



Broadcasting Decision CRTC 2012-393

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Ottawa, 20 July 2012

Request for dispute resolution by Bell Media Inc. concerning affiliation agreements with the Canadian Independent Distributors Group and TELUS Communications Company in regard to Bell Media Inc.'s specialty television services

In this decision, the Commission sets out its determinations on an application for dispute resolution by Bell Media Inc. (Bell Media) concerning affiliation agreements with the Canadian Independent Distributors Group (CIDG) and TELUS Communications Company (TELUS) in regard to Bell Media's specialty television services.

*In regard to the dispute between Bell Media and TELUS, the Commission determines that, on balance, the TELUS final offer is the appropriate choice. Accordingly, the Commission directs the parties to execute the TELUS final offer affiliation agreement by no later than **25 July 2012**.*

*In regard to the dispute between Bell Media and the CIDG, the Commission determines that Bell Media's final offer is the appropriate choice. Accordingly, the Commission directs the parties to execute their respective Bell Media final offer affiliation agreements by no later than **25 July 2012**.*

Background

1. In Broadcasting Decision 2012-208, the Commission initially addressed, by way of an expedited hearing, a bilateral dispute between the Canadian Independent Distributors Group (CIDG) and Bell Media Inc. (Bell Media) concerning the distribution of specialty television services controlled by Bell Media.
2. The members of the CIDG at that time consisted of Bragg Communications Incorporated (Bragg), the Canadian Cable Systems Alliance Inc. (CCSA), Cogeco Cable Canada LP (represented by Cogeco Cable Canada GP Inc.) (Cogeco), MTS Inc. (MTS) and TELUS Communications Company¹ (TELUS).
3. In Broadcasting Decision 2012-208, the Commission set out determinations on the following issues in regard to the dispute between the parties:
 - the packaging of programming services so that consumer choice is enhanced while ensuring that the objectives set out in the *Broadcasting Act* are fulfilled;

¹ In Broadcasting Decision 2012-208, "TELUS Communications Company" was incorrectly identified as "TELUS Communications Inc."

- pricing incentives;
 - making non-linear programming rights available on commercially reasonable terms; and
 - a final offer arbitration (FOA) process to set rates.
4. In regard to the setting of rates, since there were several ways that an affiliation agreement between the parties could be structured to reflect its decision, the Commission considered that it was preferable to allow parties to arrive at a commercially negotiated settlement. Accordingly, the Commission expected parties to be guided by the Commission's analysis and determinations set out in Broadcasting Decision 2012-208 in their negotiations with each other with the purpose of reaching an agreement.
 5. Notwithstanding the above, the Commission stated in that decision that if parties failed to reach an agreement, either party could request that the Commission conduct an FOA process.

Application for final offer arbitration

6. In accordance with the Commission's direction set out in Broadcasting Decision 2012-208, Bell Media submitted an application dated 9 May 2012 requesting Commission-supervised FOA in regard to the execution of affiliation agreements with the CIDG for 29 of the Bell Media services.²
7. In a letter dated 14 May 2012, the CIDG supported the application to proceed with FOA but requested that separate and simultaneous FOAs be conducted between Bell Media and TELUS, and between Bell Media and the remaining CIDG members.
8. On 24 March 2012, the Commission issued an Organization and Conduct letter stating, among other things, that:
 - Bell Media's application for FOA had been accepted by the Commission;
 - separate but concurrent FOA processes would be conducted between Bell Media and TELUS, and between Bell Media and the remaining CIDG members;
 - each party was to individually file a comprehensive affiliation agreement in an executable form, which would constitute a party's final offer;
 - the FOA process would include an oral component that the Commission would use to clarify any questions it had in regard to the final offers; and

² A list of the Bell Media services at issue in this dispute is set out in the appendix to this decision.

- the Commission would review both agreements and choose one in its entirety.
9. The Commission notes that, due to the commercially sensitive nature of significant parts of the record, the majority of the record has been designated as confidential by the parties pursuant to the *CRTC Rules of Practice and Procedure*, and will remain confidential. In light of the confidential nature of the record of the proceeding, the Commission's rationale set out in the sections that follow does not disclose any information contained in the final offers filed with the Commission in confidence.

