



Broadcasting Decision CRTC 2008-358

Ottawa, 22 December 2008

Complaint regarding the simultaneous substitution of the high definition broadcast of the 2008 Super Bowl

In this decision, the Commission addresses a complaint by CTV Television Inc. (CTV) regarding the simultaneous substitution, by Shaw Cablesystems Limited (Shaw), Star Choice Television Network Incorporated (Star Choice) and Bell ExpressVu Limited Partnership (Bell TV), of CTV's 3 February 2008 high definition (HD) broadcast of the 2008 Super Bowl.

Complaint against Shaw

The Commission concludes that Shaw was in non-compliance with its requirement to perform simultaneous substitution of CTV's HD broadcast of the 2008 Super Bowl, but also accepts its explanation that technical difficulties prohibited it from performing that simultaneous substitution. The Commission expects Shaw to perform HD simultaneous substitution of the 2009 Super Bowl and directs Shaw to provide both the Commission and CTV with written assurance, within two weeks of the date of the present decision, that any technical issues have been fully resolved and that complete HD substitution will take place. The Commission also requires Shaw to be prepared to implement manual override of its simultaneous substitution equipment should that equipment fail.

Complaint against Star Choice

The Commission concludes that Star Choice was in compliance with its condition of licence in regard to its performing simultaneous substitution of CTV's HD broadcast of the 2008 Super Bowl.

Complaint against Bell TV

The Commission concludes that Bell TV was in non-compliance with its requirements relating to the simultaneous substitution of CTV's HD broadcast of the 2008 Super Bowl. The Commission expects Bell TV to perform simultaneous substitution of future Super Bowl and similar broadcasts in compliance with the Broadcasting Distribution Regulations, and in the same manner that it regularly performs such substitutions. The Commission also directs Bell TV to confirm in writing, with both the Commission and CTV, within two weeks of the present decision, that it will perform such substitution.

Introduction

1. On 1 April 2008, CTV Television Inc. (CTV) filed a complaint with the Commission alleging that the following broadcasting distribution undertakings (BDUs) failed to perform simultaneous program substitution¹ (simultaneous substitution) of CTV's 3 February 2008 high definition (HD) broadcast, on CTV-HD East (CFTO-DT Toronto) and CTV-HD West (CIVT-DT Vancouver), of the 2008 National Football League (NFL) Super Bowl:
 - Shaw Cablesystems Limited (Shaw), with respect to the CTV-HD West signal, as distributed by the Class 1 cable systems operated by Shaw in the Vancouver and North Vancouver areas;
 - Star Choice Television Network Incorporated (Star Choice), with respect to the CTV-HD East signal distributed nationally by Star Choice; and
 - Bell ExpressVu Limited Partnership² (Bell TV), with respect to the CTV-HD East signal and the CTV-HD West signal, which are distributed nationally by Bell TV.
2. According to CTV, on 24 January 2008, consistent with past practice, it submitted its simulcast request with respect to the 2008 Super Bowl to Mediastats Inc., who then distributed that request to all BDUs on 29 January 2008. CTV noted that it also attached a memo to that request, stressing the importance of the BDUs performing HD simultaneous substitution of its broadcast of the 2008 Super Bowl. CTV attached copies of the above-noted simulcast request and memo to its complaint.
3. The Commission notes that, in order to request simultaneous substitution over an HD program, the television station must have an operational digital transmitter, which CTV does in both Vancouver and Toronto, and must also be broadcasting the program in HD.
4. According to CTV, the evidence shows beyond dispute that the BDUs in question had an obligation under the *Broadcasting Distribution Regulations* (the Regulations) to perform simultaneous substitution of CTV's HD broadcast of the 2008 Super Bowl but failed to fully comply with that obligation. CTV added that Bell TV also advertised to its subscribers where they could get access to the "unsubstituted" U.S. signals with U.S. Super Bowl commercials intact.
5. CTV requested that the Commission take immediate action to require Shaw, Star Choice and Bell TV to comply with the regulatory framework for the simultaneous substitution of HD signals and to perform complete simultaneous substitution of the CTV-HD East and/or CTV-HD West signals (as applicable), in accordance with their regulatory requirements.

¹ "Simultaneous program substitution" is discussed in sections 30 and 42(1)(a) of the *Broadcasting Distribution Regulations*.

² Bell ExpressVu Inc. (the general partner), and BCE Inc. and Bell Canada (partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership

6. CTV further requested that, given the ineffectiveness of previous enforcement measures, the Commission issue a permanent mandatory order under section 12(2) of the *Broadcasting Act* (the Act) requiring Shaw, Star Choice and Bell TV to immediately comply with all of their simultaneous substitution obligations for both standard definition and HD signals in accordance with the Regulations and Broadcasting Public Notice 2003-61. CTV further requested that the mandatory order be registered as an order of court in accordance with section 13 of the Act so that, going forward, if any of these BDUs breaches its simultaneous substitution obligations, that BDU would be guilty of contempt of court.

