



## Broadcasting Decision CRTC 2022-342

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### **Final offer arbitration between Rogers Communications Canada Inc. and DHX Television Ltd. regarding the distribution of Family and Family Jr.**

#### **Summary**

The Commission sets out its decision on an application for final offer arbitration by Rogers Communications Canada Inc. regarding the distribution by its licensed and exempt broadcasting distribution undertakings of the discretionary service Family and its multiplex Family Jr. (the Services) provided by DHX Television Ltd., doing business as WildBrain Television (WildBrain).

The Commission **selects WildBrain's offer**, thereby establishing the linear wholesale rate for the Services. The Commission finds that the offer proposed by WildBrain is the most reasonable in light of fair market value factors of probative value and public policy objectives.

By resolving commercial disputes, the Commission ensures that fair and reasonable commercial agreements are reached and that Canadians ultimately have access to a diverse range of quality programming.

#### **Introduction**

1. On 21 July 2022, Rogers Communications Canada Inc. (Rogers) filed an application requesting that the Commission initiate a final offer arbitration (FOA) proceeding relating to the distribution of the discretionary services of DHX Television Ltd., doing business as WildBrain Television (WildBrain), Family and its multiplex Family Jr. (the Services), by the licensed and exempt broadcasting distribution undertakings (BDUs) operated by Rogers.
2. In a conduct letter dated 8 September 2022, the Commission advised the parties that it was accepting the FOA request for the Services, 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). In that letter, the Commission defined the scope of the proceeding as establishing linear wholesale rates for Family and its multiplex Family Jr.
3. As set out in the Bulletin, 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.

4. In accordance with paragraph 59 of the Bulletin and with the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, some 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 give current and future competitors access to sensitive competition-related information to which they would not otherwise have access.
5. Abridged versions of the briefs submitted by the parties and letters from the Commission relating to procedure may be consulted on the Commission's *Expedited Public Hearings and Final Offer Arbitrations* page at [www.crtc.gc.ca](http://www.crtc.gc.ca).

## **Regulatory Framework**

6. The broadcasting policy set out in subsection 3(1) of the *Broadcasting Act* (the Act) includes the following objectives:
  - subparagraph 3(1)(d)(ii) - encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view;
  - paragraph 3(1)(e) - each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;
  - subparagraph 3(1)(i)(i) - 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;
  - subparagraph 3(1)(i)(v) - include a significant contribution from the Canadian independent production sector; and
  - subparagraph 3(1)(t)(iii) - distribution undertakings should provide reasonable terms for the carriage, packaging and retailing of those programming services.

7. The Act confers on the Commission explicit powers with regard to dispute resolution. In particular, paragraph 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. Dispute resolution is addressed in sections 12 to 15.02 of the *Broadcasting Distribution Regulations* and sections 14 and 15 of the *Discretionary Services Regulations*:

- Subsection 12(1) states that if there is a dispute between the licensee of a BDU 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.
  - Subsection 12(9) states that the licensee shall submit to having the dispute resolved in accordance with the procedural requirements established by the Commission in the Bulletin.
9. 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 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.
10. As explained in Broadcasting Information Bulletin 2015-440 and the Bulletin, 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.
11. Parties can also make submissions on which public policy objectives are relevant to a given case. 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.
12. In Broadcasting Regulatory Policy 2015-96 (Let's Talk TV), 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.

## **Position of parties**

### **Rogers' final offer**

13. Rogers submitted that its proposed reduced rates for the Services are consistent with the relevant fair market value factors set out in the Wholesale Code. Rogers submitted that the following factors are more probative in the context of this FOA:
- penetration levels, volume discounts, and the packaging of the service; and
  - rates paid for programming services of similar value to consumers, taking into consideration viewership.
14. Rogers argued that it cannot be expected to pay wholesale rates it considers high when data shows that consumers value the services less today than they have in past years. The Services' wholesale rates significantly exceed their performance, particularly compared with the rates for services that have similar viewership. Historically, services like Family and Family Jr. were drivers of viewership to the packages in which they were included. However, Rogers submitted that this is no longer true. The Services are selected less and less by Rogers subscribers both on its legacy DTV platform and on its IPTV platform in its Flex 5, Flex 10, Flex 20 and Premier packages, where customers can swap services in and out of packages.
15. Rogers attributes this trend to a number of factors including:
- Canadian consumers migrating to on-demand and online streaming platforms to watch children and youth programming;
  - the launch by Corus Entertainment Inc. (Corus) of Disney, Disney Jr. and Disney XD services, which resulted in the oversaturation of the children and youth programming markets;
  - WildBrain's decision to make its programming available internationally on a variety of streaming services including WildBrain Spark on YouTube; and
  - the implementation of the regulatory framework set out by the Commission as part of the Let's Talk TV proceeding, which emphasizes consumer choice.
16. Rogers emphasized that its proposal is in line with the Commission's objectives set out as part of the Let's Talk TV proceeding, including consumer choice, packaging flexibility and affordability, along with appropriate levels of risk sharing between BDUs and programmers. Rogers noted that the Commission said in Broadcasting Regulatory Policy 2015-438 that "a programming service that is guaranteed a minimum revenue level is unduly shielded from the effects of consumer choice." Rogers recognized that the Commission was prepared to make exceptions for Canadian independent programming services. However, Rogers added that the Commission stated that such services should not be entitled to revenues that are not commercially reasonable and reflective of the marketplace. Rogers submitted that the Commission's expectation is for channels to innovate to remain relevant to viewers and emphasized that some channels may not survive while others thrive. Rogers concluded that the Services failed to remain relevant to BDU customers and that this should impact their wholesale rates.

