



## Broadcasting Decision CRTC 2006-51

Ottawa, 24 February 2006

### **CHUM Limited, on behalf of a corporation or a partnership to be established** Across Canada

*Application 2005-1136-2*

*Broadcasting Public Notice CRTC 2005-94*

*30 September 2005*

### **Terrestrial subscription radio undertaking – Licence amendments**

*In this decision, the Commission deals with an application by CHUM Limited, on behalf of a corporation or a partnership to be established (CHUM), to amend the broadcasting licence for its terrestrial subscription radio undertaking by changing several conditions of licence.*

*The Commission notes that CHUM has indicated that, even if all of the proposed amendments to its conditions of licence were approved, it could not guarantee that it would launch the undertaking. In these circumstances, the Commission is not prepared to rule on all of the amendments proposed by CHUM which, if implemented, would bring significant changes to the service that it originally proposed to offer. However, in order to provide guidance for the licensee, the Commission considers it appropriate to rule, at this time, on CHUM's proposal for authority to link each Canadian-produced channel offered by the undertaking with a non-Canadian channel. That proposal is **denied**. The Commission defers its decision on proposed amendments related to an increase in the number of channels offered, the percentage of Canadian musical selections broadcast on Canadian-produced channels, and the percentage of programming on those channels that may be devoted to programming originally broadcast on licensed AM or FM stations. The Commission will make its decision on those proposed amendments if and when CHUM informs the Commission that it intends to launch the service, provides further details on the proposed roll-out of the service, and provides more detail on the nature of any additional channels that it may wish to offer.*

*The Commission **approves** CHUM's proposal to broadcast no more than six minutes per hour of national commercial messages on any Canadian-produced channel.*

### **Background**

1. In *Terrestrial subscription radio undertaking*, Broadcasting Decision CRTC 2005-248, 16 June 2005 (Decision 2005-248), the Commission approved an application by CHUM Limited, on behalf of a corporation or a partnership to be established (CHUM), for a broadcasting licence to operate a terrestrial subscription radio undertaking.

2. The Commission imposed conditions of licence on CHUM stipulating, among other things, that the undertaking shall distribute 50 audio channels, all of which must be produced in Canada. The conditions further provided that a minimum of 20% of the audio channels offered at any time must be French-language channels. Each of the channels must fulfil weekly requirements for levels of Canadian music comparable to those that apply to licensees of conventional radio stations. Under the terms of the *Radio Regulations, 1986* (the Regulations), radio licensees, subject to conditions of licence, must devote, during each broadcast week, at least 35% of musical selections from content category 2 (Popular Music), at least 10% of musical selections from content category 3 (Special Interest Music) and at least 7% of musical selections played during ethnic programming periods to Canadian musical selections. The Commission further allows “oldies” stations, by condition of licence, to devote 30% of musical selections from content category 2 to Canadian selections, in light of the more limited availability of Canadian music within that format.
3. In accordance with CHUM’s commitments, the Commission also imposed a condition of licence limiting to 10% the amount of programming distributed each week on a French-language or English-language channel that may consist of programming that was originally broadcast on a licensed AM or FM station, as well a condition of licence prohibiting the broadcast of any commercial messages.

### **The application**

4. CHUM proposed a number of amendments to the conditions of licence for its terrestrial subscription radio undertaking, which are set out in the appendix to this decision. Approval of CHUM’s proposals would have five major effects. First, CHUM would be permitted to distribute one non-Canadian channel for every Canadian channel offered. Second, CHUM would no longer be restricted to offering 50 Canadian-produced channels. Third, CHUM would no longer have to satisfy Canadian content requirements similar to those of commercial radio stations on each Canadian-produced channel, but would have to ensure that at least 35% of the musical selections offered on all Canadian-produced channels considered together are Canadian selections. Fourth, the maximum percentage of programming on CHUM’s Canadian-produced channels that had been originally broadcast on a licensed AM or FM station would increase from 10% to 50%. Fifth, CHUM would be permitted to distribute a maximum of six minutes per hour of national commercial messages on each Canadian channel.

