Broadcasting Regulatory Policy CRTC 2012-407

PDF version

Route reference: 2011-806

Additional references: 2011-601, 2011-601-1 and 2011-806-1

Ottawa, 26 July 2012

Amendments to various regulations – Implementation of the regulatory framework relating to vertical integration

The Commission announces amendments to the Television Broadcasting Regulations, 1987, *the* Pay Television Regulations, 1990, *the* Specialty Services Regulations, 1990, *and the* Broadcasting Distribution Regulations. *These amendments implement determinations made by the Commission in* Regulatory framework relating to vertical integration, *Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011*.

The amendments, effective the date of their registration, will be published in the Canada Gazette. *A copy of the amendments is attached to this regulatory policy.*

Background

1. In Broadcasting Regulatory Policy 2011-601, the Commission stated that vertical integration refers to the ownership or control by one entity of both audiovisual programming services, such as conventional television stations, or pay and specialty services, as well as distribution services, such as cable systems or direct-to-home satellite services. It further noted that vertical integration also includes ownership or control by one entity of both programming undertakings and production companies.

2. In that regulatory policy, the Commission set out its determinations relating to its regulatory framework for vertical integration. The Commission's main objective in establishing its vertical integration framework was to ensure that consumers continue to benefit from a wide choice of programming in a broadcasting system where programming and distribution have become increasingly integrated.

3. In order to implement the determinations set out in Broadcasting Regulatory Policy 2011-601, the Commission issued Broadcasting Notice of Consultation 2011-806, in which it called for comments on amendments to the *Broadcasting Distribution Regulations*, the *Pay Television Regulations, 1990* (Pay Television Regulations), the *Specialty Services Regulations, 1990* (Specialty Services Regulations) and the *Television Broadcasting Regulations, 1987* (Television Broadcasting Regulations). The amendments proposed in that notice of consultation sought to give effect to a number of key determinations set out in Broadcasting Regulatory Policy 2011-601. These amendments were proposed with a view to:

- harmonizing the undue preference/disadvantage rules by introducing reverse onus provisions where none existed;

- instituting a prohibition against tied-selling of programming services at the wholesale level;

- adding protections for independent Category B services through modifications to the existing 3:1 linkage rule;

- introducing mechanisms to guard against anti-competitive head starts with respect to new pay and specialty programming services;

- introducing a standstill mechanism pending the resolution of a dispute between broadcasting undertakings concerning the terms of carriage of programming or any right or obligation under the *Broadcasting Act* (the Act); and

- introducing dispute resolution provisions, including a provision relating to mandatory mediation between parties to a dispute retained by the Commission.

4. The Commission notes that it has also issued today Broadcasting Order 2012-408, in which it sets out amendments to the terms and conditions of the exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers, and Broadcasting Order 2012-409, in which it sets out amendments to the *Exemption order for digital media broadcasting undertakings* (the Digital Media Exemption Order) (formerly *Exemption order for new media broadcasting undertakings*).

5. Comments received in reply to Broadcasting Notice of Consultation 2011-806 can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Issues

6. Various issues were raised by the interveners. The Commission has taken into consideration all of the comments received, and considers that certain issues relating to the following must be addressed in detail:

- the distribution of Category B services;

- the "no head start" rule;

- the prohibition against tied selling;

- the standstill provisions; and

- dispute resolution provisions.

Distribution of Category B services

7. Sections 19(3) and 19(4) of the *Broadcasting Distribution Regulations* stipulate that for each related[1] Category B service or exempt third-language service that a broadcasting distribution undertaking (BDU) distributes, it must distribute at least three unrelated Category B services or exempt third-language services, or a combination of both types of service. Further, if the Category B service of the related programming undertaking is a French-language Category B service, at least two of the three unrelated programming services that it distributes must, to the extent that they are available, be French-language services.

8. In Broadcasting Regulatory Policy 2011-601, the Commission determined that where a BDU distributes a related Category B service, at least one of the three unrelated services that it must distribute pursuant to section 19(3) of the *Broadcasting Distribution Regulations* must be an independent[2] Category B service. It further determined that, in regard to a related French-language Category B service, one of the two French-language services of an unrelated programming undertaking must be an independent French-language Category B service.

9. In Broadcasting Notice of Consultation 2011-806, the Commission proposed amendments to section 19 of the *Broadcasting Distribution Regulations* reflecting these additional requirements as well as a requirement mirroring the French-language linkage requirement for English-language programming services. In particular, the Commission proposed that for every related English-language Category B service that a BDU distributes, at least two of the three unrelated programming services must, to the extent that they are available, be English-language services, of which at least one must be an independent English-language Category B service (the English-language linkage requirement).

10. As reflected in the above discussion, the French-language and English-language linkage requirements set out in the proposed new section 19(3.2) – which addresses the English-language linkage requirement – and the proposed revised section 19(4) – which addresses the French-language linkage requirement – apply to the extent that qualifying services are "available."

11. In this section, the Commission addresses the following issues relating to the proposed regulatory amendments regarding the distribution requirements of Category B services:

    - the 3:1 linkage rule for English-language Category B services;

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[1] A "related" service is a service in which a broadcasting distribution undertaking has an ownership interest, as defined in the *Broadcasting Distribution Regulations*.

