



Broadcasting Decision CRTC 2010-590

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Ottawa, 18 August 2010

Request for dispute resolution by Torstar Corporation relating to the distribution of ShopTV Canada by Rogers Cable Communications Inc.

The Commission sets out its determinations regarding a request for dispute resolution by Torstar Corporation (Torstar) relating to the distribution of its exempt programming undertaking known as ShopTV Canada (ShopTV) by Rogers Cable Communications Inc. (Rogers). Specifically, the Commission determines that Rogers is not in compliance with section 21(3) of the Broadcasting Distribution Regulations, which relates to the distribution of third-party exempt programming undertakings, and that Torstar has failed to demonstrate that the rate charged by Rogers for the distribution of ShopTV is no longer appropriate.

Introduction

1. On 4 May 2010, the Commission received an application by Torstar Corporation (Torstar) for dispute resolution pursuant to section 12 of the *Broadcasting Distribution Regulations* (the Regulations), in regard to the distribution of ShopTV Canada (ShopTV) by Rogers Cable Communications Inc. (Rogers). On 27 July 2010, the Commission held a public hearing in the National Capital Region to consider Torstar's application.

The parties

2. Torstar is the parent company of Toronto Star Newspapers Limited, whose division known as Torstar Media Group Television operates ShopTV, a 24-hour-a-day direct response teleshopping programming service undertaking operating pursuant to the exemption order set out in Broadcasting Public Notice 2003-11. Torstar acquired ShopTV (formerly known as Direct to You) from Rogers in 1996.
3. Rogers is a wholly-owned subsidiary of Rogers Communications Inc.; it holds two Class 1 regional licences and operates a total of 13 cable broadcasting distribution undertakings (BDUs) in various locations in Ontario, New Brunswick, and Newfoundland and Labrador.

Background

4. Rogers controls¹ and distributes, as part of its analog basic service on its Class 1 systems, the exempt programming services known as The Shopping Channel (TSC)

¹ That is, Rogers or an affiliate controls 15% or more of the total shares issued and outstanding.

and the TV Listings Channel. In addition, as part of its analog basic service on its Class 1 systems, Rogers distributes the provincial legislature services and the House of Commons programming service,² both of which are third-party exempt programming services. Finally, ShopTV is currently distributed on analog basic by Rogers on ten of its cable systems.³

5. In its application of 4 May 2010, Torstar requested that the Commission resolve a commercial dispute with Rogers relating to, among other things, the terms of distribution of ShopTV by Rogers on its cable systems in Ontario, New Brunswick, and Newfoundland and Labrador. Torstar contended that Rogers has an obligation to provide access to ShopTV on an analog basis on its Class 1 cable systems, on terms and conditions comparable to the channel assignments provided to TSC.

Issues

6. In a letter dated 28 May 2010, the Commission stated that the issues to be considered at the hearing were the following:
 - whether Rogers has an obligation under the Regulations to provide access to ShopTV on an analog basis to Rogers' Class 1 cable systems on terms and conditions comparable to the channel assignments provided to TSC; and
 - the rate that ShopTV would pay Rogers for distribution of the service on the Rogers cable systems.

Does Rogers have an obligation under the Regulations to provide access to ShopTV on an analog basis to Rogers' Class 1 cable systems on terms and conditions comparable to the channel assignments provided to TSC?

Positions of parties

Torstar

7. Torstar contended that Rogers has an obligation to distribute ShopTV under the current 1:1 provisions set out in section 21(3) of the Regulations. It argued that, given that Rogers owns and distributes TSC and the TV Listings Channel as part of its analog basic service on its Class 1 systems, it is required to distribute as part of its analog basic service at least two third-party exempt services. Further, Torstar argued that the spirit and intent of the access requirements of third-party exempt programming services was to ensure competition among commercial exempt programming services. Torstar submitted that, consequently, it would be inappropriate to interpret that the provincial legislature services and the House of Commons programming service, which have a unique niche and public role in the

² The House of Commons programming service is broadcast on the Cable Public Affairs Channel, a licensed undertaking that provides programming when the House of Commons programming service is not in operation.

³ Barrie, Bolton, CFB Borden/Alliston, Keswick, Newmarket/Aurora, Orillia, Pickering, Pine Ridge and Ajax, Scarborough, Toronto/Peel/Halton

Canadian broadcasting system and which enjoy certain regulatory privileges, are exempt services that satisfy the 1:1 matching requirement set out in section 21(3) of the Regulations.

