



Broadcasting Decision CRTC 2016-262

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Ottawa, 12 July 2016

Application 2016-0241-7

Final offer arbitration request by Videotron G.P. regarding the distribution of Bell Media Inc.'s RDS services

*The Commission sets out its decision on an application for final offer arbitration by Videotron G.P. (Videotron) regarding the distribution of Bell Media Inc.'s RDS services. Specifically, **the Commission selects Videotron's offer**, which sets out the per-subscriber wholesale rates for the distribution of the RDS services in linear packages by Videotron. The Commission finds that Videotron's offer is the better offer, 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.*

In light of the confidential designations of some of the information and arguments made by the parties in this dispute, certain reasons for the Commission's decision are provided in confidence to the two parties.

Introduction

1. On 4 March 2016, Quebecor Media Inc., on behalf of Videotron G.P. (Videotron), requested that the Commission initiate a final offer arbitration process relating to 1) the rate for the distribution of linear content,¹ 2) the stand-alone rate and 3) the multiplatform rate payable by Videotron to Bell Media Inc. (Bell) for the distribution of RDS and RDS2 (collectively, the RDS services).
2. In its response of 9 March 2016, Bell indicated that it supported Videotron's arbitration request, but that the scope of the process should be limited to the linear rate for the distribution of the RDS services. Bell proposed that the parties pursue bilateral negotiations to attempt to reach an agreement concerning the other elements of the dispute.
3. In its reply of 11 March 2016, Videotron stated that it was ready to pursue further negotiations with Bell, including participating in Commission staff-assisted mediation, while emphasizing the urgency of resolving the dispute.

¹ In this case, the linear rate means the distribution of the services in build-your-own and pre-assembled packages.

4. On 16 March 2016, in light of the parties' willingness to engage in further bilateral negotiations, the Commission suspended the arbitration request.
5. On 11 April 2016, Videotron asked the Commission to resume the final offer arbitration process, noting that the only element that remained to be determined was the linear rate.
6. In a letter dated 21 April 2016, 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 that it would be making a decision on the per-subscriber wholesale rate to be paid by Videotron to Bell for the distribution of the RDS services in a linear package.
7. Pursuant to the procedure 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.
8. 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 amounts and data, 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. Moreover, in light of the confidential designations of some of the information and arguments made by the parties in this dispute, certain reasons for the Commission's decision are provided in confidence to the two parties.
9. Abridged versions of the briefs submitted by the parties and letters from the Commission relating to the procedure may be consulted on the Commission's website at www.crtc.gc.ca.

Regulatory framework

10. 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);
 - 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).

11. The Act confers on the Commission explicit powers with regard to dispute resolution. In particular, section 10(1)(h) of the Act states that “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.” 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.”
12. 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.
13. 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* (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.
14. Moreover, 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.

15. 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. 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.

Positions of parties

Videotron's final offer

16. Videotron stated that the launch of TVA Sports in 2011 and its acquisition of the broadcast rights for the National Hockey League (NHL) in 2014 substantially changed the sports television landscape in Quebec. Videotron argued that in this context its proposed rate increases for the RDS services represent a reasonable and balanced solution that reflects the fair market value of the services.
17. With respect to historical rates, Videotron argued that the annual subscription revenues for the RDS services have risen significantly since 2010, and that programming and production expenses have not kept pace.
18. Videotron argued that the loss of NHL rights had a major impact on the RDS services and on the services' value to consumers. According to Videotron, despite the addition of RDS2, the RDS services garner a significantly lower viewing share, with 20% lower viewership in 2014-2015 than in 2010-2011.
19. As for the rates paid for services of similar value, Videotron submitted that the value of the RDS services to consumers is comparable to that of TVA Sports. In this respect, Videotron noted that while the RDS services garner higher viewership than TVA Sports, the latter is a "must-have" channel due to the highly strategic value of Canadiens games on Saturday evenings and the Stanley Cup series in particular.
20. With respect to public policy considerations, Videotron argued that it is important to consider the impact of audience migrations between the various sports services available on the market and the costs to consumers. In that regard, it submitted that there is a limit to the costs that a BDU can pass down to its subscribers and that this limit has almost been reached in this case.
21. Videotron concluded that its offer would allow Bell to rely on reasonable and predictable revenue levels, thereby allowing the RDS services to continue to offer quality programming, while taking into account audience migrations and the need to rebalance the costs for consumers.

