



Broadcasting Decision CRTC 2010-321

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Route reference: 2009-793

Ottawa, 28 May 2010

Newcap Inc.
Winnipeg, Manitoba

Application 2009-0425-2, received 2 March 2009

CHNK-FM Winnipeg – Licence renewal and amendment

*The Commission **renews** the broadcasting licence for CHNK-FM Winnipeg from 1 June 2010 to 31 August 2013. This short-term renewal will permit the Commission to review at an earlier date the licensee's compliance with its condition of licence relating to the broadcast of category 2 (Popular Music) selections, as well as with sections 8(5), 8(6) and 15 of the Radio Regulations, 1986 relating to the provision of complete logger tapes and contributions to Canadian content development.*

*The Commission **denies** the licensee's request to delete the conditions of licence associated with CHNK-FM's operation as a specialty format station.*

Introduction

1. The Commission received an application by Newcap Inc. (Newcap) to renew the broadcasting licence for the commercial specialty radio programming undertaking CHNK-FM Winnipeg, which expires 31 May 2010.¹
2. As part of its renewal application, Newcap requested that the following conditions of licence associated with CHNK-FM's operation as a specialty format station be deleted:
 - The licensee shall operate the station within the specialty format as defined in *A review of certain matters concerning radio*, Public Notice CRTC 1995-6, 21 April 1995, as amended in *Revised content categories and subcategories for radio*, Public Notice CRTC 2000-14, 28 January 2000, as amended from time to time.
 - The licensee shall ensure that no more than 60% of all musical selections broadcast during each broadcast week are selections drawn from category 2 (Popular Music).

¹ The licence was administratively renewed from 1 September to 31 December 2009 and from 1 January to 31 May 2010 in Broadcasting Decisions 2009-506 and 2009-785.

- The licensee shall, as an exception to the percentage of Canadian musical selections set out in sections 2.2(8) and 2.2(9) of the *Radio Regulations, 1986*:
 - a) in those periods of category 2 music consisting exclusively of music composed before 1956, devote a weekly average of 2% or more of its musical selections from content category 2 broadcast during those periods to Canadian selections broadcast in their entirety. The licensee shall identify those programming periods and the dates of composition of the music selections broadcast during those periods when requested by the Commission.
 - b) in those periods of category 2 music consisting of 90% or more but not exclusively, of music composed before 1956, devote a weekly average of 10% or more of its musical selections from content category 2 broadcast during those periods to Canadian selections broadcast in their entirety. The licensee shall identify those programming periods and the dates of composition of the music selections broadcast during those periods when requested by the Commission.
3. According to Newcap, approval of these amendments would permit CHNK-FM to compete more effectively with other commercial radio stations in the Winnipeg market and make future enhancements to the quality of its programming service and would provide stability to both CHNK-FM and its ethnic station CJKS Winnipeg.

Non-compliance

4. In Broadcasting Notice of Consultation 2009-793, the Commission noted that the licensee may have failed to comply with its condition of licence relating to category 2 musical selections by devoting 60.6% of its selections to category 2 music for the broadcast week of 17-23 June 2007. The Commission also noted that it had discussed at length with the licensee the reasonable distribution of its category 3 (Special Interest Music) selections. Additionally, a monitoring of the above broadcast week revealed that the logger tapes sent to the Commission were incomplete, missing a total of 8 hours of programming, namely the hours of 11 p.m. to midnight of each day of the week examined as well as the hour 1-2 p.m. for 22 June 2007. The Commission therefore indicated that the licensee may have failed to comply with sections 8(5) and 8(6) of the *Radio Regulations, 1986* (the Regulations) relating to the provision of complete logger tapes.
5. Further, when it granted the licence for the station to CKVN Radiolink System Inc. in Broadcasting Decision 2002-225, the Commission imposed a condition of licence requiring the licensee to devote \$77,000 over seven consecutive broadcast years to Canadian talent development (CTD). Following the transaction authorized in Broadcasting Decision 2005-554, Newcap became the licensee, subject to the existing conditions of licence. In its notice, the Commission noted that both licensees appeared to have failed to allocate certain CTD contributions required by condition of licence.

