



Broadcasting Decision CRTC 2006-658

Ottawa, 1 December 2006

Complaint by Bell Canada against Rogers SportsNet Inc.

*The Commission, following its consideration of a request by Bell Canada for dispute resolution, **directs** Rogers SportsNet Inc. (RSI), licensee of the specialty service SportsNet, to grant Bell Canada, in the latter's capacity as licensee of a cable broadcasting distribution undertaking (BDU) serving the Greater Toronto Area (GTA), terms with respect to the distribution of SportsNet that are no less favourable than those accorded the Class 1 cable BDUs operated in the GTA by RSI's corporate affiliate, Rogers Cable Communications Inc. (RCCI).*

The Commission notes that this requirement would be met if RSI were either to permit Bell Canada to distribute SportsNet as part of the basic service where RCCI does so, or to reach an agreement with Bell Canada regarding such other distribution arrangements as the parties may negotiate.

The parties

1. Bell Canada is controlled by BCE Inc. (BCE). Services offered by BCE companies include telephony, Internet access and content, satellite and cable broadcasting distribution, and print and E-commerce services. Bell Canada is, among other things, the licensee of a digital subscriber line (DSL) cable broadcasting distribution undertaking (BDU) serving the Greater Toronto Area (GTA).
2. Rogers SportsNet Inc. (RSI) is the licensee of SportsNet, the national, English-language specialty television programming service devoted to the provision of sports programming of regional interest that is packaged and distributed across Canada on four distinct regional feeds. RSI is owned, through wholly-owned subsidiaries, by Rogers Communications Inc., a company engaged in various communications businesses, including, among many other things, television broadcasting through Rogers Media Inc. and its wholly-owned subsidiary Rogers Broadcasting Limited, and cable distribution through Rogers Cable Inc. and its wholly-owned subsidiary, Rogers Cable Communications Inc. (RCCI).

The complaint

3. On 27 September 2006, Bell Canada requested dispute resolution wherein the relief sought was an expedited decision from the Commission that would require RSI to grant Bell Canada's Class 1 cable BDU serving the GTA access to SportsNet on terms that are no less favourable than those accorded certain Class 1 cable BDUs operated by RCCI in this market. This would include, more particularly, terms that would accord Bell Canada pricing and packaging parity with RCCI with respect to the distribution of SportsNet.

4. Bell Canada stated its intention to launch its DSL cable service in Toronto in mid-November 2006. According to Bell Canada, while most of RCCI's cable BDUs in the GTA distribute SportsNet on the basic service, RSI refused to allow Bell Canada to do likewise. It argued that, in order to have a fully competitive service, and in light of RSI's refusal to allow it to distribute SportsNet as part of the basic service, the Commission should issue an order requiring RSI to permit Bell Canada to distribute SportsNet on the basic service throughout the GTA. Bell Canada stated that it would readily agree to a condition that would require the removal of SportsNet from Bell Canada's basic service when there are no remaining RCCI BDUs in the GTA that distribute SportsNet as part of the basic service.

Positions of the parties

Bell Canada (as set out in its initial complaint dated 27 September 2006)

5. Bell Canada argued that RSI's position was in direct conflict with the following Commission determination set out in *Ownership of analog discretionary services by cable undertakings*, Public Notice CRTC 2001-66, 7 June 2001 (Public Notice 2001-66) and in *Ownership of analog discretionary services by cable undertakings – amendment to the Commission's policy*, Public Notice CRTC 2001-66-1, 24 August 2001 (Public Notice 2001-66-1):

Unaffiliated undertakings should be accorded terms and conditions that are no less favourable than those accorded to affiliated undertakings, including terms related to pricing, packaging, promotion and marketing/promotional costs.

RSI (as set out in its response dated 11 October 2006)

6. RSI submitted that the above-noted principle was a mechanism designed to protect unaffiliated programming undertakings, and not BDUs.
7. RSI also argued that the terms under which SportsNet was distributed by RCCI and other cable operators in the GTA varied from system to system, and that, while a majority of GTA cable subscribers receive SportsNet as part of the basic service, a significant minority receive the service as part of a discretionary tier. RSI noted, as an example, the fact that, at the time of SportsNet's launch, the national sports specialty service known as TSN¹ was already being distributed by Shaw Cable Systems Limited (Shaw) on the basic service of its cable BDUs in the GTA. Accordingly, Shaw placed SportsNet on a discretionary tier. RSI noted that the carriage of TSN and SportsNet on these undertakings has remained unchanged, even though RCCI acquired ownership of the undertakings from Shaw in 2000.

