



Broadcasting Decision CRTC 2004-298

Ottawa, 29 July 2004

The Sports Network Inc.
Le Réseau des sports (RDS) inc.
Country Music Television Ltd.
Across Canada

Applications 2003-0139-1, 2003-0867-8, 2003-0222-4
Broadcasting Public Notice CRTC 2003-59
30 October 2003

TSN, RDS and CMT – Licence amendments

*The Commission **approves** the applications by The Sports Network Inc. and Le Réseau des sports (RDS) inc. to amend the licences for the national specialty programming undertakings known as The Sports Network and Réseau des sports, by altering the manner in which their services are packaged and distributed by broadcasting distribution undertakings (BDUs) from “dual status” to “modified dual status”.*

*The Commission also **approves** a similar request by Country Music Television Ltd. to change the status of the national specialty programming undertaking known as Country Music Television (CMT). However, the Commission **denies** the licensee’s request to introduce a charge per subscriber, applicable when CMT is carried on the basic service of a BDU.*

A dissenting opinion by Commissioner Langford is attached.

The applications

Distribution and linkage status

1. The Commission received applications by The Sports Network Inc. (Sports Network), Le Réseau des sports (RDS) inc. (Le Réseau) and Country Music Television Ltd. (Country Music TV) requesting licence amendments relating to the distribution status of the national analog specialty programming undertakings known as The Sports Network (TSN), Réseau des sports (RDS) and Country Music Television (CMT), respectively. Country Music TV also proposed to institute a maximum monthly wholesale rate of \$0.07 in Anglophone markets and \$0.05 in Francophone markets when CMT is distributed as part of the basic service of a broadcasting distribution undertaking (BDU).

2. In respect of their carriage on Class 1 BDUs, TSN, RDS and CMT presently have “dual status” under the distribution and linkage requirements set out in *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2003-42, 29 July 2003 (Public Notice 2003-42). The distribution and linkage requirements are incorporated by reference into section 20 of the *Broadcasting Distribution Regulations* (the Regulations). The applicants proposed that the status of their undertakings be changed to “modified dual status”. The changes would be reflected in amendments to the distribution and linkage requirements.
3. Under the distribution and linkage requirements, a service with dual status must be distributed as part of the basic service of a BDU, at a regulated wholesale fee, unless the service agrees in writing to be distributed on a discretionary tier. TSN, RDS and CMT are among 12 English- and French-language specialty services authorized for distribution as dual status services.
4. Under the same requirements, a service with modified dual status must be distributed on a discretionary tier, unless both the service and the distributor agree to its distribution as part of the basic service. All specialty services licensed since 1994 (with the exception of Le Réseau de l’information and CMT) have either modified dual status or discretionary-only status. There are currently 32 specialty services with modified dual status.
5. In support of their applications, Sports Network and Le Réseau submitted that, in the early days of low-penetration discretionary tiers, dual status originally allowed the services to develop quality program schedules. They submitted that with the dual status designation, they have developed into mature services and have been successful in negotiating distribution of their services on a discretionary basis by most BDUs. Recently, however, some BDUs have either made or proposed changes to the distribution of TSN and RDS, resulting in the movement of these services from discretionary tier placement to the basic service. The applicants argued that BDUs have moved their services to the basic service in order to take advantage of regulated basic wholesale rates, which tend to be lower than the negotiated wholesale rates for discretionary distribution. Sports Network and Le Réseau indicated that approval of a change in distribution status to modified dual status would prevent BDUs that are subject to the distribution and linkage requirements from moving TSN and RDS to the basic service without their consent.
6. Both licensees further noted that the requested change would ensure their services’ continued placement on discretionary tiers, where the per-subscriber wholesale rate accruing to the licensees would enable them to continue to increase their investments in Canadian programming and maintain the high quality of service viewers have come to expect.
7. In addition, Le Réseau argued that maintaining dual status for RDS could have a negative impact on other French-language services that are packaged with RDS and that remain on the discretionary tier, and that such a situation could result in instability in Francophone markets, given the popularity of RDS as part of a package.

