



Broadcasting Decision CRTC 2005-198

Ottawa, 16 May 2005

Rogers Cable Communications Inc.

Various locations in Ontario, Quebec,
New Brunswick and Newfoundland and Labrador

Application 2004-0200-1

Broadcasting Public Notice CRTC 2004-66

9 September 2004

Amendments to authorization set out in Decision CRTC 2000-437

*The Commission **approves in part** an application by Rogers Cable Communications Inc. (Rogers) for an amendment to the condition for suspension of the requirement to perform non-simultaneous program deletion, set out in Carriage of Canadian and U.S. 4+1 signals on a digital discretionary basis, Decision CRTC 2000-437, 8 November 2000.*

Rogers is currently authorized to distribute any of the Canadian distant television signals set out in the List of Part 3 eligible satellite services and a second set of U.S. 4+1 signals on a digital discretionary basis, subject to the provision that the licensee adhere to the requirements regarding non-simultaneous program deletion, set out in section 43 of the Broadcasting Distribution Regulations. Application of the provision is currently suspended pursuant to Letter Decision CRTC 2001-777, 21 December 2001.

In this decision, the Commission amends the condition for suspension of the application of this provision for a period ending 12 August 2006. The suspension of the provision is subject to the requirement that Rogers pay the following monthly fees to broadcasters in lieu of performing non-simultaneous program deletion: \$0.50 for each subscriber who receives Canadian distant television signals and \$0.25 for each subscriber who receives a second set of U.S. 4+1 signals on a discretionary digital basis.

A dissenting opinion by Commissioner Cram is attached.

The application

1. The Commission received an application by Rogers Cable Communications Inc. for an amendment to the condition for suspension of the requirement to perform non-simultaneous program deletion, set out in *Carriage of Canadian and U.S. 4+1 signals on a digital basis*, Decision CRTC 2000-437, 8 November 2000 (Decision 2000-437).
2. In Decision 2000-437, the Commission authorized Rogers to distribute the following signals on a digital discretionary basis:

- any of the Canadian television signals set out in the *List of Part 3 eligible satellite services*¹ (the List); and
 - a second set of signals that provides the programming of the four U.S. commercial networks (CBS, NBC, ABC, FOX) and the non-commercial PBS network (hereafter referred to as the U.S. 4 + 1 signals).
3. Rogers was already distributing a first set of U.S. 4+1 signals on an analog basis.
 4. The authorization set out in Decision 2000-437 included the following provision designed to protect the program rights acquired by local broadcasters:

The distribution on a discretionary basis on the licensee's digital service of a second set of U.S. 4+1 signals (that is, a set of U.S. 4+1 signals in addition to the set of such signals already carried by the system) and Canadian distant signals is subject to the provision that, with respect to such signals, the licensee adhere to the requirements regarding non-simultaneous program deletion set out in section 43 of the *Broadcasting Distribution Regulations*. The Commission may suspend the application of this provision upon its approval of an executed agreement between the licensee and broadcasters. Such an agreement must deal with issues related to the protection of program rights arising in connection with the discretionary carriage of a second set of U.S. 4+1 signals and Canadian distant signals solely on the applicant's digital service, as approved in this decision.

5. Rogers subsequently reached an interim agreement with the Canadian Association of Broadcasters (CAB), on behalf of affected Canadian broadcasters. The Commission approved the interim agreement in Letter Decision CRTC 2001-777, 21 December 2001.
6. The interim agreement between Rogers and the CAB established interim rates payable by Rogers to the CAB in lieu of non-simultaneous program deletion; specifically, \$1.00 for each subscriber receiving Canadian distant television signals and \$0.87 for each subscriber receiving a second set of U.S. 4+1 signals on a digital discretionary basis. The interim agreement also listed the Canadian distant signals that Rogers was permitted to distribute, but contemplated the possibility of future amendments to that list.

¹ The current list of Part 3 eligible satellite services is set out in Appendix B to *Revised lists of eligible satellite services*, Broadcasting Public Notice CRTC 2005-51, 13 May 2005.