Regulatory framework

10. As set out in Broadcasting and Telecom Information Bulletin 2009-38, during an FOA process, a panel acts as arbitrator and chooses between the final offers put forward by the parties. The panel selects only one of the offers in its entirety, with the FOA resulting in a binding determination. 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 may be rejected by the Commission and the parties involved will be so advised. In the above-noted Organization and Conduct letter, the Commission informed the parties of these aspects of the FOA process.
11. In the sections that follow, the Commission addresses the appropriateness of the final offers made by the parties in each dispute and selects between the parties' offers. In arriving at its decisions, the Commission was guided by the following principles.

Concordance with the Vertical Integration Framework

12. The Commission has considered which of the offers is most likely to best contribute to the Commission's framework set out in Broadcasting Regulatory Policy 2011-601 (the Vertical Integration Framework), in particular, the objective of ensuring that consumers continue to benefit from a wide choice of programming in a broadcasting system where programming and distribution have become increasingly integrated. In the Vertical Integration Framework, the Commission also recognized the importance of providing consumers with more choice and flexibility in the services to which they can subscribe, while at the same time providing them with the ability to only pay for the services they want to watch.
13. The Commission has further considered which of the offers better reflects the guiding principles set out in the Code of Conduct appended to the Vertical Integration Framework. As the Commission has previously noted, it will refer to these principles, which are to serve as a basis for guiding commercial interactions between industry stakeholders, when conducting dispute resolution processes.

Concordance with Broadcasting Decision 2012-208

14. The Commission has considered which of the offers has better incorporated the Commission's previous analysis and determinations on the issue in dispute set out in Broadcasting Decision 2012-208.

15. Specifically, in regard to distribution and packaging, the Commission concluded in that decision that the commercial reasonableness of any given packaging option (e.g., fixed packaging or flexible packaging) could only be determined once the unit pricing and other related terms are known. The Commission stated that it would view unit pricing as commercially unreasonable if it had the effect of making flexible packaging options commercially unviable or resulted in a company that offers programming services using its market dominance so as to insulate it completely from the effect of consumers exercising choice.
16. In terms of the commercial reasonableness of pricing incentives, the Commission generally agreed that the use of such incentives and the imposition of interest payments are common business practices. However, the Commission was of the view that, when an incentive or interest payment represents a disproportionate percentage of the value of an agreement, such incentives could be viewed as punitive and considered commercially unreasonable. In this regard, the Commission reminded parties that the Vertical Integration Framework established that rates determined by the Commission or agreed to by the parties prior to the Commission reaching a decision would be applied when the last agreement reached for the distribution of the service expired.
17. The Commission has also considered which of the offers has struck the better balance of allowing a BDU to provide its subscribers with more choice and flexibility, while providing programming undertakings with reasonable and predictable levels of revenue for each of their programming services. In Broadcasting Decision 2012-208, the Commission, while strongly encouraging BDUs to adopt consumer friendly packaging options, noted that programming services will need time to adapt to an increasingly consumer-focussed environment.

Bell Media versus TELUS

18. In regard to the final offers separately submitted by Bell and TELUS, the Commission notes the following:
 - both parties' offers reflect the fact that parties made significant strides to resolve the matters previously in dispute between them;
 - both parties' offers moved in the direction of providing more consumer choice;
 - both parties' offers were conceptually reasonable in that they provided commercially reasonable terms;
 - both parties' offers contain incentives to provide a wide choice of programming in the broadcasting system, and the opportunity for greater consumer choice and flexibility; and

- both parties' offers were in compliance with the Vertical Integration Framework and the Code of Conduct.
19. The Commission considers, however, that the TELUS final offer included creative and innovative elements that were not present in the Bell Media final offer.
 20. While the Commission recognizes that both offers sought to balance the priorities of reasonable rates and a fair and equitable competitive environment, it considers that the TELUS offer presents a unique packaging and pricing model, which offers consumers greater choice, while at the same time satisfying Bell Media's need for revenue predictability.
 21. As the Commission noted in Broadcasting Decision 2012-208, programming services will need time to adapt to an increasingly consumer-focussed environment. The Commission considers that TELUS's final offer represents an incremental step towards this evolution.
 22. In regard to Bell Media's final offer, the Commission was concerned that certain provisions of the offer would reduce some of the innovative elements in TELUS's service offering that are currently available to TELUS subscribers.
 23. In light of the above, the Commission determines that, on balance, the TELUS final offer is the appropriate choice in this circumstance. Accordingly, the Commission directs the parties to execute the TELUS final offer affiliation agreement by no later than **25 July 2012**.

