



## Broadcasting Public Notice CRTC 2006-133

Ottawa, 20 October 2006

### **Determination with respect to the marketing and billing practice by which a broadcasting distribution undertaking treats the provision of service to separate dwellings owned by the same person as a single subscription**

*In Call for comments on the marketing and billing practice known as “account stacking” in the context of the Commission’s regulatory framework for broadcasting distribution undertakings, Broadcasting Public Notice CRTC 2006-41, 31 March 2006, the Commission requested comments on the practice whereby a broadcasting distribution undertaking (BDU) treats the provision of service to two separate residences owned by the same person as a single subscription and remits a wholesale fee to programming services on the basis that only one subscriber is being provided with service.*

*Having considered the record of the proceeding, the Commission determines that the practice described above is inconsistent with the objectives of the broadcasting policy for Canada as set out in the Broadcasting Act. In order to ensure that the practice ceases, the Commission is amending the applicable distribution and linkage rules, so that when a Class 1, Class 2 or direct-to-home (DTH) licensee provides a Canadian programming service to a single subscriber at two or more separate dwellings owned or occupied by the same subscriber, the licensee must remit a wholesale fee to the Canadian programming service on a per-dwelling basis.*

### **Introduction**

1. In a complaint dated 2 December 2005, Videotron Ltd. (Videotron) alleged that Star Choice Television Network Incorporated (Star Choice) had violated section 9 of the *Broadcasting Distribution Regulations* (the Regulations) by giving itself an undue preference and subjecting Videotron to an undue disadvantage by allowing the sale of several decoders and antennas to a single individual who may then install them in separate residences while paying for only one subscription, a practice referred to as “account stacking” (account stacking). Following Star Choice’s response to Videotron’s complaint, as well as unsolicited submissions from the Canadian Association of Broadcasters (CAB) and Bell ExpressVu Limited Partnership<sup>1</sup> (ExpressVu), the Commission issued *Call for comments on the marketing and billing practice known as “account stacking” in the context of the Commission’s regulatory framework for broadcasting distribution undertakings*, Broadcasting Public Notice CRTC 2006-41, 31 March 2006 (Public Notice 2006-41).

<sup>1</sup> 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

2. In Public Notice 2006-41, the Commission emphasized that it was not seeking comments on the complaint filed by Videotron, but rather was inviting comments solely on the practice of account stacking. The Commission stated that it would make a determination regarding Videotron's complaint after it had issued its policy regarding account stacking.
2. Subsequently, Star Choice requested the opportunity to provide reply comments to any submissions made in the proceeding initiated by Public Notice 2006-41. In *Call for comments on the marketing and billing practice known as "account stacking" in the context of the Commission's regulatory framework for broadcasting distribution undertakings – Submission of reply comments*, Broadcasting Public Notice CRTC 2006-41-1, 5 May 2006, the Commission announced that it would allow those parties who had filed a submission an opportunity to submit replies to any of the other comments that were filed in the proceeding.

### **Parties to the proceeding**

3. Eight parties submitted comments in this proceeding, with three of those eight parties submitting reply comments. Star Choice, ExpressVu and two individuals supported the marketing and billing practice described above or were not opposed to it. Videotron, the CAB, Rogers Cable Communications Inc. (Rogers) and the National Broadcast Reading Service Inc. (NBRS) did not consider account stacking to be an acceptable business practice.

### **Positions of parties**

4. Star Choice maintained that account stacking, which it described as a "second address service," is completely legal. Star Choice argued that the Regulations do not address the issue of second address service, let alone preclude such a service. Further, it argued that the definition of a "subscriber" found in Section 1 of the Regulations permits the practice of subscribers utilizing their subscription at two residences owned by the same household.
5. Star Choice explained that it currently permits an existing subscriber who presents clear evidence of ownership of a second residence to obtain Star Choice service at that second residence as part of the same subscription. Star Choice added that it audits subscribers who own multiple receivers by calling them on a regular basis to verify that the location of Star Choice receivers does not extend beyond the legitimate primary and secondary residences of subscribers. It stated that these audits, as well as business indicators such as sales and revenue figures, confirm that Star Choice systems are not being converted to black market use.
6. According to Star Choice, its second address service contributes to keeping its subscribers within the legitimate Canadian broadcasting system. Star Choice explained that the provision of its service to two residences owned by one subscriber is premised on the notion that such subscribers do not occupy two residences at once. Reception for viewing at the secondary residence is a substitute for viewing at the primary residence,

and direct-to-home (DTH) technology is well suited to providing subscribers with such flexibility. Accordingly, second address service is not deleterious to programmers or, more broadly, to the Canadian broadcasting system.

