



1 April 2014

John Traversy
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Mr. Secretary General,

Re: ***Call for comments on a targeted policy review for the commercial radio sector***,
Broadcasting Notices of Consultation 2013-572 and 2013-572-1 (Ottawa, 30 October
2013 and 13 December 2013) – reply comments

The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting. The Forum supports a strong Canadian broadcasting system and regulation that serves the public interest.

We are pleased to participate in the process initiated by Broadcasting Notice of Consultation 2013-572, to review the Commission's commercial radio policy. Our comments on the issues raised in the Commission's notice are attached.

Our reply to other comments submitted in the first phase of this proceeding is attached.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,

[original signed by]

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Canadian radio: In trust, for all the people

***Call for comments on a targeted policy review for the commercial radio sector,
Broadcasting Notices of Consultation 2013-572 and 2013-572-1 (Ottawa, 30 October
2013 and 13 December 2013)***

Reply comments of the Forum for Research and Policy in Communications

1 April 2014

Contents

I	Executive Summary	1
I	Reply to comments	1
A	Purpose of this proceeding: any policy changes must first fulfill Act's objectives	1
B	Relevant and material evidence in dispute or unknown	2
1	Local staffing and local news - many claims, but no supporting evidence	2
2	Impact of the internet: after almost twenty years, little is not known	6
C	Common ownership policy	11
D	Local management agreements	12
E	Local, regional and national advertising: questions 9 - 10	15
F	Digital terrestrial technologies: questions 11 - 17	17
G	Compliance mechanisms: questions 18 – 21	19
1	Level of non-compliance merits consistent, but unfettered, approach	19
2	The CRTC does not have jurisdiction to impose AMPs in broadcasting	21
3	Denying technical amendments inappropriate response to non-compliance	25
4	CRTC should use its existing powers, transparently	25
H	Regulatory amendments: questions 22 - 23	26

I Executive Summary

Introduction: achieving Parliament’s objectives for Canada’s broadcasting system

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting.
- 2 The Forum supports a strong Canadian broadcasting system that serves the public interest, and is achieving Parliament’s objectives.
- 3 In our view, any changes that the CRTC decides to make to its commercial radio policy in this proceeding must be supported by reasons, and those reasons must in turn be supported by evidence. In particular, the CRTC’s determination in this proceeding should demonstrate how its current policies are or are not achieving these objectives, and how its new policy will achieve or improve the achievement of Parliament’s goals.
- 4 Generally speaking, broadcasters are asking the CRTC in this proceeding for permission to reduce staffing through local management agreements, to maximize the distribution of their programming by adding rebroadcasters in the same market, and to increase the numbers of stations a single broadcaster can control in one location – without explaining how these changes will benefit the public or fulfill the objectives of Parliament’s broadcasting policy for Canada.
- 5 FRPC therefore continues to urge the CRTC to use the opportunity of this review to increase Canadians’ access to Canadian content and local news, and to strengthen private radio broadcasters’ achievement of Parliament’s objectives for the broadcasting system.
- 6 Specifically, the CRTC should increase Canadian content requirements for popular music, mandate minimum levels of original local news, and streamline its enforcement process to reward broadcasters that not only meet but exceed their regulatory requirements.

Reply to other parties’ submissions

- 7 FRPC’s 30 January 2014 response to CRTC questions is set out below, while additions to our response appear in **bold** font.

CRTC questions	Position of the FRPC
Q1. Should the Commission adopt a common approach to the	Yes. The CRTC should streamline its approach by eliminating its pre-

CRTC questions	Position of the FRPC
<p>issuance of a call, irrespective of market size? If not, why?</p>	<p>call market evaluation process, and relying on the competitive market to maximize applicants' contributions to achieving Parliament's broadcasting objectives.</p>
<p>Q2. Is the Commission's preliminary view on including public consultation in the market assessment process as set out in paragraphs 27 and 28 appropriate?</p>	<p>No. The benefits of adding a public-consultation phase are unclear, while its disadvantages include duplication of work, unfairness to some applicants over others, and delays in the implementation of approved services.</p>
<p>Q3. If the Commission were to hold a public consultation as part of the market assessment process, should the Notice of Consultation contain information on the original application, such as the name of the applicant and the type, nature and technical parameters of the proposed service?</p>	<p>Yes, except that the applicant's name should not be disclosed until applications are gazetted. FRPC recommends that the CRTC call for applications whenever it receives an application for a new commercial radio station. Apart from the application's technical parameters, the CRTC's call should include basic information about the level of local and local news programming being proposed, level of Canadian content in music, and level of Canadian content in spoken word programming. Applicants would bear the full risk of providing the CRTC with evidence about market capacity, thereby reducing the CRTC's costs. Transparency of a triggering application's information will enable the competitive marketplace to work properly.</p>
<p>Q4. During the market assessment process, should an applicant or intervener be required to provide specific information such as financial or economic data to support claims related to the availability of spectrum? If so, should any of this information be held in confidence by the Commission?</p>	<p>It is not clear why claims about spectrum availability require support from financial or economic data.</p>
<p>Q5. Provided that an applicant does not propose to use one of the last known available frequencies in a given market, would it be appropriate to maintain the exceptions set out in the Broadcasting Public Notice <u>2006-159</u> (listed in paragraph 18 above)? Are there any additional criteria that might warrant an exception to the policy? Please provide supporting rationale and evidence.</p>	<p>No. Maintaining the CRTC's 2006 exemptions confers an unreasonable advantage to incumbent private commercial broadcasters which has not demonstrably advanced Parliament's objectives for the broadcasting system. That said, the CRTC should exempt public and community radio applications from being the subject of a competitive call.</p>

CRTC questions	Position of the FRPC
<p>Q6. Currently, if the Commission decides not to issue a call for applications due to unfavourable market conditions, it will generally wait two years before accepting applications for new radio services in that market. Is the two-year wait period still appropriate?</p>	<p>No.</p> <p>No evidence and no reasons have been presented to support the two-year pause. In our view, Canada's private radio broadcasters are well-positioned to assume the risks of applying for licences.</p>
<p>Q7. What would be the benefits and risks associated with the establishment of a process whereby a licensee of a low-power station operating on an unprotected frequency must apply for a new licence if it wished to operate its station on a protected frequency? Should such a process apply to all markets (small, medium and large)?</p>	<p>The process could benefit broadcasters by enabling applicants to compete on an equal footing with each other for the privilege of holding a valuable public resource.</p> <p>It could benefit the broadcasting system by requiring applicants to achieve minimum levels of Canadian content, local programming and local news, and to report on the level of local employment they provide.</p> <p>Applying the process to large and smaller locations will enable less experienced broadcasters to acquire the knowledge they need to expand their programming service(s).</p>
<p>Q8. Would it be appropriate to exempt from licensing all types of commercial low-power stations (e.g., mainstream, specialty, ethnic) in all markets (small, medium and large)? What would be the benefits and the risks of allowing these exemptions?</p>	<p>No.</p> <p>All private commercial radio undertakings should be licensed through a competitive process, to reduce the risks of non-competitive licensing.</p>
<p>Q9. Are the Commission's current definitions for local and national advertising as set out in paragraph 40 still appropriate? If not, explain why these definitions are no longer appropriate and indicate how the current definitions could be revised, including the factors or criteria that should be considered in determining how local and national advertising are defined.</p>	<p>FRPC reserves comment on this matter, but notes that revising definitions related to advertising in the absence of clear and up-to-date information about local programming and radio stations' websites raises significant concerns.</p> <p>No consensus was reached on this question, which suggests that the CRTC should proceed cautiously in acting to revise its current local and national advertising definitions. These definitions benefit from relatively objective criteria that can be audited.</p> <p>FRPC does not support the changes being proposed to the CRTC's definitions because these will reduce the objective character of the definitions, in turn weakening the reliability and validity of the information they yield.</p>
<p>Q10. Is it necessary for the Commission to develop a definition for regional advertising? If so, describe what factors should be considered in the definition and describe how regional time sales can be clearly differentiated from</p>	

