



Broadcasting Decision CRTC 2003-383

Ottawa, 11 August 2003

Subsidiaries of Shaw Communications Inc. and Bragg Communications Incorporated – Non-compliance concerning the use of local availabilities

In this decision, the Commission finds, among other things, that broadcasting distribution undertakings of subsidiaries of Shaw Communications Inc. (Shaw) and Bragg Communications Incorporated and its broadcasting subsidiaries (Bragg) breached conditions of licence relating to their use of local availabilities. As a result, the Commission directs Shaw and Bragg to file quarterly compliance reports for the next three years relating to the use of local availabilities and the promotion of retail Internet and telephony services.

The Commission also clarifies that the relevant condition of licence pertaining to local availabilities does not permit mentions “in passing” of services that may be offered by a broadcasting distribution undertaking, such as Internet or telephony services, that are not specifically mentioned in the condition of licence.

Complaints by the Canadian Association of Internet Providers and Aliant Telecom Inc.

1. On 14 June 2002, the Canadian Association of Internet Providers (CAIP) filed a complaint alleging that cable broadcasting distribution undertakings (BDUs) owned and operated by subsidiaries of Shaw Communications Inc. (Shaw) had unlawfully used local availabilities to advertise Shaw’s Internet service.¹ CAIP requested that the Commission:
 - issue an order requiring Shaw to cease using local availabilities to advertise its Internet service;
 - find Shaw guilty of an offence pursuant to section 32(2) of the *Broadcasting Act* (the Act); and
 - grant other forms of relief by reference to a similar complaint previously filed by Independent Members of CAIP with regard to Rogers Cable Inc. (Rogers).

¹ The term “local availabilities” refers to periods of airtime in the programming of U.S. satellite services where opportunities are provided for BDUs to insert promotional messages.

2. On 4 September 2002, the Commission received a complaint from Aliant Telecom Inc. (Aliant) requesting that it issue mandatory orders against Bragg Communications Incorporated and its broadcasting affiliates (Bragg). Aliant submitted that Bragg was in breach of its conditions of licence, the Act, the *Broadcasting Distribution Regulations* (the Regulations) and various Commission rulings pertaining to local availabilities. Aliant complained in particular that Bragg was distributing advertisements for non-programming services provided by EastLink Limited (EastLink), an affiliated company, during the local availabilities of U.S. satellite services.
3. Aliant also stated its understanding that Bragg had distributed similar advertisements on EastLink TV, a community channel. According to Aliant, Bragg was in breach of both the Regulations and the *Telecommunications Act* by conferring an undue preference on itself and/or on an affiliated company by advertising EastLink's high-speed Internet and local telephone services during local availabilities.
4. The Commission notes that "EastLink" is the name under which Bragg provides cable and telecommunications services in Nova Scotia and Prince Edward Island.

The Commission's policy regarding the use of local availabilities

5. In *Proposal to insert certain promotional material in the local availabilities of U.S. satellite services*, Decision CRTC 95-12, 18 January 1995 (Decision 95-12), the Commission stated that it would permit cable systems controlled by Rogers Cable TV Limited (Rogers),² by condition of licence, to insert certain promotional material into the local availabilities of non-Canadian satellite services. The Commission determined that:
 - at least 75% of local availabilities must be made available for the promotion of licensed Canadian programming services and of the community channel, or for the broadcast of unpaid Canadian public service announcements; and
 - a maximum of 25% of local availabilities may be used to promote cable services related to programming, such as discretionary programming packages or cable FM services, or to provide customer service information.

The Commission further stated, in Decision 95-12, that it was not prepared to consider applications to use such availabilities for the broadcast of commercial advertising.

6. The Commission's determination was subsequently embodied in the conditions of licence of Rogers' cable BDUs. Several other BDUs, including BDUs owned and operated by Shaw and by Bragg, have since applied for and were granted similar conditions of licence in *Applications to insert certain promotional material in the local availabilities of U.S. satellite services*, Decisions CRTC 95-501, 28 July 1995, and CRTC 95-922, 21 December 1995, respectively.

² This company is now known as Rogers Cable Inc.

7. In *Advertising Internet Services on community channels or during "local availabilities,"* Public Notice CRTC 1999-93, 27 May 1999 (Public Notice 1999-93), the Commission clarified that it would be contrary to section 27(1) of the Regulations and the condition of licence relating to local availabilities for BDUs to distribute commercial advertisements for their own retail Internet services.

