



Broadcasting Public Notice CRTC 2004-62

Ottawa, 13 August 2004

Changes to the winback rules for broadcasting distribution undertakings

The Commission announces its determination to retain winback rules, and introduces additional winback rules to govern the conduct of incumbent broadcasting distribution undertakings with 6,000 or more subscribers in their dealings with residents of multiple-unit dwellings. A dissenting opinion by Commissioner Langford is attached to this notice.

Background

1. In a letter decision dated 1 April 1999, the Commission established rules (the winback rules) that prohibit the targeted marketing by incumbent cable companies of customers who have cancelled basic cable service. These rules require incumbent cable companies to refrain, for a period of 90 days, from:
 - directly contacting customers who, through an agent, have 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 initiate contact with the cable company for the purpose of cancelling basic cable service.
2. On 28 October 2002, the Canadian Cable Television Association (CCTA) filed a request, on behalf of its member companies, asking that the Commission eliminate the winback rules restricting communication between customers and incumbent cable companies.
3. In *Call for comments on proposed changes to the winback rules for broadcasting distribution undertakings*, Broadcasting Public Notice CRTC 2003-21, 25 April 2003 (Public Notice 2003-21), the Commission established a two-stage process seeking public comment on the winback rules, the CCTA's proposal, and other possible revisions to the rules.

Overview of comments

The CCTA's position

4. In addition to its initial request of 28 October 2002, the CCTA also submitted comments in both phases of the proceeding established in Public Notice 2003-21. According to the CCTA, maintaining the winback rules in the current environment may interfere with the normal functioning of competitive market forces and prevent consumers from receiving the full benefits of competition.

5. The CCTA argued that the Commission's rationale for the winback rules was tied to transitory market conditions, specifically, the dominant position of incumbent cable broadcasting distribution undertakings (BDUs) relative to the position of new entrants, that could be expected to diminish as competitive forces gained strength. It argued further that the state of competitive entry in the broadcasting distribution market has changed substantially since the winback rules were established in 1999. Specifically, the CCTA noted that the market share of competing BDUs has risen significantly and that incumbent cable companies have seen a corresponding decrease in the total number of customers they serve and in their market share. According to the CCTA, in 1999, cable companies served an aggregate of 8 million customers, or 93% of the BDU market. It indicated that, by 2002, this total had dropped to 7.5 million customers, a number equal to only 79% of all BDU customers.
6. The CCTA submitted that, collectively, the BDUs it described as "once new entrants" now serve more than 2.1 million customers in Canada, and that direct-to-home (DTH) satellite BDUs alone serve more than 2 million of these customers and have a market share of 20%. The CCTA also noted that the DTH BDUs operated by 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 (ExpressVu) and by Star Choice Television Network Incorporated (Star Choice) are now, respectively, the fourth and sixth largest BDUs in Canada.
7. The CCTA noted that one of the reasons cited by the Commission for its decision to establish the winback rules was that new entrants did not have the critical mass of historical customer information that incumbent cable companies possess. The CCTA submitted that, as a result of their increased market share, competitors now have access to a volume of customer data comparable to that possessed by the larger cable BDUs. It added that, since 1999, the four largest incumbent cable companies have established customer service groups (CSGs) for the purpose of isolating competitively sensitive customer/competitor information from their sales and marketing groups. The CCTA argued that the CSGs provide an adequate safeguard and address concerns about the use of competitively sensitive information obtained from competing licensees.

Quebecor Media Inc. and Mountain Cablevision Limited

8. Quebecor Media Inc. (Quebecor) and Mountain Cablevision Limited (Mountain) supported the CCTA's proposal to eliminate the winback rules. Quebecor argued that, over the five years that the winback rules have been in place, the broadcast distribution market has completely changed and that competition in broadcasting distribution is now a "fait accompli." Mountain noted that smaller and medium-sized cable companies face a competitive disadvantage relative to the national DTH BDUs with respect to the resources available to them for advertising their respective services.

ExpressVu, VDN Cable Inc. and Look Communications Inc.

