



Broadcasting Decision CRTC 2010-533

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Ottawa, 30 July 2010

Pellpropco Inc.

St. Catharines, Ontario

Application 2010-0200-8, received 10 February 2010

Public Hearing in Toronto, Ontario

12 May 2010

CHSC St. Catharines – Non-renewal of licence

*The Commission **denies** the application to renew the broadcasting licence held by Pellpropco Inc. for CHSC St. Catharines.*

The application

1. The Commission received an application by Pellpropco Inc. (Pellpropco) to renew the broadcasting licence for the English-language commercial radio programming undertaking CHSC St. Catharines, which expires 31 August 2010. As part of its application, Pellpropco also requested that the Commission amend the broadcasting licence for CHSC by deleting the condition of licence requiring it to refrain from broadcasting any ethnic or third-language programming on CHSC between 6 a.m. and noon Monday to Friday.
2. The Commission received interventions in opposition to the application. The interventions and the applicant's reply can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Background

3. In Broadcasting Decision 2002-155, the Commission approved an application by Pellpropco for authority to acquire the assets of CHSC and for a broadcasting licence to continue the operation of this undertaking. In Broadcasting Decision 2003-388, the Commission renewed the broadcasting licence for CHSC from 1 September 2003 to 31 August 2010.
4. In Broadcasting Decision 2006-688, the Commission denied an application by Pellpropco to amend the licence for CHSC to authorize it to devote up to 40% of its programming to third-language programs on the basis of the Commission's general approach of denying licence amendments to licensees that are in non-compliance with their regulatory obligations. The decision noted the licensee's admitted non-compliance with the requirements of Public Notice 1999-117 (the Ethnic

Broadcasting Policy) and section 7(3) of the *Radio Regulations, 1986* (the Regulations), which states that non-ethnic commercial radio stations may not devote more than 15% of their schedules to third-language programming. The decision also noted Pellpropco's non-compliance with section 9(2) of the Regulations for its failure to file its annual return for the broadcast year ending 31 August 2005.

5. In addition to the non-compliance noted in Broadcasting Decision 2006-668, during CHSC's current licence term, monitoring of the station also found other instances of apparent non-compliance with numerous sections of the Regulations, including:
 - broadcasting less than the weekly Canadian content regulatory requirement for category 2 music (section 2.2(8));
 - exceeding the weekly maximum allowable level of third-language programming (section 7(3));
 - two instances of failing to provide complete logger tapes and complete program logs (sections 8(4), 8(5) and 8(6)); and
 - failing to provide complete financial statements and complete annual Canadian talent development (CTD)¹ expenditure reports for its annual returns for the broadcast years 2004-2005, 2005-2006 and 2006-2007 (section 9(2)).
6. The Commission also received complaints alleging that since 2006 Pellpropco had reoriented CHSC's programming to serve Toronto's Italian-speaking community rather than the market it is licensed to serve, St. Catharines.
7. In light of the complaints and admitted and apparent non-compliance, in Broadcasting Notice of Public Hearing 2008-14, the Commission called Pellpropco, five years into its licence term, to a public hearing in Orillia (the Orillia hearing) to show cause why a mandatory order requiring it to conform to the Regulations relating to Canadian content, the broadcasting of third-language programming, the filing of complete annual returns and the provision of logger tapes, program logs and music lists should not be issued. The Commission also indicated that it might wish to discuss certain local programming issues, including the extent to which the local programming content and programming orientation provided on CHSC are of direct and particular relevance to St. Catharines. The Commission also signalled the possibility of imposing a new condition of licence relating to the licensee's broadcast of local programming content and its programming orientation.
8. Following the Orillia hearing and in light of its findings relating to the licensee's multiple infractions of the Regulations, the Commission issued in Broadcasting Decision 2009-391 mandatory orders directing the licensee to comply at all times with the requirements set out in sections 2.2(8), 7(3), 8(4), 8(5), 8(6) and 9(2) of the

¹ The Commission notes that for the years in question Pellpropco was subject to a condition of licence relating to its CTD contributions. The Commission further notes that, effective 1 September 2008, the Regulations were amended in order to implement the new Canadian content development (CCD) contribution regime set out in Broadcasting Public Notice 2006-158.