Interventions

6. The Commission received comments concerning the application from Stillwater Broadcasting Ltd. (Stillwater), licensee of CJSB-FM Swan River, and from Astral Media Radio (Toronto) Inc. and 4382072 Canada Inc., partners in a general partnership carrying on business as Astral Media Radio G.P. (Astral), licensee of CFQX-FM and CKMM-FM Winnipeg.
7. Having examined the application, the interventions and the applicant's reply in light of applicable policies and regulations, the Commission considers that the issues to be determined are the following:
 - Has the licensee operated the station in compliance with its conditions of licence and the Regulations?
 - Is it appropriate under the circumstances to approve the proposed licence amendment?

Has the licensee operated the station in compliance with its conditions of licence and the Regulations?

Non-compliance with maximum category 2 music level

8. As noted above, monitoring of the station's programming for the week of 17-23 June 2007 revealed that the licensee may have failed to comply with its condition of licence relating to category 2 musical selections by exceeding the maximum level by 0.6% during the broadcast week examined. The Commission notes that since Newcap's acquisition of the station, Commission staff has discussed the categorization of category 3 versus category 2 selections extensively with the licensee and has been quite lenient in its assessment of CHNK-FM's category 3 selections. The determination that the licensee may have exceeded the maximum level by 0.6% was based on selections that, while calculated as category 3 music by Newcap, were clearly selections that met the definition of category 2 music. More specifically, the music at issue was drawn from category 2 subcategory 22 (Country and country-oriented). Accordingly, the Commission concludes that the licensee failed to comply with its condition of licence relating to the broadcast of category 2 musical selections.

Non-compliance with sections 8(5) and 8(6) of the Regulations

9. Sections 8(5) and 8(6) of the Regulations read as follows:
 8. (5) A licensee shall retain a clear and intelligible tape recording or other exact copy of all matter broadcast
 - (a) for four weeks from the date of the broadcast; or
 - (b) where the Commission receives a complaint from any person regarding the matter broadcast or for any other reason wishes to investigate it and so notifies the licensee before the expiration of the period referred to in paragraph (a), for eight weeks from the date of the broadcast.

8. (6) Where, before the expiry of the applicable period referred to in subsection (5), the Commission requests from the licensee a clear and intelligible tape recording or other exact copy of matter broadcast, the licensee shall furnish it to the Commission forthwith.
10. As noted above, a monitoring of the broadcast week of 17-23 June 2007 revealed that there were 8 hours of missing programming on the logger tapes. Access to proper logger tapes is extremely important since it allows the Commission to monitor programming broadcast by the station and investigate the station's compliance with its conditions of licence and the Regulations, as well as any complaints. The furnishing of complete and accurate logger tapes is a fundamental responsibility of the licensee.
11. Newcap stated that this non-compliance occurred due to human error. In order to ensure future compliance, the licensee indicated that it would retain all audio files for the dates requested by the Commission until their assessment is complete. Furthermore, it stated that the Program Director would inspect all such files before they were sent to the Commission for analysis to ensure that all the audio files were included.

Non-compliance with CTD obligations

12. Broadcasting Decision 2002-225 specifies the CTD amounts to be allocated by the station and the parties to which these amounts are to be directed by condition of licence. The Commission notes shortfalls in these payments for the broadcast years 2003, 2004, 2005 and 2006 amounting to \$16,965. In addition, while the current licensee allocated the overall amount (\$77,000) required by condition of licence over the licence term, the Commission notes that it did not direct all its expenditures to the specific initiatives set out in its condition of licence for the years mentioned above as well as for broadcast years 2007 through 2009.
13. To ensure compliance with conditions of licence regarding CTD contributions, licensees are required to make complete payments on an annual basis of the required amounts to the parties specified in their respective conditions of licence. The Commission has since departed from this approach by allowing licensees to allocate contributions to any parties or initiatives approved as eligible for Canadian content development (CCD) funding. Such contributions are based on the licensee's revenues and made pursuant to the Regulations. However, as set out in Broadcasting Public Notice 2008-67, where the licensee's current condition of licence specifies the initiative to which the contribution is to be made, the licensee must contribute to that initiative. Accordingly, in cases where the condition is more explicit, if the licensee wishes to contribute to another initiative, it has to file an application with the Commission to amend its condition of licence to this effect.
14. The Commission notes that while the station was under different ownership at the time of the CTD non-compliance for the 2003, 2004 and 2005 broadcast years, Newcap is fully responsible for the way the payments were allocated from 2006 to 2009 under its operation. Additionally, as part of any due diligence, the Commission considers that it

