



Telecom Decision CRTC 2011-61

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Ottawa, 31 January 2011

FreeHD Canada Inc. – Application requesting that the Commission make an order to Telesat Canada under subsections 27(2) and 28(2) of the *Telecommunications Act*

File number: 8622-F35-201018482

In this decision, the Commission grants Telesat’s application for summary dismissal of FreeHD Canada Inc.’s (FreeHD) application for an order under subsections 27(2) and 28(2) of the Telecommunications Act without holding a hearing, and denies Telesat’s request for confidential treatment of material and information filed in connection with FreeHD’s application.

Introduction

1. The Commission received a letter from FreeHD Canada Inc. (FreeHD), dated 14 December 2010, seeking an expedited hearing, in accordance with Broadcasting and Telecom Information Bulletin 2009-38, into FreeHD’s application requesting that the Commission order Telesat Canada (Telesat) to allocate all of the Nimiq 5 satellite capacity to FreeHD pursuant to subsections 27(2) and 28(2) of the *Telecommunications Act* (the Act).
2. On 20 December 2010, Telesat filed two separate letters. In its first letter, Telesat submitted that the Commission should summarily dismiss FreeHD’s application for an order under subsections 27(2) and 28(2) of the Act without holding a hearing. Telesat stated that, in the event that the Commission decides not to summarily dismiss the application, it would support an expedited hearing process. In its second letter, Telesat made various submissions on confidentiality.
3. FreeHD submitted further comments on 24 December 2010 and 4 January 2011.¹
4. The public record of this proceeding is available on the Commission’s website at www.crtc.gc.ca under “Public Proceedings” or by using the file number provided above.

¹ By Commission staff letter dated 24 December 2010, FreeHD was given until 5 January 2011 to reply to Telesat’s submission that the application should be dismissed without conducting a full hearing process.

Issues

5. The Commission has identified the following issues to be addressed in this decision:

- I. Should the Commission summarily dismiss FreeHD's application for an order under subsections 27(2) and 28(2) of the Act?
- II. Should the Commission grant Telesat's request for confidential treatment of the documents associated with this proceeding?

I. Should the Commission summarily dismiss FreeHD's application for an order under subsections 27(2) and 28(2) of the Act?

6. Telesat argued that the Commission should summarily dismiss FreeHD's application without a hearing on the following grounds:

- FreeHD does not meet the criteria for an application under subsection 28(2) of the Act, since it is not "a person who carries on a broadcasting undertaking;"
- Industry Canada has already reviewed the facts which support FreeHD's allegation that there is a breach of subsection 27(2) of the Act, and has issued a letter that confirms there is no basis for the allegation;
- The application is an abuse of the Commission's regulatory process in that it is merely a bargaining ploy in FreeHD's commercial negotiations with third parties; and
- Summary dismissal will reduce the perception of regulatory risk caused by the application, which calls for what is tantamount to the expropriation of a fully contracted satellite. This risk perception would undermine the ability of the Canadian satellite industry to compete in global satellite markets and to finance its ongoing operations on reasonable terms.

7. Telesat argued that the Commission should interpret subsection 28(2) of the Act in its plain and literal sense, to apply only to persons who currently "carry on" broadcasting undertakings. Telesat submitted that subsection 28(2) of the Act should not be extended to apply to any person who has only been granted authority to attempt to get a broadcasting venture off the ground, and then to apply for a licence after it has taken the necessary steps to launch the venture. In this regard, Telesat submitted that FreeHD does not, at this point, have a broadcasting licence, noting that it only has a Commission decision stating that a broadcasting licence will be issued to it if and when it meets certain conditions required to commence broadcasting operations.

8. Telesat further submitted that there is no basis for an application of undue preference or unjust discrimination under subsection 27(2) of the Act arising from the sale of Nimiq 5 satellite capacity to Bell Satellite TV (Bell TV) and subsequent transfers by Bell TV of that capacity to Echostar Corporation (Echostar). Telesat submitted that it

simply did not have the rights to provide capacity on that satellite to anyone at any time after December 2006, including the time period when FreeHD came into existence and requested capacity.

