



Broadcasting Decision CRTC 2004-47

Ottawa, 8 February 2005

Vidéotron ltée, on behalf of itself and of Vidéotron (Regional) Ltd.

Ascot Corner, Coaticook, Cowansville, East Angus, La Malbaie, La Pocatière, Lachute, Montebello, Québec, Rivière-du-Loup, Saint-André-Avellin, Saint-Édouard-de-Lotbinière, Saint-Félicien, Saint-Joachim-de-Montmorency, Sainte-Pétronille, Saguenay (zone Chicoutimi), Sherbrooke, Sherbrooke (zone Lennoxville), Thurso, Trois-Rivières (zone Cap-de-la-Madeleine), Victoriaville and Waterloo, Quebec

Application 2003-1592-0

Broadcasting Public Notice CRTC 2004-57

4 August 2004

Proposal to implement simultaneous substitution on a regional basis across Quebec

*The Commission **denies** the application by Vidéotron ltée, on behalf of itself and of Vidéotron (Regional) Ltd., to amend certain of its licences in order to add a condition of licence that would permit it to substitute the signals of CFCF-TV, CJNT-TV or CKMI-TV-1 Montréal (the Montréal stations) for the signals of the U.S.-based stations WCAX-TV, WVNY, WPTZ or WFFF-TV (the U.S. stations) in all of the above-noted locations on occasions when one of the Montréal stations simultaneously broadcasts the same programming as a U.S. station. A dissenting opinion by Commissioner Langford is attached.*

The application

1. The Commission received an application by Vidéotron ltée, on behalf of itself and of Vidéotron (Regional) Ltd. (collectively “Vidéotron”), to amend the licences of the cable distribution undertakings (cable undertakings) serving the above-noted locations. Vidéotron proposed to add a condition of licence that would permit it to substitute the signals of CFCF-TV, CJNT-TV or CKMI-TV-1 Montréal (the Montréal stations) for the signals of the U.S.-based stations WCAX-TV, WVNY, WPTZ or WFFF-TV (the U.S. stations) on occasions when one of the Montréal stations simultaneously broadcasts the same programming as a U.S. station. The substitutions would occur on all of the above-noted cable undertakings.
2. In an effort to reduce its operational costs, Vidéotron stated that it had centralized all of its program substitutions in Quebec, with the exception of the Outaouais region. As a result, when Vidéotron performs signal substitutions on behalf of the Montréal stations, the substitution also occurs on the cable undertakings in all of the above-noted locations,

even though the Montréal stations, under the terms of the *Broadcasting Distribution Regulations* (the Regulations), generally do not have the right to simultaneous substitution on those systems.¹

3. Vidéotron noted that the Montréal stations are the only licensed private English-language stations serving Quebec, with the exception of those in the Outaouais region. Vidéotron therefore was of the view that its proposal would have no impact on other Canadian English-language stations.
4. Vidéotron indicated that, if the Commission were to deny the application, it would cost approximately \$65,000 to install the equipment necessary to ensure that the signals of the Montréal stations were not substituted for the signals of the U.S. stations on all of its cable undertakings outside the Outaouais region. Vidéotron indicated, however, that if the application were denied, it would install this equipment within 90 days of the date of the denial decision.

The intervention

5. The Commission received one intervention in connection with this application from Global Communications Limited (Global). Global supported Vidéotron's proposal in light of the technical issues involved in implementing simultaneous substitution for each cable undertaking, and the distinctiveness of the Quebec market. Global submitted, however, that its support related to the current application and was not to be taken as blanket acceptance of extending simultaneous substitution to distant signals in all markets.

The Commission's analysis and determination

6. Section 7 of the Regulations provides that a licensee of a broadcasting distribution undertaking (BDU), including a cable undertaking, shall not alter or delete a programming service in a licensed area in the course of its distribution except in certain limited circumstances.² One of these circumstances is when the licensee carries out what

¹ Either CKMI-TV-1, or the originating station CKMI-TV whose signal CKMI-TV-1 rebroadcasts, but not the other Montréal stations, qualifies as a priority signal in Ascot Corner, Coaticook, Cowansville, East Angus, Québec, Saint-Édouard-de-Lotbinière, Saint-Joachim-de-Montmorency, Sainte-Pétronille, Sherbrooke (zone Lennoxville), Thurso, Trois-Rivières (zone Cap-de-la-Madeleine), and Waterloo.

