



6 June 2014

John Traversy
Secretary General
CRTC
Ottawa, ON K1A 0N2

Dear Mr. Secretary General,

Re: *Amendment of a condition of licence, Part 1 Application 2014-0383-1*

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. The Forum supports a strong Canadian broadcasting system that serves the public's interests.
2. Allarco Entertainment Limited is asking the CRTC for an amendment of a condition of its licence whose effect will be to reduce Canadian programming expenditures (CPE) in the broadcasting system by \$6 million, from now until August 2017.
3. FRPC opposes approval of Allarco's application.

Background

4. The CRTC licensed Allarco's application for a new, national English-language general interest pay television programming undertaking in 2006, denying two competing applications in the process.¹ When it granted Allarco's application, the CRTC described the applicant's commitments to spend at least \$2 million per year on

¹ *Applications for new pay television services*, Broadcasting Decision CRTC 2006-193 (Ottawa, 18 May 2006) <http://www.crtc.gc.ca/eng/archive/2006/db2006-193.htm>.

script and concept development, and \$7 million over seven years on regional outreach.²

5. Allarco did not meet this expenditure commitment, but instead “accumulated a significant shortfall”³ with respect to script and concept development and regional outreach programs.⁴ When it renewed Superchannel’s licence in 2013, therefore, the CRTC re-imposed some, though not all, of the expenditure shortfalls as a condition of Superchannel’s licence.⁵ Specifically, condition of licence 8 requires Allarco to spend \$1.5 million in each year of its four-year licence term on script and concept development, up to a total of \$6 million.⁶ These expenditures are in addition to Superchannel’s required CPE.⁷

Allarco’s current application

6. Allarco is asking the CRTC to count the \$6 million imposed as a condition of licence because of Allarco’s failure to meet regional outreach commitments, as part of the CPE that are also required as a separate condition of the Allarco’s licence.
7. The company says that it would not reduce its regional outreach or script and concept development funding, and would continue to spend \$1.5 million on these two areas.⁸ It also says that its “proposed amendment would not diminish CPE spending”.⁹

² *Ibid.*, at ¶¶16-17.

³ *Various independent pay and specialty Category A services – Licence renewals*, Broadcasting Decision CRTC 2013-468 (Ottawa, 30 August 2013) at ¶18.

⁴ *Ibid.*, at ¶11 and ¶¶17-18.

⁵ *Ibid.*, at ¶20: “given that Super Channel will continue to contribute to the creation of new Canadian programs and to the creative sector, ... and maintain an independent voice in the pay television sector, the Commission approves the licensee’s request that Super Channel be granted a reduction in its requirements relating to regional outreach and script and concept development.”

⁶ *Ibid.*, condition of licence 8.

⁷ *Ibid.*, at ¶11: “In each broadcast year, the licensee is currently required to expend at least \$1 million on regional outreach programs and \$2 million on script and concept development, in addition to its required CPE.”

⁸ Allarco, *Supplementary Brief*, at 2.

⁹ *Ibid.*

8. Allarco argues that the Commission should grant its application because
- Allarco is an independent English-language television programming service that cannot spread Canadian programming expenditure requirements over several programming services¹⁰
 - Allarco’s regional outreach and script and concept development programs have yielded 624 licensed Canadian programs since Allarco was licensed¹¹
 - Other general interest pay television services do not have similar regional outreach expenditure obligations¹²
 - Allarco “faces a series of formidable challenges to its business model”, because “[n]early 3 million Canadians now subscribe to the unregulated NETFLIX and other non-Canadian over-the-top programming services”,¹³ a situation that “has, and continues to, siphon revenues from the Canadian broadcasting system and contributes to increasing competition for premium programming and Pay Television subscriber churn”,¹⁴
 - Approval of Allarco’s application will enable it to respond to changing program requirements in a more agile fashion,¹⁵ and
 - The amendment “is necessary” for Superchannel’s financial viability.¹⁶

¹⁰ *Ibid.*, at 1.

¹¹ *Ibid.*, at 2.

¹² *Ibid.*

¹³ *Ibid.*, at 3.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Application form 301, *Amendment Requests (Excluding technical amendments)*, (30 April 2014) at 4.2.

Comments on Allarco's application

9. The CRTC should deny Allarco's application because it does not meet the Commission's procedural requirements, because approval would bring the integrity of the CRTC's regulation of broadcasters in accordance with Parliament's broadcasting policy into disrepute, and because approval would set an inappropriate precedent for other Canadian broadcasters.

a) Application does not meet CRTC's procedural requirements

10. The CRTC's current *Rules of Practice and Procedure* require applications to provide facts relevant to the grounds of the application.¹⁷ Allarco has provided no facts to demonstrate that

- its inability to share Canadian programming expenditures on Superchannel with other programming services because it does not own other services, prevents Allarco from making the expenditures it promised to make on Superchannel
- the absence of regional outreach expenditure obligations on other services prevents Allarco from keeping the commitments it promised to make in its original licence application
- the subscription by nearly 3 million Canadians to unregulated programming services in Canada has actually affected and will continue to affect Allarco's business model
- condition of licence 8 in any way impedes Allarco's ability to respond to changing program requirements, or that
- Superchannel's financial viability is at undue risk.

