Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

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The Wholesale Code

The Commission announces the new Wholesale Code, which is set out in the appendix to this regulatory policy.

The Wholesale Code governs certain aspects of the commercial arrangements between broadcasting distribution undertakings (BDUs), programming undertakings, and exempt digital media undertakings. It will ensure that subscribers have greater choice and flexibility in the programming services they receive, that programming services are diverse, available and discoverable on multiple platforms, and that negotiations between programming services and BDUs are conducted in a fair manner.

*The Wholesale Code will be made applicable to all licensed undertakings by means of an order issued pursuant to section 9(1)(*h*) of the* Broadcasting Act*, which will take effect* ***22 January 2016****. It shall serve as a guideline for all other parties, including exempt BDUs, exempt programming undertakings, exempt digital media undertakings, and non-Canadian programming services distributed in Canada. The Commission will also apply the Wholesale Code in resolving disputes.*

Introduction

1. In Broadcasting Regulatory Policy 2011-601-1, the Commission set out the *Code of conduct for commercial arrangements and interactions* (the Code of Conduct), which has served to govern the commercial arrangements between broadcasting distribution undertakings (BDUs), programming undertakings, and exempt digital media undertakings.[1]

2. In Broadcasting Regulatory Policy 2015-96, which was issued as part of the Let's Talk TV proceeding, the Commission stated that a vigorous wholesale market is essential to fostering an environment and a retail market that enhance greater subscriber choice. It expressed the view 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;

[1] See the *Exemption order for digital media broadcasting undertakings* set out in the appendix to Broadcasting Order 2012-409.

- BDUs have the flexibility to package and set retail prices for discretionary services in the manner that they consider will best respond to customer demand and enable them to compete on an equitable basis with other BDUs;

- programming services are discoverable and able to make their programming available to Canadians on multiple platforms in order to foster continued diversity and innovation within the system; and

- appropriate wholesale fees and other terms of distribution are negotiated based on the fair market value of the service, regardless of the ownership or other interests of either the BDU or programming service.

3. In that regulatory policy, the Commission determined that strengthening the Code of Conduct would provide parties with certainty and transparency to conduct negotiations fairly, and ultimately conclude them in the interest of providing consumers with more choice and flexibility. It determined that the revised code would

    - prohibit or preclude provisions in affiliation agreements that limit the ability of BDUs to offer their subscribers increased choice and flexibility;

    - ensure the continued availability and discoverability on multiple platforms of a diverse range of programming services, including independent programming services; and

    - include new sections to help ensure the fair negotiation of terms and conditions for the distribution of programming services.

4. The Commission further stated that while it had generally identified the sections that would be included in the revised code and that these would apply in the interim as a matter of policy, it was seeking comment on the wording of that revised code in a follow up process.

5. Accordingly, in Broadcasting Notice of Consultation 2015-97 (the Notice), the Commission called for comments on the wording of a revised code.

6. In the sections that follow, the Commission sets out the positions of parties and its decisions for the following regarding the Wholesale Code:

    - the application of the Wholesale Code;
    - prohibitions;
    - penetration-based rate cards (PBRCs);
    - packaging and marketing of independent programming services;
    - multiplatform access;
    - affiliation agreements;

- other changes or clarifications to the Wholesale Code; and
- implementation of the Wholesale Code.

7. The new Wholesale Code is set out in the appendix to this regulatory policy.

8. In the Notice, the Commission indicated that it would issue an information bulletin simultaneously with the Wholesale Code to help parties understand and interpret the sections of the code. Accordingly, the Commission has also issued today Broadcasting Information Bulletin 2015-440[2].

Application of the Wholesale Code

9. In the Notice, the Commission set out the following sections in regard to whom the Wholesale Code applies:

    1. This code applies to the distribution of programming on an analog or digital basis.

    2. For the purposes of this code, "programming undertakings" means programming undertakings as defined in the *Broadcasting Act* (the Act) with the exception of radio programming undertakings.

    3. Unless otherwise provided, this code applies to licensed programming and distribution undertakings. It serves as a guideline for programming, distribution and digital media undertakings operating under an exemption order.

10. After examining the public record for this proceeding in regard to these sections, the Commission considers that the issue to be addressed is whether it should apply the Wholesale Code as a regulatory requirement or as guidelines.

Positions of parties

11. Vertically integrated (VI) entities submitted that the Wholesale Code should remain a set of guidelines rather than be given the force of regulation. Rogers, for example, argued that if the code is too prescriptive, there would be no room for parties to engage in the negotiations necessary to establish terms and conditions that are commercially reasonable. Shaw argued against any asymmetric application of the rules (i.e., where the code would be legally enforceable on some undertakings and made to apply as guidelines for others).

12. Various non-VI entities, generally favouring a strengthened, legally enforceable code, argued that the Commission should not step away from the proposed application of the Wholesale Code by regulation. Blue Ant, for example, argued that the code must be given force of regulation as the guidelines have been in place for four years and

[2] On 1 June 2022, Broadcasting Information Bulletin 2015-440 was replaced by Broadcasting Information Bulletin 2022-140.

have been ineffective in establishing fair negotiations. Bragg Communications (Eastlink) argued for stronger rules on the basis that where there is room for interpretation, there will be more disputes with larger VI services.

13. Other non-VI entities proposed that the Wholesale Code should be made a set of guidelines for independent programming services. For example, 2251723 Ontario Inc. (VMedia) submitted that exempting such services from the code so long as they are dealing only with each other would relieve the Commission of unnecessary oversight responsibilities.

14. Certain parties submitted that the Wholesale Code should made legally binding on all parties (i.e., exempt services, video-on-demand (VOD) services, subscription VOD (SVOD) services, the new exempt hybrid VOD[3] (HVOD) services, pay audio services and non-Canadian services).

15. In regard to non-Canadian services, MTS recommended that adherence to the code be imposed as a condition of authorization (i.e., that adherence be conditional to their inclusion on the *Revised list of non-Canadian programming services and stations authorized for distribution*, or the List). U.S. broadcasters including A&E, Viacom, Turner, AMC and NBC supported the application of the Wholesale Code to non-Canadian services as a set of guidelines, as originally proposed.

16. Stingray and the Independent Broadcast Group (IBG) proposed that the reference to "radio programming undertakings" in section 2 of the Wholesale Code be made more specific to clarify that the term is not meant to exclude pay audio services from the application of the code, but only radio services.

Commission's decisions

Canadian services

17. As set out in the Notice, the Wholesale Code will govern certain aspects of the wholesale relationship between distributors and programmers and apply to the distribution of programming on an analog or digital basis.

18. As noted in Broadcasting Regulatory Policy 2015-96, the Wholesale Code should be made binding on licensed distribution and programming undertakings in order to provide parties with transparency and certainty. The Commission does note the concerns raised by some parties that making the Wholesale Code binding by means of a regulation could result in a system that is lacking in flexibility to adapt quickly to changing circumstances.