[2] The definition of "independent programming undertaking" is discussed in paragraphs 18 to 21 below.

- the definition of the term “available” as used in sections 19(3.2) and 19(4) of the *Broadcasting Distribution Regulations*;

- the definitions of “exempt distribution undertaking” and “independent programming undertaking”; and

- the deadline to comply with the amended provisions.

English-language Category B services – the 3:1 linkage rule

12. Certain interveners, including both programming undertakings and distribution undertakings, opposed the proposed amendment that would introduce the English-language linkage requirement. According to those interveners:

    - The proposal goes beyond the Commission’s determination relating to the distribution of Category B programming services set out in Broadcasting Regulatory Policy 2011-601.

    - There are concerns regarding the effect of the proposed amendment on third-language services and on the contributions made by these services to the attainment of broadcasting policy objectives.

    - The proposal would have an impact on a BDU’s ability to offer a diversity of high quality programming.

    - Market forces already ensure distribution of independent English Category B services on a 1:1 ratio.

13. For its part, the Independent Broadcasters Group (IBG) supported the proposal. It noted that it raised the issue of language of market at the hearing that lead to the issuance of Broadcasting Regulatory Policy 2011-601 and that, therefore, this issue was before the Commission. It also argued that without the proposed amendment, the 3:1 distribution rule, which is meant to ensure the meaningful presence of independent Category B services, would have little practical utility for those services because of the large number of third-language services. Finally, it argued that this proposal would result in little hardship on the BDUs, given that flexibility still exists and that distribution undertakings are already generally compliant.

14. The Commission considers that the proposed English-language linkage requirement is consistent with its objective set out in Broadcasting Regulatory Policy 2011-601 of ensuring fair treatment for independent broadcasting distribution and programming services. In this regard, the Commission notes that the linkage requirement provides symmetry between the English-language and French-language services. The Commission also notes that interveners on both sides of the issue considered that most BDUs are already compliant with this requirement. Finally, the Commission notes that the English-language linkage requirement only limits flexibility to the extent that a BDU chooses to distribute a related English-language Category B

service. As such, the Commission considers that any additional burden imposed by this requirement would be minimal.

15. In light of the above, the Commission has retained the English-language linkage requirement, as proposed in Broadcasting Notice of Consultation 2011-806.

Definition of "available"

16. Based on the comments received, the Commission considers that clarification of sections 19(3.2) and 19(4) of the *Broadcasting Distribution Regulations* is required in regard to the meaning of the term "available." Accordingly, the Commission clarifies that a service is not "available" until it has launched, and that a Commission decision providing authorization to launch the service does not mean that the service is available.

Definitions of "exempt distribution undertaking" and "independent programming undertaking"

17. Sections 19(3.1), 19(3.2) and 19(4) of the *Broadcasting Distribution Regulations*, as proposed in Broadcasting Notice of Consultation 2011-806, referred to an independent Category B service as being a "Category B service in which no licensee of a distribution undertaking or operator of an exempt distribution undertaking holds, directly or indirectly, an interest or right in the assets." Comments received in reply to that notice of consultation identified certain concerns over two aspects of this wording.

18. The Commission notes that the expression "exempt distribution undertaking" requires clarification as it is not a term already defined under the *Broadcasting Distribution Regulations* and, as such, could unintentionally capture undertakings operating under the Digital Media Exemption Order. Accordingly, the Commission has amended section 19 of the *Broadcasting Distribution Regulations* to define "exempt distribution undertaking" in order to limit its scope to undertakings operating under the *Exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*.

19. In addition, concern was raised to the effect that the wording of the proposed sections 19(3.1), 19(3.2) and 19(4) of the *Broadcasting Distribution Regulations* could be interpreted as categorizing as independent those Category B services that are held by a holding company of a BDU or by a person related to such a holding company. To address this concern, the suggestion was made to include a reference to "affiliates" of licensed or exempt undertakings. Although the Commission is of the opinion that affiliates are caught by the words "directly or indirectly" in the proposed regulations, the Commission has added, for greater certainty, reference to an affiliate of a licensee or operator.

20. Finally, in order to provide greater clarity overall, the Commission has amended section 19 of the *Broadcasting Distribution Regulations* to replace the proposed wording quoted in paragraph 17 above with references to "Category B service of an

independent programming undertaking," while providing a separate definition of "independent programming undertaking."

Deadline to comply with the amended provisions

21. Astral Media Inc. proposed that the Commission provide a date by which BDUs must comply with the provisions set out in section 19 of the *Broadcasting Distribution Regulations*. In this regard, the Commission notes that licensees are already on notice that these changes will take effect as soon as reasonably possible. Accordingly, the Commission does not consider that a deferred compliance date is required and notes that these provisions come into force upon registration.

The "no head start" rule

22. The term "head start" refers to situations where a programming service is launched on a given BDU's distribution platform prior to the service having been made available for distribution to other BDUs on commercially reasonable terms.