#### **WildBrain's final offer**

17. WildBrain submitted that its proposal is fair and reasonable, taking into account the principles of the Wholesale Code. It emphasized that it is proposing to take on a number of risks inherent to the evolution of the broadcasting industry and consumer choice.
18. WildBrain stated that the Services are important independent Canadian services offering high quality original children and family entertainment that contributes to the diversity of voices. Further, the value of the Services is enhanced because it provides a variety of exclusive and distinctly Canadian content with an emphasis on live action programming.
19. WildBrain submitted that the following factors are probative in the context of this FOA:
  - historical rates, given that the Services have been maintaining viewership levels over time and that a degree of rate continuity is necessary to support longer-term investment in quality children's programming;
  - penetration levels, volume discounts, and the packaging of the service, since its proposed rates and penetration are comparable to those for similar English-language commercial discretionary services for children and families; and
  - rates paid by unaffiliated BDUs for the programming service, since its proposed rates are advantageous to Rogers compared with those paid by unaffiliated BDUs.

## **Comments**

### **Rogers**

20. Rogers argued that WildBrain's proposal fails to acknowledge the declining value of the Services for consumers and the BDUs that distribute them, particularly as target audiences migrate to online platforms to access children and youth programming.
21. In response to WildBrain's argument that the Services are maintaining viewership levels over time, Rogers pointed out that both Numeris' data and Rogers' set-top-box data show that the Services' audiences have declined. Rogers also submitted that changes in the Services' penetration in recent years is not comparable to that of similar services, particularly in the context of the uptake of Rogers' packages that allow customers to swap a pre-determined number of individual services.
22. Rogers submitted that the rates paid for comparable services and the rates paid by unaffiliated BDUs have no probative value, since they were likely negotiated a number of years ago and do not reflect the declining value of the Services.
23. Finally, Rogers argued that WildBrain's claim that its proposed rates are necessary to support Canadian linear services operating in the children and youth genre stood in opposition to WildBrain's commercial strategy over the past five years, which includes making its programming available internationally online.

### **WildBrain**

24. WildBrain argued that Rogers' proposal is at odds with the Commission's objectives for a healthy and dynamic wholesale market as set out in the Let's Talk TV policy framework. In particular, WildBrain emphasized that Rogers' proposal does not share risk appropriately between the two parties.
25. In response to Rogers' assertion that the viewership and subscription levels of the Services are declining, WildBrain stated that it has implemented strategies for providing content that will build up its services, which are performing well. Further, WildBrain argued that Rogers exaggerated the weight of this factor in its analysis.
26. With regard to the evolution of the children's programming market involving the surge of on-demand offerings, WildBrain argued that younger audiences move between platforms and programming sources depending on circumstances. Wildbrain stated that it does not offer the Services on a direct-to-consumer basis and that its multiplatform strategy is designed to drive discoverability. Further, WildBrain claimed that linear television remains a relevant platform, specifying that the majority of children ages 2 to 11 watch linear television on a regular basis.
27. WildBrain reiterated that historical rates, penetration, rates paid by unaffiliated BDUs and rates paid for comparable services are relevant factors for the purposes of fair market value analysis. WildBrain acknowledged that the market for children's programming has evolved in recent years. It argued that these changes must be appropriately contextualized, taking into account the COVID-19 pandemic, the nature of Rogers' flex packaging, the particular characteristics of children's programming and the steps WildBrain has taken to ensure that the Services retain value for consumers.

### **Additional process**

28. On 23 September 2022, WildBrain filed a procedural request, asking the Commission to strike out certain passages in Rogers' final offer submission, because in WildBrain's view, these passages included information divulged in Commission staff-assisted mediation. WildBrain argued that the disclosure of this information to the Commission would contravene paragraph 58 of the Bulletin.
29. In its reply, Rogers stated that WildBrain's request had no merit and should be dismissed. Rogers argued that much of the information in question is in the public domain and that any exceptions were obtained in negotiations with WildBrain prior to Commission staff-assisted mediation. Therefore, the information may be included in the record of this proceeding.

