



Broadcasting Decision CRTC 2010-558

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Ottawa, 6 August 2010

Request by Rogers Cable Communications Inc. concerning the interpretation of section 29.1(2) of the *Broadcasting Distribution Regulations*

The Commission finds that the exception to the payment of contributions to the Local Programming Improvement Fund for the 2009-2010 broadcast year provided in section 29.1(2) of the Broadcasting Distribution Regulations applies only at the licensee level and not to the individual undertakings of a regional licence. Therefore, to benefit from the exception, a regional licensee must have fewer than 20,000 subscribers in total.

Background

1. Prior to April 2010, the Local Programming Improvement Fund (LPIF) administrator sent preliminary invoices to Rogers Cable Communications Inc. (Rogers) that did not include Rogers' regionally licensed systems with fewer than 20,000 subscribers. These preliminary invoices were subject to adjustments. On 1 April 2010, the LPIF administrator sent a revised invoice to Rogers that included those systems. Rogers refused to pay the contributions for the regionally licensed systems with fewer than 20,000 subscribers, arguing that it met the exception for contributions set out in section 29.1(2) of the *Broadcasting Distribution Regulations* (the Regulations).

2. Section 29.1(2) of the Regulations reads as follows:

However, a licensee that has less than 20,000 subscribers on August 31, 2009 is not required to make the contribution for the broadcast year beginning on September 1, 2009.

3. On 31 May 2010, the Commission issued Broadcasting Information Bulletin 2010-333 (the Information Bulletin). The Information Bulletin explained that, in the case of regional licensees, the total number of subscribers in all the service areas that are part of the same regional licence is used to determine whether the exception in the Regulations for the payment of LPIF contributions for the 2009-2010 broadcast year applies. The Information Bulletin noted that, under the new exemption order set out in Broadcasting Order 2009-544, regional licensees could apply to carve out certain service areas from their licences so as to operate as exempt undertakings in those areas. On that same day, Commission staff sent a letter to Rogers explaining that, in accordance with the Regulations, Rogers' regional licences did not meet the criteria for relief from LPIF contributions for the 2009-2010 broadcast year and requested that Rogers pay the required amount.

Rogers' request for a Commission decision

4. Rogers filed a letter dated 11 June 2010 in which it disagreed with the Information Bulletin and Commission staff's interpretation of the Regulations and asked for a Commission decision on the issue. In particular, Rogers requested that the Commission rule on whether the threshold for the exception to LPIF contributions provided in section 29.1(2) of the Regulations applies with respect to regional licensees at the licensee level or on an undertaking-by-undertaking basis.
5. Rogers submitted that the interpretation of the Regulations in the Information Bulletin and in the Commission staff letter was inconsistent with section 29 of the Regulations, which also makes an exception for licensees with fewer than 20,000 subscribers, since the Commission applies the exception in section 29 at the level of the individual undertaking. Rogers also submitted that the interpretation was inconsistent with the first invoice from the LPIF administrator, which had excluded systems with fewer than 20,000 subscribers, with earlier statements made by the Commission concerning the scope and application of the LPIF contribution requirements, and with statements made in 2003 that regional licensing would not enhance the regulatory burden.
6. Rogers also argued that the interpretation led to an absurd result because its small regionally licensed undertakings have to contribute to the LPIF while larger individually licensed undertakings do not have to do so, based on a purely administrative distinction. It argued that this distinction was not related to the purpose of the exception to LPIF payments for 2009-2010, which was intended to provide a transition year so that licensees of small undertakings could apply to have their licences revoked pursuant to the new exemption order set out in Broadcasting Order 2009-544.
7. Lastly, Rogers submitted that applying the threshold of the exception at the licensee level would breach the rules of procedural fairness as Rogers reasonably expected the Commission to provide parties with an opportunity to comment on that interpretation.

Commission's analysis

8. The Commission notes that the exception to the payment of LPIF contributions in section 29.1(2) of the Regulations applies to a licensee. The term "licensee" is defined in section 1, which reads as follows:

"licensee" means a person who is authorized by a licence or a regional licence to carry on one or more distribution undertakings.
9. The Commission is of the view that this definition is clear and gives the complete meaning of this defined term. It clearly makes a distinction between the licensee as one entity and its distribution undertakings as another. A plain reading of this definition and of section 29.1(2) leads to the conclusion that the exception does not

apply separately to each distribution undertaking that may form part of a regional licence.

10. The Commission notes that this defined term has been consistently used and interpreted in Commission regulations. Where the Commission intended a provision of its regulations to be applied at the undertaking level, that is made clear. For example, the obligation to pay a contribution under section 29 of the Regulations is determined by whether a licensee has a community channel or whether a community station exists in the licensed area. “Community channel” and “licensed area” are defined terms. Thus, for the purposes of the obligations under section 29, the Commission has explicitly provided for this section to apply at the level of the undertaking, or “licensed area,” rather than at the level of the entire area covered by a regional licence. The Commission notes Rogers’ agreement with this interpretation of section 29. However, the Commission also notes that the wording of this section is very different from the wording in section 29.1, which does not refer to a licensed area or make any other reference to provide for its application other than at the regional licence level.
11. For the reasons set out above, the Commission finds that the exception in section 29.1(2) of the Regulations applies only at the licensee level and not to the individual undertakings of a regional licence.
12. The Commission is also of the view that this interpretation does not lead to an absurd result. In this regard, regional licensees can apply for either a carve out of systems of under 20,000 subscribers from the regional licence if they meet the criteria established in Broadcasting Order 2009-544 or for a condition of licence relieving them of the contributions under section 29.1. The notion of carve out was first explained in Public Notice 2008-100, then in Broadcasting Notice of Consultation 2009-173 and in Broadcasting Order 2009-544. The possibility of relief from LPIF contributions by a condition of licence was explained in Broadcasting Regulatory Policy 2009-543. The Commission notes that Rogers applied for a carve out of a number of its service areas on 9 June 2010, which was approved in Broadcasting Decision 2010-532.
13. The Commission notes that the LPIF administrator sent preliminary invoices to Rogers that did not include regionally licensed undertakings with fewer than 20,000 subscribers. However, as indicated above, those invoices were preliminary and subject to adjustments. Decisions relating to contributors, the amount of contributions and their recipients are only finalized in April of each year by the Commission.
14. As for Rogers’ argument that the Commission had mentioned in 2003, when it created the model of regional licensing, that this would not increase the regulatory burden on the regional licensees, the Commission notes that these statements were made in the context of the regulatory obligations that existed when it was making the particular regulatory amendments at that time.

15. Lastly, the Commission finds that its interpretation of section 29.1(2) of the Regulations does not create a breach of procedural fairness. A draft of the Regulations was published for comment by the public in Broadcasting Notice of Consultation 2009-176 before they were made by the Commission, and Rogers commented during that process.

Secretary General

Related documents

- *Deletion and exemption of licensed service areas under a broadcasting licence*, Broadcasting Decision CRTC 2010-532, 30 July 2010
- *Local programming improvement fund*, Broadcasting Information Bulletin CRTC 2010-333, 31 May 2010
- *Exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Order CRTC 2009-544, 31 August 2009
- *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
- *Call for comments on proposed amendments to the Broadcasting Distribution Regulations, the Television Broadcasting Regulations, 1987, the Pay Television Regulations, 1990 and the Specialty Services Regulations, 1990*, Broadcasting Notice of Consultation CRTC 2009-176, 3 April 2009
- *Call for comments on a proposed exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Notice of Consultation CRTC 2009-173, 1 April 2009
- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services – Regulatory policy*, Broadcasting Public Notice CRTC 2008-100, 30 October 2008