



Broadcasting Decision CRTC 2015-182

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Ottawa, 6 May 2015

Application 2014-1320-3

Final offer arbitration process request by Bell Canada relating to the distribution of Quebecor Media Inc.'s TVA Sports service

The Commission sets out its decision regarding the final offer arbitration process request by Bell Canada (Bell) relating to the distribution of Quebecor Media Inc.'s TVA Sports service. Specifically, the Commission has selected Bell's offer, which sets out wholesale rates for the distribution of TVA Sports by Bell. The acceptance of Bell's offer will have a more favourable impact on choice for subscribers in that they will continue to receive TVA Sports.

Introduction

1. On 16 December 2014, Bell Canada (Bell) requested that the Commission initiate a final offer arbitration process relating to the wholesale rates to be applied to its distribution of Quebecor Media Inc.'s (Quebecor) TVA Sports 1 and TVA Sports 2 (collectively, TVA Sports).
2. Bell indicated that the parties tried on several occasions to negotiate a distribution agreement, but that their respective positions were too far apart for business negotiations to succeed. Bell indicated that the items to be resolved between the parties are the rate per subscriber in the French-language market and the multiplatform distribution rate.
3. In its response dated 20 January 2015, Quebecor indicated that it supported Bell's arbitration request, but that the scope of the process should be broadened to include the rate applicable to the English-language market. Quebecor added that, in its view, the parties should use staff-assisted mediation.
4. On 26 February 2015, the parties submitted a joint letter informing the Commission that they had reached an agreement on English-language market and multiplatform distribution rates. As such, the parties stated that the only item remaining to be addressed is the wholesale rate for the French-language market.
5. In a letter dated 2 March 2015, the Commission advised the parties that it was accepting the final offer arbitration request pursuant to sections 12 to 15 of the *Broadcasting Distribution Regulations* (the Regulations) and Broadcasting and Telecom Information Bulletin 2013-637 (the Bulletin). The Commission specified that, as per paragraph 21 of the Bulletin, it would be making a decision on the

wholesale rate per subscriber for the linear distribution of TVA Sports in the French-language market.

6. Pursuant to the procedure set out in the Bulletin, when there is 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 very exceptional circumstances, when neither of the final offers from the parties is in the public interest, the Commission may reject both offers.
7. Portions of the record of this proceeding have been designated confidential under paragraph 40 of the Bulletin and the *CRTC Rules of Practice and Procedure*. Abridged versions of the briefs submitted by the parties and letters from the Commission relating to the procedure may be consulted on the Commission's website at www.crtc.gc.ca.

Regulatory framework

8. The Commission notes that the broadcasting policy set out in section 3(1) of the *Broadcasting Act* includes, in particular, 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);
 - 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).
9. When it establishes a rate for a programming service, the Commission takes into consideration the service's fair market value. In the present case, since the offers were submitted before the issuance of the Wholesale Code, announced in Broadcasting Regulatory Policy 2015-96, the Commission has taken into account the factors set out in Appendix 1 to Broadcasting Regulatory Policy 2011-601-1 (the *Code of Conduct for commercial arrangements and interactions*, hereafter referred to as the Code). The Code specifies that negotiating a wholesale rate for a programming service based on fair market value should take the following factors into consideration, where applicable:
 - historical rates;
 - penetration levels and volume discounts;
 - the packaging of the service;
 - rates paid by unaffiliated broadcasting distribution undertakings (BDUs) for the programming service;

- rates paid for programming services of similar value to consumers;
- the number of subscribers that 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.

10. In a final offer arbitration process, the Commission also examines the public policy objectives relevant to the facts of the case.

Positions of parties

Bell Canada's final offer

11. Bell acknowledged that the fair market value of TVA Sports has increased since it acquired the rights to broadcast National Hockey League (NHL) games, among other things, and is therefore in agreement with a rate increase. Bell submitted that the increase set out in its final offer is commercially reasonable as it takes the increased value of TVA Sports into account while allowing it to continue to offer the service under its current distribution model. It therefore considered that its offer strikes the right balance between TVA Sports programming commitments and flexibility in setting Bell's prices and packaging.
12. Bell indicated that the rate increase for pre-assembled or build-your-own packages is more than reasonable in the circumstances, given that since the launch of its NHL programming, TVA Sport's market share has increased only slightly and remains substantially lower than that of its main competitor, Réseau des sports (RDS).
13. Bell pointed out that although it is quite possible that TVA Sports will substantially increase its viewership ratings during the playoffs, this increase would apply only to a short period during the year. Bell expressed the view that Quebecor, having invested a large sum in acquiring the broadcast rights for NHL games, is trying to recoup its investment from its subscribers and unaffiliated BDUs, even though TVA Sports has not demonstrated that it has been successful in terms of viewership ratings or service value.
14. Bell argued that its offer seeks to achieve rate parity with Videotron. It contended that parity between Quebec's two largest BDUs would benefit consumers and promote competition among BDUs in other areas such as retailing, packaging and customer service.
15. All in all, Bell considered that its offer reflects fair market value for TVA Sports.

