



## Broadcasting Decision CRTC 2006-204

Ottawa, 2 June 2006

### **Complaint by MTS Allstream Inc. against Shaw Cablesystems (SMB) Limited and Videon CableSystems Inc. concerning the use of local availabilities to promote non-programming services**

*In this decision, the Commission dismisses the complaint by MTS Allstream Inc. against Shaw Cablesystems (SMB) Limited and Videon CableSystems Inc. concerning the use of local availabilities to promote non-programming services.*

#### **Background**

1. On 7 December 2005, MTS Allstream Inc. (MTS) filed a complaint against Shaw Cablesystems (SMB) Limited and Videon CableSystems Inc. (collectively Shaw) alleging that Shaw was in violation of one of its conditions of licence by using the local availabilities on U.S. satellite services to advertise Shaw's non-programming services, including high-speed Internet and telephone services, on Shaw's two cable broadcasting distribution undertakings (BDUs) serving Winnipeg, Manitoba.
2. The term "local availabilities" refers to the approximately two minutes per hour of air time set aside in the programming of certain U.S. satellite programming services for use by distributors in the United States. The current policy governing the use of local availabilities by Canadian BDUs was first articulated by the Commission in *Proposal to insert certain promotional material in the local availabilities of U.S. satellite services*, Decision CRTC 95-12, 18 January 1995. Over the years, the Commission has approved applications by Canadian BDUs so that, today, the majority of them have conditions of licence authorizing the use of local availabilities for the distribution of certain promotional material.
3. Specifically, the standard condition of licence imposed on BDUs requires that at least 75% of the local availabilities be made available for use by licensed Canadian programming services for the insertion of messages promoting their respective services, or be used by BDUs for the distribution of unpaid Canadian public service announcements and of messages promoting the community channel. A maximum of 25% of the local availabilities may be used by BDUs for the promotion of discretionary programming services and packages, customer service information, channel realignments, cable FM service and additional cable outlets.

#### **MTS' complaint concerning Shaw**

4. As noted above, MTS alleged that Shaw was in violation of its condition of licence by using the local availabilities in the programming of U.S. satellite services to advertise its non-programming services. In particular, MTS claimed that Shaw had been televising a

series of 30-second advertisements that promote Shaw's non-programming services, including its high-speed Internet and telephony services. MTS submitted an electronic version and videotaped copies of the Shaw "Broadband Experience" advertisement to the Commission.

5. MTS described the Shaw advertisement as consisting of:

...a series of images that appear to trace the journey from a home desktop computer to a school building through a big pipe. In the journey through the big pipe, the viewer first encounters a woman whose clothing attire is constantly changing. Below the woman is the word "SELECT". Next, in the continuing journey down the big pipe, the viewer sees two football players who are initially motionless, then move in reverse and then move forward. The words "PAUSE", "REWIND" and "PLAY" appear in sequence under the images of the two football players. Following the football players, the viewer next sees a laughing girl holding a telephone to her ear while sitting in a white swivel chair. The word "CONNECT" appears below the image of the girl laughing on the phone. Finally, the journey down the big pipe leads to a view of the giant pipe entering a school building. The word "Shaw" appears at the top left-hand corner of the image, while the words "24/7/365 SERVICE" appear at the bottom of the image. At the same time, a woman's voice states: "The Broadband Experience: Only from Shaw. It's big".

6. While MTS acknowledged that portions of the advertisement may have been designed to promote programming services, it submitted that the image of the laughing girl holding a telephone to her ear, above the word "CONNECT", was unambiguously directed at telephony services. In addition, MTS argued that, although the image of the woman above the word "SELECT" was ambiguous, it appeared to be an attempt to promote Internet services or the ability to shop on-line.
7. MTS submitted that Shaw's alleged use of the local availabilities to promote its non-programming services was even more egregious in light of previous Commission determinations that found Shaw to be in violation of its condition of licence regarding local availabilities and the Commission's direction to Shaw, as a result of these violations, to file quarterly compliance reports regarding its use of local availabilities for a period of three years, beginning in October 2003.<sup>1</sup>
8. MTS submitted that, given Shaw's repeated and continuing violation of its condition of licence regarding local availabilities, it was now necessary for the Commission to take stronger action to ensure that Shaw complies with its condition of licence. Accordingly, MTS requested that the Commission:

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<sup>1</sup> See *Subsidiaries of Shaw Communications Inc. and Bragg Communications Incorporated – Non-compliance concerning the use of local availabilities*, Broadcasting Decision CRTC 2003-383, 11 August 2003.

- immediately amend Shaw’s condition of licence regarding local availabilities so that, for a period of one year, Shaw may not use the local availabilities to promote its own services;
- in the alternative, direct Shaw to immediately cease the practice of using the local availabilities to advertise Shaw’s non-programming services in violation of its condition of licence and require Shaw to submit for review by the Commission, completed copies of any advertisements for Shaw services that Shaw intends to include on the local availabilities, no less than ten days prior to the use of such advertisements on the local availabilities; and
- following a public hearing, issue a mandatory order that prevents Shaw from continuing to use the local availabilities to promote non-programming services.

