



## Broadcasting Decision CRTC 2005-497

Ottawa, 18 October 2005

**Rogers Cable Communications Inc.**  
Across Canada

*Application 2004-1420-2*  
*Broadcasting Public Notice CRTC 2005-40*  
*29 April 2005*

### **Rogers on Demand – Licence amendments**

*In this decision, the Commission **approves** an application by Rogers Cable Communications Inc. (Rogers) for amendments to the conditions of licence of its national video-on-demand programming undertaking known as Rogers on Demand. The amendments permit the licensee to offer programming that includes commercial messages. The commercial messages are restricted to those contained in programs previously broadcast by other Canadian programming undertakings. The programs must be obtained by Rogers under the terms of written agreements with the licensees of those Canadian programming undertakings, and be offered on an on-demand basis at no charge to digital subscribers.*

### **The application**

1. Rogers Cable Communications Inc. (Rogers) is the licensee of a national, English- and French-language, video-on-demand (VOD) programming undertaking known as Rogers on Demand (ROD). It is a wholly owned subsidiary of Rogers Communications Inc. (RCI). Rogers currently obtains some of its programming from programming services operated by various Canadian broadcasters, including CHUM Limited, the Canadian Broadcasting Corporation, and Global Television Network Inc.<sup>1</sup> (Global), and provides it to subscribers at no charge as part of its VOD offering.
2. One of Rogers' conditions of licence reads as follows:

The licensee shall adhere to the *Pay Television Regulations, 1990*, with the exception of section 4 (logs and records).
3. The *Pay Television Regulations, 1990* (the Regulations) prohibit licensees that are subject to these Regulations from distributing any commercial message. Rogers argued that the requirement that it remove commercial messages from the programming made available to it by Canadian program providers increases its operating costs. Rogers also claimed that the only incentive that Canadian broadcasters might have to continue to

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<sup>1</sup> On 1 September 2005, Global Television Network Inc., Global Communications Limited, CanWest Media Inc. and certain other affiliated corporations amalgamated to continue as CanWest MediaWorks Inc.

provide programming to ROD for distribution to subscribers free of charge is the extended visibility that their advertising clients would receive from retention in the VOD programming of the commercial messages that were included within the programs when they were originally broadcast. Accordingly, the licensee proposed an amendment to the condition of licence set out above that would relieve it of the requirements of section 3(2)(d) of the Regulations which prohibits the distribution of programming that contains any commercial message.

4. Rogers indicated that it would accept the addition of a condition of licence prohibiting it from offering programs and the commercial messages they contain other than those programs that had previously been broadcast by Canadian television programming undertakings, and that are offered on an on-demand basis to subscribers at no charge.
5. Rogers argued that its proposal would serve to benefit the Canadian broadcasting system by virtue of the following:
  - the availability of free popular television programming on an on-demand basis, would offer a powerful incentive to digital cable subscribers to access ROD on a regular basis and to increase the number of titles that they purchase;
  - broadcasters would receive an additional distribution window for their programs; and
  - broadcasters, by having their advertising presented on a VOD basis, would be able to offset the costs associated with the acquisition of the VOD rights for the programming.
6. Rogers added that the presence of commercial messages in programs that were previously broadcast by Canadian television programming undertakings and offered on ROD free of charge would not unduly benefit Rogers (since no additional revenues would be directly generated by the VOD service), and would have no negative effect on other broadcasters.

## **Interventions**

7. The application by Rogers was the subject of a number of interventions, including one by the Canadian Association of Broadcasters (CAB), who submitted that approval of the application would represent a departure from the original licensing framework for VOD services. The CAB stated that the application raised this and a number of related issues that should be examined as part of Rogers' next licence renewal proceeding. According to the CAB, there may be cases where separate negotiations would be required to obtain the VOD rights to programming for distribution on an on-demand basis. It added that the commercial messages contained in the programming may "fall outside the original

timeframe for the advertising campaign and, hence, be of little value to advertisers,” and that “the advertisers may be unwilling to pay a premium for commercial messages carried in VOD programming” as VOD audience ratings cannot be captured, and thus, cannot be monetized.

