



Broadcasting Decision CRTC 2020-347

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Public record for this application: 2020-0216-1

Final offer arbitration between Cogeco Connexion Inc. and Bell Media Inc. regarding the distribution of VRAK

The Commission sets out its decision resulting from the final offer arbitration proceeding initiated by Cogeco Connexion Inc. (Cogeco) regarding a commercial dispute with Bell Media Inc. (Bell) concerning the distribution of the discretionary service VRAK by the broadcasting distribution undertakings that Cogeco operates.

*The Commission **selects Bell's offer**, thereby establishing the linear and multiplatform wholesale rates for distribution of VRAK by Cogeco. The Commission finds that the offer proposed by Bell is most appropriate when evaluated in light of factors relating to fair market value, taking into account their probative value.*

Resolving commercial disputes allows the Commission to ensure that Canadians have access to a diverse range of quality programming.

Introduction

1. On 25 March 2020, Cogeco Connexion Inc. (Cogeco) filed an application requesting that the Commission initiate a final offer arbitration (FOA) proceeding relating to a commercial dispute with Bell Media Inc. (Bell) regarding the distribution of certain discretionary services by the broadcasting distribution undertakings (BDUs) operated by Cogeco.
2. In its application, Cogeco argued that this case meets all of the criteria outlined in Broadcasting and Telecom Information Bulletin 2019-184 for FOA proceedings. Following its review, Commission staff informed Cogeco that it had not proposed a term and rate structure for the FOA proceeding, and that the Commission's usual practice is to limit the scope of FOA proceedings as much as possible, including limiting the number of services at issue.
3. On 15 April 2020, Cogeco provided the additional information, much of which was submitted in confidence to the Commission and Bell, and also included a proposal to limit the scope of the proceeding to the discretionary service VRAK.
4. On 21 April 2020, Bell confirmed that it was in agreement with Cogeco's proposal, and commented on the information submitted in confidence.

5. In its conduct letter dated 21 May 2020, the Commission advised the parties that it was accepting the FOA request for VRAK pursuant to sections 12 to 15 of the *Broadcasting Distribution Regulations*, sections 14 and 15 of the *Discretionary Services Regulations*, and Broadcasting and Telecom Information Bulletin 2019-184. In that letter, the Commission defined the scope of the proceeding as “establishing the linear and multiplatform wholesale rates for distribution of VRAK by Cogeco.”
6. As set out in Broadcasting and Telecom Information Bulletin 2019-184, in the context of FOA, the Commission examines the final offers submitted by the parties and selects one in its entirety. The Commission’s decision is binding on the parties. In very exceptional circumstances, when neither of the final offers from the parties is in the public interest, the Commission may reject both offers.
7. In accordance with paragraph 59 of Broadcasting and Telecom Information Bulletin 2019-184 and with the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, much of the information presented by the two parties that are subject to this decision, including certain financial information, will not be disclosed. Given the nature of this information, its disclosure could prejudice the competitive positions of the parties.

Regulatory framework

8. The broadcasting policy set out in section 3(1) of the *Broadcasting Act* (the Act) includes the following objectives:
 - programming should be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes – section 3(1)(i)(i); and
 - 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 – section 3(1)(t)(iii).
9. The Act confers on the Commission explicit powers with regard to dispute resolution. In particular, section 10(1)(h) of the Act states:

The Commission may, in furtherance of its objectives, make regulations for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings.
10. The Commission also has the ability, pursuant to section 10(1)(g) of the Act, to make regulations respecting the carriage of any foreign or other programming services by distribution undertakings and, pursuant to section 10(1)(k) of the Act, to make

regulations respecting such other matters as it deems necessary for the furtherance of its objects.

