



Broadcasting Decision CRTC 2009-269

Route reference : 2009-74

Additional reference : 2009-74-1

Ottawa, 13 May 2009

2079966 Ontario Limited

Kincardine, Goderich and Port Elgin, Ontario

Applications 2008-1565-7 and 2008-1594-6, received 21 November 2008

Change in effective control and addition of a transmitter of CIYN-FM Kincardine in Port Elgin

*The Commission **approves** the application by My Broadcasting Corporation, on behalf of 2079966 Ontario Limited, for authority, pursuant to section 11(4)(a) of the Radio Regulations, 1986, to effect a change in the effective control of 2079966 Ontario Limited.*

*The Commission **denies** the application to amend the broadcasting licence for CIYN-FM Kincardine, in order to operate a transmitter in Port Elgin, Ontario at 90.9 MHz (channel 215B) with an effective radiated power of 3,100 watts.*

The Commission determines that the revised value of the ownership transaction is \$1,126,520. Accordingly, the Commission requires the applicant to pay clear and unequivocal tangible benefits representing a minimum direct financial contribution of \$67,591.20, corresponding to 6% of the revised value of the transaction.

Introduction

1. The Commission received an application by My Broadcasting Corporation (MBC), on behalf of 2079966 Ontario Limited (2079966), for authority pursuant to section 11(4)(a) of the *Radio Regulations, 1986* (the Regulations), as amended from time to time, to effect a change in the effective control of 2079966, the licensee of the radio programming undertaking CIYN-FM Kincardine and its transmitter in Goderich, Ontario. MBC also filed an application to amend CIYN-FM's licence in order to add a transmitter in Port Elgin, Ontario at 90.9 MHz (channel 215B) with an effective radiated power (ERP) of 3,100 watts. There were no interventions to these applications.
2. Currently, 2079966 is owned by Mr. Brian Cooper (35.05% voting interest), Mr. Daniel McCarthy (35.05% voting interest) and The Haliburton Broadcasting Group Inc. (29.9% voting interest). The proposed ownership transaction would be effected through the transfer of all the issued and outstanding shares of 2079966 to MBC, a corporation jointly controlled by Mr. Jon Pole and Mr. Andrew Dickson. Furthermore, it is expected that 2079966 would later be amalgamated with MBC.

3. In the course of this transaction, Blackburn Radio Inc., a corporation ultimately controlled by Mr. Richard Costley-White, would exercise its option to acquire 29.9% of the voting shares of MBC. This latter step would not affect the control of MBC.

Background

4. The Commission approved the FM station in Kincardine with a transmitter in Goderich in Broadcasting Decision 2005-68. In the same decision, the Commission approved a transmitter of the Kincardine station in Port Elgin but denied the proposed technical parameters and directed the applicant to file another application proposing the use of an alternative FM frequency. Subsequently, in Broadcasting Decision 2005-319, the Commission approved new proposed technical parameters for the Port Elgin transmitter.
5. The licensee of CIYN-FM did not implement the transmitters in Goderich and Port Elgin within the established time frame for each transmitter, nor did it request extensions to the respective time frames. Consequently, the authorities granted for the operation of the Goderich and Port Elgin transmitters became null and void. The licensee stated that it was unable to implement these transmitters within the required time frames because of a dispute with the owners of the tower.
6. In Broadcasting Decision 2008-68, the Commission approved an application by 2079966 to operate a transmitter of CIYN-FM in Goderich.

Commission's analysis and determinations

7. The Commission has identified the following issues to be addressed in its determinations on the present applications:
 - the assessment of the value of the transaction;
 - the tangible benefits required on transfers of ownership;
 - the sale of CIYN-FM during its first licence term; and
 - the proposed transmitter in Port Elgin.

Assessment of the value of the transaction

8. Because the Commission does not solicit competing applications for authority to transfer the ownership or control of radio, television and other programming undertakings, the onus is on the applicant to demonstrate that the proposed value of the transaction is acceptable and reasonable. In accordance with the Share Purchase Agreement, the purchase price for CIYN-FM would be \$1,000,000, which excludes the \$125,000 for the Port Elgin transmitter since, for the reasons set out below, the Commission is denying the application to amend CIYN-FM's licence in order to add a transmitter in Port Elgin. The purchase price includes the value of CIYN-FM's assumed indebtedness.

9. Commission practice is to include in the value of the transaction every element comprised in the purchase price as defined in the purchase/sale agreement. The agreement for this transaction provides for the value of the working capital to be added in the determination of the purchase price. Based on the financial statements as of 31 August 2008, the Commission estimates the value of the working capital to be \$45,668 as of 4 November 2008, the date of the transaction.
10. Commission practice is also to include in the value of the transaction certain elements such as commitments related to operating leases. The purchaser indicated that it would be assuming lease commitments valued at \$80,852.
11. In light of the above, the Commission determines that the revised value of the transaction would be \$1,126,520.

