



## Broadcasting Decision CRTC 2006-600

Ottawa, 20 October 2006

**Radio Nord Communications inc.**  
Québec, Quebec

*Application 2006-0576-9*  
*Public Hearing in Québec, Quebec*  
*11 September 2006*

### **French-language FM radio station in Québec**

*The Commission **approves** the application by Radio Nord Communications inc. for a broadcasting licence to carry on a French-language FM radio programming undertaking in Québec, Quebec. This approval is subject to the applicant meeting the conditions set out in this decision.*

### **Background**

1. In *CHOI-FM – Non-renewal of licence*, Broadcasting Decision CRTC 2004-271, 13 July 2004 (Decision 2004-271), the Commission denied the application by Genex Communications inc. (Genex) to renew the licence of its French-language commercial radio station CHOI-FM Québec, Quebec, operating on the 98.1 MHz frequency.
2. At the same time as it issued Decision 2004-271, the Commission issued Broadcasting Public Notice CRTC 2004-49 (the call), in which it invited the submission of applications for a broadcasting licence to carry on a French-language radio programming undertaking to serve Québec, Quebec.
3. On 26 August 2004, the Federal Court of Appeal (FCA) authorized Genex to continue operating CHOI-FM under the same terms and conditions as those specified in the licence then in effect, and directed the Commission to stay the call for applications for a new broadcasting licence to operate on the 98.1 MHz frequency in Québec. The stay was to remain in effect until the FCA rendered its final judgment on the merits in the matter of the appeal filed by Genex from Decision 2004-271.
4. On 14 September 2005, the Commission issued Broadcasting Public Notice CRTC 2004-49-1,<sup>1</sup> in which it announced that the call for applications would be restricted to those that proposed to use frequencies other than 98.1 MHz.

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<sup>1</sup> The applications received in response to the call, as amended, were heard at the 20 March 2006 public hearing announced in Broadcasting Notice of Public Hearing CRTC 2006-2, 19 January 2006. The Commission's decisions in connection with this hearing were released on 10 August 2006.

5. On 1 September 2005, the FCA dismissed the appeal by Genex and upheld Decision 2004-271.
6. On 23 September 2005, the FCA extended the period during which Genex was permitted to continue operating CHOI-FM under the same terms and conditions as those specified in its previous licence, and extended its order to stay the call for applications for use of the 98.1 MHz frequency, until such time as the Supreme Court of Canada rendered a decision on an application to be filed by Genex for leave to appeal the FCA decision of 1 September 2005.
7. On 31 October 2005, Genex filed an application with the Supreme Court of Canada for leave to appeal the FCA decision of 1 September 2005.
8. On 13 June 2006, Genex filed a motion with the Supreme Court of Canada requesting that its consideration of Genex's application for leave to appeal be adjourned for one year. Genex stated that it had entered into an agreement with Radio Nord Communications inc. (RNCI), under which RNCI would apply for a new licence to continue the operation of CHOI-FM. It added that RNCI had in fact filed such an application with the Commission, and submitted that a certain period of time was required to allow for consideration of the application at a public hearing.
9. On 29 June 2006, the Supreme Court of Canada agreed to adjourn, until 31 May 2007, its consideration of Genex's application for leave to appeal.

### **The application**

10. On 12 May 2006, the Commission received an application from RNCI for a broadcasting licence to carry on a French-language FM radio programming undertaking in Québec, with a view to continuing the operation of radio station CHOI-FM on the 98.1 MHz frequency (channel 251C1), with an effective radiated power of 40,000 watts. The applicant proposed to offer an alternative rock music format that would target an audience of young adults 18 to 34 years of age.
11. The applicant proposed that the station would focus on local content and provide 100% local programming. It would present a range of programming which would include 24.75 hours of spoken word and 11.25 additional hours of news per week. Of this amount of news programming, 80% would be local or regional. The applicant also proposed that the station would broadcast a daily phone-in program about current events in Québec.
12. When asked at the 11 September 2006 public hearing whether RNCI planned to implement internal policies, guidelines or other measures regarding the conduct of open-line programs, the applicant stated that it did not. However, the applicant made a commitment to develop a code of ethics concerning such programming and to file a copy of the code with the Commission within four days after the hearing.

