



Broadcasting Decision CRTC 2025-319

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Gatineau, 28 November 2025

OUTtv Network Inc.
Across Canada

Public record: 2025-0107-2

Complaint by OUTtv Network Inc. against Rogers Communications Canada Inc. alleging undue preference and disadvantage regarding the repackaging of OUTtv

Summary

OUTtv Network Inc. (OUTtv Network) is an independent programming undertaking that operates the English-language discretionary service OUTtv.

In March 2025, OUTtv Network filed an application with the Commission in which it alleged that Rogers Communications Canada Inc. (Rogers) had breached the standstill rule under section 15.01 of the *Broadcasting Distribution Regulations* and, pursuant to section 9 of these same regulations, had conferred an undue preference on other programming services and a disadvantage on OUTtv. Specifically, OUTtv Network submitted that Rogers caused significant subscriber loss by removing OUTtv from one large pre-assembled general interest package, Premier, and excluding it from another such package, Ultimate TV.

The Commission received 27 interventions in response to the application, all in support of OUTtv.

After examining the positions of the parties and the record for the application in light of the regulatory framework, the Commission determines that Rogers' removal of OUTtv from the Premier package constitutes a breach of the standstill rule. The Commission also finds that the repackaging of OUTtv subjected it to a disadvantage relative to the other services in both the largest general interest package and the thematic packages in which it is now offered, and that the disadvantage is undue in light of the regulatory framework and the evidence of harm.

Accordingly, the Commission directs Rogers to restore OUTtv to the Premier package, provided that such placement is more beneficial to OUTtv than its current distribution in the Variety and Lifestyle & Entertainment theme packages, until the dispute is resolved.

To facilitate the resolution of the dispute between the parties, the Commission further directs OUTtv Network and Rogers to file for final offer arbitration within **30 days of the date of this decision**.

A dissenting opinion by Commissioners Nirmala Naidoo, Stéphanie Paquette, and Ellen C. Desmond, K.C. is attached to this decision.

Background

1. OUTtv Network Inc. (OUTtv Network) is an independent programming undertaking that operates the national, English-language discretionary service OUTtv, which serves 2SLGBTQI+¹ communities in Canada.
2. Rogers Communications Canada Inc. (Rogers) is one of the largest broadcasting and telecommunications companies in Canada, with assets in broadcasting distribution, as well as television and radio services.
3. On 18 August 2022, the Commission published Broadcasting Decision 2022-223 and Broadcasting Order 2022-224 (the Distribution Order), in which it granted OUTtv must-offer² status in English-language markets from 1 March 2023 to 31 August 2026. In that instance, the Commission left to the parties the determination of the pricing and packaging of services but expressed an expectation that broadcasting distribution undertakings (BDUs) include OUTtv in pre-assembled or thematic packages, consistent with its theme, programming, and language, and with the highest penetration rates. The Commission also encouraged BDUs to treat OUTtv fairly and avoid imposing punitive or retaliatory measures, imposing unreasonable rates, significantly altering the packaging, or otherwise substantially reducing the wholesale payment for the service.
4. Historically, Rogers carried OUTtv in its high penetration, pre-assembled general interest Premier package at a previously agreed-upon wholesale rate, which has since expired. Despite the expiry of the agreement, Rogers continued to distribute OUTtv in the Premier package.
5. In September 2023, Rogers stopped marketing Premier in favour of its new pre-assembled general interest package, Ultimate TV. OUTtv was not included in the new higher-penetration Ultimate TV pre-assembled general interest package.
6. Subsequently, in December 2024, Rogers repackaged OUTtv by removing it from Premier and adding it to two theme packages, Variety and Lifestyle & Entertainment.
7. OUTtv Network submitted that the repackaging occurred without notice while the parties were engaged in negotiations subject to the standstill rule, resulting in a significant drop in subscribers from November 2024 to January 2025. OUTtv Network also asserted that it had been negotiating in good faith and that the repackaging undermined the bargaining process.

¹ The Government of Canada uses the acronym 2SLGBTQI+ to refer to Two-Spirited, Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, and additional people who identify as part of sexually- and gender-diverse communities.