### **Shaw’s comments in reply**

9. Shaw provided its comments to the Commission concerning MTS’ complaint on 10 January 2006. According to Shaw, the complaint by MTS was totally without merit, was intended to sabotage a licence amendment application filed by Shaw respecting its use of the local availabilities<sup>2</sup>, was an abuse of the regulatory process, and should be dismissed without delay by the Commission. Shaw, however, did not dispute the authenticity of the videotaped evidence.
10. Shaw considered that MTS had misinterpreted the promotion. Shaw asserted that the image of the woman with changing attire standing above a “SELECT” button was not, as MTS suggested, an “ambiguous” image that “appears to be an attempt to promote Internet services or the ability to shop on-line”. Rather, Shaw argued that the image was not at all ambiguous. It noted that the “SELECT” button is positioned at the centre of almost all remote controls used for television, and that the image thus clearly represents consumer choice among programming services.
11. Shaw submitted that the image of a laughing girl holding a telephone to her ear above the word “CONNECT” was not directed at telephony services, but was intended to signify the many positive benefits and experiences associated with Shaw’s cable television service. Shaw argued that it was also intended to convey the way that young subscribers connect with each other by sharing their encounters with programming services or their favourite program. Shaw suggested that the image, at the very least, could also convey the positive experience of Shaw customers connecting with its customer service

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<sup>2</sup> The application referred to by Shaw was filed by its parent company, Shaw Communications Inc., on behalf of Shaw and other wholly owned subsidiaries of Shaw Communications Inc. That application is one of three similar proposals examined by the Commission in *Promotion of non-programming services using local availabilities*, Broadcasting Public Notice CRTC 2006-69 of today’s date, and is approved in *Licence amendment to replace condition of licence relating to the use of local availabilities in non-Canadian satellite services*, Broadcasting Decision CRTC 2006-206, also issued today.

representatives. Shaw also argued that, if the image was directed at telephony services, there was no basis to conclude that it was directed at Shaw's telephony services but could, in fact, be directed at MTS' telephony services.

12. According to Shaw, the image at the end of the advertisement of a large coaxial cable going into what might be an apartment building or, as suggested by MTS, a school, was immaterial since Shaw clearly supplies programming services via coaxial cable to schools and apartments.
13. Finally, Shaw submitted that the MTS complaint was motivated by MTS' opposition to having Shaw promote its new digital telephone service in Winnipeg, which MTS considered to be a competitive threat to its local telephony monopoly.

### **MTS' reply to Shaw**

14. MTS did not accept Shaw's suggested interpretations of the image of the girl on the telephone, reiterating that the image was clearly intended to promote Shaw's newly launched digital phone service. MTS also concluded that the image was directed at Shaw's telephony services, and not MTS' services as Shaw suggested, since the advertisement was an explicit Shaw advertisement. MTS noted that Shaw had been heavily promoting its digital telephony service in the Winnipeg area since its launch on 26 July 2005.
15. MTS also added that this image correlated closely with Shaw advertisements in other media that expressly promoted Shaw Digital Phone. With its reply, MTS submitted a series of Shaw's print advertisements that appeared in the Winnipeg Free Press on 22 November 2005 and 13 December 2005. MTS noted that the lay-out and impression of these print ads, which depict a woman sitting in a chair talking on the telephone, duplicated that of the laughing girl with a telephone to her ear in the "Broadband Experience" television advertisement. MTS argued that Shaw's repeated use of the same images in even more explicit Shaw Digital Phone advertisements would reinforce the perception of viewers that the girl with a phone to her ear was intended to promote Shaw's Digital Phone service.
16. With respect to the image of a woman whose attire is constantly changing, MTS noted that Shaw has used this same image in other television advertisements that unquestionably promoted Shaw Internet services and only Shaw Internet services. MTS attached to the electronic version of its submission, a Shaw "BUY, BLOCK, DOWNLOAD" advertisement for its Internet service, which includes the same image of the woman with the word "BUY" underneath it.

### **Further comment and reply**

17. On 14 March 2006, Shaw submitted further comment concerning the additional evidence filed by MTS in the form of Shaw advertisements from other media. Shaw argued that "it is totally improper to examine the use of an image in a totally different context to aid in

interpreting the use of the same or a similar image in the Broadband Experience promotion.” Shaw also noted that identical images can be used for different purposes in different contexts and that similarities in creative treatments are also a function of being cost efficient in developing advertising.

18. MTS submitted further reply comments on 17 March 2006. MTS argued, “... the fact that Shaw uses the very same or similar segments and images in its other Internet and telephone advertisements is highly relevant to the way in which a viewer will interpret these images in the ‘Broadband Experience’ commercial.” According to MTS, the fact that viewers would have seen these same images or segments in other Shaw Internet and/or telephony advertisements served to reinforce the perception that the segment depicting a woman whose attire is constantly changing was a promotion of Shaw’s Internet services and the segment depicting a girl on the telephone was a promotion of Shaw’s telephony services.

### **Commission’s analysis and determination**

19. As described above, the Shaw advertisement submitted by MTS contains a series of fast-moving images set against a musical background with no accompanying voice-over or text. Given the lack of dialogue, the Commission considers that the individual images used in the advertisement can be subject to different interpretations, thus making it impossible to conclude that any one image in particular is more a reference to one of Shaw’s non-programming services than to a broadcasting service. Accordingly, the Commission is unable to conclude that Shaw has violated its condition of licence respecting its use of local availabilities and dismisses the complaint by MTS.

Secretary General

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