



Broadcasting Decision CRTC 2004-198-1

Ottawa, 25 August 2004

Request by the licensees of The Sports Network, Talk TV and Le Réseau des sports for an order under section 9(1)(h) of the *Broadcasting Act* regarding the distribution of these services by Star Choice Communications Inc. - Reasons for denial

*In Request by the licensees of The Sports Network, Talk TV and Le Réseau des sports for an order under section 9(1)(h) of the *Broadcasting Act* regarding the distribution of these services by Star Choice Communications Inc., *Broadcasting Decision CRTC 2004-198, 4 June 2004 (Decision 2004-198), the Commission denied, for reasons that it stated would follow, the request by The Sports Network, Talk TV and Le Réseau des sports 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 2004-198.**

The parties

1. The Sports Network (TSN) and Talk TV are English-language specialty services. Le Réseau des sports (RDS) is a French-language specialty service. The licensee of TSN is The Sports Network Inc., while RDS is licensed to Le Réseau des sports (RDS) inc. Both licensee companies are ultimately controlled by CTV Inc. Talk TV is licensed to CTV Television Inc., which is also controlled by CTV Inc. TSN, Talk TV, and RDS are hereinafter called “the Services.”
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 21 May 2004, the licensees of the Services informed the Commission that it was the intention of Star Choice to remove TSN from its “Sports” package and RDS from its “Actif” package and add both services to its “Essentials/Essentiels” package. The “Essentials/Essentiels” package is Star Choice’s basic service offering. Further, the Services informed the Commission that Star Choice intended to remove Talk TV from its “Lifestyle” package and place it in its “FYI” package. Both the “Lifestyle” and “FYI” packages are offered by Star Choice to its subscribers on a discretionary basis.

4. The Services 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 TSN and RDS as currently packaged, remitting to TSN and RDS the wholesale rate payable pursuant to the terms of carriage previously agreed upon, and to continue to distribute Talk TV as part of the “Lifestyle” package, remitting to Talk TV the agreed upon wholesale rate for that service. The Services further requested that the order remain in place until the earlier of:
 - a) the resolution of this dispute via a mutually satisfactory agreement between the parties; or
 - b) a final determination by the Commission following a request for dispute resolution filed by the Services, pursuant to the dispute resolution procedures set out in sections 12 to 15 of the *Broadcasting Distribution Regulations* (the Regulations).

The Services’ position

5. The Services stated that, on 28 April 2004, they were advised by Star Choice that it was undertaking a restructuring of its specialty programming packages and that, commencing 25 May 2004, the Services would be removed from the packages in which they were distributed and moved into other programming packages.
6. The Services noted that TSN and RDS have been distributed by Star Choice since 1997 pursuant to affiliation agreements entered into at that time. The Services argued that Star Choice’s proposed changes would adversely affect TSN and RDS, and would also disadvantage Star Choice’s subscribers. In the case of Talk TV, the Services stated that the proposed move of this service would immediately reduce the number of Star Choice subscribers having access to that service from 386,000 to 140,000. The Services maintained that this would result in an immediate 64% reduction in the amount of revenue that Talk TV derives from Star Choice subscribers, representing approximately 10% of Talk TV’s total subscriber revenue.
7. The Services stated that the Commission has broad powers under section 9(1)(h) of the Act to require BDUs to distribute programming services on such terms and conditions as the Commission considers appropriate in the circumstances.
8. The Services maintained that Star Choice was taking action without adequate consultation or notice, without due regard to long-standing carriage arrangements and in circumstances where the repackaging would clearly have an immediate adverse impact on TSN, Talk TV and RDS. The Services argued that, in these circumstances, an order under section 9(1)(h) requiring Star Choice to maintain status quo carriage terms is entirely appropriate, as this would ensure that Star Choice provides reasonable terms of carriage and packaging, as mandated by the Act, until such time as the dispute surrounding the repackaging can be resolved.

Star Choice's position

9. In its letter of reply dated 27 May 2004, Star Choice submitted that the Services' 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 concerning the packages in which Star Choice distributes TSN, Talk TV and RDS, provided that the Services acknowledged that repackaging may result in revenue reductions to those services.
10. Star Choice submitted 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. In Star Choice's view, the repackaging was fully compliant with the Act, the Regulations, Commission policies and Star Choice's broadcasting licence. 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 the Services, section 9(1)(h) did not apply.
11. 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 any express provisions 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*.
12. In explaining its opposition to the Services' 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, and has succeeded in fulfilling many of the Act's objectives, but has yet to see positive returns.
 - TSN and RDS are distributed on the basic service of other major BDUs that compete with Star Choice, and the decision to repackage them on its basic service was both reasonable and crucial to Star Choice's competitiveness.

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

- Payment of the regulated basic rate to TSN and RDS was inherently reasonable, given that the rate has been approved by the Commission.
 - Distributing Talk TV in the Star Choice “FYI” package is reasonable given the nature of the service, and given as well that packaging is a commercial, not a regulatory, issue.
 - None of the services has demonstrated that it would be unable to meet its obligations as a consequence of Star Choice’s recent repackaging.
 - Star Choice has provided adequate notice to the Services, and offered to discuss packaging alternatives. This offer was not accepted.
13. With specific regard to Talk TV, Star Choice noted that this service devotes itself to talk programs 24 hours a day, and that these programs address a wide range of current issues. Star Choice noted further that Talk TV’s packaging partners in the “Lifestyle” package were Food Network, Life and HGTV. Star Choice argued that it is more appropriate to package this service in its “FYI” package, which includes other information services such as Biography, the Documentary Channel and TechTV.

