Broadcasting Decision CRTC 2018-17

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Final offer arbitration request by Quebecor Media Inc. regarding the distribution of TVA Sports by Bell TV

The Commission sets out its decision on an application for final offer arbitration by Quebecor Media Inc. (Quebecor) regarding the distribution of the mainstream sports service TVA Sports by the broadcasting distribution undertakings operated by BCE Inc. (Bell) in Quebec. Specifically, the Commission ***selects Bell's offer****, which sets out the per-subscriber wholesale rates for the distribution of TVA Sports in the francophone market. The Commission finds that the evidence does not support the increase proposed by Quebecor and that Bell's offer is therefore more reasonable, taking into account the relevant factors relating to fair market value and public policy objectives.*

Resolving commercial disputes allows the Commission to ensure that fair and reasonable commercial agreements are reached, with the ultimate goal of ensuring that Canadians have access to a diverse range of quality programming.

Introduction

1. On 15 September 2017, Quebecor Media Inc. (Quebecor) filed an application requesting that the Commission initiate a final offer arbitration process relating to the distribution of the mainstream sports service TVA Sports[1] by the broadcasting distribution undertakings operated by BCE Inc. (Bell) in the francophone market.[2] Quebecor stated that despite efforts to reach a mutual agreement, the parties were at an impasse and third-party intervention had become necessary.

2. In a response dated 20 September 2017, Bell stated that it also wished to use the Commission's final offer arbitration process. Bell also indicated that it did not agree with the rate structure proposed by Quebecor or with the length of the agreement for which the final offer arbitration rates would apply.

3. After further correspondence between the parties, in a letter dated 18 October 2017, 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). Consistent with paragraph 21 of the Bulletin, the Commission stated

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[1] TVA Sports offers programming on three feeds: TVA Sports 1, TVA Sports 2 and TVA Sports 3.

[2] For the purposes of this process, the francophone market is defined as the province of Quebec.

that it would be making a decision on the rate for the linear distribution of TVA Sports by Bell in the francophone market.

4. As set out in the Bulletin, in the context of 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.

5. In accordance with paragraph 40 of the Bulletin and the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, some information about the two parties that are subject to this decision, including certain financial information, will not be 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 not otherwise have access.

Regulatory framework

6. 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); 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).

7. The Act confers on the Commission explicit powers with regard to dispute resolution. In particular, section 10(1)(h) of the Act states:

   > the Commission may, in furtherance of its objectives, make regulations for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings.

8. Under section 9(1)(h) of the Act, the Commission may also "require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission."

9. The dispute resolution process is set out in sections 12 to 15.02 of the Regulations. Section 12(1) states that if there is a dispute between the licensee of a distribution undertaking and the operator of a licensed programming undertaking or an exempt programming undertaking concerning the carriage or terms of carriage of programming originated by the programming undertaking, including the wholesale

rate, one or both of the parties to the dispute may refer the matter to the Commission. As set out in section 12(9) of the Regulations, the licensee shall submit to having the dispute resolved in accordance with the procedural requirements established by the Commission in the Bulletin.

10. When resolving disputes by way of final offer arbitration, the Commission assesses the proposed rates based on the fair market value of the service. In the Wholesale Code set out in the appendix to Broadcasting Regulatory Policy 2015-438, the Commission established that a wholesale rate based on the fair market value of a programming service must take into consideration the following factors, where applicable:

    - historical rates;
    - penetration levels, volume discounts and 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, taking into consideration viewership;
    - 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, taking into consideration viewership;
    - 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.

11. As explained in Broadcasting Information Bulletin 2015-440, in a dispute resolution process, parties have the opportunity to make submissions regarding which fair market value factors should apply, how such factors should be interpreted and how much weight should be given to a specific factor.

12. Parties can also make submissions on which public policy objectives are relevant to a given case. Thus, if necessary, the Commission will apply a public interest test to assess whether the proposed wholesale rates are consistent with the relevant public policy objectives.

13. In Broadcasting Regulatory Policy 2015-96, the Commission indicated that a healthy and dynamic wholesale market is one in which risk and reward are shared between BDUs and programming services, striking a fair balance between allowing BDUs to provide their subscribers with more choice and flexibility and ensuring reasonable and predictable levels of revenue for programming services.

