



Broadcasting Decision CRTC 2005-120

Ottawa, 1 April 2005

Complaint by Aliant Telecom Inc. against Bragg Communications Incorporated and its subsidiaries alleging breaches of section 9 of the *Broadcasting Distribution Regulations* and section 27(2) of the *Telecommunications Act*

*The Commission concludes that the TV Listings Channel, as distributed by Bragg Communications Incorporated (Bragg) and its subsidiaries, is a program as defined under section 2(1) of the Broadcasting Act and is therefore subject to that Act. The Commission further concludes that Bragg did not contravene section 9 of the Broadcasting Distribution Regulations, which prohibits a licensee from giving an undue preference to any person, including itself, or subject any person to an undue disadvantage. It therefore **dismisses** the complaint filed by Aliant Telecom Inc.*

The parties

1. Bragg Communications Incorporated, through its subsidiaries carrying on business under the name EastLink (collectively Bragg), operates broadcasting distribution undertakings (BDUs) providing cable television service in various regions of Nova Scotia, Prince Edward Island and, to a lesser extent, New Brunswick. It is thus subject to the *Broadcasting Act* and the *Broadcasting Distribution Regulations* (the Regulations) made thereunder. Bragg also offers local telephone service and high-speed Internet in Nova Scotia, Prince Edward Island and, to a lesser extent, New Brunswick; it is therefore, with regard to these activities, subject to the *Telecommunications Act* and is recognized by the Commission as a competitive local exchange carrier.
2. Aliant Telecom Inc. (Aliant), a company controlled by BCE Inc., provides telecommunications services such as local telephony, long distance, Internet and wireless services throughout New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador. It is recognized by the Commission as an incumbent local exchange carrier.

The complaint

3. On 8 December 2004, Aliant filed a complaint with the Commission related to BDUs operated by Bragg in Nova Scotia and Prince Edward Island. Aliant stated that, on 8 October 2004, Bragg informed Aliant that it would only accept Aliant advertising on the Television Listings Channel of its BDUs in New Brunswick. Aliant submitted that, by refusing to carry its advertising in Nova Scotia and Prince Edward Island, Bragg was in violation of section 9 of the Regulations or alternatively, of section 27(2) of the *Telecommunications Act*.

4. On 7 February 2005, the Commission advised the parties that it would adjudicate this matter in accordance with the expedited process established in *Expedited procedure for resolving competitive issues*, Telecom Circular CRTC 2004-2, 10 February 2004.
5. The matter was heard by a panel of three Commissioners at a Public Hearing in Gatineau on 21 March 2005. In addition to the original 8 December 2004 letter of complaint and the oral component of the proceeding, the Commission considered Bragg's answer dated 7 January 2005, Aliant's reply dated 17 January 2005, their further arguments dated 23 February 2005, their responses to Commission interrogatories dated 25 February 2005, and the material requested by the Commission and received from the parties at the 21 March 2005 Public Hearing.

Broadcasting Act or Telecommunications Act

Regulatory framework

6. Section 2 of the *Telecommunications Act* contains the following definition:

“telecommunications” means the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system.
7. The *Telecommunications Act* excludes broadcasting and broadcasting activities from the scope of that Act. Specifically, section 4 of the *Telecommunications Act* states:

This Act does not apply in respect of broadcasting by a broadcasting undertaking.
8. Section 2 (1) of the *Broadcasting Act* contains the following definitions:

“broadcasting” means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.

“program” means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.

Meaning of the term predominantly, as employed in the definition of “program”

9. In a letter dated 19 August 1991 from the CRTC to Gowling, Strathy & Henderson (Gowling Letter Decision), the Commission discussed the meaning of the word *predominantly* in the context of a program guide, one quarter of which, as it appears on a television screen, consisting of full-motion video and the remaining three quarters

consisting of alphanumeric text. The Commission determined, among other things, that the term *predominantly* “has no special legal definition and is used in its ordinary sense, i.e. that which is more influential or more powerful.”

10. In the Gowling Letter Decision, the Commission expressed the view that, although the moving image occupied only one quarter of the screen, the attention of a person viewing the service was more likely drawn to and held by the moving image. In the circumstances, the Commission concluded that the moving image was the focus of attention and thus predominated, and that the transmission was thus a “program” as defined in the *Broadcasting Act* and subject to that Act. The Commission further concluded that Parliament knowingly chose the word *predominantly* for use in its definition of “program” so as to ensure that something that had the essential characteristics of television would be regulated as television.
11. In *Regulation of full Channel TV services (e.g. alphanumeric services)*, Telecom Decision CRTC 97-2, 5 February 1997 (Decision 97-2), the Commission reiterated its determination that the term *predominantly*, as used in its ordinary sense, signified “...that which is more influential or powerful.” It concluded that, even where a moving image occupies one-quarter of the screen, the service may be characterized as a “program” if the moving image is the focus of attention.
12. Further, in *Complaint by Wagg Communications against Shaw Communications Inc. alleging breaches of the Broadcasting Distribution Regulations*, Broadcasting Decision CRTC 2003-518, 23 October 2003 (Decision 2003-518), the Commission determined that the Shaw TV Listings Channel, which consisted of still pictorial images and alphanumeric material on half of the screen, and Shaw’s TV Listings on the other half of the screen, was not primarily alphanumeric in nature as the still image material was the focus of attention.

