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

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Practices and procedures for dispute resolution

The Commission sets out revised practices and procedures for dispute resolution. These practices and procedures build upon those adopted by the Commission in the past and reflect recent changes in the broadcasting regulatory environment relating to maximizing choice for Canadian television viewers (Broadcasting Regulatory Policy 2015-96), and to the Commission's Wholesale Code (Broadcasting Regulatory Policy 2015-438).

In addition, the Commission provides clarification in regard to the availability of dispute resolution and the application of the standstill rule in broadcasting disputes.

This information bulletin replaces Broadcasting and Telecom Information Bulletin 2013-637.

Introduction

1. The Commission considers that it is important to have well-designed and timely dispute settlement mechanisms in place for the resolution of disputes arising under either the *Broadcasting Act* or the *Telecommunications Act*.

2. In this information bulletin, the Commission sets out revised practices and procedures for dispute resolution that replace those set out in Broadcasting and Telecom Information Bulletin 2013-637. Specifically, the present information bulletin sets out, for both broadcasting and telecommunications matters, various Commission practices as well as procedural steps and time limitations that will apply to each of the following five dispute resolution mechanisms: staff-assisted mediation, final offer arbitration, expedited hearings, non-binding staff opinion, and consensus-based problem solving (collectively, the dispute resolution processes). Further, the Commission identifies considerations relating to the application of the standstill rule in broadcasting disputes, whereby both programming undertakings and broadcasting distribution undertakings (BDUs) must continue providing services to Canadians during an ongoing dispute.

3. The revised practices and procedures build upon those adopted by the Commission in the past. Further, they reflect recent changes to the broadcasting regulatory environment pursuant to the issuance of Broadcasting Regulatory Policy 2015-96, which relates to maximizing choice for Canadian television viewers, and of the Commission's Wholesale Code, set out in the appendix to Broadcasting Regulatory

Policy 2015-438, which guides certain aspects of the commercial arrangements between BDUs, programming services and exempt digital media undertakings.

General information

4. Disputes that involve one issue – or in exceptional cases, several closely related issues – and have the following characteristics will lend themselves to the Commission's dispute resolution processes:

    - the dispute is bilateral or involves only a small number of parties;
    - the parties have been unable to resolve the dispute by other methods;
    - the dispute is relevant to the regulation and supervision of either the Canadian broadcasting or telecommunications system, primarily to matters of interpretation or application of an existing Commission decision, policy or regulation; and
    - the resolution of the dispute does not require the establishment of a new policy or change to an existing policy.

5. Disputes that involve a large number of issues or interested parties will not generally be considered suitable for staff-assisted mediation and/or final offer arbitration. In such instances, the Commission will rely on other regulatory mechanisms.

6. This information bulletin reflects the procedures for bilateral disputes. With the exception of final offer arbitration, the mechanisms described below may involve the participation of two or more parties. In such case, the provisions set out below are to be read effectively to accommodate that fact.

7. Parties may always resolve their differences through private third-party mediation or arbitration, bilateral negotiations, or other means that do not involve Commission participation. The Commission expects parties to attempt to exhaust those means towards resolving outstanding issues in an efficient and effective manner before applying for the dispute resolution processes described in this information bulletin.

8. The Commission expects that parties will have made reasonable efforts to resolve their dispute prior to requesting final offer arbitration or an expedited hearing. As a result, the Commission will generally require parties to engage in mediation before it accepts the matter for other forms of dispute resolution.

9. If the Commission denies a request for final offer arbitration or an expedited hearing, it will advise the parties involved and, where appropriate, it may suggest or initiate a different resolution mechanism.

10. The Commission expects parties to respect the deadlines for filing materials and the other time frames set out within this information bulletin, which may be varied by the Commission should circumstances warrant.

The practices and procedures

11. In the sections below, the Commission sets out the practices and procedures relating to each of the five dispute resolution mechanisms.

Staff-assisted mediation

12. Staff-assisted mediation is the method of dispute resolution in which Commission staff assist parties in reaching a consensual resolution of the issues under dispute. Where full resolution cannot be achieved, Commission staff will attempt to reduce the number of contentious issues in order to clearly identify those that may require further Commission intervention. In staff-assisted mediation, any resolution is non-binding.

13. Although staff-assisted mediation is best suited to disputes that meet the criteria set out in paragraph 4, it can also be effective in multilateral situations involving parties with like interests.