CRTC questions	Position of the FRPC
local and national time sales.	
<p>Q11. Is it feasible to deploy HD Radio technology in the Canadian broadcasting system? If so, what would be the potential economic or technical impacts on incumbent stations? Licensees are further requested to comment on their intentions to conduct trials of, or to deploy HD Radio, and to provide their projected timelines.</p>	<p>FRPC agrees with the CAB that, respectfully, Industry Canada is best placed to decide whether a specific digital technology can be deployed by Canadian broadcasters.</p> <p>Once Industry Canada has made its determination, FRPC recommends that the CRTC hold a public proceeding to consider questions 11-18 in light of the new data and information available at that time.</p>
<p>Q12. To what extent are HD Radio receivers available in Canada? What is the consumer demand (actual and forecasted) for digital radio services in Canada?</p>	<p>Regardless of the type of technology being adopted, FRPC submits that stations that adopt new radio transmission technologies meet higher standards for fulfilling Parliament’s objectives for Canadian broadcasting - and in particular, higher levels of Canadian content.</p>
<p>Q13. Would HD Radio technology be suitable for mainstream commercial stations, or would it be better suited to niche formats such as ethnic or specialty programming? Please explain why.</p>	<p>We also recommend that the CRTC consider the implications of Canadian stations’ lease of technology from non-Canadians, in light of the current regulatory requirement that Canadian radio station licensees own and operate their transmitters.</p>
<p>Q14. How could HD Radio technology be employed to increase diversity, in light of the FM spectrum congestion?</p>	
<p>Q15. Should the Commission consider other digital radio technologies for use in the FM or AM bands? If so, briefly describe these other digital technologies and why they should be deployed in Canada.</p>	
<p>Q16. Should digital radio services be exempted from licensing requirements or should the Commission establish a licensing framework for these services?</p>	<p>No. No evidence has been presented to support the necessity of an exception.</p> <p>All radio services – digital or otherwise – should meet minimum requirements to achieve the objectives of Canada’s broadcasting legislation, especially for Canadian content, local service and employment.</p>
<p>Q17. If the Commission was to adopt a licensing framework for HD Radio, how similar should it be</p>	<p>The CRTC should not [use] its 25-year SCMO policy to develop a policy for the introduction of HD Radio without evidence about the success of the SCMO policy in achieving Parliament’s</p>

CRTC questions	Position of the FRPC
to the existing policy for SCMO services? What key elements ought to be considered as part of a licensing framework specific to HD Radio technology, and why?	objectives for the broadcasting system.
Q18. To what extent would the Commission's proposed additional tools and measures to encourage compliance, as described in paragraph 62, be appropriate and effective?	See below.
Requirement to complete a licence renewal application checklist	<p>Yes. This list should be made public and be included in decisions renewing stations' licences.</p> <p>It should include</p> <ul style="list-style-type: none"> information on Canadian content in musical and spoken word programming total and original hours of local programming content total and original hours of news and information levels of local employment by employment category, and evidenced about station's achievement of any conditions of licence or CRTC expectations.
Publishing annually on the Commission's website	<p>Publishing information about stations' achievements of their commitments and regulatory requirements is an inexpensive and efficient accountability tool, and should include stations'</p> <ul style="list-style-type: none"> callsigns, location licensee name ultimate ownership date licence expires, and statistics describing levels of Canadian content, French vocal music, hours of original local programming and hours of original new
Requirement for licensees in non-compliance to file regular reports	<p>This requirement unnecessarily duplicates requirements of the Annual Return and CCD processes, and does not establish that programming performance has actually improved</p>
Increasing the frequency of compliance monitoring.	<p>Ongoing monitoring is required to evaluate compliance.</p>
Limiting the number of minutes of	<p>No evidence has been provided to demonstrate that advertising</p>

CRTC questions	Position of the FRPC
advertising allowed per hour.	time is linked to regulatory non-compliance.
Increasing regulatory requirements in cases of non-compliance.	<p>Requiring non-compliant licensees to broadcast more Canadian musical selections perversely transforms Parliament's central goal for the broadcasting system into a punishment. Worse, Canadian content levels would only increase when stations break the rules, while growing numbers of compliant stations would reduce overall levels of Canadian content.</p> <p>Requiring non-compliant licensees to make mandatory CCD payments introduces fines through a regulatory back door, and creates a two-tier system where larger broadcasters can afford repeated non-compliance, while smaller broadcasters are driven out.</p>
Q19. Are increased CCD contributions an appropriate measure to address the harm that occurs in the Canadian broadcasting system as a result of non-compliance?	<p>No. Increased CCD contributions will not address the various harms created by regulatory non-compliance.</p> <p>While FRPC agrees with Goodmans LLP that the CRTC lacks jurisdiction to impose administrative monetary penalties (AMPs) under the <i>Broadcasting Act</i>, Goodmans' definition of AMPs is overly broad and would lead to absurd results.</p> <p>We also submit that using increased CCD payments to penalize regulatory non-compliance would only be lawful if such penalties are rationally connected to a broadcaster's breach: the rational connection between a broadcaster's late filing of its annual return and increased CCD payments is not evident.</p> <p>Finally, FRPC is concerned that using increased CCD payments to penalize regulatory non-compliance would be patently unreasonable, because if the remedy effectively deters non-compliance, its results would thwart Parliament's Act's objectives: as compliance increases, financial support for Canadian creative resources would decrease</p>
Q20. Are there other reasonable sanctions for different types of non-compliance?	<p>Yes. The CRTC should adopt an incentive-based system for renewing licences. Terms should be granted as follows:</p> <p>Full term - for licensees that meet and exceed regulatory requirements</p> <p>Medium term – for licensees that meet regulatory requirements</p> <p>Short term – for licensees that do not meet regulatory requirements</p> <p>FRPC does not support the idea of denying non-compliant broadcasters' amendment or licensing applications. The amendment-denial route has demonstrably failed to deter non-compliance, and it is unclear whether existing licensees can be prevented from applying for new</p>

CRTC questions	Position of the FRPC
	licences.
<p>Q21. What additional tools, if any, are needed to facilitate a licensee's compliance with regulatory requirements?</p>	<p>FRPC urges the CRTC to publish frequent (minimum annually) reports on broadcasters' performance on the CRTC's website, and to provide detailed descriptions of broadcasters' performance during their previous licence terms in CRTC licensing decisions (specifically including levels of original local news, Canadian content and numbers of reporters)</p>
<p>Q22. Should the Commission proceed with the proposed amendment of sections 8(1)(b) and 8(5) of the Regulations? If not, why?</p>	<p>The CRTC should ensure that licensees submit electronic data records, not printed logs.</p> <p>Licensees should retain logs for one year, not eight weeks</p>
<p>Q23. How should the Commission, otherwise, amend the Regulations for consistency and to better reflect digital audio technologies?</p>	<p>FRPC does not support the CAB's proposal to eliminate the regulation prohibiting the simulcasting of AM stations on sibling FM stations, as this represents an inefficient use of the broadcast spectrum. Broadcasters may always apply to the CRTC for an exception to the application of this regulation</p>
<p>Other matters</p>	
<p>To ensure that Canada's commercial radio sector is at least 51% Canadian, the CRTC should raise the level of Canadian content in popular music from 35% to 40%</p>	
<p>To ensure that Parliament's objectives for employment opportunities is being met, the CRTC should report in greater detail about employment in its annual reports and in renewal decisions</p>	
<p>The CRTC should prohibit simulcasting by commercial radio stations of television content</p>	
<p>The CRTC should convene interested stakeholders to discuss the types of information that should be gathered for the purposes of monitoring implementation of Parliament's broadcasting objectives</p>	
<p>FRPC does not support the CAB's proposal to include training for engineers and technicians as eligible CCD initiatives, because no evidence has been provided demonstrating that broadcasters are unable to hire these professionals, and because Canadian content development resources should focus on increasing the level and calibre of Canadian content in Canada's broadcasting system</p>	

I Reply to comments

1 Having reviewed parties' submissions, FRPC's comments on other parties' submissions are set out below.

A Purpose of this proceeding: any policy changes must first fulfill Act's objectives

2 FRPC's 30 January 2014 comments noted that BNoC 2013-572 provided no clear objectives for this review of commercial radio, except to suggest that the review would benefit the radio broadcasting sector.¹ We set out the law on broadcasting, pointing out that the *Broadcasting Act* requires broadcasting to strengthen Canada's cultural, political, social and economic fabric.²

3 We therefore agree with the Public Interest Advocacy Centre, National Pensioners Federation & Council of Seniors Citizens Organizations in British Columbia (PIAC/NPF/COSCO) that the outcome of this proceeding must fulfill the objectives of the *Broadcasting Act*:

Given problems of spectrum scarcity mentioned by the Commission in this notice of consultation, the Commission must ensure that frequencies are licensed to the applications that are best suited to serving the needs of a local community and to fulfilling the broadcasting policy objectives in the Act. ...³

4 We respectfully disagree with the parties whose submissions effectively seek for regulatory relief to improve their financial position, without offering anything in exchange. In our view, the CRTC's role in this proceeding is not to grant industry's requests for new regulatory measures that will increase their profit margins -- but to serve the public interest by ensuring that any changes made to the Commission's current regulatory regime for commercial radio stations will strengthen Canada's culture, democratic political system, society and economy.

5 FRPC therefore supports any regulatory changes that will increase the level of Canadian content, original local news and employment generated by commercial radio stations – and conversely opposes changes that barely maintain or actually weaken these important elements of Parliament's broadcasting policy for Canada.

¹ BNoC 2013-572, Introduction.

² FRPC, Comment #28, (Ottawa, 30 January 2014) at ¶13.

³ PIAC/NPF/COSCO, Comment #50 (Ottawa, 30 January 2014) at ¶13 (PIAC).

B Relevant and material evidence in dispute or unknown

6 A number of submissions have made comments that are not substantiated by evidence, either because the available facts are contradictory, or because no facts are presented at all.