² Must-offer means that the programming service must be offered by all broadcasting distribution undertakings to their subscribers.

8. On 5 March 2025, OUTtv Network filed an application against Rogers alleging a breach of the standstill rule set out in section 15.01 of the *Broadcasting Distribution Regulations* (BDU Regulations) and an undue preference pursuant to section 9 of these same regulations.
9. In its application, OUTtv Network indicated that Rogers included other comparable services in the Ultimate TV package and that OUTtv's exclusion from this package represents an unjustified form of detrimental treatment.
10. On 11 April 2025, Rogers filed a response to OUTtv Network's complaint, in which it argued that there was no undue preference or a breach of the standstill rule. Rogers also argued that OUTtv Network had not been engaging in good faith negotiations and instead aimed to extend the application of an inflated wholesale rate which Rogers had accepted on a short-term basis. OUTtv Network submitted a response on 17 April 2025, opposing Rogers' characterization of the situation.
11. To date, OUTtv is available in two theme packages, Variety and Lifestyle & Entertainment. The expired wholesale rate is still in place.

Interventions

12. The Commission received 27 interventions, all in support of OUTtv. The interventions commented on the importance of diversity and access to the programming provided by OUTtv and expressed concerns about precedent if the Wholesale Code and standstill rules are not enforced.

Regulatory framework

13. Paragraph 10(1)(h) of the *Broadcasting Act* (the Act) authorizes the Commission, in furtherance of its objects, to make regulations for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings. Subsection 9.1(1) of the Act also authorizes the Commission to make orders imposing conditions on the carrying on of broadcasting undertakings that it considers appropriate for the implementation of the broadcasting policy set out in subsection 3(1) of the Act.
14. The standstill rule, set out in section 15.01 of the BDU Regulations, states that during a dispute concerning carriage or terms of carriage, the licensee shall continue to distribute the programming services at the same rates and according to the same terms and conditions as it did before the dispute, until an agreement settling the dispute is reached by the concerned undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.
15. Furthermore, section 9 of the BDU Regulations provides that a licensee shall not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. It further states that the burden of establishing that any preference or

disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

OUTtv Network's position

16. According to OUTtv Network, the repackaging of OUTtv occurred during ongoing carriage negotiations, violating the standstill rule. OUTtv Network also argued that Rogers breached its obligations under sections 9 and 15.01 of the BDU Regulations, putting OUTtv at an undue disadvantage by removing it from the Premier package and not including it in the Ultimate TV package, causing significant subscriber loss.

Rogers' position

17. According to Rogers, the standstill rule was not in effect at the time negotiations began. It also argued that the standstill was not automatically initiated, and that the Commission does not have authority to retroactively impose new obligations under the Act on pre-existing situations.

18. Rogers also disagreed that identical demographics or inclusion in the same theme package is evidence of comparability between services, arguing that the allegation of dissimilar treatment is inaccurate. It submitted that repackaging OUTtv was a necessary business decision prompted by OUTtv Network's avoidance of meaningful negotiations, adding that it offered to include OUTtv in a new pre-assembled package, contingent on negotiating a commercially reasonable wholesale rate.

The Commission's approach to dealing with undue preference complaints

19. When the Commission examines a complaint alleging an undue preference or an undue disadvantage, it must first determine whether there is a preference or disadvantage, generally defined as dissimilar treatment of comparable entities.³ The threshold to establish a preference or disadvantage is relatively low; however, once met, the Commission must determine whether that preference or disadvantage is undue.⁴

20. This involves the Commission considering whether the preference or disadvantage has had, or is likely to have, a material adverse impact on the complainant or on any other person, as well as any impact the preference or disadvantage has had, or is likely to have, on the achievement of the objectives set out in the Act.

³ In Broadcasting Decision 2019-427, the Commission stated that the term "comparable" should not be strictly defined, as its meaning depends on the context of a dispute and is best assessed on a case-by-case basis.

⁴ The burden of establishing whether that preference or disadvantage is not undue rests with the person giving the preference or disadvantage.

