



Broadcasting Decision CRTC 2024-169

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Reference: Part 1 application posted on 1 May 2023

Ottawa, 26 July 2024

Consumers' Association of Canada (Manitoba); Consumers Council of Canada; Forum for Research and Policy in Communications; Option consommateur; Public Interest Advocacy Centre; and Union des consommateurs

Across Canada

Public record: 2023-0219-9

Rogers Communications Inc.'s payment of the tangible benefits allocated to the Broadcasting Participation Fund

Summary

The Commission makes decisions on broadcasting and telecommunications matters that serve the public interest. Input of industry, public interest organizations, Indigenous communities, and individual Canadians helps the Commission to make informed decisions.

The Broadcasting Participation Fund (BPF) plays a valuable role in the Canadian broadcasting system by facilitating, through funding, the participation of public interest organizations in Commission broadcasting proceedings.

In Broadcasting Decision 2022-76, the Commission directed Rogers Communications Inc. (Rogers) to pay tangible benefits¹ to the BPF over three consecutive years. These payments support the BPF in its mission to fund public interest organizations.

On 17 April 2023, the Commission received a joint application from several public interest organizations to reopen Broadcasting Decision 2022-76 asking to accelerate the payment of tangible benefits to the BPF. Specifically, the applicants stated that the BPF was struggling financially and could close in the future. As such, they requested that Rogers be required to pay the full amount of tangible benefits to the BPF on or before 1 September 2023.

In the Commission's view, Rogers has completely fulfilled the conditions of approval required by the Commission in Broadcasting Decision 2022-76, including disbursing the

¹ Tangible benefits payments come out of ownership transactions where there is a change in the ownership or control of a company. The Commission often requires the purchaser to pay "tangible benefits" to qualifying organizations and funds.

first of three payments of tangible benefits to the BPF on or by 31 August 2023. Furthermore, Rogers has confirmed that it intends to disburse the last two payments each broadcast year for 2024 and 2025. That decision is final and conclusive, and the Commission does not have the authority to reopen its past decisions under the *Broadcasting Act*. Accordingly, the Commission denies the application.

Given the importance of public participation, the Commission has included a consultation on this subject in its [regulatory plan to modernize Canada's broadcasting framework](#). As part of that proceeding, the Commission will consider the future of the BPF and options for public participation funding.

Background

1. Public participation in Commission proceedings is of great importance. A diversity of evidence informs the Commission's work in fulfilling of its mandate to regulate and supervise the broadcasting system. Obtaining evidence from individual consumers or from organizations advocating in the public interest helps the Commission make informed, evidence-based decisions with far-reaching impacts.
2. To reduce barriers to participation in broadcasting proceedings, the Commission has a framework to fund public participation. The Broadcasting Participation Fund (BPF), which operates independently from the Commission, has an important role in this framework. The BPF was created following Broadcasting Decision 2011-163. It is linked to the Commission's supervisory role over broadcasting ownership transactions in the *Broadcasting Act* (the Act). That decision authorized the transfer of effective control of CTVglobemedia Inc.'s broadcasting subsidiaries to BCE Inc. and required BCE Inc. to submit a proposal for a fund that would become the BPF.²
3. Since then, the BPF has provided funding to support public interest groups and consumer groups in both official languages. It has represented non-commercial user interests and the public interest before the Commission in broadcasting matters under the Act.
4. The BPF is funded by tangible benefits payments that come from ownership transactions. The tangible benefits can be required as a condition of the Commission's approval of broadcasting ownership transfers.
5. In Broadcasting Decision 2022-76, the Commission approved, subject to several modifications and the fulfilment of specific conditions of approval, an application by Rogers Communications Inc. (Rogers), on behalf of Shaw Communications Inc. (Shaw). The decision approved the authority to transfer the effective control of Shaw's broadcasting undertakings to Rogers. As a condition of approval, the Commission directed Rogers to file a tangible benefits proposal that included \$725,439 to the BPF, to be paid in equal annual payments over three consecutive broadcast years following the close of the transaction.

² See Broadcasting Regulatory Policy 2012-181.

6. In April 2022, Rogers filed a revised tangible benefits proposal based on the direction issued by the Commission in Broadcasting Decision 2022-76. This fulfilled the condition of approval. The revised payment schedule allocated \$241,813 for the BPF to be paid by Rogers annually by 31 August, starting in 2023, for the following three broadcast years. In 2023 Rogers paid its first of three payments to the BPF.
7. The Commission notes that Broadcasting Decision 2022-76 has not been made the subject of an appeal or a judicial review, and that Rogers has fulfilled the conditions of approval from that decision.

