



Broadcasting Decision CRTC 2007-46

Ottawa, 1 February 2007

High Fidelity HDTV Inc., on behalf of a corporation to be incorporated Across Canada

Application 2006-0850-8

Public Hearing in the National Capital Region

14 November 2006

Clash HD – Category 2 specialty service

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

The application

1. The Commission received an application by High Fidelity HDTV Inc., on behalf of a corporation to be incorporated (High Fidelity), for a broadcasting licence to operate a national, English-language Category 2¹ high definition (HD) specialty programming undertaking to be known as Clash HD.
2. The applicant proposed to offer a service that would consist of programs related to the history, analysis and dramatization of armed conflicts, military and quasi-military matters, the subjects of peacekeeping, policing and terrorism, civil unrest and disobedience, and warfare throughout the world, including the causes of such conflicts, matters, unrest and disobedience, and warfare.
3. All of the programming would be drawn from the following categories set out in item 6 of Schedule I to the *Specialty Services Regulations, 1990*: 2(a) Analysis and interpretation; 2(b) Long-form documentary; 3 Reporting and actualities; 5(b) Informal education/Recreation and leisure; 7(a) Ongoing drama series; 7(c) Specials, mini-series or made-for-TV feature films; 7(d) Theatrical feature films aired on TV; 7(g) Other drama; 11 General entertainment and human interest; 12 Interstitials; 13 Public service announcements; and 14 Infomercials, promotional and corporate videos.
4. The applicant proposed that in each year of the licence term, 100% of the programming of Clash HD would be broadcast in HD format.

¹ 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.

Interventions

5. The Commission received several interventions in response to this application: a comment by Astral Television Networks (Astral), a division of Astral Broadcasting Group Inc., and interventions in opposition by Rogers Cable Communications Inc. (Rogers) and Alliance Atlantis Communications Inc. (Alliance Atlantis). Rogers also opposed the six other applications by High Fidelity for national, English-language Category 2 HD services considered in this proceeding.

Alliance Atlantis

6. Alliance Atlantis, the owner of History Television Inc., licensee of History Television, opposed the licensing of Clash HD because it was of the view that the proposed service would be directly competitive with History Television.
7. Alliance Atlantis argued that there is a significant amount of programming overlap between History Television and Clash HD. According to Alliance Atlantis, programming related to quasi-military matters, policing and terrorism, civil unrest and disobedience, and causes of conflicts would directly compete with that of History Television, particularly with respect to historical documentaries.
8. Alliance Atlantis also submitted that the applicant's proposed nature of service is overly broad, noting that its programming would encompass and go beyond the narrow theme of the military or armed forces found on the Category 2 services Military Television and The Armed Forces Network, as well as on the foreign service Military Channel. Consequently, in Alliance Atlantis' view the licensing of Clash HD would not increase the variety and diversity of programming choices of the Canadian broadcasting system.
9. However, in the event that the Commission decided to approve the Clash HD application, Alliance Atlantis proposed that the Commission narrow the applicant's nature of service to "programs relating to the history, analysis and dramatization of armed conflict and military matters, peacekeeping and warfare throughout the world" and that the licensee be further subject, by condition of licence, to a 15% limitation on documentaries from categories 2(a) and 2(b).

Astral

10. Astral operates The Movie Network and MPix, two English-language pay television programming undertakings that provide general interest theatrical movie-based services in eastern Canada. Astral noted that under the Commission's licensing framework for new specialty and pay services, "the Commission has, in authorizing Category 2 applications, established restrictions on certain proposed services to ensure that they will not be directly competitive with existing pay, specialty and Category 1 digital channels." Astral proposed that Clash HD be subject, by condition of licence, to a 15% limitation on programs from category 7(d).

Rogers

11. Rogers, the licensee of cable broadcasting distribution undertakings serving customers in Ontario, New Brunswick, Newfoundland and Labrador, questioned the Commission's policy of including unlaunched Category 2 services in its application of the competitiveness test for assessing requests to add foreign English- and French-language services to its lists of eligible satellite services (the Lists), as set out in Public Notice CRTC 2000-173.² Under that policy, the Commission precludes the addition of a foreign service that can be considered either totally or partially competitive with any Canadian specialty or pay television services whose licence applications have been approved by the Commission, including launched and unlaunched Category 2 services.
12. Rogers argued that the approval of all High Fidelity's applications would result in the applicant's occupying a wide range of programming genres. Rogers further contended that High Fidelity could take up to five years to implement these services, thus preventing the addition of any similar non-Canadian programming services to the Lists for that period and depriving Canadians of diversity and choice in digital programming services. Finally, Rogers submitted that the Commission should reconsider its policy framework governing Category 2 services before granting additional licences to High Fidelity.

Applicant's reply

13. In response to Alliance Atlantis's intervention, High Fidelity stated that there would be no programming overlap between History Television and Clash HD since all programming broadcast on Clash HD would be HD programming that had never been seen in Canada. Further, in reply to Alliance Atlantis's statement that the licensing of Clash HD would not contribute to the variety and diversity of programming choices in the Canadian broadcasting system because the service would be very similar to the combined services of Military Television, Military Channel and The Armed Forces Network, High Fidelity noted the Commission's policy of letting market forces prevail with respect to Category 2 specialty and pay television services, as set out in *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000 (Public Notice 2000-6).
14. In response to Astral's intervention, High Fidelity indicated its willingness to accept a condition of licence requiring that not more than 15% of all programming be drawn from category 7(d).