Regulations. The Commission also imposed additional conditions of licence pertaining to the broadcast of ethnic and third-language programming between 6 a.m. and noon from Monday to Friday and the provision of English-language news on weekends. Finally, the Commission directed Pellpropco to file a complete annual return for the 2007-2008 broadcast year and audited financial statements for the broadcast years 2004-2005, 2005-2006, 2006-2007 and 2007-2008 by 30 November 2009, as well as to file proof of payment for the CTD shortfall for each of the broadcast years 2006-2007 and 2007-2008 with the Commission by 31 August 2009.

9. As part of Broadcasting Decision 2009-391, the Commission reminded the licensee that it would monitor its performance closely for the remainder of its current licence term and would review its performance as part of its licence renewal, at which time, the Commission noted, “it may consider recourse to additional measures, including short-term renewal, suspension, non-renewal or revocation of the licence, if Pellpropco again breaches the Regulations or any conditions of CHSC’s licence.”
10. In Broadcasting Notice of Consultation 2010-146, the Commission called Pellpropco to appear before it in relation to its renewal application (the Toronto hearing), noting that the licensee may have again failed to comply with the Regulations as well as its conditions of licence and mandatory orders as they relate to:
 - its condition of licence to broadcast a minimum of 20 minutes of English-language news content each Saturday and each Sunday, of which 50% each day must be of direct and particular relevance to listeners in the St. Catharines and Niagara region;²
 - section 9(2) of the Regulations and Mandatory Order 2009-395 regarding the filing of annual returns; and
 - section 9(4) the Regulations regarding the filing of information requested by the Commission, namely audited financial statements for the broadcast years 2004-2005, 2005-2006, 2006-2007 and 2007-2008 and proof of payment for the CTD shortfall for the broadcast years 2006-2007 and 2007-2008.
11. The Commission notes that due to the licensee’s failure to file proof of payment for the CTD shortfall for the broadcast years 2006-2007 and 2007-2008, it was unable to assess prior to the hearing whether the licensee was in compliance with its condition of licence relating to payment of its CTD obligations.
12. In view of the licensee’s apparent continued non-compliance, the Commission indicated that it would discuss these issues with the licensee at the hearing as part of its application to renew the broadcasting licence for CHSC. The Commission also stated that it wished to clarify certain programming and technical issues related to the operation of CHSC, including its programming service to the residents of

² For the purpose of this condition, the Commission defined news content as spoken word content that meets the Commission’s subcategory 11 News definition, as set out in the appendix to Public Notice 2000-14.

St. Catharines, its transmission facilities and the status of CHSC's studio facilities in the St. Catharines market.

13. The licensee was put on notice both prior to and at the Toronto hearing that a number of measures were open to the Commission and that the onus was on the licensee to convince the Commission that such measures were not warranted. Specifically, in Broadcasting Notice of Consultation 2010-146, the Commission reminded the licensee that it might consider recourse to additional measures, including short-term renewal, suspension, non-renewal or revocation of the licence pursuant to sections 9 and 24 of the *Broadcasting Act* (the Act). At the Toronto hearing, the licensee was further advised of the possible outcomes of the hearing by the Commission on two separate occasions, when it noted that it expected the licensee to show cause why mandatory orders should not be issued and why the Commission should not consider recourse to the above-noted additional measures. The Commission also reminded the licensee that the onus was on it to show cause why its licence should continue.

Non-compliance

English-language news content

14. In Broadcasting Decision 2009-391, the Commission found that the licensee did not maintain a clear programming orientation toward the market it was licensed to serve. Moreover, the Commission found that the lack of English-language news content represented a serious deficiency in the programming of the station. In order to address these concerns, the Commission imposed a condition of licence requiring that the licensee broadcast a minimum of 20 minutes of English-language news content on each Saturday and each Sunday, of which 50% must be of direct and particular relevance to listeners in the St. Catharines and Niagara region.
15. Subsequent to the imposition of this condition of licence, the programming of CHSC was monitored for the broadcast week of 20 to 26 September 2009. It was found that on both Sunday, 20 September 2009, and on Saturday, 26 September 2009, the licensee failed to provide the required amount of English-language news programming. When questioned at the Toronto hearing regarding this deficiency, the licensee indicated that its regular English-language news announcer was ill during this period and clearly indicated this to be the case for Sunday, 20 September 2009; however, the licensee was unable to clearly identify what had happened on Saturday, 26 September 2009. The licensee also indicated that it had since ensured that three English-language news announcers had been put in place and that two individuals employed by the station were charged with ensuring that the news broadcast by the station was reflective of the St. Catharines and Niagara region.
16. The Commission has indicated that the provision of locally oriented and relevant spoken word content is a crucial component in the evaluation of whether a station is providing a satisfactory level of local service. The Commission also notes that in Broadcasting Decision 2009-391, it had identified the lack of English-language news

