



December 11, 2008

By Epass

Mr. Robert Morin
Secretary General
Canadian Radio-television
and Telecommunications Commission
1 Promenade du Portage
Gatineau, Quebec
J8X 4B1

Dear Mr. Morin:

Re: Broadcasting Decision CRTC 2008-299: Complaint by 6166954 Canada Inc. (“616”), licensee of OUTtv, against Shaw Cablesystems Ltd. (“Shaw”), pursuant to section 9 of the Broadcasting Distribution Regulations (the “Complaint”) – Comments of 616 regarding Shaw’s reply to the Commission.

1. In the above-noted decision (the “Decision”), the Commission found that Shaw had subjected 616 to an undue disadvantage with respect to the marketing of OUTtv and directed Shaw to set out in a reply submission the steps it will take to ensure that in the future its marketing of OUTtv does not result in OUTtv being subjected to an undue disadvantage.¹ 616 is in receipt of the reply submission of Shaw dated December 4, 2008 (the “Reply”) and wishes to offer the Commission its comments.
2. In the Reply, Shaw made certain commitments with respect to channel placement, packaging, free previews and equitable marketing of OUTtv. Shaw’s commitments to make adjustments to the channel placement of OUTtv and offer free previews of the service are consistent with the Decision and acceptable to 616. Shaw’s proposals with respect to the packaging and equitable marketing of OUTtv however, do not adequately address the Commission’s determination that Shaw has subjected 616 to an undue disadvantage contrary to section 9 of the *Broadcasting Distribution*

¹ The Decision at para 28.

Regulations (the “Regulations”) through the manner in which it markets OUTtv.

Packaging

3. As set out in the Complaint and noted in the Decision, when customers request “all of the digital services” from Shaw, OUTtv is not made available unless specifically requested.² The Reply does not address this key element of the undue disadvantage to which OUTtv has been subject. As such, 616 submits that the Commission should require a commitment from Shaw that, in the event that a subscriber requests “all digital services” (or an equivalent request), that OUTtv be made available to that subscriber, regardless of whether OUTtv is specifically requested or not. It is only on this basis that OUTtv will receive the same treatment as the other category 1 digital specialty services with which it was licensed in 2000.
4. Further, in the Reply, Shaw states that it intends to “emulate the Star Choice marketing approach” in that it will “now present two All In theme paks, one with OUTtv and one without OUTtv, both of which would be offered at the same price”³ (the “Star Choice Approach”). Shaw’s current practice is to offer just one All In pak, with OUTtv available only at the request of the subscriber. While there is a subtle difference in how Shaw and Star Choice currently make OUTtv available, both approaches can be characterized as “dual packaging”.
5. Shaw appears to rely on the Commission’s statement in the Decision that the Star Choice Approach makes it “clear to Star Choice subscribers that a package that includes OUTtv exists”, as tantamount to a finding that the Star Choice Approach is consistent with Commission policy that all Category 1 services must be packaged and marketed on an equitable basis.⁴ This is not the case.
6. The issue is simple. Under the Star Choice Approach (like the current approach), OUTtv is treated differently from the other Category 1 digital specialty services. No other Category 1 digital specialty service is presented in a separate All In pak. Each Category 1 digital specialty service is included in the “mainstream” All In pak and is not in any way distinguished from the other Category 1 digital specialty services. By presenting two All In theme paks under the Star Choice Approach - one with OUTtv and one without OUTtv – Shaw is sending the message that OUTtv is “different” from the other Category 1 digital specialty services in the All In pak. The net effect of this is to allow subscribers to “opt out” of OUTtv and OUTtv alone by

² Decision at para 9.

³ Reply at para 8.

⁴ Reply at para 7.

selecting the All In pak without OUTtv. This is clearly inequitable packaging and is contrary to Commission policy and the findings set out in the Decision.

7. OUTtv notes that in correspondence over the course the Complaint, Shaw previously advised the Commission it would be willing to implement the Star Choice Approach.⁵ Despite this offer, the Commission decided that Shaw's dual packaging approach was inequitable and in violation of the Regulations. The Commission did not rule that if Shaw were to adopt the Star Choice Approach it would be in compliance, nor did the Commission make any determination that the Star Choice Approach is in and of itself, compliant. We note that one important difference between Shaw's current approach and the Star Choice Approach is that Star Choice subscribers who request "all digital services" receive OUTtv without need for a specific request. However, as no evidence has been led in this proceeding that Star Choice CSRs properly advise consumers regarding dual packaging, the Commission should make no assumptions in this regard. Whether the Star Choice Approach is sufficient to meet the requirements of section 9 of the Regulations is an open question – one that 616 intends to pursue once the reverse onus provisions referred to in Broadcasting Public Notice CRTC 2008-100: *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, 30 October 2008 (the "BDU Framework") are enshrined in the Regulations.
8. Dual packaging in the form currently available on Shaw or via the Star Choice Approach is unnecessary, causes material harm to OUTtv and goes to the core of the Complaint. In proposing to implement the Star Choice Approach, Shaw continues to distinguish OUTtv from other Category 1 digital specialty services in its marketing practices. In light of the Commission's finding in the Decision, Shaw's continued insistence on singling-out OUTtv in this manner is troubling.
9. Because no other Category 1 digital specialty service is subject to dual packaging (no matter the subtle differences in how dual packages are made available on Star Choice versus Shaw), implementing the Star Choice Approach will similarly be in violation of the Commission's policy that "all Category 1 services must be packaged and marketed on an equitable basis"⁶ and will continue to result in 616 being subject an undue disadvantage with respect to OUTtv. As such, 616 respectfully submits that, in accordance with the Decision, the Commission require Shaw to end its practice of subjecting OUTtv to dual packaging and instead offer a single All In pak that includes OUTtv. This is the only approach that will ensure OUTtv is treated equitably going forward.

