



## Broadcasting Regulatory Policy CRTC 2015-25

PDF version

Route reference: 2014-190

Additional references: 2014-190-1, 2014-190-2, 2014-190-3 and 2014-190-4

Ottawa, 29 January 2015

### Measures to address issues related to simultaneous substitution

*This policy sets out the Commission's measures to address issues related to simultaneous substitution. The policy is a result of the process initiated by Let's Talk TV:*

*A Conversation with Canadians (Let's Talk TV). Today, the Commission also publishes its decision on issues relating to the over-the-air transmission of local TV signals (see Broadcasting Regulatory Policy 2015-24). Other policy decisions resulting from the Let's Talk TV process will be published at a later date.*

*As common carriers, distributors cannot, as a rule, alter or delete the signal of programming services. Rather, their role is to provide Canadians with access to such services.*

*Simultaneous substitution occurs when a distributor temporarily replaces the signal of one TV channel with that of another channel showing the same program at the same time. Usually, an American signal which would be received over the air is replaced by a Canadian signal. Sometimes a Canadian signal from outside a given area is replaced with a local signal. There are a few reasons for allowing simultaneous substitution:*

- *to allow Canadian broadcasters to maximize audiences and advertising revenues for the non-Canadian programs for which they have acquired the Canadian market rights. When broadcasters buy programs from American producers or networks, they pay to have broadcast rights in certain markets. Even though out-of-market and out-of-country signals are widely available to Canadians, simultaneous substitution supports these broadcast rights and allows TV stations to draw more advertising dollars since without signal substitution, the audience for a TV program would be split across several stations, reducing the size of the audience for each station. With that smaller audience, the TV station couldn't charge as much for advertising. In the 2012-2013 broadcast year, the estimated revenue impact of substitution was approximately \$250 million.*
- *to promote local broadcasting and local creation. By helping local stations keep their local audiences and the advertising dollars that go with those audiences, simultaneous substitution enables them to continue to operate and to offer their viewers local as well as international programming.*

- *to keep advertising dollars in the Canadian market. A lot of the time, an American signal is replaced with a Canadian one. Since the Canadian signal features Canadian ads, advertising money is generated in the Canadian market, creating jobs and economic activity.*

*Nonetheless, Canadians have expressed ongoing frustration with the issue of simultaneous substitution in general and the frequency of errors made during the simultaneous substitution process in particular. The broadcasters that request such substitutions and the distributors that carry them out have a duty to ensure that they are free of disruptions or interruptions, given that the simultaneous substitution regime forms an exception to the general principle that distributors must act as common carriers.*

*Despite certain reservations, the Commission will continue to allow the practice of simultaneous substitution for the time being. Consistent with the above and as noted in Broadcasting Regulatory Policy 2015-24, the Commission will also continue to require conventional television licensees to maintain an over-the-air presence in order to retain the right to request simultaneous substitution.*

*However, to ensure that simultaneous substitution is executed in a seamless fashion, the Commission is introducing meaningful consequences should broadcasters and distributors make errors. Specifically, the Commission intends to amend its regulations to deal with recurring, substantial simultaneous substitution errors as follows:*

- *if the errors are made by a local television broadcaster, it will lose the privilege to request simultaneous substitution for a period of time or with respect to a type or types of programming; and*
- *if the errors are made by the distributor, it will have to provide a compensatory rebate to its customers through a specific monetary amount.*

*Further, given the comments received from Canadians and the fact that the non-Canadian advertising produced for the Super Bowl is an integral part of this special event programming, distributors will no longer be allowed to perform simultaneous substitution for this event as of the end of the 2016 NFL season (i.e. for the January/February 2017 broadcast of the Super Bowl).*

## **Introduction**

1. On 24 April 2014, the Commission launched a proceeding to conduct a formal review of its television policies (Broadcasting Notice of Consultation 2014-190). This review, which included a public hearing that began on 8 September 2014, represented Phase 3 of *Let's Talk TV: A Conversation with Canadians* (Let's Talk TV) and drew on issues and priorities identified by Canadians in the two earlier phases of that conversation. The public record for this proceeding, including reports on the comments and input from Canadians received in Phases 1 and 2, can be found on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca).

