



Broadcasting Decision CRTC 2006-384

Ottawa, 21 August 2006

Discovery Health Channel Canada ULC Across Canada

*Application 2006-0005-8
Broadcasting Public Notice CRTC 2006-33
16 March 2006*

Discovery Health Channel -- Licence amendments

*The Commission **approves** an application to amend the broadcasting licence for the national, English-language Category 1 specialty service known as Discovery Health Channel, in order to reduce the minimum percentage of the broadcast day and of the evening broadcast period that must be devoted to the exhibition of Canadian programs from the current levels of 65%, respectively, to 35%, respectively, and to reduce the minimum amount that the licensee must expend on Canadian programs from 51% of the previous broadcast year's gross revenues to 20% of those revenues.*

Background

1. The Commission originally authorized the operation of the national, English-language Category 1 specialty programming undertaking known as Discovery Health Channel (formerly known as Health Network Canada) in *Health Network Canada – a new specialty channel*, Decision CRTC 2000-461, 24 November and 14 December 2000 (Decision 2000-461). By condition of licence, Discovery Health Channel's nature of service is to provide a service "devoted entirely to useful, practical, reliable and entertaining programming related to health." The service commenced operation in September 2001.
2. Discovery Health Channel Canada ULC, the licensee of Discovery Health Channel, is owned by Alliance Atlantis Broadcasting Inc. (Alliance Atlantis) (80%) and by the U.S. company, Discovery Communications Inc. (20%).
3. Discovery Health Channel was licensed in the context of the Commission's digital licensing framework 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). Consistent with that licensing framework, the Commission imposed conditions of licence requiring the licensee to abide by its commitments to the exhibition of, and expenditures on, Canadian programming. Specifically, the Commission required the licensee to devote the following minimum percentages of the broadcast day and of the evening broadcast period to the exhibition of Canadian programs: 60% in the first year of operation; 63% in each of years two, three and four; 65% in each of years five and six; and 70% in year

seven. Since Discovery Health Channel is presently in its fifth year of operation, the licensee must currently devote 65% of the broadcast day and 65% of the evening broadcast period to the exhibition of Canadian programs. The Commission also required that, in each broadcast year following the first year of operation, the licensee must expend on Canadian programs a minimum of 51% of the previous broadcast year's gross advertising, infomercial and subscription revenues (gross revenues).

The application

4. The Commission received an application by Discovery Health Channel Canada ULC to amend the broadcasting licence for Discovery Health Channel, in order to reduce the minimum percentage of the broadcast day and of the evening broadcast period that must be devoted to the exhibition of Canadian programs from the current levels to 35% of the broadcast day and 35% of the evening broadcast period for the remainder of the licence term. The licensee also requested a reduction in its minimum requirements for Canadian programming expenditures (CPE) from the current level of 51% of the previous broadcast year's gross revenues to 20% of those revenues for the remainder of the licence term.
5. In support of its application, the licensee stated that it has already purchased all the Canadian health programming available to it, and submitted that it is experiencing significant difficulties in obtaining more Canadian programming in that genre. The licensee stated that it had contacted the major Canadian distributors of health programming and found that only 120 hours of Canadian health programming have been produced since 2003 with only 23 of those hours available for acquisition. It also indicated that, since February 2005, it has received 91 screening tapes representing 352 hours of programming and that only 15 of those tapes were Canadian, representing 37 hours of programming. According to the licensee, its difficulties in acquiring Canadian health programming are compounded by the short shelf-life of such programming arising from the unique nature of health information that must be current to reflect new medical findings and breakthroughs.
6. The licensee argued that it has invested substantially in the production of Canadian health programming in order to be able to fulfil its condition of licence for the exhibition of Canadian programming. In addition, the licensee claimed that the cost of Canadian health programming is increasing because audiences expect high quality productions. It added that Discovery Health Channel broadcasts more hours of original Canadian programming than any other Alliance Atlantis digital specialty service.
7. While the licensee maintained that it did not overestimate the size of the digital universe in its original licence application, it stated that its subscriber revenues are less than half the level it had originally anticipated, and that advertising revenues are only one-quarter of its initial projections. It stated that, given its substantial programming costs and lower than expected revenues, in its fifth year of operation, it has already expended all of its

CPE requirement for the seven year licence term. The licensee contended that, given the challenges that Discovery Health Channel faces, it would not be able to achieve financial viability under its current conditions of licence for the exhibition of, and expenditures on, Canadian programming.

