



Broadcasting Decision CRTC 2009-590

Ottawa, 22 September 2009

Complaint by Bell ExpressVu Limited Partnership against Videotron Ltd. and TVA Group Inc. regarding advertising opportunities

The Commission finds that the sale of exclusive sponsorship opportunities by TVA Group Inc. to Videotron Ltd. (Videotron) did not result in an undue preference to Videotron or an undue disadvantage to the Bell ExpressVu Limited Partnership (Bell TV), contrary to section 9 of the Broadcasting Distribution Regulations. The Commission further finds that Videotron has not conferred an undue preference on itself or subjected Bell TV to an undue disadvantage, contrary to section 27(2) of the Telecommunications Act.

The complaint

1. In a complaint dated 9 April 2009, Bell ExpressVu Limited Partnership (Bell TV) alleged that certain practices between TVA Group Inc. (TVA) and Videotron Ltd. (Videotron) conferred an undue preference on Videotron and subjected Bell TV to an undue disadvantage. In particular, Bell TV argued that TVA's refusal to allow Bell TV to purchase television advertisements on certain of its highest rated programs, and Videotron's refusal to provide any of its allocated advertising spots on these programs, was contrary to the Canadian broadcasting policy objectives set out in section 3 of the *Broadcasting Act* (the Act), section 9 of the *Broadcasting Distribution Regulations* (the BDU Regulations), and section 27(2) of the *Telecommunications Act*.
2. Bell TV requested that the Commission issue a decision to this effect as well as an order that would cap the allowable number of exclusive sponsorships that Videotron is permitted to acquire on TVA's top 10 shows, implement a more transparent bidding process for advertisements on TVA's top 10 shows, and require Videotron not to enforce the exclusivity provisions in any exclusive sponsorship arrangements that are currently in force.
3. The Commission received a response to the complaint from Quebecor Media Inc. (QMI) on behalf of TVA and Videotron as well as a reply from Bell TV. The Commission notes that, in order to have as complete a record as possible, it also accepted additional comments from QMI and subsequent reply comments from Bell TV, as part of the record.
4. The Commission notes that Bell TV and QMI requested that certain information be kept confidential on the grounds that it was competitively sensitive and that disclosure would cause each material harm. The Commission considers that in this case the harm caused by disclosure outweighs the public interest in disclosure. Accordingly, the Commission grants the request that the information in question be retained in confidence.

Issues

5. The Commission has identified the following issues, which will be dealt with below:
 - Did Videotron benefit from an undue preference and/or did Bell TV suffer an undue disadvantage contrary to section 9 of the BDU Regulations?
 - Did Videotron benefit from an undue preference and/or did Bell TV suffer an undue disadvantage contrary to section 27(2) of the *Telecommunications Act*?

Did Videotron benefit from an undue preference and/or did Bell TV suffer an undue disadvantage contrary to section 9 of the BDU Regulations?

Positions of parties

6. Bell TV stated that TVA has refused to allow it to purchase broadcast advertisements promoting Bell TV's service on the number one rated TV show in the Province of Quebec – Star Académie. Bell TV submitted that this instance was only the latest example of a pattern whereby QMI, through its effective control of TVA and Videotron, has granted itself exclusivity to advertise only its own BDU service on the top rated and most watched TVA programming.
7. Bell TV argued that TVA's conduct was anti-competitive and conferred an undue preference on Videotron and subjected Bell TV to undue disadvantage. Bell TV submitted that this conduct has had serious adverse consequences for the Quebec public, who have been denied access to important and timely information about competitive TV services. As well, TVA's conduct has had material adverse consequences on Bell TV and on broadcasting distribution undertaking (BDU) competition in the province of Quebec. Finally, Bell TV argued that TVA's conduct has adversely affected the Canadian broadcasting system in the form of lost advertising revenues for the critical non-urban over-the-air television broadcast segment of the system at a time when this segment is said to be in financial crisis.
8. In response, QMI submitted that section 9 of the BDU Regulations did not apply in these circumstances since Videotron was not acting as a BDU when it purchased commercial time on TVA's programming services. QMI added that Bell TV was not able to obtain advertising spots on TVA's programs because it was not willing to pay the required rates, and that there were other advertising opportunities available to Bell TV on TVA programs and in other TVA media.

