialty services, upon application and approval, to broadcast up to six minutes per hour of local advertising. The Commission sought comment on the advisability of further streamlining its approach to third-language ethnic Category 2 specialty services by establishing a general rule that would permit such services to broadcast up to six minutes per hour of local advertising.

Comments in response to Public Notice 2005-17

5. In response to Public Notice 2005-17, Rogers Cable Communications Inc. (Rogers), the Canadian Cable Telecommunications Association (CCTA), Quebecor Media Inc. (QMI), Terraterra Communications Inc. (Terraterra), Ethnic Channels Group Limited (ECGL), AJIT Broadcasting Corporation Inc. (AJIT) and one individual generally supported the increased availability of new third-language ethnic Category 2 pay and specialty services. However, the Canadian Association of Broadcasters (CAB), Global Television Network Inc.¹ (Global), Fairchild Television Ltd. (Fairchild) and Asian Television Network International Limited (ATN) expressed concern that the addition of new third-language ethnic Category 2 services might threaten the continued viability of existing analog third-language ethnic specialty services. The key issues addressed in the comments filed are set out below.

¹ On 1 September 2005, Global Television Network Inc., Global Communications Limited, CanWest Media Inc. and certain other CanWest corporations amalgamated to continue as CanWest MediaWorks Inc.

Impact on existing services

6. The CCTA, Rogers, QMI, AJIT, ECGL, Terraterra and one individual supported the Commission's proposal to modify its approach to the consideration of applications proposing new third-language ethnic Category 2 programming services. They argued that the addition of such services to the Canadian broadcasting system would respond to an increasing demand for third-language services, result in improved service to third-language communities, and possibly lessen viewing to unauthorized satellite services.
7. ATN, Fairchild, Global and the CAB generally argued that the Commission's longstanding policy not to license new pay and specialty services that would be competitive with existing Canadian services is an important mechanism for ensuring that Canadian services are able to contribute to the objectives of the *Broadcasting Act* (the Act). They considered that the current licensing policy of assessing applications proposing new third-language ethnic Category 2 services on a case-by-case basis should be maintained. They contended that such new services would compete directly with analog services for audiences, subscriber revenues and program rights, and unlike foreign services, for advertising revenues as well. They noted in this regard that the five existing analog third-language ethnic specialty services generally have greater obligations with respect to the exhibition of, or expenditures on, Canadian programming than do third-language ethnic Category 2 services. These parties also submitted that, as a consequence of the Commission's revised approach to non-Canadian services set out in Public Notice 2004-96, the five existing analog services face the additional prospect of increased competition from non-Canadian services operating in the same language. Fairchild claimed that the proposed approach would further discriminate against existing analog third-language ethnic specialty services because the limited size of their markets make them more vulnerable to competition, relative to their English- and French-language pay and specialty counterparts.

The proposed minimum threshold requirement of 90% for third-language programming, excluding that accompanied by English- or French-language SAP or subtitles

8. The Commission proposed to define a third-language ethnic programming service as one that provides at least 90% of its programming in languages other than English or French. The Commission further proposed that, for the purpose of making this calculation, it would exclude from consideration those programs that are accompanied by SAP or subtitles in English and/or French.
9. Rogers, the CCTA and ECGL recommended that third-language programs accompanied by SAP or subtitles in either English or French not be excluded from the calculation of the minimum required threshold amount of third-language programming. Rather, they argued that a service should qualify as a third-language ethnic programming service solely on the basis of the percentage of main audio programming offered in languages other than French and English. ECGL proposed that, should the Commission nevertheless decide, as a general rule, to exclude from the calculation programming that is accompanied by SAP or subtitles in English or French, it should consider permitting exceptions, on a case-by-case basis, when warranted by the nature of a particular service.

