



Broadcasting Decision CRTC 2006-34

Ottawa, 9 February 2006

The Sports Network Inc.
Across Canada

Application 2005-0332-7
Broadcasting Public Notice CRTC 2005-95
7 October 2005

ESPN Classic Canada – Licence amendment

*The Commission **denies** the application to amend the broadcasting licence for the national Category 2 specialty service known as ESPN Classic Canada in order to allow the programming of live sports.*

The application

1. The Commission received an application by The Sports Network Inc. (TSN) to amend the broadcasting licence of the national Category 2 specialty programming undertaking known as ESPN Classic Canada (ESPN Classic).
2. The conditions of licence setting out ESPN Classic's nature of service currently read as follows:
 - a) The licensee shall provide a national English-language Category 2 specialty television service dedicated to showcasing some of the world's greatest sporting moments and the momentous impact these events had in our lives. The service shall provide a retrospective on sports events that occurred at least 18 months prior to the broadcast day on which they are aired by the service.
 - b) The programming must be drawn exclusively from the following categories, as set out in Schedule I to the *Specialty Services Regulations, 1990*: 2a, 2b, 6a, 6b, 7d, 12, 13 and 14.
 - c) No more than 15% of all programming broadcast during the broadcast week shall be drawn from category 7.
 - d) The licensee shall not provide any news, information or highlight coverage of current sports events.
 - e) The licensee shall not provide any live event coverage.

3. TSN proposed to change two of the nature of service conditions set out above. First, the licensee proposed to delete the second sentence of condition of licence a) which states “The service shall provide a retrospective on sports events that occurred at least 18 months prior to the broadcast day on which they are aired by the service.” Second, the licensee proposed to replace condition of licence e) with the following:

e) The licensee may broadcast live sports events coverage, provided the hours devoted to such broadcasting do not exceed 15% of the licensee’s quarterly broadcast schedule.

4. The licensee submitted that approval of the proposed amendments would, by being responsive to its audience, allow TSN to improve the financial viability of the service and increase audience share. TSN also argued that live programming would assist in fulfilling ESPN Classic’s nature of service by providing “instant classics” to its audience.

Interventions

5. The Commission received interventions in opposition to this application from Rogers Media on behalf of Rogers Sportsnet (Sportsnet), The Score Television Network Ltd. (The Score), the Canadian Broadcasting Corporation (CBC), Mr. Jim Webb of Canada TV Forums, and Mr. Gregory Beaulieu. Mr. Shaun Gillis submitted an intervention in support.
6. Mr. Gillis reiterated one of TSN’s arguments, that to reach its potential as a retrospective service, ESPN Classic should be able to rebroadcast “instant classics” without the delay of 18 months currently imposed as a condition of licence.
7. Of the interventions in opposition, those received from Messrs. Webb and Beaulieu were brief. Mr. Webb expressed concern over an increase in American-based sports coverage, while Mr. Beaulieu expressed concern over dilution of ESPN Classic’s programming through the inclusion of live events.
8. The interventions by The Score, Sportsnet and the CBC expressed concern that the amendments to the nature of service proposed by TSN for ESPN Classic would serve to fundamentally alter the service such that it would become more of a general interest sports service rather than a “niche” sports service, as originally licensed. Sportsnet noted that conventional sports services such as itself and TSN actually devote only approximately 30% of their schedules to live sports programming. It argued that allowing ESPN Classic to devote up to 15% of its quarterly broadcast schedule to live sports programming would create an important exception to the Commission’s policy of seeking to ensure that Category 2 services do not compete directly with any existing analog or Category 1 specialty service.

