



## Broadcasting Decision CRTC 2014-508

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Ottawa, 2 October 2014

### **Request for final offer arbitration by Quebecor Media Inc. regarding the distribution of Sun News Network by Rogers Communications Partnership**

*The Commission sets out its decision on an application for final offer arbitration by Quebecor Media Inc. regarding the distribution of Sun News Network (SNN) by Rogers Communications Partnership (Rogers). Specifically, the Commission selects Rogers' offer, which sets wholesale rates for the distribution of SNN by Rogers.*

#### **Introduction**

1. On 26 March 2014, Quebecor Media Inc. (QMI), on behalf of Sun News Network (SNN), requested that the Commission initiate a final offer arbitration process to determine the wholesale rates for the distribution of SNN by Rogers Communications Partnership (Rogers).<sup>1</sup> QMI submitted that Rogers' offer with respect to SNN's distribution did not comply with Broadcasting Order 2013-735 (the Order) and Broadcasting Regulatory Policy 2013-734 (the Category C news framework).
2. In a letter dated 22 July 2014 (the conduct letter), the Commission noted that negotiations had stalled and that parties were at an impasse. The Commission advised the parties that it had accepted the request for final offer arbitration pursuant to sections 12 to 15 of the *Broadcasting Distribution Regulations*.
3. The Commission indicated that it considered that final offer arbitration was the appropriate method for dispute resolution in this case as the dispute was exclusively monetary, involved only two parties and otherwise met the criteria for dispute resolution set out in Broadcasting and Telecom Information Bulletin 2013-637 (the Bulletin). The Commission stated that it would make a determination only on the appropriate wholesale rates for the distribution by Rogers of SNN on the basic service and on a discretionary basis. The Commission advised the parties that other matters relating to the distribution of SNN by Rogers, such as the appropriate packaging of SNN or duration of the agreement, would not be considered and would be left to negotiation by the parties.
4. In accordance with the procedure set out in the Bulletin, in a final offer arbitration, the Commission examines the final offers submitted by the parties and selects one in its entirety. The Commission's decision is binding on the parties. In rare instances, where neither offer is in the public interest, the Commission may reject both offers.

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<sup>1</sup> Mountain Cablevision Limited and Fido Solutions Inc., partners in a general partnership carrying on business as Rogers Communications Partnership

5. Parts of the record of this proceeding have been designated as confidential pursuant to paragraph 40 of the Bulletin and the *CRTC Rules of Practice and Procedure*. Abridged versions of the submissions filed by the parties, as well as the Commission's letters relating to procedure and confidentiality designations, can be found on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca).

### **Request by SNN to vary the procedure set out in the final offer arbitration process**

6. On 22 July 2014, SNN requested that the Commission's final offer arbitration process as set out in the conduct letter be modified to include the filing of comprehensive affiliation agreements and to remove ratings performance data (that is, viewership data) from the list of information to be provided.
7. In a letter of 6 August 2014, the Commission denied SNN's request, considering it appropriate to retain the scope of the proceeding set out in the conduct letter. The Commission noted that other forms of dispute resolution, such as mediation or expedited processes, are more effective tools to deal with non-monetary matters.
8. Consistent with the Category C news framework and the Order, the Commission also noted that the existing affiliation agreement between Rogers and SNN would remain in force and that any rates determined in this final offer arbitration process would supersede those contractual clauses with which they were in conflict.
9. The Commission further concluded that viewership data could assist in assessing a service's relative value and quality to consumers. The Commission found that consideration of this data would not be prejudicial to SNN because SNN would have an opportunity to make submissions regarding how the data should be interpreted and applied in this case.