Quebecor Media Inc.'s final offer

16. Quebecor submitted that its final offer is reasonable since it grants distributors greater flexibility by giving them the choice of accounting for their royalties based on the number of subscribers or on penetration rate, while also granting Bell the flexibility to offer TVA Sports the way it wants, including in a preassembled or build-your-own package, or on its basic service.
17. Quebecor expressed the view that its offer represents fair market value in light of the size of its investments, its programming content and the already substantial growth in its viewership. Quebecor pointed out that even with its current rates, those proposed in its offer, TVA Sports will still not get a return on its investments.
18. Quebecor submitted that a simple comparison between TVA Sports' subscribers and viewership ratings, and those of RDS is insufficient to determine the current value of the service. It noted, among other things, that RDS is an analog channel whereas TVA Sports is digital; that RDS has had a 25-year monopoly; and that TVA Sports, unlike RDS, is not distributed as part of the basic service of any BDU.
19. Quebecor argued that by granting it a licence for TVA Sports in 2011, the Commission demonstrated its willingness to create a competitive environment in the field of French-language specialty sports services for the benefit of consumers. The licensee submitted that TVA Sports must therefore be allowed to become viable in an already difficult economic environment. Quebecor contended that if it cannot count on the revenues necessary to ensure the long-term survival of TVA Sports, the service could disappear, thereby restoring RDS's monopoly.

Replies

Bell Canada

20. Bell stated that the rate proposed by Quebecor would impose greater additional costs on it when compared with Videotron, thereby placing it at a major disadvantage. It added that such a rate advantage given to Videotron would result in a significant advantage for Videotron in regard to retail rates, which would not be good for consumers or competition.
21. Bell expressed the view that Quebecor's rate card runs counter to the principle set out by the Commission during the *Let's Talk TV* proceeding,¹ which sets out that BDUs have flexibility with respect to packaging and setting retail prices for optional services so that they can meet consumer demand and compete fairly with other BDUs. According to Bell, Quebecor's rate card would prevent Bell from competing with Videotron on a level playing field. It also contended that by linking the best rates with very high penetration levels, a false incentive would be given to BDUs to offer TVA Sports as part of their basic service.

¹ See Broadcasting Regulatory Policy 2015-96.

22. In addition, according to Bell, the Commission's policy on issuing licences through a competitive process neither promotes nor supports the principle that competitive services must be profitable or sustainable, but merely allows these services to benefit from reasonable and predictable revenues. Bell contended that Quebecor must assume its share of responsibility for the substantial commitments it has made with respect to NHL rights, and that it cannot shift the full burden of high programming costs to consumers.
23. Bell stated that Quebecor is using comparative viewership ratings that favour Quebecor only and do not reflect the actual value of TVA Sports. Bell considered, among other things, that the value of a service must be determined on the basis of overall market share, not on the basis of specific events, and must take into account the continuous interest of subscribers during the year.
24. Bell concluded that its offer is reasonable because it recognizes the investments made in TVA Sports' programming while ensuring rate parity in relation to what Quebecor itself pays. It further submitted that its offer strikes a balance between meeting Quebecor's programming commitments and giving Bell flexibility with retail packaging and invoicing.

Quebecor Media Inc.

25. Quebecor contended that approval of Bell's offer by the Commission could seriously harm the quality of TVA Sports' programming as well as the sustainability of TVA Sports itself, to the detriment of consumers. It noted that TVA Sports is already losing over \$21 million per year and will continue to lose money in the medium term despite the application of a new rate card.
26. As for the rate parity argument made by Bell, Quebecor pointed out that the gap between the rate category applicable to Videotron and that applicable to Bell is negligible and more than reasonable, given the difference between the respective numbers of subscribers of the two BDUs in Quebec. Further, according to Quebecor, Bell may eventually implement a more advantageous rate category given the strong growth of its Bell Fibe product in Quebec. In the same vein, Quebecor noted that Videotron could also lose subscribers and be downgraded to a lower category.
27. Quebecor submitted that RDS's success is the result of 25 years of work, a period during which it was the only service devoted entirely to sports in the French-language market. It stated that Bell is trying to force TVA Sports to sustain such large losses that it will eventually have to dispose of major sports properties, including NHL rights, with the ultimate goal of eliminating all direct competition with RDS.
28. Quebecor expressed the view that it is wrong to establish the actual value of these services based solely on a comparison of RDS's and TVA Sports' viewership ratings, as Bell has done. It added that TVA Sports is rapidly growing and that since the data does not take into account the future broadcasting of sporting events, they are skewed in Bell's favour.