The Services’ reply

14. In a reply comment dated 28 May 2004, the Services argued that section 9(1)(h) of the Act gives the Commission explicit statutory authority to specify, by order, the terms and conditions upon which a BDU shall carry programming services, so long as to do so is in furtherance of the statutory objectives set out in section 3 of the Act.
15. In the Services’ view, reasonable terms would include adherence to such basic business practices as:
- prior good faith consultation with programming services that are to be repackaged;
 - reasonable notice of the repackaging together with details of the proposed new terms of carriage and the estimated financial impact of such repackaging, if any;
 - a good faith regard for long-standing terms of carriage where applicable;
 - equal and even-handed treatment, in terms of notice and prior consultation, of all the programming services involved in the repackaging; and
 - the opportunity to negotiate a mutually satisfactory commercial arrangement in light of the changed packaging.

16. The Services maintained that Star Choice's actions with respect to TSN, Talk TV and RDS did not constitute the provision of reasonable terms for the carriage, packaging and retailing of programming services as required by section 3(1)(t)(iii) of the Act. The Services also argued that the relief requested does not contravene the Direction. The Services stated that the Direction was issued for the limited purpose of prompting the Commission to pursue licensing of DTH BDUs as a competitive alternative to cable. In the Service's view, the Direction was not intended to deprive the Commission of its ability to engage in the ongoing regulatory oversight of DTH BDUs through the use of its powers under section 9(1)(h).
17. The Services submitted that the Commission has the implicit power to grant the relief requested, as the granting of such relief is, in the circumstances, required for the effective exercise of the Commission's statutory mandate under sections 5(1) and 3(1) of the Act.
18. In discussing the matter of harm to themselves and to subscribers, the Services maintained that the removal of Talk TV from the "Lifestyle" package will result in an immediate reduction in the number of Star Choice subscribers that have access to Talk TV from 386,000 to 140,000, and an immediate 64% reduction in the revenue that Talk TV derives from Star Choice subscribers, representing approximately 10% of Talk TV's total subscriber revenue. According to a letter from the Services to Star Choice, dated 6 May 2004 and filed with the Services' reply comment, the Services had previously estimated that there would be a reduction in the combined subscriber revenue of TSN and RDS in the range of \$1 million annually if Star Choice were to repackage these services and pay the regulated basic wholesale rates.
19. The Services indicated that Star Choice had proceeded with its repackaging of TSN, Talk TV and RDS on 25 May 2004.

The Commission's analysis and determinations

20. 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

21. 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 the Services 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 the Services, 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.

22. 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.
23. 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. The Services seek an order that appears to fall squarely within the ambit of section 9(1)(h).
24. 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 the Services 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.
25. Based on the foregoing, the Commission finds that it does have the jurisdiction necessary to issue an order of the type sought by the Services, and that it could do so in appropriate circumstances.
26. In this case, the Services have asked, in effect, that the Commission order a “reinstatement” of all terms of the current distribution arrangements pending the parties’ or the Commission’s disposition of the substantive issues in dispute.
27. 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.

28. 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 the Services 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.
29. 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.
30. In the present case, the Commission considers that the Services have 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 TSN, RDS and Talk TV would have adverse consequences for these services, it is not evident to the Commission that the harm that may be suffered by the Services would be irreparable if the order were not granted, or that the harm would not be susceptible to redress by way of compensation.
31. In this regard, the Commission notes that, on 21 May 2004, the Services filed a request for dispute resolution pursuant to sections 12 to 15 of the Regulations. The Commission considers that the issues noted above may be addressed as part of that process.

Conclusion

32. The Commission is not satisfied that it should issue the order requested. Therefore, having considered all submissions received, the Commission **denies** the Services' request for an order under section 9(1)(h) of the *Broadcasting Act* to require Star Choice to continue to distribute TSN as part of the "Sports" package and RDS as part of the "Actif" package, remitting to TSN and RDS the wholesale rate payable pursuant to the terms of carriage previously agreed upon, and to continue to distribute Talk TV as part of the "Lifestyle" package, remitting to Talk TV the agreed upon wholesale rate for that service.

33. The Commission notes that, while TSN and RDS will no longer be received by subscribers in the same packages as previously, subscribers will continue to receive these services as part of Star Choice's basic service. Subscribers wishing to continue to receive Talk TV will be required to subscribe to Star Choice's "FYI" package, if they do not already.

Subsequent process

34. The Commission announced its denial of the request by the Services in *Request by the licensees of The Sports Network, Talk TV and Le Réseau des sports for an order under section 9(1)(h) of the Broadcasting Act regarding the distribution of these services by Star Choice Communications Inc.*, Broadcasting Decision CRTC 2004-198, 4 June 2004 (Decision 2004-198), for reasons that it stated would follow. Those reasons have now been set out above. Decision CRTC 2004-198 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.
35. 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.
36. 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 2004-198, 4 June 2004.