7. Under the interim agreement, the rates paid by Rogers were to be finalized following the conclusion of the CAB's agreement with ExpressVu² and Star Choice Television Network Incorporated (Star Choice), the two licensed direct-to-home (DTH) satellite distributors, with respect to the suspension of the DTH program deletion requirements under section 43 of the *Broadcasting Distribution Regulations* (the Regulations). In July 2003, the Commission, by conditions of licence, provided for the suspension of the DTH distributors' section 43 requirements, so long as they performed certain alternative measures³.
8. Rogers submitted that, despite the Commission's resolution of the DTH issues, it has been unable to negotiate with the CAB "acceptable final rates or the addition of distant Canadian signals". According to Rogers, the interim rates and limited list of Canadian distant signals contained in its current agreement with the CAB are significantly more onerous than the alternative measures set by the Commission for the DTH distributors. In its negotiations with the CAB, Rogers maintained that the terms ultimately established in its case should be similar to those set for the DTH distributors, and that additional Canadian distant signals should be added to the list of signals it is permitted to distribute under the terms of the agreement. Rogers stated that it submitted its "final proposal" to the CAB in February 2004, but that its proposal was rejected.
9. Accordingly, Rogers filed the present application with the Commission requesting an amendment to the provision of approval set out in Decision 2000-437 that would permit it to distribute the signals authorized in that decision, subject to alternative conditions. Specifically, Rogers proposed that it be required to pay \$0.25 per subscriber per month to the CAB, on behalf of affected broadcasters, for the distribution of a second set of U.S. 4+1 signals. As compensation for the distribution of Canadian distant signals, Rogers proposed to redirect 0.4% of its gross annual broadcasting-related revenue derived from digital distribution to the Canadian production fund for small-market independent broadcasters (the small market fund), which is the same fund to which DTH distributors contribute. This 0.4% contribution would be deducted from the 5% of Rogers' gross annual broadcasting-related revenues that the licensee must currently contribute to the production of Canadian programming.

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

³ *Direct-to-home (DTH) broadcasting distribution undertakings - simultaneous and non-simultaneous program deletion and the carriage of local television signals in smaller markets*, Broadcasting Public Notice CRTC 2003-37, 16 July 2003. *Licence amendment for ExpressVu – relief from requirements for simultaneous and non-simultaneous program deletion*, Broadcasting Decision CRTC 2003-257, 16 July 2003. *Licence amendment for Star Choice – relief from requirements for simultaneous and non-simultaneous program deletion*, Broadcasting Decision CRTC 2003-258, 16 July 2003

10. Subsequent to filing its application, Rogers informed the Commission that Rogers and the CAB had amended the existing agreement with respect to the interim rates paid to the CAB and the list of Canadian distant signals Rogers was permitted to distribute. Rogers stated that the new interim rates payable to the CAB were equal to the rates requested in its application, i.e. \$0.25 per month for each of Rogers' digital subscribers that receives a second set of U.S. 4+1 signals, plus an amount equal to 0.4% of the gross broadcasting revenues received from its digital subscribers (not including box rentals).
11. Rogers indicated that the amended agreement would apply until the Commission issued its decision with regard to Rogers' application. However, under the terms of the agreement, the CAB could terminate the amended agreement as to compensation, upon 30 days written notice, if the Commission did not issue a decision by 31 December 2004.

Interventions

12. In their interventions with regard to the application, the CAB and CTV Inc. (CTV) agreed with Rogers' request that, as an alternative to non-simultaneous program deletion, it should be required to pay to the CAB \$0.25 per subscriber for the distribution of a second set of U.S. 4+1 signals on a digital discretionary basis. However, the CAB and CTV opposed Rogers' proposal that 0.4% of its gross annual revenues from digital subscribers be contributed to the small market fund as compensation for the distribution of Canadian distant signals.
13. The CAB and CTV noted that, in *Direct-to-home (DTH) broadcasting distribution undertakings – simultaneous and non-simultaneous program deletion and the carriage of local television signals in smaller markets*, Broadcasting Public Notice CRTC 2003-37, 16 July 2003 (Public Notice 2003-37), the Commission determined that such a contribution to the small market fund was appropriate compensation for DTH distributors in light of its finding that small market television stations experience the greatest negative impact from the distribution of out-of-market signals by DTH distributors. However, the CAB and CTV argued that this type of compensation would not be appropriate in this case, given that none of the small market broadcasters who have access to the small market fund are affected by Rogers' distribution of Canadian distant signals. In the view of these interveners, the distribution of Canadian distant signals by Rogers diminishes viewing to the local and regional television stations operating in the areas served by Rogers and, consequently, has a negative financial impact on these broadcasters. The CAB and CTV contended that compensation should be paid for the distribution of Canadian distant signals and that the amount of compensation should be directly related to an assessment of the economic impact on local television stations resulting from the distribution of distant signals. Based on an impact study filed with its intervention, the CAB submitted that a monthly fee of \$2.00 for each subscriber who receives Canadian distant signals would be appropriate.

