



## Broadcasting Decision CRTC 2005-188

Ottawa, 5 May 2005

### **Complaint by MTS Allstream Inc. regarding distribution of discretionary services as part of the “digital basic” package offered by certain Shaw cable systems**

*In this decision, the Commission considers a request by MTS Allstream Inc. (MTS) for the issuance of an expedited mandatory order pursuant to section 12(2) of the Broadcasting Act. The order would require broadcasting distribution undertakings owned and operated by Shaw Cablesystems (SMB) Limited and Videon CableSystems Inc. (collectively, “Shaw”) to cease and desist the distribution of certain discretionary services as part of what Shaw has characterized as its “digital basic” package of services on the grounds that such distribution is contrary to the Commission’s distribution and linkage rules (D&L Rules).*

*The Commission finds that Shaw’s distribution of the services in question, although not expressly provided for in the D&L Rules, is consistent with the purpose of those rules. Accordingly, the Commission **denies** MTS’ request for the issuance of a mandatory order and also dismisses the complaint. The Commission has also issued Call for comments on proposed amendments to the distribution and linkage rules in response to issues raised in Broadcasting Decision CRTC 2005-188, Broadcasting Public Notice CRTC 2005-44, of today’s date, which seeks comments on potential amendments to the D&L Rules that reflect this decision.*

#### **The complaint**

1. In a letter dated 17 August 2004, MTS Allstream Inc. (MTS) alleged that broadcasting distribution undertakings (BDUs) owned by Shaw Cablesystems (SMB) Limited and Videon Cablesystems Inc. (collectively, “Shaw”) in and around Winnipeg, Manitoba, have been offering certain discretionary services as part of a “digital basic” package. The services identified by MTS are the Canadian pay television service Family Channel and the U.S. superstations KTLA Los Angeles, WGN-TV Chicago, WPIX New York City, and WSBK-TV Boston. With its complaint, MTS provided copies of a brochure describing bundles of services offered by Shaw. The brochure indicates that, upon rental or purchase of a digital set-top box (DSTB), customers may subscribe to a bundle of services that includes the above-noted programming services as part of what Shaw has characterized as its digital basic package of services.

2. MTS contended that this service offering is contrary to the distribution and linkage rules (D&L rules) that apply to Class 1 and Class 2 BDUs under section 20(1)<sup>1</sup> of the *Broadcasting Distribution Regulations* (the Regulations). In particular, paragraph 12 of the D&L rules pertaining to services distributed on a digital basis requires that, where a licensee distributes any of the services in question, “the licensee is required to distribute that service exclusively as a discretionary service.” MTS argued that, since the services identified by MTS are received by all subscribers to Shaw’s digital basic package without a specific fee therefor, they are not distributed on a “discretionary” basis.
3. MTS requested that the Commission issue an expedited mandatory order pursuant to section 12(2) of the *Broadcasting Act*, ordering the Shaw BDUs in question to cease and desist distribution of the Family Channel and U.S. superstations as part of their digital basic package of services.

### **Shaw’s position**

4. Shaw did not dispute that it provides the services identified by MTS to all subscribers to its digital packages, but argued that this practice does not contravene the D&L rules. In its view, this manner of distribution is a consumer-friendly initiative intended to increase the penetration of its digital offerings.
5. Shaw noted that it operates hybrid analog-digital cable systems in the Winnipeg area and that, like other hybrid systems, these systems offer a basic service on an analog basis to all subscribers. When customers wish to receive digital services, they must first purchase the analog basic service and then purchase or rent a DSTB. Subscribers who opt to upgrade their service in this manner receive the services identified by MTS, as well as digital music channels and access to pay-per-view and video-on-demand services. Shaw indicated that the cost associated with providing these additional discretionary services to digital subscribers is incorporated into the fee for the rental of a DSTB. In Shaw’s view, the services identified by MTS are actually distributed as discretionary services since they are not part of its basic service but are offered to subscribers, at their option, for an additional fee.
6. In Shaw’s view, MTS has misunderstood or misinterpreted Shaw’s digital offerings and the Commission’s regulations. Shaw argued that it would not serve the interests of consumers or the competitive marketplace for the Commission to issue a mandatory order, as requested by MTS, and asked that the Commission dismiss the MTS complaint.

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<sup>1</sup> Section 20(1) states:

Except as otherwise provided under a condition of its licence, if a licensee distributes a programming service referred to in subsection 18(5) or paragraph 19(c), (d) or (i), the licensee shall distribute the service in accordance with the Commission's Public Notice entitled *Distribution and Linkage Requirements for Class 1 and Class 2 Licensees*, as amended from time to time.

