



Broadcasting Regulatory Policy CRTC 2015-513

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Reference: 2015-330

Ottawa, 19 November 2015

Regulations to implement policy determinations regarding simultaneous substitution in the Let's Talk TV proceeding

The Commission announces that it has made the Simultaneous Programming Service Deletion and Substitution Regulations (the Regulations). These Regulations implement the Commission's policy determinations regarding simultaneous substitution in the Let's Talk TV process.

The measures set out in the Regulations will serve to ensure that the programming Canadians watch is not disrupted by simultaneous substitutions.

The Regulations will be published in the Canada Gazette, Part II, and will come into force on 1 December 2015.

Introduction

1. The Commission announces that it has made, with some changes, the proposed *Simultaneous Programming Service Deletion and Substitution Regulations* (the Regulations) set out in the appendix to Broadcasting Notice of Consultation 2015-330.
2. These Regulations implement policy determinations made by the Commission in the context of the Let's Talk TV proceeding (see Broadcasting Regulatory Policy 2015-25).
3. The Regulations are set out in the appendix to the present regulatory policy and will be effective 1 December 2015.
4. The Commission received several interventions in response to its call for comments on a number of issues, including the circumstances where requests for simultaneous substitution must be honoured, the process for determining errors and jurisdiction. The public record for this proceeding can be found on the Commission's website at www.crtc.gc.ca.
5. The Commission has reviewed the comments and has made changes to the Regulations to address some of the concerns raised by interveners. The present regulatory policy sets out its determinations on key issues, as well as its interpretation of certain sections of the Regulations to clarify any outstanding ambiguity.

Circumstances where requests for simultaneous substitution must be honoured

6. TELUS Communications Company (TELUS) noted several situations where broadcasting distribution undertakings (BDUs) should not in its view be obligated to honour requests for simultaneous substitution. In particular, TELUS noted cases where the requests were initially made four days before the date of broadcast, but subsequently amended. TELUS also pointed out the increased risk of substantial errors where BDUs were asked to schedule back-to-back substitutions by different broadcasters, particularly where the end and start times for the programs do not coincide.
7. Further, TELUS submitted that a BDU should not be required to comply with requests from broadcasters that it considers to have a less than diligent track record regarding simultaneous substitution errors. In this respect, it noted that many errors would never come to light in a complaints-based system because BDUs frequently correct the errors of broadcasters.

Commission's analysis

8. Section 4(1) of the Regulations provides that a BDU **must** comply with a request for simultaneous substitution where certain conditions are met. Among these conditions is the requirement that the request be received by the BDU at least four days before the day of the broadcast. Section 4(2) provides that if an otherwise valid request is received less than four days before the day of the broadcast, the BDU **may** comply with the request. These provisions maintain the regime currently in place for the timing of requests.
9. For purposes of meeting the condition related to the timing of requests, the Commission considers that each amendment to a request for simultaneous substitution constitutes a new request. Accordingly, if a broadcaster submits an amendment to a request less than four days before the day of the broadcast, the BDU may comply with the request for simultaneous substitution, but is not required to do so.
10. Regarding the other issues raised by TELUS, BDUs must comply with requests for simultaneous substitution that meet the conditions set out in the Regulations. Errors arising from circumstances such as back-to-back substitutions may be addressed under the due diligence defence contemplated in section 5(2) of the Regulations. Additionally, if a BDU has concerns with a broadcaster's simultaneous substitution performance, it may raise the issue with the Commission.

Process

11. Several interveners commented on the process under the proposed sections 4(3) and 5(2) of the Regulations for determining when a broadcaster or BDU has made an error that would justify prohibiting the former from requesting simultaneous substitution or requiring the latter to provide compensation to its customers. In

particular, they noted that section 4(3) regarding errors by broadcasters provides for a decision by the Commission pursuant to section 18(3) of the *Broadcasting Act* (the Act), while section 5(2) relating to errors made by BDUs does not.

Commission's analysis

12. Although the Commission would not in any event require remedial action in the absence of process, it acknowledges the discrepancy between the two sections. Accordingly, for greater clarity, it has amended section 5(2) to include reference to a decision made by the Commission under section 18(3) of the Act.

