Copyright Board Canada

CANADA

Commission du droit d'auteur Canada

Date	2025-05-30
Citation	*Re:Sound Commercial Radio Tariff (2009-2025)*, 2025 CB 1
Member	Drew Olsen
Proposed Tariffs Considered	Tariff 1.A – Commercial Radio (2015-2017, 2018-2020, 2021-2023, 2024-2028 [2024-2025 only]) Tariff 1.A.2 – Commercial Radio Simulcasts (2016-2017) Tariff 8 – Non-Interactive and Semi-Interactive Webcasts (2009-2012) [simulcast only] Tariff 8 – Simulcasting, Non-Interactive and Semi-Interactive Webcasting (2013, 2014, 2015) [simulcast only]

Approval of Proposed Tariffs as *Re:Sound Commercial Radio Tariff (2009-2025)*

Reasons for Decision

I. Overview

[1] This proceeding concerns the following proposed tariffs filed by Re:Sound (Re:Sound is the collective society that administers the rights to perform in public and to communicate to the public by telecommunication, published sound recordings for performers and makers of sound recordings):

- Tariff 1.A – Commercial Radio (2015-2017)
- Tariff 1.A – Commercial Radio (2018-2020)
- Tariff 1.A – Commercial Radio (2021-2023)
- Tariff 1.A – Commercial Radio (2024-2028) [2024-2025 only]
- Tariff 1.A.2 – Commercial Radio Simulcasts (2016-2017)
- Tariff 8 – Non-Interactive and Semi-Interactive Webcasts (2009-2012) [simulcast only]
- Tariff 8 – Simulcasting, Non-Interactive and Semi-Interactive Webcasting (2013) [simulcast only]

- Tariff 8 – Simulcasting, Non-Interactive and Semi-Interactive Webcasting (2014) [simulcast only]
- Tariff 8 – Simulcasting, Non-Interactive and Semi-Interactive Webcasting (2015) [simulcast only]

[2] The proposed tariffs set the royalties to be paid by commercial radio stations for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works, by over-the-air broadcasts and simulcasts.

[3] For the period prior to 2018, the proposed tariffs 1.A only cover the broadcasts of radio signals.

[4] Simulcasts are covered under proposed tariffs 8 for 2009 to 2015, and proposed tariff 1.A.2 for 2016 to 2017. From 2018 to 2028, the proposed tariffs 1.A cover simulcasts.

[5] This is the first time the Board is asked to approve a tariff in relation to simulcasts over the Internet of commercial radio over-the-air signals.

[6] In 2023, Re:Sound and the Canadian Association of Broadcasters (the "Parties") reached an agreement. They later requested that the Board approve the Re:Sound commercial radio tariff with respect to over-the-air broadcasts for the years 2015 to 2025, and simulcasts for the years 2009-2025.

[7] For broadcasts of radio signals, the rates I approve for the years 2015 to 2020 are the same as those of the last approved tariff, namely for low-use stations, 0.75% of gross income, and for other stations, 1.44 % on the first $1.25 million of gross income and 2.1% on the rest. As of July 1, 2020, I approve rates of 1.2% for low-use stations, and for other stations, rates of 2.7% on the first $1.25 million of gross income and 3.7% on the rest, to apply until the end of 2025.

[8] For simulcasts, the rates I approve for the years 2009 to 2014, are, for low music-use, 0.75% of gross income, and for other stations, 1.44 % on the first $1.25 million of gross income and 2.1% on the rest. As of August 13, 2014, I approve rates of 1.2% for low-use stations, and for other stations, rates of 2.7% on the first $1.25 million of gross income and 3.7% on the rest, to apply until the end of 2025.

II. Background

A. Procedural History

[9] Re:Sound filed the proposed tariffs that are the subject of this proceeding at various times but in conformity with the statutory deadlines established in the *Copyright Act*

(“the Act”). The Canadian Association of Broadcasters (CAB) objected to these proposed tariffs.

[10] On January 24, 2018, the Board informed the Parties that it would consider in a single proceeding proposed tariffs applicable to over-the-air broadcasts and simulcasts of musical works and sound recordings by commercial radio stations filed by both SOCAN and Re:Sound.

