Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Broadcasting Decision CRTC 2004-197-1

Ottawa, 25 August 2004

Request by Pelmorex Communications Inc. for an order under section 9(1)(h) of the *Broadcasting Act* regarding the distribution of The Weather Network and MétéoMédia by Star Choice Communications Inc. – Reasons for denial

In Request by Pelmorex Communications Inc. for an order under section 9(1)(h) of the *Broadcasting Act* regarding the distribution of The Weather Network and MétéoMédia by Star Choice Communications Inc., *Broadcasting Decision CRTC 2004-197, 4 June 2004 (Decision CRTC 2004-197), the Commission* ***denied****, for reasons that it stated would follow, a request by Pelmorex Communications Inc. for an order under section 9(1)(h) of the* Broadcasting Act. *In the text that follows, the Commission sets out the reasons for that denial A dissenting opinion by Commissioner Noël was attached to Decision 2004-197.*

The parties

1. Pelmorex Communications Inc. (Pelmorex) is the licensee of the specialty service known as The Weather Network (TWN) in English and as MétéoMédia (MM) in French. The service provides weather and related programming throughout Canada.

2. Star Choice Communications Inc. (Star Choice) carries on a national, direct-to-home (DTH) satellite broadcasting distribution undertaking (BDU) that serves more than 800,000 subscribers. It is a wholly owned subsidiary of Shaw Communications Inc.

The complaint

3. In its letter dated 18 May 2004, Pelmorex informed the Commission that it was the intention of Star Choice to commence distributing TWN/MM as part of a discretionary package, rather than as part of the basic service offering of its DTH BDU, effective 25 May 2004. Pelmorex requested that the Commission issue an order under section 9(1)(h) of the *Broadcasting Act* (the Act) that would require Star Choice to continue to distribute the specialty service on the basic service of the DTH BDU until the dispute between it and Star Choice concerning this matter was resolved.

Pelmorex’s position

4. Pelmorex stated that, on 28 April 2004, it received, without notice, two letters signed by an assistant to a Star Choice executive. The letters stated that, effective 25 May 2004, Star Choice would move TWN from the “Essentials” bundle to the “Your Life” bundle, and MM from the “Essentiels” bundle to the “Nouvelles/Culture” bundle.

5. Pelmorex noted that Star Choice had carried TWN/MM on the basic service since January 1998. It added that, although the basic service had had different names from time to time, the service had always been part of the Star Choice tier having the highest penetration. Pelmorex also pointed out that TWN/MM, first licensed in 1987, is a dual status service that enjoys basic carriage status throughout Canada.

6. Pelmorex stated that it had been given little time to respond to the Star Choice letters and, in its view, no reasonable opportunity to discuss the matter. It added that it had seen no evidence, research, business or marketing plans to demonstrate how the change could possibly be to the advantage of Star Choice, Pelmorex, or to subscribers. In Pelmorex's view, the decision by Star Choice to make arbitrary changes that significantly affect subscriber packaging and pricing, without careful planning and preparation to avoid subscriber discontent and backlash, would be totally unreasonable in the context of any service industry, and was certainly contrary to past practice in the broadcasting industry.

7. Pelmorex alleged, among other things, that it would be materially harmed were Star Choice to implement its repackaging proposals. Pelmorex stated that, should these occur as planned, TWN/MM would be moved to tiers that, based on its information, have an aggregate number of subscribers in the range of only 150,000 to 220,000. It added that the repackaging exercise would result in the removal of TWN/MM from the services available to more than 500,000 Star Choice subscribers. This, according to its estimates, would translate to a financial loss to Pelmorex of more than $2 million per annum (approximately 23% of which would consist of lost advertising revenues). Pelmorex noted that, using its 31 August 2003 figures as a benchmark, this would represent a reduction of more than 5.3% of its total revenues, more than 20% of its earnings before interest, taxes, depreciation and amortization (EBITDA) and more than 23% of its profit before interest and taxes (PBIT). Pelmorex claimed that this loss of revenue would be devastating and would put in doubt its ability to fulfil its regulatory obligations.

8. Pelmorex also pointed out that, although more than 500,000 English- and French-language Star Choice subscribers who currently enjoy TWN/MM as part of Star Choice's basic service would suddenly cease to have access to the service, it understood that the fee paid by basic service subscribers would not decrease, and that, should a subscriber wish to continue to receive the service, the purchase of an additional tier would be necessary.