Positions of parties

Quebecor's final offer

14. Quebecor argued that its proposed rate increases are commensurate with the increased value of TVA Sports since the start of the last contract period and that the value of TVA Sports is now practically equal to that of its most important competitor, RDS. Its key arguments were as follows:

- TVA Sports has made significant investments in programming (including the acquisition of the French-language NHL rights), having increased its spending from the 2013-2014 to 2014-2015 broadcast years by 279%;

- since the expiration of the last contract, TVA Sports has invested in new TV personalities and acquired exclusive rights to the Rogers Cup (2016), Montréal Impact and Major League Soccer, Laver Cup (tennis) and WWE (2017). There was also the return of the World Cup of Hockey in 2016;

- viewership to TVA Sports has increased, raising the service to the same level of popularity as RDS. From January to August 2017, it had the same viewing share as RDS, greater average minute audience and greater average weekly hours;

- other BDUs have accepted rate increases, demonstrating their recognition of the increased value of the service; and

- based on a study undertaken by third-party research firm, DeepBlue, viewers now value TVA Sports as much as RDS—for example, of subscribers that watch both, 65% believe TVA Sports is as good or better.

15. Quebecor also argued that its offer responds to the Commission's determinations in the previous final offer arbitration between the two parties, as set out in Broadcasting Decision 2015-182.

Bell's final offer

16. Bell argued that the value of TVA Sports has not materially increased to justify a rate above what Bell is offering, taking into consideration the increase TVA Sports already received in its last contract renewal. Bell stated that it has already compensated TVA Sports for the improvements in the service associated with the acquisition of NHL rights. In Bell's view, TVA Sports' programming and production expenses have effectively remained constant since 2015, suggesting that Quebecor has made limited efforts to improve the value proposition to consumers.

17. Bell provided viewing evidence showing that the popularity of RDS continues to outpace TVA Sports. It argued that "TVA Sports has attempted to gain viewership by purchasing rights to big ticket sports programming with high ratings volatility," which only results in increased viewership during times when these events are broadcast and only when they feature the right participants. Bell stated that RDS has

greater variety and diversity of sports programming and a stronger consistent record of audience success, justifying a higher rate. It stated that “RDS provides significant value to consumers throughout the year, whereas the value of TVA Sports is very much dependent on a limited number of marquee events—primarily NHL hockey—to drive viewership only during certain months of the year.” According to Bell, the overall market share of RDS continues to be greater than TVA Sports, and as such the relative value of the service does not warrant any increase beyond what Bell is proposing.

18. Bell also stated that TVA Sports’ footprint leans heavily towards markets that are bilingual or anglophone and that nearly all of the big-ticket programming carried by TVA Sports is also offered on widely available English-language channels (including the Canadian Broadcasting Corporation), lessening the relative value of the service to Bell’s subscribers. Further, Bell argued that increases beyond what it is proposing would put pressure on Bell’s retail pricing.

Comments

19. Quebecor argued that despite a smaller subscriber base, TVA Sports achieves and even exceeds the viewership of RDS. While Quebecor acknowledged the gap between the two services in terms of annual viewing numbers, it argued that this gap is natural considering RDS’s 20-year monopoly in the market, its affiliation with TSN, its carriage on basic in some markets and the fact that it has better packaging on Bell than TVA Sports.

20. Bell contested Quebecor’s analysis of viewership data, stating that Quebecor has selectively presented data and emphasized a period that inflates the relative strength and popularity of the service. Bell argued that based on combined data for each sports franchise and up-to-date figures until the end of October 2017, the relative value of TVA Sports is not similar to RDS, let alone equivalent. Bell stated that RDS delivers much stronger audience share and subscriber value because of the breadth and scope of its high-quality sports properties. Accordingly, Bell argued that its offer provides a more than reasonable increase to TVA Sports, commensurate with the value that viewers ascribe to it in comparison to RDS.

21. Both parties challenged the methodologies used by the other party in determining the value of the service, in particular the analysis of viewing and the value of hockey to viewers. Quebecor also rejected Bell’s arguments linking the rate increases of the last contract to this process, arguing that this is not a valid approach since the increase obtained previously was linked to the almost complete transformation of the channel with the acquisition of NHL rights and the launch of TVA Sports 2. Bell acknowledged that the value of TVA Sports increased in 2014 but disagreed that the value of the service has increased dramatically since.

22. Quebecor noted that the Commission indicated in Broadcasting Decision 2015-182 that the percentage of revenue obtained from a BDU should be equivalent to its proportion of subscribers. Quebecor argued that this ratio is not achieved in Bell’s

offer, whereas Quebecor's offer would ensure that Bell's share of revenue is proportionate to its subscriber level.

23. Quebecor also argued that Bell's offer does not recognize the significant investments made by the service and would prevent TVA Sports from obtaining sufficient and reasonable revenues to permit it to continue to grow and achieve profitability in the next five years.

24. Bell argued that Quebecor's offer amounts to guaranteeing the financial success of TVA Sports. It stated that while TVA Sports is entitled to reasonable and predictable levels of revenue, it is not entitled to levels which assure its profitability or sustainability, or to put the burden of increased monthly rates on subscribers. Bell submitted that while sports rights are expensive, Quebecor must take responsibility for the significant commitments it has made for NHL hockey rights and other programming content.