¹ TSN is operated by The Sports Network Inc., a company in which BCE has an indirect minority ownership interest.

8. RSI added that the carriage terms accorded SportsNet by RCCI on its other GTA BDUs had been negotiated in 1998 by the original managing shareholder of the service, CTV Ltd. According to RSI, a delay in the launch of SportsNet had compelled CTV Ltd. to consider options other than distribution of that service exclusively as a discretionary cable service, and that no subsequent change had been made to the distribution of SportsNet by RCCI on those GTA systems. RSI argued that the carriage of the service on basic was only a consequence of the circumstances present at the time SportsNet was launched, and in no way represented an undue preference or a violation of the principle contained in Public Notice 2001-66, reiterated in Public Notice 2001-66-1, and quoted again above.
9. RSI claimed that Bell Canada's request for an order ignored the reality of the competition that exists between SportsNet and TSN. RSI observed that SportsNet must compete for viewers, advertising revenues and rights to sports programming with TSN. It added that TSN, like SportsNet, enjoys distribution on a modified dual status basis, but has a regulated rate when distributed on the basic service that is higher than that of SportsNet.
10. RSI also pointed out that, as a modified dual status service, SportsNet must be distributed by BDUs as part of a discretionary tier unless RSI agrees to distribution of the service on basic. RSI submitted that it thus has the ability to refuse a request for basic carriage from a BDU. It contended that, if the Commission upheld Bell Canada's complaint and granted the relief sought, the Commission would effectively be changing the status of SportsNet to that of a dual status service.
11. For all the above reasons, RSI submitted that Bell Canada's request for basic cable carriage should be dismissed.

Bell Canada (as set out in its reply of 25 October 2006 to RSI's comments)

12. In a 25 October 2006 reply to RSI's comments, Bell Canada contended that RSI was mistaken in its belief that the principles established in Public Notices 2001-66 and 2001-66-1 were designed to protect unaffiliated programming undertakings, and not competing BDUs. Bell Canada noted that the Commission, in its 2001 policy notices, used the term "undertakings". It argued that the term clearly applies to those operated by both programmers and distributors.
13. Bell Canada also dismissed as irrelevant and without merit RSI's argument that, because the agreements between RSI and GTA BDU distributors pertaining to the distribution of SportsNet pre-date the Commission's policy determinations announced in Public Notices 2001-66 and 2001-66-1, distribution of that service is not covered by the principles set out in those notices. It stated that it was not aware of any agreement between a programmer and a distributor having a term as long as eight years. Bell Canada argued that SportsNet remains on the basic service of RCCI's Toronto BDUs because RCCI and its corporate affiliate, RSI, have agreed to such distribution. It suggested that RSI's refusal to accede to Bell Canada's request is motivated by RSI's financial self-interest and its desire to secure a competitive advantage for RCCI.

14. Bell Canada also submitted that the geographic territory to be served by its DSL cable BDU in the GTA is directly comparable to the area cumulatively served by RCCI's cable BDUs in the GTA. It noted that the geographic areas in which it planned to first offer service included those in which RCCI offered SportsNet as part of the basic service. Bell Canada thus argued that its BDU should receive treatment equal to that given RCCI's BDUs with respect to the carriage of SportsNet. Bell Canada acknowledged that, as the areas served by its cable BDU expand, it will reach those parts of the GTA where SportsNet is not carried on basic. Bell Canada, however, contended that it would not be practical to launch a new Class 1 BDU in the GTA with channel line ups that differed from one part of the GTA to another. Bell Canada further argued that, for a new competitor seeking to overcome the advantage of a well entrenched incumbent, simplicity and consistency of message are essential to defining the product and its value.
15. With respect to RSI's argument that TSN and SportsNet are competing sports specialty services, Bell Canada submitted that this is based on a false premise, as SportsNet was licensed as a regional sports specialty service while TSN was licensed as a national sports service.
16. Bell Canada submitted that SportsNet's modified dual status would not be compromised by its carriage on the basic service of Bell Canada's DSL BDU. Bell Canada noted in this regard that it had requested the Commission to resolve this dispute in the specific context of its Class 1 BDU in the GTA, where it will compete directly with RCCI's BDUs. While it emphasized that its request was not a back door tactic to gain similar carriage arrangements for its DTH licensee or elsewhere in its Class 1 service areas, it also insisted that any claim a service might have to the attributes of a dual status service cannot be made in isolation from the circumstances and the CRTC policies that apply. According to Bell Canada, denying it the opportunity to distribute SportsNet on basic would disadvantage Bell Canada in the GTA to the advantage of the dominant competitor, RCCI.