programming during the weekends, including local reflection, as a serious deficiency on the licensee's part.

17. In light of the above, the Commission finds that the licensee is in non-compliance with its condition of licence regarding English-language news.

Filing of annual returns

18. Section 9(2) of the Regulations specifies that:

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.

19. In Broadcasting Decision 2009-391, the Commission noted the licensee's ongoing non-compliance with this section of the Regulations, including the failure to file complete annual returns and to file such returns on a timely basis. The Commission concluded that this repeated non-compliance and the licensee's inability to provide requested information was a serious area of non-compliance and expressed concern that the procedures and systems that the licensee had put in place at the time might be insufficient. Accordingly, the Commission imposed a mandatory order requiring the licensee to comply with section 9(2) of the Regulations and further directed it to file its 2007-2008 annual return by 30 November 2009.
20. In the context of the current proceeding, the Commission notes that the licensee has again failed to adhere to section 9(2) of the Regulations and Mandatory Order 2009-395, by filing its 2007-2008 and 2008-2009 annual returns on 4 February 2010 and then only after being repeatedly reminded by Commission staff.
21. The Commission notes that timely compliance with reporting requirements is important because it allows the Commission to monitor licensee performance and compliance with its regulations and obligations, as well as to gather statistics for assessing the industry and preparing monitoring reports on which the industry relies.
22. At the Toronto hearing, counsel for the licensee assured the Commission that steps had been taken to ensure that this non-compliance does not happen again. In particular, counsel for the licensee stated that "an Outlook calendar" has a "reminder set two months in advance that the annual returns will be due." The Commission is not convinced that this most recent measure will be sufficient to address a situation of non-compliance which has persisted since 2004 and of which the licensee has been warned in two separate Commission decisions. In light of all of the above, the Commission finds Pellpropco to be in continued non-compliance with section 9(2) of the Regulations, as well as Broadcasting Mandatory Order 2009-395.

Section 9(4) of the Regulations

23. At the Orillia hearing, the Commission questioned the licensee concerning its inability to provide complete annual returns including financial statements. At that

time, the Commission was assured that the licensee's accountant was diligently working on retrieving previous financial records. The Commission also noted that non-compliance in this regard had recurred and asked the licensee if it would adhere to a condition of licence that would have it file "audited financial statements with the Commission from now on." The licensee accepted this condition of licence without debate. Although the licensee indicated at the Orillia hearing that there had been damage to the roof at the station's studio in St. Catharines some time in 2008, at no time did the licensee indicate that anything would impede its ability to file audited financial statements.

24. In Broadcasting Decision 2009-391, the Commission directed the licensee to file audited financial statements for the broadcast years 2004-2005, 2005-2006, 2006-2007 and 2007-2008 by 30 November 2009. The Commission noted with concern that the licensee provided unaudited financial statements for those broadcast years despite assuring the Commission at the Orillia hearing that it would provide audited financial statements by 2 March 2009.
25. The licensee did not file these audited financial statements as directed by the Commission, nor did it apply for relief from the above-noted direction.
26. When questioned about the reasons for this non-compliance, the licensee indicated that this failure was due to the loss of necessary documents as a result of what it described as a flood which it indicated had occurred in May 2008 at the station's premises. The Commission notes that it has not received any documentation attesting to this flood.
27. While the Commission notes that the licensee indicated that its financial records are now maintained in a fire- and flood-proof storage area, the Commission is of the view that compliance with its regulations could have been assured with some preventive measures.
28. The Commission finds that the licensee is in non-compliance with section 9(4) of the Regulations as it relates to the direction by the Commission to file audited financial statements. The Commission remains very concerned by the licensee's continued disregard for Commission directions and requirements.