1 Local staffing and local news - many claims, but no supporting evidence

7 An important theme in many submissions is the value of private commercial radio stations to local communities. The CAB says that

Radio has been able to maintain its position despite tuning losses in recent years because it continues to be able to provide locally originated programming and diversity in program types to large audiences across a number of demographic groups and it continues to skilfully manage operating costs.⁴

8 Corus added that

In an era of rapid, rampant change to the world, continental and national media environment, radio remains an important medium of reflection of local communities. Radio provides local diversity even where thousands of other sources of information might be available through digital channels.⁵

9 The Ontario Association of Broadcasters (OAB) said that the CRTC should not approve new radio programming services that “ultimately impair the ability of the existing stations to continue to serve their communities as they have in the past.”⁶

10 In fact, the level of local programming service provided by private commercial radio stations in the past and now is unknown. For many years CRTC renewal decisions have been silent about stations’ programming performance; and the CRTC does not make the radio programming logs submitted by radio stations available online. It is therefore impossible to track changes in radio programming over time.

11 We do know, however, that the quantity of local programming offered large and smaller private commercial broadcasters alike has on occasion been deficient. A few

⁴ Sylvie Bissonnette, Canadian Association of Broadcasters CEO Radio Council, Comment #48 (Ottawa, 30 January 2014) at ¶189 (CAB comment)

⁵ Sylvie Courtemanche, Corus Entertainment, Comment #45 (Toronto, 30 January 2014) at ¶18.

⁶ Douglas E. Kirk, Ontario Association of Broadcasters, Comment #47 (Markham, 29 January 2014), at ¶136 (OAB comment)

examples suffice: in April 2010 Rogers' CFUN-FM Chilliwack did not broadcast any local weather reports after 10 am,⁷ or any local news for three consecutive days;⁸ CFET-FM did not broadcast any local programming from April 2006 to May 2010;⁹ CHSC broadcast no local news or surveillance information in March 2009;¹⁰ and in July 2009 CJMS broadcast no news after 5 pm Monday to Thursday, or from Friday to Sunday.¹¹

- 12 These facts about broadcasters' decisions to reduce local programming until the CRTC takes note of the reductions make it difficult to accept broad generalizations such as this one, without a grain or more of salt:

Radio broadcasters understand the foundation of their business very well, which is to serve their local markets superbly. ... Radio's strength will continue to be its local connection and stations will continue to focus on this strategic strength. ...¹²

- 13 As for the quality of private commercial radio stations' local programming, FRPC respectfully submits that little or no evidence has been provided to support claims that the quality of this programming has improved or has simply been maintained since the CRTC issued the current commercial radio policy. This is again because the CRTC provides none of the data necessary to evaluate local programming service. For instance, apart from the fact that the CRTC's decisions long ago ceased reporting on levels of original local programming being provided by local stations, the CRTC has never published any data describing the numbers of 'on-the-street' reporters and journalists employed by local radio stations to report from and about their communities.

- 14 Instead, facts about radio broadcast journalism in Canada tend to trickle on to the public record at licensing hearings. In 2009, for example, a CRTC hearing panel

⁷ *CFUN-FM Chilliwack and its transmitters CFUN-FM-1 Abbotsford and CFUN-FM-2 Vancouver – Licence renewal and amendment and issuance of mandatory orders*, Broadcasting Decision CRTC 2011-539 and Broadcasting Orders CRTC 2011-540, 2011-541, 2011-542 and 2011-543, (Ottawa, 31 August 2011) at ¶14.

⁸ Saturday, Sunday and Monday: *Ibid.*, at ¶11.

⁹ *CFET-FM Tagish – Licence renewal*, Broadcasting Decision CRTC 2010-329 (Ottawa, 31 May 2010) at ¶17.

¹⁰ *CHSC St. Catharines – Issuance of mandatory orders*, Broadcasting Decision CRTC 2009-391 and Broadcasting Orders CRTC 2009-392 to 2009-395 (Ottawa, 30 June 2009) at ¶¶33 and 37.

¹¹ *CJMS Saint-Constant – Licence renewal*, Broadcasting Decision CRTC 2010-631 (Ottawa, 30 August 2010) at ¶¶10-11.

¹² CAB comment, *supra* note 4, at ¶120.

discussed Corus' decisions to reduce its journalism staff in Quebec by 17%, in the context of its applications to reduce local programming

2726 THE CHAIRPERSON: Okay.

...

2728 Parmi les questions qui s'y trouvaient, notamment, il y avait la fermeture de la salle de nouvelles de CKAC, la disparition du réseau d'information Radio Média, les changements d'orientation de programmation de CKAC et de prépondérance verbale des nouvelles à sport, et le transfert des principaux animateurs de CKAC, et nommément, Paul Arcand, Jean Lapierre, Gilles Proulx, au FM parlé de Montréal. Ça, c'était le contexte de cette audience-là.

2729 Or, lors de l'audience, une longue discussion a porté sur le nombre de journalistes qui seraient à l'emploi des stations de Corus, et ce, par marché. Puis je vois que vous avez déposé une annexe où vous en avez fait état.

2730 Or, compte tenu de l'importance que cette question a eue lors des audiences, puis vous nous donnez un nombre de 43 dans votre présentation orale, et vous nous donnez dans l'annexe un nombre détaillé par marché et par station, et, en plus, vous nous donnez le nombre de personnes qui peuvent être employées aussi à vos sites Internet.

2731 Cependant, si je compare avec 2005, est-ce que vous êtes capable de m'aider à réconcilier... est-ce que le nombre de journalistes a crû, a décrû, est stable par rapport à l'audience de 2005?

2732 MME COURTEMANCHE : Moi, je peux répondre parce que j'étais là. C'était 52 à ce moment-là l'effectif. Alors, oui, il y a eu une suppression, mais de 52 à 43. Alors, ça n'a pas été 50 pour cent, ça n'a pas été 75 pour cent. Ça fait que c'était le chiffre à ce moment-là qu'on préconisait, 52 journalistes à travers la province.

2733 M. CECCHINI : Et pour aller à votre question, Monsieur le Président, ça l'a crû jusqu'à 55, et, jusqu'aux coupures récentes qui ont été effectuées à Info, aux 12 journalistes, on est revenu à 43.

...

2741 LE PRÉSIDENT : Maintenant, quand je regarde vos demandes, avec les divers amendements qui ont été faits entre le moment où vous avez déposé la demande de renouvellement et aujourd'hui, d'ailleurs, monsieur Cecchini vient de faire allusion à des coupures à Info 690, puis quand je regarde, alors que vous étiez centré en 2005 avec toutes les stations AM sur essentiellement des formats à prépondérance verbale

et d'information, est-ce qu'il est vrai de dire que la prépondérance verbale, elle est encore là, mais l'information comme telle, l'information locale, a moins d'importance dans votre grille de programmation et dans votre philosophie de programmation qu'elle en avait en 2005?

2742 M. CECCHINI : Monsieur le Président, sur cette question, il est clair que par nos demandes, on réduit le nombre d'heures. Ce qui est, par contre, important, c'est le contexte, encore une fois. ...¹³

15 The CRTC's renewal decision did not, however, refer to journalistic staffing reductions or their impact on the stations' subsequent and continued reductions in local programming.¹⁴

16 The evidence in this proceeding from the Canadian Media Guild (CMG), however, paints a bleak and disturbing picture of the state of journalism in Eastern Canada. CMG said that

MBS has not had local newsgathering resources in Saint John for approximately four years. ... All of the regular 'local' news and information programming aired on MBS stations is produced in a small newsroom in Halifax. There are no local reporters to cover local or provincial government, or the issues taking place in Saint John. ... Only one of the three stations is broadcasting live after noon hour¹⁵

17 CMG added that the use of voice-tracking – which we understand that the CRTC neither monitors nor measures – on CJYC-FM and CFBC Saint John means that these stations provide neither traffic nor weather reports.¹⁶

18 In our view, the available evidence contradicts claims that local commercial radio programming has remained the same or has improved. FRPC respectfully submits that the CRTC therefore has no basis for granting any requests to reduce or relax its current regulatory approach to private commercial radio. To the contrary – we submit that the CRTC should actively monitor and enforce its policies, regulations and the terms and conditions of radio station licences, in an open and transparent manner, to ensure that stations meet the CRTC's current local programming and

¹³ CRTC, *Transcript of Proceeding* (Québec, 27 May 2009)

<<http://www.crtc.gc.ca/eng/transcripts/2009/tb0527.html>>.

¹⁴ *Various radio programming undertakings – Licence renewals*, Broadcasting Decision CRTC 2009-525 (Ottawa, 27 August 2009), and *Various radio programming undertakings – Licence renewals – Correction*, Broadcasting Decision CRTC 2009-525-1 (Ottawa, 22 December 2009).

¹⁵ Jeanne d'Arc Umurungi, Canadian Media Guild, Comment #31 (Toronto, 30 January 2014) at ¶12.

