



Broadcasting Decision CRTC 2015-472

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Reference: 2015-12

Ottawa, 21 October 2015

Findings regarding market capacity and the appropriateness of issuing a call for radio applications to serve the Hamilton/Burlington, Ontario radio market

The Commission finds that the Hamilton/Burlington radio market cannot sustain any additional commercial radio stations at this time. Consequently, the Commission will not issue a call for applications for new commercial radio stations to serve this radio market. In light of this, the Commission will return the application originally filed by Byrnes Communications Inc. for a broadcasting licence to operate a commercial radio station to serve Burlington.

A dissenting opinion by Commissioner Raj Shoan is attached to this decision.

Introduction

1. In Broadcasting Notice of Consultation 2015-12, the Commission announced that it had received an application by Byrnes Communications Inc. (Byrnes) for a broadcasting licence to operate a new commercial FM mainstream music radio station to serve Burlington, Ontario. The applicant proposed to operate the station at 88.5 MHz with an average effective radiated power (ERP) of 80 watts (maximum ERP of 350 watts).
2. Burlington is included within both the Hamilton Census Metropolitan Area (CMA) and the Hamilton Central Radio Market (Hamilton CRM), a Numeris defined geographic area, usually centred around one urban centre. Byrnes proposed to use one of the last known available frequencies in Burlington and the Hamilton CRM.
3. In accordance with Broadcasting Regulatory Policy 2014-554 (the Policy), to provide Canadians with an opportunity to comment prior to a decision on significant market development, such as a call for applications, the Commission requested comments on the capacity of the Burlington radio market to support a new radio station and on the appropriateness of issuing a call for applications for a broadcasting licence to operate a new radio station. Based on factors including market capacity, spectrum availability or scarcity, and interest in serving the market, the Policy sets out that the Commission would either a) issue a call for applications, or b) find that the market cannot sustain additional stations. For b), it would issue a decision setting out this determination and return the application to the applicant.

Interventions and reply

4. The Commission received numerous interventions supporting a call for applications, including from Byrnes. It also received interventions in opposition from Corus Entertainment Inc. (Corus), Durham Radio Inc. (Durham) and Bell Media Inc. (Bell), all of which operate radio stations in the Hamilton radio market. Byrnes replied collectively to the opposing interventions. The public record for this proceeding can be found on the Commission's website at www.crtc.gc.ca.
5. Interveners who supported a call for applications argued that Burlington is a community that is separate from the City of Hamilton and as such warrants its own local radio station. Some expressed frustration at the low level of local coverage that Hamilton radio stations provide to Burlington.
6. Corus, Durham and Bell, on the other hand, submitted that the Burlington radio market is already well served by incumbent commercial radio stations.
7. Durham stated that its commercial radio station CHKX-FM Hamilton provides locally originating news, weather, traffic and emergency coverage to both Hamilton and Burlington. It noted that station personnel attend dozens of public events in Burlington each year.
8. Corus stated that its commercial radio station CJXY-FM Burlington, as well as other stations that it operates, provide Burlington listeners with coverage of local weather and traffic updates, news and community events. It further stated that 15% of the advertising revenues from its Hamilton/Burlington stations are generated from local businesses in the Burlington area, and provided this as evidence that licensing a new station to serve Burlington would have a negative impact on the revenues of incumbent radio services. Corus added that 65% of the tuning in the Hamilton CRM goes to Toronto radio stations, which has resulted in a decline in sales of local advertising for Hamilton stations.
9. In its reply, Byrnes stated that it was comfortable with its business plan and submitted that the proposed station could reach its financial projections even if it must rely on local times sales for the first few years of operations. It considered that the high level of radio tuning migrating to Toronto stations indicates a need for a local station in Burlington to produce programming that engages and appeals to local audiences.

Commission's analysis

10. Although it is a city distinct from Hamilton, Burlington's population represents almost one-quarter (24%) of the Hamilton CRM and accounts for a significant portion of listenership and revenues of stations operating in that radio market. A new radio station in Burlington could therefore have a significant impact on listenership to stations currently operating in Hamilton, thereby unduly threatening the health of that city's radio market.

11. Further, there are seven radio stations currently licensed to serve the Hamilton/Burlington radio market that must compete for listeners, not only amongst themselves, but with the over 20 out-of-market radio stations (mostly from Toronto) that capture over half of the listening audience in Hamilton and Burlington.
12. Moreover, annual revenues for Hamilton/Burlington radio stations decreased by 19.4% between 2011 and 2014 (\$21.8 million to \$17.6 million), of which the majority, almost \$4 million, was advertising revenues. In addition, the profit before interest and taxes (PBIT) margin for the Hamilton/Burlington radio market was 13.3% in 2014, below the Canadian average PBIT margin of 18.5%.

