



May 25, 2005

Mr. Randolph Hutson
Director, Competitive Disputes
Broadcasting
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON
K1A 0N2

VIA FACSIMILE: (819) 997-4504

Dear Mr. Hutson:

RE: Expedited Hearing Concerning Complaint (Complaint) by 6166954 Canada Inc. (616) against Shaw Cable (Shaw) and Star Choice Communications Inc. (Star Choice) pursuant to sections 9, 20 and 40 of the *Broadcasting Distribution Regulations* (BDU Regs)

1. The following is a concise statement of the argument of Shaw Cable concerning the Complaint of 616, followed by a summary of reasoning in support of the argument and reference to relevant evidence and other materials:
 - The terms and conditions of the distribution of the Category 1 specialty service formerly known as PrideVision (re-named OUTtv on April 12, 2005) – specifically, its stand-alone carriage and rate arrangements - are governed by a letter carriage agreement entered into by Headline Media Group (the “Former Owners”) with each of Shaw and Star Choice on October 25, 2001 (the “PrideVision Carriage Agreement”). This agreement was filed by 616, and Shaw has made a confidentiality claim in connection therewith,
 - The PrideVision Carriage Agreement remains in full force and effect [REDACTED] and is binding upon the new owner of PrideVision/OUTtv, 616,
 - The PrideVision Carriage Agreement resulted from normal commercial negotiations between the parties,
 - The PrideVision Carriage Agreement reflected the business plan of the Former Owners with respect to the sale and distribution of Pridevision on a stand-alone basis,

- The Commission was aware of the stand-alone carriage of PrideVision and the contractual basis for that carriage and, despite a viewer complaint in 2002 concerning stand-alone distribution on Star Choice, did not require discontinuation of that method of distribution. In a letter dated May 3, 2002 from the President of PrideVision Inc. to Mr. Claude Doucet of the CRTC, it was confirmed that the offering of PrideVision on a stand-alone basis on Star Choice is the result of a business arrangement negotiated by the parties. PrideVision expressed satisfaction with that carriage agreement in the letter,
- In response to the position taken by 616, it would be both unfair and improper for BDUs, including Shaw, to be held responsible for the fact that the PrideVision/OUTtv service has not met its own financial objectives since its initial launch. It is not the responsibility of BDUs or the Commission to ensure the business success of programming licensees, or to make them whole for business losses sustained as a result of a business plan which a programmer itself executed,
- Required marketing of OUTtv in a pre-existing package accompanied by any increase in price of such a package without subscriber consent would amount to “negative optioning”. This could place Shaw in violation of various provincial statutes regarding that form of marketing and is contrary to consumer demand for choice and value in digital offerings,
- Without prejudice to our right to enforce the PrideVision Carriage Agreement against 616, Shaw has made an offer on a without prejudice basis – tabled in its written response to the Complaint of April 12, 2005 – whereby:

- OUTtv would be carried, going forward, [REDACTED]

- OUTtv would be remunerated at a wholesale rate [REDACTED]

Shaw’s offer, made without prejudice, is premised upon [REDACTED]

2. 616 has suggested that the offer of packaged carriage made by Shaw in its April 12 response to the Complaint is insufficient. Nevertheless, that without prejudice offer, submitted on a confidential basis, still stands and is fully consistent with the Commission’s policies.

Stand-Alone Carriage Was Agreed to in the PrideVision Carriage Agreement

3. The PrideVision Carriage Agreement provides for stand-alone carriage of PrideVision pursuant, specifically, to Schedule A of that agreement. While express reference to stand-alone carriage is not made, the pricing structure for PrideVision was premised upon, and only feasible in the context of, stand-alone carriage.
4. All other Category 1 services negotiated wholesale rates for carriage in newly created subscriber pick paks and a value theme package [REDACTED] [REDACTED]. At their inception, these packages began with no subscribers, and Category 1 services included in them did not enjoy any pre-established customer base.
5. By contrast, while also starting from a “zero subscriber base” as a new Category 1 service, PrideVision negotiated a wholesale fee [REDACTED] per subscriber – [REDACTED] [REDACTED]. This wholesale rate would not have been possible in any context other-than stand-alone carriage.
6. Mr. John Levy, on behalf of the Former Owners, confirmed, in a letter to the Commission dated May 3, 2002, that PrideVision itself had agreed to its distribution on a stand-alone basis. (This letter formed part of Attachment 3 to Shaw’s responses to interrogatories dated May 19, 2005.) Specifically, Mr. Levy stated that:

In response to your [Commission’s] request for clarification, we can advise as follows. PrideVision does have agreements in place with all the major cable and DTH BDUs, with one notable exception being Videotron. These agreements provide either for the stand-alone distribution of PrideVision or stand-alone distribution with the additional option for subscribers to add PrideVision onto any discretionary programming package at the option of the subscriber.

