



Broadcasting Decision CRTC 2018-56

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Reference: Part 1 application posted on 27 September 2017

Ottawa, 12 February 2018

Ebox Inc.

Various locations in Quebec

Public record for this application: 2017-0909-9

Complaint alleging Bell Media Inc.'s refusal to provide certain of its programming services

The Commission finds that Bell Media Inc. (Bell Media) has not given a preference to affiliated broadcasting distribution undertakings (BDUs) or other BDUs and has not subjected Ebox Inc. (Ebox) to a disadvantage in conducting its negotiations with Ebox for the provision of various programming services.

*Accordingly, the Commission **dismisses** the complaint by Ebox. The Commission also clarifies the parties' obligations pursuant to the Wholesale Code in order to assist the parties in resolving this dispute going forward.*

The parties

1. Ebox Inc. (Ebox) is an independent Internet service provider with subscribers in Quebec and Ontario. It is in the process of launching exempt broadcasting distribution undertakings (BDUs) to serve Montréal, Québec, Sherbrooke, Gatineau, Rivière-du-Loup, Trois-Rivières and Saguenay, Quebec and their surrounding areas.
2. Bell Media Inc. (Bell Media) is the licensee of various programming services, including the popular mainstream sports services TSN (English-language) and RDS (French-language). It is affiliated with terrestrial BDUs and a direct-to-home BDU operated by BCE Inc. (BCE).

The complaint

3. On 22 September 2017, Ebox filed an application alleging undue preference and disadvantage by Bell Media, pursuant to section 11 of the *Discretionary Services Regulations*, which reads as follows:

11 (1) A licensee shall not give an undue preference to any person, including itself, or subject any person an undue disadvantage.

- (2) In a proceeding before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.
4. Ebox alleged that Bell Media is providing its programming services to its related BDUs and to BDUs operated by Videotron, Shaw, Rogers and Cogeco in the service areas where Ebox is preparing to launch, while refusing to provide its services to Ebox.
 5. Ebox submitted that Bell Media is abusing its dominant position as a vertically integrated entity with a significant market share in the distribution sector and stands to benefit from refusing to offer its programming services to Ebox, a new entrant in the BDU landscape. It further submitted that lack of access to TSN and RDS in particular puts it at a notable disadvantage as its offering to future subscribers will be less appealing compared to that of incumbents in the market. Ebox added that there is no other alternative through which it can gain access to the programming offered by TSN and RDS as rights to their programming are granted on an exclusive basis.
 6. Ebox therefore requested that the Commission find that Bell Media is giving an undue preference to its BDUs, as well as other BDUs, and is subjecting Ebox to a disadvantage. It further requested that the Commission order Bell Media to offer its services to Ebox and resume negotiations in good faith, as well as compel Bell Media to participate in any dispute resolution proceeding that the Commission deems appropriate.

Bell Media's reply

7. Bell Media submitted that Ebox's complaint is misleading as it implies that Bell Media has chosen to unilaterally withhold its services from Ebox without any justification. Bell Media further submitted that Ebox has omitted or overlooked important and relevant facts and information relating to the parties' prior actions, as well as to the negotiations between them. In Bell Media's view, Ebox is "forum shopping," attempting to use Commission processes to obtain a result that would never emerge through reasonable commercial negotiations.
8. Bell Media submitted that it has been and remains prepared to offer its services to Ebox on reasonable terms and conditions. It added that it is entitled to negotiate such terms and conditions for its services, especially when they reflect those already available in the market and used by other BDUs to provide greater choice and flexibility for Canadian consumers. Bell Media filed, on a confidential basis, a list of over 100 BDUs, including some newly-launched BDUs, that are small or of potentially comparable size to Ebox and that signed up for its agreement during the two years prior to the filing of Ebox's present application.

9. Bell Media stated that the above is consistent with section 3(1)(t)(iii)¹ of the *Broadcasting Act* (the Act), as well as with section 6 of the Wholesale Code² since that section of the code mandates that negotiations for wholesale rates take into account the fair market value of programming services.
10. Finally, Bell Media argued that in light of the phasing out of access privileges for former Category A services (see Broadcasting Regulatory Policy 2015-96), programmers are no longer required to offer their programming services to all BDUs. As such, licensees of programming services can now choose not to have their services carried by a BDU, just as BDUs are no longer required to carry a given programming service. In Bell Media's view, such a practice is consistent with section 13 of the Wholesale Code, which is based on the agreement of both parties to pursue a carriage relationship.
11. In light of the above, Bell Media concluded that Ebox has not met the initial test of demonstrating that a preference has been given or that it has been subjected to a disadvantage, and that Ebox's complaint is therefore without merit and should be dismissed.
12. Should the Commission conclude that a preference has been given to Bell Media's BDUs or other BDUs, or that Ebox has been subjected to a disadvantage, Bell Media submitted that any such preference or disadvantage would not be undue. Specifically, it indicated that it fails to see how its actions have had or are likely to have a material adverse impact on Ebox's BDU service given that it has not yet launched and therefore currently does not have any subscribers, and given that it does not have a definitive launch date.

