



Broadcasting Decision CRTC 2006-539

Ottawa, 21 September 2006

4239130 Canada Ltd.
Across Canada

Application 2006-0140-3
Public Hearing at Edmonton, Alberta
19 June 2006

AOV Jalapeño Heat HD – Category 2 pay television service

*In this decision, the Commission **approves** an application for a broadcasting licence to operate a new Category 2 pay television programming undertaking.*

The application

1. The Commission received an application by 4239130 Canada Ltd. (a corporation ultimately controlled by Doug Rankine and by the Jorgensen Family Trust¹) (4239130 Canada), for a broadcasting licence to operate a national, English-language Category 2² pay television programming undertaking to be known as AOV Jalapeño Heat HD.
2. The applicant proposed to offer a national, English-language, pay television service that would consist of sexually explicit adult programming in the form of documentaries, dramatic films, talk shows, phone-in shows and other programs on the theme of sexuality delivered in High Definition (HD). All of the programming would be drawn from the following categories set out in Schedule 1 to the *Pay Television Regulations, 1990* (the Regulations): 1 News; 2(a) Analysis and interpretation; 2(b) Long-form documentary; 3 Reporting and actualities; 5(b) Informal education/Recreation and leisure; 7(c) Specials, mini-series or made-for-TV feature films; 7(d) Theatrical feature films aired on TV; 7(e) Animated television programs and films; 7(g) Other drama; 9 Variety; 10 Game shows; 11 General entertainment and human interest; 12 Interstitials; 13 Public service announcements; and 14 Infomercials, promotional and corporate videos.
3. In addition, the applicant proposed that it would devote not less than 15% of the broadcast day and of the evening broadcast period to the broadcast of Canadian programs in the first year of operation, 25% in the second year of operation, and 35% in the third year of operation and in each year thereafter.

¹ The Jorgensen Family Trust is controlled by Randy Jorgensen, Vincent J. Bueti and Roy Alvin Jorgensen, the trustees of the Trust.

² 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.

4. The Commission did not receive any interventions in connection with this application.

Commission's analysis and determinations

Programming categories

5. The Commission notes that 4239130 Canada proposed that AOV Jalapeño Heat HD would draw programming from category 14 (Infomercials, promotional and corporate videos) as set out in Schedule 1 to the Regulations.
6. The Commission also notes, however, that pay services are prohibited under the Regulations from distributing programming that contains any commercial message, and that category 14 is not identified as a programming option for pay services, in Schedule 1 to the Regulations. Therefore, AOV Jalapeño Heat HD is not permitted to draw programming from category 14 and is authorized to draw programming only from the categories listed in the appendix to this decision.

Canadian content

7. The Commission notes that 4239130 Canada proposed that AOV Jalapeño Heat HD would increase the amount of the broadcast day and evening broadcast period devoted to the broadcast of Canadian programs from 15% in the first year of operation, to 25% in the second year of operation and 35% in the third year and subsequent years.
8. The Commission accepts 4239130 Canada's proposal regarding the broadcast of Canadian programs, and imposes these levels as **conditions of licence**, as set out in the appendix to this decision.

Adherence to industry code

9. 4239130 Canada expressed the opinion that it is "not possible to program Adult sex films and adhere to the *CAB's Sex-Role Portrayal Code for Television and Radio Programming* (the Code) at the same time" and it is not aware of any licensee "licensed to program adult sex films exclusively" which is expected to adhere to the Code.
10. The Commission is not convinced by 4239130 Canada's arguments regarding adherence to the Code. It reminds the applicant that it must adhere at all times to 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), including the condition of licence related to adherence to the Code.

11. The Commission notes that 4239130 Canada submitted to the Commission a copy of its internal policy on adult programming in accordance with 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 (the Industry Code). The Commission expects the applicant to adhere to its internal policy on adult programming, in addition to complying with the condition of licence, as set out in the appendix to this decision, requiring adherence to Section D.3 of the Industry Code.
12. Subject to the above, the Commission is satisfied that the application is in conformity with all applicable terms and conditions announced in Public Notice 2000-171-1. Accordingly, the Commission **approves** the application by 4239130 Canada Ltd. for a broadcasting licence to operate the national, English-language, Category 2 pay television programming undertaking, AOV Jalapeño Heat HD.
13. The licence will expire 31 August 2013, and will be subject to the **conditions** set out in Public Notice 2000-171-1, as well as to the **conditions** set out in the appendix to this decision.