23. In Broadcasting Regulatory Policy 2011-601, the Commission determined that once a programming undertaking is ready to launch a new pay or specialty service, it must make that service available to all BDUs that announce an intention to distribute the service (i.e., the "no head start" rule). By way of footnote to that regulatory policy, the Commission also noted that all new programming services must receive Commission approval and that BDUs can monitor Commission decisions to keep informed of programming services that will launch in the near future.

24. In order to give effect to the above-noted determination, the Commission, in Broadcasting Notice of Consultation 2011-806, proposed the following amendments to the Pay Television Regulations and the Specialty Services Regulations, in regard to the availability of new programming services for distribution:

> Except as otherwise provided under a condition of its licence, a licensee that is ready to launch a new programming service shall make that programming service available for distribution by all licensed broadcasting distribution undertakings or operators of exempt distribution undertakings, despite the absence of a commercial agreement.

25. A corollary provision was also proposed in that same notice of consultation for the *Broadcasting Distribution Regulations*.

26. In this section, the Commission addresses the following issues regarding the "no head start" rule:

- the definition of "new" in the context of the "no head start" rule; and
- notification of launch of a new programming service.

Definition of "new" in the context of the "no head start" rule

27. Certain interveners commented on the scope to be attributed to the terms "new" and "newly launched" in the proposed amendments. The Canadian Independent Distributors Group (CIDG) and Rogers Communications Inc. (Rogers) argued that the rule should apply to all "new" services, which they understood to include high definition (HD) upgrades to existing services, multiplexes, and the "re-branding" of existing services. They noted that failure to do so would result in programming undertakings being free to launch innumerable new services not subject to the Commission's "no head start" rule.

28. For their part, Bell Canada (Bell) and Shaw Communications Inc. (Shaw) opposed the CIDG's proposed inclusion of HD upgraded services, multiplexed services and re-branded services in the definition of "new" services. They submitted that it would expand the scope of the determination reached in the vertical integration decision that the rule would apply only to newly licensed pay and specialty services and not new versions of pre-existing services.

29. The Commission notes that, generally, new programming services receive Commission approval. However, some approvals, such as those for HD versions of services and multiplexed services, are contained in licensing decisions that contemplate the future broadcast of HD or multiplexed versions of such services, without further Commission intervention. As such, these would not receive new broadcasting licences when ready to launch. The Commission considers that the application of the rule to all newly launched pay television and specialty programming services is consistent with the intent of its determinations set out in Broadcasting Regulatory Policy 2011-601. Accordingly, the Commission has amended the relevant regulations to define "new programming service" as a programming service that has not been previously distributed in Canada. This includes, but is not limited to, an HD version or a new multiplexed version of an existing programming service.

Notification of launch of a new programming service

30. The CIDG and Rogers submitted that the Commission should require prior notification of the launch of new programming services. They proposed that programming undertakings should be required to provide a minimum 60-day prior written notice of their intent to launch a new programming service.

31. The Commission considers that, in light of the definition of "new programming service," prior notification by programming undertakings would ensure that BDUs are provided with timely notice of the launch of all new services. Accordingly, the Commission expects that, in the spirit of the "no head start" rule, programming undertakings will give reasonable prior notification of the launch of new programming services in order to allow interested parties to exercise their options. While the Commission is not imposing this as a regulatory requirement at this time, it is prepared to do so if such a requirement becomes necessary.

Prohibition against tied selling

32. In Broadcasting Regulatory Policy 2011-601, the Commission concluded that because of their dominant position in the broadcasting system, vertically-integrated entities and consolidated entities licensed to operate numerous programming services could use their most popular programming services to leverage favourable carriage terms for less popular services. The Commission expressed particular concern in regard to the practice of tied selling of programming services at the wholesale level whereby a BDU would be required to purchase the distribution rights to one or more programming services in order to obtain distribution rights to another programming service. The Commission noted that such a practice would result in BDUs being obliged to offer consumers services they do not want.

33. In Broadcasting Notice of Consultation 2011-806, the Commission proposed for inclusion in a number of its regulations the following wording in order to prevent tied selling of services by programming undertakings:

> A licensee shall not offer its programming service for distribution as part of a package with other programming services unless it also makes its programming services available on a stand-alone basis.

Pay television licensees

34. Certain interveners questioned whether the wording in the proposed regulations should be modified to ensure that pay television licensees will be able to continue to comply with existing conditions of licence relating to multiplexed channels, which require that such services be offered in packages.

35. The Commission considers this request reasonable. Accordingly, it has amended the relevant sections of the various regulations to include the phrase “Except as otherwise provided under a condition of its licence”.

Distribution of over-the-air television stations

36. Certain interveners questioned whether it was necessary to incorporate a provision regarding tied selling in the Television Broadcasting Regulations given that over-the-air television stations must be distributed pursuant to the *Broadcasting Distribution Regulations*.

37. The Commission notes that the intent of the proposed amendment was to capture distant signals, which do not benefit from must-carry status. Accordingly, the Commission has added specificity to section 16 of the Television Broadcasting Regulations so that the programming services captured by the provision are those offered for distribution as a distant television station, as that term is defined in the *Broadcasting Distribution Regulations*.