8. Country Music TV stated that a number of Class 1 BDUs have already moved CMT from discretionary tiers to the basic service, resulting in lost discretionary subscription revenue for CMT. Country Music TV stated that the purpose of its application is to stop the migration of CMT from the discretionary to the basic service. Since CMT is free of charge to subscribers when a BDU distributes it as part of the basic service, CMT suffers financially when it is moved to the basic service.
9. Country Music TV indicated that, in most cases, movement of CMT to the basic service resulted in an increase in subscribers of less than 20%. Potential increases in advertising revenue resulting from distribution on basic would not be sufficient to off-set the loss of subscriber revenue that Country Music TV derives from discretionary distribution of CMT. In addition, according to Country Music TV, when BDUs moved CMT to the basic service, in many cases, a disadvantageous channel placement resulted in an actual reduction in viewership, with a consequent reduction of advertising revenue.

Request for a wholesale rate for CMT

10. As noted above, in addition to its application to alter the distribution status of CMT, Country Music TV proposed to institute a wholesale rate of \$0.07 per subscriber in Anglophone markets and \$0.05 per subscriber in Francophone markets when CMT is distributed as part of the basic service. Currently, when CMT is carried on the basic service, the distributor pays Country Music TV nothing for the distribution of CMT.
11. In support of its request, Country Music TV stated that the lack of a basic wholesale rate has made CMT a particular target for migration from discretionary to basic, where it can be carried at no cost to them by distributors facing competitive pressures.
12. Country Music TV indicated that lost revenues, whether from CMT remaining a dual status service or from not having a basic wholesale rate, will eventually affect the overall quality of the CMT service and the contribution that it makes to Canadian production. Country Music TV indicated that, although it would prefer that the Commission approve its request for modified dual status as well as its request to institute a basic wholesale rate, if only one of the options could be approved, it would prefer that the Commission approve the change in distribution status.

Interventions related to the requests for changes in distribution status

13. In response to the applications by Sports Network, Le Réseau and Country Music TV, the Commission issued Broadcasting Public Notice CRTC 2003-59, 30 October 2003 (Public Notice 2003-59), which invited comments on the three applications. The Commission noted that the applications raised general policy issues, including:
 - The appropriateness of the Commission's existing distribution requirements with regard to analog specialty services;

- The potential effects on the dynamics of negotiations between BDUs and specialty service operators; and
 - The possible impact on subscribers, related to both the quality and diversity of programming, and the cost of obtaining the programming.
14. In response to Public Notice 2003-59, the Commission received 22 interventions expressing support for the Sports Network and Le Réseau applications.
 15. Interventions in opposition to all three of the applications were submitted by the Canadian Cable Television Association (CCTA), the Canadian Cable Systems Alliance Inc. (CCSA), Cogeco Inc. (Cogeco), Mountain Cablevision Limited (Mountain) and Quebecor Media inc. (Quebecor).
 16. The opposing interveners expressed concern that the applications raise significant policy issues and should therefore not be considered on an individual basis, but rather in the context of a review of the regulatory framework related to the distribution of specialty services. The interveners also argued that, even if the applications were considered on an individual basis, the applicants have not demonstrated that a change in distribution status is necessary in order to maintain financial viability. In particular, the interveners stated that TSN and RDS have raised their wholesale discretionary rates to a level that has had a negative impact on the profit margins of some BDUs, particularly smaller BDUs, and that any further change would alter negotiations between BDUs and specialty services, to the detriment of BDUs.
 17. The interveners also argued that a change in distribution status would have the result of tilting the bargaining power in favour of specialty services, to the detriment of cable distributors and their subscribers. They submitted that this would allow a programming service, which a cable company has a regulatory obligation to distribute, to dictate its distribution and its rates with no recourse available for the distributor should these rates be inordinately high.
 18. The interveners further noted that, in the event that the applications were approved, the disruption to channel line-ups would have a negative impact on both BDUs and their subscribers.
 19. While not commenting on the merits of the three applications, the Canadian Association of Broadcasters (CAB), Rogers Media Inc. (Rogers), Pelmorex Inc. (Pelmorex) and MusiquePlus Inc. (MusiquePlus) provided comments with respect to the general policy issues raised by the applications.
 20. Pelmorex and MusiquePlus both expressed the view that any decision to remove the dual status distribution rule would have a negative impact on the ability of other specialty services to continue to meet their regulatory obligations.