9. Moreover, the interveners argued that the idea of “instant classics” is inconsistent with the basic nature of a retrospective service such as ESPN Classic. The Score’s intervention in particular pointed to a number of other retrospective services that the Commission has licensed or renewed since 2000, including Teletoon Retro, Prime TV, DejaView and TVLand among others. At the heart of these services, according to The Score, is that they each share the “importance of old as a differentiator” between themselves and similar Category 1 pay and specialty services currently licensed by the Commission.
10. On the subject of programming variety and flexibility, Sportsnet addressed the decision concerning Fox Sports World (FSW)¹ wherein the Commission approved FSW’s request for greater flexibility in its programming. Specifically, Sportsnet pointed out that the Commission granted FSW’s request to be able to offer sports other than cricket, rugby and soccer as long as it did not dedicate any coverage to North American men’s ice hockey, basketball, baseball and North American-style football. Though cited by TSN as supportive of its application, Sportsnet noted that, in granting greater flexibility to FSW, the Commission did not substantially alter the “niche” nature of the service in question.
11. The CBC and Sportsnet submitted that the requested amendments would have a significant affect on the acquisition of sports rights. In particular, Sportsnet pointed out that, when originally licensed, ESPN Classic was never limited in the types of sports it could cover, given that its niche status was gained by way of assuring a retrospective theme to its programming. Furthermore, taken together with TSN’s other sports-related services,² Sportsnet was of the view that allowing ESPN Classic to cover live sports would increase the “formidable resources and distribution platforms for the carriage of sports programming” that TSN would enjoy when negotiating the rights to live sports.
12. The CBC reiterated the Commission’s concerns about undue competitive advantage and the possible detriments to the broadcasting system and Canadian viewers that coverage of live sports events by ESPN Classic would cause. It argued that approval of the present application would not be in the public interest as it would serve to strengthen the already dominant position of TSN and its parent company’s (BCE Inc.) in the area of live sports programming. As such, the CBC expressed concern that expansion of TSN’s negotiating power could serve to preclude, or at the very least limit, Canada’s public broadcaster and others from being able to bring live sports to Canadians.
13. Of final note, both Sportsnet and The Score stated that they would support a reduction in the delay presently imposed on ESPN Classic’s programming. For its part, Sportsnet indicated that TSN should have initially proposed a shorter delay than the 18 months currently imposed. The Score stated that it might support a three-month delay.

¹ *Fox Sports World Canada – Licence amendment*, Broadcasting Decision CRTC 2005-4, 12 January 2005.

² Sportsnet pointed to TSN’s ownership interests in the Réseau des Sports and the Réseau Info Sports as well as its association through other affiliated companies in Outdoor Life, The NHL Network, Raptors NBA TV, Leafs TV and CTV.

TSN's reply

14. TSN submitted a single reply to the interventions by The Score, CBC and Sportsnet, but did not reply to the remaining interventions filed in opposition.
15. In its reply, TSN noted the apparent flexibility in the Commission's approach to the policy that specialty services should not compete directly with each other, as it pertains to sports programming. Specifically, it noted the expansion of sports programming that had occurred among Category 1 and Category 2 services, noting especially that, since the publication of *Introductory statement – Licensing of new digital pay and specialty services*, Public Notice CRTC 2000-171, 14 December 2000, the Commission has consistently allowed the programming of live sports on a variety of services including not only FSW but also non-sports related services such as ZTV.³ The result, the licensee asserted, is an increasingly competitive and fragmented programming environment that has forced even analog services such as The Score and Sportsnet to request amendments to their respective natures of service. Moreover, TSN suggested that, in the current competitive environment, classic sports programming is becoming more difficult to acquire, given that sports services are increasingly retaining the rights to classic sports programming in order to augment their live sports programming.
16. TSN also addressed the concerns respecting sports rights acquisition raised by the CBC. The licensee submitted that the credibility of the CBC's arguments on the subject should be called into question given that, in the context of an application relating to "Country Canada," the CBC had stated that allowing the airing of sports by that Category 1 specialty service would not adversely impact the cost of the rights for live sports events.
17. In light of the interventions, TSN stated its willingness to alter its application such that its conditions of licence would be changed as follows (changes italicized):
 - (a) The licensee shall provide a national English-language Category 2 specialty television service dedicated to showcasing some of the world's greatest sporting moments and the momentous impact these events had in our lives. *With the exception of (e) and (f) below, the service shall provide a retrospective on sports events that occurred at least three (3) months prior to the broadcast day on which they are aired by the service.*
 - (e) *The licensee shall devote no more than 10% of the broadcast year to the coverage of live event sports programming.*

³ As approved in *ZTV – Category 2 specialty service*, Broadcasting Decision CRTC 2005-518, 21 October 2005, ZTV is a general interest service directed at Canadians aged 18-29. Its programming focuses on innovative technologies and new media, youth/extreme sports, sex, jobs, education, music, leisure activities and current events. ZTV may draw its programming from categories 6(a) (Professional sports) and 6(b) (Amateur sports) with a limit of 15% from these program categories.

18. The licensee further proposed to add a new condition of licence that would read as follows:

(f) The licensee shall devote no more than 10% of the broadcast year to the coverage of sports events that occurred at least seven (7) days prior to the broadcast day on which they are aired by the service.

