



Broadcasting Decision CRTC 2011-56

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Route references: 2010-146

Additional references: 2010-146-2, 2010-146-4

Ottawa, 28 January 2011

CKLN Radio Incorporated

Toronto, Ontario

*Public Hearing in Toronto, Ontario
12 May 2010/8 December 2010*

CKLN-FM Toronto – Revocation of licence

*In this decision, the Commission **revokes**, by majority vote, the broadcasting licence for CKLN-FM Toronto, held by CKLN Radio Incorporated, as of 12 February 2011. In reaching this determination, the Commission considered the serious and continuous nature of the licensee's non-compliance with numerous regulatory obligations, the station's inability to institute the measures necessary to ensure ongoing compliance, and the lack of confidence on the part of the Commission that such measures could or would be instituted within a reasonable amount of time. The licensee must cease broadcasting on 12 February 2011, by no later than the end of the broadcast day.*

A dissenting opinion by Commissioner Louise Poirier is attached to this decision.

Background

1. CKLN-FM Toronto is a community-based campus radio station that is licensed to CKLN Radio Incorporated (CKLN Radio) and operates on the campus of Ryerson University in Toronto, Ontario. In Broadcasting Decision 2007-292, the Commission renewed the broadcasting licence for CKLN-FM for a full seven-year period, from 1 September 2007 to 31 August 2014.
2. In response to complaints that CKLN Radio had been experiencing ongoing difficulties with its governance structure, day-to-day management and operations, programming and ability to remain on-air, Commission staff, by letter dated 2 July 2009 (the July Staff Letter), requested responses to these complaints and other information.
3. Subsequently, on 14 September 2009, Commission staff met with CKLN Radio to discuss the seriousness of the situation and the possible consequences. Following this meeting, in a letter dated 17 September 2009 (the September Staff Letter), Commission staff sent the licensee a request that it provide the Commission with a report including, among other things, details and documentation concerning the

operations of CKLN-FM, including its governance, staff, funding, accounting, programming, and access to its transmitter site, as well as the information requested in the July Staff Letter. The licensee filed its response on 6 October 2009 (the October 2009 Report).

4. On 10 February 2010, the Commission, by letter under signature of the Secretary General (the Secretary General Letter), stated that it appeared to the Commission that CKLN Radio was in non-compliance with certain sections of the *Radio Regulations, 1986* (the Regulations) and the station's conditions of licence. The licensee filed its response on 1 March 2010.
5. Based on the evidence gathered, in Broadcasting Notice of Consultation 2010-146, the Commission announced that it would hold a public hearing on 12 May 2010 pursuant to sections 12 and 24 of the *Broadcasting Act* (the Act), during which CKLN Radio was to show cause as to the following:
 - why a mandatory order should not be issued pursuant to section 12 of the Act requiring the licensee to comply with the Regulations and its conditions of licence; and
 - why the Commission should not suspend or revoke the licence for CKLN-FM, pursuant to sections 9 and 24 of the Act.
6. On 12 May 2010, the Commission, following a request by the licensee, adjourned this hearing as it related to CKLN Radio. In a follow up letter, the Commission required the licensee to file monthly reports beginning 14 June 2010. Each report was to include a description of the steps the licensee had taken to bring itself into compliance. Subsequently, as announced in Broadcasting Notice of Consultation 2010-146-4, the Commission reconvened the hearing on 8 December 2010.
7. For both the 12 May and 8 December public hearings, the Commission received several interventions in support of CKLN-FM, several interventions commenting on its concerns over the station, as well as several interventions opposing the continuation of the station's licence.¹ The complete record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
8. Based on the record of the proceeding, the Commission has examined the situation surrounding CKLN Radio and CKLN-FM in regard to the following:
 - whether CKLN Radio is in non-compliance with the Regulations and with the conditions of its licence; and

¹ In a letter dated 26 November 2010, the Commission granted in part the objections filed by CKLN Radio on 8 November 2010 regarding certain interventions. As a result, certain interventions were struck from the record in whole or in part.

- if so, whether the Commission has confidence that CKLN Radio can comply with the Regulations and the conditions of its licence on a going forward basis.
9. Based on this examination, the Commission sets out its determination in regard to the regulatory action to be taken.

Non-compliance

10. The issues relating to CKLN Radio's apparent non-compliance with the Regulations and the conditions of its licence are the following:
- non-compliance during the lockout period;
 - the filing of annual returns;
 - the provision of logs and records; and
 - the licensee's response to Commission requests for information.

