

Copyright Board
of Canada



Commission du droit d'auteur
Canada

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Citation *Radio Retransmission Tariff (2019-2023), 2024 CB 7*
Member Katherine Braun
Proposed Tariff Considered Radio Retransmission Tariff (2019-2023)

Approval of Proposed Tariff
As
Retransmission of Distant Radio Signals (2019-2023)

REASONS FOR DECISION

I. INTRODUCTION

[1] This proceeding considers the Radio Retransmission Tariff for the years 2019-2023 (the “Proposed Tariff”)¹ filed with the Copyright Board of Canada (the “Board”) on March 29, 2018, by four Collectives².

[2] The Proposed Tariff applies to the retransmission in Canada of one or more distant radio signals that carry any work owned or controlled by a member of the Collectives for the years 2019 to 2023. Objections to the Proposed Tariff were filed by some Broadcast Distribution Undertakings (“BDUs”)³.

¹ *Proposed Statement of Royalties to be Collected for the Retransmission of Distant Signals, in Canada, for the Years 2019 to 2023* (March 29, 2018) C Gaz Supplement, Vol. 152 No 22.

² Collectives are: the Canadian Broadcasters Rights Agency Inc. (CBRA), the Canadian Retransmission Right Association (CRRA), FWS Joint Sports Claimants Inc. (FWS), and the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

³ BDUs in this proceeding are: Bell Canada, Canadian Cable Systems Alliance, Cogeco Communications Inc., Quebecor Media Inc., Rogers Communications Canada Inc., Shaw Communications Inc., Telus Communications Company.

[3] On March 28, 2023, the parties submitted a jointly-submitted text (“JST”), which was the result of a signed agreement (the “Agreement”), and asked the Board to consider the JST for the purpose of approving the Proposed Tariff⁴.

[4] The Board is of the view that the JST can serve as a basis to approve a fair and equitable tariff in this proceeding. For the reasons that follow, we approve the Proposed Tariff based on the JST under the title *Retransmission of Distant Radio Signals (2019-2023)*.

II. OVERVIEW

A. THE MOST RECENTLY-APPROVED TARIFF

[5] The last tariff for the *Retransmission of Distant Radio Signals (2014-2018)*, was approved by the Board on July 13, 2018⁵, and published in the *Canada Gazette* on July 14, 2018 (the “Most Recently-Approved Tariff”). It sets out the following rates:

- a. \$12.50 per year for small retransmission systems and by unscrambled Low or Very Low Power Television Stations (LPTVs) and unscrambled Multichannel Multipoint Distribution Systems (MDSs)
- b. 12-cents per year for all other systems for each premise served by the system
- c. A Francophone market discount of 50 per cent
- d. A discount of 75 per cent for certain non-residential premises such as health care facilities including hospitals, nursing homes, schools, and other educational institutions. A 40 per cent discount is provided for hotel rooms.

[6] The tariff also sets out the allocation of royalties among the Collectives: The Canadian Broadcasters Rights Agency (CBRA): 38.635 per cent; the Canadian Retransmission Right Association (CRRA): 11.365 per cent; and the Society of Composers, Authors and Music Publishers of Canada (SOCAN): 50 per cent.

B. THE PROPOSED TARIFF (2019-2023)

[7] The Proposed Tariff includes rates that are higher than the Most Recently-Approved Tariff.

[8] A 100 per cent per year increase was proposed (from \$12.50 to \$25.00) for small retransmission systems and unscrambled LPTVs and MDSs, to reflect the increase in administration costs since the \$12.50 rate was first approved by the Board in 1993. A 20-cent per year increase was proposed for

⁴ Pursuant to Practice Notice PN 2022-005, the parties advised the Board of the following: “The parties, with the addition of FWS, have been the parties involved in negotiation and settlement of the Radio Retransmission tariff since it was first proposed by the Collectives and certified by the Board for the years 1990-1991. The parties entered in settlement discussions and have reached an agreement that maintains most of the elements of the currently certified tariff (2014-2018) with the only material difference being a reduction in the rate.”. The actual agreement (the “Agreement”) was filed with the Board; the JST was attached to the Agreement as “Schedule A”.

⁵ *Tariff for the Retransmission of Distant Radio Signals (2014-2018)* CB-CDA 2018-147 (July 13, 2018), Gaz C Supplement Vol. 152, No. 28.

other retransmission systems and additional fees for the retransmission of broadcaster compilations were proposed⁶. The Proposed Tariff also includes an additional collective society, *FWS Joint Sports Claimants* (FWS).

