



Broadcasting Public Notice CRTC 2006-69

Ottawa, 2 June 2006

Promotion of non-programming services using local availabilities

In this public notice, the Commission considers applications received from Shaw Communications Inc., Rogers Cable Communications Inc., and Bragg Communications Incorporated, on their own behalf and/or on behalf of their wholly owned subsidiaries operating cable broadcasting distribution undertakings (BDUs) at a number of locations across Canada, requesting amendments to their conditions of licence related to the use of local availabilities. At present, it is the Commission's policy to permit BDUs, by condition of licence, to insert promotional messages from Canadian programming services as well as promotions for the community channel and public service announcements into at least 75% of these local availabilities, and to use up to 25% to promote BDU services, such as discretionary packages or equipment, as well as to provide customer service information. The amendments sought by the applicants would permit them to also use that latter 25% to promote non-programming services offered by the BDU or by affiliated companies.

For the reasons discussed in this public notice, the Commission finds it appropriate to update its policy with respect to the use of local availabilities to provide for the promotion of non-programming services. Accordingly, in three decisions also issued today, the Commission has approved the applications described above and amended the various licences held by the applicants to reflect this approval.

Background

1. Conditions of licence related to the use of local availabilities were first introduced 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). Since that first approval, virtually every licensed broadcasting distribution undertaking (BDU), including cable, direct-to-home (DTH) satellite and digital subscriber line (DSL) BDUs, has applied for and been granted this condition of licence. Such conditions of licence permit BDUs to insert certain promotional messages into the local availabilities of non-Canadian satellite services. These local availabilities amount to approximately two minutes of time per hour in the programming of as many as 12 services¹.

¹ These non-Canadian services include A&E, BET, CNN, CNBC, Court TV, Game Show, Golf, Headline News, The Learning Channel (TLC), Speed Channel, Spike TV and WTBS-TV.

2. The condition of licence granted to BDUs has remained generally unchanged since it was first introduced in Decision 95-12, and currently reads as follows:

The licensee may, by **condition of licence**, at its option, insert certain promotional material as a substitute for the “local availabilities” (i.e. non-Canadian advertising material) of non-Canadian satellite services. At least 75% of these local availabilities must be made available for use by licensed Canadian programming services for the promotion of their respective services, for the promotion of the community channel and for unpaid Canadian public service announcements. A maximum of 25% of the local availabilities may be made available for the promotion of discretionary programming services and packages, customer service information, channel realignments, cable FM service and additional cable outlets.

The applications

3. Rogers Cable Communications Inc. (Rogers), Shaw Communications Inc. on behalf of six wholly owned subsidiaries (Shaw), and Bragg Communications Incorporated., on behalf of itself and four wholly owned subsidiaries, all carrying on business as Eastlink (Eastlink)², submitted applications requesting that the Commission amend their conditions of licence related to the use of local availabilities. The amendment that each applicant has sought would permit the BDUs concerned to use the 25% portion of local availabilities currently available for the promotion of BDU services to also promote non-programming services offered by the BDU or by affiliated companies. In particular, these non-programming services could include telephone service, high-speed Internet service and wireless telephone service.
4. The applicants noted that the BDU market, and communications markets as a whole, have changed significantly since conditions of licence related to local availabilities were introduced in 1995. At that time, the cable industry did not face competition from DTH satellite BDUs or from DSL BDUs operated by the large incumbent telecommunications companies. Cable BDUs also did not seek to compete directly with these telecommunications companies in the telephone or Internet markets. The applicants argued that, today, in order to compete effectively in these new markets, they must utilize every asset at their disposal, including local availabilities.
5. The applicants emphasized that “cable” companies are actually “integrated communications companies” focused on the sale of packages of equally integrated communications services, including video, telephony, Internet and, in some cases, mobile telephony. The applicants, therefore, considered it necessary that their marketing

² The Commission has also received applications from Cogeco Cable Canada Inc., Cogeco Cable Quebec Inc. and Vidéotron Ltd., on behalf of itself and its subsidiary CF Cable TV Inc., for similar amendments to their conditions of licence regarding the use of local availabilities. As of the date of this public notice, both applications have been gazetted, but the records of these proceedings are not yet complete.

and promotional efforts consistently highlight these packages, and that their use of local availabilities should not remain limited to the promotion of discrete BDU services, as is currently the case under their existing conditions of licence regarding their use of local availabilities.