Issuance of the licence

14. 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 21 September 2009. 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 in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>

Appendix to Broadcasting Decision CRTC 2006-539

Conditions of licence

1. The licence will be subject to the conditions set out in *Introductory statement – Licensing of new digital pay and specialty services – Corrected Appendix 2*, Public Notice CRTC 2000-171-1, 6 March 2001.
2. The licensee shall provide a national, English-language, Category 2 pay television programming service devoted to sexually explicit adult programming in the form of documentaries, dramatic films, talk shows, phone-in shows and other programs on the theme of sexuality.
3. The programming shall be drawn exclusively from the following categories, as set out in Schedule I to the *Pay Television Regulations, 1990*, as amended from time to time:
 - 1 News
 - 2 (a) Analysis and interpretation
 - (b) Long-form documentary
 - 3 Reporting and actualities
 - 5 (b) Informal education/Recreation and leisure
 - 7 (c) Specials, mini-series or made-for-TV feature films
 - (d) Theatrical feature films aired on TV
 - (e) Animated television programs and films
 - (g) Other drama
 - 9 Variety
 - 10 Game shows
 - 11 General entertainment and human interest
 - 12 Interstitials
 - 13 Public service announcements
4. In the first year of operation, the licensee shall devote not less than 15% of the broadcast day and of the evening broadcast period to the broadcast of Canadian programs.
5. In the second year of operation, the licensee shall devote not less than 25% of the broadcast day and of the evening broadcast period to the broadcast of Canadian programs.
6. In the third year of operation, and in each year thereafter, the licensee shall devote not less than 35% of the broadcast day and of the evening broadcast period to the broadcast of Canadian programs.

7. In accordance with the Commission's position on Canadian programming expenditures as set out in *New Flexibility With Regard to Canadian Program Expenditures by Canadian Television Stations*, Public Notice CRTC 1992-28, 8 April 1992, in *The Reporting of Canadian Programming Expenditures*, Public Notice CRTC 1993-93, 22 June 1993, in *Additional clarification regarding the reporting of Canadian programming expenditures*, Public Notice CRTC 1993-174, 10 December 1993, and in *Incentives for English-language Canadian television drama*, Broadcasting Public Notice CRTC 2004-93, 29 November 2004, as may be amended from time to time:
- (a) In each broadcast year of the licence term following the first year of operation, the licensee shall expend on the acquisition of and/or investment in Canadian programs a minimum of 5% of the subscription revenues derived from the operation of this service during the previous broadcast year.
 - (b) In each broadcast year of the licence term following the first year of operation, excluding the final year, the licensee may expend an amount on Canadian programs that is up to ten percent (10%) less than the minimum required expenditure for that year calculated in accordance with this condition; in such case, the licensee shall expend in the next broadcast year of the licence term, in addition to the minimum required expenditure for that year, the full amount of the previous year's under-expenditure.
 - (c) In each broadcast year of the licence term following the first year of operation, where the licensee expends an amount on Canadian programs that is greater than the minimum required expenditure for that year calculated in accordance with this condition, the licensee may deduct:
 - (i) from the minimum required expenditure for the following year of the licence term, an amount not exceeding the amount of the previous year's over-expenditure; and
 - (ii) from the minimum required expenditure for any subsequent broadcast year of the licence term, an amount not exceeding the difference between the over-expenditure and any amount deducted under (i) above.
 - (d) Notwithstanding paragraphs (b) and (c) above, during the licence term, the licensee shall expend on Canadian programs, at a minimum, the total of the minimum required expenditures calculated in accordance with this condition of licence.

8. The service must only be distributed at the specific request of the subscriber. Distributors are not permitted to package the service 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 the service to subscribers that request it not to be receivable in their home, in either unscrambled or scrambled analog form.
9. The licensee shall adhere to 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, as amended from time to time and approved by the Commission.

For the purposes of the conditions of this licence, including condition of licence no.1, *broadcast day* refers to the 24-hour period beginning each day at 6 a.m., or any other period approved by the Commission.