Non-compliance during the lockout period

11. Prior to March 2009, CKLN-FM went through a series of staff level disputes, questions over the management of the station's funds, the dismissal of staff, the dismissal of volunteers, and the "election" of competing "boards of directors." In response to this infighting between factions of individuals with interests in CKLN-FM, the Palin Foundation² locked out of the station's studio premises all those purporting to be elected members of a board of directors for CKLN Radio, as well as station volunteers and staff. Consequently, in March 2009, the licensee ceased the station's normal programming and day-to-day operations.
12. This "lockout period" lasted until the resumption of the station's full schedule of programming in October 2009. CKLN Radio admitted for the record that during the lockout period, the programming broadcast "was not compliant with Commission requirements."
13. During the lockout period, in the place of regular community radio programming produced primarily by volunteers, a pre-recorded jazz program with incidental spoken word programming, set by a programmer to run on a loop before the doors were locked, was broadcast (intermittently due to transmitter problems).
14. In addition, during this period the Ryerson Student Union (RSU) withheld student levies, instead holding the monies in trust and paying certain costs on behalf of the licensee. Further, Brookfield Properties Ltd., the building manager for First Canadian Place, denied anyone associated with CKLN Radio access to CKLN-FM's transmitter

² The Palin Foundation is the building manager for the Student Campus Centre, which is where the CKLN-FM studios are located.

at First Canadian Place. As the licensee was unable to conduct necessary repairs to the transmitter during this period, the station suffered from significant signal deficiencies.

15. In Broadcasting Notice of Consultation 2010-146, the Commission noted that, given these facts, it appeared that CKLN Radio had not operated the station's transmitter in compliance with section 10.1 of the Regulations. It further noted that the combined actions of the RSU and the Palin Foundation may have affected the control of the licensee, and therefore may have required the Commission's prior approval in accordance with section 11(4)(a) of the Regulations. The Commission also expressed its concern that the manner in which CKLN-FM was being operated was inconsistent with the Commission's policy for community-based campus radio stations, which is set out in Public Notice 2000-12 (the Campus Radio Policy).

Commission's analysis and determinations

16. CKLN-FM was licensed as a community-based campus radio station pursuant to the Campus Radio Policy. This sector distinguishes itself from the private and public sectors by the unique and valuable role it plays in the communities served, by the access of volunteers to programming and other aspects of station operations, and by providing spoken word and musical programming that differs in both style and substance and that reflects the diversity and richness of the many groups that make up its communities. Campus radio stations are expected to include volunteers from the student body in all aspects of a station's operations.
17. The record demonstrates that, during the lockout period (approximately seven months), CKLN-FM was broadcasting without any community involvement or reflection, oversight or management, or apparent control by the licensee. During this period the licensee:
 - did not have volunteer participation from the student body of Ryerson University or from the community at large in either the programming broadcast or the operation of the station;
 - did not provide locally relevant and reflective spoken word programming; and
 - did not provide diversity in its musical programming.
18. Based on these facts, the Commission determines that during the lockout period, CKLN-FM's operations were not consistent with a fundamental element of its licence, namely, the requirement that it operate as a community-based campus radio station.
19. Further, given that the licensee continued to broadcast while locked out of its station and without access to its transmitter, the Commission also determines that during the lockout period, the licensee was not operating its own transmitter, and therefore was in non-compliance with section 10.1 of the Regulations.

20. Finally, although the Commission cannot conclude, based on the record of the proceeding, that there was a change in effective control to the benefit of the RSU or the Palin Foundation, and therefore that the licensee was in non-compliance with section 11(4)(a) of the Regulations, it does find that their combined actions, along with the above-noted infighting, were contributing factors to the cessation of normal operations and the resulting regulatory non-compliance.

Filing of annual returns

21. In the September Staff Letter, as reiterated in the Secretary General Letter, the Commission informed the licensee that it had not filed CKLN-FM's annual returns for the 2006/2007 and 2007/2008 broadcast years. As specified in section 9(2) of the Regulations:

On or before November 30 of each year, a licensee shall submit to the Commission a statement of accounts, on the annual return of broadcasting licensee form, for the year ending on the previous August 31.

22. On 1 March 2010, the licensee informed the Commission that it had no knowledge as to why the returns had not been filed and stated that the filing of these returns would be forthcoming "within the next few days" and that future returns would be filed on time.

