



## Broadcasting Decision CRTC 2005-536

Ottawa, 27 October 2005

**MusiquePlus inc.**  
Across Canada

*Application 2004-1005-1  
Broadcasting Public Notice CRTC 2005-28  
31 March 2005*

### **MusiquePlus – Licence amendment**

*The Commission **approves** the application by MusiquePlus inc. to amend the broadcasting licence for the national, French-language analog specialty programming undertaking known as MusiquePlus, to specify that the service shall be packaged and distributed by Class 1 broadcasting distribution undertakings on a “modified dual status” basis instead of on a “dual status” basis.*

*A dissenting opinion by Commissioner Cram is attached.*

### **The application**

1. The Commission received an application by MusiquePlus inc. (MP inc.) to amend the broadcasting licence for the national, French-language analog specialty programming undertaking known as MusiquePlus, in order to alter the manner in which it is packaged and distributed by Class 1 broadcasting distribution undertakings (BDUs).
2. In respect of its carriage on Class 1 BDUs, MusiquePlus presently has “dual status” under the distribution and linkage rules set out in *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2005-45, 11 May 2005 (the distribution and linkage rules) (Public Notice 2005-45). The distribution and linkage rules are incorporated by reference into section 20 of the *Broadcasting Distribution Regulations* (the Regulations). The licensee proposed that the status of its undertaking be changed to “modified dual status”. The proposed change would be effected by moving MusiquePlus from paragraph 3 to paragraph 4 of Part I of the distribution and linkage rules set out in Public Notice 2005-45.
3. Under the distribution and linkage rules, a service with dual status must be distributed as part of the basic service of a BDU, at a regulated wholesale rate, unless the service agrees in writing to be distributed on a discretionary tier. MusiquePlus is among nine specialty services currently authorized for distribution on a dual status basis.

4. Under the same rules, a service with modified dual status must be distributed on a discretionary tier, unless both the service and the distributor agree to its distribution as part of the basic service. All specialty services licensed since 1994 (with the exception of Le Réseau de l'information<sup>1</sup>) have either modified dual status or discretionary-only status. There are currently 35 specialty services with modified dual status.

#### **Licensee's rationale**

5. MP inc. stated that, until 1999, MusiquePlus was distributed by Class 1 BDUs exclusively on high penetration discretionary tiers. The licensee provided data indicating that, since 1999, a number of BDUs have moved MusiquePlus from discretionary tiers to the basic service, resulting in lost subscription revenues of approximately \$1.8 million for MusiquePlus. MP inc. estimated that, if the largest BDUs were to move MusiquePlus from discretionary tiers to the basic service, the service would experience further losses of approximately \$2.9 million in revenues by 2008.
6. MP inc. submitted that many Class 1 BDUs are seeking to strengthen their own bargaining position in rate negotiations with dual status specialty services such as MusiquePlus by subjecting those specialty services to the threat of being transferred to the basic service, where the regulated basic wholesale rate is usually lower than the negotiated wholesale rate for discretionary distribution. As a result, according to MP inc., these specialty services cannot maintain their existing affiliation agreements or negotiate new affiliation agreements that would enable them to fulfil their regulatory requirements and meet their financial needs. In MP inc.'s view, its position in negotiations with Class 1 BDUs is even more vulnerable than that of most dual status specialty services because the French-language BDU market is dominated by two distributors, namely Cogeco Inc. (Cogeco) and Vidéotron ltée (Vidéotron), which have a combined market share of 70% and which together represent 69% of MusiquePlus' subscribers.
7. MP inc. contended that the manner in which BDUs are currently using the dual status designation creates a distortion within the Canadian broadcasting system that is contrary to the public interest and to the objectives of the Canadian broadcasting policy set out in the *Broadcasting Act*. In this regard, the licensee alleged that BDUs do not pass on to their subscribers the savings that are achieved through the transfer of a dual status specialty service from a discretionary tier to the basic service. Further, the licensee maintained that any losses in subscription revenues incurred by a specialty service as a consequence of being transferred to the basic service could result in a reduction in its expenditures on Canadian programming.
8. MP inc. argued that, given that almost 78% of MusiquePlus' subscribers currently receive the service on high penetration discretionary tiers, transferring the service to the basic service would not result in a significant increase in subscribers and would, in fact, cause substantial financial losses for the service. In this regard, MP inc. contended that the maximum wholesale rate of \$0.17 per subscriber per month that MusiquePlus