14. The Canadian Cable and Telecommunications Association (CCTA) supported Rogers' application. The CCTA noted that the Commission had concluded in Public Notice 2003-37 that larger-market broadcasters should not be compensated for the distribution of Canadian distant signals by DTH distributors and that the distribution of these signals by DTH distributors has a far greater impact than their distribution by cable distributors. The CCTA further cautioned the Commission that its decision on the present application could potentially have a long-term impact on future agreements between cable distributors and the CAB.

The applicant's response

15. In response, Rogers argued that it must distribute the signals of local, regional and extra-regional television stations broadcast in its service areas, and that this distribution already provides substantial financial benefits for these stations and protection for program rights. Rogers further contended that it has made large investments in its infrastructure over the past decade to support the distribution of television signals, pay and specialty services and, most recently, the high definition signals of these programming services.
16. With respect to the concerns raised by the opposing interveners regarding the small market fund, Rogers indicated its willingness to direct its contributions to any fund of the Commission's choosing, provided that this contribution is deductible from the 5% of its gross annual broadcasting-related revenues that Rogers must already contribute to the production of Canadian programming.

Commission's analysis and determination

17. Rogers was among the first cable distributors to be authorized to distribute Canadian distant signals from the List and a second set of U.S. 4+1 signals on a digital discretionary basis, subject to the provision set out in Decision 2000-437. It was also the first cable distributor to reach an agreement with the CAB, albeit on an interim basis, as an alternative to non-simultaneous program deletion. Since then, the Commission has authorized several more cable and digital subscriber line-based (DSL) distributors to distribute the signals noted above on a digital discretionary basis, subject to the same provision as set out in Decision 2000-437. Many of these distributors have concluded agreements with the CAB to permit the suspension of the requirement for non-simultaneous program deletion.
18. The Commission notes that the rates of compensation payable to the CAB under the later agreements signed by other cable and DSL-based distributors are substantially lower than those established under Rogers' interim agreement. Specifically, all but one of the other distributors pay monthly compensation fees to the CAB of \$0.50 for each subscriber who receives Canadian distant signals and \$0.25 for each subscriber who receives a second set of U.S. 4+1 signals on a digital discretionary basis. In comparison,

the first interim agreement between Rogers and the CAB specified monthly compensation fees of \$1.00 for each subscriber who received Canadian distant television signals and \$0.87 for each subscriber who received a second set of U.S. 4+1 signals on a digital discretionary basis.

19. All of the agreements between distributors and the CAB, again with the exception of the interim agreement between Rogers and the CAB, expire 12 August 2006. The Commission also notes that the conditions of licence granted to ExpressVu and Star Choice, respectively, in July 2003, which relieve these parties of similar requirements, also expire 12 August 2006.
20. In light of the above-noted expiry date, given the discrepancy between the monthly fees paid by Rogers and those paid by other cable and DSL-based distributors to the CAB, the Commission finds it appropriate to amend the condition for the suspension of Rogers' requirement to perform non-simultaneous program deletion, for a period ending 12 August 2006. Without pronouncing on the merits of the methods of calculating compensation advanced by the parties, the Commission determines that, in light of the fees currently paid by other cable and DSL-based distributors, monthly fees of \$0.50 for each subscriber receiving Canadian distant television signals and \$0.25 for each subscriber receiving a second set of U.S. 4+1 signals on a discretionary digital basis are appropriate compensation for broadcasters for this period. Furthermore, the Commission considers it appropriate to authorize Rogers, for this period, to distribute any of the Canadian distant television signals set out in the *List of Part 3 eligible satellite services*. This includes all of the Canadian distant signals that Rogers currently distributes under its agreement with the CAB as well as any other Canadian distant signal on that list, provided that the licensee receives the signal from a licensed satellite relay distribution undertaking in accordance with the Commission's distant signals policy, as set out in *Structural Public Hearing*, Public Notice CRTC 1993-74, 3 June 1993.
21. In light of the foregoing, the Commission **approves in part** the application by Rogers Cable Communications Inc. The Commission deletes the licensee's current authorization approved in Decision 2000-437 and substitutes it with the following for the period ending 12 August 2006:

The licensee is authorized to distribute the following signals on a digital discretionary basis:

- any of the Canadian distant television signals set out in the *List of Part 3 eligible satellite services*. This includes any of the signals that the licensee is distributing as of 16 May 2005 as well as any other Canadian distant signal on that list provided that the licensee receives the signal from a licensed satellite relay distribution undertaking and distributes the signal in accordance with the Commission's distant signals policy, as set out in *Structural Public Hearing*, Public Notice CRTC 1993-74, 3 June 1993; and

- a second set of signals that provides the programming of the four U.S. commercial networks (CBS, NBC, ABC, FOX) and the non-commercial PBS network (hereafter referred to as the U.S. 4 + 1 signals).

The distribution on a discretionary basis on the licensee's digital service of a second set of U.S. 4+1 signals (that is, a set of U.S. 4+1 signals in addition to the set of such signals already carried by the system) and Canadian distant signals is subject to the provision that, with respect to such signals, the licensee adhere to the requirements regarding non-simultaneous program deletion set out in section 43 of the *Broadcasting Distribution Regulations*. The Commission suspends the application of this provision, for a period ending 12 August 2006, subject to the requirement that the licensee pay the following monthly fees to the Canadian Association of Broadcasters, on behalf of affected broadcasters, in lieu of performing non-simultaneous program deletion: \$0.50 for each subscriber who receives Canadian distant television signals on a digital discretionary basis and \$0.25 for each subscriber who receives a second set of U.S. 4+1 signals on a digital discretionary basis.

22. The Commission encourages Rogers and the other parties that are subject to the 12 August 2006 expiry date to pursue negotiations regarding appropriate future measures that may be adopted in lieu of program deletion.

Secretary General

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

Dissenting opinion of Commissioner Barbara Cram

I disagree with my colleagues as I believe a Public Notice should have been issued immediately to assess and then decide the actual economic impact of distant signals prior to the expiry of all agreements and decisions in August 2006.

I agree with Rogers that the rates and terms for cable carrying distant signals is significantly more onerous than the alternative measures set for DTH distributors. It is ironic that the rates that Rogers pays are higher, while cable carrying distant signals has far less impact on conventional television than DTH has, this due both to the limited number of distant signals that cable can carry and also to the limited reach of cable compared to the national reach of DTH.

I agree with both the CAB and CTV that the compensation paid for the distribution of distant signals should be related to an assessment of the economic impact on the local stations involved. Unfortunately, the impact studies are so different and both are hotly contested. Also unfortunately the decision of the majority does not even attempt to quantify any economic impact but simply picks the same number as three out of four other agreements presently in place. It should be noted that three out of the four BDU-CAB agreements are with some of the newest BDU's in the country, one of which is not even fully operational. Given that the compensation awarded in this decision and any previous decision on carriage of distant signals bears no resemblance to any empirical data or economic facts and given the disparity between the economic impact assertions of the parties, I cannot understand any basis upon which the parties can negotiate as urged by the majority.

As I stated in my dissent to Public Notice 2003-37, I believe that all conventional television should be compensated by both cable and DTH for carriage of distant signals. The numbers quoted in that dissent show the losses of local stations to distant signals as a result of timeshifting were significant then especially to conventional local stations the further west they were - this as a result of the fact that timeshifting predominantly is to earlier times. Given the increase in DTH penetration since this decision, the situation is exacerbated to the extent that the profits before interest and taxes of private local conventional television stations in smaller markets are well below industry norms. I believe there is a significant risk of losing local stations and thus local programming particularly in the West.

When I weigh the risk of losing local programming, something all Canadians and Committees of Parliament value highly, against the accelerated workload to the Commission of commencing a public proceeding, my judgement would have been to commence a proceeding immediately. I would have agreed with the CAB and CTV to

proceed to analyse and decide the economic impact on local stations of distant signals and would have expanded the process to include DTH (effective August 2006). Unfortunately my colleagues have decided upon an interim fix and then left everything to the winds of negotiation. I fear that August 2006 will arrive with no settlements, as the majority has given no guidance whatsoever, and then a process will be commenced and given the complexity of the issue no guidance will be given until one to two years later. I fear this will be too late.