Bell's final offer

22. Bell argued that its proposal represents fair market value since it addresses all of the factors set out by the Commission in the *Wholesale Code*.
23. Bell questioned the relevance of examining historical rates, noting that the rate for RDS was regulated for a number of years (from 1987 to 2011). It also noted that a partial correction was made in 2011 to bring the rate closer to actual market rates.
24. Further, Bell submitted that the conditions of distribution have changed because Videotron has eliminated pre-assembled packages for new customers and for customers who cancel services, has introduced a small entry-level service and is preparing to introduce distribution of all services on a pick-and-pay basis.
25. Bell also argued that the significant increase in competition in the sports rights market, combined with the substantial programming investments made by RDS, must be taken into account when considering the evolution of rates over time.
26. Bell maintained that programming investments at RDS are necessary due to, among other things, the growing value of sports rights, the advent of online competition in the market and the ability of rights holders to launch competitive over-the-top programming services.
27. With respect to rates paid for services of similar value, Bell argued that the proposed rates are commercially reasonable since, among other things, RDS had garnered an audience 1.6 times greater than TVA Sports had in the past year.
28. Bell submitted that the fact that viewers continue to consider RDS as the leader in sports event broadcasting in Quebec is due to its significant investments in original programming, as well as in a wide range of the most popular sports events.
29. Moreover, Bell argued that its proposal furthers the achievement of public policy objectives, particularly by enabling Videotron to provide consumers with choice and flexibility, and allowing RDS to continue to invest in programming and to offer high-quality Canadian and international programming.
30. Bell concluded that the rates proposed in its final offer are commercially reasonable, reflect the fair market value of its services and serve the public interest.

Comments

Videotron

31. With respect to historical rates, Videotron noted that its packaging model has not changed since the last agreement. Consequently, the RDS services continue to benefit from the same distribution, regardless of whether subscribers opt for pre-assembled or build-your-own packages. It therefore submitted that historical rates represent a relevant factor in the analysis of the proposed rates. Further,

Videotron challenged Bell's arguments concerning the historically slow growth in the rate for RDS, noting that subscription revenues for RDS rose substantially between 2011 and 2012.

32. Videotron submitted that contrary to Bell's allegations, most of the wholesale rates paid by unaffiliated BDUs for the RDS services were not negotiated by mutual agreement. Therefore, Videotron argued that those rates do not establish standard market rates for the RDS services and that, under the circumstances, this factor is less material in this case.
33. With respect to the rates paid for services of similar value, Videotron questioned some of the data submitted by Bell to support its comparison with TVA Sports, noting that Bell indicated neither the methodology used nor the sample population for one of the surveys cited.
34. Finally, Videotron argued that its offer reflects a fair sharing of risk and reward between the parties, while ensuring predictable and reasonable revenues for RDS, whose financial performance remains among the best.

Bell

35. In general, Bell argued that, unlike itself, Videotron has not presented arguments on all of the fair market value factors set out in the *Wholesale Code* and thus has not followed the Commission's instructions in the conduct letter for this proceeding.
36. In Bell's view, Videotron has put too much emphasis on the estimated value of a single property (namely, the NHL national rights acquired by TVA Sports), thus omitting several other relevant circumstances and factors in its arguments. Bell argued that such a position is unjustified as it disregards the significant contribution of the breadth and depth of RDS programming, which adds value to the service in the eyes of consumers.
37. Bell notes the comparison made by Videotron between the RDS and TVA Sports services. However, Bell submitted that it is important to acknowledge that RDS remains the most watched discretionary service, in the analysis of the reasonableness of the proposed rate. In that regard, Bell added that RDS captures 63% of the Francophone viewership rating for sports compared to 37% for TVA Sports, and that 39% of the sports service consumers in Quebec only watch RDS, more than twice the number of consumers that only watch its competitor. Finally, Bell argued that TVA Sports should no longer be considered a new service given its two years of experience as the national NHL broadcaster.
38. Bell submitted that Videotron's argument that the proposed rate could impact consumers' ability to pay disregards the fact that it is Videotron's retail pricing decisions that are the key factors in the consideration of customer costs.

Additional process

39. On 20 May 2016, Bell requested authorization to reply to two points raised by Videotron in its comments, namely regarding the source of the survey filed by Bell as part of its final offer and Videotron's arguments on the origin of the rates paid by certain BDUs in Quebec.
40. In this reply, Bell stated that its study had been prepared by an independent firm and that the rates in question had actually been negotiated between the parties, which continue to pay these same rates. Subsequently, Videotron was allowed a final reply, limited to the arguments raised by Bell in its reply.
41. In its reply on 25 May 2016, Videotron indicated that several statements made by Bell in its submission and reply were vague or lacked a source. Videotron also set out its view regarding the retail prices of its packages and the rates applicable to certain BDUs in Quebec.
42. In an additional letter on 26 May 2016, Bell submitted that Videotron is attempting to present new evidence in the case and requested that the Commission delete paragraphs 4 to 13 of Videotron's 25 May 2016 reply. In a letter submitted the following day, Videotron argued that its comments directly address the substance of the questions raised and that its reply should be considered in its entirety.

