



## Broadcasting Public Notice CRTC 2006-4

Ottawa, 17 January 2006

### Application of the winback rules to customers and subscribers

*The Commission will retain, without change, the customer-specific winback rules set out in CRTC letter decision dated 1 April 1999, rather than modify these rules to apply to both the customer and the subscriber.*

#### Introduction

1. In *CISC Dispute – Rules Regarding Communication Between the Customer and the Broadcasting Distribution Undertaking*, CRTC letter decision dated 1 April 1999, the Commission established winback rules that prohibited the targeted marketing by incumbent cable companies of customers who cancelled basic cable service. These rules required incumbent cable companies to refrain, for a period of 90 days, from:
  - directly contacting customers who, through an agent, notified their cable company of their intention to cancel basic cable service; and
  - offering discounts or other inducements not generally offered to the public, in instances when customers personally initiated contact with the cable company for the purpose of cancelling basic cable service.
  
2. In *Changes to the winback rules for broadcasting distribution undertakings*, Broadcasting Public Notice CRTC 2004-62, 13 August 2004 (Public Notice 2004-62), the Commission announced that it would retain the above customer-specific winback rules as they apply in respect of residents of multiple-unit dwellings (MUDs) who are customers of incumbent broadcasting distribution undertakings (BDUs) with more than 6,000 subscribers. The Commission also introduced additional winback rules to govern the conduct of these BDUs in their dealings with residents of MUDs. Specifically, the Commission further prohibited such incumbent cable companies from:
  - initiating communication with residents of a MUD for a period of 90 days from the date on which a new entrant enters into an access agreement to provide service in the MUD; and
  - engaging in the targeted marketing of all residents of a MUD, or from offering them discounts or other inducements not generally available to the public, for a period of 90 days following the date on which a new entrant enters into an access agreement to offer services in the MUD.

3. In Public Notice 2004-62, the Commission also ended the application of the winback rules in respect of customers in single-unit dwellings. Further, it stated that licensed Class 2 and Class 3 incumbent cable systems that have fewer than 6,000 subscribers would no longer be subject to the winback rules.
4. As noted above, the winback rules set out in the Commission's letter of 1 April 1999 make reference to "customers." In *Complaint by Bell ExpressVu Limited Partnership against Rogers Cable Inc. alleging certain anti-competitive practices*, Broadcasting Decision CRTC 2004-494, 12 November 2004 (Decision 2004-494), the Commission announced that it would seek public comment on whether these winback rules should apply to both "customers" and "subscribers."
5. The *Broadcasting Distribution Regulations* contain definitions that specifically distinguish between "customer" and "subscriber." These definitions are as follows:

"customer" means a person who is liable for payment for programming services that are distributed by a licensee and that are received directly or indirectly by one or more subscribers. It does not include the owner or operator of a hotel, hospital, nursing home or other commercial or institutional premises.

"subscriber" means

  - a) a household of one or more persons, whether occupying a single-unit dwelling or a unit in a multiple-unit dwelling, to which service is provided directly or indirectly by a licensee; or
  - b) the owner or operator of a hotel, hospital, nursing home or other commercial or institutional premises to which service is provided by a licensee.
6. In Decision 2004-494, the Commission noted that, in the case of a bulk services agreement, the "customer" would be the party, either the condominium corporation or landlord as the case may be, that enters into a bulk-billing agreement with the BDU and is liable for payment for the services distributed under that agreement, and not the condominium unit holder or tenant. Therefore, in these circumstances, the winback rules would prohibit a BDU from contacting the board or landlord, but not the end-users living in such buildings.
7. In Decision 2004-494, the Commission also stated its preliminary view that the objective of the customer-specific winback rules might be better achieved were those rules to apply in respect of both the customer and the subscriber, without regard to whether the subscriber is a tenant or a condominium unit holder in a MUD. In *Call for comments on changes to the winback rules regarding their application to both customers and subscribers*, Broadcasting Public Notice CRTC 2004-86, 12 November 2004 (Public Notice 2004-86), the Commission accordingly invited comments on whether these winback rules should be modified to apply to both customers and subscribers.