10. According to ECGL, Category 2 services have a legitimate interest in expanding their reach to include segments of the English- and French-speaking audience. Rogers added that the provision by a third-language ethnic programming service of some third-language programming accompanied by subtitles or SAP in English and/or in French should not be viewed in a negative light or be penalized. According to Rogers, the Commission's proposal to exclude such programming from the calculation of the amount of qualifying third-language programming would actually decrease the diversity and choice offered by third-language ethnic services.
11. AJIT and Terraterra also argued that the Commission's proposal to exclude from its calculation of the amount of third-language programming in a service all such programming that is accompanied by English- or French-language SAP or subtitles may be too restrictive. They noted that some ethnic services provide programming that, while in English or French, is directed specifically at ethnic audiences. AJIT stated that, were the Commission to adopt its proposed definition of a third-language ethnic service, those applications that had been filed on the basis of the pre-existing policy approach, and that have already been announced by the Commission in a public notice or notice of public hearing, should be grandfathered. AJIT suggested that, alternatively, a special expedited process be implemented whereby applicants would be permitted to amend their applications to make them consistent with the new policy.

The proposed buy-through requirement

12. The CAB recommended that the Commission maintain its current approach for assessing broadcasting licence applications proposing new third-language ethnic Category 2 services. It expressed concern that the Commission's proposed approach would be an inappropriate departure from its long-standing policy not to license new specialty or pay services that are competitive with existing Canadian services. The CAB suggested that, were the Commission nevertheless to decide, in the interest of increased consumer choice, to adopt a new approach to the licensing of new third-language ethnic Category 2 pay and specialty services, it should impose certain distribution requirements with respect to existing Canadian third-language ethnic services to ensure that they are not unduly compromised by the new approach. Specifically, the CAB recommended the following requirements:
 - a) Where the Commission licenses a new, third-language ethnic Category 2 service operating in the same language as an analog third-language ethnic specialty service, the Canadian content obligations of the new Category 2 service should generally match those of the analog service.
 - b) A subscriber to a new, third-language ethnic Category 2 service should be required also to subscribe to any analog third-language ethnic specialty service operating in the same language (buy-through).

- c) Should a BDU choose to distribute a new, affiliated, third-language ethnic Category 2 service, and should an unaffiliated Category 2 service offering programming in the same principal language as the affiliated Category 2 service then be in operation, the BDU would be required also to distribute the unaffiliated service. A subscriber would not be obliged to subscribe to the affiliated Category 2 service in order to receive the unaffiliated Category 2 service.
13. Fairchild agreed with the CAB that, should the Commission adopt a more open-entry approach for new third-language ethnic Category 2 services, it should also, at a minimum, impose a buy-through requirement for analog third-language ethnic services already in existence, as it did in the context of non-Canadian third-language services pursuant to Public Notice 2004-96. According to Fairchild, such a buy-through requirement would help offset the negative impact resulting from the licensing of new, competitive third-language ethnic Category 2 services.

Advertising

14. QMI and Terraterra suggested that third-language ethnic Category 2 specialty services should generally be permitted to broadcast local advertising. QMI stated that many advertisers in larger Canadian cities would benefit from the ability to direct their advertising messages to specific cultural groups. QMI also noted that the additional revenues that third-language ethnic specialty broadcasters would earn as a consequence would help them to produce high quality Canadian programming.
15. The CAB, Global, Fairchild and ATN argued that permitting new third-language ethnic Category 2 specialty services to broadcast local advertising would place them in direct competition for advertising revenues with existing analog ethnic specialty services. They stated that the Commission should therefore continue to give case-by-case consideration to broadcasting licence applications proposing new third-language ethnic Category 2 services that would be supported by revenues earned through the broadcast of local advertising. They noted that such an approach would provide interested parties with the opportunity to comment on the potential impact of any such proposal. The CAB added that, while the Commission has, in the past, approved applications by Canadian ethnic services for authority to broadcast a maximum of six minutes per hour of local advertising, such approvals have been granted on the basis of case-by-case determinations by the Commission that market conditions would support such activity. According to the CAB, suitable market conditions may not be present in every instance.