14. Any party may request staff-assisted mediation by making a written or verbal request to Commission staff in confidence. Commission staff will then establish whether the particular matter is appropriate for staff-assisted mediation. In the event that it is not, Commission staff will deny the request. It may then suggest that the matter be dealt with through a different resolution mechanism.

15. Staff-assisted mediation may be conducted by Commission staff through direct telephone conversations, conference calls, in-person meetings, or a combination of these methods. During mediation, Commission staff will assist parties in arriving at a consensual resolution by facilitating communication and exchanges, and by focusing the parties on the issues under dispute. As it is generally in the best interests of the parties to advance in a timely manner towards resolving the dispute or components of the dispute, Commission staff may establish time limitations. Should it become apparent that mediation is ineffective, Commission staff will end the mediation process.

16. When a staff-assisted mediation process has been terminated without resolution of all identified issues, Commission staff may, if all parties agree, issue a Staff Mediation Report setting out any outstanding issues. Provided that all parties give their consent, that report may form part of the record for consideration in final offer arbitration, an expedited hearing, or another Commission proceeding on issues identified in the report.

Final offer arbitration

17. Final offer arbitration is used for bilateral disputes (i.e., disputes that involve no more than two parties) that are exclusively monetary in nature and that otherwise meet the criteria in paragraph 4. It may be used when the parties involved have failed to resolve the dispute through staff-assisted mediation. A Commission panel will act as arbitrator and will choose between the final offers put forward by the parties. Final offer arbitration will result in a binding determination.

18. The party that requests final offer arbitration (the applicant) does so by filing a written application with the Commission and serving it on the other party (the respondent). The application must set out the proposed scope of the proceeding (i.e., the matter(s) for which a determination by the Commission is requested), include a concise statement of the facts and issues, and explain why the application meets the criteria for final offer arbitration.

19. The Commission expects that, prior to a request for final offer arbitration, parties will have discussed the scope of the proceeding, including their expectations regarding the duration and rate structure (i.e., fixed, variable, percentage, etc.) of any proposed solution. The parties may request the assistance of Commission staff in this discussion, should such assistance be necessary.

20. Within five days of having received a copy of the application, the respondent must advise the Commission as to whether it supports the application for final offer arbitration, and serve this notice on the applicant. Should the respondent disagree with the applicant's proposed scope, it may suggest an alternative scope.

21. Once any appropriate conference calls or exchanges of correspondence have been conducted with the parties, and within 15 days of receipt of the last document filed pursuant to the application for final offer arbitration, the Commission will advise the parties as to whether it is prepared to accept the request for final offer arbitration.

22. Should the Commission accept the request for final offer arbitration, it will set out in a conduct letter to the parties the specific dates upon which the final offer arbitration process is to be conducted and the matter(s) upon which it will make a determination. By specifying the scope of the proceeding to apply to the case at hand, the Commission will ensure that the offers to be submitted by the parties are comparable. The Commission will select as limited a scope as possible in final offer arbitration proceedings, leaving the parties to negotiate the remaining terms of an agreement.

23. Within 15 days of the date on which the parties are notified by the Commission as to whether it has accepted the request for final offer arbitration, each party must submit its final offer to the Commission. These submissions must be in reference to the scope of the proceeding as established by the Commission.

24. When they submit their final offers, parties are responsible for including concise arguments that set out all the facts in support of their respective positions. In preparing their arguments, parties should refer, where applicable, to the criteria for fair market value set out in the Wholesale Code. As noted in Broadcasting Information Bulletin 2015-440, parties have the opportunity to make submissions regarding the fair market value factors that should apply, how those factors should be interpreted, and how much weight should be accorded to a given factor. Parties can also make submissions on which public policy objectives are relevant to a given case.

25. Final offer submissions must be no longer than thirty pages. The Commission may allow a party to include an appendix to its final offer submission. In such case, the party must submit a request in writing in which it has demonstrated that the appendix serves solely to support the final offer arbitration record and does not include any new arguments in support of its offer.

26. Within five days of the date on which the final offer submissions of the parties have been received by the Commission, and upon confirmation that both offers are within the identified scope of the proceeding as established by the Commission, the Commission will forward to each of the parties a copy of the other party's offer.

27. Each party will be given an opportunity to comment on the other party's offer, but will not be allowed to change its original offer. Each party must submit to the Commission any documentation setting out that party's comments within five days of having received the offer of the other party. Such documentation must not be more than twenty pages in length, including any appendices.