13. RNCI emphasized that the news to be broadcast as part of CHOI-FM's programming would be distinct from that of its station CKNU-FM Donnacona, so as to effectively meet the needs of the two different target audiences. The CHOI-FM newsroom would also remain independent and have two full-time journalists.
14. RNCI proposed to contribute \$8,000 per year to the Canadian Association of Broadcasters' (CAB) plan for the development of Canadian talent. RNCI committed to contribute a further minimum annual amount of \$142,858 to other initiatives in support of Canadian talent development (CTD), beginning in its first year of operation, for a cumulative total of \$1,056,000 over seven years. Of the applicant's annual contributions to CTD, \$46,429 is to go to MusicAction and \$46,429 to Fonds Radio Star. In order to encourage and promote emerging artists, RNCI also proposed to contribute annual amounts of \$30,000 to the Québec International Summer Festival and \$20,000 to a contest sponsored by the station. RNCI indicated that it would accept a condition of licence requiring it to adhere to these commitments.
15. In the context of RNCI's application, Genex made a commitment to contribute \$813,000 to promote Canadian artists. This amount would be paid directly to the Fondation New Rock in order to continue the Qué-Rock project. The purpose of this project is to provide support to emerging musical groups and to fund the production of French-language vocal music in the alternative rock genre. Genex committed that this \$813,000 contribution would be made 48 hours before the date that the transaction closes, which is to occur no more than 30 days following the date of a favourable decision by the Commission.
16. When it appeared before the Commission, RNCI agreed to submit additional information about the creation and operation of the Fondation New Rock. More specifically, the applicant was to demonstrate the not-for-profit nature of this foundation, the amendments to its objects and its independence from Genex, including the procedures to be followed for appointing and replacing its directors.
17. When it appeared before the Commission, RNCI also confirmed that it was prepared to accept, as a precondition of the Commission's approval, a requirement that RNCI submit documents acceptable to the Commission confirming that the contribution of \$813,000 had been made and that the details of the commitment had been fulfilled.

## **Interventions**

18. The Commission received interventions supporting this application, as well as comments and interventions opposing it.
19. In its comments, the association representing the recording, performance, and video industry in Quebec, namely the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ), acknowledged that the current application presents a special case as it contains elements of both a new licence application and a transfer of ownership application. ADISQ considered that the Commission should thus impose certain of the requirements to which transfer of ownership applications are subject,

specifically the contribution of tangible benefits representing 6% of the value of the transaction, distributed in accordance with the criteria set out by the Commission in *Commercial Radio Policy 1998*, Public Notice CRTC 1998-41, 30 April 1998 (the commercial radio policy).

20. In addition, while accepting the \$56,000 over seven years that RNCI plans to contribute to MusicAction, ADISQ recommended that the \$1,000,000 balance of the applicant's proposed financial contribution to CTD be distributed as follows:
  - \$500,000 (50%) to Fonds Radio Star,
  - \$333,333 (33.3%) to MusicAction,
  - \$166,667 (16.7%) to other eligible projects.
21. With regard to the commitment by Genex to contribute \$813,000, ADISQ pointed out that, in 2002, that being the last time the CHOI-FM licence was renewed, the Commission stated that its current policy regarding contributions to the promotion of Canadian talent, set out in *Contributions by Radio Stations to Canadian Talent Development – A New Approach*, Public Notice CRTC 1995-196, 17 November 1995 (Public Notice 1995-196), did not permit it to approve, as direct contributions to an eligible third party, the financial contributions that Genex was proposing to make to the Qué-Rock project. Consequently, ADISQ recommended instead that the Genex contribution be distributed equally between MusicAction and Fonds Radio Star.
22. In its comments, Astral Media Radio inc. (Astral) stated that its intervention related neither to the parties to the current transaction nor to the nature of the commitments proposed by the applicant, but rather to the process that led to the filing of the application. According to Astral, this process did not comply with the practices and procedures generally recognized and accepted within the regulated industry, and raised new questions about the predictability of the regulatory framework to which all undertakings are, in principle, subject.
23. Astral submitted that this application was contrary to Commission's practice of inviting anyone to file an application following the non-renewal of a licence. Astral argued that the absence of such a call for applications has deprived the Commission of an opportunity to choose from among a range of proposals filed by a variety of parties, and to grant a licence based on the proposal that best meets the needs of the population of the Québec market.
24. Astral stated that, if Genex were to withdraw its application to the Supreme Court of Canada for leave to appeal the FCA decision, the public, the Commission and the regulated broadcasting industry would be deprived of the opportunity to obtain a decisive confirmation or denial, from the highest court in the land, of the Commission's authority to deny a licence renewal for the reasons set out in the case of CHOI-FM.