9. ExpressVu, VDN Cable Inc. (VDN) and Look Communications Inc. (Look) opposed elimination of the winback rules. VDN considered that the winback rules continue to play an important role in the preservation of a competitive broadcast distribution market. VDN stated that the 90-day window provided by the winback rules allows customers the opportunity to sample the new entrant's services, and permits the new entrant to establish a presence in a particular location and to recover some of its initial investment.
10. ExpressVu argued that the CCTA, in making its case for elimination of the winback rules, had significantly overstated the market share of new entrants. Among other things, ExpressVu considered that Canadian DTH subscribers who reside in areas not served by cable BDUs should not be counted when comparing the market shares of new entrants and incumbents. ExpressVu considered that approximately half of the current 2.1 million DTH subscribers reside in areas that are not served by cable.
11. In their comments, Look and VDN focused on the continuing need for winback rules that place limits on the targeted marketing by incumbent cable companies of the customers of smaller new entrants, particularly customers of those new entrants that focus on the provision of service to multiple-unit dwellings (MUDs). Look discussed how the smaller new entrants still face significant challenges in establishing a market foothold due to the high level of investment required to serve MUDs and the ability of incumbents to target mass marketing promotions to residents of MUDs.
12. ExpressVu, VDN and Look each suggested that incumbent cable companies, upon becoming aware that a new entrant has been granted access to a MUD, frequently offer free services, discounts or other inducements to MUD residents that they do not generally offer to the public. According to ExpressVu, cable BDUs often use sales teams to canvass door-to-door in MUDs with offers designed to induce residents to sign long-term contracts, thereby removing such residents as potential subscribers to the service of the new entrant. ExpressVu added that a cable company does not need Commission authorization to reduce prices or offer bundled services.
13. VDN argued that cable companies use their dominant market presence in this manner to keep new entrants from establishing a foothold in MUDs. VDN recommended that the 90-day restriction against making offers not generally available to the public stipulated in the winback rules should apply to all residents of a MUD, beginning on the date that a new entrant introduces service to that MUD.

Possible modifications to the winback rules

14. In Public Notice 2003-21, the Commission asked parties to comment on potential alternatives or modifications to the winback rules, including (1) decreasing the 90-day time period; (2) applying the rules only to licensees that meet certain criteria; and (3) establishing different winback rules with respect to residents of MUDs as opposed to residents of single-unit dwellings (SUDs).

15. The CCTA considered that there was no basis for retaining any winback restrictions on the activities of incumbent cable companies, regardless of the market or the type of dwelling concerned. It noted that the Commission did not make such distinctions when it lifted the winback restrictions in the long-distance telephony market. Quebecor expressed a preference for the status quo over any rule that would introduce a greater degree of complexity.
16. Generally, parties who opposed eliminating the winback rules did not provide detailed suggestions as to how these rules might be relaxed. Most either preferred the status quo or proposed even more stringent winback rules than those currently in place.

The CCTA's reply comments

17. In its reply comments, the CCTA argued, among other things, that ExpressVu had provided no evidence to substantiate its assertion that approximately fifty percent of DTH subscribers are outside the service areas of the incumbent cable companies. The CCTA also submitted that there is no reason to impose additional regulatory constraints on MUDs, since the Commission, through its policies and regulations, has adequately addressed the specific issues regarding the provision of competitive services in MUDs. The CCTA further contended that VDN's suggestion that the Commission apply the winback restrictions to all residents of a MUD for a period of 90 days after a competitor begins offering service in a MUD, would represent an unreasonable and unwarranted expansion of the winback restrictions.

The Commission's analysis and determinations

Winback rules in MUDs

18. The Commission considers that there has been significant progress towards greater competition in the broadcasting distribution market since the issuance of the winback rules in 1999. Competitive BDUs, particularly DTH operators, are making inroads into the distribution market.
19. Notwithstanding the gains made by new entrants, the Commission considers that discontinuation of winback rules at this time might have a negative impact on continued progress toward a sustainable competitive market. The Commission is particularly concerned that the complete removal of the winback rules at this time would have a disproportionate, detrimental effect on non-DTH competitors, who have achieved far lower penetration levels than DTH BDUs.
20. The Commission considers that all Canadians, including those residing in MUDs, are entitled to end-user choice. The Commission therefore notes the concerns expressed by new entrants regarding their ability to penetrate MUDs effectively, especially in urban markets, and the marketing practices of incumbents in such buildings. The Commission considers that it is in the MUD market, particularly in the larger urban areas, where new entrants continue to face obstacles to acquiring new customers and where a truly competitive market has yet to emerge. The MUD market is of particular importance to

BDUs because of its significant revenue potential and the cost efficiencies associated with serving a large number of customers in a concentrated location using a minimum amount of resources. Given the size of the MUD market and the potential cost efficiencies described above, the Commission is of the view that the obstacles faced by new entrants in this market have a significant, negative impact on them, and that these obstacles must be removed before a truly competitive market can emerge.

