



Broadcasting Regulatory Policy CRTC 2012-94

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Ottawa, 14 February 2012

Licensing and other issues relating to satellite relay distribution undertakings

In this regulatory policy, the Commission determines that:

- *it will continue to license satellite relay distribution undertakings (SRDUs) rather than exempt them from licensing;*
- *it will not incorporate the transport of pay and specialty services into SRDU licences; and*
- *its dispute resolution process remains the best way to address concerns regarding uplink fees that the Bell direct-to-home undertaking charges Canadian pay and specialty services for the transport of their signals to cable headends in cases where they do not need to use Bell's SRDU facilities.*

Introduction

1. Satellite relay distribution undertakings (SRDUs) are licensed undertakings that generally function as wholesalers by transporting broadcasting services and making those services available to broadcasting distribution undertakings (BDUs), which then offer them to subscribers. SRDU licences currently encompass the reception of conventional television stations and of some non-Canadian programming services, as well as their delivery to terrestrial BDUs, but not the transport of Canadian pay and specialty services.
2. There are currently two licensed SRDUs in Canada, one licensed to Shaw Satellite Services Inc., and the other to Bell ExpressVu Inc. (the general partner), and Bell Canada (the limited partner), carrying on business as Bell ExpressVu Limited Partnership (Bell). In addition, in Broadcasting Decision 2010-61, the Commission approved an application by FreeHD Canada Inc. (FreeHD) for a broadcasting licence to operate an SRDU. This SRDU is not yet in operation.
3. In Broadcasting Public Notice 2008-100, the Commission announced that, at the next renewal of SRDU licences, it would consider whether exempting SRDUs from licensing requirements would constitute an appropriate course of action. The Commission also announced that it would consider incorporating the satellite transport of Canadian pay and specialty services into either SRDU licences or an SRDU exemption order. The Commission reiterated this position in Broadcasting

Order 2009-638, in which it amended the exemption order respecting terrestrial relay distribution undertakings (TRDUs).

4. Accordingly, in Broadcasting Notice of Consultation 2011-350, the Commission called for comments on a possible exemption order respecting SRDUs and on the transport of Canadian pay and specialty services by SRDUs.
5. The Commission received 15 interventions in response to Notice of Consultation 2011-350. The interventions were generally equally divided between support and opposition on both the possible exemption of SRDUs and the incorporation of the transport of Canadian pay and specialty services into either SRDU licences or an SRDU exemption order. They also raised a number of other issues relating to the regulatory framework for SRDUs.

Issues

6. After reviewing the record of this proceeding, the Commission considers that it is appropriate to address the following issues:
 - possible exemption of SRDUs;
 - transport of Canadian pay and specialty services by SRDUs, whether licensed or exempt; and
 - equalization fees.

Possible exemption of SRDUs

Background

7. In Notice of Consultation 2011-350, the Commission sought comments as to whether it is necessary to continue to license SRDUs in order to ensure that they contribute to the fulfillment of the objectives set out in the *Broadcasting Act* (the Act).
8. More specifically, the Commission asked parties to comment on whether effective competition¹ had emerged in all areas of the transport of programming services, what impact exempting SRDUs from licensing requirements would have on other players involved in the broadcasting system and on the negotiation process, and how the Commission could minimize or eliminate potential negative impacts, if any, within the context of an SRDU exemption order.

¹ In Broadcasting Public Notice 2008-100, the Commission noted that the signal transport sector was dominated by one undertaking, Shaw Broadcast Services, and that until more effective competition had emerged in the sector, the exemption of SRDUs from licensing requirements would not benefit the Canadian broadcasting system. Since the issuance of Broadcasting Public Notice 2008-100, the Commission has adopted certain measures to encourage competition in the signal transport sector. These include the elimination of certain requirements for TRDUs and the removal of a requirement that licensed BDUs receive certain services from a licensed SRDU.

9. The Commission also set out a proposed exemption order in the appendix to Notice of Consultation 2011-350 and invited interested parties to comment on the specific terms and conditions included in the proposed order.