8. As part of the application process, the Commission asked the licensee to comment on a condition of licence requiring that it devote 50% of the broadcast day and 50% of the evening broadcast period to the exhibition of Canadian programs.
9. In response, the licensee maintained that such a condition, in conjunction with its current CPE condition requiring 51% of the previous broadcast year's gross revenues, would not enable Discovery Health Channel to deal with its unique challenges. The licensee also argued that, under those conditions of licence, Discovery Health Channel would never be able to achieve a positive operating profit margin and consequently would not be viable in the long term.
10. In view of the fact that the proposed Canadian content levels were considerably lower than those contemplated for Category 1 services in Public Notice 2000-6 and ultimately imposed on the Category 1 services licensed in 2000, the Commission also asked the licensee to comment on why Discovery Health Channel should continue to receive the benefits of a Category 1 licence, which include genre protection and mandatory distribution by Class 1 and Class 2 broadcasting distribution undertakings (BDUs) and direct-to-home (DTH) satellite BDUs.
11. In response, the licensee stated that it has done everything in its power to make Discovery Health Channel a success. The licensee contended that Discovery Health Channel continues to merit its status as a Category 1 service because of the unique nature of health programming and because it has fulfilled its conditions of licence and complied with the terms for Category 1 services set out in *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000, and Public Notice CRTC 2000-171-1, 6 March 2001. However, the licensee indicated its willingness to forfeit the benefits of a Category 1 licence if the Commission were to grant Discovery Health Channel a licence to operate as a Category 2 service.

Interventions

12. Most of the interventions that the Commission received in connection with this application were by independent producers who supported the proposed licence amendments. These interveners acknowledged that it was unusual for independent producers to support reductions in the exhibition of, and expenditures on, Canadian programming. However, they noted the unique challenges of health programming and expressed the view that the proposed licence amendments were appropriate in light of Discovery Health Channel's past performance as well as Alliance Atlantis' general record as the parent company of many successful Canadian specialty services. These

interveners also contended that it would be more beneficial to the Canadian broadcasting system for Discovery Health Channel to continue as a viable service than for it to cease operations.

13. Independent producers, PTV Productions Inc. (PTV) and Joe Media Group (JMG), supported the licensee's proposal to reduce its requirements for the exhibition of Canadian programs but opposed the proposed reduction in the CPE requirement. PTV submitted that the licensee should be required to maintain its current CPE requirement. For its part, JMG argued that the licensee should be required to expend a minimum of 25% of the previous broadcast year's gross revenues on Canadian programming. JMG also recommended that the Commission conduct a detailed review of any licence amendments in the context of Discovery Health Channel's licence renewal.
14. The Canadian Film and Television Production Association (CFTPA) opposed the proposed licence amendments on the grounds that the conditions of licence were based on commitments made by the licensee in its original licence application as part of a highly competitive licensing process. The CFTPA emphasized the importance of a licensee's commitments to the exhibition of, and expenditures on, Canadian programming. In addition, the CFTPA claimed that the proposed licence amendments were not warranted because Discovery Health Channel's parent company, Alliance Atlantis, is prosperous and should be able to support the service through its first licence term. The CFTPA added that, given that Discovery Health Channel's licence will expire in 2007, it would be more appropriate to consider the service's "future direction" in the context of its licence renewal.
15. In its intervention, CanWest MediaWorks Inc. (CanWest), which is involved in various specialty broadcasting undertakings including the English-language Category 1 services Men TV and Mystery, indicated that it neither supported nor opposed the application. However, CanWest submitted that the application raises policy issues that are common to all English-language Category 1 services and that the Commission should therefore consider the proposed licence amendments in the context of its review of television policy¹ or of its consideration of the licence renewals for all digital specialty services expiring in August 2007. CanWest suggested that either of those proceedings would provide the Commission with a venue to re-evaluate the higher regulatory obligations that are imposed on Category 1 services as well as whether Category 1 services should be granted the option to file applications to be licensed as Category 2 services.