¹⁶ *Ibid.*

other policies. We urge the CRTC to collect and report on information critical to our understanding of broadcast journalism in Canada.

2 *Impact of the internet: after almost twenty years, little is not known*

- 19 A second important theme in submissions made by radio broadcasters or their industry associations is that the CRTC should change its regulatory approach to private commercial radio stations to enable these broadcasters to compete with internet-based radio services. The CAB noted that

On-line revenues have grown at a much faster rate than radio and are projected to continue to grow at double-digit rates. And mobile advertising has grown from virtually nothing in 2006 to an estimated \$ 240 million in 2012. Mobile will continue to grow and presents a more direct threat to radio's value proposition than on-line in the short term.¹⁷

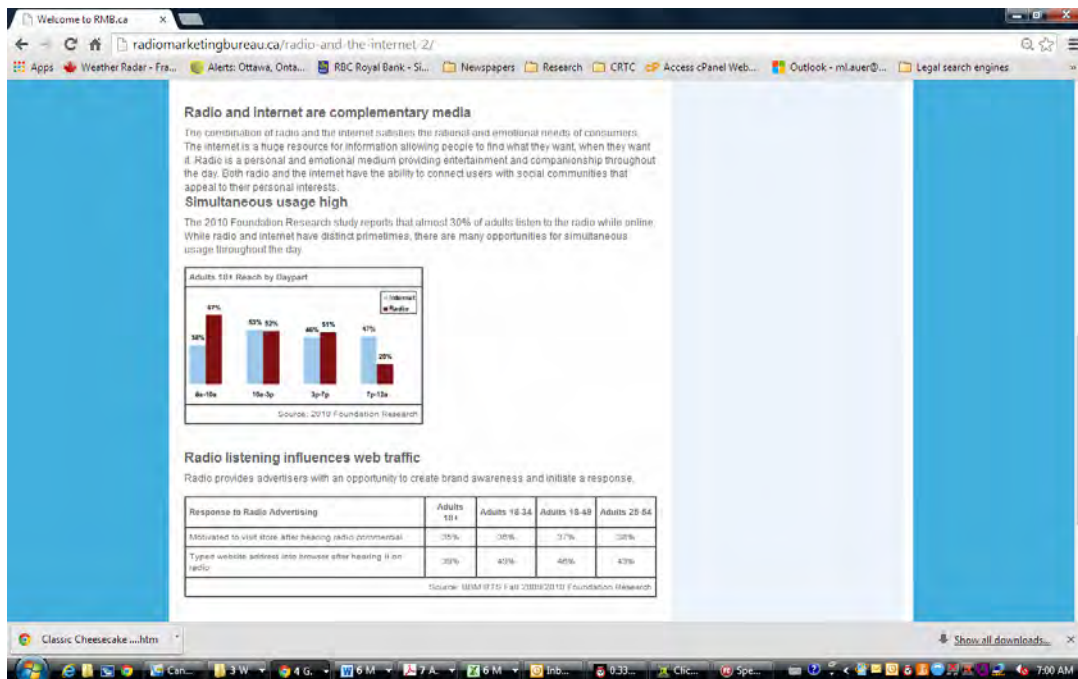
- 20 The OAB argued that

...careful consideration should also be given to the impact of non-regulated services. There can be little question that internet-delivered services are fragmenting audiences, even if there is yet little proof that these services are directly impacting local revenues.¹⁸

- 21 Yet insufficient evidence has been presented in this proceeding to provide the Commission with the basic facts it needs to determine its approach to internet-delivered radio programming services. For example, while the OAB claims that the internet fragments audiences, the Radio Marketing Bureau says that internet and conventional radio services complement each other:

¹⁷ CAB comment, *supra* note 4, at ¶192.

¹⁸ OAB comment, *supra* note 6, at ¶133.



Radio Marketing Bureau, *Radio and the Internet* < <http://radiomarketingbureau.ca/radio-and-the-internet-2/>>.

- 22 Very little information is available to the public to evaluate the degree to which conventional radio programming expenditures support internet-delivered radio, even when it seems clear that radio stations' conventional work supports their internet work:



- 23 Some broadcasters' statements also leave the impression that the impact of unregulated internet-delivered radio services is overblown: Rogers, for instance, said that tuning to over the air AM and FM services "continues to be radio's bread and butter".¹⁹
- 24 In brief, the central problem for the CRTC in this proceeding is that public parties do not have access to any evidence about the financial impact of internet-delivered radio services. This, despite the CRTC's assurance in 2010 that it would collect such information:

9. Information concerning audio and audio-visual broadcasting in new media is essential for understanding the growing importance and significance of broadcasting in new media, for assessing its impact on the conventional broadcasting system, and for monitoring the extent to which broadcasting in new media is contributing to fulfilling the objectives of the Broadcasting Act.

10. In particular, the Commission considers that the ability to follow revenue trends and identify industry investment is critical in evaluating the importance of broadcasting in new media within the Canadian broadcasting system. For instance, the ability to track revenues from

¹⁹ Susan Wheeler, Rogers Media Inc., Comment #41 (Toronto, 30 January 2014) at ¶15.

sources such as advertising and subscriptions will allow the Commission to assess the growth of the new media broadcasting industry, and make comparisons with the traditional broadcasting system. Furthermore, the Commission considers that the ability to assess the profitability of NMBUs is essential to understanding whether viable business models have become established in the new media environment. While it supports the use of third-party research, the Commission considers that specific details such as financial information must be obtained directly from NMBUs.

11. Accordingly, the Commission determines that it is necessary and appropriate to collect, from the subset of NMBUs described below, information regarding revenues and expenditures relating to broadcasting in new media. To that end, the Commission will establish a limited number of baseline metrics relating to revenues (e.g., advertising, subscription, and other revenues) and expenditures (e.g., those relating to administration, to general and technical costs, and to costs relating to program rights and production costs) from that subset of NMBUs. The Commission's intent is that the metrics be used to develop the data form that these NMBUs will be required to complete on an annual basis and that will initially be sent to the NMBUs in the first quarter of 2011.²⁰

25 If the CRTC has collected financial 'metrics' about broadcasters and the internet, it should share these, to enable the public to comment on arguments such as that of the OAB: in this proceeding it says it wants regulatory relief because of "multiple unregulated platforms like internet, mobile, and increasing WI-FI networks".²¹

26 In the absence of evidence that is available to broadcasters, and may be available to the CRTC, FRPC recommends that the CRTC either decline to act, or act in a way that achieves Parliament's broadcasting policy objectives. Instead of exempting private commercial broadcasters from regulatory requirements because they allege competitive injury from internet-based services, for example, FRPC recommends that the Commission consider placing all commercial radio broadcasters on the same footing. It should consider whether radio services delivered from unregulated platforms are now able to contribute towards the fulfillment of the *Broadcasting Act*:²² the fact that private commercial broadcasters believe they are competing

²⁰ *Reporting requirements for new media broadcasting undertakings*, Broadcasting Regulatory Policy CRTC 2010-582 (Ottawa, 13 August 2010) at ¶¶9-11.

²¹ OAB comment, *supra* note 6, at ¶13.

²² S. 9(4) of the *Broadcasting Act* permits the CRTC to exempt broadcasting undertakings from regulation, provided they are not contributing materially to the *Act's* objectives:

head to head with these unregulated services at least suggests that hitherto unregulated services are now be in a position to contribute to Parliament's objectives for Canadian broadcasting.

27 We therefore offer qualified support to the recommendation of the Canadian Independent Music Association (CIMA), that the CRTC repeal its 1999 New Media Exemption Order:²³

... the Commission's New Media Exemption Order should be repealed for radio retransmission that occurs online. This action would recognize that online radio listening is now commonplace in Canada, that broadcasters sell additional advertising for online broadcasts, and that this activity takes place completely outside regulatory requirements. Online radio retransmission is no longer an innovative new practice that requires protection from regulation.

...

In decision 2003-2, the Commission stated that it believed that internet retransmission was in a relatively immature state, which would make regulation premature. CIMA believes that online retransmission of terrestrial radio has now reached a point of maturity where it has become appropriate to consider it a regular component of traditional radio broadcasting, rather than a "new media" enterprise. The growth in the popularity of online retransmissions, the rising value of online advertising and the evidence that online radio listenership has not come at the expense of traditional broadcasting all serve to indicate that online retransmission has become an important component of traditional radio broadcasting.

If online retransmissions are to be considered a component of traditional broadcasting, CIMA submits that it should be subject to the same requirements under the Broadcasting Act as other radio activities. That is, that the radio broadcaster should be required to submit annual returns detailing online revenues, and that these revenues (or a reasonable proportion of these revenues) should contribute to the

The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1)

²³ *Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197 (Ottawa, 17 December 1999).

station's total revenues used to calculate minimum Canadian Content Development (CCD) contribution totals.²⁴

- 28 Our only qualification in supporting CIMA's proposal has to do with evidence. The CRTC ought to consult the public to discuss the parameters of a new regulatory framework for online-delivered radio programming services before repealing the new media exemption order. In our view, the notice of consultation issued for such a proceeding must include the empirical evidence needed for informed discussion and analysis, such as the revenues earned and expenditures made by, and staffing of, large radio broadcasting groups' internet-delivered programming services, and the degree to which their conventional radio services provide content for their internet services.