7. As Shaw is a “major BDU” and the letter addressed a consumer complaint directed at stand-alone carriage of PrideVision on Star Choice, this letter demonstrates that the Former Owners had agreed to stand-alone or add-on – but *not* packaged – distribution. Mr. Levy concluded his letter stating,

In summary, PrideVision is satisfied with the carriage arrangements it has in place with those BDUs with whom it has affiliation agreements.

The PrideVision Carriage Agreement Remains in Full Force and Effect

8. 616 claims that it is not bound by the PrideVision Carriage Agreement because it acquired the assets, not the ongoing business, of PrideVision and that it did not assume the PrideVision Carriage Agreement as part of the transaction.
9. An examination of the terms of the Asset Purchase Agreement between 616 and Pridevision Inc. (attached in full as Appendix 1) demonstrates, contrary to the position of 616, that the PrideVision Carriage Agreement did indeed form part of the transaction:
 - 1.01 "Purchased Business" means the business of owning and operating a gay, lesbian, bisexual, transgendered television network in Canada *at present and heretofore carried on by the Vendor...*
 - 2.01 ...the Purchaser will purchase from the Vendor, as of and with effect from the opening of business on the Closing Date, all of the right, title, benefit and interest of the Vendor in and to the undertaking and *all of the assets of the Purchased Business of every kind and description and wheresoever situate, save and except those assets referred to in Section 2.02. Without limiting the generality of the foregoing...2.01(g) all franchise, license, service or management agreements...and all other contracts relating to the Purchased Business.*
 - 2.06 Except for those obligations and liabilities referred to in Section 2.07, *the Purchaser will assume, fulfill and perform all of the obligations and liabilities of the Vendor related to the Purchased Business.*
- emphasis added
10. There are no provisions in section 2.02 (excluded assets) or section 2.07 (excluded liabilities) which suggest that the PrideVision Carriage Agreement had not been assumed by 616. Accordingly, Shaw's view that the PrideVision Carriage Agreement has been assumed is completely reasonable and legally correct.
11. Accordingly, based on the above-noted provisions, it is the position of Shaw that the PrideVision Carriage Agreement is enforceable against 616.
12. Shaw notes that the PrideVision Carriage Agreement contains an assignment clause (Clause 19) requiring the consent of the other party to any assignment thereof. While Shaw was not approached for consent to assignment by the former owners of PrideVision or 616, we note that, following the close of the transaction, 616 continued to provide the Category 1 PrideVision service to Shaw and accepted payment therefore consistent with the terms of the PrideVision Carriage Agreement. As such, Shaw relied upon the actions of 616 and continued in good faith to fulfill its responsibilities under the PrideVision Carriage Agreement.

13. 616's acceptance of remuneration pursuant to the Pridevision Carriage Agreement has continued despite of its pronouncement to Shaw that it desired new terms of carriage for its service.

The PrideVision Carriage Agreement Was Entered Into Voluntarily

14. The PrideVision Carriage Agreement was a part of the PrideVision business plan and was entered into voluntarily by the Former owners of PrideVision. Shaw has placed evidence before the Commission which demonstrates this, namely a letter from Mr. John Levy to the Commission dated May 3, 2002, filed as part of Attachment 3 to Shaw's interrogatory responses of May 19.
15. As noted above, Mr. Levy's letter was filed in connection with a subscriber complaint to the Commission concerning PrideVision's stand-alone packaging on Star Choice. The Commission requested that Mr. Levy confirm its position that the stand-alone carriage was the result of an agreement with the distributor. Mr. Levy obliged, saying that:

We can confirm Star Choice's statement in its February 20, 2002 correspondence that the offering of PrideVision on a stand-alone basis on the Star Choice DTH system is the result of a business arrangement by the parties...