Conclusion

13. Based on the written record of the proceeding, due to its concerns over the effects of licensing a new commercial radio station in Hamilton/Burlington at this time, and in light of its existing policy framework and the current CRM definition for the area, the Commission is not persuaded that issuing a call for applications for new commercial radio stations to serve that radio market is warranted. Consequently, it will return the application originally filed by Byrnes.
14. Further, consistent with its approach set out in the Policy, the Commission will not generally be disposed to accept applications for new commercial radio stations to serve the Hamilton/Burlington radio market for a period of two years from the date of this decision.

Secretary General

Related documents

- *Call for comments on market capacity and on the appropriateness of issuing a call for radio applications to serve Burlington, Ontario*, Broadcasting Notice of Consultation CRTC 2015-12, 16 January 2015
- *A targeted policy review of the commercial radio sector*, Broadcasting Regulatory Policy CRTC 2014-554, 28 October 2014

Dissenting Opinion of Commissioner Raj Shoan

This dissenting opinion represents a departure from my usual *modus operandi* when choosing whether to submit a dissent. Typically, I submit dissenting opinions when I am of the view that the Commission has committed a substantial error in law or policy in its analysis. Reasonable people can differ in their views and, in my respectful estimation, mere disagreement regarding reasonable policy interpretations should not form the basis of a dissenting opinion. Instead, a dissent should be used judiciously to draw attention to more serious errors or problematic analyses.

I am not arguing in this dissent that the Commission has committed an egregious error in law or policy. I am of the view, however, that the majority decision does a disservice to the residents of Burlington. I choose to write this dissent in the hopes that it will encourage potential applicants to apply in the future to provide the city of Burlington with a radio station truly dedicated to local service. Burlington deserves a Burlington-focused radio station; it is not simply an extension of Hamilton, as my colleagues have seemingly decided.

In this dissent, I submit that:

- a. the relevant market for analysis is Burlington as opposed to Hamilton; and
- b. the relevant market—whether Hamilton or Burlington—can easily absorb the introduction of an 80-watt radio station.

In terms of a general policy approach to radio applications, the Commission needs to begin acknowledging that broadcast markets grow, evolve and change—and that fact should inform policy decisions. Forty years ago, an argument could be made that Burlington was a suburb of Hamilton; today, it is a rapidly growing and thriving community with its own identity. As towns and cities develop their own identities and economies, I am of the view that the Commission should be prepared to grant them radio services that reflect their changing realities.

The Market is Burlington—not Hamilton

At paragraph 2 of the majority decision, the Commission argues that Burlington is included within both the Hamilton Census Metropolitan Area and the Hamilton Central Radio Market, a Numeris defined geographic area.

Market is a defined term under the *Radio Regulations, 1986* (the Regulations). In the Regulations, market means:

- (a) in the case of an A.M. station, the A.M. daytime 15mV/m contour or the central area as defined by the Bureau of Broadcast Measurement (BBM), whichever is smaller,

(b) in the case of an F.M. station, the F.M. 3mV/m contour or the central area as defined by the Bureau of Broadcast Measurement (BBM),¹ whichever is smaller, or [emphasis added]

(c) in the case of a digital radio station, the digital service area.

While this definition is seemingly clear, it causes certain analytical challenges with respect to market assessments such as this one. Those Hamilton stations whose 3 mV/m contours encapsulate Burlington took the opportunity—properly, it can be reasonably argued—to submit that the licensing of a station in Burlington would be detrimental to their operations and, accordingly, to oppose a Call for Applications. My colleagues accepted their arguments.

I approached the analysis differently. In my view, the analysis should more appropriately begin with the proposed market. In this case, the triggering application was a proposal to operate an FM station at 88.5 MHz with an average effective radiated power (ERP) of 80 watts (maximum ERP of 350 watts) in the Burlington market. As noted in Broadcasting Notice of Consultation 2015-12, the main community to be served in the primary service contour of this application is Burlington; there is no mention of Hamilton. In fact, the applicant is quite clear that the focus of the application is service to Burlington. In support of this focus, I note that the Commission received interventions in support of the application from Burlington city councillors and the Mayor of Burlington but no comments at all from Hamilton city officials.

Moreover, given Industry Canada rules respecting spectrum interference, it is unlikely the proposed frequency could be used at a power greater than 80 watts. In other words, this is a constrained frequency whose operating limitations ensure that it can only be used as a Burlington radio frequency. Accordingly, in my view, pursuant to the definition of ‘market’ contained in the Regulations, the relevant market for this assessment is Burlington—and not Hamilton—given that the 3 mV/m contour of the frequency proposed in the triggering application could cover only Burlington.

Furthermore, as stated in paragraph 20 of *A targeted policy review of the commercial radio sector*, Broadcasting Regulatory Policy CRTC 2014-554, 28 October 2014, when conducting market assessments, the Commission indicated that it would **weigh “factors such as market capacity, spectrum availability or scarcity and interest in serving the market [emphasis added].”** As noted above, the 3 mV/m contour of this frequency can only be used to serve Burlington. It is also the last frequency available to serve the Burlington market.² By technical and Industry Canada standards, this is a frequency whose best use is associated with a radio service targeted to the city of Burlington. Additionally, in terms of interest, Durham Radio Inc. indicated a desire to file an application if a call for applications was issued.