5. CHUM stated that the amendments set out above were being requested because of a discrepancy between the conditions of licence imposed on its service and those imposed on the satellite subscription radio undertakings licensed to Canadian Satellite Radio Inc. (CSR) and SIRIUS Canada Inc. (Sirius Canada).<sup>1</sup> CHUM argued that, in order for its service to be viable, it must have competitive equity with the satellite services, including the ability to offer a comparable number of channels, to distribute non-Canadian-produced channels, to obtain programming from existing radio stations and to sell national advertising. CHUM further considered that eliminating restrictions on the number of channels offered would provide consumers with more choice and give greater exposure to Canadian artists.
6. CHUM also submitted that approval of the application would allow it to consider a number of scenarios under which it might be able to develop a viable business plan. CHUM stated, however, that even with the proposed amendments, it could not guarantee that it would launch the service.

### **Positions of parties**

7. The Commission received interventions from the Canadian Independent Record Production Association (CIRPA), Le Bloc Québécois, The Canadian Recording Industry Association, Association québécoise de l'industrie du disque, du spectacle et de la vidéo, the Society of Composers Authors and Music Publishers of Canada (SOCAN), Friends of Canadian Broadcasting (Friends), Association des producteurs de films et de télévision du Québec, Union des artistes, and in a joint intervention, the National Campus and Community Radio Association Inc., l'Alliance des radios communautaires du Canada et l'Association des radiodiffuseurs communautaires du Québec (the community radio associations) commenting on the application.
8. Several parties considered that the application by CHUM was a reaction to the lower levels of Canadian programming approved for the CSR and Sirius Canada satellite subscription radio undertakings. Concern was expressed that approval of the application would serve as a precedent, opening the door to further applications to decrease Canadian programming. SOCAN, supported by Friends, considered that there was no justification for CHUM's proposed dilution of Canadian programming carried on its undertaking and argued that commercial messages were not acceptable for broadcast on a subscription radio undertaking.

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<sup>1</sup> The CSR undertaking was approved in *Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-246, 16 June 2005. The Sirius Canada undertaking was approved in *Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-247, 16 June 2005. The conditions of licence for the CSR and Sirius Canada undertakings were amended to increase commitments related to Canadian and French-language programming in *Satellite subscription radio undertaking – Licence amendment*, Broadcasting Decision CRTC 2006-37, 10 February 2006, and *Satellite subscription radio undertaking – Licence amendment*, Broadcasting Decision CRTC 2006-38, 10 February 2006, respectively.

9. The community radio associations considered that CHUM's commitments to support Canadian talent development (CTD) should be amended to reflect greater support for the community radio sector. To this end, they recommended that CHUM be required to allocate 20% of all its CTD commitments into the stewardship of the community radio associations which would then be spent by the funding body established by those associations to strengthen the community radio sector.
10. The CHUM application was opposed by Corus Entertainment Inc., Rogers Broadcasting Limited, Standard Radio Inc., Golden West Broadcasting Ltd. and Rawlco Radio Ltd. (the radio interveners), which submitted a joint intervention.
11. The radio interveners submitted that approval of CHUM's proposal, under which 50% of the programming on its Canadian channels could consist of programming first broadcast on a licensed AM or FM station, contradicted CHUM's statement, made during the licensing process, that, for subscription radio to succeed, it must be complementary to, rather than competitive with conventional radio stations.
12. The radio interveners were further concerned that, if CHUM were to provide a service consisting of 100 channels, it would capture 87% of the L-Band spectrum<sup>2</sup> in centres where its service is deployed. They submitted that expansion of CHUM's service to 100 channels had not been approved by the Department of Industry (the Department) and that it would have an impact on the Department's allotment plan for the L-Band. The radio interveners argued that, at the very least, CHUM's proposal to double the number of channels it would provide should have been supported by a technical brief.
13. The radio interveners were further of the view that approval of the CHUM application would represent a troubling precedent in that it would encourage applicants that had just been awarded licences to substantially change the terms of their conditions of licence before the service was launched.
14. They also noted that, in Decision 2005-248, the Commission had denied CHUM's request in its initial application to increase the number of channels that its undertaking would offer in Year 4 of operations. In denying that proposal, the Commission stated that it would consider an application to expand the number of channels offered once CHUM provided more complete plans concerning the content of the additional channels. The radio interveners submitted that CHUM had not provided information on the content of the additional channels with the current application and had therefore not met the Commission's evidentiary expectations with respect to an application to increase the number of channels offered.