23. On 14 September 2010, as a part of its monthly reporting obligations, CKLN Radio filed what it considered to be its annual return for the 2006/2007 broadcast year. In actuality, it was the Non-Profit Organization Information Return that was filed, which is required by the Canada Revenue Agency (CRA). Subsequently, on 27 September 2010, Commission staff informed the licensee that the CRA form is not the Commission's annual return form, and attached the proper form to be completed and filed.

24. On 13 October 2010, the licensee filed what it considered to be its annual returns for the 2006/2007, 2007/2008, 2008/2009 and 2009/2010 broadcast years. The Commission notes the material for the first three of these broadcast years was filed well after the required filing dates and much later than what was originally undertaken by the licensee on 1 March 2010. Further, the material filed for all four broadcast years did not correspond to the requirements stated in section 9(2) of the Regulations. Specifically, the licensee filed data corresponding to the reporting period ending 30 April of each year in question, instead of 31 August as required. When questioned at the hearing as to why the returns filed were for the year ending 30 April rather than for the broadcast year, the licensee indicated that it had compiled its returns in that fashion on the advice of its auditors. The Commission also notes that CKLN Radio indicated in its reply that it would be able to file the revised annual returns within a month. It did not do so.

Commission's analysis and determination

25. The requirement to file annual returns is clearly indicated in the Regulations. The Regulations also clearly set out the form and required date for the filing of these returns. Despite assurances that it understood its regulatory obligations in this matter and assurances that the filing of these returns was imminent, CKLN Radio has not demonstrated that it has mastered this very basic requirement. Therefore, the Commission finds that the licensee is in non-compliance with section 9(2) of the Regulations.

Provision of logs and records

26. Section 8(1)(a) of the Regulations specifies that, except as otherwise provided under a condition of its licence, "a licensee shall keep, in a form acceptable to the Commission, a program log or a machine readable record of the matter broadcast by the licensee." These logs must include the information specified in section 8(1)(c) of the Regulations. Section 8(5) of the Regulations specifies that a "licensee shall retain a clear and intelligible tape recording or other exact copy of all matter broadcast."

27. Sections 8(4) and 8(6) of the Regulations require a licensee to file these logs and tapes with the Commission upon request.

28. Finally, section 9(3) of the Regulations requires a licensee to submit a music list with specified information to the Commission upon request.

29. In the July Staff Letter, Commission staff requested that CKLN Radio file, by no later than 10 July 2009, the audio logger tapes, the program logs and a program schedule relating to the programming broadcast by CKLN-FM during the broadcast weeks of 7 to 13 June 2009 and 21 to 27 June 2009. No response was received from the licensee until after Commission staff met with CKLN Radio on 14 September 2009.

30. By letter dated 16 October 2009 (the October Staff Letter), Commission staff provided its findings to CKLN Radio based on the material filed. It informed the licensee that a portion of the recordings submitted were inaudible, and that the audio logger tapes provided were not for the above-noted broadcast weeks, but instead for the periods 8 to 14 June 2009 and 22 to 28 June 2009. Commission staff also noted that the requested program logs and the program schedule were not submitted.

31. In the October Staff Letter, Commission staff notified CKLN Radio that it may have failed to comply with sections 8(1) to 8(6) and 9(4) of the Regulations. Commission staff also requested the audio logger tapes, program logs and a program schedule relating to the programming broadcast during the broadcast week of 7 to 13 June 2009, and that they be submitted by no later than 28 October 2009.

32. In its reply dated 22 October 2009, CKLN Radio enclosed the requested logger tapes, but noted that program logs were not created since the period fell within the time when all programmers were locked out of the station and when no programming was broadcast. It nevertheless assured the Commission that it had "resolved all these issues" and was committed to meeting all of its requirements under the Regulations and the Act.

33. Finally, in the Secretary General Letter, the Commission again put CKLN Radio on notice of its apparent failure to comply with sections 8(4) and 8(6) as well as section 9(4) of the Regulations. The Commission also required the licensee to file the audio logger tapes, program logs and a program schedule relating to the material broadcast by CKLN-FM during the broadcast week of 10 to 16 January 2010. Only the logger tapes were filed on time by 1 March 2010, with the remaining material filed on 12 March 2010. On 9 April 2010, Commission staff indicated that CKLN Radio may have failed once again to comply with sections 8(1), 8(2), 8(4) to 8(6) and 9(3) of the Regulations. Specifically, it found that the program logs filed were not in an acceptable form, that content categories were not recorded, and that the audio logger tapes were of poor quality, containing significant amounts of audio static rendering them unclear and unintelligible. Additionally, there appeared to be discrepancies between the audio logger tape for the broadcast day of 10 January 2010 and the music list provided for that day.
34. The Commission notes that CKLN Radio did not dispute any of the Commission's findings relating to these three instances of monitoring.

