



Broadcasting Regulatory Policy CRTC 2013-585

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Route references: 2011-791 and 2011-791-1

Ottawa, 31 October 2013

Provisions governing the timeframes and modalities for the conduct of audits of subscriber information held by broadcasting distribution undertakings

The Commission has modified the provisions governing the conduct of audits of subscriber information held by broadcasting distribution undertakings (BDUs).

The revised audit provisions clarify the manner in which audits are conducted by programming undertakings, thus ensuring a proper verification of the subscriber information held by BDUs. The Commission intends to issue a notice of consultation setting out proposed amendments to section 15.1 of the Broadcasting Distribution Regulations to bring into force the audit provisions set out in the appendix to this regulatory policy.

Introduction

1. General guidelines relating to the auditing of subscriber information held by broadcasting distribution undertakings (BDUs) were announced by the Commission in Broadcasting Public Notice 2005-34. In that public notice, the Commission stated the following:

It is BDUs that compile and hold the subscriber information upon which the payments made to programming services are based, and that are used by the programming services, at least in part, to determine their advertising rates. The accuracy of the BDUs' subscriber information relating to programming services is thus of substantial importance to the financial well-being of these programming services. In the Commission's view, the ability of a pay or specialty service to have an audit conducted, where necessary, to verify the accuracy of such information is fundamental to its business, and is thus essential to its contribution toward the achievement of the objectives of the *Broadcasting Act*.

2. These guidelines have been in place since 2005 but were incorporated in the *Broadcasting Distribution Regulations* (the Regulations) in 2011.¹

¹ See Broadcasting Regulatory Policy 2011-455. Section 15.1 of the Regulations requires a licensed BDU to permit a programming undertaking to conduct an audit of the BDU's record in accordance with the terms prescribed in Broadcasting Public Notice 2005-34.

3. In Broadcasting Regulatory Policy 2011-601, the Commission concluded that additional details relating to the conduct of such audits were required. Accordingly, the Commission called for comments on the development of timeframes and other modalities for the conduct of audits, including whether those modalities should be made generally applicable to all BDUs.² This led to Broadcasting Notice of Consultation 2011-791-1, in which the Commission set out for comment draft provisions governing the timeframes and modalities for the conduct of audits (the proposed audit provisions).
4. As part of this process, the Commission also sought comments on its preliminary view that the audit provisions should apply in all relationships involving a BDU that is vertically integrated.³ Finally, the Commission indicated that it would determine the method by which the audit provisions would be implemented.
5. The Commission received comments from various interveners in response to Broadcasting Notices of Consultation 2011-791 and 2011-791-1. The public record for this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Issues

6. After examining the public record for this proceeding, the Commission considers that the issues it must address relate to the following:
 - the application and scope of the audit provisions, which include the following:
 - the parties subject to the audit provisions;
 - the purpose of the audit provisions;
 - the types of agreements subject to the audit provisions; and
 - the application of the audit provisions to video-on-demand (VOD), digital media and other broadcasting platforms;
 - the selection of the auditor;
 - information that should be provided to the auditor;
 - timelines;
 - group audits;

² See Broadcasting Notice of Consultation 2011-791.

³ As set out in Broadcasting Regulatory Policy 2011-601, "vertical integration" refers to the ownership or control, by one entity, of both audiovisual programming and distribution undertakings, or both audiovisual programming undertakings and production companies.

- the wording of certain audit provisions; and
- the implementation of the audit provisions.