[11] On July 20, 2018, the CAB informed the Board that it had reached a tentative agreement with SOCAN.

[12] On July 27, 2018, the CAB informed the Board that it had engaged in settlement discussions with Re:Sound. It asked the Board to suspend the proceeding pending such discussions. The Board accepted this request and the Parties filed monthly reports on the status of their negotiations.

[13] Re:Sound subsequently filed proposed tariffs for the years 2021-2023 and 2024-2028, and SOCAN for the years 2019, 2020-2021, 2022-2024 and 2025-2027.

[14] On May 23, 2023, the Board requested additional information about the settlement discussions between Re:Sound and the CAB and SOCAN and the CAB.

[15] On June 8, 2023, Re:Sound informed the Board that it had reached an agreement with the CAB with respect to over-the-air broadcasts for the years 2015 to 2022, and simulcasts for the years 2009-2022, and that they were in the process of finalizing those documents.

[16] On June 14, 2023, SOCAN informed the Board that it had concluded a settlement agreement with the CAB with respect to over-the-air radio broadcasts for 2014 to 2018 and simulcasts for the years 2007-2018.

[17] On March 8, 2024, the Parties requested that the Board approve Re:Sound commercial radio tariff for the years 2009 to 2022, in the form of a jointly-submitted text (“JST”). On July 5, 2024, the Parties asked the Board to approve Re:Sound commercial radio tariff for the period 2009 to 2025, and modified the JST previously filed to reflect the extension of the applicable period.

[18] On October 2, 2024, in Notice CB-CDA 2024-075, the Board informed the Parties that the examination of the SOCAN and Re:Sound proposed tariffs in relation to the public performance of music by commercial radio stations would proceed separately.

B. The Last Approved Tariff

[19] The Board approved the *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* on April 23, 2016.[1] (the "Last Approved Tariff"). The Last Approved Tariff provides for royalties to be paid by commercial radio stations to Re:Sound in respect of over-the-air broadcast signals only. There is no previously-approved tariff for the simulcast of such signals.

[20] The rates approved by the Board are as follows:

Table 1: Over-the-Air Broadcast Rates fixed in Last Approved Tariff

Low music-use stations	0.75% of gross income
Other stations	1.44% on first $1.25 million of gross income and 2.1% on the rest

C. The Proposed Tariffs

[21] The proposed tariffs provide for a rate for the performance in public of over-the-air signals by means of a radio receiving set of 0.5% of gross revenues.[2]

[22] In addition, the proposed tariffs provide for rates in relation to the broadcast of over-the-air signals, as follows:

Table 2: Proposed Over-the-Air Rates per year

Years	**2015-2017**	**2018-2020, 2021-2023, 2024-2028**
Low music-use stations	2.6% of gross income	3.44% of gross income
Other stations	4.46% on the first $1.25 million gross income 6.5% on the rest	6.61% on the first $1.25 million gross income 9.64% on the rest

[23] In respect of the communication to the public by telecommunication of simulcasts, the proposed rates vary. They range from a percentage of simulcast income to a "greater of" formula, where stations pay the greater of a percentage of their simulcast

[1] *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* (approved tariff) (April 23, 2016), C Gaz Supplement Vol. 150, No. 17 [*Commercial Radio Tariff*].
[2] See Subsection 72.1(1) of the Act (or 69(2) of the Act before 2019).

income or a fixed royalty for each play of a file. All the proposed tariffs provide for a minimum annual fee.

Table 3: Proposed Simulcast Rates

Years	**2009-2012**	**2013**	**2014, 2015**	**2016-2017**	**2018-2020, 2021-2023, 2024-2028**
Rates	12% of gross revenues	Greater of: 30% of simulcast gross revenues, or $0.0022 for each communication of a file	For each communication of a file by simulcast: $0.00090 (2014) or $0.00098 (2015)	Low music-use stations: Greater of: 2.6% of simulcast income or $0.00098 for each communication of a file Other stations: Greater of: 6.5% of simulcast income or $0.00098 for each communication of a file	Low music-use stations: Greater of: 3.44% of simulcast income or, for each play of a file: $0.00118 (2018-2020) $0.00126 (2021-2023) $0.00176 (2024-2028) Other stations: Greater of: 9.64% of simulcast income or, for each play of a file: $0.00118 (2018-2020) $0.00126 (2021-2023) $0.00176 (2024-2028)
Minimum fee	$500 per channel up to a maximum of $50,000 annually for groups of channels	$30,000 for all stations of a group	$500 per channel up to a maximum of $50,000 annually for all stations of a group	$500 per station	$500 per station (2018-2020 & 2021-2023 $1000 (2024-2028)

