



## Broadcasting and Telecom Information Bulletin CRTC 2009-38

Ottawa, 29 January 2009

### **Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings**

*In this bulletin, the Commission sets out revised procedures that apply to staff-assisted mediation, final offer arbitration, and expedited hearings. These procedures build upon practices the Commission has adopted in the past.*

#### **Introduction**

1. The Commission considers it important to have in place well-designed, predictable, and timely dispute settlement mechanisms for broadcasting and telecommunications matters that come under its regulatory purview.
2. This bulletin sets out, for both broadcasting and telecommunications matters, the procedural steps to be followed and the time limitations that will apply to each of the following: a) staff-assisted mediation, b) final offer arbitration, and c) expedited hearings (collectively, the dispute resolution processes).<sup>1</sup> These procedures build upon those that the Commission has adopted in the past.<sup>2</sup>
3. This bulletin will be the effective instrument regarding Commission procedures for the dispute resolution processes in disputes arising under either the *Broadcasting Act* or the *Telecommunications Act*. To ensure clarity, this bulletin replaces and supersedes earlier guidance regarding dispute resolution provided by the Commission in those public notices and circulars listed in Appendix 1 to this document. However, two aspects of Public Notice 2000-65 remain in effect: procedures related to "staff opinions," which are set out in paragraph 12 of Public Notice 2000-65, and procedures related to "consensus-based problem-solving," which are set out in paragraphs 15 to 17 of Public Notice 2000-65. These procedures are included in Appendix 2 to this document. An interpretation guide to the revised procedures is provided in Appendix 3.

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<sup>1</sup> These procedural steps and time limitations may be modified by the Commission in a particular case, as circumstances require.

<sup>2</sup> The Commission has consistently sought to implement practices and procedures that bring about the timely resolution of issues arising under the *Broadcasting Act* and the *Telecommunications Act*. For example, the Commission's central objective in issuing Public Notice 2000-65 was to allow it to reach determinations regarding competitive disputes as expeditiously as possible. In Telecom Circular 2004-2 and in Broadcasting Circular 2005-463 the Commission implemented measures regarding the conduct of Commission expedited public hearings.

4. Within the Commission, staff conducting mediation will be located in a separate unit and divided by an "ethical wall" from staff conducting final offer arbitration and expedited hearings. While staff-assisted mediation will continue to be available through the Commission's Broadcasting and Telecom Mediation groups, the Commission has created a distinct division within its Policy Development and Research sector to deal with final offer arbitration and expedited hearings.

### **General information**

5. Disputes that involve one issue – or in exceptional cases, several closely related issues – and have the following characteristics will lend themselves to the Commission's dispute resolution processes:
  - the dispute is bilateral or affects only a small number of parties;
  - the parties have been unable to resolve the dispute by alternative methods;
  - the dispute is relevant to the regulation and supervision of either the Canadian broadcasting or telecommunications system, primarily to matters of interpretation or application of an existing Commission decision, policy, or regulation; and
  - resolution of the dispute does not require a new policy or change to an existing policy.
6. Disputes for which resolution would effectively establish a new policy or change an existing policy will not be considered suitable for the dispute resolution processes. In addition, those disputes that involve a large number of issues or interested parties will not generally be considered suitable for these processes. In these instances, the Commission will rely on other redress mechanisms for resolving disputes.
7. This bulletin reflects the procedures for bilateral disputes. Where more than two parties are involved, the provisions of this bulletin are to be read effectively to accommodate that fact – except in the case of final offer arbitration, where only two parties can participate.
8. Where the Commission is not legally required to be involved, parties may resolve their differences through private third-party mediation or arbitration, bilateral negotiations, or other means without Commission participation. The Commission encourages parties to attempt to exhaust these means to resolve outstanding issues in an efficient and effective manner before applying for the dispute resolution processes pursuant to this bulletin.
9. While the Commission normally requires parties to engage in mediation before seeking final offer arbitration or an expedited hearing, there may be exceptional circumstances where there is an urgent need to resolve a particular dispute. In such cases, the Commission may accept the matter for final offer arbitration or an expedited hearing without first requiring mediation.

10. If the Commission denies a request for final offer arbitration or an expedited hearing, it will advise the parties involved and it may, where appropriate, suggest or initiate a different redress mechanism.
11. Deadlines for filing materials and other time frames set out within this bulletin are firm but may be varied by the Commission upon application.
12. Both programmers and broadcasting distribution undertakings are to provide continued access to programming services and carriage during an ongoing dispute.