## Positions of parties

8. The Commission received five submissions in response to Public Notice 2004-86. ExpressVu<sup>1</sup> supported the Commission's preliminary view that the customer-specific winback rules should apply to both the customer and the subscriber. In a joint submission, MTS Allstream Inc. and TELUS Communications Inc. (MTS/TELUS) also supported that view. The Canadian Cable Telecommunications Association (CCTA), Quebecor Media Inc. (QMI) and the Public Interest Advocacy Centre (PIAC) opposed the Commission's preliminary view.
9. According to ExpressVu, the incumbents in major urban markets retain a market share of approximately 90% and remain particularly dominant in the MUD market. ExpressVu argued that it is critical that new entrants operate under conditions that provide them a reasonable opportunity to enter this market segment.
10. In MTS/TELUS' view, whether a resident's basic service is independently and directly cancelled by the resident or is cancelled through the termination of a bulk billing agreement, the fact remains that the incumbent BDU's service has been cancelled with respect to that particular resident. MTS/TELUS considered that the Commission's proposed modification to the customer-specific winback rules would be consistent with the new winback rule that the Commission established in Public Notice 2004-62. MTS/TELUS noted that this new winback rule applies in respect of each resident of a MUD, even though the triggering event, an access agreement struck with a new entrant BDU, may not be a direct arrangement with the resident.
11. The CCTA and PIAC submitted that the concept of winback can reasonably be applied only to a person who is in the position to make an express decision to cancel basic cable services and obtain similar services from an alternate service provider. The CCTA noted that individual subscribers in a MUD, whose landlord or condominium board has decided to enter into a bulk billing agreement, are bound by the decision made by their landlord or condominium board, and have no contractual relationship with the incumbent for the bulk services. According to the CCTA, the Commission's proposal would extend the application of the winback rules to individuals who are not in a legal position to cancel existing broadcasting distribution services.
12. The CCTA also argued that, once a new entrant enters into a bulk billing agreement with an apartment owner or condominium board/strata council, it is reasonable that the incumbent be able to inform individual residents in the MUD about the incumbent's competitive offerings for incremental services at the time when these residents are most likely to make decisions about such services and when competition among providers would most benefit consumers. The CCTA expressed concern that the Commission's proposal would effectively ensure that the winner of the bulk contract would become the sole supplier of all incremental discretionary services to the residents.

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<sup>1</sup> Bell ExpressVu Inc., (the general partner), and BCE Inc. and 4119649 Canada Inc. (partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership

13. In its submission, QMI argued that, at a time when all the large cable operators are effectively deregulated and competition is pervasive, stricter regulation would be counterproductive and not in keeping with economic, technological and social progress. QMI objected to any further changes to the winback rules that would prohibit dialogue in MUDs.

### **Commission's analysis and determinations**

14. The Commission has stated that all Canadians, including those residing in MUDs, are entitled to end-user choice, even those that receive broadcasting services through a bulk billing agreement. In *Bulk billing by direct-to-home satellite distribution undertakings*, Broadcasting Public Notice CRTC 2002-7, 12 February 2002, while announcing that it would allow direct-to-home distributors to engage in the practice of bulk billing on the same basis as cable undertakings, the Commission stated:

... the Commission will wish to ensure that bulk billing contracts not result in exclusive access arrangements or otherwise restrict end-user choice. The Commission considers bulk billing arrangements that have the effect of excluding other service providers from distributing broadcasting services in MUDs, in circumstances where the provision of such services to end users on a competitive basis would otherwise be technically feasible would amount to undue preference, contrary to section 9 of the *Broadcasting Distribution Regulations*.