Commission's analysis and determinations

35. Recognizing that the licensee may have had difficulty producing the required audio logger tapes and related documents requested in the October Staff Letter, and given assurances that CKLN Radio had resolved all the identified issues and was committed to compliance, the Commission provided the licensee with another chance to demonstrate, after a period of about five months, that it would be able to comply, during a period of stability in its operations, with the very basic requirements set out in the Regulations. It did not. Moreover, when the Commission requested the second set of audio logger tapes and related documents, much of the related information (specifically, what the licensee described as its "program logs") was filed late. In response to why this was the case, the licensee noted that the person on whom this responsibility fell was in the Caribbean for a month. No systematic institutionalized back-up plan was put in place in that person's absence.
36. The retention of audio logger tapes and related documents is a key requirement of all radio licensees. The Commission uses these tapes and documents to examine the licensee's compliance with the Regulations and its conditions of licence, including its adherence to Canadian content requirements, spoken word requirements and advertising limitations. In the present circumstances where sustained and serious programming issues were reported, this ability to monitor was especially important. The Commission finds that CKLN Radio was in non-compliance with sections 8(1)(a), 8(1)(c), 8(4), 8(5), 8(6) and 9(3) of the Regulations.

Licensee's response to Commission requests for information

37. Section 9(4) of the Regulations specifies that "[a]t the request of the Commission, a licensee shall provide the Commission with a response to any inquiry regarding the licensee's programming, ownership or any other matter within the Commission's jurisdiction that relates to the licensee's undertaking."

38. In the July Staff Letter, Commission staff reminded the licensee that it had failed to respond to a number of outstanding complaints since February 2008. It requested that the licensee contact the Commission “as soon as practical” to discuss the failure to respond to these complaints. It was only in response to additional requests for information in the September Staff Letter that the licensee provided the information requested in July. Moreover, the October 2009 Report was filed late and did not fully respond to all requests set out in the July and September Staff Letters. Also, as noted above, the licensee was late in filing the logs and records requested by the Commission in the Secretary General Letter.

Commission’s analysis and determination

39. The Commission is charged with the supervision and administration of the Canadian broadcasting system. As such, it must at all times be in a position to contact the licensees of the broadcasting undertakings it licenses in order to adequately perform its duties. Therefore, the inability or unwillingness to respond to the Commission is cause for serious concern. The Commission finds that CKLN Radio was in non-compliance with section 9(4) of the Regulations.

Confidence of the Commission in ongoing compliance

Actions following the lockout

40. In its October 2009 Report, the licensee indicated that it understood the seriousness of the situation and the importance of complying with its regulatory obligations. To this end, the licensee committed to creating a stable management structure for the station, including the creation of a programming committee and hiring paid staff, both of which would be responsible for ensuring compliance and addressing complaints. The licensee also committed to reviewing its programming policies and other mechanisms for ensuring compliance.

41. Upon resumption of normal programming, the licensee took the following actions:

- it required all programmers to sign the volunteer agreement, which stated that “[t]here is currently no room for error in this area [adherence with regulatory obligations governing programming]; without prejudice, everyone must understand that programming privileges will be suspended or revoked if people cannot comply with these rules”;
- it implemented training for all volunteer programmers in regard to their regulatory requirements, and provided them with the programmers’ handbook;
- after repeated warnings from the Commission and in response to continuing complaints, it took additional measures, including posting reminders of regulatory obligations and an emergency contact number in the studio;
- it revised its logs and put in place new technology to record logger tapes; and