21. Based on the record of this proceeding, the Commission has determined that the winback rules should continue to apply to incumbent cable companies with respect to their dealings with individual customers who reside in MUDs. The Commission has further determined that, for the purposes of the winback rules, a MUD should be defined as a building with at least two units, at least one of which is occupied by a tenant.
22. Further, the Commission has been persuaded by the arguments of parties that, in the case of MUDs, the development of competition among distributors has been hindered by the practices of incumbent cable BDUs who, having learned that a new entrant has been granted access to a MUD, and before the new entrant has commenced operations, offer residents free services, discounts or other inducements not generally offered to the public. This is also an issue that new entrants have raised in complaints to the Commission over the last four years.
23. The Commission therefore considers it appropriate to introduce a rule to address an incumbent's mass marketing of a MUD to which a new entrant has gained access. Accordingly, incumbent cable companies are prohibited 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. Moreover, the Commission henceforth requires incumbent cable companies to refrain from the targeted marketing of all residents of a MUD, or from offering them discounts or other inducements not generally available to the public¹, 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. In order to facilitate this, the Commission requires a new entrant, on the date that it enters into an access agreement with a MUD, to inform the incumbent BDU of that fact and to provide, at a minimum, the address of the MUD in question.
24. The Commission notes that the customer-specific winback rules will continue to apply to incumbents in respect of an individual MUD resident signed up by a new entrant. Thus, in respect of MUD residents, winback rules could be in effect for two, 90-day periods. Where, however, a new entrant signs up a MUD resident during the 90-day period in which the MUD-specific winback rule is in effect, the 90-day period specified in the existing customer-specific winback rules will begin on the sign up date. Thus, if a new entrant signs up a MUD resident on day 10 of a MUD-specific winback period, then the winback period for that customer would run for 100 days in all.

¹ In *Complaint by Cablevision TRP-SDM Inc. against Cogeco Cable Inc. alleging contraventions of section 9 of the Broadcasting Distribution Regulations*, Broadcasting Decision CRTC 2004-4, 14 January 2004, the Commission stated its view that "generally available" offers should be broadly communicated.

25. The Commission is of the view that the amended winback rules will give new entrants the time they need to establish themselves in particular MUDs, and thus the opportunity to recoup their initial investments and to compete with the incumbent. This would assist entrants in establishing a better foothold in urban areas, and contribute to the development of a truly competitive market in those areas.

Winback rules in SUDs

26. The Commission considers it appropriate at this time to eliminate the winback rules as they pertain to customers in SUDs. The Commission finds that new entrants are generally better established in the SUD market than they are in the MUD market, and that the SUD market is more competitive. In the Commission's view, this is due in part to the significant upfront hardware and installation costs incurred by subscribers to DTH or MDS services, which has tended to reduce the incidence of churn in the SUD market. The Commission will accordingly no longer require incumbent cable companies to adhere to winback rules with respect to customers who reside in SUDs.

Exempt cable systems

27. In its submission in response to Public Notice 2003-21, ExpressVu noted that the Commission has never publicly ruled on whether the winback rules apply to exempt cable systems. The Commission confirms that the winback rules do not apply to cable systems that are or will be exempted pursuant to *Exemption order for small cable undertakings* issued as Appendix 1 to *Exemption order respecting cable systems having fewer than 2,000 subscribers*, Public Notice CRTC 2001-121, 7 December 2001, or to *Exemption order respecting cable broadcasting distribution undertakings that serve between 2,000 and 6,000 subscribers* issued as Appendix A to *Exemption order respecting cable broadcasting distribution undertakings that serve between 2,000 and 6,000 subscribers; and Amendment to the Broadcasting Distribution Regulations*, Broadcasting Public Notice CRTC 2004-39, 14 June 2004.