Positions of parties

Parties supporting exemption

10. Bell, Shaw Communications Inc. (Shaw), and TekSavvy Solutions Inc. (TekSavvy) all supported exempting SRDUs from licensing requirements.
11. Both parties that currently operate SRDUs (Bell and Shaw) argued that licensing SRDUs does not materially contribute to the implementation of the objectives of the Act. TekSavvy agreed that there was little value in an ongoing licensing requirement for this class of undertaking. Shaw added that, under section 9(4) of the Act, a material contribution to the implementation of the objectives of the Act is a prerequisite to licensing.
12. Further, while recognizing that SRDUs' contribution of 5% of their gross annual revenues from broadcasting activities to programming funds partly fulfills the Act's policy objectives, Bell argued that this contribution does not constitute a material contribution to those objectives.
13. Both Bell and Shaw also argued that enough competition has emerged in the signal transportation sector to merit a revision in the Commission's previous determination² that the exemption of SRDUs from licensing requirements would not benefit the Canadian broadcasting system because of the lack of effective competition in the sector. In this regard, they submitted that, since 2009,³ exempt TRDUs have been authorized to distribute signals to any exempt or licensed BDUs and are therefore in direct competition with SRDUs. Bell and Shaw also noted that "unlicensed SRDUs" (mainly American digital satellite signal distributors) are competitors with licensed SRDUs, since exempt BDUs have been authorized to receive US 4+1 signals from a non-Canadian source since 2001.⁴
14. Bell added that SRDUs also compete in the signal transportation sector with programming networks that make their signals available from their own broadcast

² See Broadcasting Public Notice 2008-100.

³ In 2009, in order to encourage greater competition in the signal transport sector, the Commission issued Broadcasting Order 2009-638 and Broadcasting Regulatory Policy 2009-639, in which it eliminated certain restrictions limiting the operations of TRDUs. Specifically, the Commission eliminated requirements stipulating that undertakings operating under the TRDU exemption order be local or regional and that they be affiliated with the BDUs to which they transport programming services, as well as the requirement that licensed BDUs receive certain services from a licensed SRDU.

⁴ See Public Notice 2001-121.

centre by fibre or through a central telecommunications centre, and with BDUs that access more signals directly by using their own satellite dishes.

15. Shaw stated that the number of channel subscribers that its SRDU currently serves is substantially fewer than at the time of its last renewal in 2004 and that this has resulted in significant declines in Shaw's SRDU annual revenues. Shaw also provided evidence that its SRDU rates have remained the same since 2003, arguing that the constancy of price demonstrates that it does not have the market power to dominate the sector.
16. Although they both supported the proposal to exempt SRDUs, Bell and Shaw expressed the view that the conditions included in the proposed exemption order were too onerous. Bell noted that the proposed order retained several key provisions currently included in SRDUs' licences, including the requirement to contribute 5% of the undertaking's gross annual revenues to programming funds. Both argued that it would be reasonable to expect that exemption criteria would be less onerous than current SRDU conditions of licence and generally consistent with the TRDU conditions of exemption, which do not include requirements to file annual returns and to contribute to Canadian programming.

Parties opposing exemption

17. Other parties, such as FreeHD, the Canadian Cable Systems Alliance (CCSA) and MTS Allstream (MTS), opposed the proposal to exempt SRDUs. These parties argued that, because of the lack of competition in the signal transportation sector, exemption of SRDUs from licensing requirements would not benefit the Canadian broadcasting system.
18. FreeHD argued that many rural BDUs rely solely on SRDUs to receive the signals of various programming services since their remote location precludes them from accessing competitive offerings from TRDUs. FreeHD added that the terrestrial fibre of TRDUs only reaches approximately 25% of Canadian BDUs' head-ends, and will likely never reach smaller rural systems.
19. The CCSA also stated that, for geographical reasons, TRDUs do not represent a feasible option in the signal transportation sector for the great majority of its members. The CCSA added that there is even limited competition between both SRDUs since the technologies used by Shaw and Bell are not compatible. This means that a switch from one SRDU to the other requires expensive equipment purchases for the BDU. Accordingly, nearly all of the smaller BDUs are rely entirely on Shaw for satellite delivery of their broadcasting signals.
20. The parties opposed to exemption added that, because both SRDUs currently operating in Canada are vertically integrated, i.e. part of an entity owning both distribution and programming undertakings, exemption could lead to abuse of market power by SRDUs. For example, Bell and Shaw could use their SRDU services to extract higher fees from independent BDUs, while only applying modest increases to wholesale rates for programming services.