- it renegotiated agreements with the Palin Foundation, the RSU and Brookfield Properties Ltd., which nevertheless did not make special provision for access to the studio or transmitter to ensure compliance should another lockout occur.
42. In contrast to its commitment set out in the October 2009 Report, the licensee chose to continue with what it described as a “working board” as a temporary oversight measure. No formalized process for dealing with complaints, independent of the board, was created; no staff was hired; and no formal management structure separate from the board was created (i.e., a programming committee). Moreover, the interventions filed in this proceeding clearly demonstrated that the infighting between different factions associated with CKLN-FM, which had led to the lockout, persisted.
 43. Following the resumption of its programming, the licensee received an elevated number of complaints relating to the material broadcast by CKLN-FM. These complaints demonstrate that this “working board” had difficulties maintaining control over the material broadcast on the station. For example, on 7 July 2010, a volunteer programmer fed the online stream of a radio station based in Seattle, Washington as a substitute for a jazz program when the host did not show up. The licensee admitted that this was inappropriate, given that it did not have the Seattle-based station’s permission to broadcast its programming and that music lists were not available for the program, among other reasons. However, it is clear that no one from the “working board” was aware of the situation as it transpired.
 44. The licensee also acknowledged ongoing problems in the area of content standards, including the use of offensive language during daytime hours. Although the licensee adopted a policy on only one of the problematic words that it aired, this policy was adopted on the day before replies to interventions were due on 15 November 2010. Moreover, it repeats the consequences that were originally stated in the volunteer agreement for more general violations of regulatory obligations. The Commission notes that the licensee did not provide any concrete examples of instances where these consequences were applied.
 45. In addition to the substance of the complaints, the record demonstrates that the licensee, lacking a formalized process for their review, sometimes acted in a cavalier or inappropriate manner towards complainants. For example, in response to a complaint received by Mr. Sid Whittaker, an email was sent by one member of the “working board” stating that he wanted to meet with Mr. Whittaker to “try to put out ‘fires’ that [they] believe [he] may be starting with the CRTC” and that he hoped “[Sid Whittaker] will find the guts” to meet with them.
 46. Moreover, despite a commitment to review its policies, the licensee continued to use an outdated programming handbook, which included erroneous characterizations of the Commission’s regulations regarding Canadian content and its policies concerning hits.

Discussions at the hearing

47. At the 8 December hearing, the licensee admitted that its “working board” did not have the experience necessary to ensure compliance with the station’s regulatory obligations. In particular, Mr. Ron Nelson stated the following:

[a]ny individual here [on the board of directors] is not a program director. We have never been a program director at a radio station before. So we had to do a lot of consulting with the NCRA and other radio stations and their program directors, such as CHRY and CIUT, to find out how to do our job properly.

48. This despite the fact that the licensee again acknowledged the importance of a stable management structure for ensuring compliance:

If [...] the proper systems are there to dynamically monitor Commission compliance, complaints, programming, it becomes a closed-loop system, and the dynamics are under control and easily managed, or there is an opportunity to manage. Right now, when we look at the past, those measures were not in place.

49. However, only after clear questioning did the licensee commit in the reply of the hearing that it would hire a staff member by 28 February 2011 to oversee the proper management of the station. Even then, it confirmed that the promised programming committee and formalized process for dealing with complaints had not been created and committed to do so only as part of its short term goals.

50. In explaining why certain actions had been taken, and others had not, the licensee indicated that it had been functioning in crisis mode, and that certain plans, including those necessary to ensure compliance, had sometimes been put on hold to deal with what it characterized as other emergencies. For example, Mr. Nelson stated the following:

A priority the other day was fundraising. It exhausted many of us, and the CRTC hearing was one week after fundraising. Could we prepare for both simultaneously? Not really. We couldn't, so we dealt with one priority at a time.

Commission analysis and determinations

51. The Commission notes that on numerous occasions CKLN Radio was provided notice of the seriousness of its apparent non-compliance and the possible consequences of that non-compliance. These included the extraordinary steps of sending Commission staff for a face-to-face meeting in September 2009, and calling the licensee to a show cause hearing within the first three years of the licence term. The licensee was provided with numerous opportunities to demonstrate its ability to ensure compliance going forward, including an additional seven months in which to take concrete steps after the adjournment of the 12 May hearing.

52. The Commission considers that, given the evidence of continued infighting and the lack of safeguards in its agreements with the Palin Foundation, the RSU and Brookfield Properties Ltd., it is entirely possible that another lockout situation could occur. The Commission considers that the licensee has not instituted sufficient structures to ensure that, should this occur, the station will not broadcast in non-compliance again.