Canadian content development

29. In Broadcasting Decision 2009-391, the Commission noted that subsequent to the Orillia hearing, it discovered that the licensee failed to fulfill the entirety of its CTD obligations for the 2006-2007 and 2007-2008 broadcast years. The licensee was directed to file proof of the shortfall payment by no later than 31 August 2009.
30. The Commission did not receive proof of this payment on the date required and was only presented with a form of proof at the Toronto hearing via a letter from the Boys & Girls Club of Niagara dated May 2010 attesting to a contribution of \$9,500 for the purchase of musical instruments. It is not clear from the letter when the contribution was actually received.

31. The licensee explained that its failure to make full CTD payments for these years was due to some confusion over changes to the CTD/CCD regime in 2006³ and their effective date. The licensee stated that it believed itself to be in compliance until it was notified by Commission staff that deficiencies remained. The licensee indicated that its accountant now had the expertise to ensure its compliance in this regard.
32. The Commission notes that the licensee was put on notice of above-noted shortfalls by letter dated 24 April 2009. The Commission further reminded the licensee of this situation and directed it to file proof of payments in Broadcasting Decision 2009-391. As a result, the Commission is not convinced that the licensee was unaware of its CTD shortfall. Even if the Commission were to accept this argument and accept that payment was made in May 2010, it notes that the licensee still did not attempt to bring itself into compliance with its CTD obligations for several months after being notified of the deficiencies. Finally, the Commission notes that it is the licensee's responsibility to ensure that it understands its CTD obligations and that such payments are made in a timely manner.
33. Accordingly, the Commission finds the licensee in non-compliance with section 9(2) of the Regulations regarding the filing of complete annual returns, which is to include proof of CTD payments. The Commission also finds the licensee in non-compliance with section 9(4) of the Regulations requiring the licensee to comply with requests for information from the Commission (in this case, the filing of proof of CTD shortfall payments by 31 August 2009), as well as with its condition of licence requiring it to make specific annual contributions to CTD, as these payments were made late.

Regulatory action

34. In its examination of the licensee's understanding of and seriousness with which it takes its responsibilities, the Commission has considered and taken into account the licensee's reaction and response to complaints and alleged non-compliance both in writing and at the hearing. The Commission considers that the reactions and responses given by Pellpropco over the course of the licence term call into question the credibility of the licensee as regards its commitment to its regulatory obligations.

Unconvincing explanations

35. With respect to the instances of non-compliance over the licence term, the Commission is not convinced by the licensee's explanations for the various deficiencies and considers the explanations offered in most cases insufficient for justifying the licensee's non-compliance.
36. For example, with respect to the weekend news broadcast, the Commission notes the licensee's claim that despite being aware of the requirement to broadcast 20 minutes of news, the weekend news person was suddenly sick on the Sunday of the broadcast week that the Commission monitored the station and went home. While the

³ See note 1.

Commission acknowledges that these things can happen, no clear explanation was given as to why there was no news broadcast the following Saturday or why a backup person was not available to fill in given the events of the previous weekend. Where non-compliance occurs, the Commission expects licensees to take corrective measures as soon as possible to ensure ongoing compliance. Whatever the reason, given the non-compliance on the previous Sunday, the Commission considers that a licensee that takes its responsibilities seriously would have taken steps to ensure that a back-up was in place for the following Saturday.

37. With respect to the filing of annual returns and audited financial statements, the licensee alleged that it is was late filing the returns and unable to provide audited financial statements, despite its promise to do so at the Orillia hearing, due to the loss of documents in a flood at its studio premises in May 2008. The licensee was only able to provide an approximate date and no evidence that such a flood occurred. It also provided no evidence to refute the information provided by interveners that no flood occurred and that the licensee was, in fact, as corroborated by publicly available information, evicted from the premises.