Interpretation

13. Several interveners expressed concerns over how errors and remedies would be determined. In particular, they submitted that many of the terms used in the Regulations, such as “not in the public interest,” “due diligence,” “recurring substantial,” “affected” and “through its own actions,” were vague and required definition as they provided no guidance for broadcasters or BDUs as to when they may face a remedial order. They also expressed concern with the role of third parties and the possibility of being held accountable when the fault may actually lie with someone other than the broadcaster or BDU.
14. Finally, they argued that it was unclear what the terms of any remedies would be, including how long broadcasters would lose the right to request simultaneous substitution and to what programs the prohibition would apply, as well as who would receive compensation and how it would be determined.

Commission's analysis

15. All determinations on whether an error constitutes a recurring substantial error requiring remedial action, as well as the nature of that remedial action, will be determined on a case-by-case basis in light of the specific facts of the case and a full record, including any due diligence arguments. In all cases, such determinations will only be made subsequent to a process under section 18(3) of the Act where all parties have had an opportunity to present information to the Commission regarding the alleged error.
16. Regarding the term “not in the public interest,” the current simultaneous substitution regime set out in sections 38 and 51 of the *Broadcasting Distribution Regulations* already provides that the Commission may order that simultaneous substitution not be performed where it finds that to do so would not be in the public interest. These sections specify that the substitution would not be in the public interest where it would cause undue financial hardship or where the signal to be substituted does not contain the same subsidiary signals as the signal being substituted. For purposes of interpreting the new Regulations, the Commission clarifies that the above-noted reasons for finding a substitution not in the public interest will continue to apply and that recurring substantial errors on the part of a broadcaster may also constitute a circumstance where the simultaneous substitution would not be in the public interest.

Leaving the provision open-ended in the Regulations in this respect will ensure that the Commission is better able to deal with simultaneous substitution issues on a case-by-case basis.

17. With respect to the concerns raised regarding the role that third parties play in simultaneous substitution errors, all of the circumstances of the case should be put before the Commission in the event of a complaint; it will then be open to a broadcaster or BDU to raise these circumstances as part of its due diligence arguments.
18. Although complaints and remedies will be determined on a case-by-case basis, in the case of a decision under section 5(2) of the Regulations requiring compensation, the appropriate parties to receive such compensation will generally be all subscribers to the BDU. Given that simultaneous substitution is only available to local television stations which must be carried on the basic service pursuant the *Broadcasting Distribution Regulations*, the programming in question will have been distributed to all subscribers.

Jurisdiction

19. BCE Inc., Rogers Communications Inc., Shaw Communications Inc. and Quebecor Media Inc. submitted that the Commission lacks the authority to impose measures such as the loss of the right to request simultaneous substitution (section 4(3) of the Regulations) or compensation (section 5(2) of the Regulations) as these provisions create sanctions that are punitive and in the nature of administrative monetary penalties (AMPs). They proposed that these provisions be deleted.
20. The National Football League (NFL) and the Small Market Independent Television Stations Coalition (SMITS) also commented on the Commission's statement of intent to issue an order under section 9(1)(h) of the Act to implement its policy not to permit simultaneous substitution for the Super Bowl beginning in the 2016-2017 season. They submitted that the Commission lacks the jurisdiction to make any order excluding the Super Bowl from the simultaneous substitution regime. According to the SMITS, such exclusion would cause material losses to almost half of its English-language member stations as they currently run CTV programming. The NFL further argued that the proposed order would conflict with Canada's treaty obligations under the North American Free Trade Agreement (NAFTA) and the Canada-United States Free Trade Agreement (CUSFTA).

Commission's analysis

21. The Commission has considered the arguments of the interveners and concluded that it has the jurisdiction to implement these regulatory changes.
22. The Commission's rationale for implementing these changes to the simultaneous substitution regime is set out in Broadcasting Regulatory Policy 2015-25 and was summarized in Broadcasting Notice of Consultation 2015-330. The Commission has

also provided additional guidance in Broadcasting Information Bulletin 2015-329 and in this regulatory policy as to how these sections will be interpreted and applied.