## **Practices and procedures**

### **a) Staff-assisted mediation**

13. Staff-assisted mediation is the method of dispute resolution in which Commission staff assist parties in dispute to reach a consensual resolution of the issues. Where full resolution cannot be achieved, the objective of Commission staff will be to reduce the number of contentious issues in order to clearly identify those that may require further Commission intervention. In staff-assisted mediation, any resolution is non-binding.
14. Staff-assisted mediation is best suited to dispute situations that meet the criteria outlined in paragraph 5. It can also be effective in multilateral situations involving parties with like interests.
15. In bilateral disputes, participation in staff-assisted mediation is mandatory for both parties prior to final offer arbitration or an expedited hearing, unless both parties (i) have participated in third-party mediation or (ii) have an agreed-upon statement of facts and request either final offer arbitration or an expedited hearing.
16. Any party may request staff-assisted mediation by making a written request to Commission staff in confidence. Commission staff will establish whether the particular matter is appropriate for mediation. In the event that it is not, staff will deny the request and may suggest that it be dealt with through a different redress mechanism.
17. Staff-assisted mediation may be conducted by Commission staff through direct telephone conversations, conference calls, in-person meetings, or a combination of these methods. During mediation, Commission staff will assist parties in arriving at a consensual resolution by facilitating communication and exchanges, and by focusing the parties on the issues at hand. As it is generally in the best interests of the parties to advance in a timely manner towards resolving the dispute or components of the dispute, Commission staff will establish time limitations – as long as mediation continues to progress. Commission staff may extend these time limitations as required. Should it become apparent that mediation is ineffective, Commission staff will end the mediation process.

18. When a staff-assisted mediation process has been terminated without resolution of all issues, Commission staff may, if all parties agree, issue a Staff Mediation Report identifying outstanding issues. That report, with the consent of all parties, may form part of the record for consideration in final offer arbitration, an expedited hearing, or another Commission proceeding on issues identified in the report.

**b) Final offer arbitration**

19. Final offer arbitration is the method of dispute resolution used for disputes that are exclusively monetary, involve only two parties, and meet the criteria outlined in paragraph 5. It may be used when the parties involved have failed to resolve the dispute through staff-assisted mediation or when condition (i) or (ii) of paragraph 15 has been met. A Commission panel will act as arbitrator and will choose between the final offers put forward by the parties. Final offer arbitration will result in a binding determination.
20. Either party (the applicant) may request final offer arbitration by filing a written application with the Commission and serving it on the other party (the respondent). The application must set out the matter(s) for which a determination by the Commission is requested, include a concise statement of the facts and issues, and explain why the application meets the criteria for final offer arbitration.
21. Within 5 days of the respondent having received a copy of the application, the respondent must advise the Commission as to whether it supports the application for final offer arbitration regarding the specific matter(s) and serve this advice on the applicant.
22. The Commission, having conducted any conference calls or exchanges of correspondence with the parties that it considered appropriate, will advise the parties within 15 days of receiving the application for final offer arbitration whether it is prepared to accept the request for a final offer process.
23. Should the Commission accept the application for final offer arbitration, it will set out in an advice letter to the parties the specific dates upon which the final offer process is to be conducted and the matter(s) upon which it will make a determination. The Commission's establishment of the disputed matters ensures that the parties will be submitting comparable offers.
24. Within 15 days of the date upon which the parties are notified by the Commission of its conduct of the final offer process, each party must submit its final offer to the Commission. These submissions must be in reference to the disputed matters upon which the Commission will make a determination. They must also include concise supporting arguments stating all the facts, Commission requirements, and regulatory decisions, and, if applicable, decisions of the Courts relied upon, in support of a party's respective position. These submissions must be no longer than 10 pages. The parties may file, as an attachment, a copy of any written material upon which they rely, except Commission determinations, tariffs, tariff filings, and other documentation published by the Commission.

25. Within 5 days of the date upon which the final offer submissions of the parties have been received by the Commission, and upon confirmation that both offers respond to the identified disputed matters, the Commission will forward to each of the parties a copy of the other party's offer. Each party will be given an opportunity to comment on the other party's offer but will not be able to change its original offer. These commenting documents must be submitted by each party to the Commission within 5 days of each party having received the offer of the other party and may be no longer than 10 pages. There will be no oral hearing.
26. After the Commission arbitration panel selects one or the other of the offers in its entirety, the Commission will issue its decision. The Commission intends to release final offer arbitration decisions within 55 days of having accepted a request for final offer arbitration, in those cases where parties have met their filing obligations.
27. Only on a very exceptional basis, where neither party's final offer is, in the opinion of the Commission, in the public interest, both final offers will be rejected by the Commission and the parties involved will be so advised. In this event, the Commission may refer the matter to an expedited hearing.

