



Broadcasting Decision CRTC 2004-3

Ottawa, 8 January 2004

Complaint by Novus Entertainment Inc. alleging anti-competitive marketing practices by Shaw Cablesystems Company

*The Commission **dismisses** a complaint by Novus Entertainment Inc., that Shaw Cablesystems Company contravened section 9 of the Broadcasting Distribution Regulations. That section prohibits a licensee from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage.*

The parties

1. Shaw Cablesystems Company (Shaw) and Novus Entertainment Inc. (Novus) operate competing licensed cable broadcasting distribution undertakings (BDUs) in the Greater Vancouver area. Shaw operates the largest cable BDU in the area, serving almost 600,000 subscribers. Novus was licensed in 1996 and has a subscriber base of approximately 4,000 subscribers.

The complaint

2. Novus filed a complaint dated 30 January 2003, alleging that a marketing promotion instituted by Shaw (the THP Promotion) constituted predatory pricing. Subsequently, in a letter dated 3 February 2003, Novus alleged, among other things, that Shaw had made an unauthorized customer transfer for the cable service of a Novus customer.
3. In a letter dated 10 February 2003, Novus further amended its complaint. It requested that the Commission determine whether the THP Promotion had conferred an undue advantage upon Shaw and/or had subjected its competitors and other persons in the market to an undue disadvantage, contrary to section 9 of the *Broadcasting Distribution Regulations* (the Regulations). Novus also alleged, as part of its complaint, a further instance of an unauthorized customer transfer.
4. Shaw replied to the Novus complaint in letters dated 28 February and 19 March 2003. In a letter dated 27 March 2003, Novus reiterated its request that the Commission prohibit dominant companies from directing promotions only to their competitors' customers where such promotions are below cost or are offered at unreasonably low prices.
5. In the following sections, the Commission examines the circumstances of Shaw's THP Promotion and the issue of transfers of customers from Novus to Shaw, in light of the requirements of section 9 of the Regulations.

Shaw's marketing promotion

Novus' position

6. The complaint by Novus concerned the THP Promotion, a promotional offer made by Shaw to over 40,000 potential customers in Vancouver for a limited duration, specifically between 20 January and 28 February 2003. Under the promotional offer, a new subscriber to Shaw's service would receive the following:
 - 60 days of Shaw digital cable free, including the total home package (which includes Shaw high-speed Internet);
 - 5 free Canucks pay-per-view games (a \$49.75 value);
 - 2 free Shaw "On Demand" movies;
 - 12-month free rental of a Shaw digital terminal and high-speed modem which would become the property of the subscriber after 12 months;
 - free installation.
7. Novus argued that, as the Commission had no policies or regulations specifically addressing the issue of predatory pricing, the Commission should review this matter under the undue preference or disadvantage provisions contained in section 9 of the Regulations, taking into account the ultimate effect that Shaw's practice could have on competition among BDUs.
8. Novus submitted that, since Shaw is the dominant cable service provider and can use its broad customer base and dominant position to subsidize below-cost offerings to targeted customers, Shaw's marketing promotion represented anti-competitive behaviour. Novus alleged that Shaw's competitors in the Vancouver area have only a narrow customer base and cannot withstand this type of anti-competitive pricing. Novus submitted that, if the loss it had experienced during one week of Shaw's campaign was an indication of future losses, Shaw would be successful in eliminating Novus as a competitor, resulting in a monopoly position for Shaw. Novus submitted that such a result would confer an undue preference on Shaw, and upon Novus' targeted customers in the short term, although those customers would be subjected to an undue disadvantage later, should Shaw be successful in eliminating a competitor. The complainant also asserted that Shaw had subjected its present customers to an undue disadvantage in that those customers must subsidize the promotion. In this regard, Novus provided to the Commission form letters from Shaw customers indicating that they had not received comparable offers to those made to Novus customers.

9. Finally, Novus was of the view that Shaw's promotion had been offered at such an unreasonably low price that it could not possibly have been offered to all of Shaw's customers without having an impact upon Shaw's profits. By offering the promotion only to competitors' customers, Shaw had not harmed its own financial position, but had seriously impacted the business of its competitors.