Messages at issue

CAIP's complaint concerning Shaw

8. CAIP did not provide videotape evidence to support its submission that Shaw had used local availabilities to promote its Internet service. The complaint was, rather, based on reports from individual CAIP members. After receiving the complaint, the Commission requested that CAIP supply videotapes of the program or programs in question, but CAIP replied that it was unable to supply such evidence.
9. Shaw was subsequently asked by the Commission to supply a videotape of the program or programs. On 16 September 2002, both Shaw and CAIP provided the Commission with videotapes of two substantially different 30-second programs for Shaw's *Total Home Package* service bundle.
10. A complete description of the content of the two messages is provided later in this decision.

Shaw's reply to CAIP's complaint

11. In its 11 October 2002 response to CAIP's complaint, Shaw acknowledged that it had inserted and distributed messages in local availabilities. It stated, however, that it considered both of the programs at issue to be consistent with the Commission's local availabilities policy, and offered three reasons for this view:
 - The programs did not focus on Shaw's Internet service, but were directed at promoting the value of purchasing its bundle of services. Shaw contended that the programming was consistent with letters dated 15 July and 19 November 1999 that were issued by Commission staff to the Association of Canadian Advertisers (ACA).
 - The programs did not unduly disadvantage CAIP members or provide an undue advantage to Shaw because CAIP members had the ability to partner with a licensed Canadian service in a program that could be included in the 75% of local availabilities that may be used to promote Canadian programming services.
 - The programs were consistent with joint marketing rules applied to telephone companies, which allow for bundling of telephony services. Shaw considered that the programs were consistent with the Commission's general policy approach to support integration, convergence and innovation in the communications marketplace.

Aliant's complaint concerning EastLink

12. Aliant provided videotape evidence of the programs identified in its complaint, recorded by Cossette Atlantic, a division of Cossette Communications Group, confirming that those programs had been inserted in local availabilities. The programs in question are:
- a 30-second program featuring computer-generated images of red-hot chilli peppers that, in Aliant's submission, promoted the EastLink Internet service and bundled services;
 - a 30-second program concerning a fictitious EastLink subscriber, Cathy Whynot, which Aliant submitted contained non-broadcasting service (telephony) messages and promoted bundled services; and
 - a 30-second program concerning a family in the process of moving that referenced certain benefits of bundled services.

A transcript of the three programs is set out later in this decision.

EastLink's reply to Aliant's complaint

13. On 3 October 2002, EastLink filed a reply to the Aliant complaint. EastLink acknowledged that it had inserted and distributed programs related to service bundles in local availabilities. It submitted, however, that the insertion of promotions for EastLink bundles falls within EastLink's rights to promote programming services, customer service information and discretionary packages under its local availabilities condition of licence, for the following reasons:
- The promotion of bundled services is a useful tool for the promotion of programming services, and the advertisement of bundled services results in increased customer access to Canadian programming services.
 - Bundling is a critical component of EastLink's branding given that it is an integrated communications company offering a suite of services. EastLink has marketed itself as a total communications company, and its programming services are an essential element of its operations. To prohibit EastLink from promoting this identity would have a detrimental affect on EastLink's ability to market itself in a convergent environment.
 - The condition of licence on the use of local availabilities allows EastLink to insert customer service information and to promote discretionary services and packages. Promoting EastLink digital cable without providing customers with information on the savings customers can achieve by bundling the services would result in customers lacking critical information about their options for obtaining programming services. The promotion of discretionary packages is done through advertising EastLink bundles.

- The promotion of bundled services does not result in EastLink conferring any preference on itself and, even if it was held to be a preference, in no way could it be interpreted as “undue.”
14. EastLink also argued that local availabilities do not come without a cost. It submitted that it pays affiliate fees for the carriage of specialty services, and that the rights to use local availabilities are factored into these fees.
 15. EastLink further submitted that the Commission has not specifically addressed the advertising of bundles in local availabilities, and argued that its actions were not contrary to the provisions of its condition of licence or to Commission decisions regarding local availabilities.