Application and scope of the audit provisions

Parties subject to the audit provisions

7. In Broadcasting Notice of Consultation 2011-791-1, the Commission expressed the preliminary view that the audit provisions should apply in all relationships involving a vertically-integrated BDU. All interveners with the exception of the Canadian Cable Systems Alliance Inc. and Saskatchewan Telecommunications (Sasktel) argued that the audit provisions should apply to all licensed BDUs. The majority of interveners argued that audit safeguards are equally relevant to both vertically-integrated and non vertically-integrated BDUs, and noted that there is no public policy rationale for an asymmetrical application of audit provisions.
8. Shaw Communications Inc. (Shaw) proposed that parties be permitted to waive audit provisions where agreement is mutual. Pelmorex Communications Inc. (Pelmorex) cautioned against making such a change, citing balance of power concerns.
9. Based on the record of the proceeding, the Commission considers that the audit provisions set out in this regulatory policy should apply to all licensed BDUs, both vertically-integrated and non vertically-integrated. In the Commission's view, the conduct of audits is a fundamental part of the commercial agreement between programming undertakings and BDUs as it ensures that programming undertakings receive the correct compensation from BDUs for the programming they distribute. The Commission considers that applying the audit provisions to all licensed BDUs would allow all parties to abide by the same set of rules, which in turn would foster greater clarity and predictability in their commercial relationships.
10. In regard to being permitted to waive the application of the audit provisions, the Commission is concerned that such an exception would disadvantage parties with inferior bargaining power. As explained above, the Commission considers that audit provisions are an important element to the overall commercial relationship between programming undertakings and BDUs and that this relationship is sometimes skewed in favour of the BDU. A broad and unequivocal application of the audit provisions would level the playing field and ensure that programming undertakings continue to have the financial ability to make a meaningful contribution to the achievement of the policy objectives of the *Broadcasting Act*.
11. Accordingly, the Commission has amended section A of the proposed audit provisions to specify that the audit provisions shall apply to both vertically-integrated and non vertically-integrated BDUs. Furthermore, the Commission has not included a provision that would allow parties to waive the audit provisions.

12. Although the prospect of applying audit provisions to exempt BDUs was not expressly raised in the context of this proceeding, the Commission expects that audits of exempt BDUs will be conducted in a manner similar to those of licensed BDUs.

Purpose of the audit provisions

13. Bell Canada (Bell) argued that the wording of section A of the proposed audit provisions is too broad because it specifies that those provisions shall apply “in all relationships” involving a vertically-integrated BDU. It submitted that the scope and purpose of audit provisions were accurately captured in section E of the proposed audit provisions, which stated that the scope of the audit is that of confirming compliance with the affiliation agreement(s) existing between the BDU and the programming undertaking. Bell therefore proposed that section A be amended to read that audit provisions are intended to confirm a BDU’s compliance with the affiliation agreement(s) between the BDU and a programming undertaking.
14. Bragg Communications Inc., carrying on business as Eastlink (Eastlink) submitted that the purpose of the audit is to verify payments under the affiliation agreements, not BDU compliance with an affiliation agreement. Rogers and Shaw submitted that the scope of an audit should be narrow, limited to verifying subscriber numbers and associated revenues.
15. Allarco Entertainment Limited Partnership (Allarco), the Canadian Broadcasting Corporation (CBC), the Independent Broadcast Group (IBG) and Pelmorex argued that the scope of an audit should not be limited to only one financial aspect in affiliation agreements, as there are other provisions in affiliation agreements that relate to a BDU’s payment obligations, such as marketing commitments, promotional and sales campaigns, copyright fee payments, and possibly uplink fee payments.
16. In Broadcasting Public Notice 2005-34, the Commission established that the purpose of the guidelines relating to the conduct of audits was to allow a proper verification of the accuracy of affiliation payments made to programming undertakings by BDUs. In regard to the present proceeding, the Commission’s intent was to add additional details to the existing audit provisions and not to expand its scope beyond that commercial relationship. The Commission determines that the audit provisions should be limited to verifying subscriber numbers and associated revenues as this is reflective of the Commission’s original intent. Accordingly, the Commission has amended section A of the proposed audit provisions to add a reference to the purpose of an audit and, consequently, has removed this reference from section E.

Types of agreements subject to the audit provisions

17. Allarco, the CBC and Pelmorex proposed that the audit provisions should apply even in the absence of a formal affiliation agreement, where other material arrangements exist between BDUs and programming undertakings. MTS Inc., on the other hand, argued that the audit provisions should only apply where there is a signed affiliation agreement.

