



Broadcasting Decision CRTC 2012-208

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Ottawa, 5 April 2012

Request for dispute resolution by the Canadian Independent Distributors Group relating to the distribution of specialty television services controlled by Bell Media Inc.

In this decision, the Commission sets out its determinations on an application for dispute resolution by the Canadian Independent Distributors Group concerning the distribution by broadcasting distribution undertakings of Bell Media Inc.'s specialty television services. The Commission sets out determinations relating to:

- *the packaging of programming services so that consumer choice is enhanced while ensuring that the objectives set out in the Broadcasting Act are fulfilled;*
- *pricing incentives;*
- *making non-linear programming rights available on commercially reasonable terms; and*
- *a final offer arbitration process to set rates.*

Introduction

1. On 17 January 2012, the Commission received a request from the Canadian Independent Distributors Group (CIDG) in relation to a dispute concerning the distribution by its members of specialty television services controlled by Bell Media Inc. (Bell Media). CIDG's members, which operate or represent broadcasting distribution undertakings (BDUs), consist of Bragg Communications Incorporated, the Canadian Cable Systems Alliance Inc. (CCSA), Cogeco Cable Canada LP (represented by Cogeco Cable Canada GP Inc.) (Cogeco), MTS Inc. and TELUS Communications Inc. According to CIDG, its members provide service to approximately 18% of all BDU subscribers in Canada.
2. CIDG submitted that it was seeking dispute resolution by way of a hybrid process. Under this process, an expedited hearing would set the non-monetary terms of distribution of Bell Media's specialty television services (the Bell Services)¹ and would specifically address:
 - flexibility regarding the distribution and packaging of the Bell Services;

¹ A list of the Bell services at issue in this dispute is set out in the appendix to this decision.

- commercial reasonableness of carriage terms; and
 - access to both linear and non-linear² program distribution rights.
3. Following determination by the Commission of the above issues, CIDG proposed that the wholesale rates for distribution of the Bell Services would be set through a final offer arbitration (FOA) process.
 4. In its letter of 23 January 2012, Bell Media stated that, while it considered that dealing with CIDG as a permanent buying group was not appropriate, it was prepared to deal with CIDG for the purposes of an expedited hearing. Bell Media further stated that it was willing to put its own application for dispute resolution between itself and Cogeco by way of the Commission's FOA process on hold until the Commission issued its determinations on matters addressed during the expedited hearing.
 5. On 6 February 2012, the Commission issued an Organization and Conduct Letter stating, among other things, that:
 - the Commission accepted CIDG's request for an expedited hearing, and the hearing would begin on 22 March 2012;
 - the Commission granted Bell Media's request to put its application concerning a dispute with Cogeco on hold;
 - interveners could request to participate;
 - for the purposes of the expedited hearing, CIDG would be treated as a single entity, including for purposes of making any written and oral submissions; and
 - the Commission would hold a mandatory mediation prior to the oral hearing.³
 6. The Commission further stated that the expedited hearing would consider the following issues:
 - flexibility regarding the distribution and packaging by CIDG members of the Bell Services during the term of the affiliation agreement, including concerns relating to packaging restrictions and minimum penetration requirements;

² "Linear services" are services that present programs at specific times as part of a program schedule such as a conventional over-the-air television service. "Non-linear services" are services for which the consumer selects the viewing time, such as video-on-demand. In this proceeding, non-linear rights also referred to distribution rights on Internet Protocol broadband video and mobile platforms.

³ See paragraphs 127 to 130 of the Broadcasting Regulatory Policy 2011-601.