11. Dispute resolution is addressed in sections 12 to 15.02 of the *Broadcasting Distribution Regulations* and sections 14 and 15 of the *Discretionary Services Regulations*. As set out in those regulations, the licensee shall submit to having the dispute resolved in accordance with the procedural requirements established by the Commission in Broadcasting and Telecom Information Bulletin 2013-637.¹
12. When resolving disputes by way of FOA, the Commission assesses the proposed rates based on the fair market value of the service. In the Wholesale Code set out in the appendix to Broadcasting Regulatory Policy 2015-438, the Commission established that a wholesale rate based on the fair market value of a programming service must take into consideration the following factors, where applicable:
 - historical rates;
 - penetration levels, volume discounts and the packaging of the service;
 - rates paid by unaffiliated BDUs for the programming service;
 - rates paid for programming services of similar value to consumers, taking into consideration viewership;
 - the number of subscribers that subscribe to a package in part or in whole due to the inclusion of the programming service in that package, taking into consideration viewership;
 - the retail rate charged for the service on a stand-alone basis; and
 - the retail rate for any packages in which the service is included.
13. As explained in Broadcasting Information Bulletin 2015-440 and Broadcasting and Telecom Information Bulletin 2019-184, in a dispute resolution process, parties have the opportunity to make submissions regarding which fair market value factors should apply, how such factors should be interpreted and how much weight should be given to a specific factor.
14. Parties can also make submissions on which public policy objectives are relevant to a given case. Thus, if necessary, the Commission will apply a public interest test to assess whether the proposed wholesale rates are consistent with the relevant public policy objectives.

¹ The most recent version of the Information Bulletin is Broadcasting and Telecom Information Bulletin 2019-184, however the *Broadcasting Distribution Regulations* and the *Discretionary Services Regulations* have not yet been revised so as to reflect this change.

15. In Broadcasting Regulatory Policy 2015-96, the Commission indicated that a healthy and dynamic wholesale market is one in which risk and reward are shared between BDUs and programming services, striking a fair balance between allowing BDUs to provide their subscribers with more choice and flexibility and ensuring reasonable and predictable levels of revenue for programming services.

Positions of parties

Cogeco's final offer

16. Cogeco submitted that the rates under the previous agreement are incompatible with the current value of VRAK and are disconnected from its fair market value. It argued that a significant change to VRAK's rates and rate structure must occur in Cogeco's main market, Quebec, and in its Francophone systems in Ontario. Cogeco submitted that its offer would meet the fair market value criteria.
17. Cogeco stated that historical rates should not be considered as a major argument in determining the fair market value of VRAK due to the structural and policy changes that have occurred and affected VRAK over time. Instead, Cogeco submitted that the following factors should be given more weight:
 - the constant and substantial decline in VRAK's viewership since 2014, which is attributable to the removal of regulatory protections and Bell's decision to rebrand VRAK, leaving it with unspecific programming and an ill-defined target audience;
 - VRAK is selected less and less by Cogeco's subscribers through either Cogeco's Sélectif/MyMix packages, where subscribers choose the services that they wish to receive, or as a preassembled package, despite VRAK being included in all of Cogeco's preassembled packages;
 - the higher wholesale rates of VRAK compared to other programming services that provide similar value to consumers. Based on the services' descriptions, programming characteristics and demographic target, Cogeco identified three services to serve as comparables: Addik TV, MAX and Séries+; and,
 - the wholesale rates paid by other BDUs for VRAK.
18. Cogeco submitted that its proposed rates would allow it to continue delivering choice and flexibility to consumers and enable it to provide a competitive offering, as envisaged under the Wholesale Code. Cogeco stated that, at present, it is not able to compete on an equitable basis with other BDUs and cited retail pricing by Bell BDUs for certain packages in support of its arguments. Cogeco considered that its proposed rates would create an equitable risk share between the two parties and allow Bell to count on a certain revenue stream while also being accountable for any negative decisions relating to VRAK's content, orientation, genre and spending.

19. With regard to the rates for its Ontario Non-Francophone market, Cogeco argued that its proposal takes into consideration the specific nature of distributing a French-language service outside of a main market and will allow Cogeco to continue to offer choices to minority language communities at reasonable rates.

Bell's final offer

20. Bell argued that VRAK is one of the foundational services in French-language television that has had a long and successful history of serving the needs and interests of Canadian viewers. For much of its history, VRAK focused on content for children. However, the Commission's framework has changed, as has the market for children's programming, so VRAK has adapted its programming strategy accordingly.
21. Bell argued that its proposal represents fair market value, is commercially reasonable, and is in the public interest. It presented the following arguments in support of its position:
- historical rates are a relevant factor as there have been no changes in Cogeco's packaging model;
 - VRAK has consistently invested in high-quality Canadian programming;
 - its proposed rates are reasonable when compared to those paid by unaffiliated BDUs;
 - it is very difficult to compare VRAK to other French-language services since, unlike other services, it has undergone significant programming changes and serves a unique niche audience;
 - VRAK has invested extensively in a digital presence that complements the linear channel, which helps retain subscribers;
 - the service is heavily dependent on subscription revenue;
 - Bell's offer equitably shares the risk between the programming service and the BDU; and
 - Bell's proposal advances public policy objectives by having a positive impact on Cogeco's ability to provide a competitive offering to consumers while allowing VRAK to continue to invest in Canadian content and provide a dedicated service for young adults.