18. The Commission reminds parties that the requirement imposed by section 15.1 of the Regulations applies in all situations where a licensed BDU pays a wholesale rate to a Canadian programming undertaking, whether or not a formal affiliation agreement is in place. All programming undertakings that receive payment for the distribution of their programming services are entitled to verify the accuracy of payments in accordance with this section. Accordingly, the Commission has clarified sections A and C of the proposed audit provisions to reflect these considerations.

Application of the audit provisions to video-on-demand, digital media and other broadcasting platforms

19. Eastlink proposed that the audit provisions should cover the distribution of programming on all platforms, including the VOD and digital media broadcasting platforms.⁴ Rogers Communications Inc. (Rogers) opposed the application of audit provisions to VOD and digital media platforms, noting that the existing audit regime applies solely to BDUs.

20. The Commission notes that the issue of developing audit provisions applicable to VOD and digital media broadcasting platforms was not specifically identified for comment in Broadcasting Notice of Consultation 2011-791 or in Broadcasting Notice of Consultation 2011-791-1. It therefore considers that there is insufficient information on the record of this proceeding to determine whether it is necessary or appropriate to extend the audit provisions to VOD and digital media broadcasting platforms at this time.

Selection of the auditor

21. In Broadcasting Notice of Consultation 2011-791-1, the Commission proposed the following provision for the selection of the auditor:

[...] The auditor shall be a professional accountant, such as a CA, CGA or CMA, and hold a valid public accounting licence, where applicable, in the jurisdiction where the physical audit will take place. [...]

22. Several interveners submitted that the requirement that the auditor hold a licence in the jurisdiction where the audit takes place should be struck. They argued that the language is unnecessarily restrictive, operationally unworkable (particularly in the case of a national BDU that could maintain records at different offices across Canada) and, in any case, unnecessary given that the jurisdictional qualification is not required for the conduct of a payment audit. They submitted that requiring the auditor to be a Chartered Accountant, a Certified General Accountant or a Certified Management Accountant would be sufficient. Several of these interveners filed, along with their

⁴ As defined in Broadcasting Exemption Order 2012-409, a digital media undertaking provides broadcasting services, in accordance with the interpretation of "broadcasting" set out in Broadcasting Public Notice 1999-84/Telecom Public Notice 99-14, that are either delivered and accessed over the Internet or delivered using point-to-point technology and received by way of mobile devices.

comments, a letter from the Broadcasting Auditors of Canada in support of their submissions.

23. The Commission considers that the adopted provisions should ensure that audits are conducted in accordance with appropriate standards, such as the Canadian Auditing Standards. These standards make specific provisions for the audit of specific financial information. They also include a provision for special purpose audit reports, including those prepared for the sole purpose of providing assurance relative to the fairness of counts, values, numbers, etc. to the parties involved in an audit.
24. In the Commission's view, requiring professional accountants to be public practitioners under the structure of their respective accounting bodies would address the need for adherence to common auditing standards and enable the auditor to express an audit opinion that conforms to the Canadian Auditing Standards. Accordingly, the Commission has amended section B of the proposed audit provisions so that it reads as follows:

The auditor shall be a professional accountant such as a Chartered Accountant, Certified General Accountant, Certified Management Accountant or Chartered Professional Accountant and be recognized by his or her respective organization as engaged in the practice of public accounting.

Information that should be provided to the auditor

25. Several interveners, including Shaw and Rogers, submitted that the proposed list of information to be provided to an auditor should be narrowed. Quebecor Média inc., on behalf of TVA Group Inc. and Videotron G.P. (Quebecor) submitted that the information in that section should be required only to the extent that it is applicable and available. Allarco, the CBC, the IBG and Pelmorex supported a broad level of detail on the basis that this information is essential to the proper conduct of an audit. Finally, Bell, the CBC, the IBG, Pelmorex, Quebecor, Sasktel and Shaw submitted that the wording of the last item in section C (i.e., "Any other information deemed necessary by the auditor") makes the provision too broad.
26. Section C of the proposed audit provisions was intended to identify the type of information that is reasonably required to permit a programming undertaking's auditor to verify and confirm the accuracy of payments made by a BDU. While the Commission considers that the specific information required for any given audit will vary depending on the circumstances, it is of the view that the type of information included in the list reflects common industry practice in the conduct of audits and constitutes information that may be required by an auditor in order to verify the accuracy of payments made to a programming undertaking.
27. Accordingly, the Commission has not made any changes to the list of information set out in section C of the proposed audit provisions. However, the Commission agrees that some of the proposed wording in that section is overly broad or unnecessarily prescriptive. Accordingly, the Commission has amended section C of the proposed

audit provisions to include the following: “the auditor may require any or all of the following information” and “Any other information reasonably required by the auditor.”

