Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Decision CRTC 2020-97

PDF version

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Public record for this application: 2019-1044-8

Final offer arbitration between Rogers Media Inc. and Bragg Communications Incorporated regarding the distribution of Sportsnet and Sportsnet One

The Commission sets out its decision in regard to the final offer arbitration proceeding initiated by Rogers Media Inc. (Rogers) regarding the distribution of the mainstream sports services Sportsnet and Sportsnet One by the broadcasting distribution undertakings (BDUs) operated by Bragg Communications Incorporated (Eastlink).

In regard to Sportsnet, the Commission ***selects Rogers' offer****, thus establishing the linear wholesale rates for distribution of Sportsnet by Eastlink. The Commission finds that the offer proposed by Rogers is more reasonable in light of penetration levels, volume discounts and packaging of the service; better aligns the rate that Eastlink pays for Sportsnet with the rates paid by unaffiliated BDUs; and better aligns the rates with the rates Eastlink pays for TSN, thus contributing to a more balanced market.*

In regard to Sportsnet One, the Commission ***selects Eastlink's offer****, thus establishing the linear wholesale rates for distribution of Sportsnet One by Eastlink. The Commission finds that the offer proposed by Eastlink is more in line with historical rates taking into consideration programming expenditures and audience trends; is more in line with the rates Eastlink pays for programming services of similar value to consumers; and better shares risk, striking a balance between allowing BDUs to provide their subscribers with more choice and flexibility and ensuring reasonable and predictable levels of revenue for programming services.*

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 7 October 2019, Rogers Media Inc. (Rogers) filed an application requesting that the Commission initiate a final offer arbitration (FOA) process relating to a commercial dispute with Bragg Communications Incorporated (Eastlink) regarding the distribution of the mainstream sports services Sportsnet and Sportsnet One, as well as the discretionary service Sportsnet 360.

2. In a response dated 11 October 2019, Eastlink stated that it generally agreed with Rogers' proposed scope for the FOA, but requested that multiplatform rights and a

discount for bulk subscribers be included, and that the penetrations-based rate card bands be undefined.

3. After further correspondence between the parties, Eastlink withdrew its request to include multiplatform rights. In addition, both parties agreed that Sportsnet 360 should be excluded from the FOA if the Commission were to decide to narrow the scope of the proceeding.

4. In its conduct letter dated 7 November 2019, the Commission advised the parties that it was accepting the FOA request for Sportsnet and Sportsnet One pursuant to sections 12 to 15 of the *Broadcasting Distribution Regulations*, sections 14 and 15 of the *Discretionary Services Regulations*, and Broadcasting and Telecom Information Bulletin 2019-184 (the Bulletin 2019-184). In this letter, the Commission outlined the scope of the proceeding as:

    - establishing the linear wholesales rates for distribution of Sportsnet by Eastlink; and

    - establishing the linear wholesale rates for distribution of Sportsnet One by Eastlink.

5. Further, the Commission found that including a third service and bulk discounts as part of the scope of the FOA would unnecessarily complicate the proceeding. As such, the Commission denied Rogers' request for FOA in regard to Sportsnet 360, and determined that bulk discounts were to be excluded from the scope of the proceeding.

6. The Commission also determined that calculating penetration using total subscribers (the aggregate basis), rather than calculating the penetration on each system, would simplify the analysis and comparison of the offers. In addition, the Commission noted that the aggregate basis is the approach that is most commonly used in the industry. Accordingly, the Commission determined that the data and the final offers were to be submitted on an aggregate basis.

7. As set out in the Bulletin 2019-184, in the context of FOA, 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.

8. In accordance with paragraph 59 of the Bulletin 2019-184 and with the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, much of the information presented by 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 prejudice the competitive positions of the parties.

Regulatory framework

9. 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).

10. 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.

11. The dispute resolution process is set out in sections 12 to 15.02 of the *Broadcasting Distribution 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 this regulations, the licensee shall submit to having the dispute resolved in accordance with the procedural requirements established by the Commission in the Broadcasting and Telecom Information Bulletin 2013-637.[1]

12. When resolving disputes by way of FOA, 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;

[1] The most recent version of the Information Bulletin is the Bulletin 2019-184, however the Regulations have not been revised so as to reflect this change.

- 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.