Background on simultaneous substitution methods employed by the different BDUs

7. The Commission notes that CTV's complaint involves allegations against three BDUs, each of which employs a different method to perform simultaneous substitution and, as a result, has somewhat different regulatory requirements regarding such substitution.
8. Shaw, as a cable BDU, performs simultaneous substitution within its local service area, as specified in section 30 of the Regulations. Although Star Choice and Bell TV are both direct-to-home (DTH) BDUs, each performs simultaneous substitution in a different way, due to the specific technology each has chosen to use.
9. Star Choice uses Virtual Channel Override (VCO) technology. Because this technology uses a software-driven switch at the subscriber's set-top box rather than a switch at the satellite uplink, Star Choice can perform simultaneous substitutions on a market-by-market basis. Essentially, if a subscriber within a certain distance of a Canadian broadcaster distributed by Star Choice tunes to the U.S. channel broadcasting the same programming at the same time as that Canadian broadcaster, the VCO technology directs the subscriber's set-top box to tune to the Canadian simulcast specified. In performing simultaneous substitution in this localized manner, Star Choice performs it in a manner comparable to that of a cable BDU. In addition, because the substitution is done market-by-market at the set-top box, Star Choice can accommodate simultaneous substitution requests from more than one broadcaster. For example, for subscribers in Ottawa, Star Choice could substitute CTV Ottawa over FOX Detroit; at the same time, for subscribers in Toronto, it could substitute CTV Toronto over FOX Detroit (assuming that all the stations referred to were distributed by Star Choice).
10. In contrast, Bell TV performs simultaneous substitution at the satellite uplink, which does not permit a market-by-market approach such as that discussed above for Star Choice. Instead, it typically performs simultaneous substitution on a national basis, with only one Canadian signal being substituted over a given non-Canadian signal. The substituted Canadian signal is then distributed to all Bell TV subscribers, regardless of where they are located in the country. As a result, using the previous example, Bell TV would not be able to accommodate requests for simultaneous substitution from both CTV Toronto and CTV Ottawa over FOX Detroit. Rather, all subscribers (in Ottawa and elsewhere) would receive simultaneous substitution from CTV Toronto over the U.S. station.

11. In Broadcasting Public Notice 2003-37, the Commission noted that the different approaches adopted by Star Choice and Bell TV were in accordance with each licensee's specific requirements for simultaneous substitution. The Commission further stated in that public notice that the approach adopted by Bell TV benefits television broadcasters whose signals originate from Toronto or Vancouver, whereas the use of VCO technology by Star Choice on identical U.S. signals offers a more localized form of simultaneous substitution, and thus has the potential to directly benefit a larger number of broadcasters.
12. Bearing in mind these differences in the methods used by Shaw, Star Choice and Bell TV, CTV's specific allegations with respect to each of the BDUs are discussed below.

Complaint against Shaw

The Complaint

13. CTV noted that, on 3 February 2008, Shaw carried two FOX-HD feeds (i.e., east and west) of the 2008 Super Bowl on its Vancouver and North Vancouver cable systems. According to CTV, instead of substituting the CTV-HD West signal over both FOX feeds, Shaw substituted the CTV signal over one FOX-HD signal only. CTV also noted Shaw's claim that it could not substitute over distant signals (i.e., over the eastern FOX feed), but contended that this is a tactic used by Shaw to circumvent its HD simultaneous substitution obligations and disregard the Commission's order requiring it to perform complete HD simultaneous substitution.

Reply by Shaw

14. Noting that it has performed HD simultaneous substitution with respect to the CTV-HD station in Vancouver since 31 December 2007, Shaw stated that earlier implementation delays were due to technical issues linked to new digital signal processing equipment and software that had yet to be resolved in such a manner that there would be no impact on the quality of service delivered. Shaw further stated that most of the technical issues regarding the implementation of HD simultaneous substitution have been resolved, resulting in a 99% success rate.
15. Shaw explained that, to perform the HD simultaneous substitution, it uses a digital video splicer – a network device that manages the digital processing of video and audio input streams for the purposes of grooming, multiplexing, and inserting digital signals. Shaw noted that the splicer is very sensitive to variances in the quality of the digital video and audio inputs and signals it processes and is used to process signals from many different sources. Shaw admitted that, with respect to the 2008 Super Bowl broadcast, the digital video splicer equipment did not perform all substitutions. However, Shaw also categorically stated the following: “unlike the admission by [Bell TV], Shaw took absolutely no steps to direct our customers to non-substituted FOX-HD signals, or to market the availability of an unsubstituted U.S. signal. There was no intent by Shaw to undermine CTV's carriage of the [Super Bowl].”

