



Broadcasting Order CRTC 2012-409

PDF version

Route reference: 2011-805

Additional references: 2011-601, 2011-601-1 and 2011-805-1

Ottawa, 26 July 2012

Amendments to the *Exemption order for new media broadcasting undertakings* (now known as the *Exemption order for digital media broadcasting undertakings*)

The Commission amends the Exemption order for new media broadcasting undertakings. These amendments implement determinations made by the Commission in Regulatory framework relating to vertical integration, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011, taking into account modifications stemming from the call for comments initiated by Call for comments on proposed amendments to the Exemption order for new media broadcasting undertakings – provisions relating to vertical integration, Broadcasting Notice of Consultation CRTC 2011-805, 22 December 2011.

A copy of the amended Exemption order for new media broadcasting undertakings, now known as the Exemption order for digital media broadcasting undertakings, is appended to this document.

Background

1. In Broadcasting Regulatory Policy 2011-601, the Commission stated that vertical integration refers to the ownership or control by one entity of both audiovisual programming services, such as conventional television stations, or pay and specialty services, as well as distribution services, such as cable systems or direct-to-home (DTH) satellite services. It further noted that vertical integration also includes ownership or control by one entity of both programming undertakings and production companies.
2. In that regulatory policy, the Commission set out its determinations relating to its regulatory framework for vertical integration. The Commission's main objective in establishing its vertical integration framework was to ensure that consumers continue to benefit from a wide choice of programming in a broadcasting system where programming and distribution have become increasingly integrated.
3. In order to implement certain determinations set out in Broadcasting Regulatory Policy 2011-601, the Commission issued Broadcasting Notice of Consultation 2011-805, in which it called for comments on amendments to the terms and conditions of the *Exemption order for new media broadcasting undertakings*, set out

in the appendix to Broadcasting Order 2009-660. The amendments proposed in that notice of consultation sought to address determinations set out in Broadcasting Regulatory Policy 2011-601 relating to exclusivity of content, anti-competitive head starts, and the introduction of specific dispute resolution provisions.

4. The Commission notes that it has also issued today Broadcasting Regulatory Policy 2012-407, in which it sets out amendments to the *Broadcasting Distribution Regulations*, the *Pay Television Regulations, 1990*, the *Specialty Services Regulations, 1990* and the *Television Broadcasting Regulations, 1987* in regard to the implementation of the regulatory framework relating to vertical integration, and Broadcasting Order 2012-408, in which it sets out amendments to the terms and conditions of the exemption order for terrestrial broadcasting undertakings serving fewer than 20,000 subscribers.
5. Comments received in connection with Broadcasting Notice of Consultation 2011-805 can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
6. The amended *Exemption order for new media broadcasting undertakings* will now be known as the *Exemption order for digital media broadcasting undertakings*. The Commission is of the view that the revised title more accurately reflects the nature of the undertakings operating under this order. In this regard, the provision of broadcasting services that are delivered and accessed over the Internet or delivered using point-to-point technology and received by way of mobile devices is no longer a new phenomenon. The *Exemption order for digital media broadcasting undertakings* (the Digital Media Exemption Order) is set out in the appendix to the present document.

Issues

7. Various issues were raised by the interveners. The Commission has taken into consideration all of the comments received, and considers that certain issues relating to the following must be addressed in detail:
 - the "no head start" rule;
 - exclusivity on digital media broadcasting platforms;
 - the standstill rule; and
 - dispute resolution.

"No head start" rule

8. The term "head start" refers to situations where a programming service is launched on a given broadcasting distribution undertaking's (BDU's) distribution platform prior to the service having been made available for distribution to other BDUs on commercially reasonable terms.