28. Since the purpose of the comments is to allow each party to respond to the other party's final offer, procedural fairness requires that the full position of each party be put forth at the beginning of the process (i.e., as part of the final offer submission). It is inappropriate to file new evidence or formulate new arguments as part of the comments, if such evidence or arguments could have been filed or formulated when submitting the final offers.

29. Accordingly, the process does not generally provide for parties to file a reply to comments as part of the final offer arbitration process. In the event that a party considers that new evidence or new arguments have been filed in the context of the comment phase, that party may request, in writing, that the Commission strike such information from the record, and provide supporting rationale for its request.

30. In regard to broadcasting disputes, after the close of the record (usually within a week) and pursuant to the regulations,[1] the Commission may require parties to participate in a mediation session before a person appointed by the Commission.

31. After the Commission arbitration panel selects one of the offers in its entirety, the Commission will issue its decision. The Commission intends to release final offer arbitration decisions within 55 days from the close of record.

32. Only on an exceptional basis, where neither party's final offer is, in the opinion of the Commission, in the public interest, both final offers will be rejected by the Commission and the parties involved will be so advised. In such case, the Commission may suggest or initiate a different dispute resolution mechanism.

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[1] This requirement is set out in section 12(4) of the *Broadcasting Distribution Regulations*, section 14(2) of the *Discretionary Services Regulations*, and section 17(2) of the *Television Broadcasting Regulations, 1987*. Paragraphs setting out this requirement can also be found in exemption orders for various types of services.

33. In addition to the considerations outlined above, requests by parties for final offer arbitration in the context of disputes relating to telecommunications matters will be considered in light of the following: as a condition to proceeding to the final offer arbitration process, where both parties request that process, they will be expected to agree not to apply under section 62 of the *Telecommunications Act* for a review and variance of the decision resulting from the final offer arbitration.[2] In the Commission's view, removing the prospect of a review and vary application will help to ensure that parties have the requisite incentive to submit reasonable final offers. Accordingly, the Commission considers that this condition relating to the final offer arbitration process is reasonable and necessary to improve the efficiency and effectiveness of the dispute settlement mechanisms available to parties.

Expedited hearings

34. Expedited hearings may be used for disputes that meet the criteria set out in paragraph 4, provided that the dispute is not exclusively monetary in nature. It may be used when the parties involved have failed to resolve the dispute through staff-assisted mediation. Under this method of dispute resolution, the Commission will establish Commission panels to conduct brief oral hearings.

35. The party that requests an expedited hearing (the applicant) does so by filing a written application with the Commission and serving it on the other party (the respondent). The application must set out the scope of the proceeding (i.e., the matter(s) for which a determination by the Commission is requested), include a concise statement of the facts and issues, and explain why the application meets the criteria for an expedited hearing.

36. Within five days of having received a copy of the application, the respondent must advise the Commission as to whether it supports the application for an expedited hearing regarding the specific matter(s) and serve this notice on the applicant. Should the respondent disagree with the applicant's proposed scope, it may suggest an alternative scope.

37. Once it has considered the respondent's position, and within 20 days of receiving the application for an expedited hearing, the Commission will advise the parties by letter as to whether it is prepared to accept the request. Should the Commission accept the application for an expedited hearing, it will set out in its notice to the parties the specific dates on which the expedited hearing is to be conducted and the matter(s) upon which it will make a determination.

38. Within 15 days of the date on which the Commission accepts a request and notifies the parties, the respondent must file a response to the application with the Commission. The response must include a concise statement of the facts and issues, and the respondent must serve the response on the applicant.

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[2] Section 62 of the *Telecommunications Act* sets out that the Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision.

39. All applications requesting expedited hearings and all response submissions must include concise supporting arguments that state all the facts, and that cite Commission requirements, regulatory decisions, and, if applicable, decisions of the Courts relied upon, in support of a party's respective position. All applications must also include a concise statement of the relief sought. These documents must be no longer than ten pages. The Commission may allow a party to include an appendix to its submission. In such case, the party must submit a request in writing in which it has demonstrated that the appendix serves solely to support the expedited hearing record and does not include any new arguments in support of its submission.

40. In regard to expedited hearings involving broadcasting disputes, after the close of the record (usually within a week), and pursuant to various Commission regulations,[3] the Commission may require parties to participate in a mediation session before a person appointed by the Commission.

41. Where the Commission has accepted an application for an expedited hearing, parties will be required to attend a brief oral hearing, to which they will be required to bring all relevant documentation and knowledgeable personnel. An adverse inference may be drawn from the failure of a party to bring all relevant documentation and knowledgeable personnel to the oral hearing.