Application

8. The Consumers' Association of Canada (Manitoba); Consumers Council of Canada; Forum for Research and Policy in Communications; Option consommateur; Public Interest Advocacy Centre; and Union des consommateurs (collectively, the co-applicants) filed an application requesting that the Commission amend the condition of approval³ set out in Broadcasting Decision 2022-76 whereby Rogers must allocate tangible benefits to the BPF over three consecutive years, to a requirement that Rogers pay the full amount to the BPF on or before 1 September 2023.
9. The application requested the Commission to reopen the decision to order Rogers to accelerate the payment of tangible benefits. At the time the application was submitted, the co-applicants noted that the BPF was struggling financially and could close in the future.
10. As noted above, since the filing of this application, Rogers has paid the first instalment of \$241,813 for the 2022-2023 broadcast year to the BPF, as per the approved schedule.
11. The Commission received numerous interventions in support of the application. The National Campus and Community Radio Association/l'Association nationale des radios étudiantes et communautaires (NCRA/ANREC), the First Mile Connectivity Consortium (FMCC), and the Canadian Association of Community Television Users and Stations (CACTUS) all noted support they have previously received from the BPF.
12. The Quebec English-language Production Council (QEPC), the Samuelson Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), and the Ontario Library Association (OLA) stated that the closure of the BPF could have a negative impact on public interest organizations and the availability of support in the future. Further, TELUS Communications Inc. (TELUS) noted its support of an advance payment in tangible benefits.

³ The condition of approval was that Rogers must *file* a revised proposal for tangible benefits payments that aligned with the Commission's direction.

13. The co-applicants do not include the BPF, and the BPF did not participate in this proceeding.

Position of the parties

The co-applicants

14. The co-applicants noted that the Commission made the BPF eligible for tangible benefits funding in 2014. They stated that the BPF has worked as planned and that it has assisted in the representation, research and advocacy of the public interest in both official languages.
15. They argued that the Act does not limit the Commission's ability to amend the conditions of approval set out in Broadcasting Decision 2022-76 (unlike limitations the Act puts on the Commission in amending conditions of service). The co-applicants submitted that the Act does not prevent broadcasters themselves from applying to amend the terms and conditions under which they operate. As a result, the application indicated that there is nothing in the Act preventing the Commission from ordering Rogers to advance its tangible benefits payments to the BPF.
16. The co-applicants are also of the view that Broadcasting Decision 2022-76 is vague and needs clarification. They noted that the three-year schedule for Rogers' payments did not include the specific years when the payments were to have been made. They argued that this created uncertainty for the BPF and therefore the Commission should be able to reopen the decision to adjust the funding schedule of the funds owed to the BPF.

Rogers' reply

17. Rogers argued that when the Commission issued Broadcasting Decision 2022-76, it was final. It was issued in accordance with the *Broadcasting Distribution Regulations* and the *Discretionary Services Regulations*, which were made pursuant to the Commission's regulation-making powers in subsection 10(1) of the Act.
18. Rogers noted, that except in limited circumstances set out in Part II of the Act, every decision or order of the Commission is final and conclusive and cannot be revised. While the Act was recently amended following the Royal Assent of Bill C-11, Rogers argued that none of those amendments authorize the Commission to reopen or revisit the determinations made in the decision.
19. Rogers also stated that the co-applicants did not identify the specific statutory or regulatory provisions that would allow the Commission to revisit and amend a decision as they propose. This not only goes against paragraph 22(2)(d) of the *CRTC Rules of Practice and Procedure* (the Rules of Procedure), but also creates procedural fairness concerns.

20. Finally, Rogers noted that the revised tangible benefits package, which it was directed to file as a condition of approval, was submitted to the Commission within the timeframe provided in that decision.

The co-applicants' reply

21. The co-applicants argued that recent amendments to the Act allow the Commission to revisit and amend Broadcasting Decision 2022-76.

22. They submitted that closure of the BPF would be harmful to communities, such as official language minority communities (OLMCs). They further argued that subsection 5.2(1) of the Act requires the Commission to reopen decisions taken in the past if OLMCs could have been adversely impacted but were not consulted. Given that paragraph 5.2(2)(f) requires that the Commission “be prepared to alter those policies, decisions or initiatives [that could adversely affect OLMCs]”, the co-applicants asserted that this authorizes the Commission to reopen past decisions, including Broadcasting Decision 2022-76. They argued that this statutory provision overrides the common law doctrine of *functus officio*, which makes Commission decisions under the Act final unless subject to a review by a court.

23. Regarding Rogers' questioning of procedural fairness, the co-applicants stated that section 7 of the Rules of Procedure empowers the Commission to dispense with or vary the Rules of Procedure if it considers it to be fair and in the public interest.

24. Further, the co-applicants replied that section 11.1 of the Act enables the Commission to reopen or review Broadcasting Decision 2022-76. This allows the Commission to order broadcasters to pay sums of money to other broadcasters, in some circumstances.

Issues

25. After examining the record for this application in light of applicable regulations and policies, the Commission addressed the following issues:

- the Commission's authority to reopen applications under the Act; and
- other mechanisms of funding for the BPF.