Licensee's reply

16. In its reply to all the interventions, the licensee stated that Discovery Health Channel is operated by a partnership made up of Alliance Atlantis and Discovery Communications Inc. and that this partnership has a fiduciary responsibility to its shareholders. For this reason, the licensee maintained that Alliance Atlantis' financial situation is not directly

¹ In *Review of certain aspects of the regulatory framework for over-the-air television*, Broadcasting Notice of Public Hearing CRTC 2006-5, 12 June 2006, the Commission announced that it will hold a public hearing commencing 27 November 2006 in the National Capital Region to review certain aspects of the regulatory framework for over-the-air television.

relevant to Discovery Health Channel's business realities. The licensee further noted that the Commission regulates specialty services on a case-by-case basis, establishing obligations based on the programming genre in question and the availability of Canadian programming in that genre. The licensee reiterated that Discovery Health Channel faces unique challenges in acquiring Canadian health programming because of the constantly changing nature of health information and emphasized that it has made every effort possible to fulfil its conditions of licence.

17. The licensee acknowledged that the challenges associated with fulfilling higher requirements for the exhibition of, and expenditures on, Canadian programming expenditures are common to all Category 1 services. Nevertheless, the licensee maintained that Discovery Health Channel's unique circumstances warrant consideration on their own merits in the context of the present application process.

Commission's analysis and determination

18. Under the licensing framework established in Public Notice 2000-6, the Commission determined that Category 1 services would be a limited number of specialty services that would make a strong contribution to the development, diversity and exhibition of Canadian programs. In return, Category 1 services would be granted protection from direct competition from other services, including new Category 2 services and foreign services, as well as guaranteed access to digital carriage by Class 1 and Class 2 BDUs and DTH satellite undertakings. At the same time, the Commission determined that it would license Category 2 services on a more open-entry basis, that Category 2 services would be subject to lower Canadian content requirements² and not subject to any requirements for CPE, but that they would not be granted genre protection or assured access to digital carriage.
19. Following a highly-competitive public process, the Commission, in December 2000, approved sixteen English-language and five French-language Category 1 services as well as 262 bilingual, English-, French- and third-language Category 2 services. Since then, the Commission approved many more Category 2 services.
20. The Commission recognizes the importance of a broadcasting undertaking's commitments to the exhibition of, and expenditures on, Canadian programming, particularly those made in the context of a competitive licensing process. At the same time, the Commission has taken a case-by-case approach in determining the Canadian programming requirements for specialty services, including Category 1 services, taking into consideration the nature of the service and the unique circumstances of the programming genre in question.

² English- and French-language Category 2 services must devote the following percentages of the broadcast day and the evening broadcast period to Canadian programs: 15% in the first year of operation; 25% in the second year; and 35% in the third year and each subsequent year. Ethnic Category 2 services must devote 15% of the broadcast day and of the evening broadcast period to Canadian programs.

21. In the present case, the Commission notes that Discovery Health Channel's Canadian content requirements, currently 65% overall and 65% of the evening broadcast period increasing to 70% for the same periods in the seventh year of operation, and its CPE requirement, namely 51% of the previous broadcast year's gross revenues, are among the highest requirements of all English-language Category 1 services. The Commission is persuaded by the licensee's arguments that the availability of Canadian health programming is limited because of the constantly evolving nature of health information, and that Discovery Health Channel is experiencing significant difficulties in acquiring enough Canadian health programming to fulfil its Canadian content conditions of licence. Consequently, during the current licence term, the licensee expended substantial money to develop or commission Canadian health programming. In fact, the licensee exceeded its CPE requirement in each broadcast year between 2003 and 2005 and, based on its current projections for 2006, is expected to exceed its entire CPE requirement for the current licence term.
22. The Commission also notes that the actual number of subscribers to Discovery Health Channel's digital service is substantially lower than what was projected in the licensee's original licence application and that the lower level of subscribers has had a proportionate negative impact on the licensee's advertising revenues. As result of the lower than expected subscriber and advertising revenues and the need to expend more than expected on Canadian health programming, Discovery Health Channel incurred substantial operating losses in its first five years of operation, leading to a negative impact on its financial viability. In this regard, the Commission notes that Discovery Health Channel's profit before interest and tax margin in 2005 was -98%, the second lowest of all English-language Category 1 services.
23. Based on its examination of the record of this proceeding, including the views expressed by the interveners, the Commission concludes that, in the circumstances, a reduction in Discovery Health Channel's requirements for the exhibition of Canadian programming is warranted for the remainder of the current licence term in order to allow the licensee to improve its profitability and to continue operation of the service. Furthermore, the Commission notes that the licensee is expected to exceed its current CPE requirement by the end of 2006. Accordingly, the Commission is satisfied that the proposed reduction in the licensee's CPE requirement for the remainder of the licence term is appropriate.
24. In light of all of the above, the Commission **approves** the application by Discovery Health Channel Canada ULC to amend the broadcasting licence for Discovery Health Channel, in order to reduce the minimum percentage of the broadcast day and of the evening broadcast period that must be devoted to the exhibition of Canadian programs to 35% of the broadcast day and 35% of the evening broadcast period for the remainder of the licence term, and to reduce the minimum amount that the licensee must expend on Canadian programs to 20% of previous broadcast year's gross revenue. Accordingly, the