6. The applicants contended that the proposed amendments to their conditions of licence would have no negative implications. Instead, approval would allow the applicants to leverage synergies developed through convergence to inform and educate potential customers as to how new services, such as voice over Internet protocol (VOIP), work and the equipment necessary to receive them, as well as to counter misinformation circulated by competitors.
7. Rogers, in particular, argued that the current limitations on the use of local availabilities are inconsistent with the objectives of the *Broadcasting Act*, specifically those identified in sections 5(2)(c) and (f). Rogers added that preventing or limiting BDUs from promoting non-programming services on local availabilities constitutes a form of indirect regulation of telecommunications activities for which there is no statutory basis under the *Broadcasting Act*.
8. The Shaw and Rogers applications were gazetted in Broadcasting Public Notice CRTC 2005-102, 16 November 2005 (Public Notice 2005-102), while the Eastlink application was gazetted in Broadcasting Public Notice CRTC 2006-17, 10 February 2006 (Public Notice 2006-17).

Interventions

9. In response to Public Notices 2005-102 and 2006-17, submissions were received from Aliant Telecom Inc. (Aliant); Alliance Atlantis Communications Inc. (Alliance Atlantis); the Association of Canadian Advertisers (ACA); Bell ExpressVu LP³ and the Class 1 BDUs licensed to Bell Canada and Aliant Telecom Inc. (submitted jointly and hereafter referred to as Bell); the Canadian Association of Broadcasters (CAB); the Canadian Cable Telecommunications Association (CCTA); CanWest MediaWorks Inc. (CanWest); Cogeco Cable Inc. (Cogeco); MTS Allstream Inc. (MTS); and Quebecor Media Inc. (QMI). In general, while a number of parties suggested changes to the amendments proposed by the applicants or other related measures, only MTS and the ACA were opposed to approval of the applications.
10. MTS considered that the requests made in the applications had been substantially addressed and denied 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

³ 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.

Notice CRTC 2005-88, 9 September 2005 (Public Notice 2005-88), in which the Commission considered a request by the CCTA to permit BDUs to sell and broadcast commercial advertising during local availabilities.

11. In MTS' view, use of local availabilities is a privilege extended to BDUs for the purpose of promoting programming services, rather than non-programming services, and approval of the applications would not contribute to the attainment of the objectives of the *Broadcasting Act*. In its view, the applications are essentially requests to "air significant amounts of advertising, absolutely free of charge." It argued that approval would provide the applicants with further tools to maintain their dominance in the BDU market. According to MTS, even if all BDUs were given the ability to use local availabilities to advertise their non-programming services, the benefits of this ability would be greater for incumbent cable BDUs than for any other BDUs, due to the incumbents' market dominance. Accordingly, MTS considered that, for incumbent BDUs, such an authorization might constitute an undue preference.
12. In its opposing intervention, the ACA noted that the programming services that contain local availabilities draw significant Canadian audiences and that these audiences represent a substantial advertising opportunity and value. It further noted that many of its member companies offer services that compete with those offered by BDUs and that, in its view, exclusive access by BDUs to this "substantial marketing and promotional resource" is anti-competitive and fundamentally unfair to other advertisers. The ACA proposed that the Commission make local availabilities available for use by all advertisers.
13. Aliant and Bell did not oppose the applications, but argued that cable BDUs are already in a good position to provide and promote bundled services and to ensure continued growth. In their view, cable BDUs already enjoy advantages over the incumbent telephone companies with respect to their ability to advertise and market their services to potential customers. As evidence, Bell noted that cable BDUs have a much greater share of the high-speed Internet services market than telephone companies, that cable BDUs maintain a 90% share in the distribution of broadcasting services in most markets and as much as a 100% share in multiple-unit dwellings in some markets. Bell also noted that cable BDUs often already control a programming service (i.e., a community channel), which they use to promote their brand. Bell submitted that, should the Commission approve the applications, it should also remove restrictions on marketing and promotions applicable to incumbent telephone companies in relation to their telecommunications services.
14. The CAB supported the applications, with certain conditions. It proposed that the applicants be authorized to promote only their own non-programming services. The CAB also proposed that the applicants be required to continue to use at least half of the 25% of local availabilities for the promotion of programming-related services and that promotions of programming and non-programming services be scheduled equitably throughout the broadcast day. Finally, the CAB requested that the Commission clarify its policy with respect to the amounts paid by programming services to BDUs for the

insertion of promotional material in local availabilities. In this regard, the CAB asked that the Commission specify that programming services should pay only the direct incremental costs incurred by BDUs, i.e., no mark-up, overhead or common costs should be paid by programming services, and that programming services should not be required to “buy” or commit to paying for insertion of promotional material for a period greater than six weeks (referred to as a “minimum buy”).