9. Pelmorex attached to its letter of 18 May 2004 a submission prepared by the law firm of McCarthy Tétrault. According to the submission, the Commission has the requisite authority to issue either an interim or a final order under section 9(1)(h) of the Act based on the facts of the current case. The essence of the argument was that the Commission's jurisdiction to grant the order sought by Pelmorex is expressly provided for in the language of section 9(1)(h) of the Act and, moreover, if the relief sought were to be considered interim in nature, that the jurisdiction to grant interim relief is properly applied as a necessary adjunct to the Commission's powers under section 9(1)(h).

Star Choice's position

10. In its letter of reply dated 21 May 2004, Star Choice submitted that the Pelmorex application for an order under section 9(1)(h) of the Act should be dismissed. It also stated that it was willing to continue good faith discussions with Pelmorex concerning possible alternatives to its repackaging proposal, and undertook not to repackage the services before 8 June 2004.

11. Star Choice stated, as its principal submission, that the Commission does not have the jurisdiction under section 9(1)(h) of the Act to issue the order requested. It stated that, for the Commission to issue the order, it must first be shown that the issuance of the order is in accordance with the broadcasting policy objectives and regulatory policies set out in the Act. Star Choice, among other things, expressed its further view that Parliament intended section 9(1)(h) to address situations in which a distributor "closed the door" on a licensed service and that, since it had not closed the door on Pelmorex, section 9(1)(h) did not apply.

12. Star Choice also argued that the Commission does not have the jurisdiction to issue an interim order under section 9(1)(h) or any other section of the Act. Among other things, Star Choice asserted in this regard that the absence of an express provision granting the Commission the power to make an interim order under section 9(1)(h) of the Act stands in marked contrast to the Commission's express jurisdiction to issue both conditional and interim relief under the *Telecommunications Act*.

13. In explaining its opposition to the Pelmorex request, Star Choice stated that it is critical that the Commission refrain from seeking to limit Star Choice's right to package its programming offerings for the following policy and other reasons:

- To do so would undermine the Governor in Council *Directions to the CRTC (Direct-to-Home (DTH) Pay-Per-View Television Programming Undertakings) Order* (the Direction)[1] that the Commission promote dynamic competition in the provision of DTH service in Canada. The Commission has always recognized that such competition is achieved, in part, through packaging flexibility.

- Star Choice has relied on the current, flexible regulatory framework in making investments of over $1.2 billion in its business, which fulfils many objectives of the Act, but has yet to see positive returns for investors.

- Star Choice's repackaging proposal is in full compliance with the Act, the *Broadcasting Distribution Regulations* (the Regulations) and Commission policies, and Pelmorex has no entitlement to carriage of TWN/MM as part of basic DTH service.

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[1] Order in Council P.C. 1995-1106, 6 July 1995.

- The Regulations and Commission policies recognize that, in a digital world, programming services will not be mandated for basic carriage unless there is clear and explicit public interest in such carriage.

- The current repackaging proposal is reasonable, and is compliant with all regulatory and licensing requirements, and Pelmorex would not be irreparably harmed by the proposed repackaging.

- Star Choice has provided adequate notice to Pelmorex, is willing to continue its discussions, and has not placed Pelmorex under duress.

14. Star Choice also explained why it considered its packaging proposal to be reasonable. Among the reasons cited was its belief that the value to subscribers of the weather service was reduced because it could not be localized to the Star Choice service, and was limited to brief graphic weather updates for about 40 cities across Canada. Star Choice noted that, in contrast, it was distributing 73 local broadcast services as part of its basic service, all of which contain weather news.

15. According to Star Choice, because the French- and English-language versions of the specialty service provided by Pelmorex contain weather news and more general information about weather phenomena, it was thus logical to place the service in discretionary packages consisting of information-based entertainment services such as Court TV, Fashion TV, Book TV, ARTV, Le Canal Nouvelles, MusiMax and TV5.

Reply by Pelmorex

16. Pelmorex also filed its final reply comment on 21 May 2004. In its reply, Pelmorex restated its position that Star Choice's behaviour in the whole matter was unreasonable and that Star Choice's consultations and discussions with Pelmorex have been unfair. It stated that it particularly objected to commercial negotiations conducted under what it described as the oppressive threat of imminent repackaging.