Commission replaces Discovery Health Channel's current conditions of licence nos. 2 and 3 with the **conditions of licence** set out in the appendix to this decision. The Commission will review these conditions of licence at the time it considers the renewal of Discovery Health Channel's licence, which expires 31 August 2009³.

25. The Commission also intends to review the licensing framework for Category 1 services in the context of the review of the regulatory framework for discretionary services announced for 2007 to 2008 in *CRTC 3-Year Work Plan 2006-2009*, 28 April 2006, and as set out in *Administrative licence renewals*, Broadcasting Decision CRTC 2006-319, 28 July 2006.

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>

³ In *Administrative licence renewals*, Broadcasting Decision CRTC 2006-319, 28 July 2006, the Commission renewed the licence for Discovery Health Channel as well as the licences for various other specialty and pay services, expiring in 2007 or 2008, until 31 August 2009.

Appendix to Broadcasting Decision CRTC 2006-384

Amended conditions of licence for Discovery Health Channel

Exhibition of Canadian programs

2. (a) In each broadcast year or portion thereof, the licensee shall devote to the exhibition of Canadian programs the following percentages of the broadcast day and the evening broadcast period:

Year of operation	Broadcast year	Broadcast day	Evening broadcast period
Year one	1 September 2001 to 31 August 2002	60%	60%
Year two	1 September 2002 to 31 August 2003	63%	63%
Year three	1 September 2003 to 31 August 2004	63%	63%
Year four	1 September 2004 to 31 August 2005	63%	63%
Year five	1 September 2005 to 31 August 2006	65%	65%

- (b) In the broadcast year beginning 1 September 2006 and in each subsequent broadcast year, the licensee shall devote not less than 35% of the broadcast day and not less than 35% of the evening broadcast period to the exhibition of Canadian programs.

Expenditures on Canadian programs

3. In accordance with the Commission's position on Canadian programming expenditures as set out in *New Flexibility With Regard to Canadian Program Expenditures by Canadian Television Stations*, Public Notice CRTC 1992-28, 8 April 1992, in *The Reporting of Canadian Programming Expenditures*, Public Notice CRTC 1993-93, 22 June 1993, in *Additional clarification regarding the reporting of Canadian programming expenditures*, Public Notice CRTC 1993-174, 10 December 1993, except as amended below:
- (a) In each broadcast year following the first year of operation up until and including the broadcast year ending 31 August 2006, the licensee shall expend on Canadian programs not less than 51% of the previous broadcast year's gross advertising, infomercial and subscription revenues.

- (b) In the broadcast year beginning 1 September 2006 and in each subsequent broadcast year, the licensee shall expend on Canadian programs not less than 20% of the previous broadcast year's gross advertising, infomercial and subscription revenues.
- (c) In each broadcast year of the licence term following the first year of operation, excluding the final year, the licensee may expend an amount on Canadian programs that is up to ten percent (10%) less than the minimum required expenditure for that year calculated in accordance with this condition; in such case, the licensee shall expend in the next year of the licence term, in addition to the minimum required expenditure for that year, the full amount of the previous year's under-expenditure.
- (d) In each broadcast year following the first year of operation, where the licensee expends an amount on Canadian programs that is greater than the minimum required expenditure for that year calculated in accordance with this condition, the licensee may deduct:
 - (i) from the minimum required expenditure for the next year of the licence term, an amount not exceeding the amount of the previous year's overexpenditure; and
 - (ii) from the minimum required expenditure for any subsequent broadcast year of the licence term, an amount not exceeding the difference between the over-expenditure and any amount deducted under (i) above.
- (e) Notwithstanding paragraphs (c) and (d) above, during the licence term, the licensee shall expend on Canadian programs, at a minimum, the total of the minimum required expenditures calculated in accordance with the licensee's condition of licence.

Definition

The term "broadcast day" shall have the same meaning as that set out in the *Television Broadcasting Regulations, 1987*.