In summary, PrideVision is satisfied with the carriage arrangements it has in place with those BDUs with whom it has affiliation agreements.

- Attachment 3 to Star Choice Interrogatory Responses, para. 4, emphasis added.

16. Shaw also notes that, in addition to this attestation to its satisfaction with contractual arrangements, the former owners of PrideVision never complained to the Commission about stand-alone carriage or attempted to assert any regulatory entitlement to packaged distribution.
17. Quite to the contrary, Mr. Levy stated in the aforementioned letter that "PrideVision continues to be prepared to have its service distributed as an *add-on* to a package of programming services...*if that would be of assistance to BDUs*" (emphasis added). The former owners never, however, suggested to the Commission that they were prepared to accept the distribution of PrideVision as *part of* a package. It is also important to note that the Commission's letter of April 22, 2002 and Mr. Levy's reply of May 3, 2002 are subsequent to Decision 2001-612, released on September 28, 2001. Stand-alone distribution was agreed upon by PrideVision and BDUs and was never the subject of an adverse ruling by the Commission.

Stand-Alone Carriage Agreement Is Consistent With CRTC Policies and Rules

18. The Commission's licensing of Category 1 services did not contemplate the broadcast of adult content. It did contemplate the licensing of Adult Category 2 services, however, and stipulated that carriage of such services must be effected in a way that did not require a subscriber to receive such services in order to acquire any other service (see *Broadcasting Public Notice CRTC 2004-56*).
19. Although Category 1 services generally benefit from packaged carriage pursuant to the Distribution and Linkage Rules, Shaw has noted that this may, in certain circumstances, be inconsistent with Commission policy regarding adult content. To the extent that OUTtv has removed the adult content from its service, such issue may now be moot.
20. Moreover, the Former Owners confirmed to the Commission that they had negotiated with Star Choice a stand-alone carriage arrangement pursuant to the PrideVision Carriage Agreement. Specifically, Mr. Levy stated (at para. 4 of the aforementioned letter) that:

We can confirm ...that the offering of PrideVision on a stand-alone basis on the Star Choice DTH system is the result of a business arrangement negotiated by the parties. We also note, as Star Choice did in its correspondence, Commissioner Langford's statement in Decision CRTC 2001-612 that if no agreement exists between a BDU and a programming service the Commission's mandated directions regarding carriage apply but that those directions can be changed by contract.

Therefore, the underlying rationale in PN 2000-6, protection of a newly licensed Category 1 service through packaged distribution, was explicitly rejected by the licensee itself through its agreement for stand-alone distribution.

21. Following the confirmation by Star Choice and Headline Media Group that PrideVision had agreed to stand-alone, rather than packaged, distribution, the CRTC itself did not request any changes to the distribution of PrideVision on Star Choice. The Commission accepted Mr. Levy's confirmation of PrideVision's satisfaction with the carriage arrangements as described in his letter of May 3, 2002.

Neither BDUs nor the Commission are Responsible for Ensuring the Success of a Programming Service's Business Plan

22. 616 has taken the position that PrideVision's poor financial performance, relative to other Category 1 services, occurred because "PrideVision was not granted the privilege of packaged distribution on Shaw's digital broadcasting distribution undertakings" (Complaint, para. 4, p. 2).

23. As we have noted, PrideVision's owners opted in favour of stand-alone distribution and received a premium wholesale rate far in excess of that paid to all other new Category 1 specialty services. As demonstrated, the method of and rate for distribution was a matter of agreement and was not imposed unilaterally upon PrideVision's owners. Rather, PrideVision's owners assume the potential risk and reward of carrying on business on these terms. This method of distribution was an important part of PrideVision's business plan.

24. The carriage and pricing strategy adopted by PrideVision's Former Owners was defended by David Errington, then Senior Vice-President and General Manager of PrideVision, in an article in the Financial Post:

David Errington...defended the business plan and said the company is aiming to hit break even after three years. "We chose to sell it as a premium service because in our mind that's the only way we can make a business out of this", he said.