Commission analysis and determinations

9. In analyzing a complaint of undue preference under the BDU Regulations, the Commission must first determine whether there is a preference or a disadvantage. Where it determines that there is a preference or disadvantage, the Commission must then determine whether, under the circumstances, it is undue.

10. In order to determine if a preference or a disadvantage is undue, the test applied by the Commission is to examine whether the preference or disadvantage has had, or is likely to have, a material adverse impact on Bell TV, or any other person. It also examines the impact the preference or disadvantage has had, or is likely to have, on the achievement of the objectives of the broadcasting policy for Canada set out in the Act.
11. While the Commission has amended the undue preference provision of the BDU Regulations to include a “reverse onus” provision,¹ this amendment came into effect on 1 September 2009. The reverse onus provision was therefore not in effect when Bell TV filed its complaint. Accordingly, in this case, the onus is on Bell TV to demonstrate that an undue preference or disadvantage has occurred.
12. With regard to the issue of preference, the Commission notes that Bell TV and Videotron are comparable entities in that they are both BDUs operating in the province of Quebec. Moreover, both Videotron and TVA are owned by QMI. While Videotron has been able to obtain exclusive sponsorship opportunities on certain TVA programs, Bell TV has demonstrated that, despite its efforts, it has not been able to obtain access to advertising spots on TVA programs where Videotron has established these exclusive arrangements.
13. In light of the foregoing, the Commission considers that Videotron is conferring a preference by securing exclusive rights to advertise on certain of Quebec’s most popular programs, thus precluding Bell TV, and others, from advertising on these programs.
14. With regard to whether the preference was undue, the Commission notes that, while Bell TV has been unable to secure advertising spots on Star Académie, the record demonstrates that Bell TV has been able to place advertisements on certain top ten TVA programs including “Occupation Double” in the fall of 2008, and “Juste pour rire” and “Dr House” in the spring of 2009. There is also evidence on the record that Bell TV refused opportunities offered by TVA at different times to advertise on other top-rated TVA programs. This suggests that TVA has not made an effort to exclude Bell TV from advertising on its programs.
15. The Commission notes, moreover, that while Bell TV has argued that Videotron and TVA’s actions are anti-competitive and compromise the attainment of the objectives of the Act, Bell TV has not demonstrated that the inability to advertise on these programs has negatively affected its ability to generate new subscribers or has reduced in a material manner its ability to gain exposure in the Quebec market.
16. While having the ability to promote its services on TVA’s most popular shows would certainly benefit Bell TV, there is insufficient evidence on the record to demonstrate the impact on Bell TV or on the achievement of the objectives set out in the *Broadcasting Act*.

¹ Broadcasting Regulatory Policy 2009-543

17. The Commission is unable to conclude, based on the evidence of this proceeding, that Videotron obtaining exclusive access to advertising spots on TVA programs to the exclusion of Bell TV has had a material adverse impact on Bell TV or another party, or a negative effect on the attainment of the objectives of the *Broadcasting Act*.
18. Further, the Commission considers that to intervene based upon the limited evidence provided in this case would be inconsistent with its general approach of relying on market forces where possible.
19. In light of the above, the Commission finds that the sale of exclusive sponsorship opportunities by TVA to Videotron did not result in an undue preference to Videotron or an undue disadvantage to Bell TV.

Did Videotron benefit from an undue preference and/or did Bell TV suffer an undue disadvantage contrary to section 27(2) of the *Telecommunications Act*?

20. The Commission notes that Bell TV did not provide any supporting arguments specific to its allegation that Videotron was conferring an undue preference on itself contrary to section 27(2) of the *Telecommunications Act*. The Commission finds that based on the evidence of this case, Videotron has not conferred an undue preference on itself or subjected Bell TV to an undue disadvantage contrary to the *Telecommunications Act*.

Secretary General

Related document

- *Amendments to the Broadcasting Distribution Regulations, the Television Broadcasting Regulations, 1987, the Pay Television Regulations, 1990, and the Specialty Services Regulations, 1990 – Implementation of certain elements of the regulatory framework for broadcasting distribution undertakings and discretionary services, and changes to contributions to Canadian programming, Broadcasting Regulatory Policy CRTC 2009-543, 31 August 2009*

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