23. Throughout these documents, the Commission made it clear that the simultaneous substitution regime is an exception to the general rule that BDUs cannot alter or delete the signal of a programming service as their role in the broadcasting system is to distribute content and they are therefore not generally involved with its content. The Commission has found that the exception of permitting and in some cases requiring simultaneous substitution fulfills an important role in achieving the policy objectives of the Act, notably by permitting the development and maintenance of a Canadian rights market and protecting the ability of Canadian broadcasters to earn revenue that they can then invest in the development and broadcast of Canadian content. However, the Commission has also found that recurring substantial errors in the manner in which BDUs and broadcasters execute simultaneous substitution jeopardize the integrity of the simultaneous substitution regime as a whole, as well as its ability to contribute to the policy objectives of the Act as a whole.
24. With respect to section 4(3) of the Regulations regarding the loss of the right to request simultaneous substitution, as noted earlier the current simultaneous substitution regime already includes the provision that the Commission may order that simultaneous substitution not be performed where it finds that to do so would not be in the public interest.
25. As regards section 5(2) of the Regulations relating to compensation for customers, this requirement is necessary to ensure that the harm to the broadcasting system can be remedied. Therefore, by making these Regulations, the Commission is not creating a new power or imposing a new rule. Instead, it is simply modifying the existing simultaneous substitution regime where necessary to ensure that it continues to fulfill the policy objectives of the Act. The revisions are remedial and are not equivalent to AMPs.
26. With respect to the Super Bowl, the Commission notes that it has not yet issued an order excluding the Super Bowl from the simultaneous substitution regime and that therefore the NFL's arguments are premature. However, given that the NFL presented the arguments, the Commission notes that section 9(1)(h) of the Act grants it broad powers to impose any terms and conditions on the distribution of programming services it deems necessary in furtherance of its objects. Unlike the Commission's powers to make regulations pursuant to section 10 of the Act, which are to be exercised with respect to all licensees or classes of licensees, section 9 of the Act relates to conditions which are by definition targeted, including conditions of licence specific to the circumstances of individual licensees.
27. The Commission's policy determination to no longer allow simultaneous substitution for the Super Bowl was based on evidence before the Commission with respect to the unique way in which Canadians perceive the Super Bowl and the role of advertisements in this program. This evidence is relevant to the policy objectives of the Act, irrespective of the commercial or legal intent of the NFL or its programming

partners with respect to the event, its integration into a full season and its commercials. The Commission's policy determinations with respect to simultaneous substitution do not affect the NFL's copyright in its programs. At most, these determinations will have a secondary impact on the value of the program as they may affect the ability of Canadian broadcasters to obtain revenues from broadcasting this program.

28. Finally, with respect to the arguments regarding NAFTA and CUSFTA, the Commission disagrees with the position stated by the NFL. Trade agreements do not apply directly to the Commission without specific legislation to this effect. Even if these treaties were directly applicable to the Commission, they would simply provide Canada with the ability to create a simultaneous substitution regime; they would in no way limit the Commission's ability to modify or even remove this regime.

Secretary General

Related documents

- *Call for comments on the proposed Simultaneous Programming Service Deletion and Substitution Regulations*, Broadcasting Notice of Consultation CRTC 2015-330, 23 July 2015
- *Simultaneous substitution errors*, Broadcasting Information Bulletin CRTC 2015-329, 23 July 2015
- *Measures to address issues related to simultaneous substitution*, Broadcasting Regulatory Policy CRTC 2015-25, 29 January 2015

Appendix to Broadcasting Regulatory Policy CRTC 2015-513

SIMULTANEOUS PROGRAMMING SERVICE DELETION AND SUBSTITUTION REGULATIONS

Definitions

1. (1) The following definitions apply in these Regulations.

“Canadian television station”
« *station de télévision canadienne* »

“Canadian television station” means a television programming undertaking that is licensed as a television station or that provides its Canadian programming service by way of a transmitting antenna and includes an educational authority responsible for an educational television programming service and the station CTV Two Atlantic.

“local television station”
« *station de télévision locale* »

“local television station”, in relation to a licensed area of a distribution undertaking, means

(a) a licensed television station that

(i) has a Grade A official contour or digital urban official contour that includes any part of the licensed area, or

(ii) if there is no Grade A official contour or digital urban official contour, has a transmitting antenna that is located within 15 km of the licensed area;

(b) an educational authority responsible for an educational television programming service; or

(c) the station CTV Two Atlantic.

Definitions — *Broadcasting Distribution Regulations*

(2) In these Regulations, the expressions “Canadian programming service”, “comparable”, “customer”, “DTH distribution undertaking”, “educational authority”, “educational television programming service”, “format”, “licence”, “licensed”, “licensed area”, “licensee”, “non-Canadian television station”, “official contour”, “operator”, “programming service”, “regional television station”, “relay distribution undertaking”, “subscriber”, “subscription television system” and “terrestrial distribution undertaking” have the same meanings as in section 1 of the *Broadcasting Distribution Regulations*.