19. In light of these concerns, the Wholesale Code shall be binding on licensed distribution and programming undertakings by means of an order issued pursuant to section 9(1)(*h*) of the Act. Through this order, the Wholesale Code will be applicable to all licensed undertakings other than radio programming undertakings. For clarity,

[3] See Broadcasting Regulatory Policy 2015-86.

licensed VOD and pay audio services will be subject to the Wholesale Code. For all other undertakings, including exempt BDUs, exempt programming undertakings and exempt digital media undertakings, it shall serve as a set of guidelines.

20. The Commission has issued this 9(1)(*h*) order today in Broadcasting Order 2015-439.

Non-Canadian services

21. Non-Canadian services with a presence in Canada are not licensed to operate in Canada. Rather, they are authorized for distribution through a Canadian sponsor (for example, a distributor, programming service or industry organization). As such, the Commission considers that the Wholesale Code should apply as a set of guidelines for non-Canadian services.

22. Nevertheless, non-Canadian services derive benefits from their distribution in Canada, and accordingly from the Canadian broadcasting system. For this reason, the Commission expects non-Canadian parties distributed in Canada to conduct their negotiations and enter into agreements with their Canadian partners in a manner that is consistent with the intent and spirit of the Wholesale Code if they wish to continue to have their programming services available in Canada.

23. The Commission is prepared to act to ensure that parties are conducting their negotiations fairly, even if it leads to a disruption in the market place. It has at its disposal various measures to ensure that all services distributed in Canada respect the code. Specifically, the Commission may, if necessary, a) issue orders under section 9(1)(*h*) of the Act to address the distribution of any non-Canadian programming service by a BDU; b) require non-Canadian services to adhere to the Wholesale Code as a condition of their inclusion on the List; or c) ultimately, remove a service from the List in order to enforce the application of the Wholesale Code.

Prohibitions

24. In the Notice, the Commission set out the following prohibitions:

> 4. Except as otherwise authorized by the Commission, the following provisions are prohibited in any affiliation agreement between a programming undertaking, a BDU, or an exempt digital media undertaking:
>
> (a) terms that prohibit the distribution of programming services on a stand-alone basis;
>
> (b) terms that prevent the offering of programming services on a build-your-own-package basis;
>
> (c) grandfathering provisions, or any similar clause that ensures distribution on the same terms and conditions as the previously negotiated agreement;
>
> (d) veto rights by programming undertakings of BDU packaging changes;

(e) requirements to mirror existing analog tiers in a digital offering;

(f) most favoured nation (MFN) provisions, or any similarly worded clause that has the effect of guaranteeing terms as favorable as those agreed to with other parties in other affiliation agreements;

(g) requirements to renegotiate agreements triggered by subscriber losses; and

(h) minimum penetration, revenue and subscription level or subscription levels.

25. After examining the public record for this proceeding in regard to the above prohibitions, the Commission considers that the issues to be addressed relate to the following:

- the addition of or modifications to prohibitions;
- the prohibition on "grandfathering" (section 4.(c));
- the renegotiation prohibition (section 4.(g)); and
- minimum penetration, revenue and subscription levels (section 4.(h)).

Addition of or modifications to prohibitions

Positions of parties

26. Many independent BDUs proposed changes to strengthen the wording of the proposed prohibitions, or to add new prohibitions. These included the following:

- strengthening the wording of sections 4.(a) and 4.(b) so that the offer of programming services on a stand-alone or build-your-own package basis is not prohibited, prevented or constrained;
- extending the prohibition that prevents programming services from exercising a veto over packaging changes to also prevent these services from requiring "consent";
- prohibiting programmers from refusing to be carried based on the technology used by a BDU; and
- prohibiting terms that set the retail price.

27. In the view of these BDUs, the proposed prohibitions are insufficient to address the many types of provisions that may be adopted by programming services to insulate themselves from the effect of consumer choice and shift the risk of such choice to BDUs.

28. Many programming services and VI entities generally sought to have more flexibility, on the basis that the proposed prohibitions would limit their ability to freely negotiate and that some of these types of provisions would not necessarily inhibit consumer

choice. For example, the IBG argued that independent programming services should be granted exceptions to the prohibitions section on the basis that they do not wield sufficient market power to dictate terms to BDUs that would materially limit packaging flexibility.

29. Some programming services also sought to have the section that prohibits MFN provisions expanded in order to, among other things, include satellite uplink fees.

Commission's decisions

30. The prohibitions section helps to ensure that programming services, particularly those owned by VI entities, do not unduly restrict the ability of BDUs to respond to subscribers' demands for increased choice and flexibility and to ensure agreements do not include sections that are inconsistent with a fair and competitive marketplace.

31. The Commission considers that the record of this proceeding does not support adding any new prohibitions or expanding on any of the proposed prohibitions in support of these objectives. Moreover, such changes would have unduly limited parties' flexibility in negotiating agreements.

32. Rather, the Commission considers it appropriate to make changes to the wording of some of the prohibitions, for consistency and to ensure maximum flexibility for parties in negotiating agreements, without compromising the Commission's stated policy objectives.

33. Accordingly, the Commission has made changes to the wording of section 4.(b) so as to ensure consistency with the wording of section 4.(a) and with the policy set out in Broadcasting Regulatory Policy 2015-96 relating to the offer of discretionary services. This relates specifically to the requirement for BDUs to offer all such services either on a pick-and-pay basis or in small, reasonably priced packages (build-your-own or pre-assembled) by March 2016, and in both ways by December 2016. Accordingly, section 4.(b) now reads as follows (changes in bold):

> 4. The following provisions are prohibited in any affiliation agreement between a programming undertaking, a BDU, or an exempt digital media undertaking:
>
> > (b) terms that **prohibit** the offering of programming services on a build-your-own-package **or small package** basis;

Grandfathering

Positions of parties

34. Many independent programming services and VI entities questioned the purpose of the prohibition on grandfathering. In their view, such a prohibition gives BDUs an advantage over programmers, and limits programmers' ability to freely negotiate. Some parties argued that allowing grandfathering does not necessarily inhibit consumer choice. For example, Quebecor stated that grandfathering provisions can

have the benefit of protecting consumers, as they would be able to continue to receive services at the same rates or on the same terms.

35. The IBG requested that the Commission clarify that the grandfathering section is intended to prevent VI programming services from requiring BDUs to maintain historical packaging indefinitely, but that terms that are the same as before and that are not otherwise contrary to the Wholesale Code are acceptable. DHX Media agreed with the IBG's position, and specified that where both parties agree to continue an old mutually beneficial packaging arrangement, this should be allowed.

