



Broadcasting Decision CRTC 2012-672

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Ottawa, 10 December 2012

OUTtv Network Inc.

Across Canada

Application 2012-0355-4

Complaint by OUTtv Network Inc. against TELUS Communications Company alleging undue preference and disadvantage

The Commission finds that, in regard to the packaging and marketing of OUTtv Network Inc.'s (OUTtv Network's) service known as OUTtv, TELUS Communications Company (TELUS) has subjected OUTtv Network to a disadvantage and has given operators of other programming services a preference.

Further, the Commission is unable to find that either the preference or the disadvantage regarding the packaging of OUTtv in TELUS's "Lifestyle Extra" package is undue. However, it finds that, in regard to the marketing of OUTtv, TELUS has subjected OUTtv Network to an undue disadvantage and has given an undue preference to operators of other programming services, contrary to section 9 of the Broadcasting Distribution Regulations.

*In regard to the above, the Commission directs TELUS to file a detailed plan by no later than **8 February 2013** demonstrating how it will remedy this undue disadvantage and preference.*

The parties

1. OUTtv Network Inc. (OUTtv Network) operates an independent specialty Category A service known as OUTtv. In its application, filed on 20 March 2012, OUTtv Network indicated that its service's lifestyle and entertainment programming is "designed to meet the needs and interests of Canada's gay, lesbian, bisexual, and transgender (GLBT) community and their allies, and also to act as a bridge between the GLBT community and a larger audience."
2. TELUS Communications Company¹ (TELUS) operates Optik TV, the third generation of its Internet Protocol Television (IPTV)-based terrestrial distribution

¹ TELUS Communications Inc., and 1219823 Alberta ULC and Emergis Inc. in partnership with TELUS Communications Inc. in TELE-MOBILE Company, partners in a general partnership carrying on business as TELUS Communications Company

service, which serves parts of British Columbia, Alberta and Quebec. TELUS does not own or control audiovisual programming undertakings or production companies and, therefore, is not a vertically integrated entity as defined in Broadcasting Regulatory Policy 2011-601.²

The complaint

3. In its application, OUTtv Network alleged that TELUS had subjected it to an undue disadvantage or had given other programming services an undue preference, contrary to the provisions set out in section 9 of the *Broadcasting Distribution Regulations* (the Regulations). It further alleged that TELUS's distribution arrangements for OUTtv do not respect clauses 4 and 6 of the *Code of conduct for commercial arrangements and interactions*³ (the Code of Conduct) since TELUS is neither:
 - distributing OUTtv in the best available package of programming services consistent with OUTtv's genre and programming, nor
 - giving OUTtv comparable marketing support as it has provided or will provide to similar programming services.
4. OUTtv has been packaged on TELUS's distribution undertaking since 2009 in a package called "Lifestyle Extra." OUTtv Network wishes for its service to be placed in the "Lifestyle" package also offered by TELUS. It argued that although both packages are consistent with its genre and programming, and although both packages contain programming services with which OUTtv is frequently packaged on other broadcasting distribution undertakings (BDUs), the "Lifestyle" package is the best package because it has significantly higher market penetration. Further, both packages are similar in composition, containing two independent Category A services and five other non-independent Canadian services, four of which are Category A services and one of which is a Category B service.
5. OUTtv Network submitted that the key difference between the two packages, which has resulted in the discrepancy in market penetration levels, was the marketing "architecture" offered to the consumer. Whereas the "Lifestyle" package was included in TELUS's two main customer bundles, namely, "Medium" ("Medium Choice") and "Large" ("Large Choice"),⁴ the "Lifestyle Extra" package was not included in either bundle. Furthermore, OUTtv Network submitted that these two bundles were the main thrust of TELUS's marketing initiatives on their website and in mailings.

² As set out in that regulatory policy, "vertical integration" refers to the "ownership or control, by one entity, of both audiovisual programming and distribution undertakings, or, both audiovisual programming undertakings and production companies."

³ As set out in Appendix 1 to Broadcasting Regulatory Policy 2011-601, as amended by Broadcasting Regulatory Policy 2011-601-1

⁴ The "Medium" bundle included a minimum of 149 channels whereas the "Large" bundle included a minimum of 180 channels.

