



Broadcasting Decision CRTC 2010-570

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Ottawa, 12 August 2010

Média de Novo Inc.
Across Canada

Application 2008-0203-4, received 5 February 2008

Proposal to insert advertising in local availabilities

*The Commission **denies** an application by Média de Novo Inc. for a broadcasting licence to operate a national English-language programming undertaking that would permit it to sell commercial advertising for insertion in the local availabilities of non-Canadian programming services and over advertisements on Canadian stations distributed in distant markets.*

The Commission finds that the applicant has not demonstrated that its proposal would provide sufficient benefits to warrant departure from the Commission's current policy on local availabilities or that its service should be licensed as a Category A programming service.

Introduction

1. Local availabilities are periods of time within the programming of non-Canadian services where broadcasting distribution undertakings (BDUs) may insert announcements or promotions, as per negotiated agreements between those BDUs and the programming services in question.
2. The Commission's current policy governing the use of local availabilities by Canadian BDUs was first articulated in Decision 95-12, modified in Broadcasting Public Notice 2006-69 and recently reiterated in Broadcasting Regulatory Policy 2010-189. The Commission's policy is intended to ensure that local availabilities are used for the benefit of the Canadian broadcasting system and primarily to promote Canadian programming services rather than for the direct financial benefit of any party.
3. Under this policy, BDUs are authorized to make use of local availabilities in accordance with the general authorization set out in Broadcasting Regulatory Policy 2009-546. This authorization provides that:
 - at least 75% of local availabilities must be made available for use by licensed Canadian programming services for the promotion of their respective services,

for the promotion of a community channel and for unpaid Canadian public service announcements; and

- a maximum of 25% of local availabilities may be used to provide subscribers with information regarding customer service and channel realignments, and for the promotion of discretionary programming services and packages, cable FM service, additional cable outlets and non-programming services, including Internet and telephone services.
4. BDUs are not permitted to sell and insert commercial advertising in local availabilities.
 5. Over the years, there has been recurrent interest in using local availabilities for the insertion of commercial advertising. In Broadcasting Decision 2007-169, the Commission denied an application by Only Imagine Inc. to insert advertising in local availabilities because, among other things, such use would constitute an inappropriate intrusion on the rights of BDUs negotiated in agreements with non-Canadian services. More recently, in Broadcasting Regulatory Policy 2010-189, the Commission rejected a framework for the sale of commercial advertising by BDUs for insertion in the local availabilities of non-Canadian programming services. In Broadcasting Regulatory Policy 2010-189, the Commission indicated that it would place significant emphasis on accelerating the development of new forms of advertising when examining any future applications with respect to the sale of commercial advertising for insertion in local availabilities.
 6. Média de Novo Inc. (MdN) filed an application for a broadcasting licence to operate a national English-language Category A programming undertaking that would permit it to sell commercial advertising and insert advertising in the local availabilities of non-Canadian programming services and over advertisements on Canadian stations distributed in distant markets. This application was received prior to the issuance of Broadcasting Regulatory Policy 2010-189. As a result, the Commission invited MdN to update the current application to address the matters noted in that policy.
 7. MdN proposed to direct 70% of the revenues derived from the sale of commercial advertising in local availabilities to a new fund that it would establish. Money from this fund would then be directed to fund programming initiatives of licensed private Canadian programming undertakings and advanced media research activities. The applicant further proposed that the Commission permit it to use some portion of those funds to offset the capital costs of expanding its proposed targeted advertising capabilities.
 8. To implement its service, MdN proposed that the Média de Novo Network Operations Centre (NOC) would format, schedule and distribute all commercial programming material to each BDU's head-end system where the actual insertion of the commercials would occur. MdN also proposed to make the system neighborhood-specific over time by gradually connecting 150 insertion points across the country, as

well as eventually implementing direct-to-viewer targeted advertising through set-top box (STB) applications.

