



Broadcasting Decision CRTC 2017-296

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Reference: Part 1 application posted on 29 March 2017

Ottawa, 23 August 2017

Shaw Communications Inc., on behalf of Shaw Cablesystems Limited, Shaw Cablesystems (VCI) Limited and Star Choice Television Network Incorporated

Across Canada

Application 2017-0232-4

Terrestrial and direct-to-home broadcasting distribution undertakings – Licence amendment

*The Commission **approves with changes** the application by Shaw Communications Inc. (Shaw) on behalf of Shaw Cablesystems Limited, Shaw Cablesystems (VCI) Limited and Star Choice Television Network Incorporated to amend the broadcasting licences for their terrestrial and direct-to-home (DTH) satellite broadcasting distribution undertakings.*

Background

1. In *Let's Talk TV – A World of Choice – A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market*, Broadcasting Regulatory Policy CRTC 2015-96, 19 March 2015 (the Policy), the Commission determined that vertically integrated broadcasting distribution undertakings (BDUs) would be required to distribute related discretionary services¹ in a 1:1 ratio with independent discretionary services (the 1:1 rule).
2. The Commission stated that the 1:1 rule would only apply to discretionary services whose access was not already guaranteed and that it would take effect on 1 September 2018, when most independent services are set to be renewed and current service-specific access privileges for independent discretionary services (i.e. Category A status) will be removed.
3. The Commission subsequently amended the *Broadcasting Distribution Regulations* (the Regulations) to reflect its determinations in the *Let's Talk TV* proceeding. The amended Regulations, including the 1:1 rule, came into effect on 1 March 2016.

¹ A related discretionary service is one provided by a related programming undertaking, which is defined as a programming undertaking of which a licensee or an affiliate of that licensee, or both, controls more than 10%.

Application

4. Shaw Communications Inc. (Shaw) filed an application on behalf of Shaw Cablesystems Limited, Shaw Cablesystems (VCI) Limited and Star Choice Television Network Incorporated to amend the broadcasting licences for their terrestrial and direct-to-home (DTH) satellite BDUs.
5. Specifically, Shaw requested an exception to the 1:1 rule set out in section 19(3) of the Regulations to exclude from the definition of discretionary service any programming service distributed by the licensee under section 18 (i.e. Category A services) on 31 August 2016. This condition would expire upon the renewal of licences for independent programming services in September 2018.
6. Shaw explained that the application was filed to resolve an inconsistency between the amended Regulations and the Policy. Specifically, it stated that following the renewal of Corus's television licences on 1 September 2017, the Corus programming services currently designated as Category A programming services, which are related to Shaw, will no longer have access privileges and will fall within the meaning of discretionary services for the purposes of applying the 1:1 rule. Consequently, as of 1 September 2017, 16 English-language and 3 French-language Corus services will be counted as Shaw-related discretionary services, while most independent Category A programming services will not lose their access privileges until 31 August 2018 and therefore cannot be used to fulfill the 1:1 rule until that time.
7. To remain in compliance, Shaw indicated that it would have to either (a) distribute several additional independent programming services, which would cause prohibitive operational and technical demands, or (b) drop related discretionary services for a one-year period, which would cause substantial subscriber disruption. Shaw argued that neither option would be consistent with the Commission's policy objective of promoting a healthy, dynamic retail market that maximizes consumer choice and flexibility and provides Canadians with access to a diverse range of programming or with the objective of the *Broadcasting Act* that distribution undertakings provide efficient delivery of programming at affordable rates.
8. Shaw submitted that the above situation is unique to itself due to the significant number of Category A programming services owned by Corus and that it would be placed at a competitive disadvantage if its requested exception were not granted. Shaw added that granting the exception would not detract from the objective of providing Canadians with access to a variety of independent programming services, nor the diversity that the 1:1 rule is intended to bring to the Canadian broadcasting system, since independent Category B programming services have benefitted from this rule since 1 March 2016 and independent Category A services will continue to benefit from mandatory carriage until their licences are renewed.
9. Finally, Shaw indicated that far from intending to reduce the number of independent discretionary services it distributes, it plans to offer more discretionary services, including services from independent providers.