9. In Broadcasting Regulatory Policy 2011-601, the Commission determined that once a programming undertaking is ready to launch a new pay or specialty service, it must make that service available to all BDUs that announce an intention to distribute the service (i.e., the “no head start” rule). The Commission further determined that the “no head start” rule would also be made to apply to television programming distributed on mobile and retail Internet platforms.
10. Various interveners commented on the scope to be attributed to the term “newly launched” in the proposed amendments. The Canadian Independent Distributors Group (CIDG) argued that the rule should apply to programming from all “new” services, which it understood to include high definition (HD) upgrades to existing services, multiplexes, and the “re-branding” of existing services. It noted that failure to do so would result in consumers being denied access to highly desirable programming, defeating both the spirit and intent of the vertical integration policy. The CIDG also proposed that undertakings operating under the exemption order should be required to provide a minimum 60-day prior written notice of their intent to provide access to programming from such new services.
11. For their part, Bell Canada (Bell), Quebecor Media inc. and Shaw Communications Inc. argued that the proposal by the CIDG would extend the application of the “no head start” rule so as to capture programming from conventional television and video-on-demand (VOD) programming undertakings, and that this was not consistent with the determinations set out in Broadcasting Regulatory Policy 2011-601. Bell also argued against the CIDG’s proposed definition of “new programming service.” In this regard, Bell submitted that adoption of the CIDG’s proposal would go beyond the scope of the determination reached in Broadcasting Regulatory Policy 2011-601.
12. The Commission agrees with those interveners that stated that the application of the “no head start” rule should be restricted to programming from pay and specialty undertakings. In the Commission’s view, this would be in keeping with the determinations set out in Broadcasting Regulatory Policy 2011-601. The Commission notes that, notwithstanding the above, the prohibition surrounding exclusivity of access over mobile and retail Internet platforms, which is discussed below, captures programming designed primarily for conventional television and VOD services.
13. The Commission also notes that in Broadcasting Regulatory Policy 2012-407 it has determined that application of the regime to all newly launched pay and specialty programming services – understood to include, though not limited to, programming from a newly launched HD or multiplex version of an existing programming service – was consistent with the intent of its determinations set out in Broadcasting Regulatory Policy 2011-601. The Commission is of the view that the same considerations apply in regard to the distribution of programming on mobile and retail Internet platforms. Accordingly, the Commission has amended the *Exemption order for new media broadcasting undertakings* in order to define “new programming service,” for the purposes of the “no head start” rule, in such a manner so as to capture programming from a pay or specialty programming service that has not been previously distributed

in Canada, which would include any newly launched HD or multiplex versions of an existing programming service.

14. The Commission notes that many of the interventions received revealed a certain level of confusion regarding the wording of the provision dealing with the “no head start” rule, as proposed for inclusion in the *Exemption order for new media broadcasting undertakings*. The Commission understands that this confusion stemmed from the interaction between the proposed provision dealing with exclusive access to content and the provision dealing with preventing anti-competitive head starts. The Commission considers that the revised wording found in paragraph 7 of the amended exemption order will address the confusion with respect to the interaction between those two regimes.
15. The Commission also clarifies that the obligation to make available programming from a new pay or specialty programming service to other digital media undertakings arises where a digital media broadcasting undertaking:
 - (i) has obtained exclusive rights for the broadcast of programming from a new pay or specialty service; and
 - (ii) intends to restrict access to that programming on the basis of a consumer’s subscription to a specific mobile or retail Internet access service, as the case may be.
16. The obligation imposed under paragraph 7 of the amended exemption order thus arises only where the two conditions outlined above are met. As is the case with respect to the “no head start” rule now incorporated in certain of the Commission’s regulations, the Commission expects that digital media broadcasting undertakings that intend to provide exclusive access to programming in a manner that restricts access based on a consumer’s specific mobile or retail Internet access service will provide other digital media broadcasting undertakings with appropriate notice in order to allow these undertakings to exercise their options.

Exclusivity

17. Historically, programming undertakings such as conventional television stations and specialty services acquired exclusive rights to broadcast programs. As such, an individual programming undertaking may be the only such undertaking that broadcasts a particular program or series. However, the Commission has traditionally required that programming services be offered to all BDUs (e.g., cable and DTH services). In this way, most Canadians have access to programs that have been acquired on an exclusive basis. This serves to implement the objectives set out in section 3(1)(d) of the *Broadcasting Act* (the Act).¹

¹ The Commission has taken a distinctive approach to pay-per-view (PPV) and VOD services. Since BDUs may offer their own PPV and VOD services, they are not permitted to acquire

18. In Broadcasting Regulatory Policy 2011-601, the Commission decided to extend this approach to mobile and retail Internet broadcasting platforms while ensuring that innovation in programming delivered over such platforms would still be encouraged.
19. In order to accomplish this, the Commission proposed an amendment to the *Exemption order for new media broadcasting undertakings* that would preclude undertakings operating under that exemption order from providing exclusive access to programming designed primarily for conventional television, specialty, pay or VOD services in situations where such access to the programming was restricted on the basis of a consumer's specific mobile or retail Internet access service.