Timelines

28. Bell, supported by Allarco, the IBG and Pelmorex, stated that a programming undertaking should be required to deliver an audit report to the BDU by no later than 15 days from the date it receives the report from the auditor.
29. Rogers proposed the following additional timelines that would apply in the case of a dispute, all of which are established with reference to the day on which the audit report is received by the BDU:
 - a 30-day period for the audited BDU to accept or reject the findings of an audit;
 - a 90-day period to address any disputes arising from an audit; and
 - a requirement that the final audit report be issued either on the 90-day dispute resolution deadline or, if there is no dispute, within 60 days.
30. It further proposed that any repayment of an over-payment or payment of an under-payment be made by no later than 30 days from the issuance of the final audit report.
31. In reply, Bell supported Rogers’ proposal with the proviso that the additional timelines be adopted on a “best efforts” basis rather than incorporated as “hard” deadlines. It argued that this would provide parties with sufficient flexibility to respond to unique circumstances. The IBG and Pelmorex also supported Rogers’ proposal, with the exception that disputes should be addressed by a BDU within 60 days rather than the proposed 90 days.
32. In the Commission’s view, timelines can add certainty and predictability to a process. In the present case, the Commission notes that the proposals regarding the timelines in the case of a dispute were made by major programming undertakings and BDUs. Based on the comments received, the Commission considers that it is appropriate to include the following deadlines to the proposed audit provisions:
 - a requirement that the programming undertaking deliver the auditor’s report to the BDU within 15 days of its reception;
 - a requirement that dispute notices be delivered by no later than 30 days from the date on which the disputing party received the audit report; and
 - a requirement that the disputing party provide to the auditor such evidence as is necessary in order to substantiate its dispute within 30 days of submitting its dispute notice.

33. In regard to resolving disputes arising from an audit, it is the Commission's view that a compromise between the respective deadlines proposed by Rogers and Bell would be appropriate. It considers that any deadline for dispute resolution should be applied on a "commercially reasonable efforts" basis so as to provide the parties involved with a level of flexibility.
34. Accordingly, the Commission has revised section E of the proposed audit provisions to incorporate the deadlines set out in paragraph 32 above as well as to provide that parties shall make commercially reasonable efforts to resolve any disputes within 75 days of the date on which a notice of dispute was provided.

Group audits

35. The Commission has examined the issue of group audits (i.e., audits conducted at the same time by the same auditor for more than one related or unrelated programming undertaking). In particular, the Commission has examined whether the audit provisions and non-disclosure agreements should apply to group audits, as well as confidentiality and timing issues that arise from such audits.

Applicability, confidentiality and non-disclosure agreements

36. Shaw submitted that group audits should only be conducted upon mutual agreement between parties, rather than imposed as a requirement, due to logistical, operational and confidentiality concerns associated with such audits.
37. Bell acknowledged the usefulness of group audits, and agreed with Shaw that it is crucial that confidential information not be shared among the individual programming undertakings that are involved in the group audit. Accordingly, it proposed an amendment to section G of the proposed audit provisions that would require the execution of confidentiality and non-disclosure agreements in the case of group audits.
38. In the Commission's view, group audits may lead to efficiencies for both programming undertakings and BDUs. In this regard, many programming undertakings can share the cost of the audit. Moreover, group audits can be more time and resource efficient for BDUs.
39. In regard to confidentiality, the Commission notes the requirements set out in section F of the proposed audit provisions specifying that "[c]onfidentiality agreements and non-disclosure agreements are to be signed to protect both the BDU and the programming undertaking against the disclosure of confidential information." The Commission considers that section F of the proposed audit provisions applies in the context of group audits and that this section is sufficiently broad to protect against inappropriate disclosure of information in the context of such audits. Furthermore, it considers that adherence by auditors to the standards of their professional associations constitutes an added safeguard against the sharing of confidential information among the individual programming undertakings forming part of the group audit.