D. The Agreement and the Jointly-Submitted Text

[24] In their submissions, the Parties explain that the starting point for the rates of the agreement and JST is the Last Approved Tariff[3]. As such, from 2009 and 2015, for simulcasts and broadcasts, respectively, the rates are those of the Last Approved Tariff (the Last Approved Tariff only covers over-the-air signals). Then, in 2014 for simulcasts and 2020 for broadcasts, the rates in the Agreement and JST are increased to reflect the expansion of Re:Sound's eligible repertoire.

[25] In relation to broadcasts of over-the-air signals, the rates increase as of July 1, 2020. The Parties explain that it is in connection with the change to Re:Sound's eligible repertoire resulting from the coming into force of the Canada-U.S.-Mexico Free Trade Agreement and the implementation of national treatment.

[26] This change was enacted through the Statement Amending the Statement Limiting the Right to Equitable Remuneration of Certain Rome Convention or WPPT Countries, SOR/2020-82, which was published in the *Canada Gazette* on April 29, 2020 (the "Statement"). As a result of the Statement, sound recordings fixed in the United States, whose maker is a national of or headquartered in the United States, are eligible for equitable remuneration effective July 1, 2020.

[27] As for simulcasts, the same rates that apply to over-the-air broadcasts apply to any additional simulcast income, effective back to 2009. The Parties explain that the rate increases on account of repertoire adjustment occurred earlier than for broadcasts. This is because U.S. sound recordings became eligible for equitable remuneration for the purpose of simulcasts on August 13, 2014, as a result of the coming into force of the WIPO Performances and Phonograms Treaty.

[28] The Agreement and the JST do not provide a rate for the performance in public of over-the-air signals by means of a radio receiving set as the proposed tariffs did. As for broadcasts and simulcasts, the rates of the Agreement are the same as those of the JST.

[29] The rates in the JST and Agreement :

Table 4: Rates in the JST

Description	Broadcast rates	Simulcast rates
Rates based on over-the-air rates of Last Approved Tariff	<u>01-01-2015 to 30-06-2020</u> Low music-use stations:	<u>01-01-2009 to 12-08-2014</u> Low music-use stations:

[3] *Commercial Radio Tariff*, *Supra* note 1.

	0.75% of gross income Other stations: 1.44% on the first $1.25 million of gross income and 2.1% on the rest	0.75% of gross income Other stations: 1.44% on the first $1.25 million of gross income and 2.1% on the rest
Increased rates due to increase in eligible repertoire	<u>01-7-2020 to 31-12-2025</u> Low music-use stations: 1.2% on gross income Other stations: 2.7% on the first $1.25 million of gross income and 3.7 % on the rest	<u>13-08-2014 to 31-12-2025</u> Low music-use stations: 1.2% on gross income Other stations: 2.7% on the first $1.25 million of gross income and 3.7 % on the rest

[30] The Parties request that the Board use the JST as a basis to approve the *Re:Sound Commercial Radio Tariff (2009-2025)*. From the Last Approved Tariff, the Parties have made some minor changes to reflect wording changes made by the Board in other proceedings and to the way that other tariffs are referenced, consistent with the Board's *Practice Notice on Filing a Proposed Tariff* (PN 2019-004 rev. 4). In addition, the Parties have updated the definitions of "service provider", added definitions of "simulcast" and other related terms given this is the first time that Re:Sound's commercial radio tariff includes simulcasting, and modified confidentiality provisions for administrative efficiency.

[31] Finally, the JST contains transitional provisions, including a formula to be applied to determine what royalties are due in respect of simulcasts where no record of simulcast revenue exists. The Parties explain that the purpose of this provision is to facilitate the calculation and payment of simulcast royalties that go back to 2009, a significant period of retroactivity for which radio stations may not have retained records of their income. If a station's simulcast income is not available for certain years, royalties are calculated using the most recent year for which records are available, to which a discount applies (in percentage terms). The discount progressively increases for earlier years.

