



Broadcasting Decision CRTC 2007-129

Ottawa, 4 May 2007

Novus Entertainment Inc.
Toronto, Ontario

Application 2006-0913-3, received 30 June 2006
Public Hearing in the National Capital Region
29 January 2007

Class 1 cable broadcasting distribution undertaking

*In this decision, the Commission **approves** the application by Novus Entertainment Inc. to operate a Class 1 cable broadcasting distribution undertaking to serve Toronto, Ontario.*

The application

1. The Commission received an application by Novus Entertainment Inc. (Novus) for a broadcasting licence to operate a Class 1 cable broadcasting distribution undertaking (BDU) to serve Toronto, Ontario.

Interventions

2. The Commission received four interventions providing comments on this application, from High Fidelity HDTV Inc. (High Fidelity), the Canadian Association of Broadcasters (CAB), Rogers Cable Communications Inc. (Rogers) and Rogers Broadcasting Limited (RBL).
3. High Fidelity supported the application by Novus, but also expressed concern that only one or two of the 15 high-definition (HD) programming services that the applicant proposed to distribute actually provide 50% or more of their programming in true HD. The intervener further stated that it looks forward to Novus following through on its intention to offer a wide variety of HD programming services by agreeing to distribute, on its cable systems in Vancouver and Toronto, High Fidelity's "24/7 all-HD programming services."
4. The CAB did not oppose the application by Novus. However, it wished to clarify the requirements regarding non-simultaneous program deletion set out in the *Broadcasting Distribution Regulations* (the Regulations), as they apply to the distribution of distant signals. Specifically, the CAB noted Novus' acknowledgement that the application of this provision may be suspended upon Commission approval of an agreement between Novus and the CAB concerning the protection of program rights. However, whereas Novus specified that the non-simultaneous program deletion provision would only apply to the

first and second sets of U.S. 4+1 signals,¹ the CAB submitted that it would also apply to distant Canadian signals, which have the greatest impact on program rights of local stations in the market to be served by the applicant's proposed undertaking. The CAB requested that the Commission ensure that the condition of licence relating to non-simultaneous program deletion refer to the distant Canadian signals and the second set of U.S. 4+1 signals to be distributed by Novus.

5. Rogers, for its part, did not oppose the application by Novus, but requested that the applicant adhere to the same regulatory regime that applies to Rogers as a terrestrial Class 1 cable BDU. Specifically, Rogers requested that the applicant demonstrate that it would comply with the Commission's distribution and linkage, priority carriage and access requirements, as well as with the policy frameworks for the distribution of digital television (DTV) and HD signals, and for the migration of services from analog to digital.
6. Rogers noted that Novus indicated that it intends to distribute a number of modified dual status channels as part of its basic offering. Rogers contended that Novus, should it not be subject to the dual status / modified status rules, would have much more flexibility than Rogers in its distribution of these services.
7. Rogers also noted that Novus did not identify the specific discretionary programming packages that would be offered to customers, and urged the Commission to request this additional information in its assessment of whether Novus would meet all of the Commission's distribution and linkage rules for Class 1 BDUs.
8. Rogers further noted that Novus proposed to carry Sun TV on channel 17, and stated that the applicant should demonstrate that it has obtained an agreement with Sun TV allowing it to carry this station outside the basic band. In regard to the proposed channel line-up, Rogers also noted that Novus proposed to carry neither the DTV signal of CBC Toronto (CBLFT), nor the Aboriginal Peoples Television Network (APTN). Moreover, Rogers stated that Novus did not meet the carriage and access requirements to distribute, on a digital basis, at least one pay television service in each official language, as well as the requirement to distribute all French- and English-language Canadian specialty services, other than Category 2 services.²
9. In addition, Rogers stated that Novus requested a condition of licence authorizing it to distribute, as part of its basic service, a set of U.S. 4+1 signals from Buffalo/Rochester, New York, or, "alternatively for each signal, the signal of a different affiliate of the same network located in the same time zone." While not objecting to this request, Rogers contended that, if the Commission were to approve this proposal for Novus, it should extend the same authority to all BDUs operating in the same market, at their request.

¹ The set of television signals that provides the programming of the four U.S. commercial networks (CBS, NBC, ABC, FOX) and the non-commercial PBS network.

² These requirements exist if the nominal bandwidth capacity is 750 MHz or greater.

10. Finally, Rogers stated that Novus, as an applicant proposing to target multiple unit dwellings, will be required to comply with all rules related to the use of inside wiring as well as with customer transfer procedures. As such, in Rogers' view, Novus should be required to discuss customer transfer procedures with Rogers and any other competitor and to negotiate a formalized transfer process with Rogers prior to submitting any requests for wire transfers.
11. RBL, in its intervention, did not address the Novus application specifically, but noted that the applicant was in violation of the Regulations in regard to its Class 1 BDU in Vancouver by not distributing the signal of OMNI BC.