Commission's analysis and decisions

Issues with the process

43. As set out in the Bulletin, final offer arbitration involves a two-step process: (1) the submission of the final offer and (2) comments. Parties are not generally allowed to file a reply to comments as part of the final offer arbitration. However, granting a right of reply was appropriate in this case to allow Bell to respond to new evidence filed by Videotron in its comments.
44. The Commission reminds parties that they are responsible for including concise supporting arguments stating all the facts when they file their final offers. Since the purpose of the comments is to allow each party to comment on the other party's final offer, procedural fairness requires that the parties' entire positions be put forth at the beginning of the process, namely as part of the final offer. It is therefore inappropriate to file new evidence and formulate new arguments as part of the comments or any reply, as the case may be, if such evidence or arguments could have been filed or formulated when filing the final offers.
45. After reviewing Videotron's reply dated 25 May 2016, the Commission finds that Videotron did not respect the integrity of the final offer arbitration process since it attempted to bolster its arguments and introduce new evidence in its reply.

46. Accordingly, the Commission considers that a remedy is appropriate under the circumstances since Bell has been subjected to a procedural breach. It has therefore stricken the new evidence filed by Videotron in paragraphs 4 to 12 of its 25 May 2016 reply. Thus, the Commission did not consider this new evidence in its review of the final offers.
47. Moreover, as for Bell's submission that Videotron did not present arguments on all of the factors to assess the fair market value of the RDS services, the Commission notes that the *Wholesale Code* states that commercial negotiations must take the fair market value factors into consideration, where applicable. Thus, it is not necessary for a party to file arguments on all the fair market value factors, but rather on those applicable to the circumstances of the proceeding.

Review of final offers

48. The Commission has examined the final offers in relation to five factors on fair market value and three public policy objectives raised by parties, which are drawn from Broadcasting Regulatory Policy 2015-96.
49. Having examined the retail rate for Videotron's build-your-own package, the Commission finds that both offers are reasonable in light of the factor regarding the retail rate for any packages in which the service is included. Further, both offers meet the policy objective of providing the BDU with packaging flexibility to allow it to respond to consumer choice, as well as the objective of providing the programming service with reasonable revenues, in this case, in proportion to the share of subscribers delivered by Videotron to the RDS services in the Quebec market.
50. The Commission finds that Bell's offer is more reasonable than Videotron's with respect to the following factors:
- 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.
51. However, the Commission considers that these factors are less probative in this case given the following circumstances:
- the affiliation between the RDS services and Bell, which means that, for purposes of examining volume discounts, the rates paid by Bell to the RDS services may be less representative of fair market value;
 - the significant market share of Videotron relative to other BDUs in Quebec; and
 - the affiliation between Videotron and TVA Sports, which means that the benchmark rate for the most comparable programming service may be less representative of fair market value.

52. Conversely, the Commission is of the view that historical rates represent a more probative factor in this case. The Commission considers it appropriate to take into account historical rates as of the last agreement, given that the rates set out in the last agreement were negotiated and regulated, and that Videotron's current packaging of the RDS services is not materially different from that in effect under the last agreement.
53. In this regard, the Commission finds that Videotron's proposed rate increase is more reasonable than Bell's, given the decrease in viewership share of the RDS services since 2011. In addition, the Commission considers that Bell has not adequately demonstrated that its proposed rate increase is necessary given the increase in programming expenses.
54. As regards the policy objective of sharing of risk, the Commission notes that variable rate cards establish wholesale rates that vary depending on the penetration levels of the programming service or the subscriber volume that the BDU delivers to the service. The Commission considers that a variable rate card may thus entail less risk for the programming service, providing it, *de facto*, with a level of predictability.
55. On the other hand, the Commission considers that a fixed rate model entails greater risk for the programming service since the rate paid by the BDU does not vary with a decrease in the penetration level or subscriber volume. Thus, in general, it would be reasonable for a fixed rate to be higher to allow for a reasonable margin of predictability for the programming service, while providing the BDU with packaging flexibility.
56. Having examined the final offers, the Commission finds that Bell's offer is less reasonable than Videotron's offer in light of the objective of sharing of risk. Specifically, Bell's offer would have the effect of insulating the programming service from the impact of subscriber choice at an unreasonable level, considering the circumstances of this case. Conversely, Videotron's offer would afford a certain level of protection against the impact of subscriber choice, which the Commission considers more reasonable in this case.
57. 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 Videotron's offer is the better offer. Accordingly, consistent with sections 3(1)(i)(i) and 3(1)(t)(iii) of the Act, and in accordance with section 12(9) of the Regulations and paragraph 25 of the Bulletin, **the Commission selects Videotron's offer.**

Secretary General

Related documents

- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015
- *Interpretation of the Wholesale Code*, Broadcasting Information Bulletin CRTC 2015-440, 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

Appendix to Broadcasting Decision CRTC 2016-262

The appendix to this decision is provided in confidence to Videotron G.P. and Bell Media Inc.