Timing and consideration of applications

16. AJIT expressed concern regarding the length of time generally taken by the Commission to dispose of Category 2 broadcasting licence applications. While acknowledging that the purpose of the proposed policy is to create a more streamlined process, AJIT noted that the Commission has delayed the approval of pending third-language ethnic Category 2 applications.

17. ECGL stated that the licensing process for Category 2 services should be no less expeditious than the process followed by the Commission in its consideration of sponsored requests for the addition of non-Canadian services to the digital lists.

Commission's analysis and determinations

18. In designing a new approach for consideration of applications proposing new third-language ethnic Category 2 pay and specialty services, the Commission has been guided by the overall objective of maximizing the availability of such Canadian services within the Canadian broadcasting system, thereby improving the diversity and choice of programming available to underserved cultural and linguistic communities.
19. As noted in Public Notice 2004-96, the Commission is of the view that Canadian third-language ethnic services are best positioned to contribute to programming diversity, and are thus important vehicles for meeting the needs and interests of Canada's third-language ethnic communities and for fulfilling important objectives of the Act. They combine high quality Canadian programming reflecting the perspectives, experiences and values of Canada's third-language ethnic communities with the most attractive non-Canadian programming.
20. In light of the broad objective noted above, and taking into account the Commission's revised approach to the consideration of non-Canadian third-language ethnic services, the Commission considers that a framework that would encourage and expedite the entry of new third-language ethnic Category 2 services would be appropriate. At the same time, the Commission is mindful of the concerns expressed by interested parties that an open-entry approach should not be allowed to have an undue negative effect on the existing analog ethnic specialty services and their ability to meet their more stringent Canadian exhibition and spending requirements. In particular, the Commission notes the views of some parties that a new third-language ethnic Category 2 service that would compete directly with an analog ethnic specialty service could have a negative impact on the subscription and viewing levels of the latter, and could compete for advertising revenue and for program rights. Accordingly, based on the record of this proceeding, the Commission considers that appropriate mechanisms should be put in place for the purpose of mitigating the potential undue negative impact created by the licensing of new third-language ethnic Category 2 services operating in the same principal language as that of one of the five existing analog ethnic specialty services. In this context, a principal language means a third language that represents 40% or more of the program schedule of a service.
21. The Commission notes in this regard that third-language ethnic Category 2 services operating predominantly in languages other than the principal languages of the existing analog ethnic specialty services, namely Cantonese, Greek, Hindi, Italian, Mandarin or Spanish, would generally be approved under the current licensing approach as they would not likely be found to be directly competitive with the analog ethnic specialty

services. For essentially the same reasons, third-language niche services (services that are focused on a specific programming genre or on a particular target group), whether or not they operate in any of those six languages, would also generally be approved. Accordingly, even under a more open-entry approach, no additional mechanisms need be applied to such services.

22. With respect to the CAB's recommendation that BDUs distributing new, affiliated third-language ethnic Category 2 services also be required to distribute at least one unaffiliated Category 2 service operating in the same language, the Commission is satisfied that the existing requirement to distribute five unaffiliated Category 2 services for each affiliated Category 2 service is sufficient to address the CAB's concern.
23. The Commission will adopt a revised, more open-entry approach to its consideration of applications proposing new third-language ethnic Category 2 pay and specialty services. Under this approach, the Commission will no longer assess the potential competitiveness of new, third-language ethnic Category 2 pay and specialty services with existing analog third-language ethnic specialty services. Instead, such applications will generally be approved, subject in appropriate cases to the buy-through requirement and the criteria specified below.