Commission's decision

36. The record suggests that the grandfathering prohibition as proposed may have been overly broad. Its intent is to prevent programming services from unilaterally insisting on previous packaging arrangements, and therefore limiting the packaging options available to a BDU.

37. Some flexibility is appropriate in cases where parties find existing arrangements mutually acceptable, provided they do not prevent BDUs from responding to consumer choice and otherwise fulfilling their obligations under Broadcasting Regulatory Policy 2015-96.

38. Accordingly, the Commission has revised this section so as to prohibit the unilateral imposition of provisions that grandfather existing terms and conditions (change in bold):

> 4. The following provisions are prohibited in any affiliation agreement between a programming undertaking, a BDU, or an exempt digital media undertaking:
>
> > (c) **provisions that unilaterally grandfather** distribution on the same terms and conditions as the previously negotiated agreement.

Renegotiation triggers

Positions of parties

39. Many independent programming services and VI entities also questioned the purpose of the prohibition on renegotiation triggers. Some expressed the concern that this section would give BDUs an advantage over programmers and limit programmers' ability to freely negotiate. According to TFO, these prohibitions run counter to free contractual negotiations between programming services and BDUs, thereby reinforcing the dominant position of BDUs vis-à-vis programming services (independent programming services in particular).

40. Certain parties submitted that allowing renegotiation triggers does not necessarily inhibit consumer choice. For example, Bell argued that renegotiation triggers can be used in ways that benefit both parties without having any impact on the goal of promoting customer choice and flexibility.

41. Rogers, on the other hand, accepted that programming services should not have rights relating to renegotiation triggers. It recommended, however, that the section be modified to ensure that such services are allowed to increase the wholesale rate in light of any decline in penetration.

Commission's decision

42. The record of the proceeding suggests that the prohibition on renegotiation triggers may be overly broad. The intent was to prevent programming services from arbitrarily reopening an affiliation agreement due to a loss of subscribers, which could inhibit a BDU from exercising full packaging flexibility.

43. However, this prohibition could also have unintended effects on BDUs and programming services that opt to negotiate a fixed price for the distribution of their services. This prohibition had been contemplated primarily in the context of PBRCs and volume-based rate cards (VBRCs). In this context, where a rate card is in place, it may not be appropriate for a programming service to trigger a renegotiation when its penetration or volume varies since presumably the rate cards account for these variations and price adjustments.

44. Under a fixed pricing model, however, it would generally be reasonable for a programming service to be allowed to negotiate a provision that triggers the renegotiation of an agreement, since fixed prices are generally negotiated on the basis of specific packaging assumptions.

45. Considering that this section may have the effect of limiting the attractiveness of fixed pricing models, the Commission has deleted the prohibition on renegotiation triggers from the Wholesale Code. However, the reasonableness of such renegotiation triggers may be examined on a case-by-case basis, in accordance with section 5.(e) of the Wholesale Code, which prohibits unreasonable terms and conditions that restrict the ability of a BDU to provide consumer choice.

Minimum penetration, revenue and subscription levels

46. In the Notice, the Commission stated that programming services should not be able to dictate their penetration or revenue levels and thus be completely insulated from the effects of consumer choice. However, it sought comments on exceptional circumstances in which minimum penetration levels should be allowed, particularly for independent services.

47. After examining the public record for this proceeding, the Commission considers that the issues to be addressed include whether to strengthen the prohibition and whether any programming service should be allowed to require minimum penetration, subscription and/or revenue guarantees.

Positions of parties

48. Various independent broadcasters as well as the CBC were opposed to a strict prohibition on minimum penetration guarantees. They submitted that independent programming services should be allowed to negotiate minimum subscriber or revenue guarantees as long as they are commercially reasonable, as this would support broadcasting policy objectives, with no material impact on consumer choice. The IBG and the CBC argued that carving out an exception for independent programming services would be more administratively efficient than to process many requests for exception.

49. Most independent BDUs were in favour of a stricter prohibition. They recommended that the wording be modified to also prohibit minimum revenue levels on the basis that all forms of revenue guarantees are inconsistent with the principle of shared risk and run counter to the objective of delivering increased choice and flexibility to consumers.

50. Some independent BDUs stated that it might be appropriate to grant exceptions to independent programming services on a very limited basis. MTS and TELUS proposed that the same criteria that apply to applications for carriage on the basic service (i.e., carriage that is implemented under section 9(1)(*h*) of the Act) should be applied when considering requests for exceptions to the general prohibition.

51. The Public Interest Advocacy Centre (PIAC) supported a strict prohibition, arguing that no exceptions should be allowed as this would exceptionally hinder consumer choice without necessarily achieving the objectives of the broadcasting system relating to the provision of greater diversity and innovation.

52. Quebecor and Shaw also supported a stricter prohibition on minimum penetration levels. Quebecor recommended that this be extended to revenue levels. Bell, Rogers and Corus, on the other hand, opposed a strict prohibition, arguing that minimum penetration guarantees are reasonable under certain circumstances and should therefore be allowed, and not just for independent programming services.

53. Turner Broadcasting stated that minimum penetration guarantees should be allowed and moved to the “unreasonable practices” section, to allow them where mutually beneficial.

Commission’s decision

54. The intent of this section is to prevent a programming service from dictating a minimum penetration level and thus being insulated from the effects of consumer choice. For example, a minimum guarantee of 20% penetration forces a BDU to ensure that 20% of its subscribers take the service, or else absorb the cost.

55. In the Commission’s view, this prohibition should be strengthened to also prevent a programming service from setting minimum revenue levels. This change is consistent with the Commission’s policies in support of consumer choice and with the notion of

shared risk between programming services and BDUs. That is, a programming service that is guaranteed a minimum revenue level is unduly shielded from the effects of consumer choice. Such a minimum could also unduly shift the risk of a programming service's business decisions onto the BDU.

56. The record of the proceeding supports carving out an exception for Canadian independent programming services with respect to minimum penetration, revenue or subscription levels, given that there is likely an overall benefit to the system in terms of (a) allowing them to meet their programming requirements and (b) providing them with a measure of support to the ultimate benefit of diversity within the system, with minimal impact in terms of consumer choice.

57. Allowing independent programming services to negotiate such provisions is less administratively burdensome than processing applications for an exception. Proceeding in such a manner also provides parties with the flexibility to negotiate and set minimum penetration, revenue or subscription levels in a manner that is commercially reasonable and reflective of the marketplace.

58. In light of the above, the Commission has revised section 4.(h) (now 4.(g)) of the Wholesale Code to read as follows (changes in bold):

> 4. The following provisions are prohibited in any affiliation agreement between a programming undertaking, a BDU, or an exempt digital media undertaking:
>
> > (g) minimum penetration, **revenue** or subscription levels**, except where negotiated by an independent programming service**.