42. The Commission may, at any time, require that the parties file further information before or at the oral hearing.

43. At the beginning of the hearing, each party will be given a brief opportunity – generally ten minutes – to address the Commission panel. The Commission panel and Commission counsel will then question the parties, after which the parties will have an opportunity to question each other – generally for 20 minutes each. Finally, each party will be given another brief opportunity – generally ten minutes – to address the Commission panel, after which the oral hearing will conclude. The Commission may modify hearing procedures as circumstances require.

44. The Commission will award the relief requested, in whole or in part, if it finds in the applicant's favour. The Commission intends to release its expedited hearing decisions within 70 days of having accepted a request for an expedited hearing, in those cases where the parties have met their filing obligations and where no adjournment has been extended in the oral hearing.

45. Hearings will generally be held in Salon Réal Therrien on the 7th floor of the Central Building, Les Terrasses de la Chaudière, 1 Promenade du Portage, Gatineau, Quebec.

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[3] *Ibid.* at paragraph 30.

Non-binding staff opinion

46. The resolution of certain disputes or the breaking of an impasse may, in certain cases, require nothing more than assistance from Commission staff over a period of a few hours or days. In other situations, parties may not be able to make progress in their negotiations, and may require a staff opinion or other assistance. Where a staff opinion is requested, and where Commission staff determines that the request is appropriate, the Commission's objective is that, wherever possible, such an opinion will be released within 60 days of the date of receipt of the request. Generally, the more complex or technical a dispute, the more likely it is that at least some type of informal or formal oral phase (including meetings between the parties) will be required. Written submissions from the parties may not be sufficient to enable Commission staff to prepare a comprehensive opinion. In such circumstances, the 60-day objective may have to be extended.

Consensus-based problem solving

47. Certain disputes may raise issues that are industry-wide in scope, or pose broad problems of a technical, operational or administrative nature. In such cases, the appropriate model of dispute resolution may be Commission staff-facilitated meetings that involve the participation of a broad cross section of industry representatives and other interested parties in a working group. That working group's purpose would be to find solutions to these problems, rather than to resolve disputes arising between individual parties. This model has been used successfully by the CRTC Interconnection Steering Committee (CISC) to address issues regarding the implementation of local telephone competition.

48. The working group would generally investigate an issue, determine the facts, and propose a solution in a consensus report that would then come before the Commission for approval. Although such a process need not involve Commission approval of the reports, participants in past CISC forums of this nature have generally sought such approval to give additional status to the results of their extensive work.

49. Typically, under this process:

- working groups would be established to focus on specific tasks and work towards creating a consensus industry position as to how a technical, operational or administrative issue should be resolved;

- membership in the working groups would be open to all parties having a demonstrable, direct interest in the outcome;

- Commission staff would attend meetings to facilitate discussion, answer questions, and occasionally provide a staff opinion to break an impasse; and

- disputes on policy matters arising in the course of the group discussions would be resolved by the Commission on the basis of a written process.

Applicability of dispute resolution and the standstill rule in broadcasting matters

50. Both BDUs and programming undertakings may avail themselves of the dispute resolution regime by virtue of provisions set out in applicable conditions of licence, provisions set out in certain exemption orders, or the regulatory provisions set out in sections 12 to 15 of the *Broadcasting Distribution Regulations* or sections 14 and 15 of the *Discretionary Services Regulations* (collectively, the dispute resolution provisions).

51. The dispute resolution provisions contemplate the resolution of disputes concerning carriage or terms of carriage of programming services or concerning any right or obligation under the *Broadcasting Act*. This broad wording allows the Commission to resolve a wide scope of disputes that may arise between BDUs and programming services.

52. A dispute exists the moment one party provides the Commission with a written notice of the dispute and serves that notice of dispute on the other undertaking involved. A notice of dispute can, for example, take the form of the filing of an undue preference application, a complaint under the Wholesale Code, a request for final offer arbitration, a request for staff-assisted mediation, or a simple notification to the Commission of the existence of the dispute.

53. A dispute ends either when the parties involved in the dispute reach an agreement settling the dispute or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter(s). Consequently, a party to the dispute is not permitted to unilaterally withdraw from dispute resolution.