² *Call for proposals to amend the lists of eligible satellite services through the inclusion of additional non-Canadian services eligible for distribution on a digital basis only*, Public Notice CRTC 2000-173, 14 December 2000.

15. Finally, in response to Rogers' intervention, High Fidelity maintained that the policy issues raised by Rogers are beyond the scope of its application for the proposed Category 2 service. High Fidelity added that Rogers' request should be addressed in the context of the Commission's review of the regulatory framework for discretionary services announced in *CRTC 3-Year Work Plan 2006-2009*, 28 April 2006 (the 3-Year Work Plan).

Commission's analysis and determinations

16. In Public Notice 2000-6, the Commission implemented a competitive, open-entry approach to licensing Category 2 services. While the Commission does not consider the impact that a Category 2 service might have on an existing Category 2 service, it does seek to ensure that Category 2 services do not compete directly with any existing pay or specialty television service, including any Category 1 service.
17. In *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000, and *Corrected Appendix 2*, Public Notice CRTC 2000-171-1, 6 March 2001 (Public Notice 2000-171-1), the Commission adopted a case-by-case approach in determining whether a proposed Category 2 service should be considered directly competitive with an analog pay or specialty service, including any existing Category 1 service. The Commission examines each application in detail, taking into consideration the proposed nature of service and the unique circumstances of the genre in question.
18. With respect to Alliance Atlantis's intervention, the Commission notes that the programming offered by History Television consists primarily of historical documentaries, movies, mini-series and history programs, with an emphasis on dramatic and documentary programs relating to Canada's past and only a small amount of military programming. Thus, the Commission considers History Television's nature of service to be much broader than that proposed by the applicant, whose programming will be related to military and policing themes.
19. Moreover, the Commission notes that in response to Astral's intervention the applicant agreed to accept a condition of licence limiting the broadcast of category 7(d) programming to 15% of the broadcast week. The Commission is imposing a **condition of licence** to that effect, as set out in the appendix to this decision.
20. The Commission is satisfied that the definition of Clash HD's nature of service and the limitation on category 7(d) programming are sufficient to ensure that the proposed service will be complementary rather than directly competitive with History Television, The Movie Network and MPix. Therefore, the Commission sees no need to impose further programming limitations on the proposed service with respect to categories 2(a) and 2(b).

21. Finally, while the Commission has noted the concerns raised by Rogers, the Commission finds that these issues are not directly relevant to its consideration of the present application. As announced in the 3-Year Work Plan, the Commission intends to review the framework for discretionary services and is of the view that the matters raised in Rogers' intervention may be more appropriately discussed in that context.
22. In light of 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 High Fidelity HDTV Inc., on behalf of a corporation to be incorporated, for a broadcasting licence to operate the national, English-language Category 2 high definition specialty programming undertaking, Clash HD.
23. The Commission reminds the applicant that if it wishes to enter at any time into an agreement with non-Canadian independent producers regarding the supply of programming or the use of a licence trademark, it must comply at all times with *Direction to the CRTC (Ineligibility of non-Canadians)*, P.C. 1997-486, 8 April 1997, as amended by P.C. 1998-1268, 15 July 1998 (the Direction). Accordingly, the Commission has imposed a **condition of licence**, as set out in the appendix to this decision, that requires the licensee to file, for the Commission's prior review, a copy of any programming supply agreement or licence trademark agreement it intends to enter into with a non-Canadian party, in order to ensure that the licensee complies at all times with the Direction.
24. 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

25. A licence will be issued once the applicant has satisfied the Commission, with supporting documentation, that the following requirements have been met:
 - an eligible Canadian corporation has been incorporated in accordance with the application in all material respects;
 - 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 1 February 2010. 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 2007-46

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 high definition specialty programming service dedicated to programming related to the history, analysis and dramatization of armed conflicts, military and quasi-military matters, the subjects of peacekeeping, policing and terrorism, civil unrest and disobedience, and warfare throughout the world, including the causes of such conflicts, matters, unrest and disobedience, and warfare.
3. The programming shall be drawn exclusively from the following categories, as set out in item 6 of Schedule I to the *Specialty Services Regulations, 1990*, as amended from time to time:
 - 2 (a) Analysis and interpretation
 - (b) Long-form documentary
 - 3 Reporting and actualities
 - 5 (b) Informal education/Recreation and leisure
 - 7 (a) Ongoing drama series
 - (c) Specials, mini-series or made-for-TV feature films
 - (d) Theatrical feature films aired on TV
 - (g) Other drama
 - 11 General entertainment and human interest
 - 12 Interstitials
 - 13 Public service announcements
 - 14 Infomercials, promotional and corporate videos
4. No more than 15% of all programming broadcast during the broadcast week shall be drawn from category 7(d).
5. In order to ensure that the licensee complies at all times with the *Direction to the CRTC (Ineligibility of non-Canadians)*, P.C. 1997-486, 8 April 1997, as amended by P.C. 1998-1268, 15 July 1998, the licensee shall file, for the Commission's prior review, a copy of any programming supply agreement and/or licence trademark agreement it intends to enter into with a non-Canadian party.
- 6.

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.