8. Nevertheless, the CAB indicated that it was willing to support the application on the condition that “(i) any distribution is in accordance with the terms of an agreement entered into with the operator of the Canadian programming service which carried the original program, and (ii) that any programming that contains commercial messages is sourced from Canadian programming services only.” The CAB accordingly recommended that a condition of licence be added that would contemplate the distribution of programming supplied by both conventional and specialty services, and that would read as follows:

The licensee shall not distribute any programming containing commercial messages except where the message is already included in a program previously aired by a Canadian programming service, and where the distribution is in accordance with the terms of a written agreement entered into with the operator of the Canadian programming service which carried the original program, and where the program is subsequently offered on an on-demand basis at no charge to the public.

9. Astral Media Inc. (Astral) acknowledged the issues surrounding Rogers’ application, as outlined in the CAB’s intervention, and raised additional concerns in relation to Rogers’ application. Astral submitted that, by offering “free on demand” programming, including commercial messages, VOD services would be stepping away from their distinctive niche as transactional pay television undertakings. Astral added that, while Rogers had based its request for the amendments to its conditions of licence on the financial costs of having to delete commercial messages, the licensee did not provide any accounting of what those costs were. Astral further noted that the costs of acquiring VOD programming rights would probably not be recovered by the additional advertising revenues collected by the broadcasters providing programming to ROD.
10. Astral also suggested that the application represented an attempt “to effectively bypass the existing regulatory requirements that all licensed pay television undertakings must adhere to under the Pay Television Regulations.” It further submitted that there was a risk that VOD services would seek access to programming from affiliated programming services, but would not guarantee the distribution of the programming of unaffiliated programming services. Astral also submitted that, by denying the application, the Commission would avoid making a significant departure from its existing VOD framework, one that would, in effect, be of benefit only to vertically integrated VOD programming undertakings.

11. Quebecor Media Inc. supported the application without any change. Global and Rogers Broadcasting Limited<sup>2</sup> also supported the application subject to the applicant obtaining the written consent of broadcasters for all programming supplied to the VOD service, as had also been proposed by the CAB. Global argued that, in light of the fact that commercial messages are time sensitive and created for specific markets, and in recognition of the way in which VOD rights are negotiated, it is of paramount importance that the consent of the broadcasters be obtained. Global argued further in this regard that the content of commercial messages may not always be relevant when made available in the VOD environment.

#### **The licensee's response to interventions**

12. In its reply to interventions, Rogers stated that it would be willing to accept the condition of licence proposed by the CAB. Rogers indicated that being permitted to retain the commercial messages in the programming would remove a significant impediment to its ability to make programming from selected Canadian broadcasters available to its customers on an on-demand basis. Rogers also noted that issues, such as those raised by Global, can be dealt with in its agreements with programmers.
13. With respect to the concerns expressed by Astral and the CAB that the approval of Rogers' application would represent a significant departure from the Commission's VOD licensing framework, Rogers stated that such a departure was fully warranted, as its VOD service would continue to complement conventional and specialty services, while increasing the diversity of programming offered to its subscribers and encouraging more viewers to access VOD programming. Rogers also emphasized that approval of its application would support the transition of analog cable subscribers to digital service, and provide broadcasters with an opportunity to be more responsive to the appetite for on-demand content.

#### **Commission's analysis and determination**

14. In *Licensing of New Video-On-Demand Programming Undertakings - Introduction to Decisions CRTC 97-283 to 97-287*, Public Notice CRTC 1997-83, 2 July 1997, the Commission approved five applications for licences to carry on national VOD programming undertakings. Among other things, the Commission noted that the undertakings would be governed by the Regulations, and that they should thus "generally not be permitted to exhibit advertising material." At the same time, the Commission noted that all of the applicants had expressed "the need for maximum flexibility in designing their program offerings," and had "therefore requested authorization to exhibit all categories of programming set out in Schedule I of the pay television regulations." The Commission observed that its decisions had accommodated those requests, and it encouraged the new VOD services "to test the consumer demand for all types of programming, especially as the capacity of the video servers increases."