29. Quebecor submitted that it must have adequate, predictable revenues in order to ensure its viability. Noting what it has invested and the losses that it has sustained and will continue to sustain in the medium term despite the new rate card, Quebecor contended that Bell's rate schedule would be equivalent to total royalties, which would have a major negative financial impact on TVA Sports.

Commission's analysis and decision

30. Based on the facts of this case and the current regulatory framework, the Commission considers that it is appropriate to focus on the following factors, which, in its view, are the most relevant for assessing the reasonableness of the proposals from a business perspective:

- historical rates;
- rates paid by unaffiliated BDUs for the programming service; and
- rates paid for programming services of similar value to consumers.

31. Further, in the present proceeding, the Commission has taken into consideration public policy objectives according to which BDUs must provide programming services with reasonable and predictable revenue thresholds, while offering BDUs flexibility in regard to packaging and their ability to respond to consumer choices. These objectives were first examined in Broadcasting Decision 2012-208 and subsequently in Broadcasting Decisions 2014-508 and 2014-509.

32. In regard to historical rates, the Commission considers that Bell's offer to increase the current rate is more reasonable than Quebecor's. Notably, in the Commission's view, given that it made its acquisitions only a short time ago, TVA Sports has not been able to sufficiently prove itself over a reasonable period to justify the size of its proposed rate increase.

33. The Commission considers that Quebecor's offer relating to rates paid by unaffiliated BDUs for programming services is more reasonable than Bell's offer in this regard. However, as these BDUs are not comparable to Bell, in terms of either the number of subscribers or the markets served, the Commission is of the view that the rate paid by these BDUs is a less critical factor in this proceeding.

34. The Commission considers that Bell's offer is more reasonable than Quebecor's, given the wholesale rates paid by Bell for similar programming services – namely, rates paid for services that offer the same genres or types of programs, or that are intended for similar audiences. More specifically, although Quebecor's offer closely approaches the rate paid by Bell to RDS, the Commission considers that the value attributed to RDS by consumers is considerably higher than the value attributed to TVA Sports, given the respective viewership ratings of the two services. However, in the circumstances, including the affiliation between Bell and RDS and the fact that

TVA Sports is a new service in the marketplace, the Commission is of the view that this factor is less critical in this proceeding.

35. In addition, in regard to public policy objectives relating to flexibility with packaging and consumer choice, the Commission considers that Quebecor's offer could limit Bell's ability to continue offering TVA Sports to its subscribers using the current distribution model (pre-assembled/build-your-own) and thus offer maximum choice to consumers. According to Quebecor's offer, in order to have the same rate as Videotron in the distribution of TVA Sports, Bell should either provide the service as part of its basic service and substantially increase penetration, or increase the number of its subscribers in the market served, which could be difficult, if not impossible, to do. If such an increased penetration rate or the increase in subscriber numbers were not achieved, the rate increase that would result could put additional pressure on retail rates for packages including TVA Sports.
36. Moreover, in light of the average increase proposed by Quebecor, the Commission is of the view that Quebecor's offer would impose a less reasonable burden on Bell subscribers as compared to Quebecor. More precisely, according to Quebecor's offer, a disproportionate percentage of total TVA Sports subscriber revenues would come from service subscribers who are Bell customers.
37. In contrast, the Commission considers that Bell's offer gives BDUs more packaging flexibility and would have less of an impact on potential costs to consumers. Further, the Commission finds that Bell's offer is more reasonable in terms of the percentage of TVA Sports subscriber revenues in relation to the percentage of TVA Sports subscribers who are Bell customers.
38. In light of all of the above, the Commission finds that Bell's offer is the best offer when all factors relating to fair market value and the relevant public policy objectives are taken into account. Therefore, in accordance with paragraph 25 of the Bulletin, the Commission chooses Bell's offer.
39. That being said, the Commission notes that the closing date of the agreement, as proposed by the two parties, is far enough in the future to allow TVA Sports to further prove itself, but soon enough to mitigate the financial impact, in the event that Quebecor effectively demonstrates that the value of its service has increased in the meantime and that TVA Sports is then able to justify a rate increase during negotiations for the next agreement.
40. The Commission further notes that some information regarding the two parties that are subject to the present decision, including certain financial amounts and data, were not disclosed. Given the nature of this information, its disclosure could give current and potential competitors access to sensitive, competition-related information to which they would otherwise not have access.

Secretary General

Related documents

- *Let's Talk TV – A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015
- *Request for final offer arbitration by TELUS Communications Company regarding the distribution of Sun News Network*, Broadcasting Decision CRTC 2014-509, 2 October 2014
- *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
- *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 – Correction*, Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011