The question of whether Bragg’s TV Listings Channel is a “program” under the *Broadcasting Act*

Aliant’s position

13. Aliant submitted that Bragg’s TV Listings Channel consists predominantly of alphanumeric text and meets the description of a “non-programming service” contained in Decision 97-2. It further emphasized the Commission’s statement in that decision that any determination as to whether a service is a broadcasting service or a telecommunications service must be made based on the specific facts of each case. Aliant also argued that viewers seek out the TV Listings Channel for the purpose of consulting the schedules of television services, which are presented in alphanumeric form, and not the advertisements, some of which include a combination of sound, video and alphanumeric text.

Bragg's position

14. Bragg submitted that what is predominant on the TV Listings Channel is not the alphanumeric television listings on the left side of the screen, but is rather the sound and visual images on the right side of the screen. According to Bragg, the images on the right side of the screen fall within the definition of a “program” set out in the *Broadcasting Act*. Bragg argued that, since these images are the predominant aspect of the TV Listings Channel, the service is not predominantly alphanumeric and is a program for the purposes of the *Broadcasting Act*.

Commission analysis and determination

15. Bragg’s TV Listings Channel consists of a split screen, one half of which displays television listings formatted as alphanumeric text. The other half of the service displays image, sound and alphanumeric advertising content and moving video clips promoting other services available to BDU subscribers.
16. In both the Gowling Letter Decision and Decision 97-2, the Commission interpreted the term *predominantly* as meaning that which is more influential or powerful. In Decision 97-2, the Commission added that, even where a moving image occupies only one-quarter of the screen, the service may be characterized as a “program” if the moving image is “the focus of attention.”
17. The Commission finds that Bragg’s TV Listings Channel is very similar to Shaw’s TV Listings Channel considered in Decision 2003-518, in that both employ a split screen to display, on one half of the screen, alphanumeric television listings, and on the other half, image and alphanumeric advertising content. In Decision 2003-518, the Commission found that Shaw’s TV Listings Channel was not predominantly alphanumeric as the still image material broadcast was the focus of attention. The Commission further notes that, in contrast with Shaw’s TV Listings Channel, the advertising content of Bragg’s TV Listing Channel contains both still and full-motion video images.
18. In the present case, the Commission concludes that, regardless of why a viewer tunes to Bragg’s TV Listings Channel, once the viewer has done so, it is the visual images, whether still or moving, that are more likely the focus of the viewer’s attention. The Commission therefore finds that Bragg’s TV Listings Channel is not predominantly alphanumeric in nature, and therefore meets the definition of a program as defined in section 2 of the *Broadcasting Act*. The Commission therefore finds that, because Bragg’s TV Listings Channel is “broadcasting”, and thus falls outside of the purview of the *Telecommunications Act*, Aliant’s complaint of undue preference must be adjudicated under the *Broadcasting Act*.

The issue of whether Bragg has given itself an undue preference or subjected Aliant to an undue disadvantage

Regulatory framework

19. 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.

20. In *Complaint by Bell ExpressVu Limited Partnership against Rogers Cable Inc. alleging certain anti-competitive practices*, Broadcasting Decision CRTC 2004-494, 12 November 2004, the Commission outlined the steps required in analyzing a complaint under section 9 of the Regulations:

In analyzing a complaint under section 9, the Commission seeks to determine, first, whether a party has given a preference to any person, or subjected any person to a disadvantage. Second, the Commission considers whether any such preference or disadvantage is undue. In examining this second issue, the Commission considers whether a preference or a disadvantage has had, or is likely to have, a material adverse impact on the complainant or on any other person. It also examines the impact the preference or disadvantage 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].

Aliant's position

21. Aliant submitted that, through Bragg's refusal to accept Aliant's telecom service advertisements for broadcast on its TV Listings Channel, through Bragg's distribution of advertising for its own services and for those of its affiliates, and through its acceptance of advertising from Bragg's wireless partner, Rogers Wireless Inc. (Rogers), Bragg has conferred an undue preference on itself, its affiliates and on Rogers, and has subjected Aliant to an undue disadvantage.
22. Aliant also submitted that Bragg is in a unique and powerful market position, both as the sole cable BDU in its service area, including the key Halifax metro area, and through its exclusive control of access by advertisers to its TV Listings Channel and to those who view that channel.
23. Aliant stated that its market research has identified cable television viewers as a target market for its cellular services, and that it considers this target market to be very important, given that it includes every cable television viewer. Aliant also noted that a far larger audience views the advertising on the TV Listings Channel than would be indicated by the total numbers of Bragg's individual cable subscribers, and that the channel is thus a very cost effective method of reaching that audience.