21. MusiquePlus also stated that BDUs are using the dual status designation as a means to strengthen their own bargaining position in the negotiation of affiliation agreements with many specialty services. MusiquePlus was of the view that the Commission should clarify the scope of the rights and/or obligations of the dual status designation.
22. Further, MusiquePlus expressed its concern that, when a service is removed from the discretionary tier and transferred to the basic service, BDUs do not reduce the retail rate payable by discretionary subscribers, despite considerable savings by the BDUs. However, BDUs do pass on the subsequently increased cost of the basic service to subscribers, plus a mark-up, which, as MusiquePlus noted in its submission, most BDUs are now free to do, due to rate deregulation.

The applicants' replies

Sports Network and Le Réseau

23. In response, Sports Network and Le Réseau submitted that BDUs subject to the distribution and linkage requirements have taken advantage of the regulated maximum basic wholesale rates of premium programming services like TSN and RDS, by moving the services from the discretionary tier to the basic service, with the following results:
 - subscribers pay more for a larger basic service, with no choice in the matter;
 - over time, the reduction of revenues to specialty services results in decreased quality of programming, and a reduction of Canadian programming expenditures for the broadcasting system; and
 - over time, the reduction of program quality becomes an excuse for BDUs to argue that more foreign services are required in the same or similar genres.
24. Sports Network and Le Réseau argued that the request by interveners for a wide-ranging policy review is a delaying tactic to ensure that BDUs may continue to move TSN and RDS from the discretionary tier to the basic service, consequently allowing BDUs to later claim that consumer disruption will occur if the distribution status is changed. The applicants were of the view that it is appropriate for the Commission to consider changes to distribution status on a case-by-case basis without such a policy review.
25. Sports Network and Le Réseau also noted that programming commitments made on behalf of TSN and RDS at the time of the last licence renewals were based on the assumption that the services would continue to be distributed on a discretionary basis. The applicants also noted that concerns expressed about increases to the negotiating power of TSN and RDS, under modified dual status, ignore the fact that both parties to negotiations of wholesale rates would have recourse to a dispute resolution process.

Country Music TV

26. In response, Country Music TV stated that its request to alter its distribution status is not meant to increase subscription revenues, but to avoid a decrease in both its subscription revenues and its ability to generate advertising revenues. Country Music TV noted that, if BDUs continue to move CMT to the basic service, and particularly to disadvantageous channel positions, the result would be a negative impact on both CMT's viewership and revenues.

Interventions in response to Country Music TV's rate proposal

27. Interventions opposing the proposal to institute a per-subscriber wholesale rate applicable when CMT is carried on the basic service were submitted by the CCTA, the CCSA, Quebecor, and Cogeco.
28. The CCTA argued that the rate proposal should be denied since Country Music TV had not provided evidence of financial need. To the contrary, according to the CCTA, in the 2003 annual report of Corus Entertainment¹, CMT was described as the fastest growing specialty channel for adults in Canada, having posted a 50% increase in adult viewers (25-54) in the year ending August 2003.
29. Cogeco and the CCSA also opposed the request based on the lack of evidence of financial need. Cogeco added that approval of the request would call into question the integrity of the Commission's licensing process, since Country Music TV made the commitment at its initial licensing, to forego a basic wholesale rate in the context of a competitive licensing process. The CCSA further stated that Country Music TV's request, if approved, would increase the cost of the basic service to the consumer, with no corresponding addition of value.
30. Quebecor indicated that it opposed a basic rate for CMT on the basis that competitive factors do not always allow BDUs to increase their rates automatically every time a programming service asks for more revenue.