54. The standstill rule sets out that, until the dispute between programming undertakings and BDUs is resolved, the parties are to provide continued access to programming services and carriage. The intent of the standstill rule is to ensure that subscribers are not deprived of services while parties are engaged in negotiations, and to level the field during negotiations between programming undertakings and BDUs. It is not intended to protect or defend the particular interests of either party. Accordingly, as set out in Broadcasting Regulatory Policy 2015-96, the standstill rule should not be invoked lightly, nor be relied upon to grant an effective access right.

55. Where one party contests the appropriateness of a dispute resolution mechanism, the Commission may be called upon to render a decision on whether to accept a referral to dispute resolution pursuant to the dispute resolution provisions. In doing so, the Commission will generally take into consideration the following, where appropriate:

- whether the dispute meets the criteria for dispute resolution set out in paragraph 4 above;

- whether the party invoking standstill has provided reasons to justify the Commission's involvement (e.g., a potential adverse impact on the applicant or on the achievement of the objectives of the *Broadcasting Act*); and

- whether the responding party has demonstrated that it has engaged in fair negotiations and has valid commercial reasons for its proposed action, including meeting its requirements under the Wholesale Code.

56. In filing these submissions, parties must ensure to clearly identify any information that is confidential and commercially sensitive, as set out in the confidentiality section below.

57. Where the Commission declines to intervene in the matter, it will end the dispute, thus lifting the standstill. Where the Commission accepts the dispute, mediation may be mandated and/or one of the formal dispute resolution processes may commence, and the standstill will remain in place.

Confidentiality

58. The fact that staff-assisted mediation is taking or has taken place, along with any and all information and materials submitted by the parties and any discussions that may occur during the course of such mediation, shall be confidential and shall not be disclosed either by the parties to the dispute or by the Commission. Further, any information in regard to the above shall not be used by any of the parties involved in subsequent proceedings before the Commission. However, as noted in paragraph 16, the Staff Mediation Report, which identifies issues remaining to be resolved, may, should all parties consent, form part of the record for consideration in another Commission proceeding on issues identified in that report.

59. For final offer arbitration and expedited hearing proceedings, the Commission's current confidentiality rules and practices will apply (see the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* as well as Broadcasting and Telecom Information Bulletin 2010-961).

60. In final offer arbitration proceedings, there are generally three versions of each document filed with the Commission: a full, complete version that contains all confidential information and is for use solely by the Commission; a version that is provided to the other party to the final offer arbitration and generally omits certain details that are of a commercially sensitive nature; and a version that is placed on the public record and generally omits commercially sensitive information as well as details pertaining to the final offers, among other things.

61. When filing their submissions, parties must clearly designate each version of the submitted document, by marking the top of every page of each version of the document with one of the following three designations: “Public version”, “Confidential version for party X” or “Confidential CRTC version”.

62. All redacted versions of documents, along with any translations, must be provided at the same time as the confidential version. Matters relating to confidentiality can be set out in a covering letter to the party’s final offer or comment submission, and will not be counted toward the page limits set out above.

63. In reviewing the public versions submitted to the Commission, the onus is on each party to ensure that its own sensitive information has been treated appropriately by the other party to the final offer arbitration.

64. The Commission will publish its decisions relating to all applications for final offer arbitration or expedited hearing. Parties will be provided with an opportunity to review the public file before publication. This review is provided to ensure that a party has not inadvertently disclosed any of the other party’s information that is confidential in nature, including financial information or information that is commercially sensitive, and that such information is treated consistently in a confidential manner by the person who submitted it. Should an issue in this regard be raised by a party, that party must identify the document in question, including the specific page number(s) and/or paragraph number(s) to be redacted. Parties are reminded that the abridged version of a document must omit only that information designated confidential. Information that is not itself inherently sensitive, such as tables of contents, headings and sentences that do not themselves contain information designated confidential, should not be omitted from the document.

Implementation of the revised practices and procedures for dispute resolution

65. These revised practices and procedures will be effective as of the date of this information bulletin.

Filing of documents

66. To the extent possible, all documents should be filed electronically via the Commission’s website. Parties are to clearly indicate in the first paragraph of their application whether their request is for staff-assisted mediation, final offer arbitration, an expedited hearing, non-binding staff opinion, or consensus-based problem solving.

Secretary General

Related documents

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

- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015

- *Let's Talk TV – A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015

- *Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2013-637, 28 November 2013

- *Procedures for filing confidential information and requesting its disclosure in Commission proceedings*, Broadcasting and Telecom Information Bulletin CRTC 2010-961, 23 December 2010