



Broadcasting Public Notice CRTC 2007-111

Ottawa, 5 October 2007

Elimination of the winback rules

In this public notice, the Commission eliminates the winback rules applicable to incumbent cable broadcasting distribution undertakings that have 6,000 or more subscribers with respect to their provision of service in multiple-unit dwellings.

Background

1. The Commission received a request dated 5 April 2007 from Rogers Cable Communications Inc. for the elimination of the remaining winback restrictions applicable to incumbent cable broadcasting distribution undertakings (BDUs) that have 6,000 or more subscribers with respect to their provision of service in multiple-unit dwellings (MUDs), as set out in Broadcasting Public Notice 2004-62.
2. In a letter decision dated 1 April 1999, the Commission established rules (the winback rules) that prohibited the targeted marketing by incumbent cable companies of customers who have cancelled basic cable service. These rules required incumbent cable companies to refrain, for a period of 90 days, from:
 - directly contacting customers who, through an agent, have notified their cable company of their intention to cancel basic cable service; and
 - offering discounts or other inducements not generally offered to the public, in instances when customers personally initiate contact with the cable company for the purpose of cancelling basic cable service.
3. In Broadcasting Public Notice 2004-62, the Commission decided to retain the above winback rules only as they applied to incumbent cable BDUs with 6,000 or more subscribers, and only with respect to the activities of such companies in MUDs. The Commission also introduced additional winback rules to govern the conduct of incumbent cable BDUs with 6,000 or more subscribers in their dealings with customers who reside in MUDS, specifying that, in addition to the rules above, such distributors should refrain from:
 - initiating communication with residents of a MUD for a period of 90 days from the date on which a new entrant enters into an access agreement to provide service in the MUD; and

- the targeted marketing of all residents of a MUD, or from offering discounts or other inducements not generally available to the public, for a period of 90 days following the date on which a new entrant enters into an access agreement to offer services in the MUD.
4. In Broadcasting Public Notice 2007-48, the Commission sought comment on whether it should eliminate the winback rules applicable to incumbent cable BDUs that have 6,000 or more subscribers.

Positions of parties

5. In response to Broadcasting Public Notice 2007-48, the Commission received comments urging it to eliminate the winback rules from Cogeco Cable Inc., Bell Video Group, Shaw Communications Inc. (Shaw) (two comments, one of which was submitted on behalf of both Shaw Cablesystems Limited and Star Choice Television Network Incorporated), Quebecor Media Inc. (QMI) (on behalf of itself and its subsidiary Videotron Ltd.), Corus Entertainment Inc. (Corus) and the Canadian Cable Systems Alliance Inc. (CCSA). In addition, the Commission received a comment from Novus Entertainment Inc. (Novus) opposing the elimination of the winback rules.
6. Most of the BDUs that supported the elimination of the winback rules generally argued that the broadcasting distribution sector is highly competitive and has been for years. Both Shaw and QMI stated that, given that the BDU market is extremely competitive, winback restrictions undermine market forces and prevent customers from receiving the maximum benefits of robust competition between incumbents and new entrants.
7. Most of the BDUs in support of eliminating the winback rules specifically noted that, if the Government considered that there was no valid reason to continue to regulate some companies in their winback activities within a less competitive sector, such as the telecommunications sector,¹ the same reasoning should apply to the highly competitive broadcasting distribution sector. The CCSA and some BDUs argued that the continued imposition of winback rules in the broadcasting distribution sector, restrictions by which telecommunications competitors are not bound, is unfair and anti-competitive.
8. In addition, Shaw stated that it advocates eliminating all restrictions on the ability of BDUs to respond to consumer demands for increased choice and to compete effectively in the provision of high quality broadcasting distribution services to Canadians. Shaw further submitted that the elimination of the winback rules should be immediately followed by the removal of the “structural separation rules” set out in Broadcasting Decision 2002-84 and the affiliated services rules set out in section 18(14) of the *Broadcasting Distribution Regulations* (the Regulations), which, in its view, limit the ability of Shaw, and to a lesser extent that of other BDUs, to compete freely and deliver value to Canadians.

¹ See the Governor in Council's *Order Varying Telecom Decision CRTC 2006-15*, P.C. 2007-532, effective 4 April 2007.