Reply by CTV

16. CTV described Shaw's explanation for its failure to implement HD simultaneous substitution as "somewhat disingenuous." It noted that Shaw has been reluctant to provide simultaneous substitution on an HD basis ever since the Commission's policy on such substitution was introduced four and a half years ago. CTV also noted that, as recently as the fall of 2007, Shaw refused to implement the necessary technological upgrades to implement HD simultaneous substitution, and reconsidered only under the threat of a mandatory order.
17. CTV submitted that, during the month of January 2008, it made numerous HD simultaneous substitution requests relating to other nationally broadcast NFL games. According to CTV, on each occasion, it was informed that Shaw did not have the technology to effect the simultaneous substitution over distant signals on an HD basis. CTV added that, on the day of the 2008 Super Bowl, the General Manager of its Vancouver station spoke directly to Shaw about the fact that it was not substituting over the Detroit FOX-HD signal and was informed that Shaw did not have the technology to do so. CTV stated that it was unaware of any time since Shaw supposedly implemented its simultaneous substitution technology that Shaw has performed such substitution over a distant signal. CTV submitted that this culture of non-compliance must be addressed by the Commission.

Commission's analysis and determinations

18. The Commission notes that, pursuant to a complaint by the Canadian Association of Broadcasters (CAB), the Commission issued a letter decision on 1 August 2007 (the 1 August letter). In that letter, it determined that certain BDUs that were not carrying out simultaneous substitution on behalf of CTV and CITY-TV in Toronto and CTV in Vancouver were not in compliance with the regulatory framework relating to the distribution of HD signals set out in Broadcasting Public Notice 2003-61. In the 1 August letter, the Commission specifically directed Shaw to perform HD simultaneous substitution with respect to the CTV station in Vancouver by the end of the 2007 calendar year. Shaw initially refused to perform such substitution; however, it agreed after the Commission initiated proceedings on a mandatory order, which ultimately could have required Shaw to do so, in effect, under a Federal Court order.
19. The Commission further notes that, in the case of the 2008 Super Bowl, in order to fully protect the programming rights of the local Vancouver CTV-HD station, Shaw would have had to perform HD simultaneous substitution over both the FOX Detroit and FOX Seattle feeds, since the game was being broadcast simultaneously by both stations.
20. Shaw began performing HD simultaneous substitution in January 2008, approximately one month before the 2008 Super Bowl broadcast. Noting that there have been technical difficulties for BDUs to overcome in implementing HD simultaneous substitution, the Commission considers Shaw's explanation that it was experiencing some technical problems at the time of the 2008 Super Bowl broadcast to be credible.

21. As noted above, Shaw submitted that it has dealt with most of the technical issues regarding HD simultaneous substitution, resulting in a 99% success rate. The Commission is of the view that Shaw will be able to successfully implement complete HD simultaneous substitution of the 2009 Super Bowl.
22. In light of the above, the Commission finds that Shaw was in non-compliance with its requirement to perform simultaneous substitution of CTV's HD broadcast of the 2008 Super Bowl, but also accepts its explanation that technical difficulties prohibited it from performing that simultaneous substitution. Further, the Commission fully expects Shaw to perform HD simultaneous substitution of the 2009 Super Bowl. The Commission therefore requires Shaw to ensure that its HD simultaneous substitution equipment is in place and fully operational in time for the 2009 Super Bowl, and that it be prepared to implement manual override of its simultaneous substitution equipment should that equipment fail. The Commission further directs Shaw to provide the Commission with written assurance, within two weeks of the date of the present decision, that any technical issues have been fully resolved and that complete HD simultaneous substitution will take place. The Commission also directs Shaw to provide CTV with a copy of that written assurance within the same time frame. Should Shaw not provide the required written assurance to both the Commission and CTV as directed above, the Commission will consider further action.

Complaint against Star Choice

The Complaint

23. Citing section 42(1)(a) of the Regulations, CTV noted that a DTH licensee is required to "delete a non-Canadian programming service and substitute the comparable and simultaneously broadcast programming service of the Canadian television programming undertaking whose signal is distributed by the licensee" if that licensee receives a written request from a licensed Canadian television programming undertaking at least four days before the broadcast of the programming service in question.
24. Noting Star Choice's use of VCO technology to perform simultaneous substitution, CTV submitted that Star Choice, while it delivered the CTV-HD East signal to all its subscribers across the country, chose to provide simultaneous substitution only for subscribers in Toronto, rather than directing each subscriber's set-top box to tune to the nearest CTV-HD signal distributed on Star Choice (i.e., CTV-HD East). CTV contended that "[t]his is in blatant violation of the requirement under the Regulations for Star Choice to 'substitute the comparable and simultaneously broadcast programming service of the Canadian television programming undertaking whose signal is distributed by the licensee'."

