



Broadcasting Decision CRTC 2009-301

Ottawa, 22 May 2009

Request for dispute resolution by Canadian Cable Systems Alliance Inc. relating to the service provided by Rogers Sportsnet Inc.

In this decision, the Commission sets out its determination that it would be appropriate to set certain terms for the distribution of Rogers Sportsnet by those cable broadcasting distribution undertakings represented by Canadian Cable Systems Alliance Inc. In light of their commercially sensitive nature, the details relating to these terms will be provided in confidence to the two parties.

Introduction

1. On 26 February 2009, Canadian Cable Systems Alliance Inc. (CCSA) requested that the Commission resolve a commercial dispute through final offer arbitration or alternatively an expedited hearing.¹ CCSA represents, for the purposes of negotiating affiliation agreements, 98 small- and medium-sized independent cable companies that comprise more than 290 individual cable broadcasting distribution undertakings (BDUs).
2. The dispute related to the distribution of the service provided by Rogers Sportsnet Inc. (RSI), licensee of Rogers Sportsnet, a national, English-language specialty television programming service devoted to the provision of sports programming of regional interest that is packaged and distributed across Canada on four distinct regional feeds as well as via a national high definition (HD) channel. Approximately 300,000 subscribers throughout the country receive Rogers Sportsnet programming through CCSA member companies. The Master Affiliation Agreement between CCSA and RSI expired on 31 August 2008 and negotiations to renew the contract have not been successful.
3. CCSA requested, among other things, that the Commission make a determination on fair and equitable rates for the distribution by its member companies of the Rogers Sportsnet service, including the Sportsnet primary signal, its regional signals and its HD signal. CCSA noted that the rates at issue also included the wholesale rate to be paid by its members for the distribution of the signals in Francophone markets.
4. On 2 April 2009, CCSA and RSI both filed detailed briefs relating to the dispute. On 15 April 2009, CCSA and RSI filed their responses to the Commission's interrogatories set out in a letter dated 9 April 2009. Abridged versions of the briefs filed by the parties and certain other filings, as well as the Commission's letters relating to the process and confidentiality, can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings." The Commission notes that since the request by CCSA was submitted under section 12 of *Broadcasting Distribution Regulations* (the Regulations) and due to the commercially sensitive nature of the information relating to the dispute, an important portion of the record will remain confidential.

¹ See Broadcasting and Telecom Information Bulletin CRTC 2009-38.

5. In light of the issues raised by the parties in their submissions and in accordance with the expedited process set out in Broadcasting and Telecom Information Bulletin 2009-38, the parties were informed by letter dated 18 March 2009 that the Commission would establish a panel to conduct a brief oral public hearing. The hearing occurred on 24 April 2009.
6. In a Commission letter dated 31 March 2009, the Commission stated that the issues to be considered at the hearing were the following:
 - Can and/or should the Commission set rates, terms and conditions for the distribution of the Rogers Sportsnet signals?
 - In the event that the Commission decides to intervene, what should these rates, terms and conditions be and for what period of time should any rate, term and condition be in force?

Can the Commission set rates, terms and conditions for the distribution of the Rogers Sportsnet signals?

Position of parties

7. CCSA noted that the regulatory framework underlying the Commission's dispute resolution process applies to all programming services. At the hearing, CCSA indicated that the *Broadcasting Act* (the Act) and the Regulations were very clear in their creation of an authority and a responsibility on the Commission's part to hear and decide commercial issues, including rates, in commercial disputes referred to it pursuant to the Regulations. In CCSA's view, there was no doubt that the Commission can set rates in this matter.
8. RSI submitted that it did not object to the Commission's authority in such matters, stating that it understood what the Commission's powers are but that the Commission should show the utmost restraint in regulating rates where it has decided to rely on competition rather than regulation.

Commission's analysis and determination

9. Section 10(1)(h) of the Act states that the Commission may, in furtherance of its objects, 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.
10. Section 12(2) of the Regulations states that if there is a dispute between the licensee of a distribution undertaking and the licensee of a programming undertaking or the operator of an exempt programming undertaking concerning the carriage or terms of carriage of programming, including the wholesale rate, originated by the programming undertaking, one or both of the parties to the dispute may refer the matter to the Commission for dispute resolution.

11. Section 15 of the Regulations further states that the Commission may, after accepting a referral of a matter for resolution under section 12, render a decision concerning any unresolved matters, including the wholesale rate.²
12. The Commission notes that the Regulations give it broad discretion to intervene when one or both parties to a dispute refer a matter to it for resolution. When the criteria set out in section 12(2) are met, the Commission may render a decision concerning any unresolved matters, including the wholesale rate. Moreover, the Commission notes that sections 12 to 15 of the Regulations make no distinctions relating to the manner in which a programming service is distributed. It is the Commission's view that its overall regulatory framework as relevant to the facts of the present dispute as well as current Commission policy must be taken into consideration when accepting or refusing a matter for dispute resolution.
13. In light of the above, the Commission considers that should it decide to do so under the specific facts of this case, it can intervene to set rates, terms and conditions for the distribution of RSI's signals by CCSA members.

Should the Commission set rates, terms and conditions for the distribution of the Rogers Sportsnet signals?