A minimum threshold requirement of 90% for third-language programming

24. In order to qualify for consideration under this approach, an applicant proposing a new third-language ethnic Category 2 service must commit to devote at least 90% of the program schedule of the service to programming in languages other than English or French. The remainder of the programming schedule, i.e., up to 10% of a proposed third-language ethnic Category 2 service, may be in one or both official languages. The Commission would encourage applicants to ensure that all such programming serves to promote Canada's linguistic duality.
25. The Commission has considered and agrees with the views of those parties who argued that third-language programming that is accompanied by English- or French-language SAP or subtitles should qualify as third-language programming in calculating the percentage of third-language programming necessary for a proposed service to qualify for consideration under the revised approach. As noted by several interveners, the provision of such programming can serve important cross-cultural purposes by making such programming accessible to Canadians who may not speak or understand the language in question, but who nonetheless wish to be exposed to such programming.
26. Accordingly, for the purpose of this revised approach, a program whose main audio portion is in a third language, and that is accompanied by SAP or subtitles in English or in French, will qualify as a third-language program. A program whose main audio portion is in French or English would not qualify as a third-language program, even though it may be accompanied by SAP or subtitles in a third-language.

27. The Commission emphasizes that the flexibility to be extended to new third-language Category 2 ethnic services under this revised approach is for the purpose of making these services more accessible and attractive to third-language ethnic audiences. Accordingly, should an applicant propose a new third-language ethnic Category 2 service that would offer a significant amount of third-language programming that is accompanied by a SAP feed in English or in French, the Commission may wish to consider whether the proposed service would be competitive with English- or French-language services. The Commission is satisfied that these provisions will ensure that new third-language ethnic Category 2 services do not have an undue negative impact on English- and French-language analog and Category 1 services, and that they are indeed focused on serving third-language ethnic audiences.

Buy-through requirement for new, general interest, third-language ethnic Category 2 specialty services

28. Where a broadcasting licence is issued for a new, general interest, third-language ethnic Category 2 specialty or pay service under the criteria set out above, including the requirement that at least 90% of the program schedule be in languages other than English and/or French, and where 40% or more of its program schedule is in Cantonese, Mandarin, Italian, Spanish, Greek or Hindi, the Commission will require BDUs choosing to distribute the service to do so only to subscribers who also subscribe to the existing analog third-language ethnic specialty service operating in that same language. As the Commission stated at the beginning of this notice, a general interest service, whether Canadian or non-Canadian, is one that, unlike a niche service, offers programming from a broad spectrum of program genres and categories. The Commission is satisfied that this buy-through requirement will alleviate the impact of the revised approach on existing analog third-language ethnic specialty services.

Applications proposing less than 90% third-language ethnic programming

29. Broadcasting licence applications proposing new ethnic Category 2 services that would offer less than 90% of their programming in a third language will continue to be assessed under the case-by-case approach set out in *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000. This approach will assist the Commission in determining whether or not a proposed service would be directly competitive with any existing analog pay or specialty service, or any Category 1 specialty service.

Advertising

30. As noted in Public Notice 2005-17, the Commission has generally approved applications by the licensees of ethnic specialty services to broadcast up to six minutes per hour of local advertising. Based on the record of this proceeding, the Commission has determined that it will generally continue to permit new services to broadcast up to six minutes per hour of local advertising unless an intervener makes a compelling case to the contrary.

Implementation

31. The Commission will amend the relevant application forms to reflect the revised approach it will now follow in its consideration of broadcasting licence applications proposing new, third-language ethnic Category 2 pay and specialty services. With respect to such applications that have been filed with the Commission, but that have not yet been announced, the Commission will permit applicants to amend their applications to take into account the revised approach set out above, should they wish to do so. An applicant wishing to amend its application must file the appropriate amendments with the Commission, in writing, by no later than 14 December 2005. Otherwise, the Commission will proceed with consideration of the application as filed.
32. The Commission will amend *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2005-98, 27 October 2005, and *Linkage requirements for direct-to-home (DTH) satellite distribution undertakings*, Broadcasting Public Notice CRTC 2005-46, 11 May 2005, both of which are incorporated by reference into the *Broadcasting Distribution Regulations*, to make these new requirements applicable to each Class 1 and Class 2 BDU, and to each DTH operator, respectively, except as otherwise provided by a condition of its licence.

Secretary General

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