- inclusion of non-linear program distribution rights to programs comprised in the linear programming of the Bell Services for distribution on CIDG members' video-on-demand, Internet Protocol broadband video and mobile platforms to their television distribution service subscribers during the term of the affiliation agreement;
 - commercial reasonableness of carriage terms for the distribution by CIDG members of the Bell Services, including the elimination of proposed penalties such as re-contracting fees, step-up fees and other commercially unreasonable fees; and
 - the process for a subsequent FOA proceeding to determine the wholesale rates for the distribution of the Bell Services by CIDG members.
7. Abridged versions of the submissions filed by the parties and certain other filings (i.e., requests by the Canadian Media Production Association and the Public Interest Advocacy Centre to submit comments), as well as the Commission's letters relating to procedure and confidentiality designations, can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings." The Commission notes that since the request by CIDG was submitted under section 12 of the *Broadcasting Distribution Regulations* (the Regulations) and due to the commercially sensitive nature of the information relating to the dispute, parts of the record will remain confidential.
8. In the remainder of this decision, the Commission sets out the regulatory framework for its findings and then addresses each of the four issues identified in paragraph 6.

Regulatory framework

9. Given that this proceeding is a bi-lateral dispute, the Commission has limited its examination to the commercial reasonableness of the proposals put forward by the parties, and to assessing whether those proposals are consistent with the objectives of the *Broadcasting Act* (the Act), Broadcasting Regulatory Policy 2011-601 as amended by Broadcasting Regulatory Policy 2011-601-1 (Vertical Integration Framework) and the Code of Conduct set out in the appendix to the Vertical Integration Framework.
10. The Commission notes that the objectives of the Act state, in section 3(1)(s), that programming undertakings should contribute significantly to the creation and presentation of Canadian programming and, in section 3(1)(t)(iii), that distribution undertakings should provide reasonable terms for the carriage, packaging and retailing of those programming services.
11. The Commission also notes that in the Vertical Integration Framework, it stated its expectation that vertically integrated BDUs make significant efforts to offer consumers more choice and flexibility in the services to which they can subscribe. The Commission also directed vertically integrated entities to report to the

Commission on how they have provided consumers with more choice and flexibility, while at the same time providing consumers with the ability to pay only for the services they want to watch, such as a pick and pay model.

12. Further, in the Vertical Integration Framework, the Commission was concerned that, with the emergence of a number of large vertically integrated entities, there was a potential for abuse of market power. The Commission therefore developed a Code of Conduct that would serve as a basis for guiding commercial interactions between the various industry stakeholders and would permit them to negotiate on fair and equal terms. Finally, the Commission indicated that it would refer to the principles set out in the Code of Conduct when conducting dispute resolution processes.

13. The Code of conduct states the following:

A programming undertaking, BDU or new media exempt undertaking should not require a party that it is contracting to accept terms or conditions for the distribution of programming on a traditional or ancillary platform that are commercially unreasonable, such as:

- a. requiring an unreasonable rate (e.g., not based on fair market value);
- b. requiring minimum penetration or revenue levels that force distribution of a service on the basic tier or in a package that is inconsistent with the service's theme or price point;
- c. refusing to make programming services available on a stand-alone basis (i.e., requiring the acquisition of a program or service in order to obtain another program or service);
- d. requiring an excessive activation fee or minimum subscription guarantee;
- e. imposing, on an independent party, a most favoured nation (MFN) clause or any other condition that imposes obligations on that independent party by virtue of a vertically integrated entity or an affiliate thereof entering into an agreement with any vertically integrated entity or any affiliate thereof, including its own.

Distribution and packaging

Positions of parties

CIDG

14. CIDG submitted that the affiliation agreement proposed by Bell Media precludes any flexibility regarding distribution and packaging of the Bell Services. In this regard, CIDG submitted, among other things, that the affiliation agreement:

- requires BDUs to package and distribute the Bell Services on the same basis as they were prior to 1 January 2011;
- imposes stringent minimum penetration requirements that do not reflect current penetration levels;
- imposes high minimum penetration levels for TSN and RDS; and
- places CIDG members at a disadvantage to other BDUs in their ability to provide new competitive packaging options.