was Newcap's responsibility to verify the state of the station it was acquiring, including its adherence to its conditions. Accordingly, the Commission finds that the licensee was in non-compliance with its condition of licence relating to CTD contributions in the licence term at issue.

Conclusion

15. As per Circular No. 444, in cases where a licensee is found in non-compliance for the first time, the Commission normally grants a short-term renewal of four years in order to permit a further review of its compliance within a reasonable period of time. Accordingly, in light of all of the above, the Commission **renews** the broadcasting licence for CHNK-FM Winnipeg from 1 June 2010 to 31 August 2013, i.e. four years from the original expiry date of 31 August 2009. The terms and **conditions of licence** are set out in the appendix to this decision. This short-term renewal will permit the Commission to review at an earlier date the licensee's compliance with its condition of licence relating to the broadcast of category 2 musical selections, as well as sections 8(5), 8(6) and 15 of the Regulations relating to the provision of complete logger tapes and contributions to CCD.

Is it appropriate under the circumstances to approve the proposed licence amendment?

Interventions and applicant's reply

16. Stillwater opposed Newcap's request to delete the condition that requires CHNK-FM to broadcast in the specialty format. It submitted that category 3 music was barely broadcast during prime time and that consequently the station's performance has nothing to do with this condition. It added that it was troubled by the logger tape issue and the amount of time it took the licensee to notice the problem. In conclusion, Stillwater submitted that three options were available to Newcap:
- continue to operate the station in the specialty format with a requirement from the Commission for even distribution of category 3 music;
 - sell the station; or
 - return the licence to the Commission.
17. For its part, Astral indicated that approval of Newcap's request would mean that CHNK-FM would enter in direct competition with other existing mainstream commercial radio stations in the market. It submitted that the amendments requested by Newcap were not appropriate for the following reasons:
- the Winnipeg market cannot sustain another mainstream commercial radio station at this time;
 - Newcap's request is contrary to the Commission's rationale for the station's licensing in 2002, namely to increase the diversity of radio programming in the market without creating direct competition with existing commercial stations; and

- the introduction of additional direct competition with mainstream commercial stations would be inconsistent with the recent analysis of the Winnipeg market following the licensing of new radio stations in the market in August 2008.²

18. In its reply to the interventions, Newcap indicated that it had inherited the following problems when it purchased the station:

- a very poor signal and equipment;
- requirements for CTD that had not been met; and
- a station essentially operated by volunteers and whose quality of programming was poor.

19. Newcap stated that it had since made substantial investments to upgrade the station, corrected all the CTD deficiencies and now provided significant community news and services, where before they were virtually non-existent. It also stated that the market remained a profitable market and had weathered the recession better than many other markets. Finally, Newcap argued that it had made efforts to improve the financial situation of the station by modifying programming within the parameters of its specialty condition of licence but had been unable to achieve profitability in the highly competitive Winnipeg radio market.