7. ExpressVu noted that there is no requirement whatsoever in the Regulations that prohibits a BDU from providing service at more than one location via a single account. With respect to the definition of a “subscriber,” ExpressVu stated that the Commission explicitly noted in *Good commercial practices*, Broadcasting Public Notice CRTC 2005-35, 18 April 2005 (Public Notice 2005-35), that the definition of a “subscriber” in the Regulations exists for the purpose of interpreting the Regulations. Programmers and distributors are free to base their affiliation arrangements on any framework they desire, whether or not it might focus on a “subscriber,” within the meaning of the Regulations.
8. ExpressVu submitted that there should be no difference between members of the same family, or household, simultaneously viewing television in different rooms of a single residence and those same family members viewing television in different rooms of different addresses. ExpressVu added that Star Choice has implemented an appropriate business rule to accommodate this contemporary reality, with the stipulation that such simultaneous viewing take place only in residences owned or rented and, in all cases, used by the same family. Although ExpressVu does not now have in place a vacation home policy that reflects this approach, it argued that it should not be precluded from adopting such a policy in the future. In this regard, ExpressVu acknowledged the need to obtain contractual permission from Canadian broadcasters in advance of implementing a policy of this type.
9. The CAB submitted that the Commission’s definition of a “subscriber” in Section 1 of the Regulations reflects the fundamental criterion that each separate dwelling to which a BDU provides service denotes a unique subscriber, irrespective of the ownership of the dwelling. To permit a BDU to treat the provision of service to two or more separate dwellings as a single subscription cannot be reconciled with the definition of a “subscriber,” which is premised on each individual dwelling to which service is provided by a BDU.
10. The CAB added that, to the extent that account stacking allows a BDU to pay a single fee to programming suppliers for what otherwise should be treated as two or more separate and distinct subscriptions, specialty and pay services are deprived of legitimate affiliation payments for those subscriptions. This practice was not contemplated and is not authorized in affiliation agreements between programmers and distributors. In situations where a subscription-based programming service that depends on a monthly wholesale fee does not have a formal affiliation agreement, or where the affiliation agreement does not include specific provisions to the contrary, the CAB argued that the term “subscriber” should be defined as in the Regulations.
11. In its submission, Rogers noted that Star Choice has confirmed that it engages in account stacking. Rogers submitted that a true cost structure imbalance has been established, which materially and negatively impacts other BDUs and programming services. Rogers

was of the view that it is difficult to quantify this impact because it does not believe that this practice is limited solely to individuals who may own a recreational property as a second residence. Rogers noted Star Choice's claim that, in authorizing the reception of services at multiple residences, it requires a subscriber to demonstrate that the subscriber owns both residences. Rogers was concerned about the ability of Star Choice to accurately confirm that a subscriber is the legitimate owner of both residences. Further, Rogers indicated that the potential exists for someone to buy two satellite decoders and antennas and split the monthly fees with a family member, friend or neighbour.