9. MdN submitted that approval of its application would generate a substantial net benefit for the Canadian broadcasting system through additional funding for licensed private Canadian programming undertakings and for advanced media research activities. Furthermore, MdN argued that approval of its application would encourage the development of new forms of advertising, since MdN's proposed service was designed to offer a new form of advertising to clients.
10. The applicant submitted that its proposed service would create a permanent annual funding stream estimated at \$285 million over 7 years to support private Canadian programming undertakings, as well as an estimated \$2.85 million over 7 years to support new forward-looking research.
11. MdN also stated that its service would not have the same negative impact on broadcasters as the framework that was rejected by the Commission in Broadcasting Regulatory Policy 2010-189. This is because MdN would not use local availabilities for local advertising, but rather committed to sell to national advertisers only.
12. With regard to its proposal to insert promotions over advertisements on Canadian stations distributed in distant markets, MdN argued that it could help reduce the negative impact that distant signal importation has on local television stations. MdN was of the view that its proposal would provide local broadcasters with a way to reduce the negative impact of viewing to distant signals by offering broadcasters the possibility of negotiating extra payments from advertisers. MdN submitted that advertisers on a broadcaster's local service currently pay only for the broadcaster's local audience, but receive exposure to the distant audience without paying any additional fees. However, if local broadcasters were given the opportunity to insert programming promotions over their commercial advertising when their stations are distributed in distant markets, MdN argued that these stations would be in a position to charge extra fees to advertisers who want their commercials broadcast in those distant markets. The broadcasters would therefore be able to monetize the distant audiences to their signals in a manner that is currently not possible.

Position of parties

13. The Commission received interventions in support of this application from advertisers, media buyers, producers, and individuals. The Commission also received interventions in opposition, mainly from BDUs, Canadian programming services and U.S. programming services, as well as a number of comments by various parties. The complete record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
14. Parties supporting the application argued that MdN's proposal represents a good opportunity to establish a responsible and non-disruptive funding solution for Canadian broadcasters, with no added cost or inconvenience to viewers. They also

supported the idea that access to local availabilities would repatriate some of the Canadian viewing lost to non-Canadian programming.

15. Advertising agencies and media buyers also submitted that the applicant's proposal to put in place the required technology to implement new forms of advertising, i.e. the use of multiple nodes, would give advertisers the ability to target their messages on a truly local basis. They added that the direct-to-viewer advertising contemplated by MdN would be of interest to advertisers.
16. Canadian broadcasters opposing the application argued that MdN's proposal would introduce a large amount of new advertising inventory to the English-language television market, which would have a detrimental impact on broadcasters. They stated that the new advertising inventory would not "grow the advertising pie," but would merely redistribute the advertising revenues currently available in the Canadian broadcasting system thereby reducing the advertising revenues of Canadian broadcasters. Broadcasters also believed that MdN's proposal to insert programming promotions over advertisements on Canadian stations distributed in distant markets was unnecessary and did not constitute a viable solution to the distant signal issue in Canada.
17. Canadian BDUs were of the view that approval of this application would allow the applicant to intrude on the property and contractual rights of third parties (BDUs and U.S. programming services) and could potentially cause U.S. programming services to prohibit the use of local availabilities by Canadian distributors.
18. A number of non-Canadian programming services indicated that they would not permit a party not contractually bound to them to alter or curtail their signals.
19. Finally, other parties were of the view that MdN should not be licensed as a programming undertaking, since its service would not be create or broadcast any Canadian content, but would rather simply insert advertising in existing programming services.

Commission's analysis and determinations

20. The Commission finds that the issues to be determined in this proceeding are as follows:
 - Would the proposed service provide sufficient benefits to justify a departure from the Commission's current policy on local availabilities?
 - Is it appropriate to licence MdN's proposal as a Category A service?

Would the proposed service provide sufficient benefits to justify departure from the Commission's current policy on local availabilities?

21. In order to allow MdN to sell and insert commercial advertising into the local availabilities of non-Canadian programming services, the Commission would need to modify its current policy on local availabilities. As mentioned earlier, in Broadcasting Regulatory Policy 2010-189, the Commission rejected a proposed framework for the sale of commercial advertising by BDUs for insertion in local availabilities of non-Canadian programming services and decided to retain its current policy.
22. The Commission rejected the proposed framework primarily because it was concerned that approval could lead to a reduction in the revenues of conventional television stations at a time when they are operating under severe financial constraints. The Commission also concluded that a net benefit to the Canadian broadcasting system from permitting the sale of advertising for insertion in local availabilities had not been sufficiently demonstrated. The Commission added that it continued to be of the view that new forms of advertising have the potential to provide substantial benefits to both broadcasters and distributors and that accelerating their development would benefit the Canadian broadcasting system as a whole. With respect to this last point, the Commission announced that it would, in its examination of any future applications with respect to the sale of commercial advertising for insertion in local availabilities, place significant emphasis on the degree to which the proposals put forward would advance or accelerate the evolution of new forms of advertising.

