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To: NCRA Members
Re: Possibility for C/C Radio in Burlington

An analysis of the dissenting opinion of Commissioner Raj Shoan

The CRTC recently [issued a decision](#) where they denied a commercial station in Burlington the license to set up a new station. They cited the impact it would have on stations in Hamilton, and that the region is substantially served by stations in Hamilton and Toronto. Commissioner Raj Shoan took the exceptional approach to issue a dissenting opinion, based on the interpretation taken by the Commission.

In essence the key element of contest is what is the market being applied for. The initial application was for Burlington, however the CRTC studied the impact which would be had by the Numeris defined radio region which included Hamilton. Shoan argues that this is a disservice as the original application spoke to a frequency which covered only Burlington, not Hamilton. He secondly argues that the Act's definition of a market is what the Commission should operate off of, not Numeris which is a private company.

The point which is most significant for the c/c sector is that Commissioner Shoan appears keen to have a community oriented radio presence operating within the Burlington market. The original application was for a commercial station, however had strong local support. It's worth noting that this is the last frequency available in the City, and is best served for the Burlington community.

At the end of Commissioner Shoan's dissenting opinion he says "*In my opinion, Burlington-a city of almost 180,000 residents-deserves a radio station of its own 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.*"

This could prove fortuitous for groups in the Burlington region looking to set up a C/C radio. We currently have no members in the Hamilton area, and there are no C/C radio stations in Burlington. If you are aware of groups initiating this work, please advise.

Please See Attached: The Dissenting Opinion of Commissioner Raj Shoan

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:

1. the relevant market for analysis is Burlington as opposed to Hamilton; and
2. 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),^{Footnote1} 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. [Footnote2](#) 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.

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:

1. the smallest 3 mV/m contour associated with the applicable frequency is limited to Burlington;
2. it is the only frequency remaining to serve the Burlington market; and
3. 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 own^{Footnote3} 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.