12. The NBRIS was of the view that a programming service provider should be paid for each residential unit that receives the programming service, since each residence that receives the programming service "consumes" the programming service. Accordingly, each residence constitutes a separate subscriber even though a single individual may own both residences. In the NBRIS' view, the existing regulatory structure is premised on the subscriber being a person in one identifiable place. The NBRIS submitted that, pursuant to *VoicePrint – Licence renewal*, Broadcasting Decision CRTC 2004-28, 21 January 2004, BDUs must pay the NBRIS per "subscriber," and so they must look to the definition of that term in the applicable regulations in order to calculate the amount to pay.
13. The NBRIS submitted that, if the Commission determines that account stacking is not acceptable, it should require Star Choice to confirm whether it remits to the NBRIS the authorized monthly wholesale fee for each residence that receives Star Choice service or for only the customer's main place of residence. If Star Choice does not remit fees for each residence, the Commission should direct Star Choice to remit payment on the basis of each residence that receives the NBRIS' VoicePrint service. Further, the NBRIS requested that the Commission direct Star Choice to provide a detailed accounting of payments that have and have not been remitted since the effective date of Distribution Order 2000-1-1, as set out in *Erratum: Distribution Order 2000-1*, Decision CRTC 2000-380-1, 21 September 2000. Finally, the NBRIS requested that the Commission order similar relief for the NBRIS in respect of all other Class 1, Class 2 and DTH BDUs.
14. According to Videotron, the practice of account stacking is not in compliance with the Regulations as it is not in accordance with the definition of a "subscriber" included in the Regulations. This definition stipulates clearly that a "subscriber" means "a household of one or more persons, whether occupying a single-unit dwelling or a unit in a multiple-unit dwelling..." (emphasis added by Videotron).<sup>2</sup> In Videotron's view, if the Commission had intended this practice to be in compliance with the Regulations, the definition would have specified [translation] "one or more single-unit dwellings or units. ..."
15. Videotron indicated that it duly pays the fees or royalties that are owed to programming undertakings for each of its subscriptions and that, when one household receives Videotron service in two different residences, those fees are paid twice because there are

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<sup>2</sup> Videotron cited the French version of the Regulations: ... ménage qui est composé d'une ou de plusieurs personnes occupant un logement unifamilial ou un des logements d'un immeuble à logements multiples

no affiliation agreements with programming undertakings that provide for the practice of account stacking. It argued that, if the Commission were to endorse this practice, Videotron could then stop making such multiple payments to programming undertakings and begin marketing its product on a similar footing by proposing to the households concerned that they pay only one subscription fee for multiple residences.

16. Another party, Mr. Stephen Podkowka, stated that the second address service offered by Star Choice, which is called the “Home Away from Home Program,” is “a great feature” for Star Choice customers who maintain a seasonal residence or want to obtain satellite television for their recreational vehicle. Mr. Podkowka submitted that, technically, it would be impossible for Star Choice to prevent account stacking because, once a receiver is authorized, it can receive programming at any location where a satellite signal can be received, either from the original dish or any supplementary dish. Mr. Podkowka argued that, if a decision were rendered against account stacking, it would only prevent Star Choice from advertising the program and from providing any necessary supplemental equipment, which is easily obtainable through other sources.

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

17. The Commission notes that several parties to this proceeding relied on the definition of a “subscriber” in Section 1 of the Regulations as a basis for either opposing or supporting the practice by which a BDU treats the provision of service to two separate residences owned by the same person as a single subscription.
18. The Regulations define a “subscriber,” in a residential context, as follows:

... a household of one or more persons, whether occupying a single-unit dwelling or a unit in a multiple-unit dwelling, to which service is provided directly or indirectly by a licensee...
19. In French, the definition of a “subscriber,” in a residential context, is defined as follows:

... ménage qui est composé d’une ou de plusieurs personnes occupant un logement unifamilial ou un des logements d’un immeuble à logements multiples et auquel le titulaire fournit directement ou indirectement des services ...
20. The Commission’s interpretation of this definition of a “subscriber” is that a residential subscriber, for the purposes of the Regulations, can be one or more persons but occupying only one unit given that the definition refers to “a single unit dwelling” or, in French, to “*un* logement unifamilial” (emphasis added).
21. The Commission does not consider the definition of a “subscriber” in the Regulations to be determinative of whether or not the practice at issue, variously described as account stacking or as “second address service,” is appropriate for the Canadian broadcasting system. As stated in Public Notice 2005-35, the Commission has been of the view that the term “subscriber” was defined in the Regulations for the specific purposes of the

Regulations and has little relevance in the context of affiliation agreements or arrangements between specialty and pay programming services and BDUs. In Public Notice 2005-35, the Commission also stated that, while BDU operators and programmers were free to employ this definition in their affiliation agreements, they were also free to negotiate other definitions that may be appropriate for the purposes of such agreements.