Obligation at "wholesale level"

38. Certain interveners proposed that the wording of the relevant provisions should be modified to clarify that the obligation applies at the wholesale level only so as to ensure that the provisions do not extend to the sale of services to retail subscribers.

39. The Commission considers that since the amendments enacting the prohibition against tied-selling impact only the regulations that apply to programming services, and that since the prohibition is not included in the *Broadcasting Distribution Regulations*, these amendments can only apply at the wholesale and not at the retail level. Accordingly, the Commission has not retained the wording proposed by the interveners.

Commercially reasonable terms

40. The CIDG and Rogers requested that the wording of amendments enacting the tied-selling prohibition be modified to preclude programming undertakings from seeking unreasonable terms and conditions in regard to their services by adding reference to "commercially reasonable terms."

41. The Commission considers that its dispute resolution process and the Code of conduct for commercial arrangements and interactions set out in the appendix to Broadcasting Regulatory Policy 2011-601-1 are adequate tools for addressing the concern identified by these parties. Accordingly, the Commission considers that the requested modifications to its proposed amendments are not necessary.

Standstill rule

42. The concept of a standstill rule is that, during an ongoing dispute between programming undertakings and BDUs, the parties are to provide continued access to programming services and distribution of such services. A standstill rule is already set out in the Pay Television Regulations and the Specialty Services Regulations for certain existing relationships.

43. In Broadcasting Regulatory Policy 2011-601, the Commission decided to broaden the application of its existing standstill requirements.

44. In this section, the Commission addresses issues regarding the standstill rule, which relate to the following:

- the inclusion of Category B and Category C services in the application of the standstill rule; and

- making changes to the distribution of services during a dispute.

Inclusion of Category B and Category C services in the application of the standstill rule

45. QMI and Rogers submitted that the Commission should exclude Category B and Category C services from the application of the standstill rule. The Commission notes, however, that such an exclusion would significantly undermine the purposes for which the rule was put in place, namely, the leveling of the field during negotiations between programming undertakings and distributors, and the protection of consumers from the loss of services during such disputes. Accordingly, Category B and Category C services are included in the relevant provisions of the regulations.

Making changes to the distribution of services during a dispute

46. The IBG submitted that the wording of the proposed section 15.01 of the *Broadcasting Distribution Regulations* should be expanded to prevent BDUs from making changes to the distribution of any programming services that result in leaving the programming service that initiated the dispute in a more disadvantageous position. In this regard, it submitted that the standstill rule should not be limited, in its application, to the services of the programming undertaking that initiated the dispute with a BDU.

47. The Commission considers that accepting this proposal would significantly expand the scope of its determination in this regard set out in Broadcasting Regulatory Policy 2011-601. It considers that the modifications proposed by the IBG are not required to address the objectives underpinning the provision under discussion, which are those of ensuring a more level playing field during negotiations between programming undertakings and BDUs, and ensuring that consumers are protected from the loss of service during disputes between such undertakings. Accordingly, the Commission denies the IBG's proposal.

Dispute resolution

48. In this section, the Commission addresses various issues regarding dispute resolution, which relate to the following:

- the limitation of dispute resolution to final offer arbitration;
- the application of the reverse onus provision;
- the absence of a commercial agreement – start date for rates, terms and conditions set by the Commission;
- application of dispute resolution provisions;
- the absence of a commercial agreement – newly launched services – contractual period set by the Commission; and
- the alteration by parties of rates, terms and conditions set by the Commission.

Limitation of dispute resolution to final offer arbitration

Background

49. Final offer arbitration (FOA), as used by the Commission, requires each party to a bilateral dispute to put forward a final offer regarding the resolution of the dispute, accompanied by supporting rationale.

50. In Broadcasting Notice of Consultation 2011-806, the Commission proposed the following amendment to section 12 of the *Broadcasting Distribution Regulations*:

> If the dispute relates to the rates, terms or conditions, or any combination of them, surrounding a programming service that is being distributed in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the Commission will proceed to resolve the matter by means of a final offer arbitration, as provided for in Broadcasting and Telecom Information Bulletin 2009-38 [...]

51. The Commission notes that in that notice of consultation, a similar provision was proposed for inclusion in the Pay Television Regulations and the Specialty Services Regulations.

Positions of parties

52. Many interveners questioned the appropriateness of restricting the dispute resolution processes available to that of FOA where the Commission is seized of a dispute arising in a situation where there is no commercial agreement between the undertakings involved. These interveners argued that this restriction is inconsistent with Broadcasting and Telecom Information Bulletin 2009-38, which specifies that FOA will be used to resolve matters that are exclusively monetary and that disputes surrounding carriage may not be limited to monetary matters. They further argued that the full range of dispute resolution mechanisms should be available so as to allow the Commission to choose the dispute resolution process that is best suited to a given dispute.

53. For its part, Bell supported FOA as the only mechanism to dispose of disputes in instances where there is no commercial agreement between the concerned undertakings. It noted that disputes surrounding rates, terms and conditions are exclusively commercial and thus are consistent with the parameters for FOA set out in Broadcasting and Telecom Information Bulletin 2009-38. Bell further argued that mandatory mediation militates in favour of not expanding available dispute resolution processes.