24. Aliant argued that, while a BDU should be able to refuse to distribute messages advertising the services of other BDUs that compete directly with it, Bragg should not be allowed to deny Aliant access to the TV Listings Channel, as Aliant does not provide broadcasting services and is not a competitor of Bragg in its capacity as a BDU. Aliant added that Bragg's obligations as a BDU are not diminished simply because Aliant, competes with Bragg and with Bragg's partner, Rogers, as providers of telecommunications services.
25. Aliant stated that Bragg's action in denying Aliant access to the TV Listings Channel on the basis of the fact that Aliant competes against Bragg in another industry was contrary to the general policy, as set out in subsection 3(1)(t)(ii) of the *Broadcasting Act*, that BDUs "...should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost."
26. Aliant admitted that it was unable to quantify the material adverse impact, in terms of financial harm or loss of market share, of Bragg's deliberate refusal to accept its advertisements. However, it submitted that Bragg's behaviour lessens the competitive state of the telecommunications industry. It added that, although Bragg's behaviour does not directly affect the achievement of the broadcasting policy, the Regulations were written in a broader context.

Bragg's position

27. Bragg submitted that, if it had conferred a preference on itself, and had subjected Aliant to a disadvantage, neither the preference nor the disadvantage was undue. It further submitted that a company should not be forced to promote the products of its direct competitor to its own customers, thereby risking the loss of customers to that competitor.
28. Bragg asserted that it was incumbent on Aliant to demonstrate whether the preference or disadvantage is undue, i.e., whether the preference or the disadvantage has had, or is likely to have, a material adverse impact on Aliant, on any other person or on the achievement of the objectives of the broadcasting policy for Canada.
29. Bragg submitted that Aliant provided no evidence to support its claim that Bragg's refusal to broadcast Aliant's advertising on Bragg's TV Listings Channel is causing significant harm to Aliant or any other party, or that it will have a material adverse impact on the achievement of the objectives of the *Broadcasting Act*.
30. Bragg also submitted that, according to Aliant's 3rd Quarter Report of October 2004, there was growth in both the customer base and revenues of Aliant's wireless and Internet services in that quarter, relative to their levels in the corresponding quarter of 2003. Bragg noted that this growth occurred despite the fact that Aliant advertising was not distributed on Bragg's TV Listings Channel. According to Bragg, this clearly suggests that Aliant is not experiencing substantial harm.

31. Bragg also argued that Aliant's inability to advertise on Bragg's TV Listings Channel will not have a negative impact on consumers or Aliant. In Bragg's view, Aliant enjoys all the advantages of an incumbent, such as a significant market share in both its regulated and non-regulated telecommunications services, and the ability to advertise these services in various media, including print and broadcast media, as well as in Aliant's billing inserts. Further, Bragg contended that Aliant had not provided any evidence of a material adverse impact on the objectives of the *Broadcasting Act*. Bragg submitted that Aliant's complaint should be dismissed as Aliant had failed to demonstrate a material adverse impact.

Commission analysis and determination

32. The Commission considers that Bragg has given a preference to itself, its affiliates and to Rogers, and has subjected Aliant to a disadvantage. The issue that remains to be determined is whether the preference and/or disadvantage are undue. This requires the Commission to determine whether the preference and/or disadvantage have had, or are likely to have, a material adverse impact on the complainant or on any other person. The Commission has also to determine the impact that the preference or disadvantage have had, or are likely to have, on the achievement of the objectives of the broadcasting policy for Canada set out in the *Broadcasting Act*.
33. The Commission notes Aliant's admission that it was unable to quantify, in terms of financial harm or loss of market share, the material adverse impact of Bragg's refusal to accept Aliant's advertisements on its TV Listing Channel in Nova Scotia and Prince Edward Island. The Commission considers that Bragg's control of the TV Listings Channel does not confer upon it market power in advertising likely to cause material harm, due to the nature of the channel and of the viewing of it, and in light of the fact that Aliant has numerous, likely more effective, advertising alternatives that it can use to reach potential customers. The Commission is therefore unable to conclude that Bragg's refusal of Aliant's advertising on the TV Listings Channel has had, or is likely to have, a material adverse impact on Aliant.
34. In light of the written record and after having heard the parties during the course of the hearing, the Commission is also unable to conclude that Bragg's refusal to accept Aliant's advertising on its TV Listings Channel has had, or is likely to have, an impact on the achievement of the objectives of the broadcasting policy for Canada set out in the *Broadcasting Act*.

35. Accordingly, the Commission is unable to conclude that the preference and the disadvantage previously found are undue, and finds that Bragg has not breached section 9 of the Regulations.

36. The Commission therefore **dismisses** the complaint filed by Aliant Telecom Inc.

Secretary General

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