### **Regulatory framework**

10. The Commission notes that the broadcasting policy set out in section 3(1) of the *Broadcasting Act* (the Act) includes the following objectives:
  - programming should be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes – section 3(1)(i)(i);
  - programming should provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern – section 3(1)(i)(iv); and
  - distribution undertakings should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services – section 3(1)(t)(iii).
11. In the Category C news framework, the Commission found that wide distribution of Category C national news specialty services on reasonable terms is necessary to provide these services with the financial means to meet their programming commitments, including the objective set out in section 3(1)(i)(iv) of the Act. Among other things, as of 20 May 2014,

licensed broadcasting distribution undertakings (BDUs) were required to include such services in the best available discretionary package consistent with their genre and programming. The Commission did not require distribution of Category C services on the basic service, noting that doing so could impact affordability for Canadian subscribers.

12. In the Order, which sets out the terms and conditions for the distribution of Category C national news specialty services, the Commission stated the following:

When negotiating a wholesale rate for any of the programming services based on fair market value,<sup>2</sup> the distribution licensee shall take into consideration the following factors:

- historical rates;
- penetration levels and volume discounts;
- the packaging of the service;
- rates paid by unaffiliated BDUs for the programming service;
- rates paid for programming services of similar value to consumers;
- the number of subscribers who subscribe to a package in part or in whole due to the inclusion of the programming service in that package;
- the retail rate charged for the service on a stand-alone basis; and
- the retail rate for any packages in which the service is included.

13. Additionally, in Broadcasting Decision 2012-208, the Commission stated that it would view unit pricing for a programming service as commercially unreasonable if it had the effect of making flexible packaging options commercially unviable or resulted in the offering of programming services by a company using its market dominance in such a way as to insulate it completely from the effect of consumer choice. The Commission emphasized that a balance must be struck between allowing a BDU to provide its subscribers with more choice and flexibility and providing programming undertakings with reasonable and predictable levels of revenue for their programming services.

## **Positions of parties**

### **Final offer submissions**

14. SNN proposed a variable rate card under which the rate for the service would vary depending on whether it was offered in a lesser or higher penetration tier or on the basic service. It argued that its rate card was reasonable as it provided an incentive for BDUs to opt for wide distribution of SNN and was flexible in terms of distribution should packaging change over time, while giving it a fair chance to become successful.

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<sup>2</sup> The fair market value factors were first established in the *Code of conduct for commercial arrangements and interactions* set out in Appendix 1 to Broadcasting Regulatory Policy 2011-601.

15. SNN argued that it was not appropriate to compare SNN to services that benefit from a broadcast network for repeat programming as it produces 100% Canadian content without the help of such a network. Finally, SNN submitted that viewership data was not a valid test of market value since SNN was a new channel with significant distribution problems that had led to a low level of awareness of the service, noting that it had only 40% average distribution while its competitors were in 100% of households.
16. For its part, Rogers proposed basic and discretionary rates, with a performance-based increase tied to SNN's average minute audience. Rogers argued that its proposed rates would greatly exceed the average wholesale rate that SNN received from all BDUs in Canada. Rogers also noted that its proposed discretionary rate for SNN would significantly exceed the current negotiated 2014 rate and the contracted 2015 rate, which were mutually agreed upon by the parties and represented far more than the fair market value when examined in the context of the factors identified in the Order.
17. Finally, Rogers argued that its proposal was consistent with the rates it pays for services of similar value to consumers. Specifically, Rogers provided a chart comparing payments per viewing hour that it makes for other popular news services and submitted set-top-box data that showed that SNN consistently ranked at or near the bottom of audience viewing levels, regardless of packaging.

## **Replies**

18. SNN stated that Rogers' offer was detrimental to SNN and inconsistent with the Category C news framework. SNN further argued that it needed a penetration-based rate card to anticipate changes in distribution in the future, including those potentially forthcoming in the Commission's ongoing television policy review. Finally, SNN argued that Rogers' proposed rates were below the average paid for Canadian news services.
19. Rogers' replied that SNN was proposing wholesale rates that would far exceed fair market value for its service. Rogers also argued that the fact that third-party BDUs did not offer SNN in high-penetration packages or that subscriber penetration levels for SNN were low were matters irrelevant to the current bilateral dispute because SNN was being distributed in high-penetration packages to Rogers customers.