⁵ Letter of Shaw to the Commission dated May 27, 2008 at page 4.

⁶ Public Notice CRTC 2000-171: *Introductory statement – Licensing of new digital pay and specialty services*, 14 December 2000.

10. Finally, to redress the material negative impact on subscriber revenues that Shaw's inequitable packaging has had on OUTtv, in 616's submission, Shaw should be required to compensate OUTtv for legacy subscriber fees retroactive to June 24, 2005 (the date of the current affiliation agreement between the parties) on the basis of the revised, equitable packaging described above.

Equitable Marketing

11. In the Reply, Shaw undertakes to make the "necessary changes to our marketing materials and the Shaw.ca website to reflect the new channel changes, marketing and packaging of OUTtv".⁷ Shaw further commits to "ensure that our CSRs are fully aware of these changes, and will be expected to be able to explain them to our digital customers"(emphasis added).⁸
12. 616 submits that, while dual packaging remains in place, this commitment is unlikely to be fulfilled. As detailed by 616 over the course of the Complaint and noted in the Decision, "when customers contact Shaw [CSRs], the package that includes OUTtv is "not even presented as an option".⁹ Shaw has demonstrated that it cannot be relied upon to market a dual packaging arrangement equitably, and has not offered any new information or evidence to suggest otherwise. What's more, 616 should not be required to monitor CSRs' compliance in this regard, as no other Category 1 digital specialty service is subject to this burden.
13. Moreover, Shaw has not undertaken to ensure that its CSRs *will* explain the changes, marketing and packaging of OUTtv to subscribers; rather, it has said that its CSRs will merely "*be able*" to do so. Regardless, even if Shaw was to ensure that its CSRs would advise customers of the availability of OUTtv in a separate package, the mere fact that such a step has to be taken attests to the fact that, as long as OUTtv is subject to dual packaging, it is being treated differently from other Category 1 digital specialty services. As many subscribers would surely attest, ordering programming packages from CSRs can already be a confusing process. To subject one particular service to another (unnecessary) step in the ordering process – and without any valid commercial reason for doing so – clearly places that service at a commercial disadvantage relative to its counterparts.
14. Further, as requiring subscribers to specifically request the All In pack with OUTtv is tantamount to requiring subscribers to specifically request OUTtv, unique privacy considerations are raised – particularly so, given that OUTtv's

⁷ Reply at para 12.

⁸ Reply at para 12.

⁹ Decision at para 9.

core audience is a population that has traditionally been subject to discrimination on the basis of sexual preference.

15. With the anticipated implementation of the “reverse onus” on BDUs in undue preference complaints, which will require that where a complainant demonstrates that a preference and/or disadvantage exists, the BDU must demonstrate that its actions are not undue, Shaw would be required to demonstrate that its CSRs are, in each and every instance, marketing OUTtv in an equitable fashion.¹⁰ If Shaw is permitted to continue to subject OUTtv to dual packaging, in order to protect its regulatory rights as a Category 1 digital specialty service, OUTtv will be forced to monitor Shaw’s CSRs compliance in this regard. Not only does this impose a unique and onerous burden on OUTtv, but it will undoubtedly lead to further complaints and requests for the Commission’s intervention, needlessly expending both 616’s and the Commission’s resources.
16. At the end of the day, a commitment to the equitable marketing of an ultimately inequitable packaging model – dual packaging – is cold comfort. As such, 616 reiterates its request that the Commission require Shaw to end its practice of subjecting OUTtv to dual packaging in any form and package and market OUTtv in a manner that is consistent with other Category 1 digital specialty services, in accordance with Commission policy.

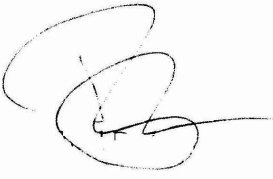
Conclusion

17. The Reply does not adequately address the undue disadvantage relating to equitable marketing to which OUTtv has been subject, as found by the Commission in the Decision. Should the Commission accept the Star Choice Approach proposed by Shaw, OUTtv will continue to be marketed in an inequitable manner – in clear violation of Commission policy and the Decision.
18. Shaw is a leading Canadian BDU and many smaller BDUs and their competitors look to it for leadership and best market practices. To allow Shaw to maintain its confusing and inequitable dual packaging of OUTtv could arguably breed “copycat” conduct and create confusion with respect to how OUTtv should be distributed.

¹⁰ The BDU Framework at para 158.

19. More disturbing, should the Complaint culminate in a result where dual packaging is maintained, this will legitimize this inequitable treatment of OUTtv, such that other BDUs may feel entitled to institute dual packaging of OUTtv (or other Category 1 digital specialty services) with impunity -- a result that is surely inconsistent with Commission policy. In 616's respectful submission, a simple and fair approach is the best approach: dual packaging should be eliminated.
20. We appreciate the Commission's attention to this matter and would be pleased to provide any further information required.

Yours very truly,

A handwritten signature in black ink, appearing to be 'Brad Danks', written over a light gray rectangular background.

Brad Danks
Chief Operating Officer

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