25. MBL Communication Média inc. (MBL) argued that if the Commission were to grant a new licence to RNCI without having issued a call for applications, it would be acting without jurisdiction, contrary to its procedures, its past decisions, the *Broadcasting Act* (the Act) and the most basic principles of natural justice and fairness. MBL referred to a legal opinion supporting this position.
26. MBL stated that assigning the 98.1 MHz frequency without a call for applications would deprive local interests of access to the last frequency with substantial regional coverage. MBL therefore asked the Commission not to grant a licence for the 98.1 MHz frequency without first issuing a call for applications to which all interested parties could respond, in accordance with its usual procedure.
27. During its appearance at the hearing, MBL also stated that one of the consequences of an approval would be to reduce cultural diversity in the programming offered to Québec residents. When questioned on this matter, MBL stressed that, if the Commission granted this frequency to RNCI, all the stations in Québec would belong to networks based outside that city. According to MBL, the only way to ensure a genuine local presence in a given region is to have some stations that are owned by people who live in that region.
28. In MBL's view, in approving the application, the Commission would be transferring CHOI-FM's licence which, it submitted, the Commission does not have the jurisdiction to do. MBL also submitted that the Commission can neither amend this licence nor decide on anything else whatsoever regarding this station, because it no longer has a licence.
29. According to MBL, the Act stipulates that a call for applications must be issued, and a subsequent public hearing must be held, whenever the Commission is seized of a matter related to the granting of a broadcasting licence.
30. MBL considered that the Commission's approval of an application in such circumstances would leave the impression that the Commission had chosen to grant a preference to one party to the detriment of all other potential applicants, contrary to the basic rules of natural justice.
31. Yves Sauvé reminded the Commission that he was one of the applicants for an FM licence to serve the Québec market heard at the public hearing of 20 March 2006 in Québec, and that the Commission had denied his application. Mr. Sauvé opposed the application by RNCI. He submitted that the amount of the transaction seemed unrealistic, but did not further substantiate this claim.
32. Communications Michel Mathieu (CMM) opposed the application, stating that the amount of \$9 million for equipment and other assets to be paid under the terms of the agreement between Genex and RNCI was clearly exaggerated.