9. Corus, echoing the views expressed by Shaw, stated that “the winback rules and a host of other rules are examples of solutions to bygone problems that have become problems in themselves.” It considered that the winback rules inhibit BDUs from “making best efforts to attract Canadian viewers and subscribers.” Corus also stated that the Commission should eliminate the above-mentioned rules relating to structural separation and affiliated services.
10. In its comment opposing the elimination of the winback rules, Novus stated that, in MUDs, it has had limited success getting authority to install its wiring and equipment during the construction phase so that it can be the initial service provider or provide service at the same time as its competitors. Novus submitted that, since developers want to manage as few parties as possible during the construction stage, it has been the “first service provider” or a “simultaneous service provider” in very few buildings (an exception being the Concord buildings, which are owned by a Novus affiliate). According to Novus, in newly constructed buildings, it may take several months for it to negotiate an access agreement with a strata council or owner, and that it must then offer its services to the residents of the MUD after other competitors have established themselves. Novus noted that it does not have wide brand recognition and must take the extra time, trouble and expense necessary to attract customers away from its better known competitors.
11. Novus further submitted that it would not be able to compete effectively if the winback rules were eliminated, as both of its competitors in the Vancouver market (i.e., TELUS Communications Inc. (TELUS) and Shaw) are significantly larger and better capitalized. In Novus’ view, “the winback rules, by forcing the incumbent competitor to stand still for three months, allow the new entrant an opportunity to bring a customer onto its service for a long enough period so that the customer is able to assess the new entrant’s products and customer service.”
12. Novus predicted that, without the winback rules, targeted marketing directed at competitive buildings would become more aggressive, as competitors would be able to direct their marketing efforts to the individual customer in a particular building where a new entrant is in place.
13. As an alternative to retaining the existing winback rules, Novus stated that it would like to see the winback rules applied generally without regard to the incumbent component. Specifically, Novus suggested that, when a competitor manages to win a customer, the service provider that the customer has left should not be allowed to contact that customer again for three months, regardless of whether the former service provider is an incumbent or not. In Novus’ view, such an approach would ensure that all service providers would be playing by the same rules.

Commission’s analysis and determinations

14. In its letter decision dated 1 April 1999, which introduced winback restrictions for incumbent cable companies, the Commission stated the following:

The ability of new entrants to engage effectively in this activity is counterbalanced by the incumbent distributors' dominant position and their significant market share. Moreover, new entrants do not have a critical mass of historical customer information or the range of services that incumbent cable companies currently enjoy. Accordingly, the Commission considers it appropriate that the restrictions set out above should be imposed on an asymmetrical basis.

15. In Broadcasting Public Notice 2004-62, the Commission expressed its particular concern that the complete removal of the winback rules at that time would have a disproportionate detrimental effect on competitors other than direct-to-home (DTH) distributors, who had achieved far lower penetration levels than DTH BDUs. At that time, the Commission considered that the amended winback rules would give new entrants the time they need to establish themselves in particular MUDs, and thus the opportunity to recoup their initial investments and to compete with the incumbent.
16. The Commission notes that the broadcasting distribution market has become significantly more mature since the winback rules were established in 1999. According to the *Broadcasting Policy Monitoring Report 2007* and the *CRTC Financial Database*, while cable companies continue to maintain the bulk of the subscriber market share, the market share from DTH and multipoint distribution system (MDS) undertakings increased from approximately 6.5% in 1999 to about 26.3% in 2006. Correspondingly, the market share of cable undertakings² fell from approximately 93.5% in 1999 to about 73.7% in 2006.
17. In addition to the significant inroads made by DTH satellite undertakings, companies such as Aliant Telecom Inc., Bell Canada, MTS Communications, Saskatchewan Telecommunications and TELUS have been licensed as Class 1 BDUs to provide service using digital subscriber line (DSL) technology. In 2006, the number of DSL subscribers increased by 42% from the previous year, for a total of close to 129,000 subscribers. Adjusting the 2006 "cable" market share figure cited in the previous paragraph to remove these subscribers results in a market share for incumbent cable companies of approximately 72.5%. Although the current penetration rate for subscribers to DSL undertakings remains relatively small on a national basis, the Commission considers that the potential for increased penetration exists due to the fact that these new entrants are, for the most part, well financed, affiliated with large corporate entities, and able to offer, or have the potential to offer, a full array of telecommunications and broadcasting services. Further, with the relative decline of MDS services and the sale of unaffiliated Class 1 cable systems such as Cable VDN Inc. to larger BDUs, the Commission considers that DSL undertakings have positioned themselves to become the main non-DTH competitor. In the Commission's view, it may be argued that there is little need to give new entrants such as DSL undertakings the assistance afforded by winback rules, especially since these companies are generally telephone companies or affiliates that, in many cases, already have a relationship with the potential BDU subscriber.

² This figure, reported in the *Broadcasting Policy Monitoring Report 2007*, includes digital subscriber line undertakings.