C. PROCEDURAL HISTORY

[9] On August 1, 2018, the BDUs filed an objection to the Proposed Tariff. In their Statement of Objection⁷, the BDUs claim that the fees set out in the Proposed Tariff do not reflect the fair, reasonable, and appropriate value of retransmission of works in the Collectives' repertoires. The BDUs claimed that the value of distant radio signals has declined owing to the availability of streaming platforms and alternate sources of audio content.

[10] On December 6, 2018, the Parties filed an application for an interim tariff for the years 2019-2023 that would continue the terms of the Most Recently-Approved Tariff. On December 28, 2018, the Board granted the request and extended the application of the tariff on an interim basis (the "Interim Tariff").⁸

[11] On February 4, 2021, the Board issued Notice CB-CDA 2021-008 informing the parties that a written hearing would be held for the consideration of the Proposed Tariff.

[12] On February 17, 2022, the Board ordered the Collectives to provide detailed grounds for the Proposed Tariff and asked the BDUs to file a reply.⁹ The Collectives¹⁰ filed their grounds on March 18, 2022, and the BDUs filed their reply on April 8, 2022.¹¹

D. THE JOINTLY-SUBMITTED TEXT (JST) AS BASIS FOR TARIFF APPROVAL

[13] On March 28, 2023, the parties asked the Board to base the approved tariff on the JST.¹²

[14] The JST includes two separate components: royalty rates to be paid by users, and an allocation of revenue among the Collectives. The rates are lower than in the Proposed Tariff and the allocation of royalties is modified from the Most Recently-Approved Tariff to account for the presence of FWS.

⁶ SOCAN explains that this rate reflects the compilation right that arises from broadcasters' selection and arrangement of copyright works and programming into what is sometimes called the "broadcast day". This right arises separately from, and in addition to, the copyright in the materials compiled, and represents a separate category of rights entitled to compensation within the retransmission regime.

⁷ BDUs, Objection to Statement of Proposed Royalties to Tariff for Retransmission of Distant Radio Signals (2019-2023), August 1, 2018.

⁸ *Interim tariff for the retransmission of distant television and radio signals (2019-2023)* CB-CDA 2018-234 (December 28, 2018).

⁹ Order of the Board CB-CDA 2022-007, February 17, 2022.

¹⁰ Collectives' response to Notice of the Board CB-CDA 2022-007, March 18, 2022. In an earlier email dated April 1, 2021, the Collectives informed the Board that they had reached an agreement concerning the allocation of royalties under the Proposed Tariff. Collective's response regarding the allocation of royalties under the Tariff, April 1, 2021.

¹¹ BDUs' reply to the Collective's response to Notice of the Board CB-CDA 2022-007, April 8, 2022.

¹² Letter from the Collectives transmitting a jointly submitted text from the parties, March 28, 2023.

[15] Compared to the Most Recently-Approved Tariff, the JST provides:

- i. New allocation of royalty shares
- ii. Unchanged rates for small retransmission and unscrambled LPTVs and MDSs at \$12.50 per year
- iii. A 33 per cent reduction in the main royalty rate, from 12-cents to 8-cents per premise
- iv. Transitional provisions to address interest accruing on refunds of overpaid royalties
- v. Eligibility of LPTVs for a francophone market 50 per cent discount
- vi. Unchanged discount for certain non-residential premises as per the Most Recently-Approved Tariff
- vii. Minor administrative wording

[16] On December 14, 2023, the BDUs informed the Board that they “withdraw their objections to the proposed tariff and request that the Board approve the proposed settlement tariff”.¹³ No objectors remain in the proceeding.

[17] On February 15, 2024, the Board notified the parties of its intention to proceed with the consideration of the Radio Retransmission Tariff for the years 2019-2023, based on the JST.¹⁴

[18] On July 12, 2024, the Board issued Order CB-CDA 2024-058, requesting a joint response regarding transition provisions between the interim and final royalties, including whether a royalty-refund mechanism should be added to the final tariff.

[19] On August 16, 2024, the BDUs informed the Board that the parties had not been able to consult on a joint response to the Board’s questions in Order CB-CDA 2024-058. The BDUs, however, agreed with the Board’s proposed changes and provided a draft text for a royalty-refund mechanism.

[20] The Collectives were informed of the BDUs position and draft text but did not provide comments or signal any opposition.

III. ISSUES

[21] The following two issues have been identified for examination:

1. Is the JST an appropriate basis to approve the Proposed Tariff?
2. How to account for the differential between the interim and final tariff?

¹³ Email from the BDUs, December 14, 2023.

¹⁴ Notice of the Board CB-CDA 2024-012, February 14, 2024.