53. Moreover, the record demonstrates that the “working board” does not have the experience or ability to properly supervise the station’s broadcasts to ensure ongoing compliance and has not obtained the necessary management expertise to do so. The Commission is gravely concerned by the lack of a stable and professional management structure, of formalized processes for dealing with complaints and monitoring compliance, and of clear, complete and enforced programming policies. The Commission finds that in the circumstances of this case a stable and accountable management framework, paid or otherwise, is essential to ensuring future compliance.
54. In regard to the elevated number of serious complaints received, while the licensee made admissions that some broadcasts were either inappropriate or non-compliant, it is the Commission’s view that follow-up actions taken by the licensee in order to ensure that its programming is consistent with the high standard objective of the Act were insufficient and incomplete. The lack of meaningful efforts to provide clear and consistent guidance to programmers as to their obligation to respect the high standard objective of the Act raises serious concern about the ability of the licensee to meet this objective in the future.
55. The Commission is also gravely concerned by the attitude of CKLN Radio towards its regulatory obligations. The licensee has demonstrated by its words and actions that compliance with its regulatory obligations has been given less time and resources than are necessary because of other priorities. Moreover, when asked about how it would respond to the issuance of mandatory orders or the suspension of its licence, the licensee stated that it believes it is taking all necessary steps to ensure compliance. It therefore stated that the issuance of mandatory orders or the suspension of its licence would not change its approach going forward.
56. The Commission considers that a responsible licensee would have taken the numerous warnings of the Commission to heart and would have prioritized compliance with its regulatory obligations. The Commission also considers that a responsible licensee, given an additional seven months after the adjournment of the 12 May hearing, would have undertaken concrete actions to implement the measures it acknowledged are key to ensuring compliance before the 8 December hearing. The Commission notes that, as indicated in Broadcasting Notice of Consultation 2010-146, it was the licensee’s responsibility to demonstrate to the Commission why it should not issue mandatory orders or suspend or revoke the broadcasting licence for CKLN-FM.
57. The Commission considers that the licensee has neither the will nor the ability to institute the measures necessary to ensure compliance with its regulatory obligations and the conditions of its licence. The Commission has no confidence that the licensee will broadcast in a compliant manner going forward.

Conclusion

58. The Commission considers that the issues of non-compliance described above, when taken cumulatively, are extremely serious. The non-compliance during the lockout period constituted a complete abrogation of CKLN Radio’s regulatory obligations. In

this context, the filing of annual returns, the provision of complete and accurate program logs and records, and responding to complaints and Commission inquiries are fundamental to the Commission's ability to monitor the station. These also become important indicators of whether the licensee has the stability and knowledge necessary to bring itself into compliance and keep itself there.

59. The Act declares that radio frequencies are public property. Moreover, community-based campus radio stations, as part of a distinct element of the broadcasting system, play a special role in serving their communities, including the students who provide the majority of their funding. Licensees therefore have the responsibility to broadcast in a manner that is consistent with the fundamental conditions of their licences and the Regulations.
60. The Commission has considered all regulatory measures available to it, including the issuance of mandatory orders as well as the suspension or the revocation of the broadcasting licence for CKLN-FM. Given the seriousness of the non-compliance and its continuous nature, the inability of CKLN Radio to institute the measures necessary to ensure ongoing compliance, and the lack of confidence on the part of the Commission that such measures could or would be instituted within a reasonable amount of time, the Commission finds that revocation is the only appropriate measure in this case.
61. Accordingly, the Commission **revokes**, by majority vote, the broadcasting licence for CKLN-FM Toronto, held by CKLN Radio Incorporated, as of 12 February 2011. The licensee must cease broadcasting on that date, by no later than the end of the broadcast day.

Secretary General

Related documents

- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2010-146, 12 March 2010, as amended by Broadcasting Notice of Consultation CRTC 2010-146-4, 13 October 2010
- *Licence renewals*, Broadcasting Decision CRTC 2007-292, 13 August 2007
- *Campus Radio Policy*, Public Notice CRTC 2000-12, 28 January 2000

Dissenting opinion of Commissioner Louise Poirier

I am firmly opposed to the panel's majority decision to revoke the licence for the campus radio station CKLN-FM Toronto, primarily because I am of the opinion that a mandatory order issued under section 12(2) of the *Broadcasting Act* should have been used as the first step for this station, which had had its licence renewed in 2007 for seven years and had never previously been in a situation of confirmed non-compliance. It should be remembered that CKLN-FM is Toronto's first campus radio station, that it was licensed by the Commission in 1983, and that since then it has always been given full licence renewals. Immediate revocation, without first applying any other regulatory measure, is clearly inconsistent with the Commission's usual practice. No other licences have been revoked in this manner in recent Commission history. Such revocations have always been preceded by either a mandatory order or a short-term licence renewal. The Commission is thus creating a precedent with respect to the principle of gradation of regulatory measures taken by the Commission when dealing with a licensee in a situation of non-compliance. This action is unwarranted and inequitable.