¹ BBM was re-branded as Numeris.

² Absent the discovery of a drop-in frequency.

Identifying the relevant market for this analysis is crucial to reaching an appropriate decision; a market assessment based on the impact of this application on incumbent Hamilton operators differs substantially from a market assessment based on the impact of this application on the Burlington market. In my view, the relevant market for analysis is Burlington, given that:

- a. the smallest 3 mV/m contour associated with the applicable frequency is limited to Burlington;
- b. it is the only frequency remaining to serve the Burlington market; and
- c. at least one other broadcaster has indicated a desire to serve the market of Burlington if a Call for Applications is issued.

Financial Impact on Market is Overstated

In arguing against the licensing of a new station to serve Burlington, the Commission, at paragraph 12 of the majority decision, notes that the profit before interest and taxes (PBIT) margin for the Hamilton/Burlington radio market was 13.3% in 2014, below the Canadian average PBIT margin of 18.5%. As such, one can extrapolate from the Commission's denial of the application that, in its view, it would be premature to licence a new radio station to serve this market.

I would argue, however, that a deeper analysis of the Hamilton market demonstrates a dynamic which supports the potential absorption of a new station. Firstly, the economic outlook for Hamilton is showing signs of stronger growth going forward; Hamilton's gross domestic product is projected to grow from 0.4% in 2013 to 2.7% in 2015, higher than the average rate in Ontario.

In addition, based on the aggregate numbers of the incumbent broadcasters in the Hamilton market, the Commission appears to have assessed the Burlington market as incapable of absorbing a new radio service at this time. A closer examination, however, reveals that the overall market struggles have been predominantly limited to one broadcaster only.

There are three broadcasters that operate in the Hamilton market: Bell Media, Durham Radio and Corus. Without breaching the confidentiality of the financial situations of the radio stations operating in this marketplace, two of the broadcasting groups are doing quite well in Hamilton and have PBIT margins well in excess of the Canadian average cited by the majority. One of these broadcasters' profitability is significantly above the Canadian average. By contrast, the third broadcasting group is doing quite poorly and its struggles have dragged the aggregate percentage of profitability for the entire marketplace to the 13.3% cited by my colleagues.

I submit that the struggles of one broadcaster in a marketplace should not act as a barrier to the entry of a new player, particularly when the other broadcasters in the market are doing quite well comparatively. To deem otherwise would be to make policy designed to protect an incumbent broadcaster without justification; instead, the Commission should

seek to support innovative and successful undertakings rather than propping up perpetually weak ones.

Conclusion

I would make the argument that the licensing of radio undertakings in this country is poised to be transformed substantially in the coming years. The eventual adoption of a national digital radio framework will have an enormous impact on radio undertakings across the country. The introduction of the connected car as well as Internet-enabled dashboards will also challenge traditional notions of a regulated audio undertaking. In the short term, however, the Commission will need to tackle local and regional market developments that could redefine how the CRTC views ‘markets’ for the purposes of radio regulation.

The dynamic between Hamilton and Burlington is perfectly illustrative of the type of market development that may necessitate CRTC re-examination in the near future. Once, Burlington was a small town of less than 50,000 residents. To serve this fledgling community with radio service, the Commission smartly licensed broadcasters with large megawatt radio stations in neighbouring urban centres (e.g. Hamilton) and tasked these undertakings with serving the regional populace as a whole. Over time, however, the dynamic between these municipalities changed; Burlington grew into a beautiful, thriving community with an identity of its own and, as a result, its residents now seek services focused primarily on themselves rather than Hamilton or Toronto.

Unfortunately, my colleagues have chosen not to prioritize the needs of the residents of Burlington at this time. Instead, the net effect of the decision of the majority is to freeze in time the definitions of certain markets based on frequency allocations made decades ago to incumbent broadcasters and ignore market evolutions that warrant a re-examination of whether said markets are being served by undertakings in an appropriate manner.

In my view, this is an unjust result and, as noted above, it does a disservice to the city of Burlington, its residents and the broadcasters who seek to provide them a dedicated, local radio station. Markets change; markets evolve. Southern Ontario is a dynamic region with several growing communities and municipalities—the extent of which likely could not have been anticipated years ago. In my opinion, Burlington—a city of almost 180,000 residents—deserves a radio station of its own³ that is truly focused on its residents first. It is my hope that, two years from now, broadcasters will step forward to provide that service to this community.

³ In this respect, I note that CJXY-FM Burlington, a Corus station, was licensed to jointly serve both Burlington and Hamilton and has, over time, transformed itself into a Hamilton-first radio station.