The Commission’s analysis

Clarification of the Commission’s policy on local availabilities

16. The Commission notes that, in its response to CAIP’s complaint, Shaw made reference to letters dated 15 July and 19 November 1999. These letters were issued by the Commission’s staff in response to a complaint from the ACA related to the condition of Rogers’ licence approved in Decision 95-12, and specifically to the prohibition on the use of local availabilities for the distribution of commercial advertisements for a BDU’s own Internet services.
17. In the letter of 15 July 1999, the Commission’s staff commented that the program in question “focused on promoting Rogers’ programming services and packages,” and that mentions of discounts for “Cantel AT&T cellular, Rogers@Home and AT&T Long Distance and other services” had been made “in passing,” were “accessory to the main purpose of the spot,” and lasted “for a very brief period of time.” In light of its assessment, the Commission’s staff considered that Rogers had provided a satisfactory response to the complaint.
18. By letter dated 19 November 1999, in response to a request by the ACA for further clarification with regard to the use of local availabilities, Commission staff stated that “a brief mention of names in passing (without a description of the service, as an exhortation to the public to purchase the service) would be allowable.”
19. The Commission notes that the condition of licence at issue in this proceeding provides that:
 - at least 75% of local availabilities must be used to promote licensed Canadian programming services or the community channel, or to broadcast unpaid Canadian public service announcements; and

- up to 25% of local availabilities may be used to promote cable services related to programming, such as discretionary programming packages or cable FM services, or to provide customer service information.
20. The Commission further notes that the condition of licence does not permit mentions “in passing” of other services that may be offered by the BDU, such as Internet or telephony services. Therefore, the Commission finds that, under this condition of licence, BDUs may not make any mention, even in passing, of services other than those referred to in the condition of licence.

The Telecommunications Act

21. As noted above, Aliant argued that EastLink’s conduct amounts to a breach of section 27(2) of the *Telecommunications Act*, which states as follows:

No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

22. In *Regulation under the Telecommunications Act of Certain Telecom Services Offered by “Broadcast Carriers”*, Telecom Decision CRTC 98-9, 9 July 1998, the Commission stated its intention to deal with the advertising of Internet services on community channels under the *Broadcasting Act*. Consistent with its practice since that time, the Commission has considered Aliant’s complaint solely under the *Broadcasting Act*.

The Shaw and EastLink programs

A. The CAIP complaint concerning Shaw

23. As noted earlier, CAIP and Shaw each provided a videotape of a program related to Shaw’s *Total Home Package* service bundle. As described below, the two programs differed substantially. The Commission notes that neither party disputed the authenticity of the videotaped evidence.

A.1 CAIP’s videotape evidence

24. A transcript of the program for Shaw’s *Total Home Package* provided by CAIP is as follows:

Narrator #1: *[Over blue screen with words “Total Home Package”]:*

“With Shaw’s Total Home Package, do I really get unlimited Internet access?” *[the words “Unlimited Internet Access” appear on screen]*

Woman # 1: “My son and I can surf the Internet at the same time!”

Narrator #1: *[Over blue screen with words “What’s the Best Thing?”]:*

“So, what’s the best thing about the *Total Home Package*?”

Man #1: “It’s unlimited Internet access and digital cable for one low monthly price!”

Child: “It’s sweet to play online games!”

Man # 2: “My Internet access is cheaper because I combine it with digital cable!”

Narrator #1: [*Over blue screen with words “Everybody has a favourite!”*]: “Seems like everyone has their own favourite.”

Woman # 2: “ That’s because there’s something for everyone!”

Narrator #1: [*Over blue screen with a generic Shaw logo*]: “So how do I get the *Total Home Package*?”

Narrator #2: [*add “www.shaw.ca” to screen*]: “Just go to shaw.ca.”

25. The Commission considers that the program provided by CAIP targets the retail Internet market. It specifically mentions the benefits of the BDU’s Internet service in terms of quality and value. While Shaw’s *Total Home Package* is specifically named, rather than Shaw’s Internet service, it is clear from the narrator’s opening remarks and from the dialogue throughout that this is a program to promote Shaw’s Internet service. A majority of the 30-second program is devoted to Shaw’s Internet service and highlights its specific benefits, including its unlimited nature, the ability for two people to surf the Internet at the same time and the ability to play online games.
26. The Commission finds that the program submitted by CAIP is primarily a promotion of non-programming (Internet) services. Such programming is not authorized under Shaw’s condition of licence. Consistent with its statement in Public Notice 1999-93 that a BDU may not use local availabilities to provide commercial advertisements for its retail Internet services, the Commission finds that Shaw violated its condition of licence regarding local availabilities when it aired the bundled service program submitted by CAIP.