Reply by Star Choice

25. Star Choice submitted that it complies fully with the Commission's policy for simultaneous substitution for HD television stations, set out in Broadcasting Public Notice 2003-61. Star Choice noted in particular paragraph 114 of that policy, which states the following:

The Commission considers that the regulatory obligations of BDU licensees operating in the same market should in principle be equivalent, taking into account their different circumstances, including the differences in their distribution technologies.
26. Star Choice submitted that section 42(1) of the Regulations does not address the geographical reach of required simultaneous substitution. According to Star Choice, its implementation of simultaneous substitution on a local basis for the benefit of local broadcasters is supported by the scope of simultaneous substitution requirements for cable BDUs, its development of its unique VCO technology, and the underlying rationale for simultaneous substitution.
27. Star Choice noted that broadcasters have never complained about the nature of its localized simultaneous substitution through VCO technology because that technology enables the signal of a specific local broadcaster to be prioritized such that it can extend its reach, thereby allowing the broadcaster to maximize the value of the particular local program rights that it has licensed. Star Choice noted that, in Broadcasting Public Notice 2003-37, the Commission confirmed the appropriateness of Star Choice's simultaneous substitution practices as follows: "The use of [VCO technology] by Star Choice on identical U.S. signals offers a more localized form of simultaneous substitution, and thus has the potential to directly benefit a larger number of broadcasters."
28. Star Choice argued that it complies with the rules by substituting the HD version of CFTO-TV (the HD CTV affiliate carried by Star Choice) over the signal of a non-Canadian HD station that broadcasts the same programming with the same signal quality. Star Choice added that its simultaneous substitution of U.S. television stations is made over a 50-mile radius from all originating Canadian television signals carried by Star Choice in order to encompass the Grade B contours of those stations. It also submitted that it implements simultaneous substitution for U.S. signals in the same manner as the cable BDUs with which it competes and that its approach serves the underlying regulatory rationale of simultaneous substitution requirements, i.e., the protection of the advertising base of local television stations.
29. Star Choice argued that its simultaneous substitution of CFTO-TV's broadcast of the Super Bowl in HD was completely consistent with all of the simultaneous substitution performed by its use of VCO technology in that it was implemented on a localized basis. Star Choice submitted that in no way did it differentiate its simultaneous substitution practices in connection with CTV's HD broadcast of the 2008 Super Bowl on CFTO-TV's HD feed.

30. In its reply, Star Choice also stated the following:

[it is] unfortunate that CTV is now challenging a simultaneous substitution methodology developed by Star Choice, at significant cost, specifically for the benefit of local Canadian broadcasters. CTV's complaint really amounts to an acknowledgement that it is able to monetize distant market viewing to its stations, although it elsewhere asserts its inability to do so.

Star Choice submitted that the Commission should dismiss CTV's complaint, arguing that it is "an inappropriate (not to mention inflammatory) attempt to revise the current rules through a bilateral complaint exercise."

Reply by CTV

31. In reply to Star Choice, CTV submitted that section 42 of the Regulations requires DTH licensees to provide simultaneous substitution on a national basis. While CTV agreed with Star Choice that the VCO technology it employs enables the BDU to provide more localized simultaneous substitution, which is of greater benefit to the broadcaster, CTV was also of the view that Star Choice's use of VCO technology does not absolve it from its requirement to provide simultaneous substitution on a national basis where appropriate.
32. CTV noted that Star Choice offers numerous up-converted analog CTV stations and that each of these stations benefits from simultaneous substitution in its given region. For example, CTV explained that CTV Montréal would get simultaneous substitution in Quebec, while CTV Vancouver would benefit from such substitution in British Columbia. CTV noted, however, that only one of its two HD over-the-air (OTA) television stations is offered by Star Choice, and that if Star Choice offered both, it could divide the country into two substitution zones, thereby benefiting both stations to some degree. CTV submitted, however, that Star Choice chooses instead to provide only localized simultaneous substitution for the one HD CTV station it distributes. CTV argued that Star Choice, having chosen to carry one HD signal, is required to provide simultaneous substitution of that signal in all markets where it is distributed.

