Broadcasting Decision CRTC 2005-460

Ottawa, 9 September 2005

Vidéotron ltée, on behalf of itself and its subsidiaries CF Cable TV Inc. and Videotron (Regional) Ltd.
Montréal, Québec, Saguenay (Chicoutimi sector), Sherbrooke, Trois-Rivières (Cap-de-la-Madeleine sector), Victoriaville, Montréal/Laval and Gatineau (Buckingham, Hull and Terrebonne sectors), Quebec[1]

Application 2003-1177-0
Broadcasting Public Notice CRTC 2004-48
9 July 2004

Proposed amendments to conditions of licence

In this decision, the Commission ***denies*** *the application by Vidéotron ltée, on behalf of itself and two subsidiaries, for amendments to the conditions of licence of various cable broadcasting distribution undertakings (BDUs) in Quebec. The proposed amendments would have permitted the BDUs to insert commercial advertising, including messages promoting affiliated broadcasting services, in 50% of the local availabilities contained in the signals of three U.S. satellite programming services.*

Introduction

1. In Broadcasting Public Notice CRTC 2004-48, 9 July 2004 (Public Notice 2004-48), the Commission announced receipt of an application by Vidéotron ltée (Vidéotron), on behalf of itself and two subsidiaries, for amendments to the conditions of licence of various cable broadcasting distribution undertakings (BDUs) in Quebec. The proposed amendments would have permitted the BDUs to insert commercial advertising, including messages promoting affiliated broadcasting services, in 50% of the local availabilities contained in the signals of three U.S. satellite programming services, namely A&E, CNN and TLC. "Local availabilities", in the context of this decision, refers to the approximately two minutes per hour of air time set aside in the programming of these and certain other U.S. satellite programming services for use by distributors in the United States.

2. In Public Notice 2004-48, the Commission noted that the Vidéotron application raised issues similar to those raised in a proposal by the Canadian Cable Telecommunications Association (CCTA) announced on the same date (see *Proposal by the Canadian Cable Television Association to amend the policy regarding the use of local availabilities - Call for comments*, Broadcasting Public Notice CRTC 2004-47, 9 July 2004 (Public Notice 2004-47). Specifically, the CCTA had requested that cable BDUs be permitted to use the

[1] The areas listed exclude some that were inadvertently listed in Broadcasting Public Notice CRTC 2004-48, 9 July 2004.

local availabilities contained in the programming of twelve popular U.S. satellite programming services for the insertion of commercial advertising, as well as other messages promoting BDU or BDU-affiliated non-programming services, including telephony services. Accordingly, the Commission announced that it would consider Vidéotron's application in light of the comments received as a result of the call for comments on the CCTA's proposal.

3. The present decision on Vidéotron's application is one of three documents issued today that address the use of local availabilities. In *Determinations on a request by the Canadian Cable Telecommunications Association for an amendment to the Commission's policy regarding the use by cable broadcasting distribution undertakings of local availabilities contained in the signals of U.S. satellite programming services*, Broadcasting Public Notice CRTC 2005-88 (Public Notice 2005-88), the Commission rejects the request by the CCTA that the Commission amend its policy regarding the use by cable BDUs of the local availabilities. As a further matter, in *Tools to promote and improve the visibility of services whose national distribution is required pursuant to section 9(1)(h) of the* Broadcasting Act, Broadcasting Public Notice CRTC 2005-89, the Commission sets out its determinations regarding appropriate mechanisms, including the use of local availabilities, to promote and improve the visibility of Canadian programming services, the carriage of which by BDUs is mandatory pursuant to section 9(1)(h) of the *Broadcasting Act* (the Act).

Current local availabilities policy

4. The current policy governing the use of local availabilities by Canadian BDUs was first articulated by the Commission in *Proposal to insert certain promotional material in the local availabilities of U.S. satellite services*, Decision CRTC 95-12, 18 January 1995 (Decision 95-12). In that decision, the Commission stated that it was not prepared to consider applications to use local availabilities for the broadcast of commercial advertising. The Commission, however, did authorize Rogers Cable TV Limited, by condition of licence, to insert, at its option, certain promotional material as a substitute for the messages contained in the local availabilities of non-Canadian satellite services. Over the years, the Commission has approved other applications by BDUs so that today, the majority of them, including direct-to-home (DTH) BDUs, have conditions of licence authorizing the use of local availabilities for the distribution of promotional material.