The current distribution and linkage rules are contained in *Distribution and Linkage requirements for Class 1 and 2 licensees*, Broadcasting Public Notice CRTC 2004-56, 29 July 2004.

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

7. The Commission notes that the point of contention between Shaw and MTS in this proceeding concerns the interpretation of the term “discretionary” as it is used in paragraph 12 of the D&L rules. This paragraph appears in the section entitled “Rules regarding the distribution of programming services on a digital basis,” and reads as follows:

Except as otherwise provided under a condition of its licence, where a Class 1 licensee distributes any of the following programming services, the licensee is required to distribute that service exclusively as a discretionary service:

- a) any pay television service or any television pay-per-view service offered by a pay television undertaking;
- b) any satellite service as set out in the list of Part 2, Part 3 and DTH Eligible Satellite Services for digital distribution as well as any non-Canadian religious satellite services.

8. The Commission notes that the intended purpose of this rule is to protect subscribers to the basic service from incurring increased costs due to the inclusion of certain services as part of the basic package. To accomplish this purpose, the rule requires that these services be offered only on a discretionary basis, i.e., the subscriber may choose to incur additional costs in order to receive these services, but these costs are not imposed on the subscriber who wishes to receive only the basic service.

9. The term “discretionary” is used in both the D&L rules and the Regulations in contradistinction to the term “basic service”; that is, a discretionary service is defined as a service that is not part of the basic service. Section 1 of the Regulations defines the basic service as follows:

the services distributed in a licensed area by a licensee as a package consisting of the programming services the distribution of which is required under sections 17, 22, 32 or 37, or a condition of its licence, and any other services that are included in the package for a single fee.

10. In comparison, section 1 of the Regulations defines a “discretionary service” as follows:

a programming service that is not included in the basic service and that is distributed to subscribers on a discretionary basis for a fee separate from and in addition to the fee charged for the basic service.

11. The Commission notes that Shaw does, in fact, offer a basic service on an analog basis that is provided to all subscribers. The services at issue in this proceeding are available to all subscribers who rent or purchase a DSTB.
12. With respect to those subscribers who rent a DSTB, the rental fee is a fee that is separate from and in addition to the fee charged for the basic service. While this fee is not entirely attributable to the services in question, this fee does distinguish these services from those offered as part of the basic service and is separate from and in addition to the fee charged for the basic service, in accordance with section 1 of the Regulations. Accordingly, the Commission considers that, in this case, the services in question generally meet the definition of a “discretionary service” contained in the Regulations.
13. Subscribers who purchase rather than rent a DSTB also pay a fee (i.e., in the form of the purchase price of the DSTB) to access these services that is separate from and in addition to that paid for the basic service. Since the fee paid by the subscriber is a one-time fee, it is not directly linked to the on-going provision of the services in question and does not clearly distinguish these services from those provided as part of the basic service.
14. However, as noted above, the rule in paragraph 12 was instituted, in part, to prevent increases in the cost of the basic service for subscribers due to the inclusion of the services it addresses as part of the basic service. In the case of Shaw’s offering, subscribers do not incur additional costs for the basic service as a result of the manner of Shaw’s distribution of the services at issue in this complaint. Further, the fact that a subscriber may receive Shaw’s basic service and choose not to purchase or rent a DSTB – and thereby choose not to gain access to the services in question – indicates that the subscriber retains discretion with respect to the reception of these services.
15. The Commission considers that Shaw’s discretionary distribution of the services at issue, although not expressly provided for in the D&L rules, is consistent with the purpose of the paragraph 12 rule. Consequently, the Commission is of the view that no purpose would be served by taking action with respect to Shaw’s distribution of these services. Accordingly, the Commission **denies** MTS’ request for a mandatory order with respect to the distribution of these services and dismisses the complaint.
16. With regard to Shaw referring to the services in question as being part of a “digital basic” package, the Commission considers this to be a marketing rather than a regulatory matter.

17. Nevertheless, the arguments raised by MTS indicate that the clarity of the rule, as currently drafted, could be improved to better reflect its intended purpose. The Commission has therefore issued *Call for comments on proposed amendments to the distribution and linkage rules in response to issues raised in Broadcasting Decision CRTC 2005-188*, Broadcasting Public Notice CRTC 2005-44, of today's date, which seeks comment on potential amendments to the D&L Rules designed to remove any ambiguity that may exist in the definition of "discretionary" as it applies to the relevant sections of those Rules, and to ensure that they properly reflect the Commission's policy.

Secretary General

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