The applicant's reply

31. In response to the interveners opposing the rate proposal, Country Music TV expressed the view that its proposed basic wholesale rate is not exorbitant, and that the proposal is not meant to increase its subscription revenues, but to maintain those revenues at the current level.

¹ Corus Entertainment is the parent company of Country Music TV.

The Commission's analysis and conclusions with respect to TSN's and RDS' distribution status requests

32. When introduced in 1987, dual status distribution was intended to assist the earliest group of specialty services to develop audiences for their programming and to become established in the Canadian broadcasting system. Distribution on the basic service ensured that the programming service had access to the largest possible number of viewers for advertising and, in conjunction with the regulated basic wholesale rate, guaranteed a minimum amount of subscriber revenue. The dual status designation also permitted the programming service and the distributor to negotiate terms and conditions for distribution of the service on a discretionary basis, when it was mutually beneficial. The Commission notes that, in time, Sports Network and Le Réseau agreed to have TSN and RDS distributed largely on a discretionary basis, and these services have, in fact, been used by BDUs to drive the penetration of discretionary tiers.
33. The Commission notes that TSN and RDS are now mature services and indeed have developed into two of the most popular specialty services in the Canadian broadcasting industry, with historical profit before interest and taxes (PBIT) above industry averages. Accordingly, these services no longer require the guaranteed access to the majority of cable subscribers and the minimum subscription revenues afforded by dual status designation. The Commission considers the requested change in status to be consistent with this fact.
34. With regard to concerns about potential increase in the negotiating power of TSN and RDS, should they be granted modified dual status, the Commission has, in the case of a dispute referred to it, the discretion to establish wholesale rates for services distributed on a discretionary basis. The Commission considers it preferable that the terms and conditions of such distribution be settled by the parties through negotiations, and encourages parties to undertake fair and balanced negotiations to that end. However, should all efforts to resolve differences fail, the Commission considers that licensed distributors' ability to have recourse to the dispute resolution mechanism will provide sufficient restraint on any increased bargaining power that might accrue to TSN or RDS as a result of them being granted modified dual status.
35. Accordingly, the Commission **approves** the applications by The Sports Network Inc. and Le Réseau des sports (RDS) inc. for licence amendments for the national analog specialty programming undertakings known as The Sports Network (TSN) and Réseau des sports (RDS). The amendments will result in a change of the distribution status of TSN and RDS from dual status to modified dual status.
36. The changes in distribution status for TSN and RDS are reflected in the revised distribution and linkage requirements set out in *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2004-56, also issued today.

The Commission's analysis and conclusions with respect to CMT's requests to change distribution status and to institute a basic wholesale rate

37. With respect to CMT, the Commission notes that, despite its dual status, most cable systems have distributed CMT on a discretionary basis, where it has developed into a financially successful service, with PBIT margins above industry averages. The Commission, however, is concerned that a trend toward moving CMT to the basic service could have a detrimental impact on the service's financial well-being in light of the fact that it is free of charge to subscribers when a BDU distributes it as part of the basic service.
38. The Commission notes Country Music TV's statement that its concerns regarding revenue loss could be addressed by approving only one of its requests, either the change in distribution status or the institution of a basic wholesale rate. During the application process, Country Music TV indicated that, although it would prefer that the Commission approve both requests, of the two, it would prefer to have the distribution status changed, since this would remove the ability of BDUs to move CMT from the discretionary tier to the basic service without Country Music TV's consent.
39. The Commission, therefore, **approves** Country Music Television Ltd.'s request for a licence amendment for the national analog specialty programming undertaking known as Country Music Television (CMT). The amendment will result in a change of the distribution status of CMT from dual status to modified dual status.
40. With respect to Country Music Television Ltd.'s proposal to institute a wholesale rate for CMT when carried as part of the basic service, the Commission is of the view that the approval of the change in CMT's distribution status will adequately address Country Music TV's concerns as to revenue erosion, since the modified dual status designation will require that Country Music TV consent to distribution on the basic service. Thus, CMT will be in a position to negotiate its wholesale rate for discretionary distribution. Accordingly, CMT's request for a maximum basic wholesale rate of \$0.07 in Anglophone markets and \$0.05 in Francophone markets is **denied**.
41. Again, the Commission notes that, in the case of a dispute referred to it, it has the discretion to establish the wholesale rates for services distributed on a discretionary basis. The Commission considers that licensed distributors' ability to have recourse to the dispute resolution mechanism will provide a sufficient restraint on any increased bargaining power that might accrue to CMT as a result of it being granted modified dual status.
42. The change in distribution status for CMT is reflected in the revised distribution and linkage requirements set out in Public Notice 2004-56, also issued today.