Commission's analysis and decisions

21. Section 9(4) of the Act states:

The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

22. As mentioned earlier, in Broadcasting Public Notice 2008-100, the Commission concluded that exemption of SRDUs from licensing requirements would not benefit the Canadian broadcasting system because of the lack of effective competition in the sector. Since then, the Commission has modified certain requirements in order to encourage greater competition in the sector. Several interveners recognized that these measures have helped to increase competition in the signal transport sector in urban areas.
23. However, the Commission notes that because of geographical, economic and technological reasons, competition is still very limited in rural and remote areas, where TRDU services are not always offered. The Commission considers that there is no evidence to conclude that the signal transport situation in remote areas is likely to change in the near future.
24. The Commission also concluded, in Broadcasting Public Notice 2008-100, that SRDUs' annual financial contribution to Canadian programming was material to the attainment of the objectives of the Act. In the Commission's view, this conclusion is still valid.
25. In light of the lack of effective competition in the signal transport sector and the current contribution of SRDUs' to the fulfillment of the objectives of the Act, the Commission concludes that it would be inappropriate to exempt SRDUs and will therefore continue to license them.

Transport of Canadian pay and specialty services by SRDUs

Background

26. In Notice of Consultation 2011-350, the Commission sought comments on the possibility of incorporating the transport of Canadian pay and specialty services into either SRDU licences or an SRDU exemption order. SRDU licences do not currently incorporate the transport of these services.

Position of parties

Parties supporting incorporation

27. FreeHD, Pelmorex Communications Inc., the CCSA, TELUS Communications Company and MTS all supported the incorporation of the transport of Canadian pay and specialty services into either SRDU licences or an SRDU exemption order.
28. Most supporting parties argued that the transport of pay and specialty services by SRDUs is an essential activity for BDUs located in rural areas and should therefore be included in the licences or in an exemption order. They added that SRDUs transport pay and specialty services in a way that is practically indistinguishable from the way that they transport conventional television stations.
29. FreeHD also argued that the incorporation of the transport of pay and specialty services would result in increased contribution from SRDUs to Canadian programming, since the revenues derived from this activity would then be subject to the 5% contribution currently required of SRDUs.

Parties opposing incorporation

30. Bell, Shaw and Cable Public Affairs Channel Inc. (CPAC) all opposed the incorporation of the transport of Canadian pay and specialty services into the licences or exemption order for SRDUs.
31. Shaw argued that the transport of pay and specialty services by SRDUs constitutes an uplinking activity, which does not require a licence or exemption under the Act. It argued that this activity is, in fact, a telecommunications service offered by SRDUs to programming services.
32. CPAC was of the view that the transport of pay and specialty services by SRDUs is in essence different than the transport of conventional television signals. CPAC noted that the signals of conventional stations are available “off air,” which allows SRDUs to select, on their own, which signals to receive and subsequently distribute to BDUs. This situation provides SRDUs with total control over the delivery of conventional signals to BDUs, from beginning to end. CPAC contrasted this practice to the transport of pay and specialty services by SRDUs, where the programming services are responsible for the delivery of their signals to BDUs and have to enter into affiliation agreements with BDUs and commercial arrangement with SRDUs.
33. CPAC expressed concern that incorporation of the transport of pay and specialty services into SRDU licences or an SRDU exemption order might erode the control that pay and specialty services currently have over the delivery of their signals by creating confusion regarding the responsibilities and obligations of the parties involved.