17. In Pelmorex's view, "reasonable" behaviour by Star Choice would have included the following:

    - an invitation by Star Choice to work in cooperation with Pelmorex in developing alternative carriage proposals;

    - provision of the rationale, accompanied by any research and analysis Star Choice might possess, explaining why Star Choice wished to make the changes;

    - details as to proposed contractual terms;

    - details of how the changes would be marketed;

- a willingness to listen to any issues or concerns Pelmorex might have had;
- provision of a reasonable period of time to conduct negotiations; and
- an allowance for dispute resolution in the event that such negotiations were unsuccessful.

18. Pelmorex considered that the negotiations in which Star Choice offered to participate were entirely inappropriate, did not provide for enough time, and would have been conducted against a deadline set unilaterally by Star Choice.

19. Pelmorex noted that Star Choice, in discussing the matter of harm to Pelmorex and to the subscribers of TWN/MM, had acknowledged that Pelmorex revenues would drop by 5.3%, representing almost a quarter of its PBIT. Pelmorex stated that, in its view, the packaging proposal was designed to enrich Star Choice at the significant expense both of Pelmorex and of consumers. Pelmorex added that Star Choice had conducted no research with respect to the impact that its proposed change would have on consumers.

20. In Pelmorex's view, the argument used by Star Choice was as follows: because nothing is specifically stated in the Regulations about the manner in which TWN/MM must be distributed, and because there was, in the estimation of Star Choice, no contract between it and Pelmorex, Star Choice was free to relegate TWN/MM to any package it wished. In Pelmorex's view, however, the regulatory framework presupposes the existence, whether in the past, present or future, of a contract containing reasonable terms between a distributor and a service provider. Pelmorex argued that, where such a contract containing reasonable terms does not or no longer exists, the regulatory framework provides for a remedy, whether through the issuance of an order pursuant to section 9(1)(h) of the Act or through the dispute resolution provisions set out in sections 12 to 15 of the Regulations.

21. Pelmorex concluded that, in its view, the Commission has clear jurisdiction under section 9(1)(h) of the Act to issue the order requested by Pelmorex, whether in an expedited, interim, or final form. It stated that it was open to any alternative process the Commission might deem appropriate for resolving the dispute, provided that the process was accompanied by a requirement that Star Choice not undertake the repackaging for the duration of that process.

The Commission's analysis and determinations

22. The Commission notes that, in this case, the parties provided comments on the jurisdiction of the Commission to grant the requested order, as well as on the substance of the behaviour or actions that would or could serve as the justification for issuing the order.

Jurisdictional issue

23. With regard to Star Choice's first argument on jurisdiction, that section 9(1)(h) of the Act does not apply to this situation, a plain reading of section 9(1)(h) indicates that the order sought by Pelmorex would fall within the range of those contemplated by the section; the dispute between the parties is over the terms and conditions of Star Choice's carriage of TWN/MM, and the order sought would set those terms. Contrary to Star Choice's contention, an order of the type sought could advance the objectives of the broadcasting policy by allowing for a resolution of a dispute on reasonable terms and would not in any way diverge from the Direction, which is to the effect that DTH BDUs should be subject to substantially the same rules and policies as other distribution undertakings and that the Commission should promote a dynamically competitive market for such DTH BDUs.

24. As is well known throughout the industry, section 9(1)(h) was designed to allow the Commission to intervene in disputes involving "cable as gatekeeper." There is nothing in the section to suggest that it is only engaged when there has been a refusal to carry the programming service at all or a breach of a regulation. An order of the type sought would not be an unusual or unexpected use of the power. In fact, the Commission has used this provision to good effect before in circumstances much the same as those present in this case.

25. Star Choice's second argument on jurisdiction was that the Commission does not have the jurisdiction to issue an interim order, whether under section 9(1)(h) or any other section of the Act. The Commission notes that section 9(1)(h) is a remedial section and refers to a specified set of circumstances, i.e., the terms and conditions of carriage of programming services by distribution undertakings. Pelmorex seeks an order that appears to fall squarely within the ambit of section 9(1)(h).

26. The fact that the order sought might be of limited duration or that it might be replaced at its termination is not surprising. In a constantly evolving industry such as broadcasting, changes in the circumstances under which orders are made will usually require some action to reflect the new circumstances. The Commission does not accept Star Choice's argument that the interim decision power found in section 61 of the *Telecommunications Act* indicates that the Commission has no jurisdiction to grant the order sought. The essential characteristic of an interim order under section 61 is that it may be reviewed and modified in a retrospective manner by a final decision. The effect of an interim order, as well as any discrepancy between the interim order and the final order, may be reviewed and remedied by the final order. Unlike decisions made pursuant to section 61 of the *Telecommunications Act*, the order proposed by Pelmorex would not be capable of revision by the Commission and, for that reason, could not be revised effective as of the date first made. A section 9(1)(h) order remains in place as issued until the expiration of its term. It is not "interim" as that term is used in the *Telecommunications Act*. Therefore, the Commission finds that, although the Act lacks a section similar to section 61 of the *Telecommunications Act*, this fact would not preclude the Commission from issuing the type of order sought.