Last-minute action

38. With respect to its actions to bring itself into compliance, the Commission notes that many such actions were taken only with repeated pressure from Commission staff and at the outset of the public hearings themselves. As noted above, timely compliance is important for a number of reasons. The Commission also considers it an interesting coincidence that the licensee would work so hard at the last minute on two separate occasions to appear to be bringing itself into compliance when it has disregarded its regulatory obligations leading up to that point.
39. For example, despite the Regulations, mandatory order and Commission direction in Broadcasting Decision 2009-391 that it file its annual returns for the broadcast years 2007-2008 and 2008-2009 by 30 November 2009, Pellpropco did not do so until 4 February 2010 and only after Commission staff actively sought this information in preparation for the Toronto hearing. As well, the filing of proof of CTD shortfall payments was only received at the time of the Toronto hearing, despite repeated requests from Commission staff and promises by the licensee that payment had been made prior to that time. The Commission notes the extra resources required to pursue non-compliance of this nature. Had it not been for the efforts of Commission staff and the looming deadline for the hearing, the Commission is not convinced that it would have received the annual returns or CTD confirmation from the licensee voluntarily.
40. A further example of the licensee's last-minute actions is its response to concerns raised in Broadcasting Notice of Consultation 2010-146 regarding CHSC's place in and ability to represent the St. Catharines area and in particular the status of CHSC's studio facilities in St. Catharines. Since 2008, CHSC has been without studios in St. Catharines, despite repeated promises that it intends to set them up as soon as possible. At the time of both the Orillia and Toronto hearings, the licensee had no physical studio presence in St. Catharines, the market it is licensed to serve. At the

Compliance going forward

41. In addition to its belated efforts to bring itself into compliance, the licensee's proposed measures for remedying the current instances of non-compliance, which were discussed at the Toronto hearing, also seem to have been devised at the last minute, leaving the Commission unconvinced as to their effectiveness and the sincerity of the licensee's willingness and ability to implement them. Based on the licensee's track record, the Commission suspects that the licensee is merely paying lip service to its obligations in an effort to retain its licence and is not serious about bringing itself into compliance.
42. The Commission notes as a particular example that the licensee had made promises regarding the filing of annual returns and other reporting requirements at the Orillia hearing. However, it is clear from the fact that the annual returns were again late for the 2008-2009 broadcast year that these measures were insufficient. Beyond creating a notification system, the licensee did not propose any further changes to its processes which would convince the Commission that this situation is likely to change in the future. The Commission further wonders why a notification system was not put in place in 2006 when the licensee was formally advised through a decision of this issue.
43. In addition, many of the licensee's promises regarding future compliance with other matters hinged on additional staff and financial resources. The Commission notes that much of this staff appears to have been hired at the last minute prior to the Toronto hearing, seemingly for the purpose of the licensee's appearing to have worked to bring itself into compliance. The Commission has concerns as to whether the licensee is serious about and has the means to maintain this staff and therefore its commitments with respect to its regulatory obligations. In particular, the Commission notes a trend of declining revenues and declining staff salaries, as well as declining programming expenses as a function of total expenses and of total revenue. The Commission also notes the difficulties the licensee has had previously in retaining staff, as evidenced by the comments of the interveners as well as the licensee's own admission at the Toronto hearing that at least two of the employees identified in its submission were no longer employees. The Commission is not persuaded by the evidence submitted by the licensee that it would be able to sufficiently increase its revenues or be able to retain staff to meet its regulatory obligations going forward.
44. Of additional concern to the Commission as regards the licensee's commitment to compliance going forward is the fact that neither of the owners of the licensee, who are ultimately responsible for compliance, appeared at the Toronto hearing.

Commitment to licensed area

45. In terms of the licensee's commitment to serving St. Catharines, the Commission notes the concerns raised by interveners regarding local reflection. In addition to the issues noted above regarding the lack of studio premises in St. Catharines, the Commission is concerned that the licensee's request to remove the condition of licence relating to ethnic programming would allow it to revert to programming which does not fulfill the needs of the market it is licensed to serve but rather targets listeners outside of that market, as was discussed in Broadcasting Decision 2009-391. While the licensee argued that this condition of licence devalues its station, the request to remove it raises concerns with the Commission that the licensee is not committed to serving the market it is licensed to serve, as well as questions about the licensee's intentions to provide a service that is relevant to St. Catharines. The licensee's lack of commitment to St. Catharines appears to be compounded by its inability to abide by its condition of licence to provide locally relevant English-language news programming on weekends as described above.