Commission's analysis and decisions

34. Historically, the Commission has considered that the transport of pay and specialty services by SRDUs was appropriately characterized as the delivery by the pay and specialty services of their programming services to cable head-ends. This view was reiterated in Broadcasting Decision 2006-564.
35. The Commission considers that incorporating the transport of Canadian pay and specialty services into SRDU licences or an SRDU exemption order would constitute a departure from that characterization. The Commission also agrees with CPAC that incorporation of the transport of Canadian pay and specialty services could lead to confusion regarding the responsibilities of each of the parties taking part in signal transportation.
36. The Commission notes, however, that contrary to some parties' assertions, uplinking activities do not constitute telecommunications. In Telecom Decision 2002-57, the Commission concluded that uplinking activities constitute broadcasting by a broadcasting undertaking.
37. Accordingly, the Commission considers that the transport of Canadian pay and specialty services is not an activity that should be incorporated into SRDU licences.

Equalization fees

38. Quebecor Media Inc., Rogers Broadcasting Limited and Independent Broadcast Group submitted that the Bell TV direct-to-home (DTH) undertaking sometimes charges an uplink fee to pay and specialty services for the transport of their signals to cable head-ends, regardless of whether such programming services actually need to also use Bell SRDU facilities.
39. The Commission has already addressed this matter in Public Notice 2008-100. It concluded that concerns about such fees would be best addressed through its dispute resolution process given that the fees are established through the individual affiliation agreements reached between the Bell DTH undertaking and pay and specialty services. The Commission remains of the view that its dispute resolution process is the best way to address this concern.

Other matters

Imposition of a reverse onus provision

40. Several parties proposed that the current condition of licence related to undue preference included in SRDUs' licences be revised to incorporate a reverse onus provision. The concept of reverse onus as applied to undue preference or disadvantage complaints operates such that, once a complainant has demonstrated the existence of a preference or disadvantage, the respondent then shoulders the burden of demonstrating the preference or disadvantage is not undue.

41. In its regulatory framework relating to vertical integration (Broadcasting Regulatory Policy 2011-601), the Commission established that reverse onus provisions should be made applicable to all programming undertakings as well as to all BDUs with respect to undue preference complaints. The Commission concluded that it is the party conferring a preference or a disadvantage that will have the necessary information required for the Commission to determine the facts of the case in order to issue a ruling.
42. The Commission is of the preliminary view that that the above rationale may also be valid with respect to SRDUs. It therefore intends to explore the possibility of incorporating a reverse onus provision in conditions of licence related to undue preference that apply to SRDUs at the time of their licence renewals.

Information sharing

43. Different parties argued that SRDU licences or an SRDU exemption order should contain a condition preventing SRDUs from sharing information with an affiliated BDU. The Commission notes that Shaw's SRDU currently has a condition of licence to ensure that any confidential information obtained from a customer or potential customer remains confidential.
44. Given that both operating SRDUs are part of vertically integrated entities, i.e. entities that own or control both audiovisual programming and distribution undertakings, the Commission considers that an SRDU sharing competitively sensitive information about a client BDU to an affiliated BDU may constitute an unfair competitive advantage. Therefore, at the next renewal of SRDU licences, the Commission intends to explore whether the Shaw SRDU should retain a condition of licence that restricts sharing of information with an affiliated BDU, and whether such a condition of licence should be incorporated into Bell's SRDU licence.

Secretary General

Related documents

- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011
- *Call for comments on a possible exemption order respecting satellite relay distribution undertakings and on the transport of Canadian pay and specialty services by such undertakings*, Broadcasting Notice of Consultation CRTC 2011-350, 27 May 2011
- *Direct-to-home satellite distribution undertaking and satellite relay distribution undertaking*, Broadcasting Decision CRTC 2010-61, 8 February 2010
- *Amendments to the requirements set out in the lists of eligible satellite services*, Broadcasting Regulatory Policy CRTC 2009-639, 9 October 2009
- *Amendments to the Exemption order respecting terrestrial relay distribution network undertakings*, Broadcasting Order CRTC 2009-638, 9 October 2009

- *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Public Notice CRTC 2008-100, 30 October 2008
- *Bell ExpressVu Satellite Relay Distribution Undertaking – Licence renewal*, Broadcasting Decision CRTC 2006-564, 28 September 2006
- *Canadian Satellite Communications Inc. – Contribution Regime*, Telecom Decision CRTC 2002-57, 13 September 2002
- *Exemption order respecting cable systems having fewer than 2,000 subscribers*, Public Notice CRTC 2001-121, 7 December 2001