IV. ANALYSIS

A. ISSUE 1: IS THE JST AN APPROPRIATE BASIS TO APPROVE THE PROPOSED TARIFF?

[22] Based on all the combined characteristics of the JST, we find that it can serve as a basis for approving the Proposed Tariff for the following reasons.

[23] First, the BDUs who have signed the Agreement are representative of the Canadian market, accounting for 90 per cent of market participants, based on number of subscribers. Other BDUs who are not signatories of the Agreement may not offer distant radio signals.

[24] Second, all BDUs (whether they are signatories or not), will pay the same reduced rate or the same rate of \$12.50 per year, depending on their category.

[25] Third, the JST does not include a royalty on compilations as included in the Proposed Tariff. This was originally a point of contention. We note that the Board has indicated that “[C]ompilations are protected works entitled, in principle, to compensation under the retransmission regime.”¹⁵ In any event, the JST in effect removes the need for any discussion on this issue.

[26] Fourth, parties advised that they are not aware of any other agreements for uses similar to those covered by the JST. We have no reason to doubt this assertion.

[27] Finally, as explained by the parties, the JST balances two positions and, given the royalties it generates, avoids disproportional “litigation” costs:

1. The BDUs’ assertion that the value of distant radio signals has decreased due to the availability of streaming platforms and alternate sources of audio content;
2. The Collectives’ assertion that the distant signals remain valuable to both consumers, particularly people living in smaller communities who do not have access to high speed internet and/or socioeconomic groups who do not have unlimited internet packages, as well as to the BDUs in terms of marketing their packages of offered signals.

B. ISSUE 2: HOW TO ACCOUNT FOR THE DIFFERENTIAL BETWEEN THE INTERIM AND FINAL TARIFF?

[28] Royalties have been collected under the Interim Tariff since January 1, 2019. As the main royalty rate was reduced, users have overpaid royalties and are entitled to refunds that take into account the opportunity costs incurred during the tariff period. Therefore, the approved tariff includes transitional provisions with an interest rates table applicable to refunds of overpaid royalties associated with the Interim Tariff.

[29] Furthermore, we modify the definition of “settlement date” found in the JST. The JST provides that interest applies to all refunds of overpaid royalties from January 1, 2019, to the “settlement

¹⁵ *Tariff for the Retransmission of Distant Radio and Television Signals, 1995-1997 and Variance to the 1994 Tariff* (Reasons) (June 28, 1996).

date”. The JST defines the “settlement date” as the date of the parties’ Agreement. However, since not all users are signatories to the Agreement, the Board sets the “settlement date” as January 26, 2025, which is approximately three months after publication of this tariff. This modified definition ensures that any refund payment to users not signatories to the Agreement, take into account opportunity costs borne during the interim tariff effective period.

[30] Lastly, the Board sets out in the approved tariff a mechanism to govern royalty refunds in order to minimize the required number of transactions between BDUs and Collectives. The BDUs explain that “To achieve this, refunds should be calculated only taking into account the royalties paid to CBRA, CRRA and SOCAN pursuant to the interim tariff and royalties payable to CBRA, CRRA and SOCAN pursuant to the approved tariff, and using the same allocations as the interim tariff. The Collectives can then agree among themselves on the adjustments necessary to account for the addition of FWS and the change in allocation.”¹⁶

[31] The text for such a mechanism was provided by the BDUs and not opposed by the Collectives. It reads as follows:

31. A payment that a collective society received before the settlement date and that was allocated pursuant to section 10 of the interim radio retransmission tariff approved on December 28, 2018 shall be deemed to have been properly allocated pursuant to this tariff.

32. A retransmitter shall allocate additional royalties pursuant to section 10 of this tariff.

33. No later than [DATE], a collective society may file with the Board a motion requesting that the Board determine (a) which collective societies are entitled to an adjustment as a result of the differences between the allocations set out in the interim radio retransmission tariff and this tariff with respect to payments due before January 1, 2024; (b) which collective societies have received more than they were entitled to; and (c) the amounts collective societies identified pursuant to paragraph (a) should receive from those identified pursuant to paragraph (b).

[32] Because Collectives have already agreed among themselves on the allocation of royalties¹⁷, it is unlikely that a “dispute resolution” mechanism such as the one proposed under section 33 is necessary. This section is therefore not included in the approved tariff.

V. DECISION

[33] Having given consideration to the record, the Board is satisfied that the royalty rates and related terms and conditions in the JST are fair and equitable.

[34] The Board approves the Proposed Tariff with changes based on the JST under the title *Retransmission of Distant Radio Signals (2019-2023)*.

¹⁶ BDUs’ response to Order CB-CDA 2024-058, August 16, 2024.

¹⁷ Collectives’ email to the Board, April, 1, 2021.