33. According to CMM, it was clear that RNCI's application was a disguised sale of assets that would enable Genex to use the Act and Decision 2004-271 to its advantage. CMM considered that approval of the application would send a negative message regarding the Commission's rules and policies, which might encourage some broadcasters to neglect their obligations as licensees.
34. CMM argued that the FM frequency longest allotted for use in the Québec area should be granted to an independent broadcaster, in order to balance the current offerings in the Québec market.
35. CMM argued that approval of the application would be unfair to the applicants who participated in the 20 March 2006 hearing and who were denied a licence. CMM submitted that, if the Supreme Court of Canada were to uphold the Commission's decision with regard to the non-renewal of the licence for CHOI-FM, the Commission should then issue a call for applications.
36. Claude Thibodeau also submitted an intervention opposing the application. He strongly disapproved of what he described as an unprecedented and apparently illegal turn of events surrounding the application. Mr. Thibodeau stated that he was concerned about the Commission's motives and independence in this matter.
37. According to Mr. Thibodeau, respect for the Act compels the Commission to await the outcome of the Supreme Court of Canada proceedings and to govern itself by the results of those proceedings. Mr. Thibodeau was of the view that the Commission cannot, unilaterally, reassign the 98.1 MHz frequency to another party. Mr. Thibodeau also noted that the call for applications that had been issued for Québec was subsequently amended to exclude all proposals regarding the 98.1 MHz frequency.
38. In Mr. Thibodeau's view, the granting of any new licence for Québec must be the subject of a public process initiated by a call for competitive applications. He argued that the analysis of Commission precedents was clear in this regard, and referred to the Commission's decisions involving the withdrawal and reassignment of the licence for CJMF-FM in Québec in 1984 in this respect.

#### **Applicant's reply**

39. RNCI did not submit a written reply to the interventions received. In its oral reply at the hearing, however, it responded to certain of the concerns raised by the interveners, especially those related to the process chosen for dealing with its application.
40. Firstly, RNCI maintained that its application was for a new licence and not for the transfer of an existing licence. RNCI also pointed out that many things had happened and that circumstances had changed since the Commission's decision in 2004. It also noted that, over that period, the FCA had held that the Commission is the master of its own proceedings as it is expert in the industry that it regulates.

41. As regards the allegations that the approval of RNCI's application would deprive the Commission of the ability to choose from among proposals that might better meet the public's needs, the applicant noted that other interested parties could have approached Genex to enter into an agreement to continue operating an FM station on the 98.1 MHz frequency in Québec. RNCI added that certain interveners who opposed the current application had chosen not to take advantage of the opportunity afforded them by the Commission when it issued the call for applications for a new radio service in Québec in 2004. According to RNCI, there are still at least two good FM frequencies available for use to serve Québec.
42. RNCI pointed out that it does not operate a network and that, contrary to what had been asserted, the formats of its stations vary from market to market, and each station is a local station, which forms the very essence of their respective business plans.
43. RNCI stated that, by continuing with CHOI-FM's current format, it was maintaining cultural diversity in the Québec market. RNCI concluded by emphasizing the [TRANSLATION] "positive effect that its application would have on the system, as remarked upon by many interveners, including ADISQ."

### **Commission's analysis and determinations**

44. The Commission has considered all of the arguments presented by the applicant and the interveners with regard to the RNCI application.

### **Procedural issues**

45. In regard to the concerns expressed by certain interveners regarding the procedures followed by the Commission in this proceeding, the Commission notes that as an independent administrative tribunal, it has wide discretion as to its procedures, subject to its governing legislation and the rules of natural justice. In the case of the CRTC, in particular, all Commission decisions, including those dealing with matters of procedure, must be reached with a view to achieving the objectives of the Broadcasting Policy for Canada set out in the Act.
46. The Commission notes further that while section 18(1) of the Act requires that public hearings be held in connection with the issuance of licences, the Act does not require that the Commission issue general calls when it receives applications for new licences.
47. While the Commission often issues calls when it receives new applications, this is not always the case. Indeed, as indicated in the commercial radio policy, and as reiterated in *The Issuance of Calls for Radio Applications*, Public Notice CRTC 1999-111, 8 July 1999, the Commission applies its policy on calls for applications on a case-by-case basis, and will issue a call in those circumstances where it determines that a call is warranted.

48. In the present case, the Commission received an application from RNCI for a new licence to continue the operations of CHOI-FM. The Commission considered this application at a public hearing in accordance with the provisions of section 18(1) of the Act. At that hearing, all interveners were given an opportunity to provide the Commission with reasons why it should approve or deny RNCI's application as well to address any procedural issues they wished to raise.
49. Having heard and considered all arguments made by interveners in their written and oral submissions, the Commission has determined that, in light of the particular circumstances of the present case, it was and remains appropriate, and in the best interests of the achievement of the objectives of the Act to have considered the RNCI application without having issued a call for applications.