C Common ownership policy

- 29 Several parties are asking the CRTC to revise its common ownership policy.²⁵ The current policy allows a single broadcaster to hold up to eight radio licences in a single community.
- 30 As Torres Media Ottawa points out, current policy permits a broadcaster to 'bundle' the stations "together to provide an advertiser with a reach that a stand-alone station could never achieve",²⁶ and would "allow for greater economies of scale".²⁷ Rogers says that the CRTC should grant a single broadcaster up to 3 FM licences in locations with 8 or more commercial radio stations provided one of the stations operates in a specialty format such as spoken word.²⁸
- 31 FRPC notes that those supporting higher ownership levels have not provided any evidence to explain how this change will better achieve Parliament's objectives for the broadcasting system than the CRTC's current approach to common ownership. Even more importantly, those supporting higher ownership levels have not explained how these increases will benefit the public, or serve the public interest.
- 32 FRPC strongly opposes any increase in the maximum number of licences granted to one party in a single location – whether the licences permit originating or rebroadcast content.

²⁴ Stuart Johnston, Canadian Independent Media Association, Comment #33 (Toronto, 30 January 2014) at ¶¶8, 58-59.

²⁵ Rogers comment, *supra* note 19, at ¶4.

²⁶ Frank Torres, Torres Media Ottawa, Comment 24 (Ottawa, 30 January 2014) at ¶11.

²⁷ *Ibid.*, at ¶6.

²⁸ Rogers comment, *supra* note 19, at ¶20.

D Local management agreements

33 OAB argues for greater use of local management agreements to address private commercial radio stations' staffing costs:

Costs of operating a radio business continue to move inexorably upward. Costs which we cannot control, such as energy, real estate, employee benefits continue to increase. In the short run, station operators trim and reorganize operations, but ultimately it comes down to personnel. The conditions now present will force operators to reduce core costs of programming and promotion which strike directly at key value local programming. This local programming is the key asset that commercial radio broadcasters utilize to compete against the CBC and unregulated competition from internet and satellite radio.²⁹

So how do small market radio operators deal with a low or no growth revenue environment in the face of ever-rising costs? The simple answer is by cutting costs to match revenue trends. Some costs (hydro, rent, benefits, programming, technical) are very tough to cut while others (promotion, sales commission) have more short-term flexibility but longer term implications. As radio revenue trends have become less attractive, we have seen relatively more money put into the product: programming and production expenses as a percentage of the total have trended upwards over the past 5 years as money was reallocated from other sources.³⁰

The reason for this is simple: radio operators live and die by the quality of the product they put on the air. While a greater focus on content may seem a healthy trend, it masks the uglier reality that other expense/investment categories important to a station's long-term viability have been consistently decreased. This includes promotion expenses such as billboards purchased to raise station awareness.³¹

34 The OAB argues that granting its LMA proposals will yield "financial health", in turn resulting "in ongoing investment in programming."³²

35 Too little evidence has been made available in the record of this proceeding to determine why or whether broadcasters' costs are increasing due to staffing. It is

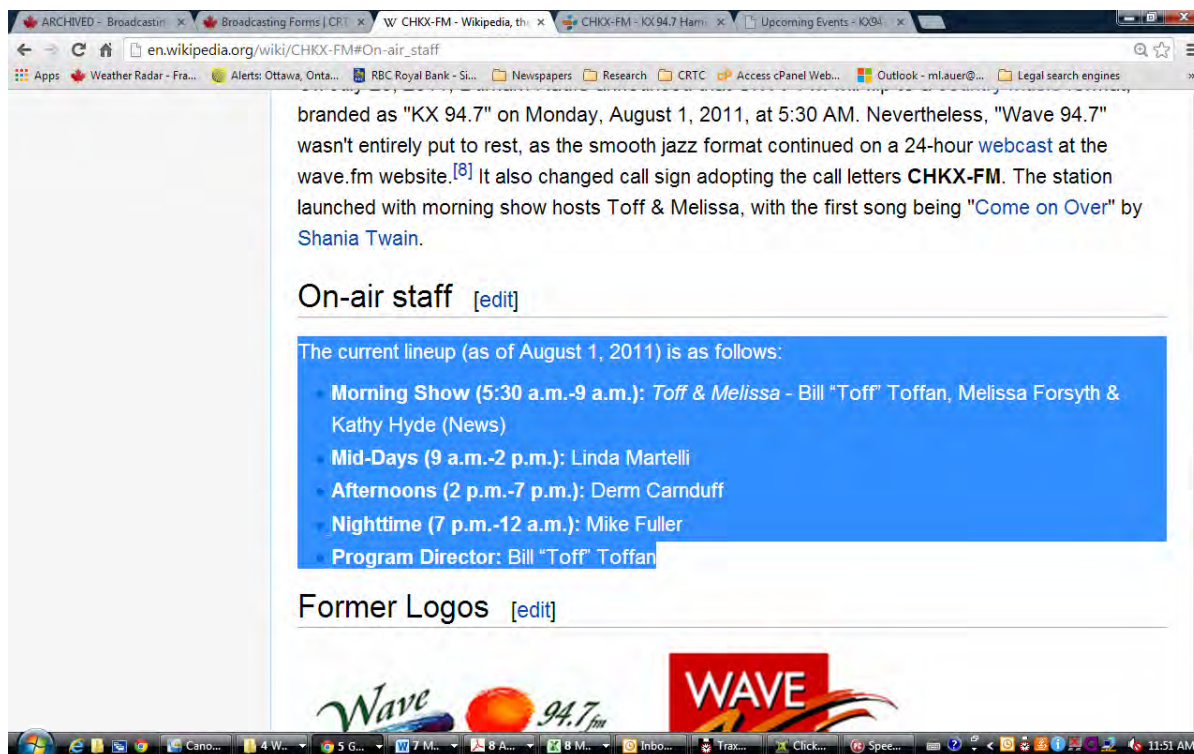
²⁹ OAB comment, *supra* note 6, at ¶16b.

³⁰ Scott Cuthbertson, *The Need for Pro-active Regulatory Review in Small Market Radio*, Part V of Douglas E. Kirk, Ontario Association of Broadcasters, Comment #47 (Markham, 29 January 2014), 6-28 at 21.

³¹ *Ibid.*

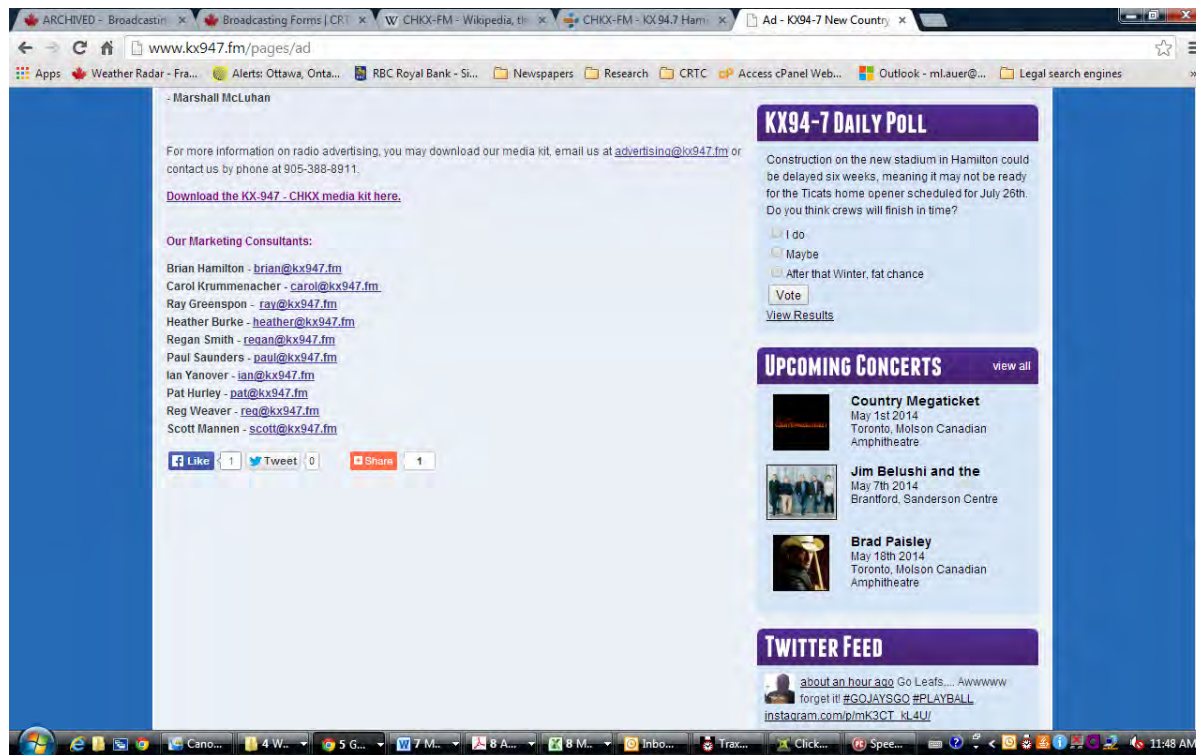
³² OAB comment, *supra* note 6, at ¶18b.