Bell Media versus the CIDG

24. In regard to the final offers separately submitted by Bell Media and the CIDG, the Commission considers that:
 - both parties' offers reflect that fact that parties made significant strides to resolve the matters previously in dispute between them;
 - both parties' offers moved in the direction of providing more consumer choice;
 - both parties' offers were conceptually reasonable in that they provided commercially reasonable terms; and
 - both parties' offers contain incentives to provide a wide choice of programming in the broadcasting system, and the opportunity for greater consumer choice and flexibility.
25. Bell Media's final offer included three executable affiliation agreements, one for each of the parties comprising the CIDG: the CCSA (which includes Bragg), Cogeco and

MTS. The CIDG's final offer included a single affiliation agreement that would apply to all of its members.

26. The Commission considers that both approaches are acceptable and notes that it attached no importance as to whether a final offer was set out in a single agreement or in three separate agreements. The Commission considers, however, that the CIDG final offer affiliation agreement is inconsistent with the standstill rule of the Vertical Integration Framework and has determined, on that basis, that it cannot be retained.
27. The standstill rule was first enunciated in paragraph 104 of Broadcasting Regulatory Policy 2011-601. This rule was then quoted in the Commission letter to Bell Media dated 14 October 2011,³ which clarified certain provisions in the Vertical Integration Framework, as well as in paragraph 29 of Broadcasting Decision 2012-208.
28. The Commission notes that the standstill rule is an integral provision of the Vertical Integration Framework as its purpose is to protect consumers from loss of service during disputes between BDUs and programmers. The rule states that in exchange for continued service during any dispute between an operator of a programming undertaking and a distribution undertaking, the rates determined by the Commission, or agreed to by the parties if settled independently, would be applied when the last agreement reached for distribution of the service expired.
29. The Commission considers that the standstill rule benefits both programming undertakings and BDUs as neither party can gain a permanent advantage by frustrating the negotiation of a new affiliation agreement.
30. Further, the Commission considers that Bell Media's proposal, on balance, better addresses the Commission's determination set out in Broadcasting Decision 2012-208 in regard to providing programming undertakings with reasonable and predictable levels of revenue for each programming service, and its expectation that a programming service should not be completely insulated from the effects of consumers exercising choice. It also better addresses the Commission's determination in regard to giving programming services time to adapt to an increasingly consumer focussed environment.
31. In light of the above, the Commission determines that Bell Media's final offer is the appropriate choice in this circumstance. Accordingly, the Commission directs the parties to execute their respective Bell Media final offer affiliation agreements by no later than **25 July 2012**.

Other matters

32. The Commission notes that all offers retained by the Commission (i.e., the TELUS affiliation agreement and the Bell Media affiliation agreements) contain a provision

³ The Commission's letter was copied to all parties to the vertical integration proceeding, including all CIDG members.

that is inconsistent with section 7 of the *Broadcasting Distribution Regulations* (the Regulations). Accordingly, the Commission directs the implicated distribution undertakings (i.e., TELUS and individual CIDG members), coincident with the execution of their respective affiliation agreements, to apply to the Commission, pursuant to section 7(a) of the Regulations, for a condition of licence that will bring the implicated distribution undertakings into compliance with section 7 of the Regulations.

Secretary General

Related documents

- *Request for dispute resolution by the Canadian Independent Distributors Group relating to the distribution of specialty television services controlled by Bell Media Inc.*, Broadcasting Decision CRTC 2012-208, 5 April 2012
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011, as corrected by *Regulatory framework relating to vertical integration – Correction*, Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011
- *Practices and Procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009, as amended by Broadcasting Regulatory Policy CRTC 2009-38-1, 26 April 2010

Appendix to Broadcasting Decision CRTC 2012-393

List of Bell Media Inc. specialty television services subject to this dispute

Animal Planet

BNN

Book TV

Bravo!

Comedy

Comedy Gold

CP24

CTV News Channel

Discovery Channel

Discovery Science

Discovery World HD

E!

ESPN Classic

Fashion TV

Investigation Discovery

MTV

MTV2

MuchLoud

MuchMore

MuchMoreRetro

MuchMusic

MuchVibe

PunchMuch

RDS

RDS2

RIS

Space

TSN

TSN2