Broadcasting Decision CRTC 2014-509

PDF version

Ottawa, 2 October 2014

Request for final offer arbitration by TELUS Communications Company regarding the distribution of Sun News Network

The Commission sets out its decision on an application for final offer arbitration by TELUS Communications Company (TELUS) regarding the distribution of Sun News Network (SNN). Specifically, the Commission selects SNN's offer, which sets the wholesale rates for the distribution of SNN by TELUS.

Introduction

1. On 18 March 2014, TELUS Communications Company (TELUS)[1] requested that the Commission initiate a final offer arbitration process to determine the wholesale rates for its distribution of Sun News Network (SNN). TELUS stated that while the parties had made several attempts to negotiate an agreement for the carriage of SNN by TELUS, they were too far apart for commercial negotiations to succeed.

2. On 2 April 2014, Commission staff suspended the final offer arbitration process in light of continuing negotiations between the parties.

3. In a letter dated 22 July 2014 (the conduct letter), the Commission noted that negotiations had stalled and that the 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*.

4. 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 TELUS 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 TELUS, 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.

5. 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.

---

[1] TELUS Communications Inc., and 1219723 Alberta ULC and Emergis Inc. in partnership with TELUS Communications Inc. in TELE-MOBILE Company, partners in a general partnership carrying on business as TELUS Communications Company

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.

6. 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.

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

7. 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.

8. 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.

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 *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 Broadcasting Regulatory Policy 2013-734 (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 Broadcasting Order 2013-735 (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,[2] 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. TELUS proposed a structural rate card based on the revenues that would be achieved by SNN if the rate card were applied across the industry, assuming the current packaging. Specifically, TELUS developed a revenue model for SNN using industry data on news services, the relative penetration of SNN across the industry and SNN’s own budget and projections in other regulatory filings to determine an appropriate revenue threshold.

---

[2] 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. Based on this revenue threshold, TELUS provided rates for basic distribution and two discretionary tiers: first-tier distribution, where the service is available to the consumer after subscribing to basic, and second-tier distribution, where the service is only available after the customer has purchased both basic and a first-tier package. TELUS argued that there should be no heavy economic incentive for basic distribution since this would be contrary to the Commission's intent to improve consumer choice and affordability.

16. With respect to the fair market value factors, TELUS argued that penetration levels were factored into its equation by applying an average penetration level across the industry to determine the total revenues that would be generated under its proposed rate card. TELUS also argued that its proposed discretionary rate was reasonable when compared to the rate paid for the most comparable news service, which was commercially negotiated at arm's length and draws much more viewership. Finally, it stated that its offer would arguably result in overpaying for SNN, but that such overpayment was necessary to ensure that the service could maintain sufficient revenue to meet its programming commitments.

17. For its part, 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.

18. SNN argued that it was not appropriate to compare 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.

Replies

19. TELUS argued that SNN's proposed rate card was not only unaligned with its own relative performance as a news service but also failed to provide a sustainable model for news services in a declining market. In TELUS's view, accepting SNN's proposal would very likely precipitate a decline in consumer demand for all news services by pricing the "best available package" for news services beyond what consumers are willing to pay. TELUS also submitted that SNN's budgets and financials were excessive given the support it sought.

20. For its part, SNN submitted that TELUS's offer relied on inaccurate business modeling and that accepting TELUS's offer would set a precedent in the market by extending full-penetration discount rates to low-penetration specialty packages. SNN further argued that TELUS's proposed rate card was not in line with the average rates paid for Canadian and U.S. services.

Further process

21. In reply to SNN's claim that the synergies of a network account for the majority of viewership, TELUS filed an analysis of the impact of repeat or shared programming on the viewership of another news service. TELUS submitted that its data demonstrated that repeat programming did not account for any significant proportion of or increase in viewership.

22. SNN replied that TELUS's analysis was deeply flawed and drew a false conclusion, noting that it was based on only two broadcast days. SNN submitted its own data analysis and concluded that main network programming drove a majority of the ratings for certain network news services.

Commission's analysis and decisions

23. 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:

    - 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.

24. In addition, the Commission has examined whether the proposals are consistent with public policy objectives set out 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.

25. The Commission considers that neither offer is broadly consistent with the rates paid to SNN by other unaffiliated BDUs, especially those that may be offering SNN at penetration levels comparable to TELUS's levels.

26. 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 carried in the same package as SNN 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.

27. On this basis, the Commission considers that neither offer is broadly consistent with the rates paid by TELUS to the most comparable news services, nor with the value attributed to SNN by consumers.

28. Noting that TELUS's offer essentially constitutes a fixed discretionary rate (i.e. the first-tier discretionary rate) since the second-tier discretionary rates do not apply to TELUS based on

its filings, the Commission considers that the proposed discretionary rate does not appropriately account for TELUS's available packages and associated penetration levels. As set out in Broadcasting Decision 2012-208, a BDU cannot reasonably expect fixed unit pricing based on fixed penetration levels while enjoying the flexibility of delivering fluctuating penetration levels.

29. The Commission further notes that TELUS's proposal is based on the application of a rate card across the industry. However, the rates determined as a result of this process will only be applied bilaterally. Accordingly, while the proposed rates might have been appropriate if applied industry-wide under the assumptions put forward by TELUS, the Commission considers that TELUS fell short of justifying its rates within the context of this bilateral dispute. Moreover, the Commission considers that TELUS's offer also falls short of providing SNN with subscription revenues in line with TELUS's relative BDU market share (that is, proportional to what TELUS's share of the industry contribution to SNN should be to allow it to meet its programming commitments).

30. By contrast, the Commission considers that SNN's offer provides SNN with annual subscription revenues generally consistent with TELUS's relative market share. Based on the facts of this case, the Commission is also of the view that SNN's offer does not constitute a disincentive for TELUS to respond to customer choice as there is no economic incentive for TELUS to offer SNN on the basic service given its packaging approach.

31. Based on the above, the Commission finds that SNN's offer is the better offer in this case as it provides TELUS with a measure of packaging flexibility, while also providing SNN with the financial means to meet its programming commitments.

32. In light of all of the above and pursuant to paragraph 25 of the Bulletin, the Commission selects SNN's offer in its entirety, which sets the wholesale rates for the distribution of SNN by TELUS 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 be paid retroactive to 20 May 2014.

33. The Commission notes that in Broadcasting Decision 2014-508, also issued today, it has set out its decision on a separate application for final offer arbitration involving the distribution of SNN by Rogers Communications Partnership (Rogers). In that case, the Commission has selected Rogers' offer, which sets the wholesale rates for the distribution of SNN by Rogers. 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 Quebecor Media Inc. regarding the distribution of Sun News Network by Rogers Communications Partnership*, Broadcasting Decision CRTC 2014-508, 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