15. CIDG argued that Bell Media's approach is restrictive and conflicts with the principles set out in the Vertical Integration Framework and the Code of Conduct.

16. CIDG argued that its members should be provided with the same flexibility as BDUs affiliated with Bell Media to create packages and choices for their customers without having to seek Bell Media's approval in advance. CIDG submitted that the proposed affiliation agreement ensures revenues for the Bell Services while making CIDG members assume the risk of avoiding any decrease in subscriber penetration. CIDG also argued that Bell Media has just as much of a role to play in ensuring high subscription levels as the BDUs that package and distribute the services.

Bell Media

17. In its written submission, Bell Media argued that the proposed affiliation agreement provides CIDG members with flexibility to meet the needs of viewers while ensuring stability for Bell Media's revenues. Bell Media submitted that BDUs would be permitted to make changes to how they package services subject to Bell Media's permission for substantial changes. Bell Media also noted that 159 BDUs, which provide service to over 80% of all BDU households in Canada, had already signed its standard affiliation agreement.

18. Bell Media also amended its initial position by providing a second wholesale model for the distribution of its analog Category A and C programming services. Under this model, Bell Media indicated that the wholesale rates payable in respect of a service would be a function of penetration levels. Thus Bell Media argued that this penetration-based rate model would provide BDUs with more packaging flexibility (i.e., the wholesale rate that a BDU pays for a service would decrease as the number of subscribers to that service increased.)

19. Bell Media noted that it already provides, and will continue to provide, maximum packaging flexibility for digital Category A and B services, permitting BDUs to package them not only in theme packs, but on a stand-alone basis as well. Bell Media further submitted that this current flexibility, combined with the flexibility offered by its penetration-based rate structure for analog Category A and C services approach, strikes a reasonable balance between providing BDUs with the ability to offer more

choice to their customers while satisfying Bell Media's need for revenue predictability.

Commission's analysis and decisions

20. The Commission reiterates its view from the Vertical Integration Framework that consumers increasingly expect to be in control of what they watch. The Commission recognizes, as argued by CIDG, that terms imposed in an affiliation agreement could limit a BDU's ability to offer consumers more choice and flexibility with respect to services.
21. As argued by Bell Media, the Commission recognizes that several of the Bell Services make significant contributions to the Canadian broadcasting system. Many of these programming services enjoy high penetration levels that generate the revenues necessary to create, acquire and present Canadian programming. The Commission is also cognizant of programmers' need for a level of certainty and predictability of revenues flowing from affiliation agreements in order to meet their Canadian programming obligations.
22. The Commission considers that a balance must be struck between allowing a BDU to provide its subscribers with more choice and flexibility, while providing programming undertakings with reasonable and predictable levels of revenue for each of their programming services. The Commission, while strongly encouraging BDUs to adopt consumer friendly packaging options, notes that programming services will need time to adapt to an increasingly consumer-focussed environment. However, the Commission considers that a programming service should not expect to be completely insulated from the effects of consumers exercising choice.
23. The Commission is of the view that terms imposed in an affiliation agreement that prevent a BDU from providing consumers with more choice and flexibility in programming services would be inconsistent with the Commission's expectations set out in the Vertical Integration Framework. An affiliation agreement that includes terms that allow for flexible packaging at variable rates or terms that provide for set packaging at fixed rates can be both commercially reasonable and consistent with the Vertical Integration Framework. The Commission also notes that a given affiliation agreement could include a combination of both fixed and variable packaging options on a "per programming service" basis.
24. It would be unreasonable for a BDU to expect flexible packaging for a given programming service while insisting that it be provided with rates similar to those provided under a set packaging option. The Commission considers that, in return for the increased flexibility, the programming undertaking may reasonably request higher wholesale rates from a BDU in recognition of the fact that lower penetration, and thus lower volume, may result under a flexible packaging option. Consequently, it would be commercially unreasonable for a BDU to expect fixed unit pricing based on fixed penetration levels while enjoying the flexibility of delivering fluctuating penetration levels.