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<sup>2</sup> The L-Band is the 1452-1492 MHz frequency band. It was allocated at the 1992 World Administrative Radio Conference to the Broadcasting Service and the Broadcasting Satellite Service, for digital audio broadcasting, on a primary basis worldwide (except the USA) and subject to certain restrictions.

15. In addition, the radio interveners submitted that CHUM was requesting the flexibility accorded to pay audio services without also assuming their obligations. For example, the radio interveners noted that CHUM had requested the flexibility to link each Canadian channel with one non-Canadian channel and to calculate Canadian content based on all of the Canadian channels considered together in the manner of pay audio services, but was not offering to contribute 4% of annual revenues to CTD, as do pay audio services.
16. Similarly, the radio interveners argued that while CHUM was seeking the same type of regulatory flexibility applied to satellite subscription radio undertakings, it was not offering to devote 5% of revenues to CTD, as do satellite subscription radio undertakings.
17. The radio interveners further submitted that the Commission had applied a different type of licensing framework to satellite subscription radio undertakings because of the unique circumstances of those undertakings, including their limited ability to offer Canadian channels. They argued that this limitation does not apply to CHUM's terrestrial subscription radio undertaking.
18. With respect to CHUM's proposal to broadcast advertising, the radio interveners submitted that subscription radio undertakings must be national services, not local services that compete with local radio stations. They expressed concern that CHUM would eventually move from limited national advertising to the broadcast of local surveillance information. The radio interveners also considered that, if CHUM's service were to broadcast advertising, it would no longer provide a service that would be complementary to that provided by conventional radio stations.

#### **CHUM's reply**

19. CHUM submitted that it was not applying to change the nature of its service, and that its application was a rational and reasonable response to the wide discrepancy that exists between the licensing framework applied to its terrestrial subscription radio undertaking and that which the Commission applied to the satellite subscription radio undertakings. CHUM argued that, since its service would compete for the same subscribers as the satellite subscription radio undertakings, an equitable licensing framework is essential.
20. CHUM submitted that its proposed approach to Canadian content, under which it would offer an average level of 35% Canadian musical selections on Canadian channels and link those channels with non-Canadian channels on a one-to-one basis, was consistent with the framework that the Commission applied to pay audio services, a type of undertaking that is most akin to subscription radio programming undertakings. CHUM argued that it could have requested greater relief, but wanted to ensure that its proposal would have the least impact on existing players. The applicant further submitted that it is difficult to understand how its proposal could be more detrimental to the Canadian broadcasting system, conventional radio or the music industry than the two satellite subscription radio undertakings, which provide many channels of foreign content and relatively few Canadian channels.

21. With regard to concerns about spectrum use, CHUM stated that, since its original plans were for a 100-channel service, the Department had already indicated that sufficient spectrum was available. Accordingly, CHUM was of the view that its current application would have no impact on the amount of L-Band spectrum that it had been allocated.
22. As to the issue of complementarity, CHUM asserted that its request to be permitted to devote up to 50% of programming on Canadian-produced channels to programming originally broadcast on licensed AM or FM stations would not make its service competitive with local radio stations since it is prevented, by condition of licence, from broadcasting any local programming. CHUM also submitted that, since satellite subscription radio undertakings may receive up to 50% of their programming from existing radio stations, it should have the same flexibility.
23. As well, CHUM argued that approval of its proposal to broadcast six minutes per hour of national commercial messages on each Canadian-produced channel would have no measurable effect on commercial radio stations since over 75% of radio advertising revenues comes from local advertising. It submitted that approval of its proposal would provide it with some level of parity with the satellite subscription radio undertakings and place it in a better position to develop a workable business plan.