Issues

21. After examining the record for this application, the Commission considers that it must address the following issues:

- Has Rogers breached the standstill rule?
- Has Rogers given a preference to the other services in the relevant theme packages or subjected OUTtv to a disadvantage?
- If so, is the preference or disadvantage undue?
- How do OUTtv Network and Rogers resolve the negotiating impasse?

Has Rogers breached the standstill rule?

Positions of parties

22. OUTtv Network argued that Rogers breached the standstill rule set out in section 15.01 of the BDU Regulations by repackaging OUTtv.

23. OUTtv Network noted that, under Rogers' condition of service 6, established in Broadcasting Decision 2024-133, any affiliation agreement with an independent programming service that is not concluded within 90 days of the initiation of negotiations must be automatically referred to the Commission for dispute resolution, initiating the standstill provision. OUTtv Network stated that since negotiations to renew its affiliation agreement with Rogers had been ongoing before Broadcasting Decision 2024-133, which came into effect on 18 June 2024, the 90-day period expired on 16 September 2024, initiating the standstill provision and prohibiting Rogers from changing OUTtv's packaging without its consent.

24. Rogers opposed OUTtv Network's claim that the December 2024 repackaging breached the standstill rule. It argued the rule was not in effect at the time because OUTtv Network had not yet served Rogers with the required written notice of the dispute until it filed the undue preference application on 5 March 2025, which is the step that initiates the standstill under subsection 15.01(2) of the BDU Regulations.

25. Rogers also disputed OUTtv Network's view that the standstill was automatically initiated, as condition of service 6(b) came into force after negotiations began and applies only to prospective negotiations initiated after. It argued that the Commission does not have retroactive authority under the Act to impose new obligations on pre-existing situations.

26. According to OUTtv Network, Rogers' claim that condition of service 6 is being applied retroactively is unfounded. It argued that retroactive application would only occur if the repackaging pre-dated 18 June 2024, which in this case it did not. OUTtv was repackaged after the 90-day period had elapsed.

Commission's decision

27. The standstill rule under section 15.01 of the BDU Regulations requires that during a dispute, a BDU continue distributing a programming service at the same rates and according to the same terms and conditions it did before the dispute until an agreement is reached or the Commission issues a decision. This provision aims to preserve the status quo during negotiations and to prevent subscribers from losing services. While the standstill rule also helps to provide fair negotiations between programming undertakings and distribution undertakings, it is not intended to protect or defend the interests of either party.
28. Typically, in order to initiate the standstill, parties are required to send a referral to the Commission by filing a notice of dispute or undue preference application. However, the present situation constitutes an exception to that general rule.
29. In Broadcasting Decision 2022-76, the Commission determined that Rogers' obligations in respect of the standstill rule should be expanded to better protect independent services from retaliatory or punitive practices. As a result, Rogers has been subject to the following condition of service, established in Broadcasting Decision 2024-133, which came into effect on 18 June 2024:
 6. The licensee shall ensure that:
 - a) in any dispute with an independent programming service, the standstill rule will be extended to all of the services belonging to that ownership group; and
 - b) if an affiliation agreement is not concluded within 90 days of the initiation of a negotiation with an independent programming service or services, the matter will be automatically referred to the Commission for dispute resolution.
30. The condition of service also states, "For greater certainty, the Commission notes that this condition will trigger the application of the standstill rule set out in section 15.01 of the [BDU Regulations]."
31. The Commission notes that the affiliation agreement between OUTtv Network and Rogers has expired and that the parties had been in negotiations for some time before the condition of service indicated above came into effect.
32. The Commission also notes that condition of service 6 above is relevant in this case because an affiliation agreement had not been reached by Rogers and OUTtv Network when it published Broadcasting Decision 2024-133. Although the Commission cannot retroactively apply this condition of service to actions before 18 June 2024, it can apply it to ongoing negotiations on a prospective basis. Therefore, if Rogers was in negotiations with a programming undertaking on 18 June 2024, then those negotiations can be deemed to have been initiated on that date for purposes of the condition of service. Furthermore, if an affiliation agreement was not concluded by 18 September 2024, that matter would

be automatically referred to the Commission for dispute resolution and the standstill would be initiated.