Other matters

43. As described earlier, some interveners in this proceeding submitted that the Commission should undertake a full policy review with regard to the distribution of analog specialty services, prior to making a determination with respect to these applications. In reply, the applicants submitted that such a review was not necessary in order for the Commission to dispose of the applications, and that the Commission should proceed to deal with the applications, as filed. The applicants were of the view, among other things, that the policy issues raised by potential status changes would vary from service to service.
44. The Commission finds that the record of the proceeding is adequate for disposing of the specific applications. In the Commission's view, it would not be in the public interest to delay consideration of the applications until a policy review of the distribution of specialty services is conducted. Furthermore, in the Commission's view, such a review is not required at this time.

Request for disclosure

45. In its intervention, the CCSA requested disclosure of the rate and revenue information that was filed by TSN in confidence in response to a Commission staff deficiency question. The undisclosed information consists of the monthly per-subscriber wholesale rate that TSN was charging the cable systems in question prior to being moved to the basic service, and the amount of subscriber revenue that TSN has lost as a result of being moved onto the basic service of each of these cable systems in each of the past five years. The CCSA argued that, without access to the company-specific rate and revenue information, it could not know the full case to be met and would be denied the full benefits of procedural fairness and natural justice.
46. The Commission notes that TSN provided on the public record the total subscriber revenue loss following the move of TSN to the basic service. Further, the Commission notes that the number of CCSA member company subscribers is a very small proportion of the total subscribers that were affected by the move to the basic service. Thus, release of only the CCSA company specific information would not reveal the main source of revenue decreases experienced by TSN. In any event, the Commission considers that the rates charged by TSN prior to each move to the basic service and the revenue reductions it states it has incurred following each move are not determinative of the issues raised in The Sports Network Inc.'s application.

47. In light of the foregoing, the Commission finds that the CCSA does not need to verify whether TSN has accurately represented the rates it charged to CCSA members for discretionary carriage and the specific revenue reductions estimated by TSN to have resulted from the move by CCSA members of TSN to the basic service in order for the CCSA or its members to have a full and fair opportunity to respond to The Sports Network Inc.'s application. The Commission concludes that the CCSA and its members have had adequate information upon which to comment and to participate meaningfully in this proceeding, and that approval of the CCSA request would cause harm to The Sports Network Inc. in the balance.
48. The Commission expects parties seeking disclosure of confidential information to file requests for disclosure prior to filing their comments in order that the Commission can dispose of the issue prior to the deadline for filing comments.
49. For all these reasons, the Commission **denies** the CCSA's request for disclosure of the confidential information filed by The Sports Network Inc. in relation to the CCSA's members.

Secretary General

This decision is to be appended to each licence. It is available in alternative format upon request, and may also be examined at the following Internet site: <http://www.crtc.gc.ca>

Dissenting opinion of Commissioner Stuart Langford

Apart with paragraph 40 with which I concur, I disagree with the majority decision in this matter and would have denied all three applications at issue. In my view, the majority decision is both unnecessary and imprudent. It attempts to correct problems which though forcefully argued by the applicants do not, judging by the evidence on the record, appear to exist. By correcting imagined problems, the majority decision threatens to create real ones. By granting programming services relief they do not need, the majority risks prejudicing the other two stakeholders involved, subscribers and signal distributors (BDUs).