15. Alliance Atlantis and CanWest also supported approval of the applications, subject to the conditions proposed by the CAB. Alliance Atlantis considered that approval of the applications could increase the penetration of digital programming services to the benefit of those services. CanWest noted, however, that the conditions proposed by the CAB are important in order to ensure that promotions of digital and other programming packages are not excluded from local availabilities.
16. Cogeco, QMI and the CCTA supported approval of the applications as well. According to Cogeco, the applications could not be characterized as unreasonable or as having far-reaching policy implications. The parties noted the need for the Commission to adapt its local availabilities policy to the dramatic technological and market changes that have occurred since 1995. The CCTA considered that approval would allow the promotion of packages of services, which would, in turn, increase the digital penetration of Canadian programming services. It further argued that approval would carry no demonstrable risk of potential harm to other BDUs. Moreover, since other BDUs would be free to request similar amendments to their conditions of licence, approval could not be considered to provide the applicants with an undue preference.
17. The CCTA also argued that the current exclusion of non-programming services from the list of services that BDUs may promote using local availabilities is a limitation on commercial freedom of expression. On this basis, the CCTA suggested that the onus lies with the Commission to justify any continuing exclusion. According to the CCTA, it can find no compelling *Broadcasting Act* objective that would justify such an exclusion, nor has the Commission identified such an objective.

Applicants' replies to interventions

18. In replying to the interventions, the applicants noted that there was general support for their applications from a broad cross-section of the industry. Shaw and Rogers noted, in particular, the support of broadcasters and reiterated their view that the advertising of bundled services will benefit Canadian programming services through the increased penetration of digital programming services, as well as of high definition and video-on-demand programming services.
19. In response to Bell, the applicants disagreed that marketing and promotional restrictions on incumbent telephone companies should be removed and noted that such a request lies outside the scope of the current proceeding. The applicants also disagreed that approval of the applications would provide a competitive advantage, submitting that the

incumbent telephone companies generally continue to hold 95% or more of the market for local telephony services. Shaw noted that Bell did not oppose the applications and generally supported the principles underlying them.

20. In response to MTS and the ACA, the applicants generally argued that the applications are not anti-competitive, and that approval would not provide the applicants with an undue competitive advantage since they are merely requesting an extension of existing conditions of licence intended to bring them into line with the way the applicants market their products and services. Rogers noted that each major incumbent telephone company has a BDU affiliate that could apply to use local availabilities in a similar manner. Shaw noted that the largest incumbent telephone company with which it competes, Telus Communications Inc., did not intervene in this proceeding.
21. Responding specifically to the ACA proposal that all parties be given access to local availabilities, Rogers submitted that this proposal was substantially similar to part of the CCTA application that was denied in Public Notice 2005-88.
22. In response to the conditions proposed by the CAB, the applicants generally agreed to schedule promotions inserted in local availabilities on an equitable basis, but did not consider it necessary for the Commission to clarify its policy with respect to the costs associated with local availabilities that are charged to programming services or the manner in which these costs are assessed. Rogers specifically noted that it charges programming services only the direct costs of insertion of promotional material, and considered that these charges and its “minimum buy” requirements are both consistent with the Commission’s policy and general industry practices.
23. The applicants were opposed to the CAB’s proposal that BDUs be authorized to promote only their own non-programming services. Rogers noted that this restriction would prevent it from promoting Rogers Mobility wireless services since these services are offered, not by Rogers, but by an affiliated company. Eastlink also noted that it offers the Rogers Mobility services as part of its packages, and expressed concern that such a provision would exclude the promotion of these packages by its BDUs.
24. The applicants differed somewhat in their responses to the CAB proposal that they be required to use at least half of the 25% of local availabilities to promote programming services. While Rogers accepted this proposal, Shaw and Eastlink argued that they should be permitted flexibility with respect to the use of the 25% and that decisions as to how to allocate local availabilities time should be theirs to make. Shaw and Eastlink noted that, in order to remain competitive, each would continue to promote “programming-related services” as part of this 25%, but argued that the Commission should not set specific requirements in this regard.

Commission's analysis and determinations

25. The Commission notes that many of the arguments made by both the applicants and interveners related to the merits of the applications with respect to the provision of telecommunications services (non-programming services) offered under the *Telecommunications Act*. Although the Commission also administers the *Telecommunications Act*, the use of local availabilities falls exclusively under the *Broadcasting Act*. The Commission is, therefore, of the view that the applications at issue in this proceeding should be considered exclusively by reference to the objectives of the *Broadcasting Act*.
26. With respect to these objectives, the Commission's intent in granting permission to use local availabilities has always been to provide an additional means of promoting Canadian programming services. In this regard, the Commission notes that the applicants have proposed no change with regard to the insertion of promotional material from programming services into at least 75% of local availabilities, and that they have all stated their intention to continue to promote discretionary programming services and packages in the remaining 25%, in conjunction with non-programming services. In the Commission's view, there are significant competitive incentives for the applicants to continue to promote programming services and packages using local availabilities, even in the absence of a regulatory requirement to do so. The Commission is, therefore, satisfied that the objective of providing an additional means to promote programming services would still be met, should it amend its policy and approve the applications at issue in this proceeding.
27. The Commission also recognizes that the ability to package programming and non-programming services and to promote these packages is of substantial importance to the applicants, as evidenced by their submissions in this proceeding. To the extent that the use of local availabilities would increase penetration of these packages, the Commission considers that such use may also increase the penetration of programming services. In the Commission's view, these outcomes would be consistent with the objectives set out in sections 3(1)(d)(iv) and 5(2)(c) of the *Broadcasting Act*. Consequently, the Commission considers that the marketing and promotion of packages of programming and non-programming services could be of benefit in advancing the objectives of the *Broadcasting Act*.

