Broadcasting Decision CRTC 2006-315

Ottawa, 26 July 2006

Rogers Cable Communications Inc.
Across Canada

Application 2005-1196-6
Broadcasting Public Notice CRTC 2006-33
16 March 2006

Direct-to-home and terrestrial pay-per-view services – Licence amendments

The Commission ***approves*** *an application by Rogers Cable Communications Inc. for amendments to the conditions of licence of its national, English-language direct-to-home (DTH) pay-per-view (PPV) programming undertaking, and of its national, English-language terrestrial PPV programming undertaking. The amendments permit the licensee to make its DTH and terrestrial PPV undertakings available for distribution in high definition format; to change the method of calculating the annual contribution of each undertaking to support the development of Canadian programming in such a manner that the respective annual gross revenues of its DTH and terrestrial PPV undertakings will be defined as two-thirds of the retail revenues received by the broadcasting distribution undertaking; and to add category 8(a) (Music and dance other than music video programs or clips), as set out in Item 6 of Schedule 1 of the* Pay Television Regulations, 1990*, to the program categories from which each undertaking may draw its programming.*

The application

1. The Commission received an application by Rogers Cable Communications Inc. (Rogers) to amend the broadcasting licences for its national, English-language direct-to-home (DTH) pay-per-view (PPV) programming undertaking and for its national, English-language terrestrial PPV programming undertaking[1].

[1] In *Direct-to-home pay-per-view sports/specials service and terrestrial pay-per-view sports/specials service – Acquisition of assets*, Broadcasting Decision CRTC 2005-343, 16 May 2005, the Commission approved Rogers Cable Communications Inc.'s application for the authority to acquire from 3216195 Canada Inc., as part of a corporate reorganization, the assets of the national, English-language direct-to-home pay-per-view (PPV) sports/specials service and of the national, English-language terrestrial PPV sports/specials service.

2. Rogers requested amendments to its conditions of licence that would permit it to make its DTH and terrestrial PPV services available for distribution in high definition (HD) format; to change the method of calculating the annual contributions made by each service to support the development of Canadian programming; and to add category 8(a) (Music and dance other than music video programs or clips), as set out in Item 6 of Schedule 1 of the *Pay Television Regulations, 1990* (the Regulations), to the program categories from which each service may draw its programming.

3. In its application, Rogers also advised the Commission of its plans to offer up to 10% of the programming on its DTH and terrestrial PPV services in languages other than English and French. Rogers stated that ethnic programming services have been key factors in encouraging its subscribers to migrate to digital. It also submitted that the multicultural and multiracial character of many of the markets it serves, particularly the Greater Toronto Area, demonstrates the importance of offering programming to its subscribers in their first languages.

High definition format

4. Rogers requested the addition of a condition of licence for each service that would allow the programming now provided by its DTH PPV service in a standard definition (SD) digital format and the programming now provided by its terrestrial PPV service in an analog format to also be available for distribution in an HD version. For each service, the HD programming would be the same as that offered on the digital version of the DTH PPV service or on the analog version of the terrestrial PPV service.

5. Specifically, the licensee proposed the addition of the following condition of licence for its DTH PPV service:

> The licensee is authorized to make available for distribution, until three years from the date of the decision, an upgraded version of its standard definition service in HD format, provided that not less than 95% of the video and audio components of the upgraded and SD version of the service are the same, exclusive of the commercial messages and of any part of the service carried on a subsidiary signal.

6. With respect to its terrestrial PPV service, Rogers proposed the addition of the following condition of licence:

> The licensee is authorized to make available for distribution, until three years from the date of the decision, an upgraded version of its analog service in HD format, provided that not less than 95% of the video and audio components of the upgraded and analog versions of the service are the same, exclusive of the commercial messages and of any part of the service carried on a subsidiary signal.