Show me the money

The applications underlying today's majority decision purport to be about many things: regulatory symmetry, consumer protection, administrative catch-up and Canadian programming. In fact, these applications are about one thing and one thing only, profit. The three applicants, TSN, RDS and CMT are making lots of money and they want to make more. By giving them the right to insist on discretionary carriage, the majority has granted their wishes. The bottom lines of TSN, RDS and CMT will continue to fatten at subscribers' expense, and BDUs have been left virtually powerless to do anything about it.

Until today, BDUs were well positioned to keep down the prices Canadians must pay for TSN, RDS and CMT. If the programming services made excessive demands in negotiating fee for carriage agreements, affected cable companies could pressure them to modify those demands or risk being transferred to basic where subscriber rates pale in comparison to those on high penetration discretionary tiers. The majority decision changes that. It strips BDUs of their only effective bargaining power and leaves them (and by extension their subscribers) with no option, should the applicants' money demands become excessive, but to come begging to the Commission for assistance.

What do we want?

In an era where reducing regulatory interference in market place forces has become practically a mantra of public and private sector commentators alike, one wonders why the majority has taken a stand that all but guarantees an opposite outcome. By stripping one party of its ability to bargain from strength, by leaving it devoid of all options but regulatory appeal, the majority has created so uneven a negotiating playing field that it must now resign itself either to endless future dispute resolution proceedings or to a marketplace where one side always gets what it wants and consumers either pay more or go without. That is not my idea of sound regulatory practice.

Assuming that Canadians do not wish to vote with their feet and give up the popular programming they love, be it sports or country music, it is difficult to understand why the majority has chosen to weaken the one stakeholder that stands between subscribers and high prices. BDUs are forced to carry TSN, RDS and CMT. They have no choice. That regulatory fact of life already gives these three specialty services enormous leverage in any carriage agreement negotiation. Today's majority decision increases that leverage by granting TSN, RDS and CMT the unfettered right to choose between basic and discretionary carriage. Nothing has been given to BDUs or subscribers to counterbalance this power shift. Market forces have become effectively neutralized.

What's the rush?

This is so marked a departure from the status quo and such a significant retreat from the current trend towards favouring market-based over regulatory-imposed solutions, that in my view, the majority should not have taken it on the basis of anything less than a full policy review. There was no need to use so heavy a regulatory hand to resolve this matter. The applicants are in no financial difficulty. If anything, it is the affected BDUs who can justifiably claim the right to cry poor in current circumstances. It is the very Class 1 cable companies prejudiced by today's majority decision, not sports and country music specialty programming services, that may require financial assistance.

This is a time when cable companies are being forced to lay out huge cash investments to make the transition to a digital protocol and are being encouraged to make even larger outlays to challenge Canada's powerful telephone monopolies. It is they who are struggling to stay out of the red, not TSN, CMT and RDS who regularly enjoy profit margins that would make bankers envious. RDS and TSN were quick to wave the flag by declaring that should profit levels not be guaranteed neither could expenditures on Canadian programming. It was a red herring. RDS and TSN's commitment to Canadian programming is hardly the driving force behind their applications. There was no evidence on the record of a counterpoint proposal to spend more on Canadian programming should the Commission grant their applications.

As for CMT, it now enjoys the carriage status and the wholesale rate it requested and was granted when it applied for the licence it is now privileged to hold. Furthermore, it is projecting a 28% operating margin for this year. The sole basis of its application appears to be that it is worried that things might get worse. If despite all factual evidence to the contrary, fear of worst case scenarios has now become a sufficient basis upon which to ground applications such as those at issue here, the Commission had better brace itself for an onslaught of paper.

By acting prematurely to the detriment of market-based solutions, the majority has exposed subscribers to the possibility of exorbitant price increase demands and placed the Commission in the middle of what promises to be an endless squabble over money. In my view, that is a move in entirely the wrong direction. I would have denied all of the applications underlying this matter. We are dealing with sophisticated players here. Should TSN, RDS and CMT experience any real as opposed to feared life-threatening revenue erosion in the future, their lawyers know where the Commission offices are. Applications for truly necessary regulatory review are never turned away.