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<sup>1</sup> In *National French-Language Television News Service – Approved*, Decision CRTC 94-285, 6 June 1994, the Commission authorized the distribution of Le Réseau de l'information on a dual status basis in Francophone markets.

receives for carriage on the basic service is one of the lowest monthly wholesale rates of all French-language specialty services. MP inc. noted that, in comparison, the average wholesale rate that French-language specialty services are authorized to charge for carriage on the basic service is \$0.50 per subscriber per month.

## **Interventions**

9. The Commission received interventions in opposition to this application by Canadian Cable Systems Alliance Inc. (CCSA) and the Canadian Cable Telecommunications Association (CCTA).
10. Both CCSA and the CCTA argued that applications that propose amendments to the distribution and linkage rules should be considered in the context of a complete review of the regulatory framework for the distribution of programming services, including the access rules for BDUs. CCSA contended that the licensee did not demonstrate a financial need that would justify the proposed amendment to the distribution and linkage rules without a full public review of the regulatory framework. For its part, the CCTA expressed concern that only the most popular specialty services would request modified dual status and that, by considering such applications on a case-by-case basis, the Commission would risk creating a basic service of inferior quality and exorbitantly-priced discretionary tiers. In the CCTA's view, such a situation would be untenable for cable BDUs that must compete with direct-to-home (DTH) satellite BDUs that have greater flexibility in the packaging of their services.
11. The CCTA submitted that MusiquePlus, as a well-established analog specialty service that enjoys guaranteed access to distribution, already benefits from regulatory protection. The CCTA also noted that MusiquePlus is part of the corporate families of CHUM Limited (CHUM) and Astral Media inc. (Astral), two of the largest broadcasters in Canada, while many small BDUs, which often operate under precarious financial circumstances, must negotiate the price and placement of specialty services with large corporate entities, such as CHUM and Astral. In the CCTA's view, approval of the application would result in a tilting of the bargaining power in favour of MusiquePlus to the detriment of BDUs and their subscribers. The CCTA also expressed concern that BDUs' bargaining power would be further weakened because they cannot refuse access to an analog specialty service.
12. CCSA argued that a substantial portion of MusiquePlus' subscription revenues are generated from its carriage on DTH BDUs and Class 2 and Class 3 cable BDUs, which are not subject to the dual status rules. In this regard, the CCTA claimed that, of the BDUs cited by MP inc. as having moved MusiquePlus to the basic service, only Cogeco and LOOK Communications Inc. are Class 1 licensees and consequently subject to the distribution and linkage rules.<sup>2</sup> Accordingly, the CCTA questioned the relevance of

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<sup>2</sup> The Commission notes that LOOK Communications Inc. (LOOK) is the licensee of a Class 1 multipoint distribution system broadcasting distribution undertaking authorized to serve communities in Ontario and Quebec. However, by condition of licence, LOOK is not required to adhere to section 20 of the *Broadcasting Distribution Regulations*, which

MP inc.'s application, since its approval would only affect Cogeco and other Class 1 BDUs that are subject to the distribution and linkage rules.

13. The CCTA noted that, in 2003, 79% of Quebec subscribers to Class 1 and Class 2 BDUs subscribed to discretionary tiers. In the CCTA's view, the approval of this application would lead to an increase in MusiquePlus' negotiated wholesale rate for discretionary carriage, an increase that would be ultimately passed on to subscribers.