Tangible benefits required on ownership transactions

12. As set out in Public Notice 1998-41 (Commercial Radio Policy 1998) and reaffirmed in Broadcasting Public Notice 2006-158 (Commercial Radio Policy 2006), the Commission requires that parties seeking to acquire ownership or control of profitable radio undertakings make commitments in the form of tangible benefits of no less than 6% of the value of transactions. In Public Notice 1998-41, the Commission stipulated that it would be prepared to forgo benefits requirements in the case of transactions involving the sale of unprofitable undertakings. However, the Commission also stated that it would not “systematically apply this exemption to stations in the first five years of operation.” At the time of the filing of the application, CIYN-FM was still within this five-year period.
13. MBC requested an exemption from the tangible benefits requirements because CIYN-FM has not yet achieved the level of operation proposed in the original licensing application, which was approved in Broadcasting Decision 2005-68. The Goderich transmitter approved in Decision 2008-68 is not yet implemented and the authorization for the Port Elgin transmitter has lapsed. In addition, CIYN-FM’s sales, capital investment in equipment and staffing levels are well below those projected in the original business plan.
14. MBC further argued that CIYN-FM is subject to a condition of licence stipulating expenditures on Canadian content development (CCD) that substantially exceed the minimum requirements set out in section 15 of the Regulations. Specifically, the applicant noted that the Regulations require stations such as CIYN-FM, whose total revenues were less than \$625,000 in the previous broadcast year, to contribute a minimum of \$500 to CCD in each broadcast year, or \$3,500 over seven consecutive broadcast years. In comparison, CIYN-FM must, by condition of licence, contribute \$10,500 to CCD in each broadcast year, including \$500 to FACTOR and \$10,000 to live performances by Canadian artists at summer music festivals in Kincardine, Goderich and Port Elgin, for a total contribution of \$73,500 over seven consecutive broadcast years. MBC contended that imposing additional tangible benefits expenditure requirements on

CIYN-FM equaling 6% of the value of the transaction would impede efforts to make the station a more sustainable operation.

15. The Commission considers that tangible benefits are costs of doing business and the cost of using the public airwaves for commercial gain. It is expected that a station will encounter some difficulties in the first few years following its launch. The Commission has considered the applicant's arguments but does not find the rationale satisfactory to support an exemption from the Commission's tangible benefits requirements.
16. Taking into consideration the revised value of the transaction, the Commission determines that MBC must pay clear and unequivocal benefits representing a minimum direct financial contribution of \$67,591.20, i.e. 6% of the revised amount of \$1,126,520. In accordance with Commission practice, this contribution must be expended equally over a seven-year period. Consistent with Public Notice 1998-41 and as reaffirmed in Broadcasting Public Notice 2006-15, the Commission expects the financial contributions to be distributed as follows:
 - 3% of the value of the transaction to be allocated to the Radio Starmaker Fund;
 - 2% of the value of the transaction to be allocated, at the discretion of the purchaser, to FACTOR or MUSICACTION; and
 - 1% of the value of the transaction to be allocated to the Kincardine Summer Music Festival.

Sale of CIYN-FM within its first licence term

17. Broadcasting Public Notice 2008-4 outlines the principles the Commission generally applies to any changes in the effective control of broadcasting undertakings occurring during the first licence term of an undertaking or shortly following a previous sale. Such transactions raise issues relating to the integrity of the licensing process and the potential for licence trafficking.
18. With respect to the integrity of the licensing process, the Commission notes that the applicant indicated that 2079966 had not anticipated selling the Kincardine station in its first licence term. The applicant explained that the current shareholders are unable to make the substantial financial investment needed to keep the stand-alone station in operation. It maintained that the proposed ownership transaction was motivated by a desire to sell CIYN-FM to a party that could ensure the long-term viability of the station.
19. In determining the potential for licence trafficking when an undertaking is sold within the first licence term, the Commission examines the investment that the vendor has made in the undertaking for the purpose of determining the profit resulting from the sale. The gain is determined by deducting costs from the value of the transaction. These costs are comprised of the start-up costs and the investments in fixed assets. In the past, the Commission has considered past cumulative losses as elements that a vendor could recover when selling an undertaking.

