

May 30, 2005

Mr. Mark E. Gromoll
Senior Analyst
Canadian Radio-television and
Telecommunications Commission
1 Promenade du Portage
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Fax: 819-997-4504

Filed electronically and by facsimile

Dear Mr. Gromoll:

**Re: Complaint by 6166954 Canada Inc. (616) against Shaw
Communications Inc. (Shaw) and Star Choice
Communications Inc. (Star Choice) pursuant to
Sections 9, 20 and 40 of the *Broadcasting Distribution
Regulations***

We are writing in response to your e-mail dated May 27, 2005, addressed jointly to the undersigned and Mr. Craig of 616, in which you have asked the parties to submit abridged versions of the documents for which requests for confidential treatment of portions thereof have been made in the record of the above-referenced proceeding. For reasons more fully set out below, we respectfully submit that abridged versions of the documents for which Shaw and Star Choice have requested confidential treatment should not be submitted and should not be placed on the public record at this time.

In your e-mail you have stated that,

"...whenever a request for confidential treatment of part of a given document is made, the requesting party should file with the request an abridged version of the document in question. This permits the abridged document to be immediately placed on the public record. Shortly thereafter, the Commission will consider each

request and make a determination whether or not to add the unabridged document, or portions thereof, to the public file."

With respect, we cannot agree that the *Broadcasting Act*, the *CRTC Rules of Procedure*, the *Broadcasting Distribution Undertaking Regulations* or Commission policy and practices support such a conclusion.

To begin with, in a letter dated March 24, 2005 from Mr. Hutson, Director, Competitive Disputes, Broadcasting, informing Star Choice that the Commission had received a complaint from 616, Mr. Hutson stated:

"I note that some of the supporting materials attached to the 616 complaint include documents for which confidentiality is generally sought. It should be noted that this material will not be placed immediately on the public record in order to give Shaw an opportunity to review and perhaps also request confidentiality, with reasons, should it see fit."

Furthermore, as we submitted in our filing dated May 26, 2005, this dispute proceeding is being governed by sections 12-15 of the *Broadcasting Distribution Regulations*. We repeat the submission that subsection 12(5) makes it mandatory for all information relating to the resolution of the dispute filed with the Commission to be kept confidential "unless the Commission determines that it would be in the public interest to do otherwise". Therefore, in a dispute resolution process of this nature, Commission regulations provide that there is a presumption in favour of confidential treatment. The importance of confidential treatment of all information is underscored by subsection 12(6), which prevents a party to the dispute from using the information provided the other party for any other purpose except with the prior consent of the party that provided the information. The mandatory confidential treatment and the prohibition on the use of the information filed in the course of a dispute resolution are extraordinary and place this type of proceeding in an entirely separate category from the Commission's normal public hearing process.

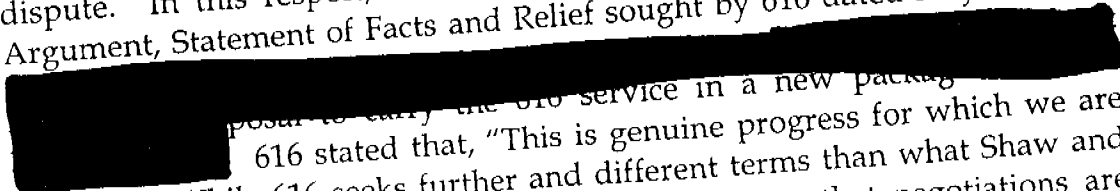
Most importantly, the approach taken by the Commission in dispute resolution processes frequently accords blanket confidential treatment to documents being considered. In our May 26, 2005 submission, we noted the fact that the Commission also employs a final offer arbitration process to resolve disputes of this nature and that when this process is utilized the very existence of the dispute resolution is itself confidential as are the filings with

the Commission and the Commission's determination. This blanket confidentiality applies not only to documents but to the very existence of the dispute resolution. All of this is a reflection of the commercial nature of the dispute and its reference to two particular parties. We reiterate our submission that the public interest and policy relative to the expedited procedure being employed with respect to the current dispute is similar to that which applies to the final offer arbitration process and determinations concerning confidentiality should be similar.

The Commission provided a helpful analysis on the issue of confidentiality in Circular No. 429 entitled, *Guidelines Respecting the Confidential Treatment of Annual Returns and Material or Information Filed in Support of a Broadcasting Application Before the Commission*. In paragraph 4, the Commission noted that each request for confidentiality is considered on a case-by-case basis and then made a very important statement that its informal guidelines are used "to ensure the uniform and consistent treatment of requests for confidentiality under section 20 of the Rules". It is our submission that in order for the Commission to be uniform and consistent in its treatment of commercial carriage disputes - most of which are dealt with pursuant to sections 12-15 of the *Broadcasting Distribution Regulations* - it must maintain the confidentiality of the documents for which confidential treatment is being sought by Shaw and Star Choice in this proceeding. To do otherwise would mean that the Commission's treatment of Shaw and Star Choice was no longer uniform and consistent with that of other parties involved in carriage disputes under the Commission's dispute resolution processes. This result would be fundamentally unfair to Shaw and Star Choice in the context of the legal meaning of "fairness".

At a minimum, the procedural safeguards afforded to participants in a commercial dispute resolution (which is effectively the nature of the current issue between Shaw, Star Choice and 616) should be afforded to the subjects of the current complaint.

We would emphasize that the position being taken by Shaw and Star Choice will not in any way inhibit the ongoing attempts to resolve this dispute. In this respect, we would refer the Commission to the Concise Argument, Statement of Facts and Relief sought by 616 dated May 25, 2005.

 616 stated that, "This is genuine progress for which we are grateful". While 616 seeks further and different terms than what Shaw and Star Choice have been proposing, the point remains that negotiations are continuing. If, however, the documents for which confidential treatment has been sought become part of the public record, matters extraneous to the

commercial issues at hand may be raised and the ability of the parties to negotiate a successful settlement of the matter be thus undermined.

As the Commission stated in PN 2005-35 concerning *Good Commercial Practices*, "...commercial arrangements between BDU operators and programmers are matters best determined by negotiations between the parties, without its intervention, particularly where the notice requirements set out above have been fulfilled". It is the submission of Shaw and Star Choice that the Commission should permit the negotiations to continue. In the event that the negotiations are not successful, the Commission has scheduled an expedited hearing process for July 8, 2005. If no agreement has been reached by that time, then the expedited hearing can proceed and 616 will not be prejudiced in any manner.

Conclusion

For all the reasons submitted above, abridged versions of the documents for which Shaw and Star Choice sought confidential treatment in our May 19, 2005 filing should be given blanket confidential treatment and abridged versions should not be placed on the public record.

We would be pleased to respond to any questions the Commission may have.

Yours truly,

Michael Ferras
Director, Regulatory Planning
Shaw Communications Inc.

Cynthia Rathwell
Vice-President, Regulatory
Affairs
Star Choice Communications Inc.

MF/CR/mjr
cc Bill Craig, 616695 Canada Inc. (416) 979-1300