2. Among the issues identified by Canadians on which the Commission sought comment in Broadcasting Notice of Consultation 2014-190 was simultaneous substitution. This is the temporary replacement of the signal of a non-Canadian station with that of a Canadian station when the program being broadcast is “comparable” (at least 95% the same, excluding commercials). In rare cases, lower priority Canadian signals from other markets are replaced with local Canadian signals. Simultaneous substitution is carried out by broadcasting distribution undertakings (BDUs), such as cable and satellite providers, at the broadcaster’s request and occurs primarily in the English-language market, allowing Canadian broadcasters to maximize audiences and advertising revenues for the non-Canadian programs for which they have acquired the Canadian market rights. This in turn helps ensure that these broadcasters have the financial resources to contribute to the Canadian broadcasting system by producing Canadian programming. The requirements regarding simultaneous substitution are set out in sections 38 and 51 of the *Broadcasting Distribution Regulations* (the Regulations) and constitute an exception to the general requirement set out in section 7 of the Regulations that distributors not alter the content or format of a programming service or delete a programming service.
3. In Broadcasting Notice of Consultation 2014-190, the Commission noted that errors made in performing substitutions, as well as the exclusion of the special non-Canadian advertising produced for events such as the Super Bowl, have made the practice an irritant to viewers and a frequent source of complaints by Canadians. The Commission also noted that there were no up-to-date estimates of its value to Canadian broadcasters.
4. In light of the above, the Commission requested comments on whether simultaneous substitution remains an appropriate mechanism to enable local broadcasters to maximize audiences and advertising revenues. More particularly, in the working document set out in Broadcasting Notice of Consultation 2014-190-3, the Commission asked parties to respond to proposals to eliminate simultaneous substitution either for all programming or solely for live event programming, such as sporting events or awards shows.

### **Positions of parties**

5. Canadians have expressed ongoing frustration with the issue of simultaneous substitution in general and the frequency of errors made during the simultaneous substitution process in particular.
6. Many participants in Phase 1 of Let’s Talk TV complained about the practice, raising concerns about the poor quality and timing of the substitution, which causes them to miss the beginning or the end of a program or miss advertising content, particularly during the Super Bowl. Some actively questioned why Canadian broadcasters should receive additional advertising support and why American networks were not permitted to broadcast their programming without alteration in Canada. Some participants suggested that this practice be restricted or banned outright. For example, one participant in Phase 1 commented:

Canadian private TV channels are owned by very wealthy telecom companies. They have enormous resources (revenues, profits, cross-promotional platforms). These telecom companies are in a strong enough position to withstand the disruptions caused by ending the simultaneous signal substitution regime. It'll hurt, but they'll be okay. There is enough creative and promotional talent up here to make Canadian shows that will be financially successful at home and sellable abroad. Simultaneous substitution creates too many warped incentives and needs to end. We need to encourage an environment where it's good business for Canadian companies to make even more and promote even harder Canadian programming, especially in the prime Fall and Winter seasons.

7. Further, some individuals who participated in the online discussion forum<sup>1</sup> argued that the number of official complaints was not indicative of the scale of the problems with simultaneous substitution. One individual suggested a more simplified tracking mechanism for simultaneous substitution errors. Most of those who commented on the issue of simultaneous substitution stated that it should be eliminated, with many expressing frustration over their inability to see the special advertising for the Super Bowl. Incorrect substitutions were also a frequent source of complaints. For example, one individual commenting on the working document stated:

As for simultaneous substitution, this has been a thorn in my side for decades, namely due to the incompetence of the cable providers to accurately and correctly substitute, but also now with US channels running programs in uneven time blocks (i.e. 9:01pm-10:02pm), and Canadian rights to US show blocks being held by different channels, watching a full night of shows without missing the end or beginning of some or all has become way too difficult because of substitutions.

8. On the other hand, the overwhelming majority of broadcasters and distributors who took part in the hearing argued that simultaneous substitution should be maintained because it allowed them to finance the production and acquisition of Canadian programming. For example, according to a study by Armstrong Consulting commissioned by Bell, Rogers and Shaw, eliminating the practice in the 2012-2013 broadcast year would have reduced advertising revenues for English-language private conventional television broadcasters by \$242-\$266 million, with a secondary impact (additional reductions in advertising revenues due to less money to put into quality programming) in the range of \$173-\$191 million.
9. Further, while eliminating simultaneous substitution solely for live event programming would be less harmful to the broadcasting industry than its complete elimination, Bell, for example, estimated that live event simultaneous substitution accounted for a very significant part of CTV's overall simultaneous substitution revenues (\$40 million or up to roughly as much as 33% of CTV's simultaneous substitution revenues).