Programming designed primarily for television

20. Several interveners submitted that the Commission should provide a definition or guidelines for the expression "programming designed primarily for television," and requested that the Commission include in the exemption order wording that would exclude programming created specifically for mobile or retail Internet platforms from the application of the Commission's proposed exclusivity regime.
21. The Commission notes that the distinction between programming designed primarily for conventional television, specialty, pay or VOD services and programming primarily designed for other platforms is one that will be constantly evolving. For this reason, it considers that providing a strict definition of these terms could undermine its intent of encouraging innovation in the creation and delivery of programming designed for mobile and retail Internet platforms. The Commission considers that it would be more appropriate to deal with this matter on a case-by-case basis.

Acquisition and exercise of rights

22. The Commission notes that several interveners objected to the proposed wording of the provision dealing with the exclusivity regime. They argued that the proposed wording suggested that the Commission was attempting to regulate the manner in which third-party entities not subject to the Act sell programming rights to content they own. Certain interveners also argued that the wording would require undertakings subject to the exemption order to acquire sub-licensing rights with respect to programming for which they have obtained exclusive rights.
23. It was never the Commission's intention to introduce regulatory requirements on third-party entities that do not qualify as broadcasting undertakings for the purposes of the Act. The Commission considers that additional clarity can be brought to the adopted provisions in order to make this clear, and considers that paragraphs 5 and 6 of the amended exemption order accomplish this.

exclusive rights to programs. This ensures that the most popular PPV and VOD programming is widely available to other PPV and VOD undertakings.

24. With respect to the comments pertaining to the need to obtain sub-licensing rights, the Commission notes that, under the exclusivity-related provisions being incorporated into the Digital Media Exemption Order, digital media broadcasting undertakings can exercise exclusive rights to programming designed primarily for conventional television, specialty, pay or VOD services without having to make such programming available to competing digital media broadcasting undertakings, provided that they do not restrict access to that programming on the basis of a consumer's specific mobile or retail Internet access service, as the case may be.

Grandfathering of past arrangements

25. Bell submitted that the Commission's new policies regarding exclusivity should apply only on a prospective basis. It added that previous exclusivity arrangements were permitted by the Commission, subject to the moratorium on exclusive content deals imposed on 7 March 2011 (see Broadcasting Decision 2011-163). It submitted that agreements entered into prior to this date should therefore be grandfathered.

26. The CIDG and Rogers Communications Inc. (Rogers) opposed Bell's proposal. The CIDG argued that adoption of the proposal would undermine the very policy rationale behind the rule, which is to ensure that Canadians have access to programming designed primarily for conventional television, specialty, pay or VOD services without having to subscribe to a number of mobile or retail Internet access service providers. Rogers stated that it was unclear whether Bell's proposal would apply to contractual renewal clauses that might be contained within agreements entered into prior to the proposed 7 March 2011 cut off date.

27. The Commission considers that it would be appropriate to grandfather, for the purposes of the exclusivity regime, agreements entered into prior to the establishment of the moratorium against exclusive arrangements set out in Broadcasting Decision 2011-163. The Commission considers, however, that Rogers' concerns regarding renewal clauses have merit and should be addressed. Accordingly, the Commission has added paragraph 6(b) to the Digital Media Exemption Order. The provision will ensure that digital media broadcasting undertakings are precluded from exercising exclusive rights to qualifying programming in a manner that restricts access on the basis of a consumer's specific mobile or retail Internet access service if the exercise of such rights is accomplished by means of the operation of a contractual renewal or extension clause taking effect after 7 March 2011.

Standstill rule

28. In Broadcasting Regulatory Policy 2011-601, the Commission instituted a standstill rule whereby an undertaking that was in a dispute with another undertaking concerning the terms of carriage of programming or any right or obligation under the Act would be required to continue providing or distributing the service that was subject to the dispute on the same terms and conditions that prevailed before the dispute. The Commission determined that instituting such a rule would protect consumers from losing access to programming during such disputes.

29. The CIDG submitted that the standstill rule proposed for inclusion in various Commission regulations should similarly be included in the amended exemption order. It argued that the same issues that arise on traditional broadcasting platforms are likely to arise on mobile and retail Internet access platforms.
30. The Commission notes that in Broadcasting Notice of Consultation 2011-805, the standstill rule was not proposed for incorporation as an amendment to the *Exemption order for new media broadcasting undertakings*. However, the Commission considers that such a rule merits inclusion. In this regard, the Commission considers that the policy rationale justifying its inclusion in the regulations under consideration in Broadcasting Notice of Consultation 2011-806 and in the exemption order under consideration in Broadcasting Notice of Consultation 2011-804 apply equally in the context of programming provided over mobile and retail Internet access platforms.
31. Accordingly, the Commission has amended the *Exemption order for new media broadcasting undertakings* in order to incorporate a standstill rule.