27. Based on the foregoing, the Commission finds that it does have the jurisdiction necessary to issue an order of the type sought by Pelmorex, and that it could do so in appropriate circumstances.

28. In this case, Pelmorex has asked, in effect, that the Commission order a "standstill" of all terms of the current distribution arrangements pending the parties' or the Commission's disposition of the substantive issues in dispute.

29. The Commission considers that the ongoing commercial relationship between programmers and distributors should properly be the subject of negotiations between the parties, who are well equipped to respond to the exigencies of the marketplace. When parties cannot agree on the terms of affiliation agreements, the Commission's regulatory regime and policies provide for the possible recourse by one or both parties to dispute resolution pursuant to sections 12 to 15 of the Regulations. As the Commission has indicated on a number of occasions, this recourse is intended as a last resort and presupposes that the parties have already taken all reasonable steps possible, including good faith negotiations, to resolve any disagreements.

30. In this case, recourse either to further negotiations or to the dispute resolution provisions set out in sections 12 to 15 of the Regulations has been made more difficult by the short notice provided and the threat of unilateral action. The request by Pelmorex for issuance of an order under section 9(1)(h) of the Act to maintain the status quo until the dispute is resolved, either through further negotiations or by a Commission determination pursuant to sections 12 to 15 of the Regulations, may thus be seen as an adjunct to the existing Commission dispute resolution approach.

31. At the same time, consistent with its view that it should only intervene in the negotiation process as a last resort, the Commission considers that it should generally issue an order under section 9(1)(h) to maintain the status quo only where it is satisfied that, in the absence of such an order, the attainment of the objectives set out in the Act would clearly be compromised. Irreparable harm to a licensed programming service that would not be susceptible to redress by way of adequate compensation would, in the Commission's view, be a pertinent factor in making such a determination.

32. In the present case, the Commission considers that Pelmorex has not demonstrated that the failure to issue an order under section 9(1)(h) would clearly compromise the attainment of the objectives set out in section 3 of the Act. While the Commission recognizes that Star Choice's decision to move TWN/MM would have adverse consequences for this service, it is not evident to the Commission that the harm that may be suffered by the applicant would be irreparable if the order were not granted, or that the harm would not be susceptible to redress by way of compensation.

33. In this regard, the Commission considers that the issues noted above may be addressed as part of the dispute resolution process set out in sections 12 to 15 of the Regulations.

Conclusion

34. The Commission is not satisfied that it should issue the order requested. Therefore, having considered all submissions received, the Commission **denies** Pelmorex's request for an order under section 9(1)(h) of the *Broadcasting Act* to require Star Choice to continue to distribute TWN/MM on its basic service until the dispute on this matter is resolved.

Subsequent process

35. The Commission announced its denial of the request by Pelmorex in *Request by Pelmorex Communications Inc. for an order under section 9(1)(h) of the* Broadcasting Act *regarding the distribution of The Weather Network and MétéoMédia by Star Choice Communications Inc.*, Broadcasting Decision CRTC 2004-197, 4 June 2004 (Decision 2004-197), for reasons that it stated would follow. Those reasons have now been set out above. Decision CRTC 2004-197 also indicated that, while the Commission remained of the view that the commercial arrangements between distributors and programmers should best be determined by negotiations between them without the Commission's intervention, it expressed its concern, based upon its review of the circumstances surrounding this case and others, that the negotiation process between parties is not consistently characterized by good commercial relations.

36. The Commission stated further that, in its view, good commercial relations are essential to allow parties to fulfil their respective responsibilities under the Act. Accordingly, the Commission announced that it would conduct a process to inquire into the measures that may be required to ensure that negotiations between distributors and programmers are conducted in accordance with good commercial practices.

37. In *Call for comments on possible requirements for the provision of notice to programming services by distributors of their plans to change packages*, Broadcasting Public Notice CRTC 2004-64 of today's date, the Commission invites comments on this matter.

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 Andrée Noël

After reading the written reasons for the majority's decision regarding this application, I confirm my dissenting opinion set out in Broadcasting Decision CRTC 2004-197, 4 June 2004.