18. The Commission agrees with parties who argued that the continued imposition of winback rules on BDUs creates an asymmetry between the BDU marketplace and the telecommunications marketplace in Canada. The Commission considers that it would be difficult to reconcile the elimination of winback rules in the telecommunications market with their continued application in the broadcasting distribution market, where competitors hold a market share approaching 30%. Furthermore, the Commission considers that winback rules may hamper the efforts of competitors who are trying to market a suite of broadcasting and telecommunications services in a converged marketplace.
19. In addition, it is the Commission's view that there is validity to the argument that the winback rules, while intended to foster competition in its initial stages, are in the longer term a restraint on competition that should not be retained longer than necessary. Given the state of competition in the BDU market, the Commission considers that the original rationale for imposing these restrictions, and in particular asymmetrical restrictions, no longer applies. The Commission has already removed the winback restrictions on BDUs with 6,000 subscribers or less and on all BDUs with respect to the provision of service in single unit dwellings. The Commission considers that the elimination of the remaining winback rules will further encourage competition. This in turn can contribute to affordability of service by putting downward pressure on subscription rates, and provide incentives for BDUs to reduce costs, thereby contributing to the efficient delivery of services, which is consistent with the objectives of the *Broadcasting Act*.
20. In its submission in this proceeding, Novus indicated that one of the main issues it faces as an "over-builder" is that it has had limited success in being the first service provider or a simultaneous service provider in newly constructed buildings. According to Novus, "customers perceive changing of service providers as a hassle and if they make up their minds to do so and then are offered a winback inducement by the service provider they intend to leave, it is likely that the customers will stay with the original service provider virtually every time." The Commission acknowledges that, without the winback rules, a new entrant such as Novus may be somewhat less likely to make a significant up-front investment to gain entrance to a MUD, only to be faced by increased competition from an incumbent cable company. However, the Commission does not consider this concern sufficient to warrant the retention of the winback rules, which, as noted above, it considers to be a restraint on competition that should not be retained longer than necessary.
21. With respect to Novus' alternative of retaining a 90-day restriction for both new entrants and incumbents as a way to ensure that all service providers are playing by the same rules, it is the Commission's view that, given the state of competition, this would be an unwarranted intrusion into the BDU marketplace. The Commission considers that the elimination of the remaining winback rules is a better means to ensure that all BDUs are subject to the same rules.

22. In light of all of the above, the Commission eliminates the winback rules governing the conduct of incumbent cable BDUs with 6,000 or more subscribers in their dealings with residents of MUDs.

Other issues

23. In regard to the elimination of structural separation rules (see Broadcasting Decision 2002-84) and affiliated service rules, as proposed by Shaw and Corus, the Commission considers that these issues fall outside the scope of this proceeding. Further, parties have been given the opportunity to raise the issue of structural separation in the context of the *Diversity of Voices Proceeding* (see Broadcasting Notice of Public Hearing 2007-5), where the Commission provided an opportunity for parties to comment on whether safeguards such as those set out in Broadcasting Decision 2002-84 are effective, and, if not, what alternative measures would be more effective. In the case of the rules relating to affiliated services, Shaw will have an opportunity along with other parties to submit comments on this issue as part of the proceeding relating to the review of the Regulations (see Broadcasting Notice of Public Hearing 2007-10).

Secretary General

Related Documents

- *Call for comments on the elimination of the winback rules*, Broadcasting Public Notice CRTC 2007-48, 8 May 2007
- *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Notice of Public Hearing CRTC 2007-10, 5 July 2007, as amended by *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Notice of Public Hearing CRTC 2007-10-1, 12 September 2007, and *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Notice of Public Hearing CRTC 2007-10-2, 26 September 2007
- *Diversity of Voices Proceeding*, Broadcasting Notice of Public Hearing CRTC 2007-5, 13 April 2007, as amended by Broadcasting Notice of Public Hearing CRTC 2007-5-1, 17 August 2007, Broadcasting Notice of Public Hearing CRTC 2007-5-2, 7 September 2007, and Broadcasting Notice of Public Hearing CRTC 2007-5-3, 24 September 2007
- *Changes to the winback rules for broadcasting distribution undertakings*, Broadcasting Public Notice CRTC 2004-62, 13 August 2004

- *Amendments to conditions of licence relating to structural separation for Cancom and Star Choice*, Broadcasting Decision CRTC 2002-84, 12 April 2002
- *Re: CISC Dispute – Rules Regarding Communication Between the Customer and the Broadcasting Distribution Undertaking*, letter decision dated 1 April 1999

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