**c) Expedited hearing**

28. An expedited hearing is the method of dispute resolution used for those disputes that meet the criteria outlined in paragraph 5, provided that the nature of the dispute is not exclusively monetary. It may be used when the parties involved have failed to resolve the dispute through staff-assisted mediation or when condition (i) or (ii) of paragraph 15 has been met. The Commission will award the relief requested, in whole or in part, if it finds in the applicant's favour. Under this method of dispute resolution, the Commission will establish Commission panels to conduct brief oral hearings.
29. Either party (the applicant) may request an expedited hearing by filing a written application with the Commission and serving it on the other party (the respondent). The application must set out the matter(s) for which a determination by the Commission is requested, include a concise statement of the facts and issues, and explain why the application meets the criteria for an expedited hearing.
30. Within 5 days of the respondent having received a copy of the application, the respondent must advise the Commission as to whether it supports the application for an expedited hearing regarding the specific matter(s) and serve this advice on the applicant.
31. The Commission, having considered any advice received from the respondent, will advise the parties by letter within 20 days of receiving the application for an expedited hearing whether it is prepared to accept the request. Should the Commission accept the application for an expedited hearing, it will set out in its advice letter to the parties the specific dates upon which the expedited hearing is to be conducted and the matter(s) upon which it will make a determination.

32. Within 15 days of the Commission having accepted a request and notified the parties, the respondent must file a response to the application with the Commission. The response must include a concise statement of the facts and issues, and the respondent must serve the response on the applicant.
33. All applications requesting expedited hearings and response submissions must include concise supporting arguments stating all the facts, Commission requirements, and regulatory decisions, and, if applicable, decisions of the Courts relied upon, in support of a party's respective position. All applications must also include a concise statement of the relief sought. These documents must be no longer than 10 pages. The parties may file, as an attachment, a copy of any written material upon which they rely, except Commission determinations, tariffs, tariff filings, and other documentation published by the Commission. The Commission will not accept the filing of additional documents at the hearing, except upon specific leave.
34. Where the Commission has accepted an application for an expedited hearing, parties will be required to attend a brief oral hearing, to which they will be required to bring all relevant documentation and knowledgeable personnel. An adverse inference may be drawn from the failure of a party to bring all relevant documentation and knowledgeable personnel to the oral hearing.
35. The Commission may, at any time, require that one or both of the parties file further information before or at the oral hearing.
36. At the beginning of the hearing, each party will be given a brief opportunity – generally 10 minutes – to address the panel. The Commission panel and Commission counsel will then question the parties, after which the parties will have an opportunity to question each other – generally for 20 minutes each. Finally, each party will be given another brief opportunity – generally 10 minutes – to address the panel, following which the oral hearing will conclude. The Commission may modify hearing procedures as circumstances require.
37. The Commission intends to release its expedited hearing decisions within 70 days of having accepted a request for an expedited hearing, in those cases where the parties have met their filing obligations and where no adjournment has been extended in the oral hearing.
38. Hearings will generally be held in Salon Réal Therrien on the 7<sup>th</sup> floor of the Central Building, Les Terrasses de la Chaudière, 1 Promenade du Portage, Gatineau, Quebec.

### **Confidentiality**

39. All information and materials submitted by the parties in the course of staff-assisted mediation, as well as the existence of such mediation and all discussions in the course of such mediation, will be confidential and will not be disclosed by the parties or the Commission and may not be used by any of the parties in subsequent proceedings before the Commission. As noted in paragraph 18, if all parties agree, the Commission may issue a Staff Mediation Report identifying issues remaining for resolution. That report, with the consent of all parties, may form part of the record for consideration in another Commission proceeding on issues identified in the report.

40. For final offer arbitration and expedited hearing proceedings, existing Commission confidentiality rules and practices will apply. Where a party files information with the Commission in confidence, the party must provide sufficient details as to the nature and extent of the specific direct harm that it considers would result from the disclosure of the information subject to the confidentiality claim. The party is also to file an abridged version of the document for the public record accompanied by reasons for the confidentiality claim or reasons for objecting to the filing of an abridged version.
41. Information filed with the Commission will be placed on the public record unless the party filing the information asserts a claim for confidentiality at the time of filing. Where the Commission is of the opinion that any specific direct harm likely to result from public disclosure is not sufficient to outweigh the public interest in disclosing the information, it may place information for which confidentiality has been claimed on the public record, on its own initiative or at the request of a third party, after providing the party filing the information a further opportunity to justify its claim for confidentiality.
42. For disputes subject to section 12 of the *Broadcasting Distribution Regulations*, information filed with the Commission will generally be kept confidential.<sup>3</sup> For such disputes, parties are not required to request confidentiality for materials filed with the Commission. Where the Commission is of the preliminary opinion that it is in the public interest that information filed pursuant to a dispute subject to section 12 be made public, the Commission will provide the filing party an opportunity to assert a claim for confidentiality as set out above.