Commission's analysis and decision

54. The Commission acknowledges that a dispute relating to carriage terms may include non-monetary elements, and further acknowledges that Broadcasting Regulatory Policy 2011-601 did not specify that FOA would be the sole means by which the

Commission would resolve disputes surrounding carriage, absent a commercial agreement. While the Commission recognizes the utility of FOA in resolving such disputes, it also considers that flexibility should be maintained in order to allow it to choose the method that best suits the circumstances of the dispute. Accordingly, the Commission has removed reference to FOA in the relevant regulations.

Application of the reverse onus provision

Background

55. The reverse onus provision operates such that, once a complainant (e.g., a programming undertaking) has demonstrated the existence of a preference or disadvantage, the burden then shifts to the respondent (e.g., the BDU) to demonstrate that the preference or disadvantage is not undue. A reverse onus provision is already set out in section 9(2) of the *Broadcasting Distribution Regulations*, section 3 of the *Digital Media Exemption Order*[3], and, for video-on-demand undertakings, in condition of licence 10 set out in the appendix to Broadcasting Regulatory Policy 2011-59-1. In Broadcasting Regulatory Policy 2011-601, the Commission determined that the reverse onus provision should be made applicable to all programming undertakings as well as BDUs.

Positions of parties

56. Bell argued that the logic underpinning the reverse onus provision is that the entity found to have conferred a preference or advantage on a person is best placed to provide the information required for the Commission to determine the facts of the case and make a ruling. Bell questioned whether this was always the case and argued that it would be inappropriate to apply a reversal of onus where the complainant is the party best placed to adduce evidence to the effect that the preference or disadvantage conferred is causing it adverse harm.

Commission's analysis and decision

57. In the Commission's view, if the respondent is not in possession of the information required for the Commission to determine the facts of the case, or if the applicant has not adduced evidence to demonstrate the existence or the likelihood of harm, the respondent would plead that reality and the Commission would assess the matter accordingly in determining whether the respondent had met its burden. Accordingly, the Commission does not consider that any further amendments are required to the relevant provisions of the regulations.

58. Although not specifically set out in the relevant regulations, the Commission reminds parties that the reverse onus provision does not relieve a complainant of demonstrating the existence of a preference/disadvantage.

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[3] See Broadcasting Order 2012-409

Absence of commercial agreement – start date for rates, terms and conditions set by the Commission

59. Shaw submitted that the start date for rates, terms and conditions determined by the Commission as a result of a dispute should be no earlier than the date on which the Commission becomes seized of the matter, for example, when it is referred for dispute resolution.

60. The Commission considers that the proposal relating to dispute resolution set out in Broadcasting Notice of Consultation 2011-806 accurately reflects its determination in Broadcasting Regulatory Policy 2011-601. In the Commission's view, the specific timing of when there is an "absence of a commercial agreement" can be determined on a case-by-case basis (e.g., an agreement could be evidenced simply by a term sheet as opposed to a complete written agreement). Furthermore, the Commission considers that the proposed wording of the relevant regulatory amendments provides the undertakings involved with sufficient clarity regarding the potential start date for resulting rates, terms and conditions. Accordingly, the Commission considers it appropriate to deny Shaw's proposal.

Application of dispute resolution provisions

61. The IBG submitted that the Commission should not introduce amendments that serve to limit its authority and accordingly submitted that dispute resolution should be available in any situation – whether a commercial agreement exists or not – and to all services – whether new or established.

62. The Commission notes that the proposal relating to dispute resolution set out in Broadcasting Notice of Consultation 2011-806 is consistent with its determination in Broadcasting Regulatory Policy 2011-601. The Commission underlines that dispute resolution processes are available for situations not captured by the proposed amendments. Accordingly, the Commission considers it appropriate to deny the IBG's proposal.

Absence of commercial agreement – newly launched services – contractual period set by the Commission

63. Certain interveners submitted that allowing the Commission to set the contractual period surrounding the carriage of a newly launched programming service amounts to the Commission granting must carry status to the programming service of the undertaking that is a party to the dispute and that has launched the service. It was proposed that the regulatory amendments should be worded so as to allow BDUs the ability to refuse distribution in cases where rates, terms and conditions set by the Commission are, in the BDU's opinion, not commercially reasonable.

64. The Commission notes that only BDUs can invoke the "no head start" rule. Accordingly, the Commission considers it appropriate to impose on those BDUs that invoke the "no head start" rule the corollary obligation to abide by the rates, terms and conditions established by the Commission when such matters are brought before

it for dispute resolution. As discussed below, BDUs that are a party to a dispute before the Commission are nonetheless permitted to negotiate an alternate carriage agreement with concerned programming undertakings. Accordingly, the Commission considers it appropriate to deny this proposal.

Alteration by parties of the rates, terms and conditions set by Commission

65. In the comments received there was debate about whether parties should be precluded from reaching a different agreement than that established by the Commission after the conclusion of the dispute resolution process. The Commission notes that the proposed regulations allow and encourage negotiation both during and after dispute resolution. Parties are not forced to renegotiate afterwards if they do not wish to – they have a binding Commission decision. Accordingly, the Commission considers it appropriate to retain the proposed provision allowing for parties to a dispute to reach an agreement on rates, terms and/or conditions different from, and superseding, those determined by the Commission.