40. In light of the above, the Commission does not consider it appropriate to make any amendments to section G of the audit provisions, relating to group audits.

Timeline flexibility

41. Rogers, supported by Bell, submitted that there should be flexibility in regard to the timelines it proposed for section E in the case of group audits.
42. In the Commission's view, the conduct of group audits should generally follow the conduct of individual audits. It acknowledges, however, that group audits can be more difficult to coordinate. Consequently, the Commission considers that it would be appropriate to provide parties with a certain level of flexibility in regard to the timelines that apply to group audits. For this reason, the Commission has amended section G of the proposed audit provisions to specify that single audit timelines shall apply to group audits unless the groups participating in the group audit agree to different timelines. This amendment is reflected in the appendix to this regulatory policy.

Wording amendments

43. The Commission has taken into consideration suggestions made by parties in regard to the wording of certain clauses. Specifically, the Commission has revised section D of the proposed audit provisions to clarify that audit requests shall be "delivered" rather than "served" by the programming undertaking on the BDU. It has also amended this section to clarify that a request for an audit shall be made by no later than 12 months after the end of the period to be audited, "unless otherwise agreed to" by parties. Further, it has revised section E of the proposed audit provisions to specify that the audit shall take place "during normal business hours." Finally, the Commission has made minor amendments to the wording of certain audit provisions, to be consistent with the amendments noted above.

Implementation

44. The Commission's current audit regime for BDUs and programming undertakings is set out in section 15.1 of the Regulations and incorporates by reference Broadcasting Public Notice 2005-34. Section 15.1 reads as follows:

A licensee shall give access to its records to any Canadian programming undertaking that receives a wholesale rate for its programming services to enable the programming undertaking to verify the subscriber numbers for the programming services of the programming undertaking in accordance with the terms prescribed in Broadcasting Public Notice CRTC 2005-34, dated April 18, 2005 and entitled *Auditing of distributor subscriber information by programming services*.

45. The Commission considers that an amendment to section 15.1 of the Regulations, which would replace the reference to Broadcasting Public Notice 2005-34 with a

reference to the provisions set out in the appendix to this regulatory policy, is the most efficient means of bringing the audit provisions into force.

46. Accordingly, the Commission will shortly be issuing a notice of consultation setting out proposed amendments to section 15.1 of the Regulations that would bring into force the audit provisions set out in the appendix to this regulatory policy.

Secretary General

Related documents

- *Call for comments on proposed standard clauses for non-disclosure agreements and provisions for the conduct of audits*, Broadcasting Notice of Consultation CRTC 2011-791-1, 10 August 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
- *Amended exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers – Implementation of the regulatory framework relating to vertical integration and other amendments*, Broadcasting Order CRTC 2012-408, 26 July 2012
- *Call for comments on audit provisions for broadcasting distribution undertakings and on a standard form non-disclosure agreement*, Broadcasting Notice of Consultation CRTC 2011-791, 19 December 2011
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011
- *Amendments to the Broadcasting Distribution Regulations and other Commission Regulations*, Broadcasting Regulatory Policy CRTC 2011-455, 29 July 2011
- *Auditing of distributor subscriber information by programming services*, Broadcasting Public Notice CRTC 2005-34, 18 April 2005
- *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999

Appendix to Broadcasting Regulatory Policy CRTC 2013-585

Provisions governing the timeframes and modalities for the conduct of audits of subscriber information held by broadcasting distribution undertakings

A. Purpose and application

These audit provisions govern the verification of broadcasting distribution undertaking (BDU) subscriber numbers and associated revenues by an auditor, on behalf of a programming undertaking. Such verification could include the verification of monthly reports, subscriber counts and payments from the BDU, as well as other information reasonably required by the auditor as detailed under section C below.