### **Commission's analysis**

#### **Procedural request**

30. Paragraph 58 of the Bulletin states:

The fact that staff-assisted mediation is taking or has taken place, along with any and all information and materials submitted by the parties and any discussions that may

occur during the course of such mediation, shall be confidential and shall not be disclosed either by the parties to the dispute or by the Commission. Further, any information in regard to the above shall not be used by any of the parties involved in subsequent proceedings before the Commission. However, as noted in paragraph 16, the Staff Mediation Report, which identifies issues remaining to be resolved, may, should all parties consent, form part of the record for consideration in another Commission proceeding on issues identified in that report.

31. The Commission notes that the purpose of paragraph 58 is to encourage parties to compromise during staff-assisted mediation without fear that any such compromises could be used against them in an FOA should the mediation ultimately fail. The Commission also notes that that paragraph acts only to protect information that was disclosed solely during staff-assisted mediation and that parties are free to use information that was otherwise obtained even if that information was also used in staff-assisted mediation.
32. The Commission is of the view that the record does not establish that the information in question was obtained solely during staff-assisted mediation. Accordingly, the Commission **denies** WildBrain's procedural request.

#### **Review of final offers**

33. The Commission recognizes that viewership trends are different in children and youth programming. On the one hand, online viewing is already a strong habit, and on the other hand, average minute audience values exceed those for target audiences that include adults as well as children. The Commission will gauge the probative value of the relevant fair market value factors accordingly.
34. 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, packaging and viewership;
  - rates paid by unaffiliated BDUs for the programming service; and
  - rates paid for programming services of similar value to consumers, taking into consideration viewership.
35. The Commission also takes into consideration several public policy objectives, particularly those listed in paragraph 6 above, as well as that of ensuring that risk and reward are shared between BDUs and programming services, striking a fair balance enabling BDUs to provide their subscribers with more choice and flexibility and ensuring reasonable and predictable levels of revenue for programming services.
36. In Let's Talk TV, the Commission declared that children's programming comprises an integral part of the linear Canadian broadcasting system. In this context and as explained in Broadcasting Regulatory Policy 2015-438, the Commission considers that ensuring reasonable revenues for independent youth and children's programming services to be to

the overall benefit of the broadcasting system. This enables these services to meet their programming requirements and provides them with a measure of support to the ultimate benefit of diversity within the system, with minimal impact in terms of consumer choice.

37. Taking into account the impact of the COVID-19 pandemic as well as current and expected inflation rates, the Commission finds that WildBrain is proposing a wholesale rate over the agreement term that acknowledges the recent decline in the viewership of the Services as expected in light of trends in the children's television market. Therefore, WildBrain's offer is in line with historical rates. Rogers proposed more serious declines that better takes into account WildBrain's decreased investments in programming expenditures as a share of its revenue over the past three years. Accordingly, the Commission finds that Rogers' offer better reflects the historical rates of the Services given the historical investment trends that impact their programming content.
38. The Commission required the offering of flexible packaging as part of Let's Talk TV and over a year after the launch of the Disney services by Corus. The Commission finds that the Services' apparent decline in popularity has been accelerated by Rogers' approach to flexible packaging. Indeed, the Commission finds this decrease to be most attributable to overall decreases in BDU or linear children's programming subscribers, whereas the absolute number of viewers for the Services has remained relatively stable.
39. Further, the Commission considers that Rogers' proposed penetration-based rate card structure in this era of flexibility would discourage its efforts to increase or sustain current penetration levels, since decreased penetration under this structure would result in significant cost savings while maintaining its overall BDU subscriber revenue. Therefore, the Commission finds WildBrain's proposed penetration-based rate cards to be more reasonable.
40. Having examined the rates paid by Rogers for privately owned youth and children's programming services, taking into consideration viewership, the Commission is unable to determine from the parties' submissions whether the proposed rates are in fact reflective of the services' intrinsic market value or current distribution choices. Therefore, the Commission finds that neither offer is more reasonable in light of this factor.
41. Finally, with regards to rates paid by non-Rogers BDUs for the Services, the Commission considers that both offers are competitive. Factoring in the ownership composition of the market for Canadian linear youth and children's services and the Commission's related public policy objectives, the Commission finds that WildBrain's offer better reflects the Service's relative market value.

## **Conclusion**

42. The Commission examined each offer and relevant documents in light of factors relating to fair market value, as well as public policy objectives, taking into account their probative value. The Commission notes that its decision was based on other considerations as well but that this information was submitted in confidence. In light of the above, the Commission **selects WildBrain's offer.**

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