Commission's analysis and determination

20. The Commission acknowledges the investment and improvements that the licensee has made to the station. However, it remains gravely concerned with the number of non-compliances that occurred during this first licence term. The Commission notes that its policy allows licensees to apply for amendments to their conditions at any time and that such applications are dealt with on a case-by-case basis. However, in cases where the licensee is found in non-compliance with its conditions of licence and/or the Regulations, it is the Commission's general practice to deny such requests. The Commission is not convinced that an exception to this practice is warranted in this case. Accordingly, the Commission **denies** the licensee's request to delete the conditions of licence associated with CHNK-FM's operation as a specialty format station.
21. Given the diversity of its category 3 music offering, the Commission expects the licensee to ensure that this category 3 music is reasonably distributed throughout the broadcast week, particularly between 6 a.m. and 6 p.m. Monday to Friday.
22. The Commission reminds the licensee that it must fulfill all of the benefit commitments set out in Broadcasting Decision 2005-554, in which the Commission approved an application by Newcap for authorization to transfer the effective control of CKVN Radiolink System Inc. to Newcap. The Commission expects the licensee to file a report at the conclusion of the benefits period setting out the details concerning how it has fulfilled its commitments.

² See Broadcasting Decision 2008-195.

Employment equity

23. Because this licensee is subject to the *Employment Equity Act* and files reports concerning employment equity with the Department of Human Resources and Skills Development Canada, its employment equity practices are not examined by the Commission.

Secretary General

Related documents

- Broadcasting Notice of Consultation CRTC 2009-793, 21 December 2009
- *Administrative renewals*, Broadcasting Decision CRTC 2009-785, 17 December 2009
- *Administrative renewals*, Broadcasting Decision CRTC 2009-506, 20 August 2009
- *Licensing of new radio stations to serve Winnipeg, Manitoba*, Broadcasting Decision CRTC 2008-195, 21 August 2008
- *Amendments to the Radio Regulations, 1986 – Implementation of the Commercial Radio Policy 2006 and the Digital Radio Policy – Regulatory Policy*, Broadcasting Public Notice CRTC 2008-67, 23 July 2008
- *Transfer of effective control*, Broadcasting Decision CRTC 2005-554, 4 November 2005
- *Application for a nostalgia radio station to serve Winnipeg*, Broadcasting Decision CRTC 2002-225, 8 August 2002
- *Practices regarding radio non-compliance*, Circular No. 444, 7 May 2001

**This decision is to be appended to the licence.*

Appendix to Broadcasting Decision CRTC 2010-321

Terms, conditions of licence and expectation

Terms

The licence will expire 31 August 2013.

Conditions of licence

1. The licence will be subject to the conditions set out in *Conditions of licence for commercial AM and FM radio stations*, Broadcasting Regulatory Policy CRTC 2009-62, 11 February 2009.
2. The licensee shall operate the station within the specialty format as defined in *A review of certain matters concerning radio*, Public Notice CRTC 1995-6, 21 April 1995, as amended in *Revised content categories and subcategories for radio*, Public Notice CRTC 2000-14, 28 January 2000, as amended from time to time.
3. The licensee shall ensure that no more than 60% of all musical selections broadcast during each broadcast week are selections drawn from category 2 (Popular Music).
4. The licensee shall, as an exception to the percentage of Canadian musical selections set out in sections 2.2(8) and 2.2(9) of the *Radio Regulations, 1986* (the Regulations):
 - a) in those periods of category 2 music consisting exclusively of music composed before 1956, devote a weekly average of 2% or more of its musical selections from content category 2 broadcast during those periods to Canadian selections broadcast in their entirety. The licensee shall identify those programming periods and the dates of composition of the music selections broadcast during those periods when requested by the Commission.
 - b) in those periods of category 2 music consisting of 90% or more but not exclusively, of music composed before 1956, devote a weekly average of 10% or more of its musical selections from content category 2 broadcast during those periods to Canadian selections broadcast in their entirety. The licensee shall identify those programming periods and the dates of composition of the music selections broadcast during those periods when requested by the Commission.

For the purposes of this condition, the terms “broadcast week,” “content category” and “musical selection” shall have the meaning set out in the Regulations.

Expectation

The Commission expects the licensee to ensure that it distributes the station's blend of a maximum of 60% category 2 musical selections and a minimum of 40% category 3 musical selections reasonably throughout the broadcast day and the broadcast week and in particular between 6 a.m. and 6 p.m. Monday to Friday.