Impact on Canadian broadcasters

23. The Commission is concerned that it is not clear what proportion of the revenues generated by the sale of commercial advertising in local availabilities under MdN's proposal would be derived from the advertising revenues of other players in the broadcasting system, such as conventional television broadcasters, specialty services and radio broadcasters.
24. In Broadcasting Regulatory Policy 2010-189, the Commission concluded that some of the revenues obtained through the sale of advertising for insertion in local availabilities would be derived from advertising revenues currently earned by broadcasters. A change in the Commission's policy to allow the sale of advertising for insertion in local availabilities would therefore have at least some negative impact on the advertising revenues currently earned by broadcasters. MdN has not provided sufficient evidence to demonstrate that its service would not have such a negative impact.
25. In addition, there are a number of uncertainties contained in MdN's proposal that make it difficult to ascertain the value of the financial contribution that MdN would be able to make to the Canadian broadcasting system. First, MdN recognized that its revenues could potentially be reduced if BDUs were to elect not to make use of local availabilities or if some U.S. cable services were to cease offering BDUs the rights to make use of local availabilities as a result of its proposal. Since the consent of U.S.

programming services is essential to use local availabilities and some U.S. programming services have stated that they would not permit a party not contractually bound to them to alter or curtail their signals as would be the case under MdN's proposal, the Commission is of the view that MdN has not demonstrated that it would be able to access all of the local availabilities it proposes. This casts doubt on the accuracy of its projected revenues. Second, MdN proposed that the Commission permit it to use some portion of its 70% contribution to offset the capital costs of expanding its targeted advertising capabilities but has not specified the exact levels that it seeks to offset. It is not clear what impact this would have on MdN's proposed financial contributions. In light of these uncertainties, the Commission is not in a position to conclude that MdN's proposed annual stream of funding would offset the potential negative financial impact that the sale of advertising in local availabilities could have on broadcasters.

26. The Commission remains concerned about any decrease in advertising revenues for conventional broadcasters at this time given the severe financial constraints under which such broadcasters currently operate. In light of this and all of the above, the Commission considers that approval of the application could have an unacceptable negative impact on the advertising revenues of Canadian broadcasters.

New forms of advertising

27. With respect to the development of new forms of advertising, Rogers Communications Inc. (Rogers) and Shaw Communications Inc. (Shaw) submitted that they are currently developing new advanced forms of advertising, including interactive and addressable advertising. Therefore, Rogers and Shaw argued that they in a better position than MdN to foster the growth of new forms of advertising.
28. The Commission notes that MdN has provided little detail regarding its business plan and the costs that it would incur to implement and operate its targeted advertising system. MdN's proposal to implement direct-to-viewer targeted advertising through STB applications and Internet Protocol stream insertion also seems to rely considerably on the evolution of the STB market. Since MdN has not provided evidence that it is currently working in conjunction with STB manufacturers, the Commission is concerned that the applicant's proposed timeframe might be based more on assumption than on fact.
29. Accordingly, due to the uncertainty and lack of detailed information surrounding this aspect of the application, the Commission cannot conclude that MdN's service would accelerate the move to new forms of advertising.

Distant signals

30. The Commission notes that no broadcaster supported MdN's proposal to insert promotions over advertisements on Canadian stations distributed in distant markets. Most mentioned that such an arrangement could be negotiated directly between a broadcaster and a BDU, without the intervention of a third party such as MdN.

31. While such arrangements may produce some potential benefits to the broadcasting system, the Commission considers that MdN has neither demonstrated these benefits nor shown that its involvement in the distant market issue is in any way necessary to achieve them.

Is it appropriate to license Média de Novo's Inc.'s proposal as a Category A service?