Penetration-based rate cards

59. PBRCs set out varying wholesale rates based on a programming service's share of a BDU's subscriber base. In general terms, the lower the penetration, the higher the wholesale rate.

60. In the Notice, the Commission set out the following section in regard to PBRCs:

> 5. A programming undertaking, BDU, or exempt digital media undertaking shall not require that a party accept terms or conditions for the distribution of programming that are commercially unreasonable, such as:
>
> > (c) requiring an unreasonable penetration-based rate card.

61. It also set out its view on the circumstances under which PBRCs would be generally considered unreasonable:

- if they cannot be justified on a commercial basis or are anti-competitive;
- if they force distribution of a service on the basic tier or in a package that is inconsistent with the service's theme or price point; or
- if they insulate a programming service entirely from the effects of consumer choice.

62. Further, the Commission expressed the preliminary view that PBRCs that seek compensation for advertising revenue losses (advertising make-whole) would also be considered unreasonable. It also invited parties to comment on what terms would constitute an unreasonable PBRC, and what factors should be considered in making this assessment.

63. After examining the public record for this proceeding in regard to PBRCs, the Commission considers that the issue to be addressed is whether it should provide additional clarification as to what constitutes an "unreasonable" PBRC.

Positions of parties

64. Independent broadcasters sought to allow more flexibility in regard to PBRCs for independent programming services. They generally favoured PBRCs that compensate for subscriber losses (subscription make-whole), arguing that a revenue floor is critical for ensuring that BDUs have the proper incentive to place such services in appropriate thematic and preassembled packages and provide them with fair marketing support. Noting that they face fixed programming costs, broadcasters argued that PBRCs provide them with stable revenue levels, allowing them to make investments in programming.

65. Independent BDUs generally argued that stricter limits should be placed on PBRCs compared to those proposed in the Notice. In this regard, they submitted that rate cards should represent an equitable sharing of risk, and that smaller, independent BDUs should not bear the risk and costs of increased consumer choice and the impact of that choice on programming services.

66. Certain of these BDUs opposed all forms of make-whole PBRCs. In their view, both advertising make-whole and subscription make-whole PBRCs insulate a programming service from the effects of consumer choice and create disincentives for discretionary packaging and for programming services to improve their product. These BDUs expressed concerns relating to allowing VI entities to negotiate subscription make-whole PBRCs, arguing that this inappropriately places all of the risk on the BDU while enabling the VI entity to maximize and leverage revenues elsewhere.

67. The Competition Bureau submitted that the Commission should use five factors to determine the reasonableness of a PBRC:

- whether the PBRC allows BDUs and programming services to share the potential risks and costs associated with lower penetration levels of programming services in a world of increased choice and flexibility;
- whether the PBRC applies to an independent programming service or to a VI programming service;
- whether a PBRC applied to a VI programming service raises rival BDUs' costs above those of its related VI BDU;

- whether the PBRC applies to a programming service that is considered a "must-have"; and
- whether the PBRC applies to a programming service that is newly licensed, and, if so, the duration of that PBRC.

68. PIAC, in its reply, supported this proposal and argued that the Commission must be clear on what constitutes unreasonable PBRCs.

69. Rogers and Shaw submitted that subscription make-whole PBRCs should generally be considered reasonable. Specifically, Rogers argued that many independent BDUs proposing additional prohibitions relating to PBRCs are trying to avoid risks and want to shift them to the programming services, which is neither fair nor balanced. Shaw argued that under some circumstances, advertising make-whole PBRCs may also be appropriate, such as where a service earns little or no advertising revenue.

70. Corus and Bell on the other hand were against prescriptive PBRC rules. In Corus's view, the reasonableness of a PBRC cannot be established through a regulatory process as there are simply too many market factors and circumstances unique to each negotiation. Bell argued that a rigid *ex ante* prohibition on certain rate structures is inappropriate since any inquiry into the reasonableness of rates is necessarily fact specific. It submitted, however, that subscription make-whole PBRCs should not be prohibited. In its view, if a BDU faces fixed costs for a programming service, its economic incentive is to offer the service in the most efficient and valuable way.

71. For its part, Quebecor opposed all forms of make-whole PBRCs, and submitted that PBRCs must reflect the linguistic market (i.e., the PBRC for a French-language market should be different from that for an English-language market).

Commission's decisions

72. The Commission will generally consider PBRCs unreasonable if they:

- cannot be justified on a commercial basis or are anti-competitive;
- force distribution of a service on the basic tier or in a package that is inconsistent with the service's theme or price point; or
- insulate a programming service from the effects of consumer choice.

73. Advertising make-whole PBRCs are an example of a PBRC that is considered unreasonable, as this type of rate card has the effect of insulating a programming service from the effects of consumer choice.

74. In regard to subscription make-whole PBRCs, the record of the proceeding supports allowing these types of PBRCs, under limited circumstances, to provide programming services with a degree of reliability in their revenue levels as a means of ensuring they are able to meet their programming requirements.

75. This may be the case in particular for independent programming services, which have fewer opportunities to leverage other revenues through cross-subsidization of other activities, and which may also have lower advertising revenue levels and thus be more vulnerable to a decrease in subscription revenues.

76. With a view to ensuring that subscription make-whole PBRCs are limited to circumstances where they are warranted from a public policy standpoint, the Commission considers it appropriate to examine subscription make-whole PBRCs on a case-by-case basis. As set out in Broadcasting Information Bulletin 2015-440[4], the Commission will adopt the Competition Bureau's five factors for assessing the reasonableness of PBRCs, where appropriate. These factors will allow the Commission to examine a PBRC by taking into consideration, notably, whether or not it is being imposed by a VI entity, and its effects on the marketplace and on the sharing of risks and costs in a world of increased choice and flexibility.

Packaging and marketing of independent programming services

77. In the Notice, the Commission set out the following sections in regard to the packaging of independent programming services (the packaging sections):

    7. Where a BDU offers pre-assembled or themed packages, independent programming services, with the exception of adult services, shall be offered in at least one package in addition to being offered on a stand-alone basis.
    8. Where a BDU includes related programming services in themed packages, it shall include all relevant independent programming services in those packages.
    9. An independent programming service shall, unless the parties agree otherwise, be included in the best available pre-assembled or themed package consistent with its theme and programming.

78. The Commission also set out the following section in regard to the marketing of independent programming services (the marketing section):

    10. A programming service shall be given comparable marketing support by the BDU as is given to similar or related services.

79. These sections aim to provide a degree of support so that independent programming services are discoverable and able to make their programming available to Canadians, on fair terms, thereby fostering greater diversity within the system and ultimately greater choice for Canadians.

80. After examining the public record for this proceeding in regard to the packaging and marketing of independent programming services, the Commission considers that the issues to be addressed are the following:

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[4] See footnote 2.