8. Finally, Torstar contended that ShopTV was the first exempt service to request carriage on Rogers' Class 1 systems under the Commission's first come, first served approach,⁴ and that as long as Rogers distributes TSC or any other affiliated service on those systems, it must carry ShopTV rather than any other exempt service.

Rogers

9. Rogers submitted that none of its systems have an obligation to provide carriage to ShopTV on an analog channel, and that it is fully compliant with its obligations under section 21(3) of the Regulations in regard to the services that it distributes on its Class 1 systems. Rogers also stated that there is no evidence that the Commission intended that "public interest channels" such as provincial legislature services and the House of Commons programming service not be treated as "third-party exempt programming undertakings" for purposes of section 21(3) of the Regulations.
10. Finally, Rogers argued that the first come, first served approach is not applicable in the present case because all of its Class 1 systems are in compliance with section 21(3) of the Regulations. Rogers further stated that, in any case, the provincial legislature services and the House of Commons programming service pre-date the existence of ShopTV and are therefore entitled to carriage under the Commission's first come, first served policy ahead of ShopTV.

Commission's analysis and determinations

11. Section 21(3) of the Regulations, which is applicable only to Class 1 licensees, reads as follows:

If a licensee distributes in a licensed area on one or more analog channels the programming services of an exempt programming undertaking of which the licensee or an affiliate, or both, controls 15% or more of the total shares issued and outstanding, the licensee shall make available in the licensed area an equal number of analog channels for the distribution of programming services of third party exempt programming undertakings.

12. In Public Notice 1996-60, the Commission explained that the purpose of requiring a 1:1 matching requirement for affiliated exempt programming services distributed on analog distribution systems was to preclude "any preferential treatment being given to the exempt services in which distribution undertakings have an ownership interest above a certain level." The obligations set out in Public Notice 1996-60 and codified in the Regulations require BDUs to make available an offsetting number of analog channels in order to prevent preferential treatment of their own services. The

⁴ The Commission's first come, first served approach is set out in Public Notice 1996-60 and clarified in Public Notice 2000-72.

Commission notes that, pursuant to sections 17(1)(i), 17(1)(j) and 18(11.1) of the Regulations, Class 1 BDUs are required to carry the House of Commons programming service. Accordingly, it would be contrary to the purpose of requiring a 1:1 matching requirement for affiliated exempt programming services to permit Rogers to count, for the purposes of section 21(3) of the Regulations, a service that already has mandatory distribution and that does not reflect an obligation on the part of Rogers to make it available as a third-party exempt programming undertaking.

13. In light of the above, the Commission determines that where Rogers is counting the House of Commons programming service as a third-party exempt service in order to meet its regulatory obligations under section 21(3) of the Regulations, it is not in compliance. In order to come into compliance for the applicable systems, Rogers would have to modify its basic analog service offering to either cease the distribution of one of its own exempt programming undertakings or distribute an additional third-party programming undertaking.
14. The Commission is concerned, however, that in those systems where there is not sufficient analog capacity to distribute an additional third-party exempt programming undertaking (capacity that could be made available by using channels that are not currently occupied by a programming service), the requirement to do so may result in Rogers electing to drop another programming undertaking. In Public Notice 1996-60, the Commission stated that BDUs must give priority to the carriage of the services of licensed Canadian programming undertakings over all other services, including those provided by exempt programming undertakings.
15. Furthermore, as noted in paragraph 14 of Broadcasting Decision 2009-488, the Commission, where appropriate, operates with a view to minimize customer disruption. Currently, the Commission notes that consumers are faced with a rapidly changing Canadian broadcasting system, including the transition to digital transmission for over-the-air television stations and a new regulatory regime that will likely result in some changes for consumers and that may require some consumer education measures. As per Broadcasting Public Notice 2008-100, the Commission intends to issue revised BDU regulations that will apply to digital services, while issuing modified regulatory obligations for analog distribution.
16. The Commission therefore considers that, in keeping with the principle set out in Public Notice 1996-60, and so as to prevent disruption to consumers, an exception is warranted, and that it will permit Rogers to satisfy the requirements of section 21(3) of the Regulations by distributing an additional third-party exempt programming undertaking as part of its digital basic service. For greater clarity, where as a result of the determinations set out herein Rogers is in non-compliance with section 21(3) of the Regulations, it may remedy its non-compliance by either:
 - no longer distributing one of its own exempt programming undertakings as part of its analog basic service;