Interventions

13. The Commission received interventions in support of Ebox's application from the Canadian Cable Systems Alliance (CCSA), Canadian Network Operators Consortium Inc. (CNOc), the Public Interest Advocacy Centre (PIAC) and TELUS Communications Inc. (TELUS), as well as from an individual who stated that the Commission should regulate in support of a competitive market, where smaller players can compete. It also received interventions in opposition to Ebox's application from Corus Entertainment Inc. (Corus) and Rogers Media Inc. (Rogers).
14. The CCSA, CNOc, PIAC and TELUS submitted that an outright refusal to offer existing programming services to a new BDU entrant, while offering these same

¹ "It is hereby declared as the broadcasting policy for Canada that [...] distribution undertakings [...] should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services [...]"

² The Wholesale Code, set out in the appendix to Broadcasting Regulatory Policy 2015-438, governs certain aspects of the commercial arrangements between BDUs, programming undertakings, and exempt digital media undertakings.

services to established competitors in the market, constitutes a clear case of undue preference and undue disadvantage.

15. In their view, the actions of Bell Media run counter to the development of a healthy distribution market that supports enhanced competition and consumer choice. The CNOC added that Bell Media's actions undermine various objectives of the Act, including those relating to developing a wide range of Canadian programming, ensuring that distribution undertakings provide efficient delivery of programming at affordable rates, and ensuring that contractual arrangements provide for reasonable terms of carriage, packaging and retailing of programming services by BDUs.
16. These interveners argued that Bell Media's actions do not advance the interests of consumers given that they will result in a less competitive market and will hamper innovation. They further argued that Bell Media's actions demonstrate the particular vulnerability of independent BDUs in the face of a significantly consolidated and vertically integrated media sector and the clear need for the Commission to maintain its safeguards against anti-competitive behavior.
17. In this regard, the CCSA submitted that denying competing BDUs access to programming services simply by refusing to deal with those BDUs would create a precedent and would result in stifling innovation by newer distribution partners in the delivery models, packaging and pricing they can make available to Canadian consumers. TELUS added that allowing licensees to withhold their programming services from BDUs would be inconsistent with the Commission's approach to programming exclusivity, given that the Commission has historically permitted programming services to acquire exclusive rights to broadcast programs on the basis that they were offered to all BDUs. For its part, the CNOC argued that a BDU that cannot secure programming, especially popular mainstream programming, will be restricted to offering a limited service compared to its competitors in the market, resulting in a substantial lessening or prevention of competition.
18. PIAC submitted that it would be effectively impossible to launch a BDU service without Bell Media's popular programming services. Citing the 2016 Communications Monitoring Report, it noted that BCE, the largest Canadian broadcaster, captures almost one-third (31%) of all television revenues in Canada. PIAC added that a regulatory gap in the area of access to programming services held by vertically integrated entities creates fertile ground for a serious abuse of dominance by a large entity capable of effectively shutting out competitors.
19. Finally, the CCSA submitted that Bell Media's refusal to provide its programming services to a BDU runs counter to the condition of licence for the discretionary services that form part of the Bell French-language group of services, set out in Appendix 2 to Broadcasting Decision 2017-144, that prohibits the licensee from including or enforcing "any provision in or in connection with an affiliation agreement that is designed to prevent or create incentives that would effectively prevent another programming undertaking or BDU from launching or distributing another licensed programming service."

20. In their opposing interventions, Rogers and Corus submitted that Ebox has failed to provide sufficient evidence that Bell Media has given its BDUs or other BDUs a preference or has subjected Ebox to a disadvantage. They expressed the view that, as a matter of policy, programming services must have the same freedom as BDUs, noting that BDUs benefit from the flexibility of deciding whether to carry programming services. According to Rogers, asymmetrical regulation puts enormous and inequitable power in the hands of the BDU without providing a programming service with a reciprocal ability to determine whether the commercial terms being offered represent fair market value.
21. Rogers added that refusal to accept Bell Media's terms regarding access to its programming services is not an accepted ground for an undue preference complaint. It further argued that by accepting Ebox's attempt to get a "better deal" than other BDUs with which it will be competing, the Commission would be encouraging every new entrant BDU to follow a similar path.

Reply by Bell Media

22. In its 7 November 2017 reply, Bell Media argued that comments filed in certain interventions focussed almost entirely on its decision to withhold its programming services and that they overlooked its attempts to resolve the dispute and enter into an affiliation agreement with Ebox. Bell Media reiterated that it is prepared to negotiate the carriage of its services based on reasonable terms and conditions.