I am also opposed to the revocation because during the hearing, the licensee and the volunteers present reasonably demonstrated and all stated under oath that CKLN-FM had corrected numerous non-compliances that occurred between 2009 and early 2010 in preparation for the show cause hearing that was scheduled for May 2010 and then adjourned to December 2010. The licensee also stated under oath that it would correct the remaining non-compliances in the coming weeks. The Commission should therefore have presumed that the licensee was acting in good faith and issued a mandatory order, all the while closely monitoring the station on a monthly basis, as is done in such situations, and informing the licensee that another hearing could be held in the coming months in the event of a new apparent non-compliance. I sincerely believe that the licensee had taken steps in the right direction and that with a little time it could have succeeded in achieving full compliance.

Finally, I am opposed to the revocation of CKLN-FM's licence because the Commission should have first waited until the Ontario Superior Court of Justice (the Superior Court) settled the matter before it concerning the legitimacy of the current board of directors. A mandatory order would have given the Superior Court time to issue a ruling and avoid a potential appeal of this decision in the event of a ruling that the current board of directors was not the licensee's legitimate representative. In fact, we adjourned the 12 May 2010 show cause hearing into CKLN-FM so that the dispute before the Superior Court could be settled. Given that the dispute has not been settled, we should have continued to wait, as we did at first, all the while ensuring compliance with our regulations.

Let us examine the problems I raised above in more detail.

1. The principle of gradation

Although there is no specific policy on the revocation of a licence while it is still in effect, the Commission has always adhered to the principle of gradation of regulatory measures that it takes when dealing with licensees in situations of non-

compliance. To my knowledge and based on the research conducted, I conclude that the Commission has never revoked a licence without first issuing a mandatory order or reducing the licence term at the time of renewal. Circular 444 (*Practices regarding radio non-compliance*) clearly reflects this practice of gradation, which is well established and has been applied in many cases. In support of this statement, below are descriptions of a few cases similar to that of CKLN-FM Toronto.

When the Commission determined that CFAR Flin Flon was in non-compliance with the *Radio Regulations, 1986* (the Regulations) and with a condition of licence, it first issued a four-year renewal (Broadcasting Decision 2004-334) and then, following a second situation of non-compliance, issued a two-year renewal (Broadcasting Decision 2008-149). As we can see, the Commission generally waits until licence renewal to deal with a licensee in a situation of non-compliance and it generally does so by reducing the licence term at its renewal. In this manner, the Commission acknowledges that a licence is a valuable asset, a privilege. However, the Commission also acknowledges that it cannot withdraw this privilege from a licensee without giving it necessary and reasonable opportunities to comply and without adhering to a diligent and predictable process.

A more significant case is that addressed in Broadcasting Decision 2010-614 and Broadcasting Order 2010-615 concerning licences held by Aboriginal Voices Radio Inc. (AVR Inc.). This case is particularly indicative of the Commission's practice because when AVR Inc. appeared at the same public hearing as CKLN-FM in May 2010 to explain an apparent non-compliance, the Commission renewed those licences for two years and imposed a mandatory order. This was done after AVR Inc. had already been issued short-term renewals for a period of only three years (Broadcasting Decision 2007-121) with the imposition of additional conditions of licence. Consequently, to date AVR Inc. has been issued two licence renewals despite recurring non-compliances. It should be noted that one of the stations affected by this decision (CKAV-FM) operates, like CKLN-FM, in the Toronto market. The scarcity of frequencies in this market requires that we demonstrate restraint and take precautions before revoking a licence.

Finally, Broadcasting Decision 2008-223, in which CJMS Saint-Constant received a two-year renewal following a second non-compliance with the Regulations, is yet one more example among so many others. This licensee recently saw its licence renewed for four years (deviating from the Commission's usual practice), despite a third non-compliance.

In closing this section, I would like to point out that in paragraphs 40 and 41 of this decision the Commission notes the improvements in CKLN-FM's compliance. Any licensee would have expected a simple encouragement accompanied by a mandatory order rather than a regulatory measure as irreversible as revocation.

2. Trust in the licensee

At the hearing, the Commission took the exceptional step of having all participants swear an oath or solemnly promise to tell the truth. One can thus presume that this unusual element added to the veracity of the statements made by the members of the board of directors, volunteers and interveners. Many things may have changed since the week of 10-16 January 2010, the last period for which the Commission requested, among other things, the licensee's program logs. The licensee stated several times, under oath, that it had remedied several of the non-compliances, including those related to its logs. The licensee stated that 25 of its 170 volunteers were students at Ryerson University and promised that it would change the date of submission of annual reports at its next board of directors meeting. It also agreed that it had to hire a general manager by February to oversee future compliance more effectively. These are just a few examples.