25. In the Commission's view, the fixed and variable packaging options proposed over the course of the hearing are conceptually reasonable. However, the commercial reasonableness of any given option can only be determined once the unit pricing and other related terms are known. The Commission would view unit pricing as commercially unreasonable if it had the effect of making flexible packaging options commercially unviable or resulted in a company that offers programming services using its market dominance so as to insulate it completely from the effect of consumers exercising choice.

Commercial reasonableness of pricing incentives

Positions of parties

CIDG

26. CIDG submitted that affiliation agreements should not include provisions regarding penalties that would apply based on the failure of parties to agree on the terms of affiliation. CIDG considered that such penalties are unreasonable and inconsistent with the Code of Conduct. At the hearing, CIDG objected to retroactive payments beyond 1 September 2011 and to the payment of interest, on the basis that those conditions were unreasonable given that the parties are in dispute.

Bell Media

27. Bell Media submitted that the wholesale unit rates imposed at FOA should apply retroactively, together with interest. Bell Media further argued that it was commercially reasonable and common business practice to offer incentives to BDUs that sign or renew agreements to distribute services early and to impose administrative charges on those who delay or cause business uncertainty and administrative costs.

Commission's analysis and decisions

28. The Commission generally agrees that the use of pricing incentives and the imposition of interest payments are common business practices. However, the Commission is of the view that, when an incentive or interest payment represents a disproportionate percentage of the value of an agreement, such incentives could be viewed as punitive and considered commercially unreasonable.

29. The Commission also notes that, during the hearing, parties discussed whether or not the appropriate date for the application of retroactive rates and terms is the date of expiry of the previous agreement. The Commission reminds parties that the Vertical Integration Framework established that rates determined by the Commission or agreed to by the parties prior to the Commission reaching a decision would be applied when the last agreement reached for the distribution of the service expires.⁴ The

⁴ See paragraph 104 of the Vertical Integration Framework.

Commission notes that applying interest charges based on the cost of money to amounts associated with retroactive balances is an acceptable business practice. These determinations should be taken into consideration by the parties during negotiations or in the submission of their final offers to the Commission.

Non-linear programming rights

Position of parties

CIDG

30. In its written submission, CIDG argued that non-linear rights have been excluded from the proposed affiliation agreement and that Bell Media has also refused to negotiate these rights with CIDG members. CIDG submitted that Bell Media should be required to include the non-linear rights to programming on the Bell Services in the affiliation agreement as these non-linear rights become available.
31. CIDG argued that the distribution of programming on a non-linear basis benefits the linear programming service by extending potential viewership and enabling programming discovery by subscribers even after the linear broadcasts have passed. According to CIDG, including these rights as part of the linear carriage agreements recognizes the symbiotic relationship between distributor and programmer whereby the distributor invests in a platform to showcase programming of the programming service, all of which is to the benefit of subscribers.
32. At the hearing, CIDG submitted that it was seeking non-linear rights to programming at no separate fee when Bell Media made those rights available to end-users and other BDUs at no separate fee, and on commercially reasonable terms when those rights were made available by Bell Media for a fee.

Bell Media

33. Bell Media submitted that it has been clear about its intention to monetize all non-linear rights separately from traditional linear television rights and that none of the affiliation agreements that Bell Media has signed with 159 BDUs to date cover non-linear rights. Bell Media noted that it had, in past affiliation agreements, made some non-linear rights for video-on-demand programming available either separately from, or in the same agreement, as linear rights. Usually only a few services were covered, and the rights were granted in exchange for consideration. Bell Media submitted that CIDG had not offered any additional consideration in exchange for non-linear rights.
34. Bell Media further stated that negotiations for the carriage of linear and non-linear programming rights are different because non-linear rights are unregulated. Therefore, in Bell Media's view, the Commission does not have the authority to require a program's rights holder to make that program available for non-linear distribution.