11. Allarco has also not explained how the number of licensed Canadian programs it facilitated since its launch is relevant to its current application regarding its expenditure performance over the next four years. We respectfully submit that to the extent that these numbers are in fact relevant to the counting of regional

¹⁷ S. 22(2)(e).

outreach and script and concept development expenditures as part of Superchannel’s required CPE (Allarco’s failure to establish this aside), the numbers that would actually be relevant are the numbers of licensed Canadian programs that will result over the next four years under the current condition of licence, and that might result in the same period under the amended condition of licence.

12. It is also unclear why the fact that other general interest pay television services do not have similar regional outreach expenditure obligations is relevant to the CRTC’s expectation that once an applicant is licensed, the applicant will meet commitments made to obtain its licence (which is why Allarco is now subject to condition of licence 8). Allarco should have, but has not, addressed the CRTC’s explanation in Broadcasting Decision CRTC 2013-468 “that while other pay television services are not currently subject to conditions of licence relating to regional outreach or script and concept development, they must nevertheless meet certain requirements and expectations to the same effect”.¹⁸ If the CRTC were to accept Allarco’s argument, moreover, each general interest pay television service would presumably be expected to meet identical requirements, through regulations of general application – the CRTC apparently determined instead that tailoring expectations to the circumstances of individual licensees will yield benefits to the broadcasting system that exceed those to be obtained from regulations that apply equally to all services.

13. Allarco has also not explained how the alleged siphoning of revenues by unlicensed programming services from Canada’s broadcasting system affects or is relevant to Allarco’s ability to keep the commitments it originally made to obtain its licence. Even with this alleged revenue siphoning – and, one assumes, under the current expenditure requirements established by Allarco’s licence including those from condition of licence 8 – Allarco is forecasting “subscriber growth and consequently revenue growth”.¹⁹ FRPC respectfully submits that the CRTC should deny applications for regulatory relief which claim a service’s financial viability is at risk unless amendments are approved, when the applicant simultaneously presents evidence of revenue growth.

¹⁸ Broadcasting Decision CRTC 2013-468, at ¶17.

¹⁹ *Supplementary Brief*, at 2.

14. Finally, we note that Allarco's application form states that no CRTC policies or practices are relevant to its application.²⁰ Broadcasting Decision CRTC 2013-468 specifically refers to the CRTC's "standard practice" regarding licensee non-compliance at paragraph 19. Allarco has not explained why the CRTC should effectively rewrite this practice, by dropping the sanction imposed via condition of licence 8 for Allarco's previous non-compliance.

b) Integrity of CRTC's regulation of broadcasters

15. Allarco has not provided clear reasons for the CRTC to disregard the promises that Allarco made to obtain the Superchannel licence, and effectively asks the Commission to ignore the fact that its proposed amendment will reduce total expenditures on Canadian programming – CPE in addition to regional outreach and script and concept development expenditures – by \$6 million (by incorporating the separate requirements for regional outreach and script and concept development within the CPE envelope).

16. Approving Allarco's current application will signal to existing and prospective licensees not only that commitments made at licensing hearings are simply guidelines²¹ rather than firm undertakings, but also that applicants may freely whittle away at their total support for Canadian programming by deftly combining previously separate financial commitments. FRPC respectfully submits that approval of Allarco's current application would thereby bring the integrity of the Commission's regulation of Canadian broadcasters so as to implement section 3 of the *Broadcasting Act*, into disrepute.

²⁰ Application form 301, *Amendment Requests (Excluding technical amendments)*, (30 April 2014) at 3.2(b).

²¹ *Pirates of the Caribbean: The Curse of the Black Pearl* (2003):

Elizabeth: Wait! You have to take me to shore. According to the Code of the Order of the Brethren...

Barbossa: First, your return to shore was not part of our negotiations nor our agreement so I must do nothing. And secondly, you must be a pirate for the pirate's code to apply and you're not. And thirdly, the code is more what you'd call "guidelines" than actual rules. Welcome aboard the Black Pearl, Miss Turner .

c) Precedent set by disregarding CRTC's *Rules of Practice and Procedure*


17. Lastly, FRPC notes that approval of Allarco's application despite its failure to provide relevant facts and clear grounds would convey the unfortunate message the licensees need not take these *Rules* especially seriously, thereby bringing the CRTC's administration of its responsibilities under the *Broadcasting Act* into disrepute.
18. For the reasons noted above, FRPC respectfully urges the Commission to deny Allarco's application to amend condition of licence 8.

Thank you, Mr. Secretary-General, for the opportunity to comment on application 2014-0383-1.

We look forward to the opportunity of reviewing other comments submitted in this proceeding.

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

Sincerely yours,



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