Several of these statements were corroborated under oath by the volunteers in attendance. They stated that everyone was now very aware of the need to use appropriate and respectful language on the air, among other things, and that they were receiving training on the regulatory requirements. Also, the Ryerson Student Union (RSU), the station's main source of funding, maintained its funding to CKLN-FM, suggesting its continued confidence in the station. In a democratic system, in which the students are the equivalent of taxpayers, they opted to trust the station.

Paragraph 6 of Circular 444 concludes as follows:

Where the Commission is not satisfied that the licensee has taken all necessary measures to ensure that non-compliance will not recur, and where it considers that a short-term renewal may not in itself correct the non-compliance situation, it may also issue a mandatory order.

While this policy may not apply directly to this case, its spirit should have been applied to CKLN-FM, as it always has been for previous licensees.

The Commission is guided by the *Broadcasting Act* in supervising and supporting equitably all components of the broadcasting system - private, public, community and campus - to provide Canadians with the greatest possible programming variety. Despite a more problematic episode in 2009, CKLN-FM Toronto played, and up to now continued to play, a significant role in achieving this goal. Given the Commission's mandate to foster the vitality of our broadcasting system, a constructive rather than a coercive approach would have been more appropriate in this case.

Revocation should be used sparingly, for exceptional reasons in exceptional and serious situations and only as a last resort, i.e. after all other reasonable regulatory measures likely to put the licensee on the path to compliance have been used and have failed.

3. The decision by the Ontario Superior Court of Justice

Are the licensee's representatives who appeared before us its legitimate representatives? We do not yet have an answer to this question because the matter is still before the Superior Court. Why not wait until the court has ruled on the matter before taking such drastic action? Revoking the licence causes irreparable harm to the licensee. While I do not wish to engage in making far-fetched conjectures, I believe that the principle of precaution should have been applied here as well. If the Superior Court determines that the representatives who appeared before us are not legitimate, could the licence revocation be declared invalid? And if a frequency reassignment proceeding were initiated in the meantime, what would the consequences be? It would thus have been preferable to wait until the dispute before the Superior Court is settled before considering the possibility of revoking CKLN-FM's licence. In fact, some changes to the licensee's general by-laws (representation of the educational institution on the board of directors) that the Commission would like to see made cannot be implemented until the process before the Superior Court has been completed. Why put the cart before the horse?

4. Additional considerations

Below are arguments I would like to add in support of my position.

- None of the interveners at the hearing, I repeat, none, requested the revocation of CKLN-FM's licence. All of them said that they would be satisfied with a mandatory order to bring the station into compliance. Only one intervener preferred suspension to give the licensee time to reorganize fully. Revoking the licence at this stage will not satisfy anyone. The potential winners could be future applicants who will have the opportunity to apply for CKLN-FM's very desirable frequency in the much sought after Toronto market. Future applicants could have been among the licensees present at the hearing.
- This campus radio station has no financial problems, given that the RSU was involved at all stages of the station's restructuring and maintained its annual contribution of close to \$300,000. The station repaid its outstanding debt recently, in addition to raising several tens of thousands of dollars at the end of 2010, demonstrating the community's commitment to this station.
- Although I appreciate the fact that Commission staff travelled to meet with the licensee in September 2009 to observe the problem up close and advise the licensee more effectively on the alleged non-compliances, in the absence of evidence to the contrary, a staff visit cannot be considered a first step equivalent to a mandatory order. When revoking a licence, the Commission must proceed very carefully. This is particularly true in this case given that the licensee was granted a renewal for seven years in 2007 and had always been granted full renewals since its creation almost 28 years ago.

Conclusion

To conclude, revoking CKLN-FM's licence at this time creates a precedent that I cannot endorse. The regulatory measure that has been adopted is disproportionate to the fault. It would have been more transparent and more consistent with the Commission's usual practices to issue a mandatory order accompanied by close monitoring of the licensee. This would have constituted fair treatment for CKLN-FM Toronto, which has served its community with credibility and passion since 1983 and which has always had its license renewed for full terms, thus leading to the conclusion that the Commission has never been significantly concerned with the licensee's compliance with its regulatory obligations. At the hearing, the licensee clearly stated its firm intention to comply.

Hastily revoking a campus radio station licence in Toronto, Canada's biggest market, will not send a positive signal to the campus radio community, which consists of organizations comprised mainly of volunteers, who unstintingly contribute time and energy to give their community a voice. This decision is consistent neither with the Commission's usual practice nor with the spirit of Circular 444. In my opinion, based on the evidence before us, the decision to revoke the licence at this time is premature, disproportionate and inequitable.