true, for instance, that some radio stations have higher staffing costs than others. For example, according to wikipedia – not our preferred source of information, but the only one we could find – CHKX-FM Hamilton has six on-air staff:



36

37 The CHKX-FM website states that the station has ten marketing staff:



- 38 The reason that CHKX-FM’s marketing staff levels may be higher than its programming staff levels may be because the station’s licensee (Burlington Communications) applied for and received the CRTC’s permission to expand the station’s coverage by increasing its effective radiated power by 1,038% between 2000 and 2005: from 1,880³³ to 21,400 watts.³⁴
- 39 Our point is that the CRTC should not change its approach to regulating commercial radio stations because broadcasters’ decisions to grow have resulted in costs they should have foreseen.
- 40 Even if it were true, moreover, that broadcasters cannot cope with the staffing levels needed to provide the programming service to which they committed when they applied for or to renew their licences, the CRTC should not grant regulatory relief requests without clear commitments to strengthen programming. Otherwise the

³³ *Increase in power for CIWV-FM Hamilton/Burlington*, Decision CRTC 2001-496 (Ottawa, 17 August 2001) at ¶16.

³⁴ *CIWV-FM Hamilton/Burlington - Technical change*, Broadcasting Decision CRTC 2005-575 (Ottawa, 5 December 2005) at ¶1:

regulatory ‘bargain’, so to speak, struck between the CRTC and broadcasters will be one-sided, favouring broadcasters rather than the public interest.

E Local, regional and national advertising: questions 9 - 10

41 Although Parliament empowered the CRTC to regulate advertising time and its “character”, to enable the *Act’s* objectives for the broadcasting system to be achieved,³⁵ the CRTC’s radio regulations neither define nor limit advertising time. The CRTC instead defines local and national advertising in its *Data Collection-Broadcasting Glossary*³⁶ based on the identity of the person who made the advertising sale:

Local time sales: Revenue from the sale of air time by local sales representatives, net of advertising agency commissions and trade discounts. Local time sales include the fair market value of bartered contracts, sponsorship, or any other non-monetary transactions. This does not include revenue from infomercials.

National time sales: Revenue for national advertising, net of any advertising agency commissions and trade discounts. National sales are usually commissionable to the station’s national sales representative. This does not include revenue from infomercials.³⁷

42 An important advantage of the CRTC’s current definitions is that the information identifying the parties who have made advertising sales can be verified by auditors.

43 The CAB suggests retaining the CRTC’s current definition of local advertising, not defining regional advertising, and redefining national advertising in terms of the type of advertising client:

... we are concerned about the recent approval of the CBC’s application for national sales on CBC Radio 2. CBC Radio 2 could thwart the intent of

³⁵ Ss. 10(1)(d) and (e):
 10. (1) The Commission may, in furtherance of its objects, make regulations
 ...
 (d) respecting the character of advertising and the amount of broadcasting time that may be devoted to advertising;
 (e) respecting the proportion of time that may be devoted to the broadcasting of programs, including advertisements or announcements, of a partisan political character and the assignment of that time on an equitable basis to political parties and candidates;

³⁶ BNoC 2013-572, at ¶40.

³⁷ *Ibid.*

its conditions of licence by introducing regional advertising under the guise of national advertising. Therefore, we suggest that for English markets only the Commission define national advertising as being advertising by clients with a retail presence in at least seven of Canada's ten provinces. We recognize the specificity of the French-language markets especially as it relates to national advertising and therefore we do not advocate any changes to the national advertising definition for these markets.³⁸

44 A concern raised by the CAB's proposal has to do with verification of the information: who will be responsible for identifying an advertiser's retail presence in different parts of Canada?

45 The OAB says that the CRTC's local and national definitions are both inaccurate, and that advertising should be identified by the audience being sought:

45. As competition has increased in all sectors advertisers and media buyers have been forced to re-examine the way they approach their advertising plans. While they may purchase advertising time nationally to get the best rate, the creative that is run may differ depending on the goals established for the individual advertiser (s). The reasons for this change are varied such as weather, geographic location, ethnicity or the time of year just to name a few. As well we have seen the introduction of regional advertising groups, particularly in the automotive sector, such as the Ontario Ford Dealers Association. This means that we can no longer identify commercials as national based on the advertiser or media buyer. We need to identify commercial type by the audience it targets.³⁹

46 Our concern with OAB's suggestion is that by basing the definition of national advertising on audience, the application of the definition will become more subjective, and more difficult to verify.

47 PIAC/NPF/COSCO suggests that a definition be developed for regional advertising, to ensure that local radio stations that are prohibited from soliciting local advertising, not solicit regional advertising:

39. Similarly, given the Commission's concerns with respect to interpreting and enforcing policies and licensing requirements, we would generally support the development of a definition for regional

³⁸ CAB comment, *supra* note 4, at ¶20.

³⁹ OAB comment, *supra* note 6, at ¶¶44-45.

advertising. However, it should be employed and interpreted as a separate, specific term. Our concern is that licensees who do not meet the one-third local programming requirements have been soliciting regional advertising that would not, technically speaking, constitute “local advertising” under the current definition. Therefore, we support the development of a definition of “regional advertising” in order to enable the Commission to effectively enforce regulatory requirements.⁴⁰

48 As a preliminary matter it seems that insufficient consensus exists for the CRTC to formulate a reasonable determination – except to say that there is some support for defining regional advertising.

49 Second, FRPC would prefer definitions that are transparent and whose application is easy to verify by auditors.

50 Due to the lack of consensus in this area, and the fact that several of the definitions being proposed would be difficult to verify once implemented, FRPC does not support a change in the CRTC’s definitions at this time.

F Digital terrestrial technologies: questions 11 - 17

51 Having reviewed parties’ comments about digital terrestrial technologies, we agree with the position of the CAB technical brief:

- With all due respect to the CRTC, it is up to Industry Canada to decide whether a specific digital technology can be transmitted by a Canadian broadcast licensee, if for no other reason than the fact that emission standards for all equipment employing radio spectrum must be set by the Department and these must conform with bi-lateral and international agreements that Canada has signed.

- That being said, broadcasters encourage dialog among all stakeholders on matters involving broadcasting standards and permissible operating modes in any broadcasting band.⁴¹

52 Once Industry Canada decides on a specific digital technology, FRPC respectfully recommends that the CRTC initiate a new proceeding to consider these questions anew.

⁴⁰ PIAC/NPF/COSCO, *supra* note 3, at ¶139.

⁴¹ CAB, Technical comments, at 7.

- 53 That proceeding would likely happen in several years, and should consider the parameters of a policy to govern the implementation of new radio distribution technology (i.e., not to establish a policy for a specific technology, such as HD). We agree, for example, with the OAB that “the key elements of licencing AM and FM stations, such as Canadian Content, commitments to spoken word, should be the cornerstone of licencing HD channels”⁴² – in fact, such requirements should be standard for all commercial radio stations, regardless of their radio distribution technology, and should also include a requirement for original local content and local news.
- 54 FRPC respectfully submits that any new policy for digital radio stations ensure higher standards for meeting Parliament’s objectives for broadcasting. For instance, when broadcasters begin to use new technologies because they believe a favourable business case supports their introduction, these stations should provide higher levels of Canadian programming, including local news and information, to their audiences. We also note that the fact that the United States does not impose content restrictions on digital radio broadcasters in that country, as Worldband Media points out,⁴³ is not relevant to the CRTC’s determinations because the CRTC’s legal mandate is to implement Canada’s 1991 *Broadcasting Act*, not the 1934 US *Communications Act*.
- 55 The proceeding we support should also address the issue of technology ownership. The CRTC’s current *Radio regulations, 1986* require licensees to own and operate their own transmitters,⁴⁴ but the evidence in this proceeding raises concerns that licensees would have to lease HD distribution technology, from non-Canadians:

An often-overlooked cost factor is the licensing fees that must be paid to iBiquity Digital Corporation for the right to use its proprietary HD Radio™ software and firmware; specifically, 1. A basic one-time fee of \$US10-12K, for the right to broadcast a simple digital simulcast of existing programming; plus, 2. 3% of the annual revenue for each multicast audio signal (min \$1000 annually for each); plus 3. 3% of the annual revenue for each datacasting service provided to 3rd parties (min \$1000 annually for each.)⁴⁵

⁴² OAB comment, *supra* note 6, at ¶71.