22. The Commission notes that the record of the proceeding indicates that account stacking is not widespread at this time. The record indicates that Star Choice was the only party to this proceeding that is currently offering its customers the possibility of having service at two separate residences while paying for only one subscription. Further, Star Choice submitted that only a small fraction of its customers have chosen to receive service in this manner, and that its “second address service” is not causing any harm to programmers or to the Canadian broadcasting system.
23. In this regard, the Commission considers that it would be difficult for a BDU to ensure that service received at a second location is purely a substitute for the customer’s viewing at his or her primary residence. Among other things, the Commission considers that there is a significant potential for an individual to purchase a “second address service” and use it to split monthly fees with a family member, friend, neighbour or lessee, thus reducing the amount of fees that ultimately flow to programming service providers.
24. In addition, the Commission considers that it may not be possible for all programming undertakings to adequately address the practice during the course of contractual negotiations with BDUs that now employ it or those that may seek to employ it in future. Those that have not entered into, or that for reasons such as lack of bargaining power are unable to enter into, affiliation agreements that address account stacking could be deprived of a portion of the revenues that they would otherwise receive. This reduction in revenues has the potential to negatively affect the programming service’s ability to fulfil its programming commitments, and thus to contribute to the attainment of the cultural objectives of the *Broadcasting Act* and to the Canadian broadcasting system in general.
25. Further, the record of this proceeding indicates that, should the Commission allow the practice to continue, other BDUs would likely adopt similar marketing and billing techniques to the extent that they are able to do so. In other words, the practice would likely spread, at least among those BDUs that are in a position to adopt it. BDUs that are unable to provide service on a similar basis, or that are unable to provide it to a similar extent, would have an incentive to attempt to reduce the wholesale fees that they pay to programming services to a level equivalent to that paid by BDUs offering service on this basis. Thus, the general effect of the practice would be to put downward pressure on fees payable to programming undertakings, with the potential for the negative effects noted in the previous paragraph.

26. Those BDUs that would be unable to respond to the practice of account stacking in either of the ways noted above would find themselves at a competitive disadvantage vis-à-vis Star Choice or other competitors. In the Commission's view, the BDUs most likely to find themselves in this position would include smaller BDUs that the Commission has previously found face particular challenges in competing with DTH undertakings (see, for example, *Small cable systems – Digital migration policy*, Public Notice CRTC 2001-130, 21 December 2001).
27. Therefore, notwithstanding that the practice does not appear to be widespread at this time, the Commission finds that, based on the record of this proceeding, the practice could have significant negative effects on broadcasters and on the broadcasting system in general, especially if it were to be adopted on a wider basis.
28. In light of the above, the Commission finds that the practice whereby a BDU provides service to two or more separate dwellings owned by the same person under a single subscription and remits a wholesale fee to programming services on the basis that only one subscriber is being provided with service to be inappropriate. In the Commission's view, where a Class 1, Class 2 or DTH licensee provides a Canadian programming service to a single subscriber at two or more separate dwellings owned or occupied by the same subscriber, the licensee must remit a wholesale fee to the Canadian programming service on a per-dwelling basis, and that wholesale fee may not be discounted by virtue of the fact that the service is being provided to the subscriber at more than one dwelling. In order to ensure that this is the case, the Commission is amending the distribution and linkage rules that apply to BDUs accordingly. A revised set of linkage requirements for DTH BDUs and a revised set of distribution and linkage rules for class 1 and class 2 BDUs, which include such amendments, are set out in *Linkage requirements for direct-to-home (DTH) satellite distribution undertakings*, Broadcasting Public Notice CRTC 2006-134, 20 October 2006, and *Distribution and linkage requirements for Class 1 and Class 2 licensees*, Broadcasting Public Notice CRTC 2006-135, 20 October 2006.
29. Regarding the various requests made by the NBRS in the event that the Commission determined that account stacking is not acceptable, Star Choice, as well all other BDUs, will be required by way of the applicable distribution and linkage rules to remit to the NBRS and other programming services the same wholesale fee for each dwelling in question, whether that fee has been established by Commission decision or contractually between the parties. The Commission anticipates that BDUs will maintain separate records that are sufficient to ascertain the number and types of their subscribers that have received services in more than one dwelling, in the event of an audit by a programming service. The Commission has established guidelines for the conduct of such audits, which are set out in *Auditing of distributor subscriber information by programming services*, Broadcasting Public Notice CRTC 2005-34, 18 April 2005.

## **Videotron's complaint**

30. As noted above, the Commission suspended consideration of the Videotron complaint pending the outcome of this policy proceeding. The Commission will allow both Videotron and Star Choice an opportunity to provide additional submissions before making its decision with regard to the complaint.

Secretary General

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