## **Commission's analysis and decision**

20. Based on the facts of this case and the current regulatory framework, the Commission considers it appropriate to focus on the following factors, which it deems most relevant to an assessment of the commercial reasonableness of the proposals:
  - historical rates;
  - rates paid by unaffiliated BDUs for the programming service;
  - rates paid for programming services of similar value to consumers; and
  - the number of subscribers who subscribe to a package in part or in whole due to the inclusion of the programming service in that package.

21. In addition, the Commission has examined whether the proposals are consistent with the public policy objectives set out in the Category C news framework, the Order and Broadcasting Decision 2012-208, including those of providing the programming service with the financial means to meet its programming commitments, while also providing the BDU with packaging flexibility and the ability to respond to consumer choice.
22. The Commission considers that Rogers' offer represents a more reasonable rate. The Commission also considers that Rogers' offer is more consistent with the rates paid by unaffiliated BDUs for SNN, especially those that may be offering SNN at penetration levels comparable to Rogers' levels.
23. With respect to the rates paid for programming services of similar value to consumers and the number of subscribers who opt for a package due to the inclusion of the programming service, the Commission finds it most relevant to examine what the distributor is paying for comparable news services and to use viewership data to measure the value of SNN to consumers. The Commission finds it appropriate to compare SNN's viewing share to that of comparable news services which have not benefited from broad distribution in Canada at the outset.
24. In this regard, the Commission considers that Rogers' offer is more consistent with the rates Rogers is paying to the most comparable news services and is more consistent overall with the value attributed to SNN by consumers.
25. Finally, with respect to consumer choice and packaging flexibility, the Commission considers that applying SNN's proposed rate card in this case would limit the distributor's flexibility and incentive to provide consumer choice. That is, there is a significant economic incentive for Rogers to offer SNN on the basic service rather than as it is currently packaged. Consequently, given the facts of this case, the Commission concludes that selecting SNN's offer would be inconsistent with public policy objectives set out in Broadcasting Decision 2012-208, as well as with the *Code of conduct for commercial arrangements and interactions* set out in Appendix 1 to Broadcasting Regulatory Policy 2011-601, which states that the Commission would consider unreasonable minimum penetration or revenue levels that force distribution of a service on the basic tier.
26. By contrast, the Commission considers that Rogers' offer would provide it with more flexibility in its packaging of SNN, consistent with the objectives set out in Broadcasting Decision 2012-208.
27. Moreover, Rogers' offer would provide SNN with annual subscription revenues generally consistent with Rogers' relative BDU market share (that is, proportional to what Rogers' share of the industry contribution to SNN should be to allow SNN to meet its programming commitments). On this basis, the Commission considers that Rogers' offer would provide SNN with the financial means to meet its programming commitments, consistent with the public policy objectives set out in the Category C news framework.
28. Based on all of the above and pursuant to paragraph 25 of the Bulletin, the Commission selects Rogers' offer in its entirety, which sets wholesale rates for the distribution of SNN by

Rogers on the basic service and on a discretionary basis. As set out in the Commission's 6 August 2014 letter, the wholesale rate to be applied between the parties will supersede the rate in the existing affiliation agreement and will be paid retroactive to 20 May 2014.

29. The Commission notes that in Broadcasting Decision 2014-509, also issued today, it has set out its decision on a separate application for final offer arbitration involving the distribution of SNN by TELUS Communications Company (TELUS). In that case, the Commission has selected SNN's offer, which sets the wholesale rates for the distribution of SNN by TELUS. The Commission notes that in rendering a decision in a final offer arbitration, it selects the better of the two final offers by the parties, based on the facts specific to that case.

Secretary General

### **Related documents**

- *Request for final offer arbitration by TELUS Communications Company regarding the distribution of Sun News Network*, Broadcasting Decision CRTC 2014-509, 2 October 2014
- *Distribution of Category C national news specialty services*, Broadcasting Order CRTC 2013-735, 19 December 2013
- *Distribution of Canadian Category C national news specialty services*, Broadcasting Regulatory Policy CRTC 2013-734, 19 December 2013
- *Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2013-637, 28 November 2013
- *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 amended by Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011