- clarification of certain terms;
- applicability of the packaging sections to “premium” pay services;
- applicability of the packaging sections to third-language services; and
- applicability of the packaging sections to single or limited point-of-view religious services.

Clarification of certain terms

Positions of parties

81. Many parties recommended that the Commission provide more clarity as to what is meant by “relevant” and “best available” in relation to pre-assembled and theme packages in the packaging sections, and by “comparable” and “similar or related” in relation to the marketing section. Shaw opposed this view, submitting that the Commission’s discretion to interpret the Wholesale Code should not be fettered in advance of any disputes that come before the Commission.

82. In addition to recommending that the Commission clearly define the criteria, some independent broadcasters argued that these criteria should not include any reference to viewership or subscribership, as this would be a circular argument since these metrics are largely dependent on a service’s packaging and marketing. Shaw, TELUS and other BDUs, on the other hand, argued that the criteria need to account for a service’s viewership and popularity.

83. Finally, some interveners proposed adding to the list of criteria a new criterion relating to the language of the service, to determine the correct package and to ensure that packages remain consistent with the objective of subscriber choice.

Commission’s decision

84. The terms “relevant,” “comparable” and “similar or related” should not be strictly defined, as their meaning depends on the context of a given negotiation or dispute and is therefore best left to an assessment on a case-by-case basis. Where applicable, the Commission will take into consideration the appropriate balance between the objectives of diversity of voices and consumer choice.

85. In regard to the term “best available package,” the Commission stated in Broadcasting Decision 2012-672 that “the differing penetration levels of packages should not be sufficient in and of itself to sustain a finding of undue preference or disadvantage.” The Commission maintains the view that “best available package” does not necessarily mean most highly penetrated, as this interpretation would run counter to consumer choice objectives set out in Broadcasting Regulatory Policy 2015-96. That said, in a given case, it may be found that the “best available package” within which an independent programming service must be placed is the most highly penetrated, if this interpretation is shown to strike the appropriate balance between the objectives of diversity of voices and consumer choice.

86. Moreover, the Commission considers that it is appropriate, from both a commercial and a consumer standpoint, to add the language of the service as a criterion. Accordingly, this section now reads as follows (changes in bold):

> 9. An independent programming service shall, unless the parties agree otherwise, be included in the best available pre-assembled or theme package consistent with its theme**,** programming **and language**.

Applicability of the packaging sections to premium pay services

Positions of parties

87. Allarco argued that the packaging sections should apply to its premium pay service Super Channel, even though services such as this one have historically been offered primarily on a stand-alone basis.

88. Shaw and Rogers replied that the packaging sections should not apply to services that have historically been offered on a stand-alone basis, as including them in packages would drive consumer prices higher and run counter to the Commission's stated objective of making distribution more flexible for consumers.

Commission's decision

89. The premium pay services (Bell's The Movie Network (TMN) and Super Écran, Corus's Movie Central, and Allarco's Super Channel[5]) have historically been sold on a stand-alone basis by most BDUs. As a result of the application of the Wholesale Code's packaging sections, Super Channel, the only independent premium channel, would have to be offered in at least one package on all BDUs that offer pre-assembled or theme packages.

90. The Commission considers that the offer of independent premium pay services in theme packages would contribute to their discoverability and provide additional options to consumers. Further, since all services will be required to be offered on a pick-and-pay basis by December 2016, no consumer will be obliged to subscribe to any independent premium pay service in order to receive a VI premium pay service.

91. Accordingly, the Commission finds that the packaging sections should apply to the distribution of premium pay services.

Applicability of the packaging sections to third-language services

Positions of parties

92. Rogers submitted that the packaging sections of the Wholesale Code should not apply to Canadian third-language services, arguing that the new 1:1 ratio announced in

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[5] While DHX Media's Family Channel has been offered on a stand-alone basis in the past as a premium pay service, it is currently offered in regular "non-premium" specialty packages by most large BDUs.

Broadcasting Regulatory Policy 2015-96[6] will provide sufficient support for independently-owned third-language services. Ethnic Channels Group Limited, on the other hand, argued that because the 1:1 ratio is triggered by the carriage of non-Canadian services only, Canadian third-language services may be at a disadvantage. The IBG expressed the view that sections 8 and 9 of the Wholesale Code should apply to all services equally, including third-language services.

Commission's decision

93. In the Commission's view, Rogers has not demonstrated how the packaging sections set out in the Wholesale Code are inconsistent with or superfluous to the 1:1 ratio announced in Broadcasting Regulatory Policy 2015-96. On the contrary, it considers that the packaging sections will ensure that Canadian third-language services are included in the best available pre-assembled or theme package consistent with its theme, programming and language, regardless of the presence of non-Canadian services in those packages. Accordingly, the packaging sections will apply to third-language services.

Applicability of the packaging sections to single or limited point-of-view religious services

Positions of parties

94. MTS and Sasktel proposed to exclude single-faith religious services from the application of the packaging sections, as these have historically been offered only on a stand-alone basis or in packages with similar services.

Commission's decision

95. Section 26 of the *Broadcasting Distribution Regulations* enumerates various types of religious services and stipulates that these services may only be distributed in packages that are comprised solely of one or more of those types of religious services. In light of this restriction, the Commission considers it appropriate to exclude from section 7 the types of religious programming services specified in section 26 of the *Broadcasting Distribution Regulations*.

96. Accordingly, the Commission has revised section 7 of the Wholesale Code to read as follows (changes in bold):

> 7. Where a BDU offers pre-assembled or theme packages, independent programming services, **with the exception of programming services identified in sections 25 and 26 of the *Broadcasting Distribution Regulations***, shall be offered in at least one package in addition to being offered on a stand-alone basis.

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[6] In that policy, the Commission mandated that Canadian third-language services be offered in packages in a 1:1 ratio with non-Canadian services of the same language, in recognition of the open-entry framework for non-Canadian third-language services and their resulting widespread availability.

Multiplatform access

97. In the Notice, the Commission noted that Canadians are increasingly accessing programming on the Internet and on platforms other than the traditional television set. It stressed the need for the broadcasting industry to pursue creative multiplatform strategies to ensure that they are reaching and engaging viewers.

98. The Code of Conduct included an obligation on VI BDUs to provide access to independent programming services. Accordingly, the Commission considered it appropriate to include in the Wholesale Code such a section, as well as sections that ensure independent BDUs have access to content and prevent unreasonable terms and conditions that restrict a programming service from providing access to its programming on multiple platforms.