The CAB proposal

28. With respect to the first condition proposed by the CAB, the Commission generally agrees with the principle that the applicants should only use local availabilities to promote their own non-programming services, and not the non-programming services of other parties. However, the Commission notes the applicants' concerns that limiting the promotion of non-programming services to those offered by BDUs would prevent Rogers from promoting certain other services, such as the Rogers Mobility wireless services.

29. The Commission can find no reason in the record of this proceeding as to why promotions for services such as Rogers Mobility wireless services (whether offered by Rogers or Eastlink), which are commonly bundled with these parties' BDU services, should be treated in a different manner than promotions for other telephony services described by the applicants. Accordingly, consistent with the rationale set out in paragraphs 25 and 26 above, the Commission considers it appropriate to allow BDUs to use local availabilities to promote non-programming services, whether offered by themselves, by an affiliate or through joint-marketing arrangements with third parties, that are offered in conjunction with programming services offered by the BDU.
30. With respect to the second condition proposed by the CAB, the Commission generally agrees that BDUs should continue to use part of the 25% of local availabilities to promote the programming services they offer. The Commission notes the applicants' commitments in this regard, and considers that it is in the best interests of the applicants to use local availabilities to promote both their programming services and their non-programming services. Accordingly, the Commission is of the view that it is not necessary to impose additional requirements on the applicants intended to ensure continued promotion of programming services.
31. With respect to the CAB's request that the Commission specify that programming services should not be required to meet "minimum buy" requirements set by BDUs, the Commission notes Rogers' response that minimum buys are necessary administrative mechanisms and are consistent with the Commission's policy and industry practices. In any event, the Commission also notes that this request pertains to the 75% of local availabilities that are used to insert promotions from programming services. Accordingly, this request is outside the scope of the current proceeding.
32. With respect to the CAB's further request that the Commission specify that programming services should pay only the direct incremental costs incurred by BDUs, the Commission considers that its policy on this matter is well-established. As set out in *Building on Success – A Policy Framework for Canadian Television*, Public Notice CRTC 1999-97, 11 June 1999, BDUs may only charge Canadian programming services their share of the direct costs associated with the insertion of their promotional material in local availabilities.

ACA proposal

33. The Commission considers that the proposal by the ACA, that use of local availabilities should be offered to all advertisers, is similar in many respects to that denied in Public Notice 2005-88. The Commission is concerned that the ACA proposal would present many of the same difficulties as the CCTA's proposal that was denied at that time, in that it would devalue the commercial advertising time on which broadcasters rely. The Commission also considers that it could create additional problems related to equitable access by numerous potential users of limited local availabilities.

Aliant and Bell proposal

34. In the Commission's view, the proposal by Aliant and Bell that the Commission remove restrictions on marketing and promotions of local telephony services by incumbent telephone companies if it approved the applications lies outside the scope of the current proceeding. Further, the Commission notes that these issues were recently addressed in the proceeding conducted under the *Telecommunications Act* that culminated in the issuance of *Forbearance from the regulation of retail local exchange service*, Telecom Decision CRTC 2006-15, 6 April 2006.

Commission's conclusion

35. In light of the above, the Commission finds it appropriate to update its policy with respect to the use of local availabilities to permit BDUs to use these availabilities to promote non-programming services, subject to the conditions noted below. BDUs that seek and receive amendments to their conditions of licence that allow them to use local availabilities for this purpose will be authorized to use a maximum of 25% of local availabilities for the promotion of discretionary programming services and packages, customer service information, channel realignments, cable FM service, additional cable outlets and non-programming services, including telephone and Internet services.
36. The Commission considers that the promotion of non-programming services in local availabilities should generally be limited to those non-programming services that are made available in conjunction with programming services, and that are offered by the BDU, by an affiliated company, or by a third party pursuant to a marketing arrangement with the BDU, such as that between Eastlink and Rogers. Should a complaint arise, BDUs should ensure that they are in a position to provide, at the Commission's request, a report with respect to their use of local availabilities.
37. In accordance with these conclusions, the Commission has also issued today Broadcasting Decisions CRTC 2006-205, 2006-206 and 2006-207, each entitled *Licence amendment to replace condition of licence relating to the use of local availabilities in non-Canadian satellite services*, in which it approves the Rogers, Shaw and Eastlink applications described above and amends the various licences held by these applicants to reflect this approval and the Commission's determinations in this public notice.

Secretary General

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