



## Broadcasting Decision CRTC 2006-364

Ottawa, 14 August 2006

### **Cogeco Cable Canada Inc.**

Various locations in Ontario

### **Cogeco Cable Québec Inc.**

Various locations in Quebec

*Application 2006-0271-5*

*Broadcasting Public Notice CRTC 2006-49*

*12 April 2006*

### **Licence amendment to replace condition of licence relating to the use of local availabilities in non-Canadian satellite services**

*In this decision, the Commission **approves** an application by Cogeco Cable Canada Inc. and Cogeco Cable Québec Inc. to amend the broadcasting licences for the cable broadcasting distribution undertakings serving various locations in Ontario and Quebec in order to replace the existing condition of licence relating to the use of local availabilities.*

### **The application**

1. The Commission received an application by Cogeco Cable Canada Inc. and Cogeco Cable Québec Inc. (collectively, Cogeco) to amend the broadcasting licences for the Class 1, 2 and 3 cable broadcasting distribution undertakings (BDUs) serving various locations in Ontario and Quebec. Specifically, Cogeco requested that the Commission replace the condition of licence relating to the use of local availabilities, which currently reads:

The licensee may, 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 commercial 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.

with the following condition of licence:

The licensee may, 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, additional cable outlets **and to promote non-programming services, such as Internet and local telephony.** [emphasis added]

2. Cogeco’s application cited similar information and rationale to those contained in three decisions issued 2 June 2006, namely Broadcasting Decisions CRTC 2006-205, 2006-206 and 2006-207, also entitled *Licence amendment to replace condition of licence relating to the use of local availabilities in non-Canadian satellite services*, which dealt with applications by Rogers Cable Communications Inc., Shaw Communications Inc., and Bragg Communications Incorporated, on behalf of itself and four wholly owned subsidiaries, the operators of some 14 BDUs in Nova Scotia and Prince Edward Island, all carrying on business as Eastlink.

### **Interventions**

3. The Commission received an opposing intervention from MTS Allstream Inc. (MTS) and comments from the Canadian Association of Broadcasters (CAB) supporting the application, but with certain conditions.
4. MTS considered that the request made in the application 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 Notice CRTC 2005-88, 9 September 2005, in which the Commission considered a request by the Canadian Cable Telecommunications Association to permit BDUs to sell and broadcast commercial advertising during local availabilities.
5. In MTS’s view, the 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 application would not contribute to the attainment of the objectives of the *Broadcasting Act*. In its view, the application is essentially a request to “air significant amounts of advertising, absolutely free of charge.” It argued that granting this request would open the door for Cogeco to give an undue advantage to itself or its affiliates and that this advantage would be both unprecedented and potentially anti-competitive.

6. The CAB supported the application, with certain conditions. It proposed that the applicant be authorized to promote only its own non-programming services. The CAB also proposed that the applicant 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”).

#### **Cogeco’s reply**

7. In reply to MTS, Cogeco argued that its application is not anti-competitive, and that approval would not provide it with an undue competitive advantage.
8. In reply to the conditions proposed by the CAB, Cogeco generally agreed to schedule promotions inserted in local availabilities on an equitable basis. Cogeco was also not opposed to the CAB’s proposal that BDUs be authorized to promote only their own non-programming services. However, Cogeco argued that each BDU should be given the flexibility to decide how to use the 25% of local availabilities. Cogeco noted that a condition of licence to regulate the use of the 25% would reduce the ability of BDUs to market their services and would create a new and unnecessary level of regulation.

#### **Commission’s analysis and determination**

9. The views of the interveners regarding the proposed use of local availabilities to promote non-programming services, such as Internet and local telephony and including the issues raised by MTS and the CAB in their interventions to Cogeco’s application, are discussed in detail in *Promotion of non-programming services using local availabilities*, Broadcasting Public Notice CRTC 2006-69, 2 June 2006 (Public Notice 2006-69). In that notice, the Commission set out its conclusion that it is 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 certain conditions.
10. Specifically, the Commission concluded that BDUs that seek and receive amendments to their conditions of licence so as 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 Internet and telephone services.

11. In Public Notice 2006-69, the Commission also added 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. The Commission noted that, 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. With respect to the costs of broadcasting promotions in local availabilities, the Commission reiterated that BDUs may only charge Canadian programming services their share of the direct costs associated with the insertion of their promotional material in local availabilities.
12. The Commission considers that the Cogeco application falls within the scope of its updated policy regarding the use of local availabilities set out in Public Notice 2006-69. Accordingly, and consistent with that policy, the Commission **approves** the application by Cogeco Cable Canada Inc. and Cogeco Cable Québec Inc. and amends the broadcasting licences for the Class 1, 2 and 3 BDUs serving various locations in Ontario and Quebec by replacing the existing condition of licence relating to the use of local availabilities with the following **condition of licence**:

The licensee may, 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 used to provide subscribers with information regarding customer service and channel realignments, and for the promotion of discretionary programming services and packages, cable FM service, additional cable outlets and non-programming services, including Internet and telephone services.

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>*