### **Commission's analysis and determinations**

24. The Commission notes that CHUM has indicated that, even if all of the proposed amendments to its conditions of licence were approved, it could not guarantee that it would launch the undertaking. In these circumstances, the Commission is not prepared to rule on all of the amendments proposed by CHUM which, if implemented, would bring significant changes to the service that it originally proposed to offer. However, in order to provide guidance for the licensee, the Commission considers that is appropriate to rule at this time on CHUM's proposal for authority to link each Canadian-produced channel with a non-Canadian channel.
25. Under CHUM's current condition of licence it shall offer 50 channels, all of which must be Canadian-produced. It has asked to be permitted to link each Canadian-produced channel with one non-Canadian produced channel, as is the case with pay audio services.
26. The Commission considers that there are several differences between pay audio services and CHUM's terrestrial subscription radio undertaking. Pay audio services are distributed by broadcasting distribution undertakings and are therefore not available to mobile listeners. Pay audio services are also prohibited from distributing spoken word programming, with the exception of the identification of musical selections, promotion of the service, and programming directed to children. The CHUM undertaking, on the other hand, would be distributed using over-the-air transmitters and would therefore be available to mobile listeners. It also has fewer limitations than pay audio undertakings with respect to the type of spoken word programming broadcast. Accordingly, the Commission does not consider it appropriate to apply the same condition of licence to the CHUM undertaking as applies to the pay audio services.

27. CHUM has also argued that approval of its proposal would allow it to compete on a more equitable basis with the satellite subscription radio undertakings licensed to CSR and Sirius Canada. In *Introduction to Broadcasting Decisions CRTC 2005-246 to 2005-248: Licensing of new satellite and terrestrial subscription radio undertakings*, Broadcasting Public Notice CRTC 2005-61, 16 June 2005, the Commission set out a licensing framework for satellite subscription radio undertakings. As the satellite-based services proposed by CSR and Sirius Canada raised different issues than those raised by the terrestrial-based service proposed by CHUM, the Commission dealt with the two types of services separately. With respect to the satellite-based services, the Commission noted that dependence on US satellites for signal delivery limits the amount of bandwidth available to Canadian licensees, which in turn limits the number of Canadian channels that can be presented to Canadian audiences. The Commission notes that CHUM's terrestrial subscription radio undertaking does not face the same limitations. The Commission further considers that it would be inappropriate to deploy a significant portion of Canada's L-Band spectrum for the distribution of non-Canadian audio channels.
28. In light of these considerations, the Commission **denies** CHUM's proposal under which it would be permitted to link each Canadian-produced channel that it offers with one non-Canadian produced channel.
29. CHUM has also proposed that the Commission amend its conditions of licence so that the terrestrial subscription radio undertaking would no longer be restricted to offering 50 Canadian-produced channels. It has also proposed amendments under which it would no longer have to satisfy Canadian content requirements on each Canadian-produced channel, but would have to ensure that at least 35% of the musical selections offered on all Canadian-produced channels considered together are Canadian selections, and to increase the maximum percentage of programming that has been originally broadcast on licensed AM or FM stations from 10% to 50%.
30. The Commission defers its decision on those proposed amendments and will make its decision if and when CHUM informs the Commission that it intends to launch the service and provides further details on the proposed roll-out of the service. In Decision 2005-248, the Commission stated that it would be prepared to consider an application to increase the number of channels offered once CHUM was able to provide more complete plans concerning the content of the additional channels. CHUM has not provided such plans with the current application. Therefore, should CHUM wish to proceed with this aspect of the application, it should provide more detail to the Commission on the nature of any additional channels that it may wish to offer.

#### **Addition of national commercial messages**

31. The Commission considers that the broadcast by CHUM of six minutes of national commercial messages on each Canadian-produced channel would have minimal effect on local radio stations, which generally concentrate on the sale of local advertising. With respect to concerns raised by the radio interveners that the CHUM undertaking may

begin to compete with local radio stations by broadcasting local programming, the Commission notes that CHUM's licence will continue to be subject to a condition that prohibits it from broadcasting "any local surveillance information or other programming designed specifically for a particular geographic community or locality." The Commission is further of the view that the distribution of a limited number of national commercial messages may help CHUM to develop a viable business plan.

32. Accordingly, the Commission **approves** CHUM's proposal to amend its broadcasting licence by replacing its current condition of licence 8. That condition of licence will now read as follows:

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 is distributed on all transmitters of its service.

33. The Commission further **approves** CHUM's proposal to amend its broadcasting licence by adding the following **condition of licence**:

The licensee shall adhere to the provisions of the CAB's *Broadcast Code for Advertising to Children*, as amended from time to time and approved by the Commission.

#### **Other matters**

34. The Commission does not consider that it is appropriate to impose requirements with respect to the division of the licensee's CTD expenditures as was suggested by the community radio associations, given that the Commission set out no requirements in this regard in Decision 2005-248.