5. The policy requires that at least 75% of the local availabilities be made available for use by licensed Canadian programming services for the insertion of messages promoting their respective services, or be used by BDUs for the distribution of unpaid Canadian public service announcements and of messages promoting the community channel. A maximum of 25% of the local availabilities may be used by BDUs for the promotion of discretionary programming services and packages, customer service information, channel realignments, cable FM service and additional cable outlets.

6. On various occasions, the Commission has provided clarification regarding certain aspects of its policy. In *Application to insert certain promotional material in the local availabilities of U.S. satellite services*, Decision CRTC 98-271, 10 August 1998, the Commission concluded that BDUs should not be prohibited from charging a fee to recover the costs they incur in inserting promotional material of licensed programming services in the local availabilities of U.S. satellite services. In *Advertising Internet services on community channels or during "local availabilities"*, Public Notice CRTC 1999-93, 27 May 1999, the Commission clarified that "the list of services that a BDU may promote, which are referred to in the condition of licence, does not include a non-programming service that is available on a commercial basis." In *Building on Success - A Policy Framework for Canadian Television*, Public Notice CRTC 1999-97, 11 June 1999 (Public Notice 1999-97), the Commission determined that BDUs "may not charge Canadian programming services an amount in excess of their share of the direct costs associated with the insertion of promotional material in the local availabilities of foreign satellite services." Further, in *Subsidiaries of Shaw Communications Inc. and Bragg Communications Incorporated – Non-compliance concerning the use of local availabilities*, Broadcasting Decision CRTC 2003-383, 11 August 2003, the Commission clarified that "the relevant condition of licence pertaining to local availabilities does not permit mentions 'in passing' of services that may be offered by a broadcasting distribution undertaking, such as Internet or telephony services, that are not specifically mentioned in the condition of licence."

Vidéotron's application and supporting rationale

7. In its application, Vidéotron proposed to use 50% of the local availabilities contained in the programming of the three U.S. English-language satellite services for the insertion of commercial advertising. The remaining 50% of the local availabilities would continue to be available for the promotion of Canadian programming services and the community channel, and for the broadcast of unpaid public service announcements. Vidéotron indicated that it would place no restrictions on access to those availabilities, and if they were oversubscribed, a "first come, first served" principle would be applied to ensure an equitable and balanced distribution.

8. Vidéotron proposed to charge advertisers an average fee of $30 for 30 seconds of air time. It estimated that half of the local availabilities on the three U.S. satellite programming services would make approximately 52,000 half-minute spots available to it for this purpose each year. Based on a projected sell out rate of 75%, Vidéotron estimated that it would generate additional revenues of approximately $1.17 million annually.

9. According to Vidéotron, the U.S. satellite programming services provide the local availabilities to Vidéotron's cable BDUs without fee or other consideration. The applicant stated, however, that to prevent the possibility that advertising revenues might be exported, it would accept a condition of licence that would prohibit it from compensating the U.S. satellite services for advertising revenues derived from its use of the local availabilities for the insertion of commercial messages.

10. Vidéotron stated that it would accept a further condition of licence requiring that 5% of all revenues generated by its sale of commercial advertising inserted in the local availabilities be directed to the creation of Canadian programming. It further indicated that all of the commercial advertising inserted in these local availabilities for distribution in the primarily francophone markets served by its BDUs would be in English.

11. In support of its application, Vidéotron stated that, while increased competition has prevented cable BDUs from raising the fees they charge for basic service, they have nevertheless been obliged to [TRANSLATION] "…make enormous investments to upgrade their system capacity" and have had to "subsidize each and every digital subscriber." Vidéotron argued further that the conditions and needs of the French- and English-language broadcasting industries differ sufficiently to enable the Commission to approve its application independently of any decision reached concerning the CCTA's proposal.

Interventions

12. The Commission received 18 interventions in response to Public Notice 2004-48 announcing Vidéotron's application. All but one intervener (Cogeco Cable Inc.) expressed opposition to the proposal. All of the 18 interventions were also filed as comments in response to Public Notice 2004-47 announcing the CCTA's proposal. With three exceptions, the interventions that were filed with respect to the Vidéotron application did not address that application specifically, but rather discussed matters that the interveners considered as being the broader issues raised by the two proposals. Hence, the arguments made in these interventions essentially duplicated those made in the comments filed to the CCTA proposal. These arguments were largely focused upon what most interveners viewed as the negative implications of permitting cable or other BDUs to use local availabilities for the insertion of commercial advertising and messages promoting affiliated non-programming services.