⁴³ Prabhakaran Selvadurai, Worldband Media, Comment 27, (Markham, 30 January 2014) at ¶12.

⁴⁴ S. 10.1.

⁴⁵ CAB, Technical comments, at 7.

56 The CRTC should consider whether to amend its radio regulations, and whether this amendment raises any concerns about non-Canadian control over Canadian radio stations.

G Compliance mechanisms: questions 18 – 21

57 BNoC 2013-572 set out the CRTC's view that "despite establishing a more flexible approach to non-compliance ... a large number" of radio licensees are non-compliant. The notice did not explain the Commission's view as to why its flexible approach to enforcement failed to deter non-compliance. Instead it proposed six additional measures "to help licensees comply with regulatory requirements and conditions of licence":

Requirement to complete a licence renewal application checklist that would be provided on the Commission's website as a tool for licensees and would be incorporated into the application process. The checklist would summarize all criteria evaluated during the licence renewal process, including all required elements. The application would not be accepted until the "check-off" process is complete.

Publishing annually on the Commission's website lists of stations operating in compliance and in non-compliance.

Requirement for licensees in non-compliance to file regular reports that indicate improvements in areas of non-compliance. For example, for failing to submit annual returns, financial statements or CCD proof of payment on time, the licensee could be required to submit audited financial statements, annual summaries of all CCD contributions with proof of payment, etc.

Increasing the frequency of compliance monitoring.

Limiting the number of minutes of advertising allowed per hour.

Increasing regulatory requirements in cases of non-compliance. The Commission could take measures to address the harm caused to the broadcasting system in cases of non-compliance with, for example, music programming requirements and CCD contributions.

1 *Level of non-compliance merits consistent, but unfettered, approach*

58 While BNoC 2013-572 mentioned the 'large number' of licensees that breach the Commission's regulatory requirements, the Ontario Association of Broadcasters

(OAB) hopes and expects that non-compliance is “the exception and not the rule.” It therefore submitted that non-compliance should be addressed case by case.⁴⁶

- 59 Broadly-based empirical research has established that non-compliance with Canadian broadcasting law is the rule in radio,⁴⁷ not the exception. As non-compliance hinders the implementation of Parliament’s objectives for Canadian broadcasting, FRPC strongly supports the CRTC’s adoption of a regulatory approach that will reduce non-compliance, and fulfill Parliament’s broadcasting objectives. This regulatory approach should include penalties that will discourage individual broadcasters from continuing to breach the CRTC’s requirements, and will deter others from following the same path: *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 SCR 672 at ¶¶52-65.
- 60 In our view, the available evidence demonstrates that CRTC’s continued reliance on a case-by-case approach to broadcasting has failed to deter ongoing and repeated instances of non-compliance for individual licensees, or in the broadcasting system as a whole: see *e.g. Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283 (CanLII).
- 61 The OAB has suggested that if “the vast majority of non-compliance issues are not willful but directly related to a lack of resources”,⁴⁸ non-compliant stations’ advertising income should not be reduced as “this may simply exacerbate the root cause of the non-compliance.”⁴⁹ The OAB also suggests that the CRTC should review “The ability of all stations in a market to meet their regulatory commitments should be a significant part of the Commission’s determination... whether or not any market can sustain an additional station.”⁵⁰
- 62 FRPC respectfully disagrees with the OAB’s analysis and recommendation: applicants are required to know all regulatory requirements when they apply for licences – and the CRTC is therefore entitled to believe that successful applicants have set aside the appropriate resources to ensure regulatory compliance; taking into consideration the level of non-compliance in a market could lead to the

⁴⁶ OAB comment, *supra* note 6, at ¶172.

⁴⁷ See M.L. Auer, “The CRTC’s Enforcement of Canada’s Broadcasting Legislation: ‘Concern’, ‘Serious Concern’, and ‘Grave Concern’”, 5:3 *Canadian Journal of Law and Technology* (2006) 115-151 <http://cjlt.dal.ca/vol5_no3/auer.pdf>, and Geneviève Bonin, *Accountability and the CRTC: an evaluation of the Canadian commercial radio licence renewal process (1997-2007)* (McGill University, Montréal: September 2010) <http://digitool.library.mcgill.ca/webclient/StreamGate?folder_id=0&dvs=1396348084762~841>.

⁴⁸ OAB comment, *supra* note 6, at ¶173.

⁴⁹ *Ibid.*, at ¶174.

⁵⁰ *Ibid.*, at ¶175.

troubling result that non-compliant licensees (whose limited resources purportedly account for their non-compliance) would be rewarded with less competition.

- 63 FRPC respectfully submits that the public interest is best served by the CRTC's adoption of a consistent and transparent approach to enforcing its regulations and the *Broadcasting Act*, which takes into account the particular circumstances of individual licensees. Consistency does not mean rigidity: the CRTC should not ignore exceptional circumstances related to non-compliance.⁵¹ We agree with the OAB's position that "Each station should be able to rely on the fact that every station is expected to play by the same rules and know that any breach of those rules will be dealt with consistently."⁵²

2 ***The CRTC does not have jurisdiction to impose AMPs in broadcasting***

- 64 The CAB CEO Radio Council asked Goodmans LLP for its opinion on whether the CRTC has the jurisdiction under the *CRTC or Broadcasting Acts* "to impose an administrative monetary penalty, be it in the form of a direct fine or levy or indirectly through initiatives such as the contribution to a third party programming fund; increased programming requirements or by limiting a licensee's ability to generate advertising revenue (collectively, "AMPs"), in response to non-compliance by a licensee with the Act, applicable regulations, conditions of licence or other regulatory requirements."⁵³
- 65 In brief, Goodmans believes the CRTC lacks jurisdiction to impose AMPs for broadcast non-compliance.
- 66 FRPC agrees with Goodmans that the CRTC lacks jurisdiction to impose AMPs under the *Broadcasting Act*. If Parliament had intended to enable the CRTC to impose AMPs for broadcasting infractions, it would have said so – and did not. Sections 32 and 33 – setting out financial penalties for those convicted of breaching the CRTC's regulations or their conditions of licence – are a complete code for imposing monetary penalties under the *Broadcasting Act*.

⁵¹ See e.g. *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 FCR 385, at ¶177:

... the fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision maker may deviate from normal practice in the light of particular facts

⁵² OAB comment, *supra* note 6, at ¶181.

⁵³ Robert Malcolmson, Goodmans LLP (Toronto, 21 January 2014), at ¶2 [Goodmans opinion].

- 67 FRPC disagrees, though, with Goodmans’ overly broad definition of AMPs. We do not agree, for example, that requirements to increase programming or to limit advertising are AMPs. In our view these requirements – when tied to the fulfillment of the objects of the *Broadcasting Act* – are entirely within the CRTC’s jurisdiction to set the terms and conditions of the licences under which broadcasters are allowed to operate. Parliament established this jurisdiction in sections 9(1)(b), 9(1)(c) and 9(1)(d) of the *Broadcasting Act*. Given the *Broadcasting Act*’s standing as “an instrument of cultural policy”,⁵⁴ which Goodmans acknowledges, it is absurd to say that CRTC requirements mandating Canadian programming are actually AMPs. If Goodmans’ opinion were correct, the CRTC could not regulate broadcasters’ “use of Canadian creative and other resources in the creation and presentation of programming”,⁵⁵ and would therefore be unable to implement Parliament’s broadcasting policy for Canada, as required by section 5(1).
- 68 FRPC also disagrees with Goodman’s view that section 12(2) of the *Broadcasting Act* – the mandatory order provision – “is simply a mechanism by which the CRTC can compel compliance”⁵⁶ We think that section 12(2)⁵⁷ provides the CRTC with a wider and flexible remedial role to fulfill the *Broadcasting Act*’s objectives, similar to that described by the Supreme Court of Canada in the 1996 case of *Royal Oak Mines*.⁵⁸
- 69 That said, an order issued by the Commission under section 12(2) to ensure that its regulations, licences, decisions or orders are met, “must be rationally connected or

⁵⁴ *Ibid.*, at ¶10.

⁵⁵ *Broadcasting Act*, s. 3(1)(f).

⁵⁶ Goodmans opinion, *supra* note 53, at ¶17.

⁵⁷ S. 12(2):

The Commission may, by order, require any person to do, forthwith or within or at any time and in any manner specified by the Commission, any act or thing that the person is or may be required to do pursuant to this Part or to any regulation, licence, decision or order made or issued by the Commission under this Part and may, by order, forbid the doing or continuing of any act or thing that is contrary to this Part or to any such regulation, licence, decision or order

⁵⁸ *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369. (per Cory J., for the majority), at ¶155:

In examining the legislation itself it is apparent that Parliament has clearly given the Canada Labour Relations Board a wide remedial role. The wording of s. 99(2) does not place precise limits on the Board’s jurisdiction. In fact, the Board may order anything that is “equitable” for a party to do or refrain from doing in order to fulfil the objectives of the Code. In my view, this was done to give the Board the flexibility necessary to address the ever changing circumstances that present themselves in the wide variety of disputes which come before it in the sensitive field of labour relations. The aims of the Canada Labour Code include the constructive resolution of labour disputes for the benefit of the parties and the public. The expert and experienced labour boards were set up to achieve these goals. The problem before the Board was one which Parliament intended it to resolve.

related to [a] breach and its consequences.”⁵⁹ FRPC respectfully submits that an order requiring non-compliant radio licensees to increase their financial support for CCD is not rationally connected to broadcasters’ failures to provide sufficient proof of payment of or eligibility for CCD payments, or to file complete annual returns.