Conclusion

46. Pellpropco has shown a history of repeated non-compliance and disregard for its regulatory obligations since acquiring CHSC in 2002. The Commission considers that, under the same circumstances of being denied a licence amendment due to non-compliance and of being called to a mandatory hearing mid-licence, a responsible licensee would have understood the seriousness of its situation and the Commission's warnings at that time, seized the opportunity to rectify the situation and taken all necessary steps to do so as quickly as possible. However, Pellpropco has taken the opposite course of action, committing repeated and further acts of non-compliance and taking steps to bring itself into compliance only after intervention by Commission staff and at the outset of the public hearing itself. In fact, the licensee's explanations for non-compliance, steps toward compliance and proposed remedies seem to have been made in haste, leaving the Commission unconvinced as to the seriousness with which the licensee takes its regulatory obligations, as well as its ability and willingness to bring the station into compliance.

47. Under the circumstances, the Commission is not convinced that the licensee has the ability and capacity to put its house in order and, generally, to operate its station responsibly and to fulfil its regulatory obligations and conditions of licence. The Commission notes that at the Toronto hearing, counsel for the licensee stated that the licensee's representative at the hearing, Mr. Domenic Pellegrino, has now taken the opportunity to "read through all of the Regulations, all of the legislation and the policies that the Commission has and a number of the notices." The Commission finds it regrettable that the licensee apparently put off its responsibilities in this regard until 2010 despite the fact that it took possession of the station in 2002. Further, the Commission is gravely concerned with the repeated and wilful non-compliance that Pellpropco has demonstrated. The Act declares that radio frequencies are public property. The Commission is seriously concerned when a licensee does not serve the locality, market or region it is licensed to serve. By the licensee's non-compliance,

the Commission considers that Pellpropco has failed to fulfill its obligations to listeners in St. Catharines.

48. As noted above, the Commission ensured that Pellpropco had numerous warnings regarding the possible consequences of its non-compliance and opportunity to remedy the situation. However, the repeated non-compliance and attitude of the licensee in regards to its regulatory obligations leads the Commission to conclude that these warnings went substantially unheeded and that the licensee is unlikely to bring itself into compliance.
49. The Commission has reviewed the various measures it may adopt to ensure that broadcasting licensees meet their obligations where it finds that they are in non-compliance, such as short-term renewal, suspension and non-renewal. In this instance, it is clear that the licensee is not complying with a mandatory order and a condition of licence that were imposed only a year ago, and the licensee's approach to its regulatory obligations over the course of its licence term leaves the Commission with no reason to believe that it would comply with either its present obligations or new ones if it were granted even a short-term renewal. The Commission is similarly not convinced that a suspension would be effective as there is no evidence to suggest that the licensee would not revert to its present practices. In light of all of the above, the Commission is of the view that non-renewal is the only appropriate measure in this case.
50. Accordingly, the Commission **denies** the application to renew the broadcasting licence held by Pellpropco Inc. for CHSC St. Catharines. Accordingly, the licensee must cease broadcasting by no later than the end of the broadcast day on 31 August 2010. In light of the decision not to renew, there is no need to deal with the request to amend the licence.

Secretary General

Related documents

- Broadcasting Notice of Consultation CRTC 2010-146, 12 March 2010
- *CHSC St. Catharines – Issuance of mandatory orders*, Broadcasting Decision CRTC 2009-391 and Broadcasting Orders CRTC 2009-392 to 2009-395, 30 June 2009
- Broadcasting Notice of Public Hearing CRTC 2008-14, 13 November 2008
- *CHSC St. Catharines – Licence amendment*, Broadcasting Decision CRTC 2006-688, 21 December 2006
- *CHSC St. Catharines – Licence renewal*, Broadcasting Decision CRTC 2003-388, 11 August 2003

- *CHSC St. Catharines – Acquisition of assets*, Broadcasting Decision CRTC 2002-155, 19 June 2002
- *Revised content categories and subcategories for radio*, Public Notice CRTC 2000-14, 28 January 2000
- *Ethnic broadcasting policy*, Public Notice CRTC 1999-117, 16 July 1999