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<sup>1</sup> To facilitate the further engagement of Canadians, the Commission extended the deadline for the second phase of the online discussion forum for the proceeding until 19 September 2014, the last day of the public hearing (see Broadcasting Notice of Consultation 2014-190-3).

10. While clearly indicating that the continuation of simultaneous substitution is important, industry stakeholders went on to state that measures needed to be taken to reduce the number of substitution errors and to better communicate to the public the benefits of simultaneous substitution. In particular, during the hearing, Bell, Channel Zero, Eastlink and Rogers indicated their interest in participating in a working group to develop industry practices to reduce the quantity of substitution errors and standard language that BDUs and broadcasters would use to clearly and succinctly explain to subscribers the importance and benefits of simultaneous substitution. Channel Zero suggested that the creation of the working group was important enough that it should report to the Commission on possible solutions by no later than mid-December 2014.
11. In response to a Commission letter dated 24 December 2014 requesting a status report on the progress made towards the development of a working group, the parties in question (Bell, the Canadian Cable Systems Alliance, Channel Zero, Cogeco, Eastlink, MTS, Quebecor, Rogers, SaskTel, Shaw and TELUS) replied on 9 January 2015 that they had met and had agreed to form such a working group, which would hold its first meeting that month to finalize its objectives, associated timelines and a date by which it would report back to the Commission on the actions taken and recommendations for further improvements. The Public Interest Advocacy Centre noted that the working group currently consisted solely of industry representatives and submitted that the Canadian public should have a voice and be represented, particularly with respect to consumer awareness and redress related to simultaneous substitution.
12. Many parties also stressed that while the Commission receives a number of official complaints each year regarding simultaneous substitution, these complaints relate to a very small fraction of the total number of simultaneous substitutions performed every year by BDUs (i.e. fewer than 500 out of more than a half-billion hours of simulcast viewing annually, according to Bell). TELUS noted that of these complaints, 20% were expressions of frustration with the policy itself (especially as it relates to the broadcast of the Super Bowl) and submitted that these numbers demonstrated that when performed correctly and with the care of both the BDU and broadcaster, simultaneous substitution is a seamless process that is unnoticeable to viewers. Nonetheless, BDUs and broadcasters admitted that they had to do a better job of communicating to their subscribers and viewers the benefits of simultaneous substitution, as well as improve their practices to avoid simultaneous substitution errors.

### **Commission's analysis and decisions**

13. Under the current rights market, local Canadian broadcasters frequently acquire broadcast rights to popular U.S. programming. While this programming is also available on the U.S. networks, the Canadian broadcast rights to the programming belong to the relevant Canadian broadcasters, not the U.S. broadcasters. Canadian broadcasters have long argued that they need to maximize audiences and advertising revenues for acquired non-Canadian programming. Signal substitution allows local stations to keep their local audiences and the advertising dollars that go with those

audiences, enabling them to continue to operate and to offer their viewers local as well as international programming. This includes the production of local news, information and analysis. As such, the Commission has allowed Canadian broadcasters to request that BDUs carrying U.S. programming substitute the Canadian signal for the U.S. signal when a comparable program is aired simultaneously. To accommodate this practice, the Commission has created an exception to the general requirement that distributors shall not alter the content or format of a programming service or delete a programming service set out in section 7 of the Regulations.