Interventions

10. The Commission received an intervention supporting the application by Corus Entertainment Inc., as well as an opposing intervention from Allarco Entertainment 2008 Inc. (Allarco) and comments by Groupe V Média inc. on behalf of MusiquePlus Inc. (Groupe V), by the Independent Broadcast Group (IBG) and by TELUS Communications Company (TELUS). The public record for this application can be found on the Commission's website at www.crtc.gc.ca or by using the application number provided above.
11. Allarco stated that the 1:1 ratio was key to ensuring diversity in the Canadian broadcasting system and providing access for independent programming services that contribute on an ongoing basis to the development and airing of premium Canadian programming.
12. Groupe V argued that granting the licence amendment as proposed would go against the Commission's policy decision to provide some protection to independent programming services. In particular, Groupe V noted that, unlike the licences for most independent Category A programming services, the licences for its Category A programming services MusiquePlus and MAX expire on 31 August 2017. Further, it noted that these services will lose access privileges as of 1 September 2017. Consequently, if the amendment were granted, Shaw would no longer be required to offer these two programming services as of that date. Groupe V proposed that Shaw accept the imposition of an additional condition of licence that would require it to continue to distribute the unrelated French-language Category A programming services that it distributed at the time of its application until 31 August 2018.
13. The IBG acknowledged that it was not likely the Commission's intention in framing the new rules to require that a BDU add or remove a large number of discretionary services during a one-year transition period. However, it noted that the early implementation of the 1:1 rule in March 2016 created greater flexibility for BDUs with respect to Category B discretionary services since BDUs were no longer required to distribute related and unrelated Category B services in a 1:3 ratio. The IBG further noted that the number of independent discretionary services distributed by Shaw (25) was more than the number of related discretionary services (18) and that the change in rules had provided Shaw with additional flexibility to add new related services or drop independent services. The IBG submitted that while Shaw indicated that it did not plan to drop independent programming services from its lineup, if its proposed amendment were accepted, it would continue to have this flexibility until 2018.
14. The IBG submitted that a better and fairer approach would be to count independent Category A services as discretionary services starting on 1 September 2017. In this way, independent Category A services would be treated the same for linkage purposes as Shaw's related Category A services. The IBG, with the support of Allarco, proposed the following condition of licence:

As an exception to 19(3) of the *Broadcasting Distribution Regulations*, for the purposes of subsection (3), the definition of discretionary service in subsection 19(1) includes each programming service that the licensee distributes under subparagraph 18(2)(a)(i) [English-language Category A services] and subparagraph 18(2)(b)(i) [French-language Category A services] of the *Broadcasting Distribution Regulations*. This condition of licence will expire on 1 September 2018.

15. The IBG stated that if its proposal were accepted, Shaw would need to add one new English-language and two new French-language independent discretionary services on its cable systems and one new English-language independent discretionary service on its DTH platform. The IBG added that its proposal would be consistent with Shaw's stated intention to add independent discretionary services well in advance of September 2018.
16. TELUS submitted that the Commission should uphold the safeguards intended to protect independent programming services from being subjected to an undue disadvantage by vertically integrated BDUs.

Applicant's reply

17. Shaw agreed with Groupe V that its proposed exception could cause a problem for the Category A French-language services that will be renewed in September 2017. To avoid disadvantaging these particular services, Shaw proposed to add the word "related" as follows:

As an exception to subsection 19(3) of the *Broadcasting Distribution Regulations*, for the purposes of subsection (3), the definition of discretionary service in section 1 does not include the services of a related programming undertaking that the licensee distributed under section 18 on 31 August 2016. This condition will expire upon renewal of independent programming services' television licences, at or around 1 September 2018.

18. While agreeing that the IBG's alternative proposal was a fair and reasonable approach, Shaw submitted that it represented a solution that was inconsistent with the Commission's stated timeline for the implementation of the 1:1 rule for independent Category A services. Shaw argued that its proposal properly aligns the amended Regulations with both the date specified in the Policy (1 September 2018) and the removal of independent Category A services' access privileges.

Commission's analysis and decision

19. Requiring Shaw to remain in compliance with the amended Regulations until 1 September 2018 would impose a significant burden on the company. At the same time, interveners to this proceeding have expressed concern that Shaw may take advantage of the additional flexibility afforded by the requested exception to either increase the distribution of related services or reduce the number of independent services that count toward the 1:1 rule.

20. To address the concerns of all parties, while reflecting the intent of the Policy that the 1:1 rule take effect on 1 September 2018, the Commission considers that Shaw's request for an exception should be granted but should also include a requirement that the licensee continue to distribute at least the same number of English- and French-language independent discretionary services as it distributes under section 19(3) of the Regulations as of the date of this decision. This requirement will expire with the exception on 31 August 2018.

21. Accordingly, the Commission **approves with changes** the application by Shaw Communications Inc. on behalf of Shaw Cablesystems Limited, Shaw Cablesystems (VCI) Limited and Star Choice Television Network Incorporated to amend the broadcasting licences for their terrestrial and DTH satellite BDUs. Specifically, the Commission imposes the following **condition of licence** with respect to these undertakings:

As an exception to subsection 19(3) of the *Broadcasting Distribution Regulations*, the programming service of a related programming undertaking that the licensee distributed under section 18 on 31 August 2016 shall not be included in the calculation of the ratio of discretionary services of related programming undertakings to independent programming undertakings.

The licensee shall distribute at least the same number of English- and French-language independent discretionary services that it distributed under subsection 19(3) of the *Broadcasting Distribution Regulations* as of 23 August 2017.

This condition will expire on 31 August 2018.

Secretary General

This decision is to be appended to each licence.