33. Rogers indicated in its response to the complaint that it repackaged OUTtv from the Premier package in December 2024 given OUTtv Network's refusal to negotiate a new wholesale rate. Therefore, the Commission finds that Rogers changed its packaging terms while the standstill was in place.
34. The Commission notes that Rogers' decision to move OUTtv from the Premier package to two lower penetration theme packages, Variety and Lifestyle & Entertainment, altered the terms and conditions of OUTtv's existing distribution. As such, the Commission is of the view that Rogers' actions contravened the standstill rule in section 15.01 of the BDU Regulations for having removed OUTtv from the Premier package while the parties were engaged in a dispute.
35. As such, the Commission directs Rogers to restore OUTtv to the Premier package, provided that such placement is more beneficial to OUTtv than its current distribution in the Variety and Lifestyle & Entertainment theme packages, until the dispute is resolved. The Commission will consider the dispute resolved when an agreement settling the dispute is reached by the concerned undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.

Has Rogers given a preference to the other services in the relevant theme packages or subjected OUTtv to a disadvantage?

What are the comparable entities for the purpose of the current complaint?

Positions of parties

36. OUTtv Network submitted that while its unique mandate makes it difficult to identify true comparators, its treatment by Rogers is different to all other discretionary services in the relevant theme packages, which are all distributed in higher penetration general interest packages.⁵ According to OUTtv Network, Rogers acknowledged that OUTtv could and should be distributed in a pre-assembled general interest package, but that it has excluded OUTtv from all such packages.
37. Rogers argued that undue preference rules are not meant to guarantee distribution for niche services, rejecting the claim that the 38 other services in its Variety and Lifestyle & Entertainment theme packages are valid comparators simply because they are included in the same theme packages. Rogers added that it cannot be expected to disprove undue preference or disadvantage without OUTtv Network first providing substantive analysis to establish comparability.

⁵ Comparative carriage data for the Popular, Ultimate TV, Variety, and Lifestyle & Entertainment packages, current as of 14 April 2025.

Commission's decision

38. While OUTtv is unique in its focus to serve 2SLGBTQI+ communities in Canada and its must-offer status, it is packaged alongside 38 other discretionary services in Rogers' Variety and Lifestyle & Entertainment theme packages.
39. The Commission acknowledges Rogers' view that inclusion in the same theme package does not automatically establish comparability. However, the Commission is of the view that OUTtv must be comparable in some way to the other services in these packages for Rogers to have included it.
40. Further, OUTtv Network has shown more than thematic association by identifying consistent treatment across all other services in these packages. Specifically, all 38 services, apart from OUTtv, are included in at least one pre-assembled general interest package, such as Popular TV or Ultimate TV. This contrast provides a meaningful basis for comparison.
41. Accordingly, since Rogers has demonstrated that it considers the services in the Variety and Lifestyle & Entertainment theme packages to be sufficiently comparable to include OUTtv in those packages, the Commission is of the view that the services in the theme packages that include OUTtv are the appropriate comparators for the purposes of the undue preference analysis.

Has Rogers given a preference to other services or subjected OUTtv to a disadvantage?

Position of parties

42. OUTtv Network indicated that because OUTtv is the only service out of 38 in the Variety and Lifestyle & Entertainment theme packages that is excluded from either the Popular TV or Ultimate TV packages, this represents dissimilar treatment which subjects OUTtv to a disadvantage. OUTtv Network added that it only learned of this change from Rogers in January 2025 after seeing its subscribers dropping significantly.
43. In OUTtv Network's view, Rogers' willingness to include OUTtv in the Ultimate TV package under a renewed agreement confirms that the Ultimate TV package is suited to OUTtv's theme, programming, and language. Given the significantly higher penetration of the Ultimate TV package compared to the theme packages, OUTtv Network concludes that it is the package best suited for its carriage under paragraph 9 of the Wholesale Code.⁶ Further, this would be consistent with the Commission's stated expectations that

⁶ The Commission's Wholesale Code, set out in the appendix to Broadcasting Regulatory Policy 2015-438, requires that, unless otherwise negotiated, an independent service shall be placed in the best available pre-assembled or theme package consistent with its theme, programming, and language.

