Broadcasting Decision CRTC 2008-75

Ottawa, 3 April 2008

HDTV Networks Incorporated
Across Canada

Application 2006-1658-4, received 14 December 2006
Public Hearing in the National Capital Region
12 February 2008

National high definition over-the-air digital television service

The Commission ***denies*** *the application by HDTV Networks Incorporated for a broadcasting licence to operate a national, English-language high definition over-the-air digital television service.*

A dissenting opinion by Vice-Chairman of Telecommunications Len Katz is attached.

The application

1. The Commission received an application by HDTV Networks Incorporated (HDTV Networks) for a broadcasting licence to operate a national, English-language high definition (HD) over-the-air (OTA) digital television service, with transmitters in Vancouver, British Columbia, Calgary and Edmonton, Alberta, Winnipeg, Manitoba, Toronto and Ottawa, Ontario, Montréal, Quebec and Halifax, Nova Scotia.

2. The service would broadcast 100% HD programming originating from a Vancouver-based national broadcast centre, with facilities in the above-mentioned cities providing regional input into the national service. The regional programming would be limited to five hours per week of input into news programs. In its application, HDTV Networks initially stated that the service would not broadcast local programming, and that it would not solicit local advertising. However, at the public hearing, the applicant stated that it would be willing to provide 16 hours of local programming per week, and that this would not have a substantial impact on its business plan. This new proposal was based on the following assumptions:

   - the service would provide two hours of local programming per market per week; and

   - the local programming budget would be taken from its news and non-priority Canadian programming budgets, as tabled with the Commission at the public hearing.

3. HDTV Networks proposed to devote 126 hours each week to the broadcast of HD programming, and indicated that 60% of the programming broadcast between 6 a.m. and midnight, and 50% of the programming broadcasting between 6 p.m. and midnight, would be Canadian programming. The applicant further indicated that the service would broadcast three hours of priority programming per broadcast week for the first four years of the licence term, and would increase this amount to four hours per broadcast week for the following three years of the licence term. However, in reply to interventions to its application, HDTV Networks revised its proposal and increased its priority programming per broadcast week, commencing with an average of six hours per week for the first three years of operation, and increasing to eight hours per week in subsequent years.

4. The applicant proposed that its service be distributed by broadcasting distribution undertakings (BDUs) as follows:

- on the analog basic service of cable BDUs until the completion of the transition of analog services to "basic digital" and the removal of OTA Canadian television programming services from analog basic service to digital basic;

- in standard definition (SD) digital format on the basic service of cable BDUs and all-digital BDUs (digital subscriber line (DSL)-based and direct-to-home satellite BDUs) until such a period of time as the signals of other OTA Canadian broadcasters are distributed in HD; and

- in HD format[1] on the basic service of all-digital BDUs and the digital basic service of cable BDUs.

5. The Commission received numerous interventions in support of, as well as numerous comments on this application. The Commission also received several interventions opposing the application. Further materials were filed after the public hearing, and interested parties were given the opportunity to comment on those materials. The interventions and the replies to the interventions can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Commission's analysis and determinations

6. After examining the application, the interventions and the applicant's replies to the interventions, and after reviewing the material filed by HDTV Networks after the public hearing, the Commission considers that the primary issues relevant to its determinations relate, firstly, to the provision of local programming and, secondly, to the manner proposed by the applicant for the distribution of the service and the impact of the

[1] The Commission notes that it is the HD version of the signal that would be broadcast OTA. This HD version would therefore be the primary signal, i.e., the only signal that terrestrial BDUs would normally be required to distribute under the current regulatory framework. The applicant proposed to provide BDUs with a "direct feed" containing a down-graded SD version of its programming service that would be used to distribute the signal as part of their SD digital and analog services.

proposed distribution on the applicant’s business plan.

Provision of local programming

7. A number of interveners, including the Canadian Association of Broadcasters, CTVglobemedia Inc. (CTVgm), CanWest MediaWorks Inc. (now Canwest Media Inc.), Rogers Communications Inc. (Rogers) and Crossroads Television System, expressed concerns regarding the provision of local programming. These interveners submitted that, since the proposed service would not provide sufficient local programming, HDTV Networks did not merit being licensed as an OTA television broadcaster; that approval of the application would have a negative impact on the ability of existing local stations to continue to meet their programming commitments; and that it would be inappropriate to accord distribution of the service while existing stations must provide local programming in order for distribution by BDUs to be maintained.