Commission's analysis and determination

19. In *Licensing framework policy for new digital pay and specialty services*, Public Notice CRTC 2000-6, 13 January 2000 (Public Notice 2000-6), the Commission implemented a competitive, open-entry approach to licensing Category 2 services. While the Commission does not consider the impact that a new or amended Category 2 service might have on an existing Category 2 service, it does seek to ensure that newly licensed Category 2 services and the amendments sought for such services do not create a situation of direct competition with any existing analog or category 1 pay or specialty television service.
20. The Commission stated in *Revised procedures for processing applications for new digital Category 2 pay and specialty television services*, Broadcasting Public Notice CRTC 2004-24, 8 April 2004, that it may deny Category 2 applications in the following circumstances:
- where there is a well-supported intervention demonstrating that a service would be directly competitive with an existing service, and where the applicant has not persuaded the Commission to the contrary;
 - where an applicant, even in the absence of such an intervention, has not satisfied the Commission that its proposed service would not be directly competitive with an existing service;
 - where an applicant has not demonstrated that it meets the ownership requirements.
21. In the present case, the Commission considers that approval of the proposed amendments would permit ESPN Classic to be directly competitive with certain analog sports specialty services. The Commission is particularly concerned by the lack of a limit on the types of live sports that could be presented, as well as the large number of hours of live sports events proposed by the licensee. The Commission is of the view that approval of the licensee's proposal could move ESPN Classic into a competitive position with other sports services in terms of the amount of live sports programming that is presented. Accordingly, the Commission considers that the changes proposed could result in ESPN Classic becoming directly competitive with the analog sports specialty services, contrary to the licensing framework established in Public Notice 2000-6.

22. The application also raises the question of what constitutes “classic” programming. TSN submitted that it is plausible to characterize a current or future sports event as “an instant classic.” Moreover, it argued that the broadcast of such events would be consistent with the offerings of a service that is defined by the retrospective and classic nature of the sports that it broadcasts.
23. However, as the intervention by The Score argued, the retrospective services licensed by the Commission since 2000 have defined themselves in terms of the “oldness” or “past-tense” nature of the programming that they offer. In effect, the criteria for determining what is “classic” for a service such as Teletoon Retro, MuchMore Retro and TVLand is established in the context of the retrospective nature of the programming that it broadcasts. The Commission considers that this narrowcast approach to retrospective services aids in ensuring that these services are not directly competitive with other analog and Category 1 pay or specialty services, since the retrospective services appeal to viewers for whom older drama, animation, situation comedies and music videos or, in the case of ESPN Classic, sports, are attractive.
24. In the initial application for a licence for ESPN Classic, TSN applied a similar philosophy to its programming. Specifically, it expressed its intention to offer programming that would “provide a retrospective ... featuring athletes that have become stars or were stars in their own time ...; the sort of material [that] has not been traditionally shown to Canadians on television.” TSN argued that the service’s programming would be able to present seminal events that have served to affect Canadian culture while also providing fodder for online meetings and debates to discuss these events’ effects. The Commission considers that this focus on established culturally altering events would be diminished by the insertion of as much as 657 hours annually, or 10% of the broadcast year, of unproven classic or unproven culturally relevant material. Moreover, the nature of service provided by ESPN Classic as a condition of licence specifically states that it will provide a retrospective on sports events, thereby further emphasizing the “oldness” of the programming it originally intended to offer.
25. In relation to the above, the Commission notes that the current nature of service states that ESPN Classic shall “provide a retrospective on sports events that occurred at least 18 months prior to the broadcast day on which they are aired by the service.” The Commission also notes the licensee’s willingness to accept a reduction to three months in the minimum age of programming aired to fulfil its retrospective requirement. The Commission, however, does not accept that a three-month limit would be sufficient to qualify a program as “classic” in the way TSN framed its application or in the way that the ESPN Classic service is defined.

26. The Commission also notes several interveners' concerns about undue competitive disadvantage. In this regard, the Commission notes the statements set out in Public Notice 2000-6 about concentration of media ownership and its impact on programming diversity and fair competition that apply to services offering live sports. Given the other holdings of the licensee and its parent company Bell Globemedia Inc., the Commission is of the view that approval of the proposed amendments would substantially increase the ability of Bell Globemedia Inc. and its subsidiaries to acquire the rights to live sports coverage.
27. Furthermore, having taken into account the interventions presented in opposition, the Commission is concerned that approval of the amendments requested by TSN could permit ESPN Classic to become a general interest sports service. As a result, ESPN Classic would undoubtedly dilute that which most distinguishes itself from analog sports services. All of this would fundamentally change its nature of service. The Commission also reminds the licensee that financial viability is not a factor taken into account in the analysis of a Category 2 application.
28. Accordingly, the Commission **denies** the application by The Sports Network Inc. to amend the broadcasting licence for the national Category 2 specialty programming undertaking known as ESPN Classic Canada by changing its conditions of licence in order to allow the programming of live sports.

Secretary General

This decision is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>