99. In the Notice, the Commission therefore set out the following sections in regard to multiplatform access:

> 5. A programming undertaking, BDU, or exempt digital media undertaking shall not require that a party accept terms or conditions for the distribution of programming that are commercially unreasonable, such as
>
> > (f) imposing unreasonable terms and conditions that restrict a programming service from providing access to its programming on multiple distribution platforms.
>
> 11. Where a BDU provides its related programming services with access to multiple distribution platforms, it shall offer reasonable terms of access that are based on fair market value to independent programming services.
> (the "multiplatform access section")
>
> 12. Where a programming service provides a related BDU with programming on multiple distribution platforms, it shall offer reasonable terms based on fair market value to other BDUs for their non-linear multiplatform rights at the same time as their linear rights and provide such content on a timely basis.
> (the "multiplatform rights section")

100. After examining the public record for this proceeding in regard to these sections, the Commission considers that the issues to be addressed are the following:

- whether it is necessary to clarify "unreasonable terms and conditions" in section 5.(f) and make this section reciprocal for BDUs; and
- whether the multiplatform rights section should apply only to content that is broadcast as part of a linear programming service.

Clarification of terms, and reciprocity for BDUs

101. Section 5.(f) seeks to ensure that all BDUs and programming services work co-operatively so that Canadians have access to programming on multiple platforms.

102. In order to achieve this objective, the Notice set out that programming services should, when engaging in multiple platforms strategies, provide BDUs with reasonable access to their programming. At the same time, BDUs must not unduly constrain the ability of programming services to experiment with their content, and provide their content to subscribers in new ways on multiple platforms.

Positions of parties

103. Rogers urged the Commission to adopt clear principles that can be used to determine whether a party is proposing unreasonable multiplatform terms and conditions. Shaw submitted that the Wholesale Code should include sections requiring industry standard terms so that programming services would be prohibited from asserting specific terms that would effectively frustrate efforts of BDUs to include their services in multiplatform offerings.

104. More specifically, several independent BDUs recommended that the obligation set out in section 5.(f) be made reciprocal. For example, TELUS and VMedia (supported by Rogers) proposed adding wording to the effect that "terms that restrict a BDU from being able to provide programming on multiple distribution platforms" be considered unreasonable. The Canadian Cable Systems Alliance (CCSA) and Zazeen Inc. (Zazeen) made a similar proposal, but stated that this should be added to the Wholesale Code as a distinct section.

105. Independent broadcasters proposed the following examples of unreasonable terms and conditions:

- any condition that would preclude the ability of an independent programming service to exploit its own content on its own non-linear platforms;
- not providing separate and reasonable compensation; and
- a BDU charging onerous access fees for the "authorization" or "authentication" of a service.

Commission's decision

106. In the Commission's view, given the pace of change in the multiplatform distribution environment, the term "unreasonable terms and conditions" should not be strictly defined. Rather, it should remain flexible in order to provide parties with the latitude they require to adapt and innovate in this quickly evolving environment.

107. Negotiations over terms and conditions for multiplatform distribution are best left to programming services and BDUs, who can evaluate their business cases and determine how to pursue multiplatform strategies in a competitive marketplace. Where necessary, any concerns regarding the negotiation of such terms and conditions, including questions regarding compensation, may be referred to the Commission and will be evaluated on a case-by-case basis.

108. As noted above, the Notice set out the objective of ensuring that both BDUs and programming services are able to pursue multiplatform strategies. Therefore, and in light of the concern raised by several BDUs that securing non-linear distribution rights was sometimes problematic, the Commission considers it appropriate to add to this section a reciprocal protection for BDUs. Accordingly, section 5.(f) of the Wholesale Code now reads as follows (change in bold):

> 5. A programming undertaking, BDU, or exempt digital media undertaking shall not require that a party accept terms or conditions for the distribution of programming that are commercially unreasonable, such as
>
> > (f) imposing unreasonable terms and conditions that restrict a programming service **or a BDU** from providing programming on multiple distribution platforms.

Applicability of the multiplatform rights section

109. Section 12 deals with the negotiation of multiplatform rights by non-VI BDUs, where such rights are being shared between the BDU and programming arms of a VI entity.

Positions of parties

110. BDUs, and in particular independent BDUs, were generally of the view that multiplatform rights were essential for gaining and/or keeping customers and should therefore not be seen as an additional revenue stream. Certain parties expressed the concern that section 12 could be interpreted as applying to non-linear programming services (i.e., online video services).

111. TELUS submitted that services must make all multiplatform rights related to their services available to all BDUs with the same or similar level of convenience if consumers are to truly have the ability to choose programming they want from their provider of choice. The CCSA and Zazeen submitted that when customers pay for linear programming, they should be able to view it on all devices within the base rate.

112. VMedia argued that if a VI entity offers multiplatform content to its customers at no cost, then it should be presumed it was free to the VI entity and should therefore be offered to independent BDUs at no cost, or at best at an incremental cost of providing that content in that form to those BDUs. Sogetel proposed that it should be considered unreasonable for a programming service to charge an extra fee to a BDU for multiplatform distribution of the linear content acquired by the BDU and distributed on its own digital media platform.

Commission's decision

113. The multiplatform rights section was adapted from a condition of licence imposed on Bell as a result of its acquisition of Astral.[7] That condition of licence aimed to safeguard against potential anti-competitive behaviour. Specifically, requiring Bell to negotiate its non-linear multiplatform rights with other BDUs sought to ensure the efficient delivery of programming at affordable rates and reasonable terms of carriage, to the overall benefit of the availability and diversity of programming for Canadians.

114. The current section set out in the Wholesale Code requires that all VI programming services offer reasonable terms for the distribution of their programming on a multiplatform basis to unrelated BDUs at the same time as their linear rights, and provide such content on a timely basis.

115. The record of this proceeding demonstrates that access to programming for distribution on a multiplatform basis on reasonable terms is an increasingly essential strategy for gaining and keeping customers. The availability of such programming on the non-linear platforms of other BDUs also promotes consumer choice as Canadians should be able to access content on the platform they choose, with the service provider of their choice. Accordingly, the Commission maintains the wording of section 12 as set out in the Notice. However, for clarification, this section does not apply where programming is being provided exclusively on a non-linear basis, for example, under the HVOD policy.

Affiliation agreements

116. Bell, Corus and Rogers, and BDUs that distribute Category C national news services, are required to submit to dispute resolution 120 days prior to the expiry of their affiliation agreements (the 120-day rule). These entities, with the exception of Rogers, are also subject to conditions of licence requiring them to file their affiliation agreements with the Commission five days following the execution of those agreements.

117. In the Notice, the Commission set out the following sections in regard to affiliation agreements:

> 13. If a BDU has not renewed an affiliation agreement to which it is a party with a programming service by 120 days preceding the expiry date of the agreement and if the other contracting party has confirmed in writing its intention to renew the agreement, the parties shall refer the matter to the Commission for dispute resolution under sections 12 to 15 of the *Broadcasting Distribution Regulations*.