Commission's analysis and determinations

33. The Commission notes that Star Choice does not distribute the CTV Vancouver HD signal, and that it is under no obligation to do so. Under the Commission's currently applicable framework for the distribution of digital television signals, set out in Broadcasting Public Notice 2003-61, any obligation Star Choice has to distribute CTV-HD signals is met through its distribution of the CTV Toronto HD signal.
34. In the 1 August letter, the Commission directed Star Choice to perform HD simultaneous substitution with respect to, among other stations, the CTV station in Toronto by the end of the 2007 calendar year. As was the case with Shaw, Star Choice initially refused to perform simultaneous substitution, but agreed to do so after the Commission initiated proceedings on a mandatory order, which could have ultimately required Star Choice to perform simultaneous substitution under a Federal Court order.

35. The Commission notes that Star Choice has a condition of licence that sets out its requirement for simultaneous substitution and that supersedes section 42 of the Regulations. That condition of licence, which is set out in Appendix I to Broadcasting Decision 2004-130, is as follows:
2. If a licensee receives, at least four days before the date on which the programming service is broadcast, a written request for substitution or deletion from the operator of a licensed Canadian television programming undertaking made in accordance with section 42 of the Regulations, the licensee shall delete a non-Canadian programming service and substitute a comparable and simultaneously broadcast programming service of the Canadian television programming undertaking whose signal is distributed by the licensee, provided that both the non-Canadian television programming service and the Canadian television programming service originate from the same up-link centre.
36. The Commission notes that this condition of licence is substantially the same as Star Choice's previous condition of licence on simultaneous substitution, which is set out in Decision 97-576.
37. As stated in Broadcasting Public Notice 2003-37, as noted above, the Commission considers that Star Choice's use of VCO technology on identical U.S. signals offers a more localized form of simultaneous substitution, and thus has the potential to directly benefit a larger number of broadcasters. In that public notice, the Commission also noted that the approach taken by Star Choice was in accordance with the licensee's existing condition of licence relating to simultaneous substitution. As discussed earlier, Star Choice performs simultaneous substitution in a manner comparable to that of a cable BDU, which is consistent with the rationale for using simultaneous substitution as a means of protecting the program rights of local broadcasters.
38. In light of this, the Commission considers that Star Choice was in compliance with its condition of licence in regard to the simultaneous substitution of the 2008 Super Bowl in HD. In fact, as noted by Star Choice, it did not deviate in any way from its usual practice regarding simultaneous substitution, which the Commission has endorsed and found to be in accordance with the BDU's conditions of licence. Further, as noted by Star Choice, broadcasters have not previously objected to its method of simultaneous substitution, which ultimately works to the benefit of local broadcasters.

Complaint against Bell TV

The Complaint

39. CTV noted that, typically, Bell TV carries only one feed of the FOX-HD Boston signal and one feed of the FOX-HD Seattle signal. CTV further noted that, because Bell TV performs simultaneous substitution at its uplink centres, it usually performs it on a national basis, with only one Canadian signal being substituted over a given non-Canadian signal (typically, the CTV-HD East signal would be substituted over the

FOX-HD Boston signal on a national basis, and the CTV-HD West signal would be substituted over the FOX-HD Seattle signal on a national basis). CTV explained that the substituted Canadian signal is then distributed to Bell TV subscribers, regardless of where they are located in the country. According to CTV, this is consistent with DTH's national footprint and compliant with the requirement under the Regulations that DTH BDUs substitute the Canadian signal over the non-Canadian signal in the manner in which it is distributed by the licensee (i.e., nationally).

40. With respect to the simultaneous substitution of the 2008 Super Bowl, CTV submitted that Bell TV, instead of carrying one feed each of the FOX-HD Seattle and Boston signals, opted to carry two feeds of each signal and then deliberately attempted to perform simultaneous substitution for CTV-HD East on only one of its FOX-HD Boston feeds and for CTV-HD West on only one of its FOX-HD Seattle feeds. CTV alleged that Bell TV's intent was that only Toronto and Vancouver subscribers (which includes subscribers residing within a 70-kilometre radius of those cities) would receive the FOX-HD Boston and FOX-HD Seattle feeds, respectively, with the Canadian signals substituted over them, and that the second unsubstituted feed of the FOX-HD Seattle and Boston signals would be available to viewers outside these zones. CTV submitted, however, that Bell TV's attempts fell short, as a number of viewers within downtown Toronto reported being able to view the unsubstituted FOX-HD Boston feed, with the U.S. commercials intact.
41. CTV also submitted that Bell TV posted, on its electronic programming guide, notices highlighting that viewers could watch the U.S. commercials on the unsubstituted FOX feeds, thereby deliberately diverting Canadian viewers to the U.S. commercials (CTV attached examples of those notices to its complaint). CTV contended that this resulted in a loss of viewership to the CTV Canadian HD signals and a reduced ability to monetize that viewing audience.