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<sup>2</sup> Rogers Broadcasting Limited is indirectly owned 100% by RCI and is an affiliate of the applicant. It is also licensee of two Toronto television stations and of many radio stations across Canada, and has indirect holdings in numerous specialty services.

15. In the case of Rogers' present application, the Commission agrees with the CAB and Astral that the proposed amendments would allow ROD to operate in a manner that differs from the principally movie-based transactional pay services that were originally envisaged by the Commission in its framework for the licensing of VOD undertakings. It notes, however, that the framework did contemplate according VOD undertakings a measure of flexibility to experiment with the types of programming they offer.
16. With respect to the regulatory prohibition against the distribution of commercial messages in VOD programming, the Commission notes that this prohibition initially stemmed from its concern that these and other pay services not have an undue negative impact on existing conventional broadcasters. In the present case, the Commission notes that the commercial messages included in the programs provided to Rogers by other Canadian programming undertakings would be the same as those that these other Canadian programming undertakings had originally placed in those programs. The Commission also notes that, under the proposed conditions of licence as amended by the CAB and accepted by Rogers, the latter would have to obtain the prior written agreement of the other programming undertakings before their programs, and the original commercial messages they contain, were made available as part of the ROD service.
17. Further, the Commission has considered Rogers' argument that, while the proposed amendments would not create any additional direct revenue for the licensee, nor would the licensees of the other participating programming services stand to suffer from any decline in their advertising revenue. In fact, in addition to providing a second distribution window for Canadian programs, the proposed licence amendments may result in an increase in the advertising revenue earned by these other participating programming services.
18. Although the Commission will continue to monitor and assess the evolving nature of VOD services and their role as part of the Canadian broadcasting system, it is satisfied that approval of Rogers' application for amendments to its conditions of licence, revised to reflect the modifications suggested by the CAB in its intervention and accepted by the licensee, would not represent a significant departure from the Commission's framework for the licensing of VOD undertakings. It is further satisfied that the benefits of approval, as described above, outweigh the concerns raised in interventions, notably those expressed by Astral. With specific regard to Astral's concern that vertically integrated VOD services such as ROD would obtain programming from affiliated programming services, but would not guarantee the distribution of the programming of unaffiliated programming services, the Commission notes that, under section 6.1 (1) of the Regulations, Rogers is prohibited from giving an undue preference to any person, including itself, or subjecting any person to an undue disadvantage.

19. Accordingly, the Commission **approves** the application by Rogers Cable Communications Inc. for amendments to the conditions of licence of its national VOD programming undertaking known as Rogers on Demand.<sup>3</sup> Specifically, the Commission amends the **condition of licence** pertaining to adherence to the Regulations to read as follows:

The licensee shall adhere to the *Pay Television Regulations, 1990*, with the exception of section 3(2)(d) (commercial messages) and section 4 (logs and records).

20. The Commission also adds the following **condition of licence**:

The licensee shall not include as part of its VOD offering any program containing a commercial message except where

- a) the message was already included in a program previously broadcast by a Canadian programming service;
- b) the program's inclusion as part of the VOD offering is in accordance with the terms of a written agreement entered into with the operator of the Canadian programming service that broadcast the program; and
- c) the program is offered to subscribers on an on-demand basis at no charge.

Secretary General

*This decision is to be appended to the licence. It is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*

<sup>3</sup>In *Illico sur demande – Licence amendments* Broadcasting Decision CRTC 2005-498, 18 October 2005, the Commission has approved an application by Groupe Archambeault inc. (Groupe Archambault) for amendments to the conditions of licence governing the operation of its regional VOD undertaking. In the case of both the Rogers and the Archambault application, the proposed amendments, the interventions filed in their regard, and the issues raised by the interveners, were essentially identical.