#### **The application**

50. As to the merits of the application, the Commission considers that the substantial investment in CTD that will result from the approval of RNCI's application, will provide significant benefits to French-language vocal artists, including emerging artists, to musicians in the Québec area and to the Canadian broadcasting system. The Commission notes that the contributions to CTD of close to \$2 million proposed in the context of RNCI's application would far exceed the \$8,000 per year required under current policies for stations operating in a market the size of Québec. A number of matters related to the applicant's CTD commitments are examined in greater detail in the following section of this decision.
51. Approval of the application will also ensure continuity of a radio service in Québec that adds musical diversity to the radio programming available to listeners in this market.
52. The Commission also notes that RCNI intends to retain the staff currently at the station, thereby preserving their employment.
53. In addition, the granting of a licence to RNCI to operate CHOI-FM will ensure preservation of the fragile balance in the Québec market described by the Commission in *Licensing of new radio stations and licence amendments for radio stations in the area of Québec, Quebec – Introduction to Broadcasting Decisions CRTC 2006-348 to 2006-351*, Broadcasting Public Notice CRTC 2006-101, 10 August 2006. The maintenance of this station in its current format will also serve to avoid disrupting the establishment of the three services recently authorized by the Commission following the public hearing of 20 March 2006.<sup>2</sup> It will also provide a measure of stability sought by current and potential advertisers in this market and will resolve some of the uncertainty created by the non-renewal of this station's licence under the previous operator, one the Commission had deemed, in Decision 2004-271, to be no longer capable of discharging the responsibilities of a broadcasting licensee.

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<sup>2</sup> Broadcasting Public Notice CRTC 2006-101 and Broadcasting Decisions CRTC 2006-348, 2006-349 and 2006-350.

54. In light of the foregoing, and subject to the conditions of approval and conditions of licence described below, the Commission **approves** the application submitted by Radio Nord Communications inc. for a broadcasting licence to carry on a French-language commercial FM radio programming undertaking to serve Québec on the frequency 98.1 MHz (channel 251C1) with an effective radiated power of 40,000 watts. The licence will expire on 31 August 2012.

**Conditions of approval and conditions of licence related to CTD**

55. The Commission considers it appropriate to incorporate the applicant's commitment to expend a total of \$1,056,000 on CTD over the licence term as set out in the application. Accordingly, the licence shall be subject to a **condition of licence** requiring that the licensee expend, in the course of each broadcast year, during the licence term \$150,858 in direct contributions distributed as follows:
- \$54,429 to MusicAction;
  - \$46,429 to Fonds Radio Star;
  - \$30,000 to the Québec International Summer Festival; and
  - \$20,000 to a competition for emerging artists.
56. As regards the commitment to contribute \$813,000 to Fondation New Rock prior to the closing of the proposed transaction, the Commission considers the amount to be appropriate, and will require, as a **condition of this approval** becoming effective, that RNCI file the documentary evidence demonstrating that the amount of \$813,000 has in fact been disbursed to the Fondation New Rock.
57. The Commission notes that the Fondation New Rock cannot be deemed an eligible third party within the meaning of Public Notice 1995-196. However, the Commission considers that a contribution in the amount of \$813,000 by Genex to the Fondation New Rock would qualify as an eligible, direct expenditure on CTD, in accordance with Appendix I of *An FM Policy for the Nineties*, Public Notice CRTC 1990-111, 17 December 1990 (Public Notice 1990-111), provided the foundation's objects are formally amended in the manner discussed at the hearing.
58. In keeping with its commitment at the public hearing, on 13 September 2006, RNCI filed documentation with the Commission pertaining to its request for supplementary letters patent that would amend the objects of the Fondation New Rock. The Commission is satisfied that the amendment of these objects will render them consistent with the mandate of the Fondation New Rock which, as described in Genex's commitment, is to promote emerging artists in the alternative rock music sector. The Commission has also received documentation demonstrating that the Fondation New Rock is a not-for-profit organization.