Position of parties

14. CCSA submitted that there was an imbalance of power between its members and RSI. Specifically, it submitted that if its members could not obtain the service and offer it at equitable rates, this would have a wide-ranging and dramatic impact on these members, as they would be put at a disadvantage relative to their competitors. CCSA also submitted that viewers in small and rural systems might lose access to the signals entirely or be required to pay too high a price.
15. Further, in CCSA's view, if the Commission were to decide to intervene, it should do so for the distribution of all of RSI's signals: the primary signal, the regional signals, the HD signal and the signals in Francophone markets. CCSA contended that if the Commission were to decide to set only the rate for the primary signal, RSI's immediate response would be to increase the cost of its other feeds. In this respect, CCSA noted that RSI has one licence for all of the Rogers Sportsnet feeds at issue and that the Commission has consistently amended and renewed that licence on the premise that all these feeds constitute a single licensed specialty service.
16. RSI stated that there was no imbalance of power between itself and CCSA. It submitted that the rates it had offered to CCSA members had been commercially validated, i.e. it had already negotiated new affiliation agreements on materially the same terms and conditions as those offered to CCSA. RSI also submitted that a Commission decision to

² Section 12(1) states that "For the purposes of sections 12 and 15, 'wholesale rate' means the fee payable on a monthly basis by a licensee to a programming undertaking to receive a programming service."

set a wholesale rate for Rogers Sportsnet's signals would undermine its ability to negotiate with other distributors. RSI argued that except where there are allegations of undue preference or where there is high-handed or abusive behaviour, the Commission should not involve itself in the negotiation of wholesale rates for services where there is no access right, as is currently the case for exempt BDUs serving Anglophone markets and BDUs serving Francophone markets, as well as for the HD and non-primary regional signals.

17. Further, as regards the primary feed, RSI noted that the Commission had announced in Broadcasting Public Notice 2008-100 relating to the regulatory frameworks for BDUs and discretionary programming services that competitive sports services would no longer benefit from guaranteed access rights in the future. RSI submitted that a decision to set wholesale rates would be contrary to the Commission's new policy relating to such services as set out in that notice.

Commission's analysis and determination

18. In the call for comments initiating its review of the regulatory frameworks for BDUs and discretionary programming services,³ the Commission sought public comments on the appropriate role of dispute resolution in an environment of reduced regulation. In Broadcasting Public Notice 2008-100, the Commission acknowledged its responsibility in resolving disputes that arise between BDUs and programming undertakings where those disputes are relevant to the regulation and supervision of the Canadian broadcasting system. The Commission accordingly issued Broadcasting and Telecom Information Bulletin 2009-38, in which it set out in detail the procedural steps and the time limitations relating to requests for dispute resolution.
19. Whether a programming service has guaranteed access rights to a distribution system or not, the Commission notes that it has repeatedly stated in past policy statements that negotiations should be left to the parties themselves, with Commission involvement occurring only as a last resort (see Broadcasting Public Notice 2005-35). The Commission also notes RSI's argument with respect to allegations of undue preference or abusive behaviour. The Commission considers that although such allegations may very well be relevant in certain instances, they are not the only factors that the Commission may take into consideration when accepting or refusing a referral of a matter for resolution under section 12 of the Regulations. The Commission's view remains that it should intervene only in exceptional cases where, for example, the attainment of the objectives set out in the Act could be compromised.
20. In the present case, the Commission notes that the changes announced in Broadcasting Public Notice 2008-100 are currently set to take effect, for the most part, on 31 August 2011. The Commission further notes that until such time as the amendments to the Regulations proposed in that notice come into effect, some of the BDUs represented by CCSA will be required to continue to offer the Rogers Sportsnet primary signal. The Commission notes that Rogers Sportsnet is a popular service with strong Canadian

³ See Broadcasting Notice of Public Hearing CRTC 2007-10.

programming expenditures and unique regional programming. The Commission considers that the parties have reached an impasse in their negotiations, which appear to have been ongoing for more than one year. The Commission further considers that a determination not to intervene would leave the parties at an impasse in their negotiations and that this impasse could have an impact on the fulfillment of their regulatory obligations.

21. In light of all of the above, the Commission considers that under the specific facts of this case, it is in the best interest of the broadcasting system for the Commission to intervene in the present dispute. In accordance with past policy statements, the Commission will intervene to the least extent possible with a view to resolving the impasse between the parties.

Confidentiality

22. The Commission notes that section 12(5) of the Regulations states that any information relating to the resolution of a dispute filed with the Commission must be kept confidential unless the Commission determines that it would be in the public interest to do otherwise. Section 12(6) adds that when the Commission accepts a referral of a matter for dispute resolution, information provided by a party for the purposes of the dispute resolution may not be used by the other party to the dispute for any other purpose except with the prior consent of the party providing the information.
23. It was also noted in Broadcasting and Telecom Information Bulletin 2009-38 that information filed pursuant to section 12 of the Regulations will generally be kept confidential. Accordingly, in light of its commercially sensitive nature, the appendix setting out the Commission's determinations in this matter will be provided in confidence to the two parties.

Secretary General

Related documents

- *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory policy*, Broadcasting Public Notice CRTC 2008-100, 30 October 2008

- *Good commercial practices*, Broadcasting Public Notice CRTC 2005-35, 18 April 2005

Secretary General

This decision is available in alternative format upon request and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>.

Appendix to Broadcasting Decision CRTC 2009-301

The appendix to this decision is provided in confidence to Canadian Cable Systems Alliance Inc. and Rogers Sportsnet Inc.