- "PrideVision pricing 'half-way to pay-TV'", Financial Post, November 14, 2001 (attached as Appendix 2)

25. Furthermore, Mr. Errington, noted the following concerning the business plan for the service:

...PrideVision is offering advertisers not numbers overall but rather entry to an environment, an under-served gay audience with disposable income.

- Canadian Press/Victoria Times Colonist, November 16, 2001 (attached as Appendix3)

26. Shaw and PrideVision negotiated fair terms and conditions of carriage for the PrideVision service that were consistent with PrideVision's business plan. However, Shaw must not be required to guarantee the business success of those services. Furthermore, it is not the responsibility of the Commission to preserve the viability of a service where its business plan has foundered. There are examples of services that have not, for one reason or another, succeeded, and the Commission was neither asked to, nor did it order BDUs, to come to their rescue. These services have included C-Channel, Star Television, WTSN and MSNBC Canada, the latter being one in which Shaw Communications Inc. had an ownership interest.

27. In acquiring the assets of PrideVision, 616 indicated to the Commission that it would pursue carriage arrangements afforded to other Category 1 services, but did not indicate that it would be seeking carriage in an existing package. Despite the existence of a binding contract providing for stand-alone carriage whose term continues to [REDACTED] Shaw has made a without prejudice offer by which PrideVision could assume the same distribution model as that assumed by all other Category 1 services at their inception. However the responsibility for

PrideVision's failure to meet its own financial objectives should not be placed upon the shoulders of Shaw, Shaw's customers, or any other BDU or its subscribers.

The Need to Avoid Perceived "Negative Optioning"

28. For the reasons set out above, Shaw does not believe it would be fair or proper to require it to carry OUTtv in an existing package at the expense of Shaw (i.e. without passing the cost through to subscribers). At the same time, required packaging of OUTtv in a pre-existing package with a pass-through to subscribers could place Shaw in violation of various provincial laws proscribing "negative optioning" marketing.
29. Specifically, general "negative optioning" laws are in force in the following jurisdictions: Ontario, British Columbia, Alberta, and Nova Scotia. Moreover, the majority of provinces, through various types of legislation, provide serious impediments to negative optioning by way of prohibitions that are in place for various unfair selling practices. In sum, there is general concern about "negative optioning" selling practices.
30. Even aside from legal issues, negative optioning is a disadvantageous marketing practice that can result in substantial harm to consumers and BDUs alike. In a digital environment in which "choice" and "value" are fundamental expectations of consumers and key components of BDU marketing strategies, "negative marketing" is undesirable.

Summary

32. For all of the reasons set out above, Shaw respectfully submits that the complaint submitted by 616 should be dismissed. In particular, dismissal of the complaint is warranted because:
 - the matter before Commission in the Complaint and this expedited hearing is a commercial one, which is properly the subject of negotiations between the parties,
 - the PrideVision Carriage Agreement, was voluntarily entered into by PrideVision's former owners and was an asset purchased by 616 when it took over the service last summer, and
 - in spite of the enforceability of that Agreement, Shaw has made, on a without prejudice basis, a fair proposal to 616 concerning carriage of OUTtv going forward. In that proposal (contained in our original reply to the Complaint, dated April 12, 2005), we offered to carry OUTtv [REDACTED]

33. Shaw thanks the Commission for the opportunity to make this concise submission of argument and hopes that it will be of assistance. We look forward to addressing these issues and participating in the hearing scheduled for July 8.

Confidentiality

31. Pursuant to the CRTC Rules of Procedure, Shaw requests confidentiality as between the parties to the dispute (namely, itself and 616) of the without prejudice packaging offer made in Shaw's reply to the Complaint (April 12, 2005) and in this argument.
32. Similarly, the references to the wholesale rates enjoyed by PrideVision under the PrideVision Carriage Agreement (para. 5, above), as well as the average wholesale rates of other Category 1 services (para. 4, above) constitute commercially sensitive information for which we request confidentiality as between 616 and ourselves.
33. We respectfully request confidentiality for the proposal because it constitutes sensitive commercial information that could prejudice the competitive position of Shaw.
34. These confidentiality requests are in addition to the previous confidentiality claims made by Shaw in the course of the Complaint and/or expedited hearing proceeding.

Yours truly,



Michael Ferras
Director, Regulatory Planning
Shaw Communications Inc.

cc. William Craig, 6166954 Canada Inc.