6. According to OUTtv Network, TELUS's placement of OUTtv in the "Lifestyle Extra" package has had a material adverse impact on OUTtv Network. It provided financial estimates to demonstrate that it was experiencing a substantial loss in revenues by virtue of OUTtv being placed in the lower penetration "Lifestyle Extra" package rather than in the "Lifestyle" package, due to lost subscription fees. OUTtv Network further submitted that lower penetration rates also deprive it of the opportunity to showcase its service to a larger audience and, consequently, receive additional revenue from advertisers.
7. OUTtv Network noted that as a Category A service, OUTtv is subject to substantial regulatory requirements, such as Canadian programming expenditures and content requirements that are greater than those for Category B services. It argued that a material increase in revenues from subscription fees would improve its ability to produce and acquire quality Canadian programming in keeping with its regulatory requirements and allow it to compete effectively with other Category A services. It further argued that a lower overall subscriber base makes it more difficult to implement changes to its programming delivery and digital distribution infrastructure (for example, its planned launch of a high definition service).
8. OUTtv Network submitted that the Commission has acknowledged in previous decisions OUTtv's unique contributions to the Canadian broadcasting system and the benefits associated with the service receiving more revenue through higher market penetration.⁵
9. In light of the above, OUTtv Network requested that the Commission make a finding of undue preference and disadvantage against TELUS, and that TELUS be required to place OUTtv in the "Lifestyle" package, the best available package in OUTtv Network's view, with marketing support comparable to that given to similar services.

TELUS's answer

10. In its answer, TELUS submitted that it has neither subjected OUTtv Network to an undue disadvantage, nor has given an undue preference to other services. It further submitted that its packaging and marketing of OUTtv on Optik TV is not inconsistent with the Code of Conduct. TELUS argued that the "Lifestyle" theme was too large for a single package, which made it necessary to split it up into two distinct packages within the theme or genre in order for it to be comparable in size and cost to all the other theme packages that it offered. TELUS indicated that the choice of services for each of the packages is entirely based on the best grouping of the "genre within the genre." It further indicated that the "Lifestyle" package contains services that are more educational, informational and instructional in nature, while "Lifestyle Extra"

⁵ See Broadcasting Decision 2000-456, in which the Commission issued the first broadcasting licence for OUTtv, and Broadcasting Decision 2008-299, which related to a carriage dispute between OUTtv Network (then 6166954 Canada Inc.) and Shaw Cablesystems Ltd.

includes more entertainment programming, talk shows, reality-based programming and dramatic programming.⁶

11. In regard to marketing, TELUS noted that its customers have a choice of theme packages (with the exception of premium movie services and third-language services) that are priced identically. It further noted that, as of February 2012, it was only in the “Large” bundle that the “Lifestyle” package was offered explicitly.
12. TELUS submitted that while the inclusion of “Lifestyle” in the “Large” bundle might be viewed as a preference, it is certainly not an undue one as reflected by the relatively low number of Optik TV subscribers who choose the “Large” bundle when compared to those who select either the “Medium” bundle or a self-created bundle. It further submitted that it made changes to Optik TV’s bundles to give subscribers even more choice by being allowed to choose or swap out any theme package in both the “Large” and “Medium” bundles.
13. TELUS argued that it has not made any proposal to downgrade OUTtv or move it into a lower penetration theme package. As a result of the unprecedented growth rate in the number of Optik TV subscribers, TELUS forecasts a considerable increase in OUTtv Network’s revenues year-over-year in its current theme package.
14. Finally, TELUS argued that it has no motive to favour one Category A service over another since it neither owns nor is affiliated with any programming undertaking. It stated that it has maintained the packaging best suited to OUTtv’s programming and that penetration levels for all services are the result of customer choice alone.

OUTtv Network’s reply to TELUS

15. In its reply, OUTtv Network submitted that TELUS provided little, if any information to justify the disadvantages or preferences in order to establish that they are not undue and that they will not, in fact, have a material adverse impact on OUTtv Network and on the achievement of the broadcasting policy objectives.
16. According to OUTtv Network, TELUS has not supported its contention (for instance, through marketing material or consumer information) that the “Lifestyle” package contains services that are more “educational, informational and instructional.” It submitted that, in fact, most of the premium content on all of the services in the “Lifestyle” package is more entertainment-orientated than educational, informational or instructional. OUTtv Network argued that its service’s mix of movies, drama, reality, travel and lifestyle programming is similar to elements of each of the services in the “Lifestyle” package, and quite comparable to E! and Slice in particular, and noted that it is often packaged with these other services on other BDUs. OUTtv

⁶ In a letter dated 23 July 2012, TELUS indicated that although the two packages are similarly named, they are not of the same genre or programming type, with “Lifestyle” being more “home and garden” focussed and “Lifestyle Extra” being more “entertainment” focussed.