Conclusion

66. A copy of the amendments to the *Broadcasting Distribution Regulations*, the Television Broadcasting Regulations, the Pay Television Regulations and the Specialty Services Regulations is provided in the appendix to this regulatory policy. The amendments are effective on the date of their registration.

Secretary General

Related documents

- *Amendments to the* Exemption order for new media broadcasting undertakings *(now known as the* Exemption order for digital media broadcasting undertakings*)*, Broadcasting Order CRTC 2012-409, 26 July 2012

- *Amended exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers – Implementation of the regulatory framework relating to vertical integration and other amendments*, Broadcasting Order CRTC 2012-408, 26 July 2012

- *Standard requirements for video-on-demand undertakings – Provision of an outlet for local expression, measures to control the loudness of commercial messages and annual filing of aggregate statistical data*, Broadcasting Regulatory Policy CRTC 2011-59-1, 8 May 2012

- *Call for comments on proposed amendments to the* Broadcasting Distribution Regulations *and other Commission regulations – provisions relating to vertical integration*, Broadcasting Notice of Consultation CRTC 2011-806, 22 December 2011, as amended by Broadcasting Notice of Consultation CRTC 2011-806-1, 2 February 2012

- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011, as corrected by *Regulatory framework relating to vertical integration – Correction*, Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011

- *Amendments to the* Broadcasting Distribution Regulations *and other Commission Regulations*, Broadcasting Regulatory Policy CRTC 2011-455, 29 July 2011

- *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings*, Broadcasting Order CRTC 2009-660, 22 October 2009

- *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009

Appendix to Broadcasting Regulatory Policy CRTC 2012-407

REGULATIONS AMENDING CERTAIN REGULATIONS MADE UNDER THE BROADCASTING ACT

TELEVISION BROADCASTING REGULATIONS, 1987

1. (1) The definition "licensed" in section 2 of the *Television Broadcasting Regulations, 1987*[1] is replaced by the following:

"licensed" means licensed by the Commission under paragraph 9(1)(*b*) of the Act; (*autorisé*)

(2) Section 2 of the Regulations is amended by adding the following in alphabetical order:

"exempt distribution undertaking" means a distribution undertaking whose operator is, by order of the Commission made under subsection 9(4) of the Act, exempt from any or all of the requirements of Part II of the Act; (*entreprise de distribution exemptée*)

2. Section 15 of the Regulations is renumbered as subsection 15(1) and is amended by adding the following:

(2) In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

3. The Regulations are amended by adding the following after section 15:

TIED SELLING

16. (1) For the purposes of this section, "distant television station" has the same meaning as in section 1 of the *Broadcasting Distribution Regulations*.

(2) Except as otherwise provided under a condition of its licence, a licensee shall not offer its programming service for distribution as a distant television station as part of a package with other programming services unless it also makes its programming service available as a distant television station on a stand-alone basis.

DISPUTE RESOLUTION

17. (1) If there is a dispute between the licensee and the operator of a licensed distribution undertaking or an exempt distribution undertaking, concerning the carriage or terms of carriage of programming originated by the licensee, including the wholesale rate and the terms of any audit referred to in section 15.1 of the *Broadcasting Distribution Regulations*, one or both of the parties to the dispute may refer the matter to the Commission for dispute resolution.

(2) If the Commission accepts a referral of a matter for dispute resolution, the parties to the dispute are required to participate in a mediation with a person appointed by the Commission.

(3) During the dispute resolution process, the person appointed under subsection (2) may require additional information from the parties.

PAY TELEVISION REGULATIONS, 1990

4. Section 2 of the *Pay Television Regulations, 1990*[2] is amended by adding the following in alphabetical order:

"licensed" means licensed by the Commission under paragraph 9(1)(*b*) of the Act; (*autorisé*)

"new programming service" means a programming service that has not been previously distributed in Canada and includes, but is not limited to, a high definition version or a new multiplex of an existing programming service. (*nouveau service de programmation*)

5. Section 6.1 of the Regulations is amended by adding the following after subsection (2):

(3) In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

6. The Regulations are amended by adding the following after section 6.1:

TIED SELLING

6.2 Except as otherwise provided under a condition of its licence, a licensee shall not offer its programming service for distribution as part of a package with other programming services unless it also makes its programming service available on a stand-alone basis.

AVAILABILITY OF NEW PROGRAMMING SERVICES FOR DISTRIBUTION

6.3 Except as otherwise provided under a condition of its licence, a licensee that is ready to launch a new programming service shall make that programming service available for distribution by all licensed broadcasting distribution undertakings or operators of exempt distribution undertakings, despite the absence of a commercial agreement.

DISPUTE RESOLUTION

6.4 (1) If there is a dispute between the licensee and the operator of a licensed distribution undertaking or an exempt distribution undertaking, concerning the carriage or terms of carriage of programming originated by the licensee, including the wholesale rate

and the terms of any audit referred to in section 15.1 of the *Broadcasting Distribution Regulations*, one or both of the parties to the dispute may refer the matter to the Commission for dispute resolution.