Authority under the Act

26. As per subsection 31(1) of the Act, decisions are final and conclusive. This means that they cannot be reopened by the Commission. Additionally, at common law, Commission decisions made pursuant to its authority under the Act are unchangeable under the doctrine of *functus officio*, except for very limited circumstances, such as to correct clerical errors. None of these circumstances would apply in this instance.

27. As illustrated in Broadcasting Decision 2024-133, the Commission notes that Broadcasting Decision 2022-76 directed Rogers to file a revised tangible benefits

package that includes funding allocated as per the Commission's direction. Rogers has fulfilled this condition of approval.

28. The co-applicants make several arguments in support of the idea that the Commission can reopen Broadcasting Decision 2022-76 to accelerate the payment of funds Rogers is required to make to the BPF. The Commission is of the view that these arguments do not apply, in light of the clear statutory language in subsection 31(1) of the Act. This says that all decisions are final and conclusive, a conclusion which is also supported by the principle of *functus officio*. As Rogers argued, the application of both 31(1) and *functus officio* requires that Broadcasting Decision 2022-76 must stand. That decision is final and conclusive, and the Commission does not have the authority to reopen it as requested by the co-applicants.
29. The Commission does not consider that Broadcasting Decision 2022-76 is vague, nor that the BPF's procedural rights have been infringed. The Commission directed Rogers to file a tangible benefits package that required payments to the BPF over three consecutive broadcast years. Given that this was a condition of approval that applied upon the close of the transaction, it was intentional and correct to not include specific dates. The Commission could not know when the transaction, which involved many assets not subject to the Commission's jurisdiction, would close.
30. The Commission does not consider that Broadcasting Decision 2022-76 is vague, as alleged by the co-applicants. Rogers understood that it had to make the first payment once the transaction closed, which was made on time.
31. The Commission is not aligned with the co-applicants' interpretation of section 5.2 of the Act and that this provision would authorize the Commission to reopen past decisions. This requires the Commission to consult OLMCs in certain circumstances and to maintain an open mind during consultations. Subsection 31(1) of the Act is clear. Section 5.2 of the Act does not displace this provision nor empower the Commission to change Broadcasting Decision 2022-76.
32. Finally, the Commission notes the co-applicants' reference to section 11.1 in their reply. The Commission may invoke subsections 11.1(1) and 11.1(2) to make an order on spending to be made by a broadcasting undertaking for one of the specific purposes outlined in that section. However, in this instance the Commission cannot invoke section 11.1 to reopen Broadcasting Decision 2022-76. In the Commission's view, this would require Rogers to provide funds to the BPF while Rogers is currently required to provide funds to the BPF as per the revised tangible benefits package filed with the Commission. This would not be a proper exercise of this power.
33. In light of the above, the Commission denies the co-applicants' request to reopen Broadcasting Decision 2022-76 to change the funding schedule of tangible benefits payments to the BPF.

Other mechanisms of funding for the BPF

34. The Commission recognizes the efforts of the BPF in assisting in the representation, research, and advocacy of the public interest in both official languages through its funding. It also notes the interventions submitted in support of the application and the positive impact the BPF has had on the interveners. The Commission appreciates that the BPF is fulfilling a valuable function by facilitating the participation of public interest organizations in Commission proceedings.
35. The Commission acknowledges that the determination made on this application does not result in short-term funding of the BPF, nor provide the funding as quickly as would the advanced payment sought by the co-applicants in this decision. However, the Commission understands that since the filing of the application, the BPF has received some funding support, allowing it to continue its operations.
36. As part of the Commission's regulatory plan to modernize Canada's broadcasting framework, the Commission intends to launch a consultation that will explore new ways to fund the participation of groups that represent the public interest in Commission proceedings. As part of that proceeding, the Commission will consider the future of the BPF and options for public participation funding.
37. The Commission also encourages broadcasters who are filing ownership transaction applications to favourably consider directing any future tangible benefits packages to the BPF, given its importance to broadcasting proceedings.

Conclusion

38. In light of all of the above, the Commission denies the application by the Consumers' Association of Canada (Manitoba), Consumers Council of Canada, Forum for Research and Policy in Communications, Option consommateur, Public Interest Advocacy Centre and Union des consommateurs to reopen Broadcasting Decision 2022-76, or otherwise require Rogers to accelerate its tangible benefits payments to the BPF.

Secretary General

Related documents

- *Fulfilment of conditions of approval set out in Shaw Communications Inc. – Change of ownership and effective control, Broadcasting Decision CRTC 2024-133, 18 June 2024*
- *Shaw Communications Inc. – Change of ownership and effective control, Broadcasting Decision CRTC 2022-76, 24 March 2022*
- *Broadcasting Participation Fund, Broadcasting Regulatory Policy CRTC 2012-181, 26 March 2012*

- *Change in effective control of CTVglobemedia Inc.'s licensed broadcasting subsidiaries*, Broadcasting Decision CRTC 2011-163, 7 March 2011