Network submitted that TELUS has not identified any other packages, apart from “Lifestyle Extra,” that would be suitable for OUTtv.

17. OUTtv Network further submitted that although TELUS has recognized that its marketing architecture needs changes and although it is making that marketing architecture more consumer friendly, there is no evidence that these changes will improve OUTtv’s market penetration. According to OUTtv Network, any increase in its service’s penetration due to the growth in popularity of Optik TV would come at the expense of other BDUs, on which OUTtv has more favourable packaging arrangements and higher penetration, which would therefore not result in a net benefit to OUTtv Network.

Commission requests for information from TELUS

18. Commission staff issued letters dated 3 July 2012 and 8 August 2012 requesting TELUS to provide updated information about its packaging and marketing practices, as well as penetration information for its packages.
19. In its 9 July 2012 response to the first letter, TELUS indicated that since 5 June 2012, TELUS has no longer been marketing the “Large” bundle on its website for Optik TV. It also stated that it had ceased highlighting fixed theme packages as part of the “Medium” bundle on its website and began enabling customer service representatives to swap theme packages offered as part of the “Medium” bundle, thereby providing for full customization of the Optik TV purchasing options. TELUS further indicated that its marketing of Optik TV in the past 18 months has been focussed on the features available with Optik TV, as opposed to marketing the programming and theme packages available.
20. In its 10 August 2012 response to the second letter, TELUS indicated that changes were made to the names of its bundles just days after its above-noted 9 July 2012 response. It noted that the newly created “Large” bundle replaced the former “Your Pick HD” bundle and, therefore, that no changes were made to the packaging structure of this bundle when compared to that shown in its 9 July 2012 response. TELUS also noted that a “Medium” bundle currently exists as well.

OUTtv Network’s reply to the new information from TELUS

21. In its reply of 15 August 2012 to the new information provided by TELUS, OUTtv Network submitted that the “Lifestyle” package is promoted explicitly by TELUS as the default offering to consumers within both the “Large” and “Medium” bundle offerings, while “Lifestyle Extra” is not.

Commission’s analysis and decisions

22. When examining a complaint alleging undue preference or disadvantage, the Commission must first determine whether a licensee has given a preference or subjected another person to a disadvantage. If the Commission finds that a preference

has been given or a person has been subjected to a disadvantage, it must then determine whether, under the circumstances, that preference or disadvantage is undue.

23. In order to determine whether a preference or disadvantage is undue, the Commission examines whether the preference or disadvantage had, or could have, a material adverse impact on the complainant or any other person, and the effect that the preference or disadvantage had, or will have, on the achievement of the Canadian broadcasting policy objectives set out in the *Broadcasting Act* (the Act).
24. Under section 9(2) of the Regulations, once a complainant has demonstrated that a preference has been given or that a person has been subjected to a disadvantage, the burden of demonstrating that such preference or disadvantage is not undue rests with the licensee having given the preference or subjected another person to a disadvantage.

Relevant policy framework

25. The Commission has considered OUTtv Network's complaint in light of relevant policy objectives, which include the following:
 - section 3(1)(d)(ii) of the Act, which states that the Canadian broadcasting system should encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view;
 - section 3(1)(d)(iii) of the Act, which states that the Canadian broadcasting system through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society;
 - section 3(1)(t)(ii) of the Act, which states that distribution undertakings should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost; and
 - section 3(1)(t)(iii) of the Act, which states that distribution undertakings should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services.

26. The Commission has also considered the complaint in light of the general objectives and guidelines for commercial arrangements between BDUs and programming undertakings as set out in the Code of Conduct. The relevant passages applicable to the present dispute read as follows:

- Clause 4 – An independent Category A programming service should, unless the parties agree otherwise, be included in the best available package consistent with its genre and programming.
- Clause 6 – A programming service should be given comparable marketing support by the BDU as is given to similar or related services.

27. While Category A services are generally required to be carried by BDUs and offered to consumers in packages before being offered on a stand-alone basis, matters of packaging terms and conditions have generally been left to market negotiations between BDUs and operators of programming services. In recent years, the Commission has liberalized certain aspects of packaging in order to give BDUs greater flexibility in the manner in which they create and offer their packages in order to respond to consumer demand.

Is there a preference or disadvantage?

28. The first issue that must be addressed by the Commission is whether TELUS's packaging and marketing of OUTtv has subjected OUTtv Network to a disadvantage or has given a preference to operators of other programming services.