Commission's analysis and decisions

35. In the Vertical Integration Framework, the Commission was concerned with vertically integrated entities affording themselves an undue preference by providing themselves with exclusive access, on various distribution platforms, to content that they control. The Commission incorporated into the Code of Conduct the principle that, where a BDU provides its related programming services with access to multiple distribution platforms, it should offer reasonable terms of access that are based on fair market value to non-related programming services.
36. The Commission notes that, at the hearing, both parties acknowledged that non-linear distribution rights have a market value. CIDG wanted the ability to access these rights on a going-forward basis provided that it could be done at a fair market value. For its part, Bell Media wanted to ensure that it could develop business models for commercial distribution of non-linear rights.
37. The Commission also notes that Bell Media indicated that it is still early and it is in the process of negotiating the acquisition and use of non-linear rights, developing business models and ensuring the technical capabilities are present to make non-linear rights available to other parties. Moreover, Bell Media committed to make these non-linear rights available on commercial terms to CIDG members at the same time as they are offered to other BDUs.
38. The Commission considers that non-linear rights are distinct from linear rights and offer a separate value proposition. The Commission also recognizes that the evolution of non-linear rights requires the development of new business models. The Commission expects that when non-linear rights are made available to distributors, they will be provided on commercially reasonable terms, and negotiated in compliance with the Vertical Integration Framework and the Code of Conduct.

Process for final offer arbitration

Positions of parties

CIDG

39. CIDG submitted that it would be appropriate to file its final offer on wholesale rates for the Bell Services following the Commission's determinations in the current proceeding.
40. CIDG argued for one FOA process such that Bell Media would make its offer and CIDG, collectively, would make one offer. CIDG submitted that the FOA would result in a single agreement which would be made binding on each of its members and that this would involve a master affiliation agreement as well as an individual assumption agreement by each BDU. CIDG further submitted that this approach was the same as currently employed by the CCSA.

Bell Media

41. Bell Media submitted that the Commission should conduct a separate FOA proceeding for each CIDG member. It argued that these proceedings should occur concurrently so that no party experiences an undue delay in resolving the disputed issues.
42. At the hearing, Bell Media noted that it has traditionally offered a set of rates for BDUs that distribute their programming to a large volume of subscribers and another set of rates for those BDUs that distribute their programming to a smaller subscriber base (smaller-volume BDUs). As such, Bell Media stated that CIDG's members, whether individually or collectively, would be offered the rates typically offered to smaller-volume BDUs.

Commission's analysis and decisions

43. Given that there are several ways that an agreement could be structured to reflect this decision, the Commission considers that it is preferable to allow parties to arrive at a commercially negotiated settlement.
44. Accordingly, the Commission expects parties to be guided by the Commission's analysis and determinations set out in this decision and to engage in direct negotiations with each other with the purpose of reaching an agreement.
45. Should the parties fail to reach an agreement, given CIDG's submission that a single agreement could be made binding on each of CIDG's individual members, as well as Bell Media's submission that its smaller-volume BDU rates would apply to every CIDG member, the Commission finds that CIDG members are entitled to negotiate and participate in FOA as a group if they so choose.

Secretary General

Related documents

- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011, as amended by Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011
- *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009, as amended by Broadcasting and Telecom Information Bulletin CRTC 2009-38-1, 26 April 2010

Secretary General

Appendix to Broadcasting Decision CRTC 2012-208

List of Bell Media Inc. specialty television services subject to this dispute

Animal Planet

BNN

Book TV

Bravo!

Comedy

Comedy Gold

CP24

CTV News Channel

Discovery Channel

Discovery Science

Discovery World HD

E!

ESPN Classic

Fashion TV

Investigation Discovery

MTV

MTV2

MuchLoud

MuchMore

MuchMoreRetro

MuchMusic

MuchVibe

PunchMuch

RDS

RDS2

RIS

Space

TSN

TSN2