7. The Commission did not receive any interventions in connection with this request.

Contributions to Canadian production funds

8. Rogers' DTH and terrestrial PPV services are each subject to a condition of licence requiring the licensee to contribute a minimum of 5% of the gross annual revenues earned by each PPV service to an existing, independently-administered, Canadian program production fund. For each service, the contributions to the fund must take the form of monthly instalments paid within 45 days of month's end and must represent a minimum of 5% of that month's gross revenues.

9. Rogers requested that the Commission amend the condition of licence for each service in order to allow that the respective annual gross revenues of the DTH PPV service and of the terrestrial PPV service be deemed to be 50% of the total retail revenues received from subscribers. Rogers noted that this is the method used by affiliated video-on-demand (VOD) services, as outlined in *Introductory statement to Decisions CRTC 2000-733 to 2000-738: Licensing of new video-on-demand and pay-per-view services*, Public Notice CRTC 2000-172, 14 December 2000 (Public Notice 2000-172).

10. In *Direct-to-home pay-per-view service – Licence renewal*, Broadcasting Decision CRTC 2006-22, 31 January 2006 (Decision 2006-22), and *Terrestrial pay-per-view service – Licence renewal*, Broadcasting Decision CRTC 2006-23, 31 January 2006 (Decision 2006-23), the Commission ruled on similar requests by Bell ExpressVu Limited Partnership[2] (Bell ExpressVu), and by Shaw Pay-Per-View Ltd. (Shaw). In those decisions, the Commission confirmed that a PPV licensee's share of retail revenue must continue to be calculated in the following fashion: the amount paid to third-party suppliers for content, or the cost of goods sold, and one-half of the residual amount.

11. As part of the present application process, the Commission asked Rogers whether it would be willing to calculate its annual contributions to a Canadian production fund in accordance with the method that was applied to the PPV services operated by Bell ExpressVu and Shaw.

12. In response, Rogers requested that it be allowed to calculate its annual contributions in such a manner that the respective annual gross revenues of its DTH and terrestrial PPV services would be defined as two-thirds of the retail revenues received by the broadcasting distribution undertaking (BDU). Rogers submitted that this method should result in contributions that would be equivalent to those paid by other PPV licensees and would simplify the administration of those payments. Rogers also argued that the split of revenues that must be paid to its content suppliers is not based on any one single formula. Rogers stated that the cost of goods sold for sporting events varies from property to property and expressed the view that the revenue allocation formula that was approved as part of the PPV licence renewal decisions for Bell ExpressVu and Shaw, respectively, would be too complicated for Rogers' PPV services.

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[2] Bell ExpressVu Inc. (the general partner) and BCE Inc. and 4119649 Canada Inc. (partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership

Intervention

13. The Commission received an intervention by Bell ExpressVu, which commented on Rogers' proposal to change the method of calculating its annual contributions to a Canadian production fund.

14. Bell ExpressVu stated that it would support Rogers' proposal provided that the Commission confirmed its willingness to approve similar applications from other licensees of PPV services. In Bell ExpressVu's view, approval of the method proposed by Rogers in its response to the Commission would create a competitive imbalance in the PPV market as well as regulatory inconsistency with the current conditions of licence that are imposed on all other PPV services, including the intervener's own DTH PPV service. Finally, Bell ExpressVu noted that its request to change its method for calculating its contributions to a Canadian production fund in order to allow its gross annual revenues to be deemed to be 50% of the total retail revenues received from subscribers to the BDU was denied by the Commission in Decision 2006-22.

15. Rogers did not respond to Bell ExpressVu's intervention.

Program category 8 (Music and dance)

16. Under each service's current nature of service condition of licence, the licensee is authorized to draw its programs exclusively from the categories set out in Item 6 of Schedule 1 of the Regulations, with the exception of categories 7 (Drama and comedy), 8 (Music and dance)[3] and 10 (Game shows). Rogers stated that it wishes to broadcast live performances consisting primarily of music and/or dance on its DTH and terrestrial PPV services and requested that the condition of licence of each service be amended in order to permit the licensee to broadcast programming from program category 8.