Secretary General

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



## **Appendix to Broadcasting Decision CRTC 2006-51**

### **Changes to conditions of licence proposed by the applicant**

CHUM proposed to change a number of its conditions of licence as follows:

Condition of licence 1 currently states:

1. The licensee shall distribute 50 audio channels, all of which must be produced in Canada.

CHUM proposed to replace condition of licence 1 with the following:

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.

Condition of licence 3 currently states:

3. 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.

CHUM proposed to replace condition of licence 3 with the following:

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.

Condition of licence 4 currently states:

4. (1) For the purposes of this condition, "ethnic programming period" means that portion of a broadcast week during which a licensee broadcasts ethnic programs.

(2) For the purposes of this condition, "Canadian selection" means a musical selection

- (a) that meets at least two of the following conditions, namely,
  - (i) the music is or lyrics are performed principally by a Canadian,
  - (ii) the music is composed entirely by a Canadian,
  - (iii) the lyrics are written entirely by a Canadian,
  - (iv) the musical selection consists of a live performance that is
    - (A) recorded wholly in Canada, or
    - (B) performed wholly in and broadcast live in Canada, and

(v) the musical selection was performed live or recorded after September 1, 1991, and a Canadian who has collaborated with a non-Canadian receives at least fifty per cent of the credit as composer and lyricist according to the records of a recognized performing rights society;

(b) that is an instrumental performance of a musical composition that meets the conditions set out in subparagraph (a)(ii) or (iii);

(c) that is a performance of a musical composition that a Canadian has composed for instruments only; or

(d) that has already qualified as a Canadian selection under regulations previously in effect.

(3) The licensee shall, in a broadcast week, devote 10% or more of its musical selections from content category 3 broadcast on each channel to Canadian selections and schedule them in a reasonable manner throughout each broadcast day.

(4) Where 7 % or more of the musical selections broadcast by the licensee on any channel during an ethnic programming period are Canadian selections and are scheduled in a reasonable manner throughout that period, condition of licence 4(6) shall apply only in respect of those musical selections that are broadcast on that channel during that part of the broadcast week that is not devoted to ethnic programs.

(5) The licensee may on any channel in a broadcast week, reduce the percentage of its Canadian musical selections from content category 2 referred to in condition of licence 4(6) to

(a) not less than 20% if, in that broadcast week, the licensee devotes 35% or more but less than 50% of all its musical selections to instrumental selections; and

(b) not less than 15% if, in that broadcast week, the licensee devotes 50% or more of all its musical selections to instrumental selections.

(6) The licensee shall, on each channel, in a broadcast week, devote 35% or more of its musical selections from content category 2 to Canadian selections broadcast in their entirety and schedule them in a reasonable manner throughout each broadcast day.

(7) For the purpose of this condition of licence, a montage is deemed to be a Canadian selection broadcast in its entirety if

(a) the total duration of the excerpts of Canadian selections from content category 2 is greater than 50% of the total duration of the montage; and

(b) the total duration of the montage is four minutes or more.

(8) The licensee shall, as an exception to the percentage of Canadian musical selections set out in condition of licence 4(6) above, on a channel where at least 90% of the musical selections from content category 2 that it broadcasts are selections released before 1 January 1981

- in that broadcast week, devote 30% or more of its musical selections from content category 2 to Canadian selections broadcast in their entirety.

For purposes of this condition, the licensee will also be responsible for specifying, on the music lists it provides to the Commission, the year of release for all musical selections it broadcasts.

CHUM proposed to replace condition of licence 4 with the following:

A minimum of 35% of the musical selections broadcast each week on the licensee's Canadian-produced audio channels, considered together, must be Canadian.

Condition of licence 8 currently states:

8. The licensee shall not broadcast any commercial messages.

CHUM proposed to replace condition of licence 8 with the following:

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.

CHUM further proposed to add the following conditions of licence:

- The licensee shall adhere to the provisions of the CAB's Broadcast Code for Advertising to Children, as amended from time to time and approved by the Commission.
- 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*.

- 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.

Finally, CHUM proposed that condition of licence number 11 become condition of licence number 13, and be revised by adding the term “Canadian musical selection,” so that it would read as follows:

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.