[7] See Broadcasting Decision 2013-310. A similar condition of licence was later imposed on Rogers' and Corus's programming services.

14. Parties shall file with the Commission all affiliation agreements to which they are a party with a programming service within five days following the execution of the agreement by the parties.

15. Within 120 days following the launch of a programming service, parties shall file with the Commission all agreements to which they are a party with the programming service.

118. After examining the public record for this proceeding in regard to affiliation agreements, the Commission considers that the issues to be addressed are the following:

- whether the 120-day rule applies when a BDU does not intend to renew an agreement;
- whether the 120-day rule should apply to "lapsed" agreements; and
- whether other changes or clarity are needed to the affiliation agreements section.

Application of the 120-day rule when a BDU does not intend to renew an agreement

Positions of parties

119. In regard to the 120-day rule set out in section 13, several parties submitted that the proposed wording implies that the decision to renew rests with programming services. Eastlink, for example, proposed that this section should be clarified such that it does not preclude a BDU from ceasing carriage of a programming service or opting for non-renewal of an agreement. In the same vein, Cogeco proposed that the obligation for parties to refer a dispute to the Commission be subject to prior written confirmation by both parties that they intend to renew the affiliation agreement. Zazeen and TELUS raised similar concerns.

120. Pelmorex opposed the above proposals, arguing that they would give large BDUs leverage over independent programming services and compel an independent programming service to accept the BDU's terms.

Commission's decision

121. The Commission considers it appropriate to specify in section 13 that dispute resolution is engaged only when both parties (the programming service and the BDU) intend to renew the agreement. Accordingly, section 13 shall now read as follows (changes in bold):

13. If a BDU has not renewed an affiliation agreement to which it is a party with a programming service by 120 days preceding the expiry date of the agreement and if **both parties have** confirmed in writing **their** intention to renew the agreement, the parties shall refer the matter to the Commission for dispute resolution under sections 12 to 15 of the *Broadcasting Distribution Regulations*.

Application of the 120-day rule to "lapsed" agreements

Positions of parties

122. Several independent entities questioned how affiliation agreements that expire before the Wholesale Code comes into effect would be treated. For example, broadcasters such as the IBG, the CBC, Blue Ant and Allarco submitted that expired affiliation agreements, or those that will expire before 31 December 2015, should be referred to the Commission for dispute resolution.

123. Shaw, however, disagreed with this proposal, arguing that it would increase regulatory burden.

Commission's decision

124. The 120-day rule is designed to help ensure fair commercial negotiations and reduce the risks for smaller operators, by removing the obligation for them to proactively request Commission assistance, shortening delays in negotiations, and reducing the possibility of retroactive payments.

125. In order to ensure that the above objectives are met, this section applies to expired or lapsed agreements, as well as to agreements in principle or such other terms by which a service is carried, in the absence of a signed affiliation agreement.

Other changes to the affiliation agreements sections

Positions of parties

126. Various parties proposed a number of other wording changes or clarifications to the affiliation agreements sections, including the following:

- for sections 14 and 15, replacing "parties" with "BDUs" so as to avoid the duplicate filing of agreements from both BDUs and programming services;
- for section 14, replacing the five-day deadline with a ten-day deadline;
- for section 15, replacing "agreements" with "affiliation agreements"; and
- clarifying whether "master affiliation agreements" could be filed instead of individual agreements.

Commission's decisions

127. The Commission considers that a number of the proposed changes are appropriate from an administrative standpoint. Accordingly, it replaces "parties" with "BDUs" in sections 14 and 15, as this eliminates the duplicate filing of agreements by both BDUs and programming services. Section 14 is also amended to provide parties with ten working days to file agreements with the Commission, rather than the five working days that had been proposed.

128. In addition, the Commission clarifies that filing master affiliation agreements, where applicable, is acceptable as this reduces administrative burden, particularly on smaller BDUs.

129. However, the Commission considers it appropriate to retain the term "agreements" in section 15 rather than "affiliation agreements," as the former covers all types of agreements that might exist between parties (for example, term sheets, memoranda of understanding, or agreements in principle).

130. Accordingly, sections 14 and 15 of the Wholesale Code now read as follows (changes in bold):

> 14. **A BDU** shall file with the Commission **any affiliation agreement** to which **it is** a party with a programming service within **ten working** days following the execution of the agreement by the parties.
>
> 15. Within 120 days following the launch of a programming service, **a BDU** shall file with the Commission all agreements to which **it is** a party with the programming service.

Other changes or clarifications to the Wholesale Code

Positions of parties

131. Parties requested various other changes or clarifications to the Wholesale Code, including the following:

- additions or changes to the fair market value factors;
- thresholds or limits of "unreasonableness" with respect to VBRCs;
- changes to the tied-selling section;
- clarification as to the scope of the broader consumer choice section (5.(e));
- exclusion from the application of the packaging sections where BDUs offer small theme packages;
- the addition of a "must use" obligation for multiplatform rights; and
- the addition of an "opt-out" with respect to the 120-day rule.

132. In addition, the following proposals relating to the Commission's dispute resolution processes were made:

- requesting a full review of the existing dispute resolution processes;
- adding a section to the Wholesale Code specifying the burden of proof;

- making changes to confidentiality and disclosure rules set out in Broadcasting and Telecom Information Bulletin 2013-637, which sets out practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings, and the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*; and

- requesting that commercial disputes go to a third-party commercial arbitration process rather than to the Commission's dispute resolution processes.

Commission's decisions

133. After examining the record of this proceeding and the specific proposals made by parties, the Commission finds that no further modifications or additions to the Wholesale Code are warranted at this time other than a few relatively minor modifications to its wording. These minor changes have been made to remove redundancies, to clarify its application, and to reflect other regulations or policies in place.

134. The Commission has not retained these other proposals put forward by the interveners as it considers that these proposals would undermine parties' flexibility in negotiating affiliation agreements, particularly where business models and practices are evolving, or would have otherwise undermined the overall intent of the Wholesale Code. In addition, many of the concerns raised by parties can be addressed through the undue preference regulations.

135. Broadcasting Information Bulletin 2015-440[8] provides clarity as to the intent and scope of the Wholesale Code's sections. Information relating to the Commission's dispute resolution mechanisms and confidentiality practices can be found in Broadcasting and Telecom Information Bulletin 2013-637, and will also be provided in a web guide to dispute resolution that will soon be posted on the Commission's website.

Implementation of the Wholesale Code

136. As set out above, the Commission has, in reference, made the Wholesale Code binding by means of an order issued pursuant to section 9(1)(*h*) of the Act. This order will take effect **22 January 2016**.

137. The Commission intends, over time, to impose the Wholesale Code on all licensed distribution and programming undertakings by means of a condition of licence with a view to ultimately repealing the 9(1)(*h*) order.