17. Rogers contended that approval of this request would enable its PPV services to compete on a more equitable basis with other national PPV services that are authorized to offer category 8 programs.

18. The Commission did not receive any interventions in connection with this request.

Commission's analysis and determinations

High definition format

19. In *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61, 11 November 2003 (Public Notice 2003-61), the Commission stated that it would authorize the licensee of a Canadian pay

[3] This includes 8(a) (Music and dance other than music video programs or clips), 8(b) (Music video clips) and 8(c) (Music video programs.

or specialty service to make available an upgraded version of the service, by means of an amendment to the licence of the corresponding service. This authority would be in effect for a term of three years, pending the development of a licensing and distribution framework for Canadian pay and specialty services in HD format.

20. The Commission published its new framework in *Regulatory framework for the licensing and distribution of high definition pay and specialty services*, Broadcasting Public Notice CRTC 2006-74, 15 June 2006 (Public Notice 2006-74). In that Public Notice, the Commission stated:

> Those services that are authorized to offer HD programming by way of licence amendment will remain subject to the requirement initially imposed in Public Notice 2003-61 that the programming on the analog or SD service and on the upgraded service be comparable, that is, not less than 95% of the video and audio components must be the same. Further, the Commission will require that all of the programming making up the 5% allowance be provided in HD.

21. Given that the present application was filed and published prior to the release of Public Notice 2006-74, the Commission accepts the conditions of licence proposed by Rogers, which reflect the previous approach established in Public Notice 2003-61, and does not contain the additional requirement that all of the 5% allowance be provided in HD.

22. In light of the above, the Commission **approves** the licensee's request. Accordingly, with respect to the DTH PPV service, the Commission adds the following **condition of licence**:

> Rogers Cable Communications Inc. is authorized to make available for distribution for a period of three years from the date of this decision, a version of its direct-to-home pay-per-view service in high definition format, provided that not less than 95% of the video and audio components of the upgraded and standard definition versions of the service are the same, exclusive of the commercial messages and of any part of the service carried on a subsidiary signal.

23. With respect to the terrestrial PPV service, the Commission adds the following **condition of licence**:

> Rogers Cable Communications Inc. is authorized to make available for distribution for a period of three years from the date of this decision, a version of its terrestrial pay-per-view service in high definition format, provided that not less than 95% of the video and audio components of the upgraded and analog versions of the service are the same, exclusive of the commercial messages and of any part of the service carried on a subsidiary signal.

Contributions to Canadian production funds

24. At the time Rogers filed the present request, the Commission was in the process of considering similar requests by Bell ExpressVu and Shaw as part of the licence renewal applications for their respective PPV services. In Decision 2006-22 renewing the licence for Bell ExpressVu, and in Decision 2006-23 renewing the licence for Shaw, the Commission stated that, although it has deemed gross annual revenues for affiliated VOD undertakings to be 50% of the total retail revenues received from customers, it has not applied this definition to any DTH or terrestrial PPV service. The Commission noted that, in practice, gross revenues for DTH and terrestrial PPV services are deemed to be the programming service's total revenues, as reported in the licensee's annual returns. In addition, the Commission confirmed that the method by which the gross annual revenues of Bell ExpressVu's DTH PPV service and Shaw's terrestrial PPV service were to be determined was as follows: the revenues allocated to the PPV licensees based on the share of retail revenues required to cover the cost of goods sold plus one-half of the residual amount.

25. As part of the present application process, the Commission asked Rogers to comment on the method for determining gross annual revenues set out in Decisions 2006-22 and 2006-23. In response, Rogers submitted that, given that the programming offered by its DTH and terrestrial PPV services consists of sports and specials for which the cost of goods sold varies, calculating an allocation based on the costs of goods sold would be complex. Rogers added that, in general, the cost of goods sold represented about one-third of retail revenues. Accordingly, Rogers proposed that the gross annual revenues earned by its DTH and terrestrial PPV services would be defined as two-thirds of the retail revenues received by the BDU.