9. Telesat submitted that it was advised by Industry Canada on 1 October 2009 that it was satisfied that there was no opportunity to make available vacated capacity to other Canadians and that, on that basis, it was satisfied that Telesat was in compliance with the terms of the condition of licence.
10. As noted above, Telesat argued that FreeHD's application represented an inappropriate use of the Commission's regulatory process. In Telesat's view, FreeHD's application amounts to a threat to invoke a major and disruptive regulatory intervention into a functioning and competitive marketplace. It submitted that the purpose of subsection 28(2) of the Act is not to provide a person who does not yet carry on a broadcasting undertaking with a regulatory threat to back up future unspecified negotiating proposals, nor is the purpose of subsection 28(2) to mobilize Commission resources to gain leverage in commercial negotiations.
11. In Telesat's view, the application appears tantamount to a request for regulatory expropriation of one of Telesat's two most valuable satellite contracts and of its most valuable international contract, which would severely impair its business, valuation, and creditworthiness.
12. In reply, FreeHD argued that the Commission should proceed with the requested expedited hearing. In so doing, FreeHD stated that it is indeed carrying on a broadcasting undertaking, albeit on a different level during this start-up phase of its business. All undertakings normally progress through a start-up phase of operations as they carry on and ready their service. FreeHD stated that the Commission requested it to file Satellite Capacity Reports and to appear at the recent hearing initiated by Broadcasting Notice of Consultation 2010-488 in the capacity of a direct-to-home (DTH) broadcasting distribution undertaking (BDU). FreeHD submitted that because a new applicant's operational licence has not yet been awarded following a decision does not mean a newly awarded licenced undertaking does not qualify for the protections arising from the Commission's various regulations.
13. FreeHD argued that the reference to Industry Canada provides no evidence against the facts in its application, and has no direct bearing in this matter. It argued that Telesat had failed to dispute the evidence that Telesat knew of Bell TV's intention not to utilize any of the Nimiq 5 satellite for perhaps more than one year. FreeHD believes that Bell TV and Telesat dealt the Nimiq 5 satellite away in a manner such that it could not be utilized by a competitor to Bell TV.
14. FreeHD noted the Commission's mandate to ensure that both the broadcasting and telecommunications systems serve the Canadian public and to use the objectives in the *Broadcasting Act* and the Act to guide its policy decisions, arguing that the Commission's regulatory processes also exist to protect Canadian programmers and

distributors, such as FreeHD. FreeHD stated that its application is based on furthering the objectives of the *Broadcasting Act*, and is not intended to gain leverage in commercial negotiations.

15. FreeHD argued against Telesat's statements that the loss of the Nimiq 5 contract would severely impair Telesat's business, valuation, and creditworthiness, and that there would be negative impacts arising from the requested order on the markets and Canadian BDUs. FreeHD considers that Telesat regards any potential impact on its shareholders as a greater priority than the urgent needs of Canada's entire broadcasting industry and furthering the objectives of the *Broadcasting Act*.
16. FreeHD submitted that there are no longer any workable satellite capacity options available to it, hence the need for its application. The company submitted that its application represents a logical progression to the sequence of available options once all other avenues were exhausted.

Commission's analysis and determinations

17. The Commission notes that it has broad authority over its processes, including the authority to summarily dismiss an application. The Commission considers that the summary dismissal of an application should only be granted in exceptional circumstances where, for example, an application is frivolous, vexatious, or trivial or gives rise to an abuse of process or where there is no genuine issue for consideration by the Commission. The Commission further considers that the legal onus of demonstrating that the application should be summarily dismissed lies with Telesat.
18. Subsection 28(2) of the Act states