20. In the present case, the applicant indicated that the start-up costs and investments for CIYN-FM amounted to \$316,543. Cumulative losses as of 31 August 2008 amounted to \$220,447. It did not provide the net earnings between that date and 4 November 2008, the date of the transaction.
21. Based on the 2008 net loss, the Commission estimates the loss for the two-month period noted above amounts to \$6,054. Consequently, the cumulative loss amounts to \$226,501. Taking into consideration the revised value of the transaction of \$1,126,520, the profit would be \$583,476.
22. In light of the above, the Commission is satisfied that the proposed transaction will not compromise the integrity of the licensing process. Consequently, the Commission determines that this does not represent a situation of licence trafficking.

Proposed transmitter in Port Elgin

23. The sale of the transmitter would occur shortly after the Commission's decision on the present applications. Further, the value of the ownership transaction depends on whether the Commission approves or denies the proposed Port Elgin transmitter. Accordingly, the Commission finds that the proposed licence amendment also raises issues about the integrity of the licensing process and the potential for licence trafficking.
24. The applicant confirmed that as of 4 November 2008, the date of the transaction, no financial expenditures or investments had been made on the proposed Port Elgin transmitter. If the Commission were to approve the proposed licence amendment, the profit resulting from the sale of the transmitter would be \$125,000. In the Commission's view, the profit to be realized from the sale of the proposed transmitter would be significant particularly in view of the fact that the vendor did not fulfil the original requirements set out in Broadcasting Decision 2005-68 to establish a transmitter in Port Elgin and has not made any financial investment in the undertaking.
25. The Commission further notes that paragraph 2.1(3)(a) of the Share Purchase Agreement indicates that, if the Commission were to deny the present proposed licence amendment, MBC could file another application nine months from the date of that decision requesting another licence amendment in order to add a transmitter of CIYN-FM in Port Elgin. In that case, MBC would not be required to pay the \$125,000.
26. In light of the above, the Commission finds that approval of the proposed licence amendment would compromise the integrity of the licensing process and would not be in the public interest. The Commission considers that, given paragraph 2.1(3)(a) of the Share Purchase Agreement, an application filed by MBC within nine months of the date of the present decision proposing the addition of a transmitter of CIYN-FM in Port Elgin would also raise concerns about the potential of licence trafficking.

Conclusion

27. The Commission **approves** the application by My Broadcasting Corporation, on behalf of 2079966 Ontario Limited, for authority, pursuant to section 11(4)(a) of the *Radio Regulations, 1986*, to effect a change in effective control of 2079966 Ontario Limited. Further, in the event of an amalgamation involving 2079966, the Commission expects the applicant to file the supporting corporate documents.
28. The Commission **denies** the application to amend the broadcasting licence for CIYN-FM Kincardine in order to operate a transmitter in Port Elgin at 90.9 MHz (channel 215B) with an ERP of 3,100 watts. Further, the Commission expects that MBC will not file a new application, within nine months from the date of the present decision for an amendment to CIYN-FM's licence in order to add a transmitter in Port Elgin.
29. In light of the above, the Commission determines that the revised value of the ownership transaction is \$1,126,520. The Commission therefore requires the applicant to pay clear and unequivocal tangible benefits representing a minimum direct financial contribution of \$67,591.20, i.e. 6% of the revised value of the transaction.

Canadian content development requirements

30. In the broadcast year ending 31 August 2006, 2079966 failed to comply with its condition of licence requiring that it contribute \$10,500 annually to CCD. The licensee explained that the shortfall was a result of a misunderstanding with Commission staff. In the broadcast year ending 31 August 2007, the licensee contributed \$21,400 to CCD in order to make up for its 2006 shortfall. The Commission will examine CIYN-FM's compliance in this regard in the context of its licence renewal in 2012.

Employment equity

31. In accordance with Public Notice 1992-59, 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

Related documents

- *Diversity of voices* – Regulatory Policy, Broadcasting Public Notice CRTC 2008-4, 15 January 2008
- *CIYN-FM Kincardine – New transmitter at Goderich*, Broadcasting Decision CRTC 2008-68, 25 March 2008
- *Commercial Radio Policy 2006*, Broadcasting Public Notice CRTC 2006-158, 15 December 2006

- *Use of frequency 90.9 MHz by the new transmitter in Port Elgin, Broadcasting Decision CRTC 2005-319, 8 July 2005*
- *Adult Classic Hit FM radio station in Kincardine, with transmitters in Goderich and Port Elgin, Broadcasting Decision CRTC 2005-68, 17 February 2005*
- *Commercial Radio Policy 1998, Public Notice CRTC 1998-41, 30 April 1998*
- *Implementation of an employment equity policy, Public Notice CRTC 1992-59, 1 September 1992*

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>.