BDUs include OUTtv in packages with the highest possible penetration and that they treat OUTtv fairly.⁷

44. Rogers argued that there is no legal or regulatory basis for a finding of undue disadvantage in this case or to compel distribution of the service in specific pre-assembled packages at a wholesale rate which has since expired. Rogers submitted that it regularly adjusts TV packages to manage costs and to offer customers better choice and value. It further stated that the repackaging decision was necessary as OUTtv Network deliberately avoided meaningful negotiations for over two years in order to maintain what Rogers considers a disproportionately high and commercially unsustainable wholesale rate. It added that it offered to include OUTtv in the Ultimate TV package, contingent on negotiating a commercially reasonable wholesale rate that is comparable to other services.
45. Rogers also disputed OUTtv Network's interpretation that it breached paragraph 9 of the Wholesale Code, which it argued gives BDUs the discretion to choose between the best available pre-assembled or theme package. Rogers asserted that it has met this requirement by offering OUTtv in what it considers the two best available theme packages suited to its genre.
46. OUTtv Network opposed Rogers' interpretation, arguing that relegating OUTtv to lower-penetration theme packages cannot be deemed "best available" under any reasonable reading of paragraph 9 of the Wholesale Code, and that Rogers' justification for the dissimilar treatment of OUTtv is inadequate.
47. OUTtv Network also submitted that it was not notified of the packaging changes until after they had been made. It noted that, in Broadcasting Public Notice 2005-35, the Commission established that BDUs should provide 60 days' advance notice detailing the date of the change, the new channel number, full information on the new package (including its name, expected penetration rate, and retail price), and any changes to the wholesale rate or its calculation method.⁸
48. Rogers disputed OUTtv Network's position, arguing that the expectation has no legal bearing and was never incorporated into the Commission's Code of conduct for commercial arrangements and interactions,⁹ the Wholesale Code, or the BDU Regulations. It submitted that these conditions do not apply to the present situation, as the removal of OUTtv from the Premier package did not involve a new channel number, a change from one package to another, or any change to the wholesale rate or calculation method.

⁷ In the Distribution Order, "fair" treatment of the service means avoiding significant packaging changes, including withdrawal of the service from packages; avoiding the imposition of unreasonable rates and punitive or retaliatory measures against the service; and avoiding substantial reductions to wholesale payments.

⁸ See paragraphs 17-20 of Broadcasting Public Notice 2005-35.

⁹ See appendix 1 of Broadcasting Regulatory Policy 2011-601.

Commission's decision

49. The Commission considers that Rogers did not breach paragraph 9 of the Wholesale Code, which specifies that independent programming services must be placed in the best available pre-assembled or theme package. The Commission is of the view that BDUs generally have the discretion to determine the most appropriate package for a service that is consistent with this requirement.
50. The Commission also considers that since Rogers' repackaging of OUTtv did not result in a change to the channel number, the wholesale rate, or the rate calculation method, Rogers did not breach the specific expectations outlined in Broadcasting Public Notice 2005-35.
51. However, given that Rogers includes all comparable services, with the exception of OUTtv, in the higher penetration Ultimate TV package or the Variety and Lifestyle & Entertainment theme packages, the Commission considers that Rogers' repackaging of OUTtv constitutes sufficiently dissimilar treatment of comparable services and therefore did subject the service to a disadvantage.
52. In light of the above, the Commission finds that Rogers subjected OUTtv to a disadvantage by removing it from the Premier package and not including it in another pre-assembled, high-penetration package in the same way that it did the other services in the theme packages to which it was moved.

Is any preference or disadvantage undue?

Position of parties

53. OUTtv Network submitted that the repackaging of OUTtv severely undermined its viability, either by significantly reducing its distribution or by creating conditions that could force the service out of operation. It argued that the repackaging represents a breach of the Commission's expectations and has resulted in a substantial reduction in wholesale payments.
54. OUTtv Network further indicated that subscriber reports demonstrate the service's low penetration. It submitted that Rogers' own data confirms that its viewership spiked during free preview periods with broad availability, demonstrating that low audience numbers result from limited reach rather than lack of interest. Additionally, OUTtv Network emphasized its important role in the broadcasting system despite its smaller audience shares.
55. Rogers submitted that the repackaging did not represent a significant change to OUTtv's distribution and that comparable services receive only a fraction of the per-subscriber rate that Rogers pays for OUTtv. It argued that OUTtv Network's refusal to negotiate a new rate suitable for broader distribution made it unsustainable to keep OUTtv in the Premier package.