A.2 Shaw’s videotape evidence

27. The videotape provided by Shaw shows an e-mail message with a voice-over describing its contents. The message is broadly targeted (“Hey Bud”) and generally highlights the programming available, including pay-per-view special events and commercial-free films. The message also mentions that overall savings can be achieved by subscribing to Shaw’s *Total Home Package*. For approximately three seconds, the screen shows, in a plain font, that cable and Internet service may be combined, and this point is briefly mentioned in the voice-over. The program audio does not specifically mention Shaw’s Internet service, nor does it include any logos or other branding associated with Shaw’s Internet service.
28. The Commission notes that the program provided by Shaw focuses primarily on programming services. The actual mention of the Internet service within the program is brief, and there is no explanation or description of benefits or preferences associated with this service. The Internet component of the program is presented as an aspect of a bundled package of services offered to clients at a discount.

29. The Commission considers that references to Internet service in this program could be described as “a brief mention of names in passing,” as referred to in Commission staff’s letter of 19 November 1999. However, in light of the Commission’s clarification of the condition of licence at issue, the Commission considers that this program includes a commercial advertisement for the Internet service portion of the bundled service package. Given the Commission staff’s letter of 19 November 1999, the Commission is not prepared at this time to find Shaw in breach of the condition of licence regarding local availabilities with respect to its airing of this program. However, in future, the airing of this program during local availabilities would place Shaw in breach of that condition of licence.

B. The Aliant complaint concerning Bragg

30. As noted above, Aliant provided videotapes of the programs cited in its complaint. The programs in question are described below. The Commission notes that EastLink did not dispute the authenticity of the videotaped evidence.

B.1 Red-hot chilli peppers

31. The following is a transcript of EastLink’s red-hot chilli peppers program:

Narrator #1: *[Screen depicts computer generated images of red-hot chilli peppers emerging from a computer monitor, jumping on a keyboard and on an EastLink branded mouse-pad]:* “It’s the hottest thing to hit the Internet. EastLink’s high-speed Internet. So fast it will bring a tear to your eye. Oh my, is it hot.”

Narrator # 1: *[A computer monitor appears that rapidly depicts numerous websites and web-pages with the words SHOPPING, GAMES, TRAVEL, BUSINESS, FINANCE, among others, superimposed overtop]* “Zoom through the net. On average nothing is faster. Nada. It’s always on, with unlimited access and no phone tie-ups. So hot it’s scorching.”

Narrator #2: *[Over blue screen showing the \$24.95/month price for the Internet service]* “Call now and get the first four months for only \$24.95 per month or bundle up and continue the savings. Call EastLink today”
[a generic EastLink logo appears].

32. The Commission considers that, other than one brief reference to a discount for bundled service, the program is focused on communicating various benefits of EastLink’s Internet service, which are specifically named in the program. Such benefits include the Internet service’s unlimited nature, the fact that it does not tie up the telephone line, the variety and diversity of services available, and the service’s high speed. The program highlights a specific discount rate (\$24.95) applicable to the first four months of EastLink’s Internet service, which is visually depicted during the program. The only non-Internet aspect of the program is an oblique reference to generalized savings associated with EastLink bundles.

33. The Commission finds that the “red-hot chilli peppers” program is dedicated mostly to EastLink’s Internet service, and that this program is a commercial advertisement for EastLink’s Internet service. Consistent with its statement in Public Notice 1999-93 that a BDU may not use local availabilities to provide commercial advertisements for its retail Internet services, the Commission finds that EastLink violated the terms of the local availabilities condition of licence when it aired the red-hot chilli peppers program.

B.2 Cathy Whynot

34. The following is a transcript of a program promoting a service bundle that is communicated through EastLink subscriber, Cathy Whynot:

Cathy Whynot: *[Screen depicts Ms. Whynot moving about her kitchen, inserted at the base of the screen is a reference to her location in Bridgewater, Nova Scotia]:* “What I really like is not having to figure out the best long distance plan.”

Narrator: *[A blue screen appears with the following visual message: Every month we compare the three most popular long distance plans and choose the best deal for you.]* “EastLink does the work for you.”

Cathy Whynot: “Every bill shows us how much money we saved.”

Narrator: *[A blue screen shows an image of a telephone, computer mouse and television remote control wrapped in coaxial cable that appears to be shaped as a basket. The base of the image indicates that the cost of bundles start at \$66.95.]* “And with EastLink, bundle up and save even more, up to \$300 per year.”

Cathy Whynot: “I can’t recommend EastLink highly enough.”

Narrator: “People everywhere are turning to the reliability and value of EastLink. Call today.”