(2) If the Commission accepts a referral of a matter for dispute resolution, the parties to the dispute are required to participate in a mediation with a person appointed by the Commission.

(3) During the dispute resolution process, the person appointed under subsection (2) may require additional information from the parties.

(4) If a licensed distribution undertaking or an exempt distribution undertaking distributes the programming service of the licensee in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the licensee shall submit to having the dispute resolved as provided for in Broadcasting and Telecom Information Bulletin CRTC 2009-38, dated January 29, 2009, and the rates, terms and conditions established by the Commission will apply as of the day on which the programming service was first made available to the distributor in the absence of a commercial agreement.

(5) If the dispute relates to the rates, terms or conditions, or any combination of them, surrounding a new programming service that is being distributed in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the parties will be bound by the rates, terms and conditions established by the Commission for the duration of the contractual term established by the Commission.

(6) Despite subsections (4) and (5), the parties may reach an agreement with respect to rates, terms or conditions that differ from those established by the Commission.

7. Section 7 of the Regulations is replaced by the following:

7. (1) During any dispute between a licensee and a person licensed to carry on a distribution undertaking or the operator of an exempt distribution undertaking concerning the carriage or terms of carriage of programming originated by the licensee or concerning any right or obligation under the Act, the licensee shall continue to provide its programming services to the distribution undertaking at the same rates and on the same terms and conditions as it did before the dispute.

(2) For the purposes of subsection (1), a dispute exists from the moment that written notice of the dispute is provided to the Commission and served on the other undertaking that is party to the dispute and ends when an agreement settling the dispute is reached by the concerned undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.

SPECIALTY SERVICES REGULATIONS, 1990

8. Section 2 of the *Specialty Services Regulations, 1990*[3] is amended by adding the following in alphabetical order:

"licensed" means licensed by the Commission under paragraph 9(1)(*b*) of the Act; (*autorisé*)

"new programming service" means a programming service that has not been previously distributed in Canada and includes, but is not limited to, a high definition version or a new multiplex of an existing programming service. (*nouveau service de programmation*)

9. Section 10.1 of the Regulations is renumbered as subsection 10.1(1) and is amended by adding the following:

(2) In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

10. The Regulations are amended by adding the following after section 10.1:

TIED SELLING

10.2 Except as otherwise provided under a condition of its licence, a licensee shall not offer its programming service for distribution as part of a package with other programming services unless it also makes its programming service available on a stand-alone basis.

AVAILABILITY OF NEW PROGRAMMING SERVICES FOR DISTRIBUTION

10.3 Except as otherwise provided under a condition of its licence, a licensee that is ready to launch a new programming service shall make that programming service available for distribution by all licensed broadcasting distribution undertakings or operators of exempt distribution undertakings, despite the absence of a commercial agreement.

DISPUTE RESOLUTION

10.4 (1) If there is a dispute between the licensee and the operator of a licensed distribution undertaking or an exempt distribution undertaking, concerning the carriage or terms of carriage of programming originated by the licensee, including the wholesale rate and the terms of any audit referred to in section 15.1 of the *Broadcasting Distribution Regulations*, one or both of the parties to the dispute may refer the matter to the Commission for dispute resolution.

(2) If the Commission accepts a referral of a matter for dispute resolution, the parties to the dispute are required to participate in a mediation with a person appointed by the Commission.

(3) During the dispute resolution process, the person appointed under subsection (2) may require additional information from the parties.

(4) If a licensed distribution undertaking or an exempt distribution undertaking distributes the programming service of the licensee in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the licensee shall submit to having the dispute resolved as provided for in Broadcasting and Telecom Information Bulletin CRTC 2009-38, dated January 29, 2009, and the rates, terms and conditions established by the Commission will apply as of the date on which the programming service was first made available to the distributor in the absence of a commercial agreement.

(5) If the dispute relates to the rates, terms or conditions, or any combination of them, surrounding a new programming service that is being distributed in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the parties will be bound by the rates, terms and conditions established by the Commission for the duration of the contractual term established by the Commission.

(6) Despite subsections (4) and (5), the parties may reach an agreement with respect to rates, terms or conditions that differ from those established by the Commission.

11. Section 11 of the Regulations is replaced by the following:

11. (1) During any dispute between a licensee and a person licensed to carry on a distribution undertaking or the operator of an exempt distribution undertaking concerning the carriage or terms of carriage of programming originated by the licensee or concerning any right or obligation under the Act, the licensee shall continue to provide its programming services to the distribution undertaking at the same rates and on the same terms and conditions as it did before the dispute.

(2) For the purposes of subsection (1), a dispute exists from the moment that written notice of the dispute is provided to the Commission and served on the other undertaking that is party to the dispute and ends when an agreement settling the dispute is reached by the concerned undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.