14. Given that this regime forms an exception to the overall prohibition against altering or deleting a programming service, the burden of proof was on broadcasters and BDUs to show that the regime continues to have merit and that its execution can be seamless for Canadians. The record of this proceeding indicates that simultaneous substitution is still of significant benefit to Canadian broadcasters since it allows them to fully exploit and monetize the programming rights they have acquired, to the benefit of their overall investment in the production of Canadian programming. While the Commission recognizes the challenges of quantifying the actual financial benefits of simultaneous substitution for broadcasters, it generally agrees that the estimated value of advertising revenue attributable to substitution in the 2012-2013 broadcast year was approximately \$250 million.
15. Of the acquired programming rights, live event programming is more likely to be watched in real time with commercial interruptions than other types of programming and as such remains a valuable type of programming for local television broadcasters, particularly in light of the fact that alternative platforms currently do not provide a meaningful alternative to such programming.
16. The simultaneous substitution regime was put in place in the 1970s with a view to allowing greater choice by giving Canadians access to programming from local, regional, national and international sources, while continuing to protect the rights of broadcasters and promote local broadcasting as well as the creation of programs made by Canadians. In light of the evolving rights market and the availability of content on multiple platforms, the Commission foresees a day when this regime may no longer be necessary or will be significantly less valuable for the support of Canadian programming.
17. The Commission has taken note of Canadians' increasing frustration with the issue of simultaneous substitution in general and the frequency of errors made during the simultaneous substitution process in particular. Canadians are rightly dissatisfied when simultaneous substitution errors occur, since subscribers are not receiving the service they have paid for through their subscription, regardless of whether or not they watch the affected programming. Canadians are entitled to an appropriate level of service and it is the Commission's view that BDUs and broadcasters are not currently meeting this required level of service as it relates to simultaneous substitution.

18. In light of the above and despite certain reservations, the Commission will continue to allow the practice of simultaneous substitution for local over-the-air stations for the time being as an exception to the general requirement that distributors shall not alter the content or format of a programming service or delete a programming service. As noted in Broadcasting Regulatory Policy 2015-24, the Commission will also continue to require conventional television licensees to maintain an over-the-air presence in order to retain the right to request simultaneous substitution. However, the Commission is of the view that BDUs should no longer be allowed to provide simultaneous substitution for specialty services and will amend the Regulations accordingly. This will contain simultaneous substitution to a narrow area of application, namely over-the-air signals.
19. Further, given the concerns raised by Canadians regarding simultaneous substitution errors, the Commission considers that the broadcasters that request such substitutions and the distributors that carry them out have an obligation to ensure that they are done properly (i.e. consistent with the Regulations, substitutions should only occur where the programming is comparable and broadcast simultaneously and should end as soon as either one of these conditions is no longer met). For sporting events, simultaneous substitution must not affect the viewing of the entire game or sporting contest. The Commission is also of the view that there is a need for increased collaboration between broadcasters and BDUs. In this regard, it has taken note of the proposal to create a working group to develop industry practices to reduce the quantity of substitution errors, which parties stressed was relatively low. The Commission considers that broadcasters and BDUs should take responsibility for the programming broadcast and for providing an appropriate level of service for their customers and viewers.
20. To address this issue, the Commission intends to amend its regulations to deal with recurring, substantial simultaneous substitution errors as follows:
- if the errors are made by a local television broadcaster, it will lose the privilege to request simultaneous substitution for a period of time or with respect to a type or types of programming;<sup>2</sup> and
  - if the errors are made by the BDU, it will have to provide a compensatory rebate to its customers through a specific monetary amount.
21. To ensure procedural fairness to all broadcasters and BDUs, the Commission's findings on such matters will be determined on a case-by-case basis and in the context of a process during which parties will have an opportunity to present any explanation for the errors, including whether the errors occurred despite the exercising of due diligence by a broadcasting undertaking.

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<sup>2</sup> For instance, sports events, specific sports events or live events.

22. Further, given the comments received from Canadians and the fact that the non-Canadian advertising produced for the Super Bowl is an integral part of this special event programming, distributors will no longer be allowed to perform simultaneous substitution for this event as of the end of the 2016 NFL season (i.e. for the January/February 2017 broadcast of the Super Bowl). The Commission notes that the existing commercial arrangement relating to the broadcast of this event by CTV provided for its broadcast over a number of years. However, the Commission is of the view that the above determination will provide the broadcaster with a reasonable period to make adjustments. The broadcaster may choose to waive simultaneous substitution for 2016 if it considers that viewer and subscriber demand warrants such a measure.

### **Implementation**

23. The Commission will issue a notice of consultation seeking comment on the text of proposed amendments to the Regulations required to enact the policy changes in this decision.

Secretary General

### **Related documents**

- *Over-the-air transmission of television signals and local programming*, Broadcasting Regulatory Policy 2015-24, 29 January 2015
- *Let's Talk TV – Working document for discussion*, Broadcasting Notice of Consultation CRTC 2014-190-3, 21 August 2014
- *Let's Talk TV*, Broadcasting Notice of Consultation CRTC 2014-190, 24 April 2014