13. The three exceptions mentioned above were the interventions filed by the Canadian Association of Broadcasters (CAB), CTV Inc. (CTV), and Bell ExpressVu[2], each of whom specifically addressed the Vidéotron application in their comments. Bell ExpressVu was concerned that approval of Vidéotron's application would have a negative impact on the revenues of specialty and conventional television services. In its intervention, CTV suggested that, with approval of the application, Vidéotron might earn in the range of $25 million to $29 million per year. It added that that the advertising revenue that BDUs would earn "will likely be generated from a reallocation of revenues from existing Canadian conventional and specialty services to the new U.S. inventory."

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[2] Bell ExpressVu Inc., (the general partner), and BCE Inc. and 4119649 Canada Inc. (partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership.

Commission’s analysis and determinations

14. The Commission notes that Vidéotron did not propose to use the local availabilities to distribute messages promoting affiliated non-programming services. The Commission also notes that Vidéotron differentiated its application from the CCTA proposal on the basis of the relatively smaller revenue impact of the former and the distinctions that exist between the English- and French-language broadcasting industries. Nevertheless, as indicated in Public Notice 2004-47, the Commission considered Vidéotron’s application in light of the interventions filed to that application, and of the further comments received pursuant to its call for comments on the CCTA’s proposal.

15. Based on its consideration of all of the evidence, including its analysis of the issues identified by the parties commenting on the CCTA’s proposal, the Commission, in Public Notice 2005-88, announced its determination to reject that proposal and to maintain its existing policy respecting the use of local availabilities by BDUs. Among the concerns noted by the Commission as reasons for this determination was the lack of evidence that the cable BDU industry needs the revenues that would be generated through the proposed use of the local availabilities. More significant, however, was the Commission’s concern for any potential negative impact that implementation of the proposal might have on: the ability of Canadian programming services to meet their obligations under the Act; the interest that potential entrants might have in applying for a licence; the ability of newly-launched services to establish themselves; the promotional opportunities that would remain available to Canadian programming services; the attainment of the Commission’s policy objectives; and the structure of the Canadian broadcasting system. In this latter regard, the Commission concluded that the CCTA had not demonstrated clear and substantial benefits to the Canadian broadcasting system to justify the fundamental change to the system that approval of its proposal might bring about. In the Commission’s view, most of the concerns identified by the Commission as reasons for denial of the CCTA’s proposal apply as strongly to the Vidéotron application.

16. Based on data gathered by BBM Canada regarding the hours of viewing to the three U.S. satellite programming services concerned in the markets identified by Vidéotron, and on the Commission’s calculation of the average revenue per hour of viewing earned by the most popular Canadian specialty services, the Commission estimates that the revenues that might be generated by Vidéotron’s application, and thus its economic impact, would not be greater than Vidéotron’s own estimate. Nevertheless, as CTV argued in its intervention, approval of Vidéotron’s application could still result in the redirection of a certain number of advertising dollars away from conventional and specialty television broadcasters, thus giving rise to many of the Commission’s concerns noted above.

17. As for Vidéotron's argument that the distinctions between the conditions and needs of the English- and French-language broadcasting industries support approval of its application, the Commission notes that Quebecor Media Inc. (Quebecor) offered a somewhat similar argument in its comment on the CCTA's proposal. According to Quebecor, the CCTA's proposal would have a negligible negative impact on the French-language market and argued that, even were the Commission to conclude that the policy change would not be beneficial nationally, implementation of the proposal should be considered in the French-language market where non-Canadian programming is less popular among viewers than Canadian programming.

18. In the Commission's view, the fact that Vidéotron operates in francophone markets does not diminish the potential implications that its application has for existing and future programming services and for the attainment of the Commission's policy objectives. Further, the Commission finds that the end result of allowing Vidéotron, a cable distributor, to generate revenues from the sale of commercial advertising would be a fundamental change to the structure of the broadcasting system, but that no clear and substantial benefits to justify such a fundamental change have been demonstrated by the applicant.

Conclusion

19. In light of all the foregoing, the Commission **denies** the application by Vidéotron ltée, on behalf of itself and two subsidiaries, for amendments to the conditions of licence of cable BDUs serving various communities in Quebec to allow the distribution of commercial advertising and of messages promoting affiliated broadcasting services in 50% of the local availabilities of three U.S. satellite programming services.

Secretary General