Cable systems with under 6,000 subscribers

28. The Commission notes that smaller cable BDUs have generally experienced greater subscriber losses than larger cable BDUs as the result of competition from new entrants, particularly DTH providers. In light of the difficulties that these smaller licensed cable systems face in competing with larger new entrants, the Commission has decided that licensed Class 2 and Class 3 incumbent cable systems that have fewer than 6,000 subscribers will no longer be subject to the winback rules.

Secretary General

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Dissenting opinion of Commissioner Stuart Langford

I disagree with the majority's decision to maintain existing winback restrictions on incumbent cable companies in multiple unit dwellings (MUDs) and to place new limits on the marketing of cable company products in those MUDs. Continuing to restrict the sales force of one type of enterprise in an intensely competitive market is simply unfair. To then burden cable companies with further marketing prohibitions when the problem the majority appears to be trying to remedy is access to MUDs not the retention of existing customers, is puzzling, to put it kindly.

Times have changed

In the earliest days of nurturing competition in a monopoly environment, regulatory interference may be a defensible strategy. Once a competitive marketplace has matured, however, regulators are well advised to mature with it, to resist the temptation to micro-manage, and instead, to stand aside and let consumers choose. The nascent stage has long since passed in the development of a competitive broadcasting distribution undertaking (BDU) marketplace in Canada. So too has the need to nurture new entrants.

Direct-to-home (DTH) satellite BDUs, Bell ExpressVu and Star Choice, now serve more than two million customers. Many of those customers, because no cable passes their homes, are served on a virtual monopoly basis as far as competition from cable BDUs is concerned. Canada's two satellite DTH companies have come a long way since they first struggled to cut out a piece of the distribution market for themselves. Today, they are forces to be reckoned with, ferocious competitors owned by well established parent companies with deep pockets. They do not require special assistance and nurturing. Perhaps they never did. It is past time for the Commission to stand aside and let the market decide.

Two steps backwards

Clearly, this is not the majority's position; it has decided not merely to maintain outdated existing MUD winback rules but to further interfere with market forces by adding a new layer of regulation. In my view, the majority has taken two steps backwards, a move in precisely the wrong direction. The effect is far more likely to be an increase in applications to the Commission for clarification and dispute resolution than a furtherance of the Commission's long-stated competitive agenda.

Oops, wrong problem

By the majority's own assessment (a conclusion with which I do not agree) the problem facing newer competitors is not customer retention but building access. To quote the majority, "new entrants" cannot "penetrate MUDs effectively". (paragraph 20) Having identified access as the problem, however, the majority offers a solution, marketing restrictions, that has nothing to do with access. The majority's new restrictions won't get

a competitor through the door, as it were; they simply limit “an incumbent’s mass marketing of a MUD to which a new entrant has gained access.” (paragraph 23) It is like identifying starvation as a problem and then offering to supply indigestion remedies to anyone lucky enough to obtain food.

Best made plans

Over the years, the Commission has gone to considerable lengths to facilitate the entrance into the Canadian market of BDU competitors to cable companies. DTH satellite signal providers have been particularly singled out for assistance, with such advantages as asymmetrical regulations regarding the carriage of local signals and new rules designed to facilitate access to MUDs. The hope was that competition would lead to advantages for consumers and the broadcasting system as a whole.

Things have not worked out as planned. Unregulated prices have gone up. Consumers are paying more no matter what type of distribution system they choose. As for the system as a whole, too many local broadcasters find themselves in dire economic straits as the viewers they once served are lured away by distant signals beamed into their homes via satellite. Satellite DTH providers see access to big city high-rises as the ultimate pot of gold at the end of the competitive rainbow. Perhaps they are correct. While the battle to seize the pot of gold plays itself out, however, the fundamental question remains: When if ever will the benefits to consumers and the Canadian broadcasting system as a whole begin to kick in?

In my view, the majority, by maintaining existing restrictions of dubious value, and tacking on new poorly targeted rules, will do nothing to advance the competitive agenda in any meaningful way. If with all the regulatory coddling they have already received DTH providers cannot sell enough of their products to prosper, then the need for rethinking fundamentals very likely lies in their commercial not the Commission’s regulatory arena.