Applicant's replies

12. In its reply to Rogers, Novus stated that it would, at all times, make every effort to comply with distribution and linkage, priority carriage and access requirements, as well as with the policy framework for the distribution of DTV signals and HD pay and specialty services, and the framework for the migration of services from analog to digital, as specified by the Commission.
13. In regard to channel line-up flexibility, Novus stated that it presently carries two modified dual status signals on its basic service in Vancouver, that it has negotiated agreements with broadcasters to carry these signals on the basic tier, and that it hopes to carry these signals on its basic tier in its Toronto service area. Novus further noted that, in the event the programmers do not agree to extend the same terms to the Toronto area, it would reconfigure its channel line-up to include these services on a discretionary tier and would file an amended channel listing with the Commission.
14. With respect to Rogers' concern that the applicant did not identify the specific discretionary program packages that would be offered to customers, Novus argued that neither Bell Canada nor VDN Cable Inc. was required to do so as part of their licence applications. Furthermore, Novus expressed its reluctance to provide this information, noting that many new services are constantly being added, that it would need time to build its head-end, and that the changing competitive landscape could be very different in the near future.
15. Regarding the carriage of Sun TV, Novus requested, in its reply to Rogers' intervention, that it be granted a condition of licence that would change the priority status of Sun TV under section 17 of the Regulations, so as to permit the carriage of Sun TV on Channel 17, outside the basic band. Novus also acknowledged that it currently does not have an agreement with Sun TV for this proposal, but would begin negotiations with Sun TV upon approval of the application.

16. In regard to Rogers' concern that the proposed channel line-up did not meet carriage and access requirements, Novus stated that reference to the carriage of CBLFT and APTN, as well as to the distribution, on a digital basis, of at least one pay television service in each official language, and of all French- and English-language Canadian specialty services, other than Category 2 services, had been inadvertently excluded from its application. Novus filed a revised distribution of services list with its reply to Rogers' intervention.
17. In reply to Rogers' comment regarding Novus' distribution, as part of its basic service, of a set of U.S. 4+1 signals from Buffalo/Rochester, or, "alternatively for each signal, the signal of a different affiliate of the same network located in the same time zone," the applicant indicated that it has since confirmed carriage arrangements for the Buffalo/Rochester signals. As such, authorization to offer alternative signals of a different affiliate of the same network located in the same time zone is no longer required.
18. Novus also indicated that it has not yet discussed wire transfer issues with Rogers or other competing BDUs, but that there would be ample time for Novus and Rogers to address these matters, given the time it would take for the applicant to establish its head-end and begin building its network.
19. In reply to the concern raised by RBL, Novus stated that it has filed an application with the Commission to be relieved of its obligation to carry OMNI BC. Novus indicated that the issue raised by RBL should therefore be addressed in the context of that application.
20. Novus did not reply to the interventions submitted by High Fidelity or the CAB.

Commission's analysis and determinations

21. With respect to the concerns raised regarding the distribution of DTV and HD signals, the Commission notes the applicant's commitment to "make every effort to comply" with the Commission's distribution and linkage, priority carriage and access requirements that are applicable to all Class 1 BDUs. The Commission reminds Novus that it is required to adhere at all times to these requirements.
22. In this regard, the Commission notes that it announced its intention to issue "transitional digital television" licences to existing television station licensees in *A licensing policy to oversee the transition from analog to digital, over-the-air television broadcasting*, Broadcasting Public Notice CRTC 2002-31, 12 June 2002. Under such licences, stations would be authorized to broadcast a maximum of 14 hours per week of over-the-air programming on the digital service that is not duplicated on the analog service. Further, in *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61, 11 November 2003 (Public Notice 2003-61), which announced the Commission's regulatory framework with respect to the distribution of signals provided by digital over-the-air television stations, the Commission stated that

BDUs would be required to distribute the signals of priority digital television stations, including those with HD programming. In Public Notice 2003-61, the Commission also specified that, where a BDU is required to distribute the analog signal of a television station as part of its basic service, it is also required to distribute the digital signal.

23. The Commission also notes that Novus indicated that it will be technically capable of distributing programming services in HD format and that it intends to distribute all priority and “must-carry” services that are available on a digital basis, including digital signals with HD content. In *Regulatory framework for the licensing and distribution of high definition pay and specialty services*, Broadcasting Public Notice CRTC 2006-74, 15 June 2006 (Public Notice 2006-74), the Commission imposed certain requirements for the licensing and distribution of HD pay and specialty services. The Commission reminds Novus that it must comply with the regulatory requirements relative to all digital and HD services it carries.
24. The Commission notes that Novus has filed a revised channel line-up, demonstrating that it intends to distribute the signals of CBLFT and APTN, of at least one pay television service in each official language, and of all French- and English-language Canadian specialty services, other than Category 2 services.
25. The Commission notes that Novus has filed an application concerning the carriage of OMNI BC on its BDU in Vancouver. Since this is a matter related to Novus’ Vancouver BDU and not to its proposed Toronto BDU, it does not fall within the scope of this application and will not be addressed further in this decision.
26. The Commission further notes that Novus, should it wish to depart from current regulations or from regulations that may be adopted by the Commission in its future proceedings, would have to apply to the Commission for permission to do so. Parties would have an opportunity to intervene at that time.