26. The Commission notes that Rogers' proposed revised method for calculating gross annual revenues would represent a simpler administrative approach for the licensee's contribution payments given that its programming is dedicated to live sports and special events where the cost of goods sold varies from property to property. The Commission also notes that Rogers' proposed revised method of calculation would result in contribution levels that are comparable to those of other PPV licensees.

27. With respect to the concerns raised by Bell ExpressVu, the Commission is satisfied that the approach proposed by Rogers would be consistent with the calculation method used by other PPV licensees. In addition, the Commission notes that the contributions that would ensue from the licensee's proposed method of calculation would be approximately the same as those required under the licensee's current conditions of licence. Consequently, the Commission is of the view that approval of Rogers' request would not create a competitive imbalance in the PPV market or regulatory inconsistency with other PPV licensees.

28. With respect to Bell ExpressVu's request that the Commission consider favourably new or revised applications from other PPV licensees seeking similar licence amendments, the Commission will continue to take a case-by-case approach in dealing with such applications.

29. In light of the above, the Commission **approves** the licensee's request. The Commission is imposing the following **condition of licence** on Rogers' DTH PPV service and on its terrestrial PPV service:

> The licensee shall contribute a minimum of 5% of the gross annual revenues earned by its pay-per-view (PPV) television programming undertaking to an existing, independently-administered, Canadian program production fund. Contributions to the fund shall take the form of monthly instalments paid within 45 days of month's end and representing a minimum of 5% of the PPV television programming undertaking's gross revenues for that month.
>
> For the purpose of this condition of licence, the gross revenues of the PPV television programming undertaking shall be defined as two-thirds of the retail revenues received by the broadcasting distribution undertaking.

Program categories

30. In Public Notice 2000-172, the Commission stated that the regulatory approach to general interest PPV and VOD services should generally be consistent. While the Commission recognises that Rogers' DTH and terrestrial PPV services are not defined as general interest, the Commission considers that it would be consistent with its general approach to VOD and PPV services to allow Rogers the flexibility, in this case, to offer programming drawn from category 8(a) on each service that is consistent with the licensee's nature of service, which includes live sports events and other special events. In addition, the Commission notes it did not receive any interventions in connection with this request. Accordingly, the Commission **approves** the licensee's request.

31. The revised nature of service **condition of licence** for the DTH PPV service reads as follows:

> The licensee shall provide a national, English-language direct-to-home (DTH) pay-per-view (PPV) television service. The licensee shall draw its programs exclusively from the categories set out in Item 6 of Schedule 1 of the *Pay Television Regulations, 1990*, with the exception of categories 7 (Drama and comedy), 8(b) (Music video clips), 8(c) (Music video programs) and 10 (Game shows).

32. The revised nature of service **condition of licence** for the terrestrial PPV service, reads as follows:

> The licensee shall provide a national English-language terrestrial pay-per-view (PPV) television service. The licensee shall draw its programs exclusively from the categories set out in Item 6 of Schedule 1 of the *Pay Television Regulations, 1990*, with the exception of categories 7 (Drama and comedy), 8(b) (Music video clips, 8(c) (Music video programs) and 10 (Game shows).

Third-language programming

33. The Commission notes Rogers' proposal to offer up to 10% of programming in languages other than English and French on its DTH and terrestrial PPV services. In the Commission's view, this proposal will provide the licensee with an opportunity to reflect the multicultural and multiracial character of the communities it serves. At the same time, the Commission is satisfied that this proposal is consistent with the limitation set out in *Ethnic broadcasting policy*, Public Notice CRTC 1999-117, 16 July 1999, which allows non-ethnic radio or television stations to devote no more than 15% of their schedules to third-language programming.

Secretary General

This decision is to be appended to each licence. It 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