Packaging

29. TELUS has placed OUTtv in the "Lifestyle Extra" package, which experiences a significantly lower penetration rate than that for other theme packages it offers, in particular, the "Lifestyle" package. The Commission considers that TELUS's placement of OUTtv in the "Lifestyle Extra" package has had a negative impact on OUTtv's revenues when compared to revenues of programming services that are placed in the "Lifestyle" package. The Commission therefore finds that, in regard to the packaging of OUTtv, TELUS has subjected OUTtv Network to a disadvantage and has given operators of the programming services placed in the "Lifestyle" package a preference.

Marketing

30. Prior to 5 June 2012, TELUS marketed its "Lifestyle" package as part of the "Large" bundle offered to Optik TV subscribers. As noted above, prior to February 2012, it was marketed in the "Medium" bundle as well. As for the "Lifestyle Extra" package, it was not marketed as part of either bundle.

31. TELUS made changes to its marketing approaches for its theme-based packages in June and July 2012, after OUTtv Network filed its complaint. As a result of these changes, neither the "Medium" bundle nor the "Large" bundle is marketed to include,

by default, the “Lifestyle” package. However, TELUS’s website offers consumers specific recommendations for theme packages for each of the “Large” and “Medium” bundles under the “We suggest” drop down menu. Under this website display, the “Lifestyle” package is recommended for both bundles, while the “Lifestyle Extra” package is not recommended for either bundle.

32. In the Commission’s view, the penetration numbers filed by TELUS for this proceeding demonstrate that a large number of its customers subscribe to the “Medium” bundle, and a smaller but significant number of customers subscribe to the “Large” bundle. The Commission therefore considers that TELUS’s marketing of the “Lifestyle” package within the “Medium” or “Large” bundles, whether as default inclusions or suggestions on the website, gives the services that are included in the “Lifestyle” package an advantage or preference when compared to the services included in the “Lifestyle Extra” package, a package that includes OUTtv.
33. In light of the above, the Commission finds that TELUS, in its marketing of the “Lifestyle” and “Lifestyle Extra” packages, has subjected OUTtv Network to a disadvantage and has given operators of the programming services placed in the “Lifestyle” package a preference.

Are the preference and disadvantage undue?

34. In determining whether the disadvantage and preference are undue, the Commission has examined whether the packaging and marketing of OUTtv have had, or are likely to have, a material adverse impact on OUTtv Network, or on any other person. It has also examined the impact that the packaging and marketing of OUTtv have had, or are likely to have, on the achievement of the Canadian broadcasting policy objectives. The Commission has taken into account clauses 4 and 6 of the Code of Conduct in its consideration of these impacts.

Packaging

35. In addition to sharing the “Lifestyle” moniker, the “Lifestyle” and “Lifestyle Extra” packages, as noted above, are similar in that they both include the same number of programming services as well as the same composition of Category A services (including independent Category A services) and Category B services. Despite these similarities, TELUS argued that the two packages can be distinguished based on characteristics of the programming in regard to theme or genre. However, the Commission considers that TELUS did not provide sufficient evidence, on a service-by-service basis, to establish that the “Lifestyle” and “Lifestyle Extra” packages constitute separate genres for the purpose of clause 4 of the Code of Conduct. The Commission is therefore of the view that both the “Lifestyle” and “Lifestyle Extra” packages would be consistent with OUTtv’s “genre and programming.”
36. As noted above, the Commission’s general policy approach has been to leave matters of packaging terms and conditions to market negotiations between BDUs and operators of programming services and to give BDUs greater flexibility to respond to consumer demand. At the same time, the Commission has recognized the important

role of independent Category A services in the Canadian broadcasting system and the need for additional regulatory safeguards to address potential anti-competitive actions they may face, particularly with respect to their carriage on vertically integrated entities.

