



## Broadcasting Decision CRTC 2007-411

Ottawa, 30 November 2007

**Encore Avenue Ltd.**  
Edmonton, Alberta

*Application 2007-0487-6, received 30 March 2007  
Broadcasting Public Notice CRTC 2007-63  
12 June 2007*

### **Encore Avenue – Distribution authorization**

*The Commission **approves** an application to permit one of the multiplexed program channels of the regional pay television service known as Encore Avenue to be provided on an unencrypted basis and distributed on one of the discretionary analog tiers of Shaw Communications Inc.'s cable systems serving communities in western Canada.*

### **Introduction**

1. Encore Avenue Ltd. (Encore Ltd.) filed an application for authorization to permit one of the multiplexed program channels of its regional, English-language general interest pay television programming undertaking known as Encore Avenue to be distributed on unencrypted basis on one of the discretionary analog tiers of Shaw Communications Inc.'s (Shaw) cable broadcasting distribution undertakings (BDUs) serving communities in western Canada.
2. Encore Avenue is licensed to serve western Canada on a discretionary basis. The service is offered on two channels: Encore Avenue 1 and Encore Avenue 2. Encore Ltd., the licensee company, is indirectly owned by Corus Entertainment Inc., a corporate affiliate of Shaw.
3. In Decision 94-278, Encore Avenue's original licensing decision, the Commission did not impose a specific condition of licence stipulating the service's distribution, but did indicate an expectation that the licensee, "consistent with its business plan, not ... permit its service to be offered as part of an unencrypted high penetration tier."
4. In Broadcasting Decision 2005-30, the Commission denied a previous application by Encore Ltd. to permit its pay television service to be provided on an unencrypted basis on discretionary analog tiers of BDUs. Among other things, the Commission expressed concern that approval of that application could reduce the attractiveness of digital and thereby serve as a disincentive in the deployment of digital services. The Commission also considered that an approval might allow the pay television service to compete more directly with Canadian analog specialty programming undertakings.

5. On 27 June 2006, Shaw began distributing Encore Avenue 2 on an unencrypted, discretionary analog tier of its BDUs, replacing the non-Canadian service, Consumer News and Business Channel (CNBC), which was moved to a discretionary digital tier.
6. Shaw intervened in support of the present application. CTVglobemedia, CanWest Mediaworks Inc., Allarcom Entertainment Inc. (Allarcom), the Canadian Film & Television Production Association, the Directors Guild of Canada and the Writers Guild of Canada opposed the application.
7. After considering the positions of the parties to this proceeding, the Commission finds that the relevant issues arising from the application are the following.
  - Would an approval be consistent with Encore Avenue's licence terms and other regulatory requirements?
  - Would an approval have an undue negative impact on Canadian analog specialty services?
  - Would an approval undermine the Commission's objective of encouraging the transition to digital technology?
  - Would requiring the removal of Encore Avenue 2 from its current carriage on Shaw's unencrypted discretionary analog tier be in the public interest?

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

### **Encore Avenue's licence terms and other regulatory requirements**

8. In the view of the opposing interveners, Shaw's carriage of Encore Avenue 2 on an unencrypted, discretionary analog tier is not consistent with the service's licence terms. Opposing interveners also contended that Shaw's carriage of Encore Avenue 2 was contrary to certain other regulatory requirements.
9. The Commission notes that Encore Avenue was originally licensed as an analog service pursuant to Decision 94-278. At that time, there were no digital services and BDUs typically offered only one high penetration extended basic tier. As noted above, the Commission expected that the licensee would not permit its service to be offered as part of an unencrypted high penetration tier, but did not impose a condition of licence in that regard. The Commission maintained that expectation in Decision 2005-30.
10. Opposing interveners questioned whether Shaw's distribution of Encore Avenue 2 was consistent with the Distribution and Linkage requirements for Class 1 and Class 2 BDUs set out in Broadcasting Public 2007-51 (D&L requirements). The Commission notes that the D&L requirements stipulate that analog pay television services, such as Encore Avenue, must be distributed as discretionary services. The *Broadcasting Distribution Regulations* (the Regulations) define a discretionary service as follows:

*“discretionary service”* means 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. Shaw confirmed that, while Encore Avenue 2 is distributed on an analog tier, it is not part of the basic service. Rather, Encore Avenue 2 is distributed as a discretionary service, as it is offered to subscribers, at their option, for an additional fee.
12. Under the D&L requirements, Encore Avenue, as a Canadian pay television service, may be linked in a given discretionary tier with up to five channels of any non-Canadian service from the Revised lists of eligible satellite services. Accordingly, Shaw’s distribution of Encore Avenue 2 on an analog discretionary tier gives rise to concerns with respect to the potential displacement of Canadian services so as to add more non-Canadian services in the tier in which Encore Avenue 2 has been placed. The Commission notes, however, that both Encore Ltd. and Shaw confirmed that no Canadian service is being displaced from Shaw’s discretionary analog tier to make room for Encore Avenue 2. Further, Shaw has not added more non-Canadian services to that analog tier as a result of the addition of Encore Avenue 2. In addition, Shaw has not increased the subscriber fee for this analog discretionary tier due to its distribution of Encore Avenue 2.
13. Allarcom expressed concern that Shaw may be granting an undue preference to Encore Avenue, contrary to the provisions prohibiting undue preference set out in section 9 of the Regulations<sup>1</sup>. The Commission notes that the matter at issue in this proceeding is an application by Encore Ltd. with respect to its pay television licence. It would be inappropriate for the Commission to make a determination based upon the record of this proceeding as to whether Shaw has granted an undue preference to Encore Ltd. by distributing Encore Avenue 2 on an analog discretionary tier. However, the Commission’s finding in the present case would not preclude Allarcom from making a complaint, should it believe that the treatment of its programming services by Shaw would constitute an undue preference or disadvantage.
14. Based on the above, the Commission concludes that there is nothing to expressly prohibit the distribution of Encore Avenue 2 on an unencrypted discretionary analog tier of Shaw’s BDUs serving communities in western Canada.

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<sup>1</sup> Section 9 of the *Broadcasting Distribution Regulations* stipulates that no licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

### **Impact on Canadian analog specialty services**

15. Opposing interveners argued that permitting Encore Avenue 2's distribution on Shaw's unencrypted discretionary analog tier would enable the pay television service to compete directly with Canadian analog specialty services. Since Encore Avenue is subject to substantially lower requirements for the exhibition of, and expenditures on, Canadian programming than those imposed on specialty services, the opposing interveners contended that such competition could have a significant negative impact on Canadian analog specialty services.
16. The Commission notes, however, that Encore Avenue is not permitted to sell commercial advertising or sponsorships and thus cannot attract advertising dollars away from Canadian analog specialty services. In addition, Encore Avenue is restricted, by condition of licence, to offering feature films and theatrical releases copyrighted at least five years prior to the broadcast year in which they are distributed by the service. Further, Encore Avenue has not obtained exclusive rights to the programs it has purchased.
17. The Commission therefore determines that approval of this application would not have an undue negative impact on Canadian analog specialty services.

### **Transition to digital technology**

18. Opposing interveners contended that Encore Ltd.'s proposal would undermine the Commission's objective of encouraging digital programming services. The Commission, however, is persuaded by the arguments presented by Encore Ltd. and Shaw that the attractiveness of Shaw's discretionary digital tiers is not devalued, because Encore Avenue 1 and Encore Avenue 2 continue to be available together as a package on Shaw's digital tier. According to Shaw, the attractiveness of its digital offering is being further enhanced by the addition of CNBC.
19. The Commission therefore determines that approval of this application would not undermine the objective of encouraging the transition to digital technology.

### **Public interest**

20. Taking into account the findings made above, the Commission does not consider that it would be in the best interest of subscribers, or in the public interest more generally, to require the removal of Encore Avenue 2 from its current placement on Shaw's unencrypted discretionary analog tier. Nonetheless, given the basis on which Encore Avenue was licensed and the determination set out in Broadcasting Decision 2005-30, the Commission points out to both Encore Ltd. and Shaw that it would have been more appropriate for Encore Ltd. to have sought prior approval from the Commission for the distribution of Encore Avenue 2 on an unencrypted discretionary analog tier.

## Conclusion

21. In light of all of the above, the Commission **approves** the application by Encore Avenue Ltd. for authorization to permit one of the multiplexed program channels of Encore Avenue to be distributed on unencrypted basis on one of the discretionary analog tiers of Shaw Communications Inc.'s cable broadcasting distribution undertakings serving communities in western Canada.

Secretary General

## Related documents

- *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2007-51, 16 May 2007
- *Encore Avenue and Comic Strip – Licence amendment*, Broadcasting Decision CRTC 2005-30, 31 January 2005
- *Licence renewal for MovieMax!*, Decision CRTC 2001-731, 29 November 2001
- *Approval of New Pay Television Services: “The Classic Channel” and “MOVIEMAX”*, Decision CRTC 94-278, 6 June 1994 and Decision CRTC 94-278-1, 29 June 1994

*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>*