### **Timing of new practices and procedures**

43. The above-referenced procedures and practices will be effective as of the date this bulletin is issued.

### **Filing of documents**

44. Please note that to the extent possible, all documents should be filed electronically via the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca). Parties are to clearly indicate in the first paragraph of their application whether their request is for staff-assisted mediation, final offer arbitration, or an expedited hearing.

Secretary General

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<sup>3</sup> Section 12 of the *Broadcasting Distribution Regulations* sets out the policy regarding dispute resolution for disputes “between the licensee of a distribution undertaking and the licensee of a programming undertaking or the operator of an exempt programming undertaking concerning the carriage or terms of carriage of programming, including the wholesale rate, originated by the programming undertaking...”

## Related documents

- *Expedited procedure for resolving issues arising under the Broadcasting Act*, Broadcasting Circular CRTC 2005-463, 18 April 2005
- *Expedited procedure for resolving competitive issues*, Telecom Circular CRTC 2004-2, 10 February 2004
- *Practices and procedures for resolving competitive and access disputes*, Public Notice CRTC 2000-65, 12 May 2000

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*

This bulletin replaces and supersedes guidance regarding dispute resolution provided by the Commission in the following public notices and circulars:

1. *Expedited procedure for resolving issues arising under the Broadcasting Act*, Broadcasting Circular CRTC 2005-463, 18 April 2005
2. *Expedited procedure for resolving competitive issues*, Telecom Circular CRTC 2004-2, 10 February 2004
3. *Practices and procedures for resolving competitive and access disputes*, Public Notice CRTC 2000-65, 12 May 2000
4. *Broadcasting Distribution Regulations*, Public Notice CRTC 1997-150, 22 December 1997
5. *Access rules for broadcasting distribution undertakings*, Public Notice CRTC 1996-60, 26 April 1996
6. *New procedures regarding competitive issues*, Telecom Public Notice CRTC 95-51, 8 December 1995
7. *Amendments to the Cable Television Regulations, 1986*, Public Notice CRTC 1994-7, 3 February 1994

The following procedures, set out by the Commission in Public Notice 2000-65 remain in effect:

### **Staff-assisted opinion**

12. In some instances, all that may be needed is some assistance from Commission staff over a period of a few hours or days to break an impasse. In other situations, parties may not be able to make progress in their negotiations, and may require a staff opinion or other assistance. Where a staff opinion is requested, the Commission's objective is that, wherever possible, such an opinion would be released within 60 days of the date of receipt of the request. Generally, the more complex or technical a dispute, the more likely it is that at least some type of informal or formal oral phase (including meetings between the parties) will be required. Written submissions from the parties may not be sufficient to enable CRTC staff to prepare a comprehensive opinion. In such circumstances, the 60-day objective may have to be extended.

### **Model 2: Consensus-based problem-solving**

15. This model contemplates staff-facilitated meetings involving participation in a working group by a broad cross section of industry representatives and other interested parties. The working group's purpose would be to find solutions to broad problems of a technical, operational or administrative nature, and perhaps industry-wide in scope, rather than to resolve disputes arising between individual parties. This model has been used successfully by the CRTC Interconnection Steering Committee (CISC) to address issues regarding the implementation of local telephone competition.

16. The working group would generally investigate an issue, determine the facts and propose a solution in a consensus report that would then come before the Commission for approval. Although such a process need not involve Commission approval of the reports, participants in past CISC forums of this nature have generally sought such approval to give additional status to the results of their extensive work.

17. Typically, under this process:

- working groups would be established to focus on specific tasks and work towards creating a consensus industry position as to how a technical, administrative or operational issue should be resolved;
- membership in the working groups is open to all parties having a demonstrable, direct interest in the outcome;
- staff would attend meetings to facilitate discussion, answer questions, and occasionally provide a staff opinion to break an impasse; and
- disputes on policy matters arising in the course of the group discussions would be resolved by the Commission on the basis of a written process.

# Interpretation Guide – Practices and Procedures for Staff-Assisted Mediation, Final Offer Arbitration, and Expedited Hearings

Parties should first attempt to resolve the dispute on their own.