13. As explained in Broadcasting Information Bulletin 2015-440 and Bulletin 2019-184, 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.
14. 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.
15. 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

Eastlink's final offer

16. Eastlink argued that based on the relevant factors set out in section 6 of the Wholesale Code, its proposal represents fair market value for Sportsnet and Sportsnet One, taking into account three main considerations: the substantial declines in the services' viewership and market shares over the last three years; Rogers' loss of key sports rights that are highly valued by its customers; and, the wholesale rates Eastlink pays for TSN which, according to Eastlink, consistently outperforms Sportsnet by a wide margin. Despite this, Eastlink proposed rates that it believed would provide Rogers with reasonable and predictable revenue levels for the services.
17. Eastlink submitted that its offer is also consistent with the principle of shared risk. It explained that Rogers has made several programming choices over the last few years that have made Sportsnet and Sportsnet One less attractive to consumers, resulting in significant declines in the popularity of the services. Eastlink argued that, despite this, Rogers is now trying to insulate itself from these choices by demanding large rate increases that are not commensurate with the current value of the services. It added that Rogers can no longer be allowed to rely on rates set up so as to protect it from the impacts of consumer choice and its own failure to create attractive programming services.

Rogers' final offer

18. Rogers submitted that its final offers for Sportsnet and Sportsnet One are consistent with the criteria outlined in the Wholesale Code and that the per subscriber wholesale rates proposed represent fair market value for the following reasons:

    - they are comparable to the other market-based wholesale rates that Rogers recently negotiated;
    - they ensure that the rates paid by Eastlink do not give an undue competitive advantage to any BDUs, including Eastlink;
    - they reflect the strong viewership numbers that have been maintained by Sportsnet and Sportsnet One over the past five years and Sportsnet's position as one of Canada's two most popular discretionary services;
    - they reflect the considerable value that a significant portion of Eastlink's subscribers place on accessing Sportsnet and Sportsnet One;
    - they are reasonable, and take into account the significant cost of acquiring sports rights and producing sports programming that broadcasters face domestically and worldwide; and
    - they do not restrict packaging or seek to insulate Sportsnet and Sportsnet One from the impact of greater consumer choice.

19. Rogers argued that its proposed commercially reasonable wholesale rates for Sportsnet and Sportsnet One are based on fair market value given that those rates are comparable with rates that it has commercially negotiated with other unaffiliated BDUs. It added that its rates reflect the overall value of the two services it provides to Eastlink and its customers, and that the rates enable Rogers to obtain reasonable and predictable levels of revenue in an environment where the cost of acquiring sports programming rights continue to rise.

Comments

20. Eastlink argued that the significant decline in the services' popularity is due to several programming choices over the last few years that have made the services less attractive to consumers. Rogers replied that the numbers raised by Eastlink actually mirrored the rate of decline seen in Eastlink's own subscriber numbers.

21. Eastlink argued that contrary to Rogers' claims, Rogers' rights and production costs have not increased considerably over the last five years, and instead have decreased. According to Rogers, Eastlink focused only on one year, therefore ignoring the major investments that were previously made to acquire and produce content. In doing so, the factors that inform programming costs from year to year were not taken into consideration. Rogers stated that it continues to look for production efficiencies as the advertising and subscription revenue markets continue to shrink.

22. In regard to Eastlink's claim that its offer is also consistent with the principle of shared risk, Rogers replied that it is very clear that Eastlink's final offer is intended to insulate it from market conditions and preserve its industry leading margins at the expense of sports services that are helping Eastlink to retain its subscriber base.

Commission's analysis and decisions

23. The Commission has examined the final offers in light of the fair market value factors, and determined that the factors relevant to this FOA are the following:

- 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.

24. The Commission has also taken into consideration the public policy objective of ensuring that 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.

25. In this case, while relevant to the proceeding, the Commission finds that the public policy considerations were less probative compared to the fair market value factors presented above, as both parties' proposals would support the public policy objectives.

Sportsnet

26. The Commission considers that while Sportsnet performance remains strong, there has been a downward trend in viewership to the service in recent years: indeed, the service's audience performance peaked in the 2015-2016 and 2016-2017 broadcast years and has declined since. Additionally, in assessing the fair market value in the context of historical rates, the Commission examined programming expenditures. While Sportsnet's programming expenditures increased significantly from 2013-2014 to 2016-2017, they decreased in the 2017-2018 broadcast year. In light of the above, the Commission finds that the final offer presented by Eastlink aligns better with relevant historical data, and the arguments presented by the parties.