Reply by Bell TV

42. Bell TV submitted that it has followed to the letter the Commission's rules relating to simultaneous substitution. It argued that, like Star Choice, it was only required to perform simultaneous substitution in Toronto and Vancouver, where CTV operates HD transmitters. Bell TV further noted that, in the 1 August letter, the Commission specified that simultaneous substitution is not required outside Toronto and Vancouver, where CTV does not operate HD transmitters.
43. Bell TV also noted that Class 1 cable BDUs are required to perform simultaneous substitution only in markets where a broadcaster operates an HD transmitter, and argued that all cable subscribers outside of Toronto and Vancouver therefore had "unfettered access" to the Fox-HD signals during the broadcast of the 2008 Super Bowl. Bell TV submitted that, in order to be in complete and full compliance with the Commission's policy, it set out to provide full and complete simultaneous substitution in Toronto's and Vancouver's local greater market areas, the two markets where CTV has local HD transmitters, and, following the lead of other BDUs, offered an "unfettered" FOX-HD feed in other markets.

44. Bell TV explained that it normally carries one feed of the FOX-HD Boston signal and one feed of the FOX-HD Seattle signal and performs simultaneous substitution at its uplink centres, with one Canadian signal substituted over a given non-Canadian signal. It added that, where the programming is identical, it would typically substitute the FOX-HD Boston signal with a CTV-HD Toronto signal and the FOX-HD Seattle signal with the CTV-HD Vancouver signal, and then distribute the substituted Canadian signal to all Bell TV HD subscribers regardless of where they are located in the country. Thus, according to Bell TV, where cable subscribers would have the opportunity to view unsubstituted U.S. network signals in HD, it typically provides substituted HD signals.
45. Bell TV submitted, however, that the Super Bowl is not a “typical” event. It argued that the annual Super Bowl broadcast is a unique pop culture phenomenon and that advertisers spend millions of dollars each year to create commercial messages that are unique and entertaining and that Canadians want to see. Bell TV also argued that it operates in a highly competitive environment and that it was evident in the weeks leading up to the event that cable operators outside of Toronto and Vancouver would offer their subscribers an unsubstituted FOX-HD broadcast of the 2008 Super Bowl, with the U.S. commercials intact. According to Bell TV, in order to remain competitive, it must do the same, while fully respecting the Commission’s rules for the simultaneous substitution of HD signals. Bell TV also noted that it discussed this issue with CTV executives prior to the broadcast and that CTV knew of its intentions.
46. Bell TV explained that, in order to accomplish this substitution, it duplicated the feed of the FOX-HD Seattle and FOX-HD Boston signals on its satellite and performed the simultaneous substitution of the CTV-HD Toronto signal over one of the FOX-HD East signals, and of the CTV-HD Vancouver signal over one of the FOX-HD West signals. It then successfully engineered its system such that viewers in Toronto and Vancouver would receive only the substituted (CTV) HD signals. Bell TV added that, outside of Toronto and Vancouver, where CTV does not operate HD transmitters, the unsubstituted HD broadcast was available to Bell TV subscribers, as it would be on cable systems in those markets. It also noted that, unlike cable BDUs, it also made the CTV-HD version of the program available to those subscribers.
47. Bell TV claimed that, in order to demonstrate to its DTH subscribers that it would match the local cable operators’ HD broadcast of the 2008 Super Bowl, it publicized the fact to its subscribers through its electronic program guide. Bell TV noted that the screen shots of its program guide provided by CTV demonstrate that Bell TV specified that the unsubstituted HD signal would be available only to its subscribers outside of Toronto and Vancouver.
48. Bell TV also submitted that, since CTV provided no evidence to support its allegation that “a number of viewers within downtown Toronto have reported being able to view the unsubstituted FOX-HD Boston feed, with U.S. ads intact,” the Commission must reject this allegation.

49. Finally, Bell TV submitted that, contrary to CTV's allegations, its successful performance of simultaneous substitution ensured no loss of viewing to the CTV-HD signals in Toronto and Vancouver. Bell TV further noted that,

[e]xcept for this one instance, [Bell TV] provides simultaneous substitution for CTV's HD signals in all markets, rather than just in those markets where the regulations require. Hence, for 364 out of 365 days in the year, [Bell TV] delivers bonus audiences to CTV's Toronto and Vancouver HD signals from viewers throughout the country, exceeding its regulatory obligations.

Bell TV submitted that it also informed CTV that, if CTV were able to persuade the industry to adopt a common approach (i.e., pan-Canada substitution), Bell TV would have been a willing partner in such an undertaking.