BROADCASTING DISTRIBUTION REGULATIONS

12. Section 1 of the *Broadcasting Distribution Regulations*[4] is amended by adding the following in alphabetical order:

"new programming service" means a programming service that has not been previously distributed in Canada and includes, but is not limited to, a high definition version or a new multiplex of an existing programming service. (*nouveau service de programmation*)

13. Paragraph (*c*) of the definition "voting interest" in subsection 4(1) of the Regulations is replaced by the following:

(*c*) a partnership, a trust, an association or a joint venture means an interest or right in the assets of it that entitles the owner to receive a share of its profits, to receive a share of its assets on dissolution and to participate directly in its management or to vote on the election of the persons to be entrusted with the power and responsibility to manage it; and

14. (1) Subsections 12(4) and (5) of the Regulations are replaced by the following:

(4) If the Commission accepts a referral of a matter for dispute resolution, the parties to the dispute are required to participate in a mediation with a person appointed by the Commission.

(2) Subsection 12(7) of the Regulations is replaced by the following:

(7) During the dispute resolution process, the person appointed under subsection (4) may require additional information from the parties.

(3) Section 12 of the Regulations is amended by adding the following after subsection (8):

(9) If the dispute relates to the rates, terms or conditions, or any combination of them, surrounding a programming service that is being distributed in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the licensee shall submit to having the dispute resolved as provided for in Broadcasting and Telecom Information Bulletin CRTC 2009-38, dated January 29, 2009, and the rates, terms and conditions established by the Commission will apply as of the day on which the programming service was first made available to the distributor in the absence of a commercial agreement.

(10) If the dispute relates to the rates, terms or conditions, or any combination of them, surrounding a new programming service that is being distributed in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the parties will be bound by the rates, terms and conditions established by the Commission for the duration of the contractual term established by the Commission.

(11) Despite subsections (9) and (10), the parties may reach an agreement with respect to rates, terms or conditions that differ from those established by the Commission.

15. The Regulations are amended by adding the following after section 15:

OBLIGATION DURING DISPUTE

15.01 (1) During any dispute between a licensee and a person licensed to carry on a programming undertaking or the operator of an exempt programming undertaking concerning the carriage or terms of carriage of programming services or concerning any right or obligation under the Act, the licensee shall continue to distribute those programming services at the same rates and on the same terms and conditions as it did before the dispute.

(2) For the purposes of subsection (1), a dispute exists from the moment that written notice of the dispute is provided to the Commission and served on the other undertaking that is party to the dispute and ends when an agreement settling the dispute is reached by the concerned undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.

OBLIGATION TO PROGRAMMING UNDERTAKINGS REGARDING DISTRIBUTION WITHOUT AGREEMENT

15.02 A licensee who distributes a new programming service with respect to which it has no commercial agreement shall abide by the rates, terms and conditions established by the operator of the concerned programming undertaking until a commercial agreement is reached between the parties or the Commission renders a decision concerning any unresolved matter.

16. (1) Subsection 19(1) of the Regulations is amended by adding the following in alphabetical order:

"exempt distribution undertaking" means a distribution undertaking the operator of which is exempt under the terms of the order entitled *Exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers* made by the Commission under subsection 9(4) of the Act, that is set out in the Appendix to Broadcasting Order CRTC 2009-544, dated August 31, 2009, as amended from time to time. (*entreprise de distribution exemptée*)

"independent programming undertaking" means a programming undertaking for which no licensee of a distribution undertaking or operator of an exempt distribution undertaking, or an affiliate of the licensee or operator, holds, directly or indirectly, an interest or right in the assets. (*entreprise de distribution indépendante*)

(2) The portion of subsection 19(2) of the Regulations before paragraph (*a*) is replaced by the following:

(2) For the purposes of subsections (3) and (3.1), a Category B service includes

(3) Subsections 19(3) and (4) of the Regulations are replaced by the following:

(3) Except as otherwise provided under a condition of its licence and subject to subsections (3.1) to (4), a licensee shall, for each Category B service and each exempt third-language service of a related programming undertaking that it distributes in a licensed area, distribute in that area at least three Category B services or at least three exempt third-language services — or any combination of at least three of those services — of unrelated programming undertakings.

(3.1) Except as otherwise provided under a condition of its licence, a licensee shall, for each Category B service of a related programming undertaking that it distributes in a licensed area, distribute in that area at least one Category B service of an independent programming undertaking.

(3.2) Except as otherwise provided under a condition of its licence, if the Category B service of the related programming undertaking referred to in subsections (3) and (3.1) is an English-language Category B service, at least two of the three programming services of the unrelated programming undertakings that are to be distributed under subsection (3) shall, to the extent that they are available, be English-language services of which at least one shall be a Category B service of an independent programming undertaking.

(4) Except as otherwise provided under a condition of its licence, if the Category B service of the related programming undertaking referred to in subsections (3) and (3.1) is a French-language Category B service, at least two of the three programming services of the unrelated programming undertakings that are to be distributed under subsection (3) shall, to the extent that they are available, be French-language services of which at least one shall be a Category B service of an independent programming undertaking.

COMING INTO FORCE

17. These Regulations come into force on the day on which they are registered.

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[1] SOR/87-49

[2] SOR/90-105

[3] SOR/90-106

[4] SOR/97-555