#### **Licensee's reply**

14. In response to the interveners' request for a wide-ranging policy review, MP inc. noted that, in *TSN, RDS and CMT – Licence amendments*, Broadcasting Decision CRTC 2004-298, 29 July 2004, the Commission approved similar applications to change the distribution status of the national specialty services known as The Sports Network (TSN), Le Réseau des sports (RDS), and Country Music Television (CMT), from dual status to modified dual status without a review of the regulatory framework. MP inc. also stated that the change in the distribution status granted to TSN, RDS and CMT, respectively, was not based on any "economic crisis" in the case of those specialty services.
15. MP inc. acknowledged that approval of the application would only affect Cogeco and other Class 1 BDUs that are subject to the distribution and linkage rules. However, MP inc. pointed out that Class 1 BDUs serve more than 90% of all subscribers to BDUs in Canada, and reiterated that the French-language BDU market is dominated by Cogeco and Vidéotron. MP inc. stated that any distributor that is concerned about the quality of its basic service would still have the option of offering services having modified dual status as part of the basic service, with the consent of those services.
16. MP inc. maintained that its application was not motivated by a desire to increase its revenues, but rather to ensure that MusiquePlus' authorized distribution status reflects its actual distribution, which is on a discretionary basis for a large majority of its subscribers. [The licensee argued that, since MusiquePlus is carried on discretionary tiers with high penetration, which have a comparable number of subscribers to the basic service, transferring MusiquePlus to the basic service would not result in a significant increase in subscribers.](#) Consequently, MP inc. would not be able demand higher advertising rates and therefore did not foresee an increase in advertising revenues.

#### **Commission's analysis and determination**

17. The Commission has considered the interveners' arguments that proposed amendments to the distribution and linkage rules should be considered in the context of a complete review of the regulatory framework for the distribution of programming services,

including the access rules for BDUs. The Commission is satisfied that the record of the proceeding is sufficient to allow it to dispose of the present application without delay. The Commission is further satisfied that a review of the regulatory framework is not required at this time.

18. When introduced in 1987, dual status distribution was intended to assist the earliest group of specialty services to attract audiences for their programming and to become established in the Canadian broadcasting system. Distribution on the basic service ensured that a programming service would have access to the largest possible number of viewers and consequently be able to generate more advertising revenues. In conjunction with the regulated basic wholesale rate, the dual status designation guaranteed a minimum amount of subscriber revenue. The dual status designation also permitted a programming service and a distributor to negotiate terms and conditions for distribution of the service on a discretionary basis, when it was mutually beneficial. The Commission notes that, in time, MP inc. agreed to have MusiquePlus distributed largely on a discretionary basis, and this service has, in fact, been used by BDUs to drive the penetration of discretionary tiers.
19. The Commission notes that MusiquePlus is now a well-established and popular service in the French-language market. Accordingly, the Commission determines that MusiquePlus no longer requires the guaranteed access to the majority of cable subscribers and the minimum subscription revenues afforded by dual status designation. The Commission considers the requested change in status to be consistent with these realities.
20. With regard to the interveners' concerns regarding the potential effect that approval of this application might have on negotiations between MP inc. and BDUs regarding terms and conditions, the Commission notes that, in the case of a dispute referred to it, it has the discretion to establish wholesale rates for services distributed on a discretionary basis. The Commission considers it preferable that the terms and conditions of such distribution be settled by the parties through negotiations, and encourages parties to undertake fair and balanced negotiations to that end. However, should all efforts to resolve differences fail, the Commission considers that the recourse a licensed distributor has to the dispute resolution mechanism will constitute a sufficient restraint on any increased bargaining power that might accrue to MusiquePlus as a result of being granted modified dual status.
21. MP inc. indicated that, since 1999, a number of BDUs have moved MusiquePlus to the basic service. The Commission notes, however, that only Cogeco, as a Class 1 BDU subject to the distribution and linkage rules might experience disruption to its channel line-up with the approval of this application.
22. In light of all of the above, the Commission **approves** the application by MusiquePlus inc. to amend the broadcasting licence for the national, French-language analog specialty programming undertaking known as MusiquePlus, in order to change the distribution status of MusiquePlus from dual status to modified dual status.

23. The change in distribution status for MusiquePlus is reflected in the revised distribution and linkage rules set out in *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2005-98, also issued today.

Secretary General

*This decision is to be appended to the 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>*

### **Dissenting opinion of Commissioner Barbara Cram**

I believe this decision goes in the opposite direction of where the Commission should be going. I agree with the reasoning of Commissioner Langford in his dissent in Decision 2004-298.