Application

2. These Regulations apply to a person that is licensed to carry on a distribution undertaking, other than a person that is licensed to carry on

- (a) a subscription television system;
- (b) a relay distribution undertaking; or
- (c) an undertaking that only rebroadcasts the radiocommunications of one or more other licensed undertakings.

Terrestrial distribution undertaking

3. (1) The operator of a Canadian television station may ask a licensee that carries on a terrestrial distribution undertaking to delete the programming service of another Canadian television station or a non-Canadian television station and substitute for it the programming service of a local television station or regional television station.

DTH distribution undertaking

(2) The operator of a Canadian television station may ask a licensee that carries on a DTH distribution undertaking

- (a) to delete the programming service of a non-Canadian television station and substitute for it the programming service of the Canadian television station; or
- (b) in respect of subscribers located within the Grade B official contour or noise-limited bounding official contour of the Canadian television station, to delete the programming service of another Canadian television station and substitute for it the programming service of the Canadian television station.

Obligation to carry out request

4. (1) Except as otherwise provided under these Regulations or in a condition of its licence, a licensee that receives a request referred to in section 3 must carry out the requested deletion and substitution if the following conditions are met:

- (a) the request is in writing and is received by the licensee at least four days before the day on which the programming service to be substituted is to be broadcast;
- (b) the programming service to be deleted and the programming service to be substituted are comparable and are to be broadcast simultaneously;
- (c) the programming service to be substituted has the same format as, or a higher format than, the programming service to be deleted; and
- (d) if the licensee carries on a terrestrial distribution undertaking, the programming service to be substituted has a higher priority under section 17 of the *Broadcasting Distribution Regulations* than the programming service to be deleted.

Late request

(2) In the case of a request that is not received within the period referred to in paragraph (1) (a) but that meets the conditions set out in paragraphs (1) (b) to (d), the

licensee may carry out the requested deletion and substitution, except as otherwise provided under these Regulations or in a condition of its licence.

Decision by Commission

(3) A licensee must not delete a programming service and substitute another programming service for it if the Commission decides under subsection 18 (3) of the *Broadcasting Act* that the deletion and substitution are not in the public interest.

Deletion and substitution by operator

(4) The licensee and the operator of the local television station or the regional television station may agree to have the operator carry out the deletion and substitution.

More than one request

(5) If a licensee that carries on a terrestrial distribution undertaking receives a request for deletion and substitution from more than one operator of a Canadian television station, it must give preference to the programming service of the television station that has the highest priority under section 17 of the *Broadcasting Distribution Regulations*.

Discontinuation of substitution

(6) A licensee may discontinue a deletion and substitution if the deleted and substituted programming services are not, or are no longer, comparable and broadcast simultaneously.

Minimal disruption

5. (1) A licensee that deletes a programming service and substitutes another programming service for it must exercise due diligence to ensure that the deletion and substitution do not result in errors in the provision of the service and that they cause only minimal disruption of the service to its subscribers.

Compensation

(2) A licensee must provide compensation to its customers if the Commission decides under subsection 18 (3) of the *Broadcasting Act* that the licensee deleted and substituted a programming service in a manner that, through its own actions, resulted in recurring substantial errors and did not establish that it exercised due diligence to avoid those errors.

Errors

(3) For the purposes of this section, an error occurs if the deletion and substitution of the programming service are not carried out simultaneously or the video or audio components of the programming service are affected as a result of the deletion and substitution.

CONSEQUENTIAL AMENDMENTS TO THE BROADCASTING DISTRIBUTION REGULATIONS

6. Paragraph 7(a) of the *Broadcasting Distribution Regulations*¹ is replaced by the following:

(a) as required or authorized by a condition of its licence or under the *Simultaneous Programming Service Deletion and Substitution Regulations*.

7. Section 38 of the Regulations and the heading before it are repealed.

8. Section 39 of the Regulations is replaced by the following:

39. Except as otherwise provided under a condition of licence, this Part and sections 19, 23 to 26, 28 and 30 to 37 apply to terrestrial distribution undertakings that elect to distribute programming services on an analog basis.

9. Section 51 of the Regulations and the heading before it are repealed.

COMING INTO FORCE

10. These Regulations come into force on December 1, 2015.

¹SOR/97-555