The Commission's analysis and determination

17. Bell Canada and RSI have presented conflicting interpretations of the policy determinations announced by the Commission in Public Notices 2001-66 and 2001-66-1. In those notices, the Commission stated that it had decided to change its policy with respect to ownership of analog pay and specialty programming services by cable BDUs by permitting such BDUs and their related entities to purchase interests, including controlling interests, in Canadian analog pay and specialty programming services. While it enunciated a number of principles in its 2001 notices, the Commission considers the following two principles as being relevant to this particular dispute:
 - All specialty and pay services should be supplied and distributed on fair and equitable terms, including terms related to pricing, packaging, promotion and marketing/promotional costs.

- Unaffiliated undertakings should be accorded terms and conditions that are no less favourable than those accorded to affiliated undertakings, including terms related to pricing, packaging, promotion and marketing/promotional costs.

18. In the Commission's view, a plain reading of the above principles does not suggest that their application is limited to programming undertakings. The Commission notes, in particular, the inclusion of the word "supplied" in the first of the principles, which inherently speaks to the terms under which specialty and pay services are supplied to distributors. Accordingly, the Commission considers that RSI's argument that the principles set out in Public Notices 2001-66 and 2001-66-1 are not safeguards for BDUs as well as programming services is incorrect.
19. With respect to RSI's references to the circumstances under which terms had originally been struck for the cable carriage of SportsNet in the GTA, including such matters as whether or not the carriage terms for SportsNet had been negotiated under the management of CTV Ltd., what the motives underlying those arrangements may have been, and whether or not such terms have been revisited since the launch of SportsNet in 1998 or since the time Rogers acquired ownership of that service in 2000, the Commission does not consider these to be matters of relevance in the present dispute.
20. The Commission notes RSI's argument that Bell Canada's request for an order ignored the reality of the competition that exists between SportsNet and TSN, and its claim that, were the Commission to grant the order requested by Bell Canada, RSI might be obliged to abandon its modified dual status and accede to distribution of SportsNet on the basic service.
21. While the Commission recognizes that there may be a degree of competition between the two services, it does not view this as relevant to the current dispute. As for the implications of the order requested by Bell Canada for SportsNet's existing modified dual status, the Commission considers that the principles it enunciated in Public Notices 2001-66 and 2001-66-1 are for the purpose of ensuring fair treatment of unaffiliated broadcasting undertakings, and should be viewed as limiting the rights that generally accompany modified dual status to the extent necessary to ensure such treatment.
22. The Commission notes in this regard that the *Broadcasting Act* states under section 3(1)(t)(iii) that distribution undertakings: "should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services." The principles set out in Public Notices 2001-66 and 2001-66-1 are consistent with this objective.
23. With regard to Bell Canada's request for an order requiring RSI to allow it to distribute SportsNet as part of the basic service throughout the GTA, the Commission is not persuaded by Bell Canada's argument that it would not be practical for it to launch a service with different channel line-ups in different parts of the city, and that it needs to have SportsNet on the basic service (regardless of RCCI's channel line-up) in order to

“overcome the advantage of a well entrenched incumbent, simplicity and consistency of message are essential to defining the product and value proposition.” While the Commission finds it understandable that Bell Canada would prefer not to face the marketing difficulty of launching its DSL BDU with a channel line-up that would differ from one part of the GTA to another, it notes that this could be avoided by, for example, distributing SportsNet throughout the licensed area on a discretionary basis only.

24. By requiring RSI to permit Bell Canada to distribute SportsNet on the basic service of its DSL BDU throughout the GTA, the Commission would, in effect, be according Bell Canada more favourable terms than those currently enjoyed by RCCI. The Commission notes in this regard that, while SportsNet is on the basic service of RCCI’s BDUs in Toronto, Downsview and Mississauga, there are many other portions of the GTA that are served by RCCI, and that encompass a large area, where SportsNet is distributed on a discretionary basis. In the Commission’s view, for reasons of competitive equity, RSI should be required to permit Bell Canada to distribute SportsNet on the basic service in the same areas of the GTA that RCCI does, but not outside of those areas.

Conclusion

25. The Commission, for the reasons set out above, **directs** RSI to grant Bell Canada, in the latter’s capacity as licensee of a DSL cable BDU serving the GTA, terms with respect to the distribution of SportsNet that are no less favourable than those accorded the Class 1 cable BDUs operated in the GTA by RCCI.
26. The Commission notes that this requirement would be met if RSI were either to permit Bell Canada to distribute SportsNet as part of the basic service where RCCI does so, or to reach an agreement with Bell Canada regarding such other distribution arrangements as the parties may negotiate.

Secretary General

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