Commission's analysis and decisions

25. The Commission has examined the final offers in relation to the following key factors on fair market value applicable in this case:

- historical rates;
- penetration levels, volume discounts and the packaging of the service;
- rates paid by unaffiliated BDUs for the programming service; and
- rates paid for programming services of similar value to consumers, taking into consideration viewership.

26. The Commission has also taken into consideration the public policy objectives of ensuring that risks and rewards are shared between BDUs and programming services, striking a fair balance between allowing BDUs to provide their subscribers with more choice and flexibility and ensuring reasonable and predictable levels of revenue for programming services.

27. In this case, the Commission has determined that historical rates, viewing trends and programming expenditures, as well as the rates paid for services of similar value to subscribers, are factors that have stronger probative value when identifying the value of the service.

28. The Commission found that there is an upward trend in viewership to TVA Sports. However, the Commission is of the view that TVA Sports' improved viewership in recent years is mitigated by its volatility: the significant increase in viewership in the 2016-2017 broadcast year is attenuated by a decrease in viewership in 2015-2016. Accordingly, the Commission considers that the service's historical viewership trends support the rate proposed by Bell.

29. In addition, in assessing the fair market value factor in the context of historical rates, the Commission examined programming expenditures. While TVA Sports made significant programming investments during the 2014-2015 broadcast year (279% increase in total programming expenditures from the previous broadcast year), there have been limited increases in TVA Sports' expenditures since then, according to the Commission's financial data. As such, the Commission considers that the historical expenditure data supports the rate proposed by Bell.

30. As for the comparison of TVA Sports to services of similar value to subscribers, the Commission notes that although viewership to the most comparable service, RDS, decreased slightly from the previous year, it still outperformed TVA Sports. While the gap between TVA Sports and RDS is narrowing, there is still notable disparity between their viewership shares. RDS would appear to have stronger and more stable viewership overall, which is indicative of the value placed on the service by viewers. As such, the Commission considers that Bell's offer is more reasonable in light of the value of TVA Sports to consumers as compared to RDS.

31. With respect to the fair market value factors relating to volume discounts and the rates paid by unaffiliated BDUs for the programming service, the Commission considers that Quebecor's offer is more reasonable than Bell's offer. However, as the unaffiliated BDUs are not comparable to Bell in terms of subscriber levels, the Commission is of the view that the rate paid by these BDUs is a less critical factor in this proceeding.

32. Based on the above, the Commission finds that Bell's offer is more reasonable when examining historical rates together with viewership trends and programming expenditures, as well as in terms of the rates paid for services of similar value to subscribers. Although it finds that Quebecor's offer is more reasonable in terms of the fair market value factor relating to volume discounts and the rates paid by other unaffiliated BDUs, the Commission considers that these factors are less probative given that no other BDU is comparable in size to Bell in Quebec.

33. The Commission is of the view that both offers allow the BDU to offer subscriber choice and flexibility. In regard to shared risk, Bell's subscriber levels are increasing and the penetration of TVA Sports on Bell has remained fairly constant since January 2013. Accordingly, TVA Sports' revenue from Bell is likely to increase rather than decrease under either offer.

34. Regarding Quebecor's concerns that Bell's offer would not permit TVA Sports to obtain sufficient and reasonable revenues, the Commission considers that the difference in value between the two offers is unlikely to make a significant difference to the viability of the service over the contract term. Finally, the Commission is not convinced by Quebecor's arguments that the percentage of revenue obtained from Bell is unreasonable given the proportion of subscribers it delivers. The Commission therefore considers that TVA Sports' level of revenues would remain reasonable under either offer.

35. Based on the above, the Commission finds that both offers are consistent with the relevant public policy objectives examined in this case.

Conclusion

36. In light of the relevant factors examined relating to fair market value and the public policy objectives, and taking into account their probative value, the Commission finds that the evidence does not support the rate increase proposed by Quebecor. Accordingly, consistent with sections 3(1)(i)(i) and 3(1)(t)(iii) of the Act, section 12(9) of the Regulations and paragraph 25 of the Bulletin, the Commission **selects Bell's offer**.

Secretary General

Related documents

- *Interpretation of the Wholesale Code*, Broadcasting Information Bulletin CRTC 2015-440, 24 September 2015

- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015

- *Final offer arbitration process request by Bell Canada relating to the distribution of Quebecor Media Inc.'s TVA Sports service*, Broadcasting Decision CRTC 2015-182, *6 May 2015*

- *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

- *Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2013-637, 28 November 2013