These audit provisions shall apply to all audits of a BDU by a programming undertaking, whether the programming undertaking and BDU are bound by a formal affiliation agreement or not, and whether the BDU is vertically integrated or non vertically integrated, as per the definition of “vertically integration” set out in *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011.

B. Selection of the auditor

The programming undertaking shall select the auditor.

The auditor shall be a professional accountant, such as a Chartered Accountant, Certified General Accountant, Certified Management Accountant or Chartered Professional Accountant, and be recognized by his or her respective organization as engaged in the practice of public accounting.

Should the BDU object to the selection of the auditor, the BDU shall provide in writing to the programming undertaking, copying the proposed auditor, within 15 days of receipt of the written audit request, the grounds for its objection. The programming undertaking shall have 15 days from the receipt of the notice of the BDU’s objection to the selected auditor to reply to the BDU in writing, either selecting another auditor or, if keeping the original selection, setting out its response to the objection. If the matter is not resolved, the issue may then be submitted to the Commission for dispute resolution (with the Commission reserving the right to suspend the application of audit timeframes as described in section D below).

C. Access to information

The BDU shall make available all such books, records, accounts and other information as is reasonably required so as to permit a programming undertaking’s auditor to verify and confirm that the BDU’s payments for distribution of the programming undertaking’s service(s) comply with the terms of any existing agreements. More specifically, the auditor may require any or all of the following information:

- channel listing of each system applicable to period audited;
- retail rates of all packages and/or services offered to customers during audit period;
- monthly system subscriber reports;
- monthly remittance calculations;
- list of all bulk accounts by system:
 - number of units/rooms for each account;
 - number of basic subscribers for each account;
 - number of extended tier subscribers for each account;
 - activation date of each account;
 - rate per unit/room for each account; and
 - name of each account;
- list of all complimentary subscriptions by system;
- details of all promotions offered by BDU; and
- any other information reasonably required by the auditor.

Audit information shall be made available in electronic format where possible or otherwise be made available in a format that facilitates the most efficient and effective audit.

D. Timeframes, period covered by the audit and audit report

A written audit request shall be delivered by the programming undertaking to the BDU. The audit shall commence on a date to be mutually agreed upon by the auditor and the BDU, such date to be no later than 90 days from the date of delivery of the written request to the BDU.

Unless otherwise agreed to, a request for an audit may be made at any time after the period being proposed to be audited has ended but no later than 12 months after the end of the period proposed to be audited.

The period covered by the audit shall be for 12 months or a longer period if agreed to by parties. A given time period shall be subject to only one audit.

The auditors shall conduct their audits and present or validate their findings within the general standards adopted by their governing body.

E. Conduct of the audit

The audit shall take place during normal business hours and on the premises where the BDU maintains the records applicable to the audit.

The parties shall make commercially reasonable efforts to ensure the audit is completed and the audit report is submitted to both parties within 210 days from the notice of intention to audit.

The programming undertaking shall deliver the auditor's report to the BDU within 15 days of receipt from the auditor.

If either party disputes any of the findings of the audit report, it shall, within 30 days of that party's reception of the auditor's report, notify the other party, setting out the reasons for its dispute. The party disputing a claim shall, within 30 days of the dispute notification, make available such evidence to the auditor as is necessary to substantiate the disputed portion of the claim. The parties shall make commercially reasonable efforts to resolve any disputes within 75 days of the notice of dispute.

Repayment of any over-payment or payment of an under-payment shall be made within 30 days of the resolution of a dispute or, where there is no dispute, within 30 days of the deadline for disputing the auditor's report.

F. Retention of records

The auditor may retain sufficient information to validate its findings. The auditor and the BDU can agree on which information can be retained and photocopied and which information should be discarded once the audit is complete. Confidentiality agreements and non-disclosure agreements are to be signed to protect both the BDU and the programming undertaking against the disclosure of confidential information.

G. Group audits

The conduct of audits as set out above shall apply equally to audits conducted by individual programming undertakings, as well as audits conducted at the same time by the same auditor for more than one related or unrelated programming undertaking.

The timelines set out above shall apply in the case of group audits, unless otherwise agreed to by the parties participating in the group audit.