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The CRTC unveils a new group-based television regulatory policy

By Stephen Zolf

On March 22, 2010 the Canadian Radio-television and Telecommunications Commission (CRTC) introduced a more flexible regulatory framework for English-language private television broadcasters.[1] The new framework takes into account the current broadcasting landscape in which corporate groups control both conventional over-the-air television stations and specialty services. Starting in 2011, the CRTC will hold licence-renewal hearings for the largest English-language private ownership groups: CTV, Canwest and Rogers. The CRTC will take into account a corporate group's total revenues when setting regulatory obligations.

The CRTC has proposed the following policy approach for group based-licencing :

Expenditures on Canadian programming

- The large private ownership groups will spend at least 30 per cent of their gross revenues on Canadian programming. This would establish a floor that is comparable to the amount these ownership groups spent on Canadian productions between 2007 and 2009.
- To meet this obligation, ownership groups will have the flexibility to shift resources among their English-language conventional television stations and specialty services. In particular, the ownership groups will have the ability to allocate:
  - 100 per cent of their required expenditures for specialty services to other eligible specialty services or to conventional television stations, and
  - 25 per cent of the required expenditures for conventional television stations to specialty services.
- Ownership groups will be able to pool their resources to create compelling programs, such as high-quality drama series, for broadcast on whichever channels have the greatest audiences.
- The CRTC has identified the objective of the production of programs that are of "national interest" and require regulatory support, defined as:
  - drama and comedy series
  - documentaries, and
  - award shows that promote Canadian culture.
- For these "national interest" programs, the CRTC is proposing that ownership groups spend at least 5 per cent of their gross revenues on programs of national interest, which they can broadcast on the platforms of their choice. The CRTC is also proposing that 75 per cent of these funds be allocated to programming created by independent producers.

Exhibition of Canadian programs

- Given the ability of viewers to consume broadcasting content at their convenience and on multiple platforms, the CRTC will emphasize the creation of Canadian programs rather than prescribing where and when they should be shown. The CRTC has eliminated the quotas requiring broadcasters to air Canadian programs drawn from specific categories. These programs, including programs of national interest, such as drama and documentaries, will be supported through minimum spending requirements.
- Canadian content exhibition requirement for English and French language conventional television stations will be lowered from 60 per cent to 55 per cent during the broadcast year.
- The CRTC will continue to require that 50 per cent of the shows aired between 6 p.m. and midnight must be Canadian.
- Exhibition requirements for specialty services will continue to be set on a case-by-case basis.

Exceptions to the group-based approach

News and sports services and pay-per-view and video-on-demand services will be excluded from the group-based framework due to the different nature of these services.

Value of local television programming

The CRTC determined that television broadcasters should be permitted to negotiate with broadcasting distribution undertakings (BDU) to establish "the fair value of the product provided by those broadcasters to the BDU." Broadcasters that own programs or have paid for the exclusive right to air programs should have the right to negotiate for payment with BDUs, which, in turn, further disseminate those programs.

The CRTC's intention is to establish a regime in which market forces can function effectively, "for the benefit of the broadcasting system." But the twist is that the broadcaster must choose whether it wishes to remain under the status quo regime of current regulatory protections or enter into a market-based negotiation with a BDU.

Private local television stations would have a choice of two options:

> OPTION 1: negotiate with BDUs for the value of the distribution of their programming services; in the event that the parties cannot agree, the station could require the BDU to delete the programming exhibited by the station.
>
> OPTION 2: continue to benefit from existing regulatory protections.
>
> The local television stations would make their choice by a CRTC-set date, and this choice would be set for a fixed term of three years.
>
> If a television station chooses Option 1, the following elements would apply:

- The station would forego all existing regulatory protections related to the distribution of local television signals by BDUs, including mandatory distribution, priority channel placement on analog basic and simultaneous substitution.
- BDUs would be required, at the request of private local television stations, to delete any program owned by the licensee of that local television station or for which it has acquired exclusive contractual exhibition rights.
- Deletions would be exercised against the signal of any programming undertaking distributed by the BDU, whether foreign or domestic, affiliated or not, including that of the private local television station making the request.
- The television stations and the BDU could negotiate for a fair value in exchange for the distribution of its programming service (in lieu of the station's deletion rights). This compensation could be monetary, non-monetary (e.g., simultaneous or non-simultaneous substitution, carriage arrangements, marketing and promotion), or both.
- Parties to the negotiation would be given a fixed period to conclude negotiations, during which the existing regulatory protections would continue to apply. This period could be shortened or extended by agreement between the parties.
- The CRTC would not be involved in the terms and conditions of the resulting agreements and would intervene only in cases where there is evidence parties are not negotiating in good faith, and would consider acting as arbitrator only where both parties make a request.

If a station chooses Option 2, all existing and ongoing regulatory protections for private local television stations would remain in force. These would include, where provided by regulation or by condition of licence: mandatory carriage, priority channel placement on analog basic, program deletion, simultaneous or non-simultaneous substitution.[2] Under Option 2, the value for signal or "fee for carriage" regime would not apply.

During its proceeding in 2009 to examine the issue of "value for signal", the CRTC received conflicting legal opinions as to whether it has the authority to implement a negotiation regime. To resolve this uncertainty, the CRTC has initiated a reference to the Federal Court of Appeal seeking clarification on its jurisdiction under the *Broadcasting Act*. The CRTC has asked the Court to consider its request on an expedited basis.

The Local Programming Improvement Fund

The Local Programming Improvement Fund will be maintained in its current form. As a result, BDUs will continue to contribute 1.5 per cent of their gross broadcasting revenues to support local television programming in markets with a population of less than one million. The CRTC will conduct a comprehensive review of the Fund during the 2011–2012 broadcast year.

Transition to digital television

The Commission also launched a proceeding to ensure an orderly transition to digital television for consumers. The CRTC confirmed that local television stations in "mandatory markets"[3] must complete the switchover by August 31, 2011. However, some flexibility has been granted to television stations in smaller markets that may want to delay the transition. As long as they are not using channels 52 to 69, these stations will be allowed to continue broadcasting in analog for the present time. These stations serve approximately 17 per cent of the Canadian population.

Among the issues that the CRTC will consider in the digital television proceeding are:

- the number of Canadians that could potentially lose access to free local television as a result of the transition;
- the size, type and manner of administering a subsidy program for over-the-air viewers, should such a program be authorized;
- the provision of a free package of local and regional television stations;
- measures to educate consumers, and
- the establishment of a trial market ahead of the transition date.

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1 See Broadcasting Regulatory Policy CRTC 2010-167, Broadcasting Order CRTC 2010-168 and Broadcasting Notice of Consultation CRTC 2010-169.

2 or any payments to individual stations or funds approved by the Commission in lieu of these obligations, including payments for carriage of distant signals.

3 The Commission has defined mandatory markets as: provincial and territorial capital cities; markets with a population over 300,000, and markets with a population under 300,000 where there is more than one local television station.

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