32. The implementation of MdN's proposed service would require the Commission to grant the applicant guaranteed access to BDUs' head-ends through a Category A programming service licence. MdN would then be able to format, schedule and distribute the commercial programming material to each BDU, who would be compelled to insert such material over the local availabilities of U.S. programming services if the BDU wished to make use of local availabilities.
33. In Broadcasting Decision 2007-169, the Commission noted that the affiliation agreements between Canadian distributors and U.S. programming services convey rights to BDUs to use local availabilities without conveying ownership of them. The Commission then concluded that taking away the current contractual right for the use of local availabilities and reassigning this right to a third party through regulatory action would constitute an unduly intrusive regulatory measure.
34. MdN argued that approval of its application would only amount to the Commission prescribing a different use of local availabilities to BDUs, not imposing intrusive regulatory measures, since BDUs would still have the choice of whether or not to use local availabilities in such a manner. However, the Commission considers that granting MdN guaranteed access through a Category A licence would indeed be unduly intrusive since BDUs could not exploit the negotiated rights to use local availabilities without the involvement of MdN. These negotiated rights belong to BDUs, and the Commission is not prepared to interfere with these rights by imposing the involvement of a third party.
35. Some parties argued that MdN should not qualify as a Category A service, or even as a programming undertaking, since its content would be comprised entirely of advertisements and the service would not have any Canadian content obligations or any Canadian program expenditure requirements.
36. The Commission notes that, although advertising is programming under the *Broadcasting Act*, it normally grants licences to programming undertakings that propose to produce, acquire or broadcast Canadian and other programming. Such programming typically consists of material drawn from categories recognized by the Commission presented often, but not always, in conjunction with advertising.
37. Moreover, in Public Notice 2000-6, the Commission stated that Category A services (called Category 1 services at the time) should make a strong contribution to the development, diversity and distribution of Canadian programming. In providing such a contribution, Category A services have been required to make specific commitments to produce, purchase and exhibit Canadian programming. MdN made no commitment in this regard.

38. Additionally, in Broadcasting Public Notice 2008-100, the Commission noted that, in order to be granted guaranteed access, applicants for new Category A services would have to clearly demonstrate that the proposed service is both unique and of sufficient importance to subscribers.
39. MdN acknowledged that its service would not meet the requirements that the Commission has established for Category A services in the same manner as other currently licensed Category A services. It stated that its contribution to the development, diversity and distribution of Canadian programming would be achieved by injecting substantial funding for these very purposes into the broadcasting system.
40. However, the Commission is of the view that there are a number of ways in which each licensee must fulfill their requirements to contribute to the Canadian broadcasting system, and that financial contribution alone is not a sufficient means to achieve the objectives of the *Broadcasting Act*.
41. Additionally, the Commission notes that it recently announced, in Broadcasting Information Bulletin 2010-198, that it would not consider applications for new Category A services before October 2011.
42. In light of the above, the Commission will not grant MdN's request to be licensed as a Category A service.

Conclusion

43. Based on all of the foregoing, the Commission **denies** the application by Média de Novo Inc. for a broadcasting licence to operate a national English-language programming undertaking that would permit it to sell commercial advertising and insert advertising in the local availabilities of non-Canadian programming services and over advertisements on Canadian stations distributed in distant markets.
44. Nonetheless, in the event the Commission were to change its policy regarding the sale of commercial advertising for insertion in local availabilities in the future, nothing would preclude MdN from offering its services as an aggregator of advertising material to Canadian BDUs that might wish to insert commercial advertising in local availabilities under any such new policy. Such an arrangement would not require the Commission's intervention.

Secretary General

Related documents

- *Amendment to the timeframe for consideration of new Category A services*, Broadcasting Information Bulletin CRTC 2010-198, 31 March 2010
- *Commercial advertising in the local availabilities of non-Canadian services*, Broadcasting Regulatory Policy CRTC 2010-189, 29 March 2010

- *General authorizations for broadcasting distribution undertakings*, Broadcasting Regulatory Policy CRTC 2009-546, 31 August 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Regulatory Policy, Broadcasting Public Notice CRTC 2008-100, 30 October 2008
- *Proposal to sell commercial advertising and insert it into the local availabilities of U.S. programming services distributed by Canadian broadcasting distribution undertakings*, Broadcasting Decision CRTC 2007-169, 8 June 2007
- *Promotion of non-programming services using local availabilities*, Broadcasting Public Notice CRTC 2006-69, 2 June 2006
- *Licensing framework policy for new digital pay and specialty services*, Broadcasting Public Notice CRTC 2000-6, 13 January 2000
- *Proposal to insert certain promotional material in the local availabilities of U.S. satellite services*, Decision CRTC 95-12, 18 January 1995