Reply by CTV

50. As discussed above for Star Choice, CTV stated that the obligation for DTH licensees to perform simultaneous substitution, consistent with the manner in which they are licensed, is national in scope. CTV further noted that, unlike cable BDUs, "DTH licensees are required to provide simultaneous substitution to all Canadian television programming undertakings, as opposed to only local and regional stations."
51. CTV disagreed with Bell TV's statement that, while it normally provides substitution for both CTV's Toronto and Vancouver stations, it is not obliged to do so on a national basis. CTV argued that the national approach to simultaneous substitution is wholly consistent with Bell TV's obligations under the Regulations, and that this was noted by the Commission in Broadcasting Public Notice 2003-37 following its examination of Bell TV's simultaneous substitution practices.
52. CTV noted that Bell TV, in discussing its HD simultaneous substitution requirements, made no reference to the Regulations but relied instead on sections from the 1 August letter, specifically, the Commission's statement that it "considers that BDUs that are not carrying out simultaneous substitution on behalf of CTV and CITY-TV in Toronto and CTV in Vancouver are not complying with the regulatory framework set out in [Broadcasting] Public Notice 2003-61." CTV submitted that the reference in the letter to the markets in which these stations operate was simply for identification purposes and does not, in any way, define the geographical extent of simultaneous substitution required by BDUs. CTV added that the purpose of the 1 August letter was to clarify the obligations of Shaw and Star Choice relating to HD simultaneous substitution in light of Broadcasting Public Notice 2003-61, and in light of a complaint filed by the CAB.
53. CTV also noted that, as stated in the 1 August letter, Broadcasting Public Notice 2003-61 specifies that a "primary digital service that is carried by a distributor on a priority basis will enjoy the same substitution rights as an analog service with the same priority status." It further noted that the rights of analog signals are not specified in Broadcasting Public Notice 2003-61, but in the Regulations.

54. In regard to its claim that Bell TV did not fully effect simultaneous substitution in Toronto, CTV submitted a sworn affidavit from Scott Henderson, Vice-President of Communications for CTVglobemedia Inc. and an Bell TV subscriber, attesting to the fact that, on 3 February 2008, he was able to receive the unsubstituted U.S. feed of the 2008 Super Bowl within the Greater Toronto Area.
55. In reply to Bell TV's arguments that its approach was justified because it operates in a competitive environment, CTV noted that regulatory obligations should not come second to competitive motives. According to CTV, while it is true that cable operators outside of Toronto and Vancouver did offer the U.S. 2008 Super Bowl feed with the U.S. commercials intact, this practice is consistent with the obligations of those licensees under the Regulations. CTV argued that DTH operators are subject to a different set of obligations – not just in the area of simultaneous substitution, but in other areas as well (for example, the distribution of local television stations).
56. CTV also disagreed with Bell TV's assertion that viewers who tune into the Super Bowl are primarily interested in the commercial messages. CTV added that those viewers who really want to see the U.S. commercials can download them from the Internet within minutes after their being broadcast during the game.
57. Finally, CTV submitted that some of Bell TV's statements demonstrate that it clearly does not understand the distant signal tuning problem. As noted by CTV in its reply,

if [Bell TV] tried to charge for distant viewing audiences on a network level, agencies would purchase the games on a local market level at local costs, thereby avoiding payment for the distant signal audience. However, when distant tuning is lost to U.S. stations because substitution has not been effected, advertisers lose this distant viewing which they do value (even though they aren't paying for it).

Commission's analysis and determinations

58. Bell TV's primary obligation regarding simultaneous substitution is set out in section 42(1)(a) of the Regulations:

42.(1) Except as otherwise provided under a condition of its licence, if a licensee receives, at least four days before the date on which the programming service is broadcast, a written request for substitution or deletion from the operator of a licensed Canadian television programming undertaking, the licensee shall

(a) delete a non-Canadian programming service and substitute the comparable and simultaneously broadcast programming service of the Canadian television programming undertaking whose signal is distributed by the licensee [...].

59. The Commission notes that Bell TV was not among the BDUs that were the subject of the above-noted complaint by the CAB regarding HD simultaneous substitution. This is because it was undertaking such substitution at the time. Like Star Choice, Bell TV is

required to perform HD simultaneous substitution with respect to the CTV station in Toronto. Since it distributes the CTV Vancouver HD signal, it is also obliged to perform simultaneous substitution for CTV's station in that city.