8. In reply to these concerns, HDTV Networks submitted that its proposal not to provide significant amounts of local programming in each of the eight markets does not contravene the *Broadcasting Act* (the Act), and that it has accepted the price that a broadcaster must pay for foregoing local programming, that is, not being permitted to solicit local advertising in those markets.

9. The Commission notes that local and/or regional reflection have traditionally been the key elements in distinguishing conventional OTA television services from specialty services, and considers that OTA television services are the cornerstone for the provision of local programming. As noted above, the applicant did modify its proposal so as to provide two hours per week of local programming in each of the eight markets it proposed to serve. However, the Commission notes that the average amount of local programming provided by existing television stations in these markets is more than 22 hours per week. Therefore, the Commission is of the view that HDTV Networks’ revised local programming proposal would not be sufficient to serve the needs and interests of the markets it proposes to serve.

10. The Commission agrees with the submission of many interveners that HDTV Networks’ application amounted to a Canadian version of the American “Superstation” concept. The Commission has not accepted a model of national distribution without significant local programming content as being appropriate for Canada as it is inconsistent with the Commission’s overall OTA policy. It would be untenable and fundamentally unfair to allow HDTV Networks to be relieved of the local content obligation (or accept a minimum of two hours per broadcast week per region) while insisting that others provide an average of 22 hours of local content per broadcast week. In short, HDTV Networks has applied for a type of licence that the Commission has not authorized and has no intention of authorizing, as the whole concept appears inconsistent with certain important objectives of the Act. In these circumstances, the applicant has not provided sufficient reason for the Commission to make an exception to the OTA policy.

The proposed manner for the distribution of the service and its impact on the viability of the applicant's business plan

11. A number of interveners also raised concerns related to the proposed manner in which the proposed service would be distributed. According to CTVgm, the applicant's request for both analog and digital distribution without any of the obligations that services with such distribution rights are required to meet is unprecedented and inconsistent with the Commission's policy framework relating to the transition to digital. Rogers submitted that the distribution of the proposed service on analog and SD digital basic is also inconsistent with the Commission's policy framework, as it could discourage analog subscribers from moving to the digital and HD platforms.

12. In reply, HDTV Networks stated that it does not plan to launch its proposed service until after the 17 February 2009 shutdown date for analog transmitters in the United States and that, consequently, most Canadian BDUs would have ample distribution capacity at that time as they will no longer be distributing analog conventional television signals from the United States. The applicant submitted that this should allow those BDUs to accommodate the dual distribution of HDTV Networks for the interim period, until the Canadian digital conversion set for August 2011. The applicant also submitted that its distribution proposal is both equitable and in the public interest, as it would allow HDTV Networks to effectively compete with incumbent conventional Canadian English-language television broadcasters during the two-year interim period, during which time it is projected that fewer than half of Canadian BDU homes will have digital boxes.

13. The Commission notes that the proposed manner of distribution of the service is more extensive than that accorded to other OTA television stations, and, as such, is inconsistent with the distribution policy framework set out in *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61, 11 November 2003. These policies are intended to support the transition from analog to digital and HD broadcasting and distribution. Imposing distribution requirements such as those proposed by the applicant would be contrary to this goal. In addition, the only significant difference between HDTV Networks' proposed service and existing OTA stations is the applicant's proposed HD programming. Accordingly, the Commission considers that granting non-HD carriage to a station for which the only distinguishing feature is its HD technology and requiring BDUs to distribute the service in the manner proposed by HDTV Networks is not warranted.

14. Furthermore, applicants are required to provide a clear and solid business plan, including clear financial projections, to allow the Commission to determine whether a proposed service would be viable and thus warrant mandatory carriage on BDUs that have limited carriage capacity. Although HDTV Networks provided programming, financial and distribution information, the Commission considers that not being permitted to distribute the service on the analog service of cable BDUs significantly changes the applicant's business plan and, consequently, calls into question its viability. This was confirmed by the applicant at the public hearing when it indicated that the impact of not being carried on analog could represent a 50% decrease in projected revenues, from $654 million to $327 million over the course of the seven-year licence term.

15. Finally, the applicant did not submit an amended business plan reflecting the new programming commitments, in particular, the commitment pertaining to the cost relating to the increased priority programming. The Commission is therefore unable to appraise the financial ability of HDTV Networks to meet is proposed and new programming commitments on its business plan.