27. The Commission considers that Eastlink's packaging of Sportsnet, as well as the service's high level of penetration, attest to its value to consumers. In addition, its strong audience performance in Eastlink's key markets further supports the service's popularity and perceived value. Rogers' proposed rates would also be more consistent with the rates paid by unaffiliated BDUs with a comparable subscriber volume, an element deemed to be of particular relevance in this specific FOA.

Therefore, in regard to penetration levels, volume discounts and packaging of the service, as well as the rates paid by unaffiliated BDUs, the Commission considers that Rogers' offer is more reasonable, and would support a more balanced market.

28. Despite some variations in the popularity of their respective program schedules, TSN is the service that offers the most similar value to consumers, taking into consideration viewership. Upon examination of the rates paid by Eastlink for TSN at comparable penetration levels, the Commission finds that Rogers' proposal is more reasonable.

29. Finally, in terms of the public policy objective 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, the Commission finds that while both parties' proposals reasonably share risk, Eastlink's proposal does so more effectively.

30. In light of the relevant factors relating to fair market value and the public policy objective examined, taking into account their probative value, and noting that its decision was based on other considerations as well, but that this information was submitted in confidence, in regard to the linear wholesale rate for distribution of Sportsnet by Eastlink, the Commission finds that the rates proposed by Rogers are more reasonable and would contribute to a more balanced market. The Commission finds that the offer proposed by Rogers is more reasonable in light of penetration levels, volume discounts and packaging of the service; it better aligns the rate that Eastlink pays for Sportsnet with the rates paid by unaffiliated BDUs; and better aligns Sportsnet rates with the rate that Eastlink pays for TSN at comparable penetration.

Sportsnet One

31. The Commission considers that, similarly to Sportsnet, Sportsnet One's viewership also peaked in the 2015-2016 and 2016-2017 broadcast years. However, Sportsnet One's audience performance has been more consistent, decreasing less than Sportsnet's in recent years. With respect to programming expenditures, the Commission considers that they have trended upwards. Nevertheless, upon examination of the parties' proposals, the Commission has determined that Eastlink's offer is more consistent with the trends observed in the data.

32. The Commission considers that Eastlink's packaging of Sportsnet One, as well as its high degree of penetration, attests to its value to consumers. Additionally, Rogers' proposed rates would bring Eastlink in line with the rates paid by unaffiliated BDUs of comparable size. Therefore, in regard to penetration levels, volume discounts and the packaging of the service, as well as the rates paid by unaffiliated BDUs, the Commission considers that Rogers' offer is more reasonable, and would support a more balanced market.

33. The Commission considers a comparison of Sportsnet One to other sports services is less practical than the comparison of Sportsnet to TSN. Nonetheless, when comparing the programming and overall viewership of Sportsnet One with other sports services, and the respective wholesale rates paid by Eastlink, the Commission finds Eastlink's offer to be more reasonable than Rogers'.

34. Finally, in terms of 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, the Commission finds that while both parties' proposals reasonably share risk, Eastlink's proposal does so more effectively.

35. In light of the relevant factors examined relating to fair market value and the public policy objectives, taking into account their probative value, and noting that its decision was based on other considerations as well, but that this information was submitted in confidence, the Commission determines that in regard to the linear wholesale rate for distribution of Sportsnet One by Eastlink, the rates proposed by Eastlink are more reasonable than those proposed by Rogers. The Commission also finds that the offer proposed by Eastlink is more in line with historical rates taking into consideration programming expenditures and audience trends, is more in line with the rates Eastlink pays for programming services of similar value to consumers, and better shares the risk, striking a balance between allowing BDUs to provide their subscribers with more choice and flexibility and ensuring reasonable and predictable levels of revenue for programming services.

Conclusion

36. The Commission examined each offer and relevant documents in light of factors relating to fair market value, as well as the public policy objectives, taking into account their probative value. Noting that its decision was based on other considerations as well, but that this information was submitted in confidence, the Commission **selects Rogers' offer** for Sportsnet, and **selects Eastlink's** offer for Sportsnet One.

Secretary General

Related documents

- *Practices and procedures for dispute resolution*, Broadcasting and Telecom Information Bulletin CRTC 2019-184, 29 May 2019
- *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

- *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