15. The Commission has adopted distinct approaches to the concept of end-user choice as it applies to MUDs owned by a condominium corporation (condominium MUDs) and MUDs where ownership resides with a landlord (rental MUDs). In *Application of the concept of end-user choice in multiple unit dwelling condominiums*, Broadcasting Public Notice CRTC 2003-18, 11 April 2003 (Public Notice 2003-18), the Commission found it appropriate that, in a condominium, the choice as to which distribution undertaking or undertakings will provide services to the building be made by the Board or Strata Council; that is to say, end-user choice is exercised at the level of the Board or Council. As a result of this policy, in a related complaint against ExpressVu by Novus Entertainment Inc., the Commission found that ExpressVu had not conferred an undue preference on itself by entering into a building access agreement in respect of a condominium building, the terms of which agreement limited the number of BDUs that may serve the building.<sup>2</sup>

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<sup>2</sup> See *Complaint by Novus Entertainment against Bell ExpressVu Limited Partnership regarding access to a condominium multiple unit dwelling*, Broadcasting Decision CRTC 2003-275, 18 July 2003.

16. In the case of rental MUDs, however, individual residents exercise end-user choice in their own right. Where a bulk billing arrangement is entered into by a service provider in respect of a rental MUD, and where that arrangement would exclude another service provider from offering its broadcasting services in that MUD, despite it being otherwise technically feasible to do so, the Commission generally considers the arrangement to constitute an undue preference. Thus, the Commission does not permit distributors to enter into exclusive arrangements with landlords, unless it is not technically feasible for more than one distributor to provide service in the building.
17. The Commission has considered the proposed amendment to the winback rules in the context of these different approaches to the concept of end-user choice.

### **Rental MUDs**

18. The Commission notes that, while a bulk billing arrangement need not preclude subscribers in rental MUDs from choosing another distributor and paying the additional costs associated with that service or from purchasing incremental services such as pay-per-view or video-on-demand from another distributor, individual residents already have several practical disincentives to do so. For instance, in rental MUDs where bulk billing arrangements are in place, charges for distribution services are typically bundled into rent charges, making it difficult for residents to individually opt out of the arrangement and choose another service provider. Unless a resident of a rental MUD who wishes to take the services of another service provider is able to renegotiate lower rent payments, the resident would, in effect, end up paying two service providers. In addition, a building owner will have likely signed a binding contract with the new entrant distributor, making it difficult to switch back to the incumbent provider in response to pressure from residents. Finally, unless the building is double-wired, any second service provider would have to install its own wiring in order to provide service to the building, since the existing inside wire would be used by the bulk service provider.
19. The Commission considers that end-user choice in rental MUDs where bulk billing agreements are in place remains a desirable objective. Given the disincentives that currently exist to the achievement of that objective, the Commission is concerned that modifying the winback rules could contribute to creating de facto exclusive arrangements in these MUDs. Further, in the Commission's view, interveners provided insufficient evidence that new entrants require the additional protection the proposed amendment might provide in the context of rental MUDs where bulk billing agreements are in place. The Commission therefore considers that the record of this proceeding does not provide sufficient rationale to support adopting the proposed amendment to the winback rules as it applies to rental MUDs.

## Condominiums

20. As noted above, in a condominium, the condominium board functions as the end-user and makes the decision as to who will provide broadcasting services to the building. Thus, the Commission does not prohibit exclusive arrangements in these buildings, and would not be concerned, as it is in the case of rental MUDs, that the proposed amendment to the winback rules might contribute to de facto exclusive arrangements for the provision of basic and even incremental broadcasting services.
21. At the same time, having reviewed the record of the proceeding, the Commission is not persuaded that any additional protection for new entrants is warranted in condominiums. The Commission also considers that applying different rules to condominiums would be impractical and/or would impose an excessive administrative burden on licensees.
22. For the reasons cited above, the Commission will retain, without change, the customer-specific winback rules set out in CRTC letter decision dated 1 April 1999, rather than modify these rules to apply to both the customer and the subscriber.

Secretary General

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