Dispute Resolution

Limitation of dispute resolution to final offer arbitration

32. Final offer arbitration (FOA), as used by the Commission, requires each party to a bilateral dispute to put forward a final offer regarding the resolution of the dispute, accompanied by supporting rationale.
33. The Commission notes that many interveners questioned the appropriateness of restricting the dispute resolution processes available to that of FOA where the Commission is seized of a dispute arising in a situation where there is no commercial agreement between the undertakings involved. They argued that this restriction is inconsistent with Broadcasting and Telecom Information Bulletin 2009-38, which specifies that FOA will be used to resolve matters that are “exclusively monetary” in nature and that disputes surrounding carriage may not be limited to monetary matters. They further argued that the full range of dispute resolution mechanisms should be available so as to allow the Commission to choose the dispute resolution process that is best suited to a given dispute.
34. For its part, Bell supported maintaining FOA as the sole mechanism to dispose of disputes in instances where there is no commercial agreement between the concerned undertakings. It noted that disputes surrounding rates, terms and conditions are exclusively commercial in nature and that the proposal was therefore consistent with the parameters for FOA set out in Broadcasting and Telecom Information Bulletin 2009-38. In addition, Bell argued that mandatory mediation militates in favour of not expanding available dispute resolution processes.
35. The Commission acknowledges that a dispute relating to carriage terms may include non-monetary elements, and further acknowledges that Broadcasting Regulatory Policy 2011-601 did not specify that FOA would be the sole means by which the Commission would resolve disputes surrounding carriage of programming, absent a commercial agreement. While the Commission recognizes the utility of FOA in resolving such disputes, it also considers that flexibility should be maintained in order

to allow it to choose the method that best suits the circumstances of the dispute. Accordingly, the Commission has removed reference to FOA in the amended exemption order.

Absence of commercial agreement – setting of rates, terms and conditions

36. The Independent Broadcasters Group (IBG) noted that the Commission proposed dispute resolution provisions that would apply to specific circumstances, namely, to disputes arising in the absence of a commercial agreement between the undertakings involved. It argued that the proposed amendments limit the Commission's authority, and accordingly submitted that the dispute resolution provisions should apply to all disputes. The IBG also submitted that the Commission should not restrict its flexibility to determine the appropriate start date for the rates as well as the terms and conditions when disposing of dispute.
37. Subject to the removal of the reference to FOA, the Commission considers that the proposed dispute resolution provisions set out in Broadcasting Notice of Consultation 2011-805 are consistent with the determinations set out in Broadcasting Regulatory Policy 2011-601. The Commission underlines that dispute resolution processes are available for situations not captured by the proposed amendments under consideration. Accordingly, the Commission considers it appropriate to deny the IBG's proposals.

Alteration by parties of the terms and conditions set by the Commission

38. The CIDG and Saskatchewan Telecommunications questioned the Commission's proposed amendment that would allow parties engaged in a dispute resolution process before the Commission to reach an agreement on terms that differ from those established by the Commission. The Commission notes that the proposed amendment allows and encourages negotiation both during and after dispute resolution. Parties are not, however, forced to re-negotiate afterwards if they do not wish to – they have a binding Commission decision. Accordingly, the Commission considers it appropriate to retain the proposed provision allowing for parties to a dispute to reach agreement on rates, terms and/or conditions different from, and superseding, those determined by the Commission.