Comments

Cogeco

22. In response to Bell's arguments related to difficulties in comparing VRAK to other services, Cogeco argued that there is very little that is unique in VRAK's

programming as it stands today. Cogeco referred to the descriptions of Séries+, MAX and Addik TV and argued that they are very similar to that of VRAK. In addition, Cogeco submitted that there is little difference between those services and VRAK in terms of the ratio of television series versus movies, Canadian programming, and scripted versus unscripted programming. Despite these similarities to Séries+, MAX and Addik TV, VRAK has considerably lower viewership, while being paid higher wholesale rates.

23. With respect to Bell's arguments concerning VRAK's programming changes, Cogeco compared VRAK's audience performance to that of MAX, which also rebranded in 2016. Cogeco argued that MAX was very successful in spite of rebranding, while spending considerably less on programming.
24. Cogeco also commented on Bell's increased expenditures on foreign programming, arguing that this had led to decreases in spending on Canadian programming. In addition, Cogeco submitted that much of VRAK's programming is also available through other channels, so the level of programming investment that Bell reported for only one service should not be taken at face value.
25. With regard to Bell's arguments relating to VRAK's dependency on subscription revenues, Cogeco argued that VRAK has been allowed to generate advertising revenues since 2006, and that between 2013 and 2018, VRAK's advertising revenue decreased by 40%. Cogeco submitted that since advertising revenue is dependent on viewership performance, VRAK's reliance on subscription revenue was entirely due to Bell's programming decisions.
26. Cogeco further argued that the rates paid by other BDUs are likely to be the result of the inequality of bargaining power between Bell and smaller independent BDUs rather than an indicator of the true value of VRAK. In terms of the probative value to be ascribed to the standalone rates, Cogeco reiterated that this should be given little weight, as Cogeco has a very few standalone subscribers.

Bell

27. Bell argued that, while Cogeco compared VRAK to other services, there are inevitable nuances in making such a comparison. It was of the view that no other service can be directly compared to VRAK. Bell submitted that a comparison to what other BDUs are willing to pay for VRAK is a more precise comparison and should be given much more weight in the Commission's evaluation of the respective offers.
28. With regard to Cogeco's arguments pertaining to retail pricing of Bell BDUs for certain packages, Bell submitted that the regular retail prices charged by Bell Fibe for these packages are actually 9% to 17% more than what Cogeco charges for the same packages.

29. In terms of the rates to be paid by Ontario systems, Bell argued that the principles underlying the basis for primary and secondary markets have changed. The justification for presumptive discounts in the secondary market revolved around packaging support. By being packaged in tiers that also included English-language services, French-language services benefited from more subscribers and greater penetration levels than they would have otherwise obtained. According to Bell, that dynamic has largely been eliminated as packaging focus has shifted to consumer choice (i.e., theme packs and pick-packs).
30. In response to Cogeco's allegations that VRAK is an ill-defined service, and that Cogeco should not be penalized for Bell's programming decisions, Bell reiterated the reasons for VRAK's rebranding to a general interest service targeting young adults. Bell noted that VRAK's legacy Canadian programming obligations were not removed until September 2017.
31. With regard to the services that Cogeco identified as comparable to VRAK, Bell stated that Cogeco had focused on viewership (Average Minute Audience or AMA), the ratio of scripted to unscripted programming and the descriptions for each service. Bell argued that, while AMA is one of the variables to consider in assessing the value of a service, it is not the only one, and that AMA is best used for advertising. Bell submitted that VRAK has consistently demonstrated a commitment to quality Canadian programming, one that is reflected by investments in Canadian programming. In comparing these expenditures to those of the services identified by Cogeco, Bell concluded that VRAK invests more resources into the production of quality Canadian content than the other services, and that subscribers value those investments.