70 Even if there were a rational connection between increased CCD payments and non-compliance issues related to CCD or other issues – and this connection is impossible to discern – imposing increased CCD payments to penalize broadcasters’ non-compliance would be patently unreasonable, because the purported remedy would contradict the *Broadcasting Act’s* objects and purposes.⁶⁰

71 Of course, an initial problem in considering whether CCD-based penalties support or contradict the *Broadcasting Act’s* objectives, is that the *Act* does not refer specifically to CCD, or more generally to other types of financial support for Canadian programming. Nevertheless the CRTC has for many years accepted such payments made by licence and ownership applicants seeking to demonstrate their support for Parliament’s broadcasting policy, and to our knowledge broadcasters’ decisions to offer to make these payments, and the CRTC’s decisions to accept these offers, have not been challenged.

72 One might assume that CCD payments are based on the section 3(1)(f) requirement for maximum or predominant use of Canadian creative resources.⁶¹ In 1990 the

⁵⁹ *Ibid.*, at ¶156:

The requirement that the Board's order must remedy or counteract any consequence of a contravention or failure to comply with the Code imposes the condition that the Board's remedy must be rationally connected or related to the breach and its consequences. This requirement is also consistent with the test established in *National Bank of Canada v. Retail Clerks' International Union*, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269, which required that there be a relation between the breach, its consequences and the remedy. Section 99 also provides that the Board may remedy breaches which are adverse to the fulfilment of the objectives of the Code. This empowers the Board to fashion remedies which are consistent with the Code's policy considerations. **Therefore, if the Board imposes a remedy which is not rationally connected to the breach and its consequences or is inconsistent with the policy objectives of the statute then it will be exceeding its jurisdiction. Its decision will in those circumstances be patently unreasonable.**

[bold font added]

⁶⁰ *Ibid.*, at ¶168:

There are four situations in which a remedial order will be considered patently unreasonable: (1) where the remedy is punitive in nature; (2) where the remedy granted infringes the Canadian Charter of Rights and Freedoms; (3) where there is no rational connection between the breach, its consequences, and the remedy; and (4) where the remedy contradicts the objects and purposes of the Code. ...

...

[74.] ... the remedies the Board imposes are meant to counteract the consequences of the parties' transgressions which are adverse to the fulfilment of those objectives. Therefore, an integral part of the Board's remedial duty is to strive to accomplish the [Labour] Code's purposes.

⁶¹ S. 3(1)(f):

CRTC explained its approach to CTD, but again without reference to a specific section of the 1968 *Broadcasting Act* then in force.⁶² The CRTC simply laid out its

... view that the Canadian broadcasting system has an important role to play in the development of Canadian artists, primarily through airplay. It believes that it is equally important to ensure that an adequate supply of Canadian material is available to offer Canadian listeners a diversity of high quality Canadian content on each station, and in various musical as well as spoken word categories. While broadcasters are not solely responsible for seeking out and developing Canadian creative talent, it is clearly in their interest to take an active role in this process to ensure that there is a sufficiently large pool of Canadian recorded music as well as other types of Canadian creative material available for broadcast.⁶³

73 The CRTC also said in 1995 that CCD (formerly known as CTD, or Canadian Talent Development) payments “are important to help ensure that there is a sufficiently large pool of Canadian music and other Canadian creative material available for broadcast”,⁶⁴ though it once more failed to link CCD payment requirements to any specific section of the *Broadcasting Act*.

74 Absent a justification for CCD founded in the *Broadcasting Act*, the problem with using increased CCD payments as a regulatory penalty is that successful implementation will reduce total financial support for CCD. If increasing CCD payments for non-compliance encourages regulatory compliance, fewer broadcasters will make higher CCD payments – and the counter-intuitive impact of using CCD payments to encourage regulatory compliance will be to reduce support for Canadian creative talent, possibly discouraging broadcasters from making higher, or maximum, use of that talent. This result would be patently unreasonable because it would contradict Parliament’s objectives for the *Broadcasting Act*. FRPC continues to oppose the use of CCD or other payments for Canadian programming as a regulatory penalty.

... each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources; ...

⁶² As amended in 1978.

⁶³ *AN FM POLICY FOR THE NINETIES*, Public Notice CRTC 1990-111 (Ottawa, 17 December 1990).

⁶⁴ *CONTRIBUTIONS BY RADIO STATIONS TO CANADIAN TALENT DEVELOPMENT -- A NEW APPROACH*, Public Notice CRTC 1995-196 (Ottawa, 17 November 1995), at“1. Introduction”).

75 FRPC’s 30 January submission instead recommended that the CRTC use its existing powers to address regulatory non-compliance, and we continue to believe this is the appropriate approach.

3 *Denying technical amendments inappropriate response to non-compliance*

76 Torres Media Ottawa has suggested that the CRTC “... could restrict a non-compliant station from applying for new services or technical amendments”.⁶⁵

77 We have two concerns with this proposal. First, it is unclear whether, as a matter of law, existing licensees can be prevented from seeking new licences: see *e.g. Confederation Broadcasting (Ottawa) Ltd. v. Canadian Radio-Television Commission*, [1971] SCR 906.⁶⁶ Second, the CRTC has attempted to link regulatory non-compliance with the denial of technical amendment applications⁶⁷ in the past – but this approach proved ineffective, as the CRTC is now attempting to address non-compliance levels through other means.

78 Respectfully, therefore, FRPC does not support this proposal. We believe instead that the CRTC should rely on its existing powers, including the ability to prosecute non-compliant broadcasters.

4 *CRTC should use its existing powers, transparently*

79 FRPC agrees with the CAB Radio Council that “the Commission has at its disposition all the tools it needs to ensure compliance.”⁶⁸

80 That said, and having reviewed parties’ comments about regulatory enforcement, we now take this opportunity to revise our response to question 21 (Q21. What additional tools, if any, are needed to facilitate a licensee’s compliance with regulatory requirements?). FRPC urges the CRTC to facilitate compliance by licensees by undertaking more frequent reviews of broadcasters’ performance with respect to the terms and conditions of their licences and the CRTC’s regulations, by making the results of these reviews readily available on the CRTC’s website, and by including details about

⁶⁵ Torres Comment, *supra* note 26, at ¶143.

⁶⁶ Although this case dealt with the CRTC’s effective denial of a broadcaster’s right to apply for renewal, we believe it would support the proposition that the CRTC cannot deny any party the right to apply for a licence, provided the party meets the appropriate legislative requirements.

⁶⁷ See *e.g. CJNE-FM Nipawin - New transmitter at Tisdale*, Broadcasting Decision CRTC 2007-233 (Ottawa, 16 July 2007) and *CHHA Toronto – Technical change*, Broadcasting Decision CRTC 2010-594 (Ottawa, 19 August 2010).

⁶⁸ CAB comment, *supra* note 4, at ¶124.

this information in its licensing decisions (whether to renew, suspend or revoke licences). At minimum the CRTC's renewal decisions should describe the level of original local news and Canadian content provided by each broadcaster during its most recently completed licence term; the CRTC should also consider providing details about the level of journalistic staffing provided by broadcasters in the communities they serve.

H Regulatory amendments: questions 22 - 23

- 81 FRPC had reserved comment on question 23 (How should the Commission, otherwise, amend the Regulations for consistency and to better reflect digital audio technologies?).
- 82 The CAB has recommended the elimination of section 14 of the *Radio Regulations*. It prohibits the simulcast of an AM station on a sibling FM station.⁶⁹ We do not support this proposal, as it represents an inefficient use of the publicly-owned spectrum. That said, broadcasters may be able to make a case that exceptional circumstances necessitates simulcasting as describes. In that event, a broadcaster may always apply to the CRTC for an exception to the application of the CRTC's regulations.
- 83 The CAB has also suggested that the CRTC include training for engineering students as an eligible initiative for Canadian talent development purposes.⁷⁰ FRPC does not support this request, laudable as it appears, as CAB has not provided evidence demonstrating broadcasters' inability to hire broadcast engineers and technicians. FRPC respects "the many talented and skilled men and women who work very hard to deliver compelling content" to radio stations' listeners every day, but notes that there is no evidence of inadequate technical distribution capacity. The CRTC's Canadian content development initiatives should be targeted towards increasing the level and calibre of Canadian content available to the public.

* * * End of document * * *

⁶⁹ *Ibid.*, at ¶28.

⁷⁰ *Ibid.*, at ¶¶30-31.