Final reply by Ebox

23. In its 14 November 2017 final reply, Ebox stated that Bell Media is mischaracterizing the focus of the complaint. In its view, the issue is not whether Bell Media is offering fair contractual terms to Ebox, but rather Bell Media's statement that it is under no regulatory obligation to offer Ebox its programming services. Ebox indicated that it is seeking the Commission's clarification that Bell Media cannot refuse to give BDUs access to its programming services.
24. Further, Ebox disagreed with the claim that it has not demonstrated the existence of a disadvantage. Noting the popularity of the programming services in question, Ebox argued that Bell Media's refusal to provide its services constitutes a clear case of disadvantage. It added that Bell Media's arguments regarding the regulatory right of licensees to refuse BDUs access to programming services are not founded on past Commission regulatory policies and decisions.
25. Finally, Ebox stated that the launch of its BDU has been delayed by systematic obstruction on the part of Bell Media and that the Commission's intervention is essential to compensate for the imbalance between itself, a small to medium-sized enterprise seeking to launch a BDU to serve certain regions of Quebec, and the economic power of Bell Media.

Commission's analysis and decisions

26. When the Commission examines a complaint alleging undue preference or disadvantage, it must first determine whether the complainant demonstrated that the other party has given preference to any person, including itself, or has subjected any person to a disadvantage.
27. Should the Commission find that there exists a preference or disadvantage, it then proceeds to determine whether such a preference or disadvantage is undue. Specifically, the Commission examines whether the preference or disadvantage has had or is likely to have a material adverse impact on the complainant or any other person. It also examines the impact the preference or disadvantage has had or is likely to have on the achievement of the objectives of the Act.
28. In the Commission's view, Ebox's claim regarding undue preference and disadvantage is based on the premise that Bell Media is providing its programming services to its related BDUs and other BDUs, while refusing to provide its programming services to Ebox.
29. Notwithstanding certain statements and arguments made by Bell Media, the Commission notes that Bell Media has participated in a number of negotiations with Ebox since the beginning of this dispute. This reflects a willingness on the part of Bell Media to negotiate with Ebox.
30. Further, Bell Media stated that it has been and remains prepared to engage in commercial negotiations with Ebox, as long as the rates to be negotiated are based on the rates negotiated with other BDUs in the market. Although the record of this proceeding does not include the offers exchanged by the parties, Ebox has not contested Bell Media's claim that it has made an offer to Ebox based on rates negotiated with comparable BDUs.
31. The Commission considers that the evidence on the public record for this proceeding suggests that Bell Media is willing to offer its programming services to Ebox.
32. In light of all of the above, the Commission finds that Bell Media, in its negotiations with Ebox for the provision of its programming services, has not given its BDU or other BDUs a preference and has not subjected Ebox to a disadvantage. Consequently, the Commission **dismisses** Ebox's complaint.

Clarifications on other matters raised in this proceeding

33. Commercial matters are generally best determined by negotiations between the parties involved. Nevertheless, the Wholesale Code sets out that there may be circumstances where the Commission must intervene in the public interest, including cases where the attainment of the objectives set out in the Act could be compromised.

34. As a general practice, the Commission expects parties to negotiate new agreements based on the provisions of the Wholesale Code, including establishing rates based on the fair market value of programming services, pursuant to section 6 of that code.
35. As such, the Commission considers that, in their negotiations, it would be commercially unreasonable for either party to demand a rate that is not based on the fair market value of Bell Media's programming services in accordance with the applicable fair market value factors set out in the Wholesale Code. In this regard, the Commission further considers that the rates paid by unaffiliated BDUs for Bell Media's programming services are highly probative given that Ebox's BDU has not yet launched.
36. In regard to the broader question raised in this proceeding of whether programming services can withhold their services from BDUs, the Commission notes that in Broadcasting Regulatory Policy 2011-601, it considered that vertically integrated entities have both the opportunity and incentive to give undue preference by providing themselves with exclusive access to content that they control. Specifically, it stated that the potential increase in the market share of the distribution services that form part of the vertically integrated entity would provide an incentive for that entity to deny competing distribution systems access to popular programming.
37. In the Commission's view, any concerns regarding the above are most appropriately dealt with through its existing regulatory mechanisms, including the undue preference provisions and the competitive safeguards set out in the Wholesale Code.
38. In this regard, the Commission is committed to upholding existing competitive safeguards to ensure fair and reasonable commercial negotiations.

Secretary General

Related documents

- *Bell Media Inc. – Licence renewal for French-language television services*, Broadcasting Decision CRTC 2017-144, 15 May 2017
- *The Wholesale Code*, Broadcasting Regulatory Policy CRTC 2015-438, 24 September 2015
- *Let's Talk TV: A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011