[a generic EastLink logo appears].

35. As described above, the Cathy Whynot program contains messages citing certain benefits of EastLink’s bundled service package. The program highlights specific benefits of the BDU’s telephone service and mentions the advantages of EastLink’s long-distance telephone service.
36. The Commission considers that this program is primarily a commercial advertisement for EastLink’s long-distance telephone services, which is not authorized under the condition of licence. Consequently, the Commission finds that EastLink violated the terms of the condition of licence respecting local availabilities when it aired the Cathy Whynot program.

B.3 Family move

37. The following is a transcript of EastLink's "family move" program:

Narrator: *[A family of four sitting on a sofa, in the process of moving households]:* "Moving? Relax. EastLink helps you save time and money."

Narrator: *[A blue screen shows an image of a telephone, computer mouse and television remote control wrapped in coaxial cable that appears to be shaped as a basket. At the base of the image the following words appear "bundle up and save.]"* "Connect any two EastLink services - cable, high speed Internet or telephone - and the installation is free. That saves you up to \$100. And get even more savings and billing convenience with an EastLink bundle."

[The image of the family of four sitting on a sofa reappears]: "Take the hassle out of moving with EastLink."

38. The Commission notes that the family move program highlights certain benefits of bundled services and briefly mentions EastLink's cable, high-speed Internet and telephone services. The program does not include any logos or other branding associated with EastLink's non-programming services. The references to the Internet and telephone services are very brief, and there is no explanation or description of benefits or preferences associated with these services. These components of the bundle are presented as options that a client could select. The program offers a free installation incentive, valued at \$100, when a client agrees to take at least two of EastLink's bundled services, and makes references to the generic value and convenience of bundling services.
39. As with the Shaw program discussed above, the Commission considers that references to Internet service and telephone service in this program could be described as "a brief mention of names in passing," as referred to in Commission staff's letter of 19 November 1999. However, in light of the Commission's clarification of the condition of licence at issue, the Commission considers that this program includes a commercial advertisement for the Internet and telephone service portions of EastLink's bundled service package. Given the Commission staff's letter of 19 November 1999, the Commission is not prepared at this time to find EastLink in breach of the condition of licence regarding local availabilities with respect to its airing of this program. However, in future, the airing of this program during local availabilities would place EastLink in breach of that condition of licence.

The Commission's conclusions

40. The Commission **directs** Shaw and Bragg to cease airing, during local availabilities, all programs that the Commission has found in this decision would violate the condition of licence on local availabilities. In this regard, the Commission has been advised that EastLink has ceased airing the "red-hot chilli peppers" program and the "Cathy Whynot" program that the Commission has found to be in breach of its condition of licence.

41. Further, pursuant to section 11(3) of the Regulations, and consistent with *Rogers Cable Inc. – Breach of Broadcasting Distribution Regulations and Conditions of Licence*, Broadcasting Public Notice CRTC 2002-44, 12 August 2002, the Commission **directs** each of Bragg and Shaw to file quarterly compliance reports for a period of three years regarding their use of local availabilities. The first of these reports is to cover the period from the date of this decision to 30 September 2003, inclusive, and is to be filed by 31 October 2003.
42. Each report shall include a declaration from a senior officer of the company, on behalf of all of its BDUs, confirming their compliance with the condition of licence and policies relating to the use of local availabilities and, in particular that no program, announcement or promotion aired in local availabilities during the period of the report referred to services other than those specifically mentioned in the local availabilities condition of licence.
43. In light of the directions set out in the previous paragraphs, the Commission does not consider it necessary to issue mandatory orders at this time. Accordingly, the Commission **denies** Aliant and CAIP's requests for relief by way of mandatory orders.
44. The Commission also **denies** Aliant's request, as set out in its complaint of 4 September 2002, for relief that would require EastLink to provide advertising credits to Aliant. In the Commission's view, such relief would entail further breaches of the local availabilities condition of licence or breaches of the regulations or decisions relating to the community channel or the promotional channel.
45. In addition, the Commission **denies** the complainants' requests for relief under sections 32 and 33 of the Act.
46. Finally, given that it has found that Shaw and Bragg violated the local availabilities condition of licence in airing these programs, the Commission finds it unnecessary to consider whether section 9 of the Regulations was also breached.
47. The Commission will review the compliance reports to be filed pursuant to this decision, and should those reports or further complaints reveal continued non-compliance, the Commission will consider additional forms of relief, as appropriate.

Secretary General

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