Conclusion

16. In light of all of the above, the Commission **denies** the application by HDTV Networks Incorporated for a broadcasting licence to operate a national, English-language HD OTA digital television service with transmitters in Vancouver, British Columbia, Calgary and Edmonton, Alberta, Winnipeg, Manitoba, Toronto and Ottawa, Ontario, Montréal, Quebec and Halifax, Nova Scotia.

Secretary General

Dissenting opinion of Vice-Chairman of Telecommunications Len Katz

I must respectfully disagree with the decision of my colleagues to deny outright HDTV Networks' application for a new digital television undertaking.

While I agree with my colleagues that a primary issue relevant to the Commission's determinations in this proceeding relates to the provision of local programming, I strongly believe the *Broadcasting Act* is equally clear that the *Canadian broadcasting system should encourage the development of Canadian expression and diversity of views*. I do not believe it is contrary to the *Broadcasting Act* or its accompanying regulations to allow new entrants some period of time to establish themselves prior to holding them to the same conditions as well-established industry participants.

HDTV Networks proposed to invest some $300 million. In addition, it offered to comply with the standard obligations for priority programming, Canadian content exhibition and Canadian programming expenditures to the tune of $350 million over the first seven-year licence term. It is only in regard to local programming requirements that HDTV Networks fell short of "average" local programming norms. Why not provide a transition period during which a new entrant can establish itself after which time it must be treated consistent with the established players?

I see little distinction between a new wireless operator entering the market against the likes of Rogers, Bell and Telus and a new network broadcaster going up against CTVglobemedia, CanWest and Rogers Media. In the wireless case, Industry Canada has recognized the challenge facing new entrants and has offered concessions to the new entrants in order for them to establish themselves and compete in a market driven economy. Yet, for some reason, my colleagues have chosen not to accept this transitional stage for a new national broadcasting network during its formative years.

In this particular case, the transition argument is even more compelling. Being only a digital broadcaster, HDTV Networks does not have the reach from which to generate the audience to finance the same degree of local programming as the incumbents – all of whom have access to all Canadians. Digital television today is only available in about 50% of the Canadian households. Yet HDTV Networks has fully committed to all the other obligations including Canadian content exhibition, priority programming and Canadian programming expenditures.

The application was opposed by the incumbents who argued that a new entrant would further accelerate an already declining sector. With regard to the impact of a new entrant on national advertising revenue, I have not been convinced that any potential financial harm is not outweighed by the gain to the broadcasting system. Moreover, the financial issues associated with this sector are the focus of an upcoming proceeding (see *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Notice of Public Hearing CRTC 2007-10, 5 July 2007), which can address the matter should it be deemed necessary.

Finally, on the matter of financial viability, I question the role of the Commission in assessing the likelihood of success of a new entrant. I believe the Commission's mandate does not include the responsibility of managing markets. New entrants bring with them different business models. Who is to say which model will be more successful? I would prefer to leave it to the marketplace. We must not confuse the *Broadcasting Act's* objectives of protecting Canadian culture and identity with protecting Canadian markets… particularly where it relates to Canadian companies, built by Canadians for Canadians.

To force everyone into the same box is to deny entrepreneurs the ability to innovate. As we embark on this new digital era, spectrum scarcity will no longer be as limiting a factor as it once was. Opportunities for differentiation will present itself. The Commission needs to be more open to new ways.

The Commission recently issued *Diversity of Voices*, Regulatory policy, Broadcasting Public Notice CRTC 2008-4, 15 January 2008, regarding Canada's need to maintain a diversity of voices. What better way to achieve this diversity than to licence new networks?

To deny HDTV Networks at this time, I believe, sends the wrong message, not only to the applicant, but to all prospective Canadian entrepreneurs and innovators, that in order to enter the Canadian system, you must make the same commitments as the established players. This leaves little if any flexibility or creativity.

I would have preferred that the Commission licence HDTV Networks with clear conditions that would provide some content requirement relief in HDTV Networks' early years with gradual increases to its commitments as it gets more established.

For all these reasons, I believe that the timing is appropriate for the Commission to have licensed HDTV Networks as a digital network, with clear requirements to ramp up its local programming, as audience levels for digital access become more ubiquitous in Canada.