U.S. 4+1 signals on the basic service

27. The Commission notes that Novus, in reply to Rogers’ intervention, stated that it no longer required authorization to distribute alternative signals of a different affiliate of the same network in the same time zone as those U.S. 4+1 signals specified in the application for distribution as part of the basic service. Novus therefore requested a modification to the proposed condition of licence relating to the distribution of U.S. 4+1 signals on a digital discretionary basis. The **condition of licence** is set out in the appendix to this decision.

Carriage of CKXT-TV (Sun TV) outside the basic band

28. Pursuant to section 17 of the Regulations, Class 1 BDUs are required to distribute various television programming services, including those of local television stations, as part of the basic service, and are further required to distribute them in order of priority, beginning with the basic band (channels 2 to 13). The Commission may relieve a licensee from these requirements by condition of licence. In order to be relieved of these requirements,

the Commission generally requires that the local broadcaster's consent be given. The Commission notes that Novus has yet to negotiate a carriage agreement with CKXT-TV (Sun TV) Toronto. Therefore, should Novus' negotiations result in a requirement for relief due to unavailable channels on the basic band for this priority signal, it would have to apply to the Commission for such a condition of licence, stating the negotiated channel placement for this signal. Parties would have an opportunity to intervene at that time.

Relief from carriage of CFYZ Toronto

29. The Commission notes Novus' request for relief from its obligation to distribute CFYZ Toronto, an information radio service that is operated by the Greater Toronto Airports Authority and that broadcasts flight arrivals and departures, as well as traffic and weather conditions. In light of the Commission's amendment to Section 22 of the Regulations, Class 1 licensees are now required to distribute only local campus, community and native radio stations, as well as at least one CBC radio station operating in English and one operating in French. Since Novus is not required to distribute CFYZ, a condition of licence is not required in this instance.

Inside wiring

30. In *Revised policy concerning inside wire regime; Call for comments on proposed amendments to section 10 of the Broadcasting Distribution Regulations*, Public Notice CRTC 2000-81, 9 June 2000, the Commission stated that, in order to facilitate timely joint visits for transferring service, all licensees are required to accommodate requests by other distributors for access to customer service enclosures or distribution panels within 24 hours of receiving such a request and to provide them with a two-hour appointment window. Since these requirements are applicable to all BDUs that own inside wire, the Commission considers that it is not necessary to impose additional requirements in this instance.

Conclusion

31. The Commission considers that it is appropriate to license Novus to offer a broadcasting distribution service to Toronto. Accordingly, the Commission **approves** the application by Novus Entertainment Inc. for a broadcasting licence to operate a Class 1 cable broadcasting distribution undertaking to serve Toronto, Ontario.
32. The operation of this undertaking will be regulated pursuant to the *Broadcasting Distribution Regulations*. The licence will expire 31 August 2013 and will be subject to the **conditions** set out therein, as well as to the **conditions** set out in the appendix to this decision.

Issuance of the licence

33. The Commission reminds Novus that, pursuant to section 22(1) of the *Broadcasting Act*, no licence may be issued until the Department of Industry notifies the Commission that a broadcasting certificate is issued.

34. Furthermore, the licence for this undertaking will only be issued once 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 24 months from the date of this decision, unless a request for an extension of time is approved by the Commission before 4 May 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.

Employment equity

35. In accordance with *Implementation of an employment equity policy*, Public Notice CRTC 1992-59, 1 September 1992, the Commission encourages the licensee to consider employment equity issues in its hiring practices and in all other aspects of its management of human resources.

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 2007-129

Conditions of licence

1. The licensee is authorized to distribute, as part of its basic service, the signals of WIVB-TV (CBS), WGRZ-TV (NBC), WKBW-TV (ABC), WNED-TV (PBS) Buffalo, and WUHF (FOX) Rochester, New York, received from a licensed satellite relay distribution undertaking.
2. The licensee is authorized to distribute, on a digital discretionary basis, the signal of WTVS-TV (PBS) Detroit, Michigan.
3. The licensee is authorized to distribute the following signals on a digital discretionary basis:
 - any of the distant Canadian television signals set out in the *List of Part 3 eligible satellite services*; and
 - a second set of signals that provides the programming of the four U.S. commercial networks (CBS, NBC, ABC, FOX) and the non-commercial PBS network (hereafter referred to as the U.S. 4+1 signals) set out in the *List of Part 3 eligible satellite services*.

The distribution on a discretionary basis on the licensee's digital service of a second set of U.S. 4+1 signals and any of the distant Canadian television signals set out in the *List of Part 3 eligible satellite services* is subject to the provision that, with respect to such signals, the licensee adhere to the requirements regarding non-simultaneous program deletion set out in section 43 of the *Broadcasting Distribution Regulations*. The Commission may suspend the application of this provision, with respect to the signals to be distributed, upon its approval of an executed agreement between the licensee and broadcasters. Such an agreement must deal with issues related to the protection of program rights arising in connection with the discretionary carriage of a second set of U.S. 4+1 signals and distant Canadian signals solely on the licensee's digital service.

The Commission reminds the licensee that the requirements set out in section 30 of the *Broadcasting Distribution Regulations* regarding simultaneous substitution apply also in the case of U.S. 4+1 signals and distant Canadian signals.