37. The Commission notes that TELUS is not a vertically integrated entity, and therefore considers that it has not packaged OUTtv with a view to favouring its own programming services. In addition, OUTtv Network's complaint was not prompted by a specific packaging change by TELUS, since OUTtv has been in the "Lifestyle Extra" package since being offered on Optik TV in 2009.
38. The Commission further notes that the "Lifestyle" and "Lifestyle Extra" packages are similarly constituted, each having the same number of services overall and the same number of independent Category A services, all within the same theme. It is important to note that both packages are available to TELUS's customers at the same price. The Commission therefore considers that OUTtv Network's complaint rests solely on the discrepancy in the relative penetration levels of the packages.
39. The Commission acknowledges that TELUS's packaging of OUTtv in the lower penetration "Lifestyle Extra" package has had a material adverse impact on OUTtv Network's revenues. However, the Commission considers that, in the circumstances, the fact that the "Lifestyle" package has a higher penetration rate than the "Lifestyle Extra" package is insufficient in and of itself to support a finding that the preference and disadvantage caused by the packaging of OUTtv are undue or that OUTtv has not been placed in the "best available package" in accordance with clause 4 of the Code of Conduct, as claimed by OUTtv Network. Requiring TELUS to place OUTtv in the "Lifestyle" package in the circumstances would unreasonably undermine TELUS's overall packaging flexibility and lead to less choice for consumers. The Commission is of the view that this outcome would be contrary to the achievement of sections 3(1)(t)(ii) and 3(1)(t)(iii) of the Act.
40. Further, the Commission considers that the differing penetration levels of packages should not be sufficient in and of itself to sustain a finding of undue preference or disadvantage. Such an interpretation could lead to the placement of all independent Category A services in the most highly penetrated packages, which would run contrary to the Commission's above-noted policy objectives.
41. In light of the above, the Commission is unable to find that either the preference or the disadvantage regarding the packaging of OUTtv in the "Lifestyle Extra" package is undue and contrary to section 9 of the Regulations.

Marketing

42. As noted above, the Commission considers that TELUS's marketing of the "Lifestyle" package within "Medium" and "Large" bundles, which it has not done for the "Lifestyle Extra" package, has had a significant impact on the relative popularity of the packages, and thus on OUTtv Network. While TELUS's recent changes to its marketing approaches, including giving its consumers the express ability to swap

theme packages within the bundles, appear to be a step in the right direction, the Commission considers that TELUS has not gone far enough in its marketing of the “Lifestyle Extra” package to address the effects of the historical marketing preferences offered to services in the “Lifestyle” package.

43. Furthermore, the Commission considers that TELUS continues to maintain an uneven playing field between the two packages since its website currently recommends the “Lifestyle” package for both the “Medium” and “Large” bundles, whereas the “Lifestyle Extra” package is not recommended in either bundle. Although TELUS submitted that it would provide considerable marketing support to help create awareness of OUTtv in the GLBT community, the Commission is not aware of any measures that TELUS has actually taken in this regard.
44. More importantly, the Commission considers that the overall marketing of independent Category A services, and of OUTtv by TELUS in the present case, should ensure that these services have a reasonable opportunity to be exposed to subscribers. In an ever changing broadcasting environment where there is an increased demand by consumers for greater choice of services and flexibility of packages to which they subscribe, the equality of opportunity to be marketed in an appropriate manner is vital to the future success of these Canadian services in furtherance of sections 3(1)(d)(ii) and 3(1)(d)(iii) of the Act.
45. Similarly, the Commission considers that the objectives set out in sections 3(1)(t)(ii) and 3(1)(t)(iii) of the Act are advanced when BDUs afford a fair opportunity for a programming service to compete and succeed in the marketplace through appropriate marketing initiatives. The Commission considers that TELUS’s marketing of OUTtv as part of the lower penetration “Lifestyle Extra” package has also failed in this regard.
46. In light of the above, the Commission concludes that TELUS has not provided OUTtv with marketing support comparable to that provided to other similar services, namely, those offered in the “Lifestyle” package, in a manner consistent with clause 6 of the Code of Conduct. The Commission also concludes that TELUS’s failure to market OUTtv in a manner comparable to that for other similar services has had, and is likely to continue to have a material adverse impact on OUTtv Network and a negative impact on the achievement of the Canadian broadcasting policy objectives, as set out above. The Commission therefore finds that, in regard to the marketing of OUTtv, TELUS has subjected OUTtv Network to an undue disadvantage and has given an undue preference to operators of the services in the “Lifestyle” package, contrary to section 9 of the Regulations.
47. Accordingly, the Commission directs TELUS to file a detailed plan by no later than **8 February 2013** demonstrating how it will remedy this undue disadvantage and preference. More specifically, the Commission directs TELUS to file a detailed marketing plan that highlights how it intends to market OUTtv and/or the “Lifestyle Extra” package, including the amount of financial support it will provide for the promotion of OUTtv and/or the “Lifestyle Extra” package.

Secretary General

Related documents

- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011
- *Complaint by 6166954 Canada Inc., licensee of OUTv, against Shaw Cablesystems Ltd. pursuant to section 9 of the Broadcasting Distribution Regulations*, Broadcasting Decision CRTC 2008-299, 4 November 2008
- *PrideVision – a new specialty channel*, Decision CRTC 2000-456, 14 December 2000

**This decision is to be appended to the licence.*