138. As such, the Commission intends to modify the standard conditions of licence of the relevant distribution and programming undertakings to include a condition of licence requiring adherence to the Wholesale Code.

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[8] See footnote 2.

139. The Commission also invites parties to apply for the following condition of licence requiring adherence to the Wholesale Code:

> The licensee shall adhere to the Wholesale Code, set out in the appendix to *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015, in its dealings with any licensed or exempt broadcasting undertaking.

140. To allow the Commission to process such applications expeditiously, parties are asked to file their applications for this condition of licence separately from applications for other amendments to conditions of licence. In assessing applications for other licence amendments, the Commission may take into consideration whether the licensee has this condition of licence or has applied for this condition of licence.

Secretary General

Related documents

- *Interpretation of the Wholesale Code*, Broadcasting Information Bulletin CRTC 2022-140, 1 June 2022
- *Interpretation of the Wholesale Code*, Broadcasting Information Bulletin CRTC 2015-440, 24 September 2015
- *Distribution of the programming of licensed programming undertakings by broadcasting distribution undertakings*, Broadcasting Order CRTC 2015-439, 24 September 2015
- *Call for comments on a Wholesale Code*, Broadcasting Notice of Consultation CRTC 2015-97, 19 March 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
- *Let's Talk TV: The way forward – Creating compelling and diverse Canadian programming*, Broadcasting Regulatory Policy CRTC 2015-86, 12 March 2015
- *Request for final offer arbitration by TELUS Communications Company regarding the distribution of Sun News Network*, Broadcasting Decision CRTC 2014-509, 2 October 2014
- *Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2013-637, 28 November 2013
- *Astral broadcasting undertakings – Change of effective control*, Broadcasting Decision CRTC 2013-310, 27 June 2013

- *Complaint by OUTtv Network Inc. against TELUS Communications Company alleging undue preference and disadvantage*, Broadcasting Decision CRTC 2012-672, 10 December 2012
- *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
- *Regulatory framework relating to vertical integration – Correction*, Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011

Appendix to Broadcasting Regulatory Policy CRTC 2015-438

Wholesale Code

Introduction

This code sets out the general provisions that shall govern the commercial arrangements between broadcasting distribution undertakings (BDUs), programming undertakings, and exempt digital media undertakings.

While such matters are generally best determined by negotiations between the parties, there may be circumstances where the Commission must intervene in the public interest. This would primarily occur in cases where the attainment of the objectives set out in the *Broadcasting Act* could be compromised including when the provisions set out in the code have not been respected by the parties engaged in commercial arrangements.

This code sets the rules and parameters on matters that shall be considered by parties as part of the negotiation process between BDUs, programming undertakings, and exempt digital media undertakings. It also establishes the practices that would generally be considered reasonable or unreasonable by the Commission in any subsequent process concerning allegations of undue preference/disadvantage or other requests for a dispute resolution determination.

Application

1. This code applies to the distribution of programming on an analog or digital basis.

2. For the purposes of this code, "programming undertakings" means programming undertakings as defined in the *Broadcasting Act*, with the exception of radio programming undertakings.

3. Unless otherwise provided, this code applies to licensed programming and distribution undertakings. It serves as a guideline for programming, distribution, and digital media undertakings operating under an exemption order.

Prohibitions

4. The following provisions are prohibited in any affiliation agreement between a programming undertaking, a BDU, or an exempt digital media undertaking:

   (a) terms that prohibit the distribution of programming services on a stand-alone basis;

   (b) terms that prohibit the offering of programming services on a build-your-own-package or small package basis;

   (c) provisions that unilaterally grandfather distribution on the same terms and conditions as the previously negotiated agreement;

(d) veto rights by programming undertakings of BDU packaging changes;

(e) requirements to mirror existing analog tiers in a digital offering;

(f) most favoured nation (MFN) provisions, or any similarly worded provision that has the effect of guaranteeing terms as favourable as those agreed to with other parties in other affiliation agreements; and

(g) minimum penetration, revenue or subscription levels, except where negotiated by an independent programming service.

Commercially unreasonable practices

5. A programming undertaking, BDU, or exempt digital media undertaking shall not require that a party accept terms or conditions for the distribution of programming that are commercially unreasonable, such as

(a) requiring an unreasonable rate (e.g., not based on fair market value);

(b) requiring an unreasonable volume-based rate card;

(c) requiring an unreasonable penetration-based rate card;

(d) requiring the acquisition of a program or service in order to obtain another program or service (tied-selling);

(e) imposing unreasonable terms and conditions that restrict the ability of a BDU to provide consumer choice; and

(f) imposing unreasonable terms and conditions that restrict a programming service or a BDU from providing programming on multiple distribution platforms.

Commercially reasonable practices

6. In negotiating a wholesale rate for a programming service based on fair market value, a programming undertaking, BDU, or exempt digital media undertaking shall take into consideration the following factors, where applicable:

(a) historical rates;

(b) penetration levels, volume discounts, and the packaging of the service;

(c) rates paid by unaffiliated BDUs for the programming service;

(d) rates paid for programming services of similar value to consumers, taking into consideration viewership;

(e) 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;

(f) the retail rate charged for the service on a stand-alone basis; and

(g) the retail rate for any packages in which the service is included.

7. Where a BDU offers pre-assembled or theme packages, independent programming services, with the exception of programming services identified in sections 25 and 26 of the *Broadcasting Distribution Regulations*, shall be offered in at least one package in addition to being offered on a stand-alone basis.

8. Where a BDU includes related programming services in theme packages, it shall include all relevant independent programming services in those packages.

9. An independent programming service shall, unless the parties agree otherwise, be included in the best available pre-assembled or theme package consistent with its theme, programming and language.

10. A programming service shall be given comparable marketing support by the BDU as is given to similar or related services.

11. Where a BDU provides its related programming services with access to multiple distribution platforms, it shall offer reasonable terms of access that are based on fair market value to independent programming services.

12. Where a programming service provides a related BDU with programming on multiple distribution platforms, it shall offer reasonable terms based on fair market value to other BDUs for their non-linear multiplatform rights at the same time as their linear rights and provide such content on a timely basis.

Affiliation agreements

13. If a BDU has not renewed an affiliation agreement to which it is a party with a programming service by 120 days preceding the expiry date of the agreement and if both parties have confirmed in writing their intention to renew the agreement, the parties shall refer the matter to the Commission for dispute resolution under sections 12 to 15 of the *Broadcasting Distribution Regulations*.

14. A BDU shall file with the Commission any affiliation agreement to which it is a party with a programming service within ten working days following the execution of the agreement by the parties.

15. Within 120 days following the launch of a programming service, a BDU shall file with the Commission all agreements to which it is a party with the programming service.