60. As noted above, Bell TV, unlike Star Choice, performs simultaneous substitution on the uplink, which does not allow for a market-by-market approach to such substitution. As such, it typically performs simultaneous substitution on a national basis, with only one Canadian signal being substituted over a given non-Canadian signal. The substituted Canadian signal is then distributed to all Bell TV subscribers, regardless of where they are located in the country.
61. In Broadcasting Public Notice 2003-37, the Commission found Bell TV's approach to simultaneous substitution to be in accordance with that licensee's existing condition of licence in this regard (which is now replaced by the almost identically worded regulation noted above), and that its approach benefits television broadcasters whose signals originate from Toronto or Vancouver. Given the technology used by Bell TV, it would be unreasonable to expect it to perform simultaneous substitution on a local basis, as is the case for Star Choice or cable BDUs. In fact, in order to technically perform such substitution, as noted above, Bell TV had to duplicate the feed of the FOX-HD Seattle and FOX-HD Boston signals on its satellite and perform simultaneous substitution of the CTV signals over only one version of the signals. To expect it to do this for all signals on a regular basis would create significant difficulty for Bell TV and would consume valuable satellite capacity. In recognition of these challenges, the Commission accepted Bell TV's method of national substitution, even though it falls short of fully protecting the program rights of local broadcasters, which is the intended purpose of simultaneous substitution.
62. It is evident that Bell TV deviated from its usual practice in its simultaneous substitution of the HD versions of the 2008 Super Bowl broadcast by performing that substitution on a local basis and limiting it to the Toronto and Vancouver markets. Although this method of simultaneous substitution may be seen by some as more consistent with the way that cable BDUs perform it, the Commission is of the view that Bell TV should not be permitted to choose the applicable regulatory approach depending on what works to its greatest advantage in a given set of circumstances.
63. Bell TV justified its actions by arguing that it had to perform simultaneous substitution in the same manner as cable BDUs, due to the uniqueness and importance of the Super Bowl as a "pop culture phenomenon," and in order to remain competitive with those cable BDUs. However, the Commission considers it unlikely that a significant number of subscribers would switch providers simply in order to be able to watch the Super Bowl commercials, particularly when those subscribers have invested in the DTH hardware. In any event, the Commission does not consider Bell TV's argument to be a valid justification for departing from an accepted approach to simultaneous substitution.

64. Further, the Commission considers Bell TV's characterization of the 1 August letter to be incorrect, and that a more correct interpretation is that the 1 August letter generally serves to identify those stations entitled to request HD simultaneous substitution (i.e., those with operational transmitters) rather than to fully define the area within which substitutions must occur.³
65. The Commission therefore finds that Bell TV was in non-compliance with its requirements relating to the simultaneous substitution of HD programming in regard to the 2008 Super Bowl. As noted above, the Commission is of the view that Bell TV should not be permitted to choose the applicable regulatory approach depending on what works to the licensee's greatest advantage in a given set of circumstances. The Commission therefore fully expects Bell TV to perform simultaneous substitution of future Super Bowl and similar broadcasts in compliance with the Regulations, and in the same manner that it regularly performs such substitutions (i.e., on a national basis, with CTV-HD Vancouver substituted over the Seattle feed, and CTV-HD Toronto substituted over the Detroit feed).
66. The Commission also directs Bell TV to confirm in writing, within two weeks of the present decision, that it will perform such substitution, and to provide a copy of such confirmation to CTV within that same time frame. Should Bell TV not provide the required written assurance to both the Commission and CTV as directed above, the Commission will consider further action.

Secretary General

Related documents

- Letter to Shaw Communications & Star Choice Communications, CRTC Letter, 1 August 2007
- *Star Choice – Licence Renewal*, Broadcasting Decision CRTC 2004-130, 31 March 2004
- *The regulatory framework for the distribution of digital television signals*, Broadcasting Public Notice CRTC 2003-61, 11 November 2003

³ Under the policy approach adopted in Broadcasting Public Notice 2003-61, licensed digital OTA television undertakings are authorized, for a limited period of time prior to constructing a transmitter, to provide digital versions of OTA television stations to distributors by direct feed. The distribution of such signals is optional by the BDU, and must be negotiated between the broadcaster and the BDU. Further, the broadcaster is not entitled to request simultaneous substitution of such signals. This is because the Commission regarded the ability to request simultaneous substitution as an incentive for broadcasters to construct transmitters so that their signals would be available over the air. In the 1 August letter, the Commission stated that "[t]he policy established in Broadcasting Public Notice 2003-61 does not make provision for CanWest [MediaWorks Inc.] to submit requests for the simultaneous substitution in the absence of an operational transmitter."

- *Direct-to-home (DTH) broadcasting distribution undertakings – simultaneous and non-simultaneous program deletion and the carriage of local television signals in smaller markets, Broadcasting Public Notice CRTC 2003-37, 16 July 2003*
- *Proposed licence amendments affecting the program deletion and substitution requirements of DTH satellite distribution undertakings – Approved or Approved in part, Decision CRTC 97-576, 8 October 1997*

This decision 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>.