Secretary General

Related documents

- *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
- *Amendments to various regulations – Implementation of the regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2012-407, 26 July 2012

- *Call for comments on proposed amendments to the Broadcasting Distribution Regulations and other Commission regulations – provisions relating to vertical integration*, Broadcasting Notice of Consultation CRTC 2011-806, 22 December 2011, as amended by Broadcasting Notice of Consultation CRTC 2011-806-1, 2 February 2012
- *Call for comments on proposed amendments to the Exemption order for new media broadcasting undertakings – provisions relating to vertical integration*, Broadcasting Notice of Consultation CRTC 2011-805, 22 December 2011, as amended by Broadcasting Notice of Consultation CRTC 2011-805-1, 2 February 2011
- *Call for comments on proposed amendments to the terms and conditions of the exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Notice of Consultation CRTC 2011-804, 22 December 2011, as amended by Broadcasting Notice of Consultation CRTC 2011-804-1, 2 February 2011
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011, as corrected by *Regulatory framework relating to vertical integration – Correction*, Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011
- *Change in effective control of CTVglobemedia Inc.'s licensed broadcasting subsidiaries*, Broadcasting Decision CRTC 2011-163, 7 March 2011
- *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertaking*, Broadcasting Order CRTC 2009-660, 22 October 2009
- *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009

Appendix to Broadcasting Order CRTC 2012-409

Exemption order for digital media broadcasting undertakings

A. General

1. For the purpose of this order, the following definitions apply:

“television programming” means programming designed primarily for conventional television, specialty, pay or video-on-demand services.

“terms of carriage” means the rates, terms and conditions pursuant to which a programming service is provided by one broadcasting undertaking to another.

“new programming service” means a licensed pay television or specialty service that has not previously been distributed in Canada and includes, but is not limited to, a high definition version or a new multiplex of an existing programming service.

2. The undertaking provides broadcasting services, in accordance with the interpretation of “broadcasting” set out in *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999, that are:

- a) delivered and accessed over the Internet; or
- b) delivered using point-to-point technology and received by way of mobile devices.

3. The undertaking does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

4. The undertaking submits such information regarding the undertaking’s activities in broadcasting in digital media, and such other information that is required by the Commission in order to monitor the development of broadcasting in digital media, at such time and in such form, as requested by the Commission from time to time.

B. Exclusivity

5. Subject to paragraph 6, the undertaking does not offer television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service.

6. The undertaking does not acquire, exercise, renew or otherwise extend rights to television programming on an exclusive or otherwise preferential basis unless:

- a) the undertaking is not prevented, directly or indirectly, from making that television programming available to subscribers of all service providers providing

access to the same platform over which the undertaking broadcasts the programming; or

- b) such rights were acquired prior to 8 March 2011 and such rights are not exercised further to an extension of contractual term, by renewal or otherwise, taking effect after 7 March 2011.

C. Anti-competitive Head Start

7. An undertaking that has acquired exclusive rights to television programming from a new programming service shall, when ready to provide access to that programming in a manner that restricts access based on a consumer's subscription to a specific mobile or retail Internet access service, make all television programming from that new programming service to which it itself provides access available to all other undertakings operating over the same broadcasting platform that have communicated an intent to provide access to the television programming, notwithstanding the absence of a commercial agreement.

8. For the purposes of paragraph 7, if the television programming is provided by one undertaking to another in the absence of a commercial agreement, it is subject to the terms of carriage determined by the former until a commercial agreement is reached between the parties or the Commission renders a decision concerning any unresolved matter.

D. Obligation during dispute

9. If there is a dispute concerning the carriage or terms of carriage of programming or concerning any other right or obligation under the *Broadcasting Act*, the undertaking shall continue to provide access to the programming services on the same terms of carriage as it did before the dispute.

10. For purposes of paragraph 9, a dispute exists from the moment that written notice of the dispute is provided to the Commission and served on the other undertaking that is party to the dispute and ends when an agreement settling the dispute is reached by the undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.

E. Dispute Resolution

11. If there is a dispute concerning any aspect of the terms of carriage, one or both of the undertakings to the dispute may refer the matter to the Commission for dispute resolution and the undertakings to the dispute submit to any decision that may result therefrom.

12. If the Commission accepts a referral of a matter for dispute resolution, the undertaking submits to participation in a mediation before a person appointed by the Commission.

13. Where the undertaking provides another undertaking with access to television programming in the absence of a commercial agreement and the matter proceeds before the Commission for dispute resolution, the undertaking submits to:

- a) having the dispute resolved as provided for in *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 from time to time; and
- b) the terms of carriage established by the Commission as of the date the programming was first made available to the relevant undertaking absent a commercial agreement and on a going-forward basis for the contractual term established by the Commission.

14. For greater certainty, nothing in paragraphs 11 or 13 prevents parties from reaching an agreement with respect to rates, terms or conditions that differ from those established by the Commission.

15. During dispute resolution, the undertaking submits to produce and file such additional information as may be requested by the Commission or any individual named by the Commission to act as a mediator in a given dispute.