Commission's analysis and decisions

Introduction

32. The Commission has examined the final offers in light of the fair market value factors, and determined that the factors relevant to this FOA are the following:
 - historical rates;
 - penetration levels, volume discounts and the packaging of the service;
 - rates paid by unaffiliated BDUs for the programming service;
 - rates paid for programming services of similar value to consumers, taking into consideration viewership; and

- the retail rate charged for the service on stand-alone basis.
33. While the parties submitted general arguments relating to the retail price of packages, the Commission is of the view that the parties presented no compelling evidence evaluating VRAK's importance as part of a package. Therefore, the Commission finds that this factor is irrelevant to this proceeding.
34. The Commission has also taken into consideration the public policy objective of ensuring that the Cogeco is able to provide a competitive offering to consumers. Given that both parties' proposals would support that objective, the Commission considers that this factor has minimal impact on this proceeding.

Analysis of applicable fair market-value factors

35. The Commission notes that Bell has implemented significant changes to VRAK's programming following the release of Broadcasting Regulatory Policy 2015-96 and that the service has experienced declines in audience levels. While historical rates are typically given a high degree of probative value in FOA proceedings, in this case, the Commission is of the view that the probative value is limited to a certain degree by the changes in VRAK's programming and the regulatory changes following the release of Broadcasting Regulatory Policy 2015-96. A portion of VRAK's programming is also now available through other channels. Additionally, in assessing the fair market value in the context of historical rates, the Commission examined programming expenditures. Between 2013-2014 and 2018-2019, VRAK's programming expenditures fluctuated from year to year, with the average over the six-year period being slightly higher than the programming expenditures reported in 2013-2014. Taking all of the above into consideration, the Commission finds that while programming that was previously exclusive to VRAK and is now available through other channels decreases VRAK's value as a distinct service, the final offer presented by Bell remains the most reasonable in that it more closely reflects historical trends in wholesale rates and trends in VRAK's programming expenditures.
36. Since the release of Broadcasting Regulatory Policy 2015-96, after which VRAK ceased to be distributed on the basic service of BDUs, its penetration levels and audience levels have declined. Although little information can be drawn from Cogeco's packaging of the service due to Cogeco's relatively small number of preassembled packages and that they all contain VRAK, the Commission is of the view that the viewership data has high probative value. The Commission is of the view that the rates proposed by Cogeco more appropriately reflect these declines. In terms of the packaging of the service, the fact that VRAK is present in all of Cogeco's packages may attest to its value, which would suggest that Bell's offer may be more reasonable. However, given that audience performance is a result of the behavior of all subscribers, the Commission considers that it should be given more weight. Given the above, and VRAK's relatively low selection rate by Cogeco subscribers, the Commission finds that Cogeco's offer is more reasonable when evaluated in light of penetration levels and packaging.

37. The Commission has also examined the rates proposed by Cogeco and Bell in comparison to those charged to unaffiliated BDUs and considers this factor to have high probative value in the context of this proceeding. On the basis of this comparison, the Commission finds that Bell's proposed rates for VRAK are more reasonable when compared to unaffiliated BDUs while taking volume discounts and packaging into account, and would contribute to a more balanced market.
38. Cogeco argued that Séries+, MAX and Addik TV are services that are of similar value to consumers as VRAK. Bell disagreed that the services were comparable. Having analysed the levels of Canadian programming, Canadian programming expenditures and the categories of programming that the four services offer, the Commission has determined that the differences are significant enough to attenuate the probative value of this factor. Taking into account this low probative value, when comparing the rates paid for these three services compared to VRAK taking into consideration viewership, the Commission finds that Cogeco's offer is more appropriate.
39. While very few customers subscribe to VRAK on a stand-alone basis, greatly limiting the probative value of this factor, the Commission finds that Bell's proposal is closer to the standalone rates for Séries+, MAX and Addik TV. It is therefore of the view that the stand-alone rate proposed by Bell is more reasonable.

Conclusion

40. The Commission examined each offer and relevant documents in light of factors relating to fair market value, as well as the public policy objectives, taking into account their probative value. Noting that its decision was based on other considerations as well, but that this information was submitted in confidence, the Commission **selects Bell's offer.**

Secretary General

Related documents

- *Practices and procedures for dispute resolution*, Broadcasting and Telecom Information Bulletin CRTC 2019-184, 29 May 2019
- *Interpretation of the Wholesale Code*, Broadcasting Information Bulletin CRTC 2015-440, 24 September 2015
- *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
- *Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2013-637, 28 November 2013