Shaw's position

10. In its 28 February 2003 reply to the complaint, Shaw stated that its promotional offer was offered only for a limited duration, specifically between 20 January and 28 February 2003. In its further letter dated 19 March 2003, Shaw confirmed that no similar promotion was then underway. It added that the offer in question had been open only to individuals who did not, at the time, subscribe to Shaw's cable and Internet services, and who may have included subscribers of competing direct-to-home (DTH) BDUs, of Novus or of illegal satellite services, as well as persons then without access to any existing broadcast service other than those available over the air. Shaw stated that only a very small percentage of the potential customers were Novus subscribers.
11. Shaw expressed its view that the use of targeted promotional campaigns is commonplace where competition exists between suppliers. According to Shaw, in *Complaint by VDN Cable Inc. against Vidéotron ltée alleging that Vidéotron ltée contravened section 9 of the Broadcasting Distribution Regulations*, Broadcasting Decision CRTC 2003-25, 24 January 2003, the Commission had expressly recognized that the Winback Rules¹ contemplated the offering of discounts or other inducements in attempts to reacquire customers.
12. According to Shaw, Novus did not provide any information to establish that the promotion conferred a preference or disadvantage on any person. Shaw also submitted that Novus did not file any information substantiating its allegation that Shaw had engaged in predatory pricing. Further, Shaw expressly denied that any of its past or present promotional activities were anti-competitive.

The Commission's analysis and determinations

13. Section 9 of the Regulations states:

No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

14. As to whether or not Shaw's promotional offer gave a preference to itself or to any other person, or subjected any person to a disadvantage, the Commission considers that the THP Promotion did confer a preference on new and a disadvantage on existing Shaw

¹ The Winback Rules were set out by the Commission in *CISC Dispute – Rules Regarding Communications Between the Customer and the Broadcasting Distribution Undertaking*, CRTC letter decision, 1 April 1999.

subscribers, in that any new Shaw subscriber would receive the package of services described in paragraph 6 above at a savings of more than \$500 when compared to the amount that existing subscribers would have to pay for the same package.

15. In determining whether or not the preference or disadvantage is undue, the Commission considered whether it has had or is likely to have a material adverse impact upon the complainant or any other person, as well as the impact it has had or is likely to have on the achievement of the objectives of the broadcasting policy for Canada set out in the *Broadcasting Act*.
16. With respect to Novus' argument that Shaw conferred an undue preference on itself by taking a significant number of customers from its competitors and thereby providing further barriers to serious competition, Novus did not provide any indication of the number of customers it or other competitors had lost. Accordingly, the Commission is unable to assess whether or to what extent the promotion had an impact on Novus or on competition. In part, this may be due to the fact that Shaw's THP Promotion was a one-time offer, as opposed to a promotion carried out on a regular or frequent basis, and was only available for a limited period of time.
17. With respect to Novus' concern that there could be another promotional campaign by Shaw within a few months, and that this could result in the elimination of competition, there is no evidence to indicate any intent by Shaw to repeat such offers or promotions frequently or for longer periods of time.
18. Based on the record, the Commission cannot conclude that the preference and disadvantage conferred under the THP promotion were undue. The Commission accordingly finds that Shaw did not breach section 9 of the Regulations. At the same time, the Commission notes that its disposition of a complaint based on section 9 of the Regulations could be different if such promotions were offered for a longer period of time and/or were offered more frequently.

Unauthorized customer transfers of Novus subscribers

Novus' position

19. As noted above, in its complaint Novus alleged that Shaw had made two unauthorized transfers of Novus subscribers during the THP Promotion. Novus submitted that such unauthorized customer transfers are common during aggressive marketing campaigns.

Shaw's position

20. Shaw denied Novus' allegations respecting the unauthorized customer transfers. In its letter of 28 February 2003, Shaw stated that, while both of the customers in question had agreed to subscribe to the Shaw promotion, they had since been reconnected to Novus.

The Commission's analysis and determination

21. While it is unclear whether or not the two transfers in question were authorized, the Commission notes that the usual practice followed by Novus and Shaw in making customer transfers has been to provide disconnection notices to each other by facsimile and that these notices have been honoured immediately and without question. Therefore, the Commission considers that the procedure existing between the parties appears to be working.

Conclusion

22. In light of the differences on the facts, the Commission is unable to determine whether or not these two transfers constituted contraventions of section 9 of the Regulations.

Secretary General

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