59. The Commission notes that the prospective directors of the Fondation New Rock are Charles Drouin, Claude Beaudoin and Raynald Brière. According to correspondence that RNCI filed with the Commission on 13 September 2006, the documentation regarding the procedures for the appointing the directors, which should ensure that the independence of the Board of Directors from Genex will be maintained, will be complete once the supplementary letters patent have been issued by the appropriate authorities.
60. Accordingly, it is a **condition of this approval** becoming effective that RNCI file documentary evidence demonstrating that:
- the Fondation New Rock is a not-for-profit organization;
  - the proposed amendment to the objects of the Fondation New Rock has been authorized by the appropriate authorities; and
  - the Fondation New Rock is independent of Genex, including independence with regard to the procedures for appointing and replacing its directors.
61. The Commission also notes that RNCI has made a commitment to file an annual report concerning the activities of the Fondation New Rock and has indicated that it would accept a condition of licence to that effect. Accordingly, the licence will be subject to the **condition** that, within three months following the end of each of the Fondation New Rock's fiscal years, the licensee shall file an annual report on the activities of the foundation, including, among other things, details of its revenues and expenditures, as well as details of the activities financed through the \$813,000 contributed as a result of this proceeding.
62. Finally, to the extent that the annual reports of the Fondation New Rock demonstrate that any part of the \$813,000 was not spent on projects that satisfy the policy requirements set out in Public Notice 1990-111 with respect to eligible, direct expenses on Canadian talent development, the licence will be subject to a **condition** requiring that equivalent expenditures on CTD be made to an eligible third party, within the meaning of *Contributions by Radio Stations to Canadian Talent Development – A New Approach*, Public Notice CRTC 1995-196, 17 November 1995.

**Other conditions of licence**

63. The licence shall be subject to the **conditions** set out in *New licence form for commercial radio stations*, Public Notice CRTC 1999-137, 24 August 1999, with the exception of condition of licence 5 regarding contributions to the CAB's Canadian talent development plan.

**Other conditions of approval**

64. In addition to the conditions of approval set out in paragraphs 56 and 60 above, the Commission requires as a **condition of this approval** becoming effective, that:

- the judicial authority under which Genex is currently operating CHOI-FM at the 98.1 MHz frequency ceases to be in effect.
- the licence fees payable under Part II of the *Broadcasting Licence Fee Regulations, 1997* in connection with the operation of CHOI-FM for the period ending 31 August 2006 be paid, as well as any other licence fees that might be due and payable under the *Broadcasting Licence Fee Regulations, 1997* for the operation of CHOI-FM for the period from 1 September 2006 to the date of issuance of the licence.

65. The Commission notes that, as the present approval ensures the continuity of the operations of CHOI-FM, the Commission will require that RNCI pay licence fees under Part I of the *Broadcasting Licence Fee Regulations, 1997* starting with RNCI's first year of operation of CHOI-FM. The Commission will make use of the financial data relating to the operation of CHOI-FM by Genex for the purpose of calculating these fees.

#### **Deadline for meeting the requirements of the conditions of approval**

66. This approval shall become null and void and the licence shall not be issued if the conditions set out in paragraphs 56, 60 and 64 above are not met within six months following the date of this decision, unless the Commission provides written authorization of an extension of the six-month period, upon a request by RNCI filed before the expiry of that six-month period.

#### **Open-line programming**

67. Pursuant to its commitment at the public hearing of 11 September 2006, RNCI has submitted a copy of its code of ethics governing open-line programming. In light of RNCI's undertaking to comply with this code and with the Commission's policy regarding open-line programming,<sup>3</sup> the Commission sees no need to require RNCI to comply with its code of ethics as a condition of licence.

#### **Employment equity**

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

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>*

<sup>3</sup> *Policy Regarding Open-Line Programming*, Public Notice CRTC 1988-213, 23 December 1988.