III. Issues

[32] The following are the issues that the Board has identified that must be addressed:

a. Is the agreement between the Parties an appropriate basis for the setting of rates, terms and conditions of *Re:Sound Commercial Radio Tariff (2009-2025)*?
b. If so, should the jointly-submitted text be used as a basis for the wording of the tariff, and are any changes to that text warranted?

IV. Analysis

A. Is the agreement between the Parties an appropriate basis for the setting of rates, terms and conditions of *Re:Sound Commercial Radio Tariff (2009-2025)*?

[33] For the following reasons, I conclude that the agreement is an appropriate benchmark of what can be a fair and equitable tariff for the years 2009 to 2025.

1. The CAB can represent the interest of all affected users

[34] In this proceeding, CAB is the only objector and the sole signatory of the agreement with Re:Sound.

[35] In assessing whether an agreement provides a good basis to approve a tariff, the Board may consider whether the objectors that are signatories to the agreement are capable of representing the interests of all potential users. The underlying reasoning behind this consideration is that if the association adequately represented the interests of its members, and if those members share sufficient characteristics with affected users that are non-members, it is reasonable to infer that the association can be representative of the interests of non-members' users as well.[4]

[36] The Parties submit that the CAB is able to represent the interests of all potential users for the following reasons. First, the CAB, a trade organization representing the Canadian private broadcasting industry, represents 568 commercial radio stations, approximately 78% of all commercial radio stations in Canada. Second, their members come from all types of radio stations: large, medium and small stations, in music and non-music formats, in markets of all sizes, in all geographic regions of Canada, and in English, French, and many other languages.

[37] For the reasons stated by the Parties, I am of the view that CAB members are representative of all private commercial radio stations in Canada.

2. The agreement reflects a change in the market

[38] Absent reasons to the contrary, the Last Approved Tariff constitutes a possible starting point for the Board's analysis of what could be fair and equitable for the tariff under examination. This is because the Last Approved Tariff is presumed to be fair and equitable for the period for which it was approved. One such reason to the contrary could be that a change in the relevant market has occurred during the period under examination.

[4] See *SOCAN 22.D.3 (2007-2013)* 2023 CB 1 (February 24, 2023), para. 21-31.

[39] For the rates that are contained in the agreement, the rates for broadcasts of over-the-air signals are, at first, the same as those fixed in the Last Approved Tariff; they then increase during the agreement period. However, this is explained by the fact that there has been a relevant change in the market: Re:Sound's repertoire that is eligible for remuneration has increased as noted above.

[40] As for simulcasts of radio signals, the tariff is inaugural (there is no "previously-approved tariff"). However, the rates for simulcasts − for the first years of the tariff and after the increases on account of repertoire − are the same as those for broadcasts of over-the-air signals.

[41] Given the reasons set out by the Parties, I conclude that the increases to the rates in the agreement are warranted. For the tariff to be fair and equitable, the rates need to be adjusted upwards to account for any resulting increase in repertoire. Also, since the CAB can represent the interests of all affected users and since it agreed to those rates, I conclude that those increased rates are appropriate.

3. All objections have been addressed

[42] In assessing whether a tariff based on an agreement can be fair and equitable, the Board may consider whether the issues raised in the objections have been addressed. The purpose of this exercise is to assess whether there are reasons to conclude that a tariff based on an agreement would not be fair.

[43] The CAB's objections are comprehensive. It asserted that the rates of the proposed tariffs, including the rates that account for the repertoire adjustment, were too high.

[44] The CAB also opposed the inclusion of a rate of 0.5% of gross revenue in respect of the performance in public by means of a radio receiving set. It contended that the Board concluded in the reasons pertaining to the Last Approved Tariff that Re:Sound was not entitled to such royalty as it already received royalties for the use envisaged in the Act.[5]

[45] In addition, CAB objected to the calculation of royalties based on the total income of all stations owned by the same company. It noted that the Board rejected this request in the *Commercial Radio Tariff Decision, 2011-2017* [6].