Commission's decision

56. In assessing whether the preference or disadvantage is undue, the Commission must determine whether the treatment had, or is likely to have, an adverse impact on OUTtv Network and on the achievement of the objectives of the Act. In this case, the Commission finds that the removal of OUTtv from the Premier package and its absence from the Ultimate TV package resulted in a sharp decline in subscribers and a substantial reduction in revenues.
57. The Commission also finds that the repackaging of OUTtv substantially reduced its audience reach and therefore undermined its ability to fulfill its programming mandate. The Commission recognizes OUTtv's content as making an important contribution to diversity in the Canadian broadcasting system. In particular, the Commission notes OUTtv's contribution to ensuring the representation of 2SLGBTQI+ communities and to fulfilling several objectives of the Act.¹⁰
58. The Commission notes that there is no regulatory obligation to provide advance notice of repackaging decisions and considers that the failure to provide advance notice of the December 2024 repackaging of OUTtv does not constitute a breach of Rogers' obligations.
59. Nevertheless, given the significant impacts resulting from the removal of OUTtv from the Premier package, and given the parties' negotiations at the time, the Commission is of the view that OUTtv Network could reasonably have expected to be informed of such a change to the packaging of OUTtv. The Commission considers that the absence of prior notice undermined OUTtv Network's ability to prepare for or mitigate the adverse consequences of the repackaging and should be a factor in its decision regarding whether OUTtv was subjected to a disadvantage by Rogers.
60. As the Commission notes above, while Rogers' repackaging of OUTtv did not contravene the Wholesale Code, it still conferred an undue disadvantage on OUTtv. In Broadcasting Decision 2022-223, the Commission recognized OUTtv's contribution to and importance in the Canadian broadcasting system. In that decision, the Commission also set an expectation that, in order to facilitate OUTtv's distribution to the greatest number of subscribers, OUTtv be placed in pre-assembled or thematic packages that are consistent with its theme, programming, and language, and with the highest penetration rates. As such, the reduction in access to OUTtv that resulted from its repackaging is inconsistent with this expectation.
61. The Commission therefore considers that Rogers' actions not only resulted in material harm to OUTtv Network but were also inconsistent with the Commission's rationale for the must-offer status granted to OUTtv. Furthermore, the Commission considers that the repackaging of OUTtv conflicts with the objectives of the Act, including the objectives to

¹⁰ See subparagraphs 3(1)(d)(ii) and (iii), and 3(1)(i)(iv) of the Act.

support a diversity of voices, to support Canadian programming, and to foster equitable access for underserved communities.

62. In light of the above, the Commission finds that Rogers has subjected OUTtv to an undue disadvantage.

How do OUTtv Network and Rogers resolve the negotiating impasse?

63. While the parties are at an impasse as to the appropriate rates for distribution of OUTtv, the Commission notes that there is a path forward since Rogers proposed to include OUTtv in the Ultimate TV package subject to the successful negotiation of a new commercially sustainable wholesale rate.

64. The Commission is of the view that Rogers' proposal to include OUTtv in the higher penetration Ultimate TV package would resolve one of the primary issues of OUTtv Network's undue preference complaint.

65. However, the Commission notes that OUTtv's wholesale rate represents a significantly disproportionate percentage of the monthly retail rate for the Variety theme package. OUTtv's current wholesale rate also represents a disproportionately high percentage of the Lifestyle & Entertainment package's monthly retail rate and a far greater proportion of its total wholesale cost.

66. The Commission considers it unlikely that the parties will be able to agree on a mutually acceptable wholesale rate, given the duration of the current impasse and that the parties have participated in multiple unsuccessful staff-assisted mediation sessions.