Where a person who carries on a broadcasting undertaking does not agree with a Canadian carrier with respect to the allocation of satellite capacity for the transmission by the carrier of programs, as defined in subsection 2(1) of the *Broadcasting Act*, the Commission may allocate satellite capacity to particular broadcasting undertakings if it is satisfied that the allocation will further the implementation of the broadcasting policy for Canada set out in subsection 3(1) of that Act.
19. The Commission notes, based on the record of this proceeding, that Telesat's efforts to market the Nimiq 5 capacity to Canadian broadcasting undertakings started in 2003 when it received Industry Canada Approval in Principle Spectrum License to operate the Nimiq 5 satellite. On 22 December 2006, Telesat sold all of the capacity of the Nimiq 5 satellite for the full life of the satellite to what was then its affiliate, Bell TV. The Commission notes that Bell TV subsequently advised Telesat that half of the Nimiq 5 capacity was resold to Echostar in March 2008. On 17 September 2009, the date of Nimiq 5's launch, Telesat announced that it had completed agreements with Bell TV and Echostar. Bell TV had contracted with Telesat to build a new satellite (Nimiq 6) and agreed to the transfer of the remaining capacity it had contracted on the Nimiq 5 satellite to Echostar.

20. The Commission notes that FreeHD filed its application for a broadcasting licence to operate a national DTH satellite distribution undertaking with the Commission on 28 July 2009. The Commission also notes that FreeHD received approval, in part, of its application for broadcasting licenses to operate a DTH satellite distribution undertaking and a national satellite relay distribution undertaking on 8 February 2010, almost five months after the launch of the Nimiq 5 satellite and more than three years after Telesat's sale of all of the capacity of the Nimiq 5 satellite for the full life of the satellite to Bell TV.
21. In the circumstances, the Commission considers that at the time of the negotiations that led to the contracting of the Nimiq 5 capacity, FreeHD was neither a Canadian broadcasting undertaking nor a DTH satellite distribution undertaking. The Commission is therefore not convinced that Telesat had any obligations towards FreeHD at that time, nor would it have any today, considering that there is no capacity left on the Nimiq 5 satellite.
22. In light of the above, the Commission considers that there is no genuine issue for it to intervene in this dispute and to potentially grant the order requested by FreeHD under subsections 27(2) and 28(2) of the Act. In addition, the Commission considers that, under the specific circumstances of this record, granting the order requested by FreeHD would retrospectively disrupt and significantly interfere with commercial relations and could have a significant adverse impact on the Canadian satellite industry. Accordingly, the Commission grants Telesat's request to summarily dismiss FreeHD's application.

II. Should the Commission grant Telesat's request for confidential treatment of documents associated with this proceeding?

23. In its comments, Telesat requested that any proceeding be held *in camera* and that all information and materials submitted in connection with FreeHD's application remain confidential. Further, Telesat objected to the filing of an abridged version of such information and materials.
24. Telesat argued that a non-confidential proceeding would quickly make known the fact that the Commission may consider confiscating a customer's long-term contracted interest in a satellite in order to allocate it for interim use by a speculative venture that does not carry on a broadcasting undertaking and that has shown no evidence of the financial capacity required to carry on the one it proposes. Telesat added that there is little interest in public disclosure since only a few parties are directly affected.
25. In response, FreeHD noted that the Canadian broadcast industry would benefit from making the matters in this hearing public. FreeHD has, however, agreed to an *in camera* hearing as a sign of co-operation.

Commission's analysis and determinations

26. The Commission notes that information filed with it will generally be placed on the public record unless the party filing the information asserts a claim for confidentiality at the time of filing. Where the Commission is of the opinion that any specific direct

harm likely to result from public disclosure is not sufficient to outweigh the public interest in disclosing the information, it may place information for which confidentiality has been claimed on the public record on its own initiative.

27. The Commission considers that Telesat's request should only be granted in exceptional circumstances where there is clear evidence of substantial direct harm sufficient enough to outweigh the public interest. Considering (i) the nature of the information that has been filed by the parties on the record of this proceeding, (ii) the significance and the precedential aspect of the Commission's ruling and, (iii) the Commission's general practice to make public as much information as possible, the Commission is not convinced that there are exceptional circumstances that would permit it to allow such a confidentiality request. The Commission therefore **denies** Telesat's request.

Secretary General

Related documents

- *Review of the direct-to-home satellite distribution policy*, Broadcasting Notice of Consultation CRTC 2010-488, 20 July 2010, as amended by Broadcasting Notice of Consultation CRTC 2010-488-1, 19 November 2010
- *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009