[46] The CAB further opposed the inclusion of an adjustment provision which limits the time during which a station may recover overpayments to 12 months. It argued that the

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[5] *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* (reasons) (April 21, 2016), para. 256.
[6] *Ibid.,* para 291.

provision was unfair given that there was no corresponding limit on the time for which Re:Sound may recover royalties.

[47] Finally, the CAB objected to applying interest on amounts due where financial and music-use reports are filed late, as well as to the requirement for users to provide Re:Sound with certain information on the use of sound recordings, not just where the information is available (as stated in the Last Approved Tariff), but whether available or not.

[48] I have reviewed the various objections of the CAB to Re:Sound's proposed tariffs throughout the period under examination as well as its Notice of Grounds for Objection to Re:Sound's proposed tariff for the years 2024-2028.[7] I am of the view that the issues put forward by CAB's objections have been resolved in the agreement.

B. Should the jointly-submitted text be used as a basis for the wording of the tariff and, if so, are any changes to that text warranted?

1. The jointly-submitted text can be used as basis for the wording of the *Re:Sound Commercial Radio Tariff (2009-2025)*

[49] The Parties ask that the Board approve the proposed tariffs in the form of the JST. Since I concluded that the agreement is an appropriate benchmark for the approval of the proposed tariffs and since the jointly-submitted text and the agreement share similarities, I consider that the jointly-submitted text is indeed a good starting point for the text of the *Re:Sound Commercial Radio Tariff (2009-2025).* I will thus use it, and make adjustments where necessary.

2. The jointly-submitted text is more advantageous to users than the proposed tariffs

[50] The rates in the JST are lower than the rates in the proposed tariffs. As such, users will not pay greater royalties pursuant to the JST than under the proposed tariffs. Also, compared to the proposed tariffs, the JST does not include a royalty rate of 0.5% of gross revenues for the performance in public of over-the-air signals by means of a radio receiving set, does not include an asymmetric treatment between Re:Sound and users in case of over payment, does not state that interest apply for late filing of certain information and does not provide that the calculation of royalties is based on the total income of all stations owned by the same company.

[7] Only the years 2024 and 2025 of the Proposed Tariff for 2024-2028 are considered in this proceeding.

3. Are any changes to the jointly-submitted text warranted?

[51] Section 3(4) of the Last Approved Tariff indicated that the tariff was “subject to the special royalty rate set out in subparagraph 68.1(1)(a)(i) of the Copyright Act” [now subsection 72(2) of the Copyright Act].

[52] The agreement also provides for a similar provision (section 11). However, such a statement is not included in the JST.

[53] Subsection 72(2) of the Act reads:

> **(2)** For wireless transmission systems, other than community systems and public transmission systems, broadcasters shall pay
>
> > **(a)** $100 on the first $1.25 million of annual advertising revenues in respect of each year; and
> >
> > **(b)** 100% of the royalties set out in the approved tariff or fixed under subsection 71(2) for that year on any portion of annual advertising revenues exceeding $1.25 million.

[54] This subsection entitles broadcasters to pay Re:Sound only $100 on their first $1.25 million of advertising revenue for the performance in public right or the communication to the public by telecommunication right.

[55] I am approving rates that exceed this amount for the first $1.25 million in advertising revenue, but note that so long as subsection 72 (2) is in force, these rates will not be effective. For clarity, I am adding wording to this effect in the tariff. Section 4 of the *Re:Sound Commercial Radio (2009-2025)* will therefore read as follows:

> 4. Pursuant to paragraph 72(2)(a) of the Copyright Act, notwithstanding sections 5 and 6, commercial radio stations shall pay $100 on the first $1.25 million of annual advertising revenues.

[56] Second, in the JST, the treatment of amounts due is disadvantageous to users. The Parties have not provided justification for this. In my view, there is no reason to treat non-signatories subject to the tariff differently that the signatory-users. Accordingly, I adjust the tariff with respect to amounts due so that signatory and non-signatory users are subject to the same treatment.

V. Decision

[57] Based on the record in this proceeding, and for the reasons stated above, the proposed tariffs are approved under the title *Re:Sound Commercial Radio Tariff (2009-2025)* at the rates indicated in the Overview section and in Table 4.