- distributing an additional third-party exempt programming undertaking as part of its analog basic service; or
 - where there is not sufficient analog capacity⁵ available, distributing an additional third-party exempt programming undertaking as part of its digital basic service.
17. However, even if Rogers elects to remove a programming undertaking from its analog service in order to come into compliance with section 21(3) of the Regulations rather than offer an additional third-party exempt programming undertaking as part of its digital basic service, as per Public Notice 1996-60, Rogers is not permitted to remove a licensed Canadian programming undertaking from its analog service.
18. The Commission considers it appropriate for Rogers to have some time to remedy its non-compliance. Accordingly, in those systems where Rogers is not in compliance with section 21(3) of the Regulations, it has 30 days from the date of this decision to remedy its non-compliance.
19. In regard to Torstar's arguments concerning the first come, first served approach as it relates to Rogers' systems where ShopTV is not currently distributed, the Commission notes that Rogers indicated on the record that there are no services in line in regard to its analog systems. Accordingly, the Commission considers that Torstar has adequately demonstrated that it has first-in-line status on the Rogers systems under consideration in the present proceeding.
20. With the above-noted determinations, parties have the opportunity to come to a commercial resolution to any outstanding issues on their own.

Rate that ShopTV would pay Rogers for distribution of the service on the Rogers cable systems

Positions of parties

21. In regard to the rate that ShopTV would pay Rogers for distribution on Rogers' cable systems, Torstar noted that it is not asking the Commission to revisit the maximum rate established in Public Notice 1997-35. Rather, Torstar requested that the Commission resolve an ongoing protracted and expensive rate dispute between the parties.
22. To assist the Commission in determining a rate, Torstar submitted three rate benchmarks it considered appropriate: an international exempt services rate comparison, a 2007 study by Jim Macdonald updating the current Canadian Cable

⁵ The Commission notes that this is not the case in the Rogers systems where ShopTV is currently being distributed in analog.

Television Association formula, and a table⁶ showing the rates that ShopTV pays other BDUs that do not have affiliated exempt programming services.

23. Rogers argued that Torstar's request for a revised access rate was based on an inadequate record. Rogers noted that no evidence was presented in this proceeding that would enable the Commission to make a fact-based determination that the value of an analog channel on Rogers' cable systems is now less than what it was when it was set out in Public Notice 1997-35. Rogers submitted that analysis they had undertaken demonstrates that the rate may in fact be higher.

Commission's analysis and determinations

24. The Commission notes that the rate established in Public Notice 1997-35 was based on the costs, operating and capital, attributable to providing channel capacity.
25. The Commission considers that the evidence provided by Torstar arguing that the rate set out in Public Notice 1997-35 is too high and should be revised downward is, at best, inconclusive. Although a study was provided attempting to use more recent data to revise the calculations that led to the rate established in Public Notice 1997-35, there were several issues, such as the appropriate number of channels to use in the calculation and whether channel capacity should include the number of both analog and digital channels or just analog channels, that rendered the accuracy of the resulting rate questionable.
26. The Commission finds, moreover, that there is insufficient evidence that the rates provided by Torstar depicting what foreign entities charge other shopping programming services for access to their broadcasting channels are comparable to the rates charged within the Canadian broadcasting system.
27. In light of the above, the Commission determines that Torstar has failed to demonstrate that the rate currently being charged by Rogers is no longer appropriate.

Conclusion

28. In light of all of the above, the Commission determines that Rogers Cable Communications Inc. is not in compliance with section 21(3) of the *Broadcasting Distribution Regulations*, which relates to the distribution of third-party exempt programming undertakings, and that Torstar Corporation has failed to demonstrate that the rate charged for its exempt programming undertaking is no longer appropriate.

Secretary General

⁶ This table was filed in confidence with the Commission.

Related documents

- *Various cable broadcasting distribution undertakings across Canada – Licence amendments*, Broadcasting Decision CRTC 2009-488, 13 August 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory policy*, Broadcasting Public Notice CRTC 2008-100, 30 October 2008
- *Review of exemption orders respecting experimental video-on-demand programming undertakings, video games programming service undertakings and teleshopping programming service undertakings*, Broadcasting Public Notice CRTC 2003-11, 6 March 2003
- *Clarification of the “first come, first served” policy for exempt programming services*, Public Notice CRTC 2000-72, 31 May 2000
- *Access Rate for Exempt Programming Undertakings*, Public Notice CRTC 1997-35, 2 April 1997
- *Access rules for broadcasting distribution undertakings*, Public Notice CRTC 1996-60, 26 April 1996