67. As such, the Commission is of the view that the most effective way to facilitate the resolution of the dispute is to use final offer arbitration (FOA).¹¹

Conclusion

68. In light of all of the above, the Commission finds, by majority decision, that Rogers has breached the standstill rule and subjected OUTtv to an undue disadvantage.

69. The Commission **directs** Rogers Communications Canada Inc. to restore OUTtv to the Premier package, provided that such a placement is more beneficial to OUTtv than its current distribution in the Variety and Lifestyle & Entertainment theme packages. That packaging must remain in effect until the dispute is resolved, either when the parties reach an agreement or, if no such agreement is reached, when the Commission renders a decision that resolves the matter.

¹¹ FOA is an alternative dispute resolution tool reserved exclusively for disputes that are monetary, and results in a binding decision. Both parties to the dispute submit offers to the Commission, and a Commission panel acts as arbitrator and chooses between the final offers. In rare cases, the panel may determine that neither offer is in the public interest and reject both.

70. The Commission further **directs** OUTtv Network Inc. and Rogers Communications Canada Inc. to file for FOA under the Commission's dispute resolution framework, and to do so **within 30 days of the date of this decision**. The parties may continue to use the Commission's staff-assisted mediation services during the FOA process.
71. The Commission is currently examining the distribution of independent services and programs of exceptional importance as part of its work to modernize Canada's broadcasting framework. As a part of this work, the Commission launched Broadcasting Notice of Consultation 2025-2, which is examining rules to ensure a fair and competitive marketplace for small, medium, and large programming, distribution, and online services. This broader policy framework will help ensure the sustainability and growth of Canada's broadcasting system.

Secretary General

Related documents

- *The Path Forward – Working towards a sustainable Canadian broadcasting system*, Broadcasting Notice of Consultation CRTC 2025-2, 9 January 2025, as amended by Broadcasting Notices of Consultation CRTC 2025-2-1, 24 March 2025; 2025-2-2, 31 March 2025; 2025-2-3, 23 July 2025; and 2025-2-4, 1 August 2025
- *Fulfilment of conditions of approval set out in Shaw Communications Inc. – Change of ownership and effective control*, Broadcasting Decision CRTC 2024-133, 18 June 2024
- *OUTtv – Licence renewal, and granting of must-offer status in English-language markets*, Broadcasting Decision CRTC 2022-223 and Broadcasting Order CRTC 2022-224, 18 August 2022
- *Complaint by Quebecor, on behalf of TVA, against Bell, represented by BCE, alleging undue preference regarding the packaging of TVA Sports*, Broadcasting Decision CRTC 2019-427, 19 December 2019
- *Complaint against Bell Canada concerning the distribution of the Category B service Avis de Recherche*, Broadcasting Decision CRTC 2016-38, 4 February 2016
- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011, as amended by *Regulatory framework relating to vertical integration – Correction*, Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011
- *Good commercial practices*, Broadcasting Public Notice CRTC 2005-35, 18 April 2005

Dissenting opinion of Commissioners Stéphanie Paquette, Nirmala Naidoo, and Ellen C. Desmond, K.C.

Introduction

1. As the result of a complaint filed by OUTtv Network Inc. (OUTtv Network), which operates the English-language discretionary service OUTtv, the Commission must determine whether (i) Rogers Communications Inc. (Rogers) violated the standstill rule under section 15.01 of the *Broadcasting Distribution Regulations* (BDU Regulations) and whether (ii) Rogers' actions constituted an undue preference in favour of other programming services and/or an undue disadvantage to OUTtv under section 9 of the BDU Regulations.

Background

2. OUTtv has historically been carried in Rogers' highly penetrated Premier package, pursuant to an agreement that is now expired but currently under renegotiation between the parties.
3. In September of 2023, Rogers ceased marketing its pre-assembled Premier package and replaced it with a new pre-assembled package, namely Ultimate TV. OUTtv was not placed in the new Ultimate TV package, even though all other services (previously in the Premier package) had been carried forward. Instead, OUTtv was placed in two other theme packages. The expired wholesale rate previously negotiated has continued in place.

Did Rogers violate the standstill rule?

4. By unanimous agreement, the Commission has determined that Rogers did in fact violate the standstill rule under section 15.01 of the BDU Regulations by modifying the distribution of OUTtv during the negotiation process, which was still ongoing.

Did Rogers' actions constitute an undue preference in favour of other programming services and/or an undue disadvantage to OUTtv?

5. However, for the reasons set out below, we respectfully disagree with the majority's finding that Rogers' actions necessarily constituted an undue disadvantage relative to other programming services under section 9 of the BDU Regulations.

Lack of evidence

6. To determine whether Rogers has subjected OUTtv to an undue preference or disadvantage, the Commission generally considers whether there has been dissimilar treatment of comparable services. In Broadcasting Decision 2019-427, the Commission stated that the term "comparable" should not be strictly defined, as its meaning depends on the context of a dispute and is best assessed on a case-by-case basis. In effect, when looking at each dispute or allegation, the Commission must conduct a careful analysis, taking into consideration a range of factors.

7. OUTtv is a very unique service whose content and purpose is to serve 2SLGBTQI+ communities in Canada. Diversity of voices and programming that promotes inclusivity is crucial to a broadcasting system that is representative of and benefits all Canadians and upholds the objectives of the *Broadcasting Act*. The Commission takes any action that interferes with services such as OUTtv very seriously. To ensure this practice is on solid ground, the Commission must thoroughly consider each application in an in-depth manner to ensure this principle is respected.
8. In this instance, and at first glance, it may appear that Rogers was treating OUTtv differently by not granting the service the same access to higher penetration packages as all other services that had been in the Premier package. This change in packaging did, in turn, lead to a difference in OUTtv's penetration rate. Moreover, OUTtv has been benefiting from a "must-offer" status since 2022¹ which is an important consideration and requires Rogers to respect the regulatory requirements associated with this status.
9. However, if the Commission were to stop its analysis at this stage of the inquiry, this *prima facie* determination would mean that a broadcasting distribution undertaking (BDU) could be subjected to an undue preference or disadvantage complaint each time it reassembles service packages.
10. With the greatest respect to our colleagues, the Commission has an obligation to conduct a more thorough analysis to determine whether Rogers' actions reached the level of conferring a "preference" or "disadvantage" (which warrants targeted intervention) or were based on valid commercial reasons (which does not). This analysis cannot be limited to whether there has been a change in the packaging itself. Inclusion in the same theme package is not, in itself, evidence of comparability between services. A contextual analysis must include other factors, including contractual rights and obligations of the parties, the fair market value of the service, the cost of offering the service, the market demand, customer choice, and the business imperatives.
11. A BDU's decision to repackage services which leads to a change in penetration rates for a particular service, does not necessarily mean there has been a breach of the BDU Regulations. To determine whether Rogers had treated OUTtv fairly and in accordance with its obligations, all aspects of the commercial relationship between the parties had to be considered, in order to make an informed decision. In our view, a substantial analysis was not conducted in this instance.
12. Our colleagues have determined that while the parties are at an impasse, there is a path forward since Rogers has proposed to include OUTtv in the Ultimate TV package and this, in effect, would resolve one of the primary issues in this dispute. In their view, only the wholesale rate now needs to be resolved. However, this conclusion increases, without solid ground, Rogers' carriage requirements and interferes directly with the BDU's ability to build and adapt its offer to the market demand. A more contextual approach is required.

¹ The must offer status was granted by the Commission in Broadcasting Decision 2022-223 and Broadcasting Order 2022-224.

Conclusion

13. In this instance, the evidence provided by OUTtv Network falls short of allowing the Commission to determine whether OUTtv has been treated unfairly and dissimilar to other like services and a thorough contextual analysis has not been performed. As such, we are unable to conclude that Rogers has subjected OUTtv to an undue preference or disadvantage.
14. Moreover, concluding an undue preference or disadvantage exists, based primarily on the fact that a BDU repackaged a service, sets a dangerous industry-wide precedent by interfering in the ability of the BDUs to conduct their business affairs and by interfering with their ability to optimize their programming offerings to customers. A finding of undue preference or disadvantage should be approached with caution. Regulatory intervention should be predictable and objective in an evolving broadcasting landscape.