² Section 7 states:

A licensee shall not alter or delete a programming service in a licensed area in the course of its distribution except

(a) as required or authorized under a condition of its licence or these Regulations;

(b) for the purpose of complying with subsection 328(1) of the *Canada Elections Act*;

(c) for the purpose of deleting a programming service to comply with an order of a court prohibiting the distribution of the service to any part of the licensed area;

(d) for the purpose of altering a programming service to insert an emergency alert message in accordance with an agreement entered into with the operator of the service or the network responsible for the service;

(e) for the purpose of preventing the breach of programming or underlying rights of a third party, in accordance with an agreement entered into with the operator of the service or the network responsible for the service; or

(f) for the purpose of deleting a subsidiary signal, unless the signal is, itself, a programming service or is related to the service being distributed.

is known as simultaneous substitution. Section 30(2)(a)(i) and (ii) of the Regulations provides for simultaneous substitution as follows:

(2) Except as otherwise provided under a condition of its licence, and subject to subsection (5), a Class 1 licensee

(a) shall, in a licensed area, delete the programming service of a television station and substitute the programming service of a local television station or a regional television station or, with the agreement of the broadcaster operating the local television station or regional television station, have that broadcaster carry out the deletion and substitution, if

(i) the programming service to be deleted and the programming service to be substituted are comparable and simultaneously broadcast,

(ii) the local television station or regional television station has a higher priority under section 17.

7. Section 17 refers primarily to over-the-air television programming services that cable undertakings must distribute as part of the basic service. Local and regional stations are defined by reference to their broadcasting contours in relation to a BDU's licensed area.
8. The Commission notes that, with the exception of CKMI-TV-1 in some Quebec markets, the Montréal stations do not qualify as local or regional stations with respect to the Vidéotron cable undertakings that are the subject of this application. On some of the undertakings, the Montréal stations would in fact be considered distant signals. Accordingly, absent specific authorization from the Commission, Vidéotron has no authority to substitute the Montréal stations for the U.S. stations on these systems. Absent specific authorization, Vidéotron is therefore in violation of section 7 of the Regulations with respect to such substitutions.
9. The Commission considers that the concepts of priority carriage and simultaneous substitution play a fundamental role in the Canadian broadcasting system. That role, in part, is to recognize the importance of the local broadcaster, and its value in the locality it serves, by seeking to preserve its legitimate programming rights. The concepts have become well established and are understood both by the industry and by subscribers. They have been accepted in other legislation, such as the *Copyright Act*, and have been recognized in international treaties.
10. Given the fundamental importance of these concepts, and the generally wide acceptance of the basis on which rules arising out of them apply, the Commission considers that exceptions to them should not be made except in situations where there is meaningful evidence that an exception would lead to a clear public interest benefit or that the application of the rules would be unfair to one or more of the parties involved.

11. With regard to the subscribers, the Commission generally considers that they are entitled to view foreign signals that are legitimately distributed in Canada, except in limited, specific circumstances.
12. The Commission has approved an application for a condition of licence similar to that requested by Vidéotron only once before, and only for a short-term period. In *Authorization to alter and delete certain U.S. signals and substitute the signal CKXT-TV Toronto*, Broadcasting Decision CRTC 2004-416, 21 September 2004 (Decision 2004-416), the Commission granted Rogers Cable Communications Inc. (Rogers) a condition of licence, effective for a twelve-month period, allowing it to simultaneously substitute the signal of CKXT-TV Toronto for non-Canadian signals on its Owen Sound undertaking. In making its request, Rogers explained that its network architecture, which was established prior to CKXT-TV's launch, was designed to create centralized feeds of the non-Canadian signals for distribution throughout a number of systems in and around the Greater Toronto Area (GTA), including Owen Sound. With the launch of CKXT-TV, however, the substitution requirements in the GTA and Owen Sound differ, mainly because CKXT-TV is not a priority signal for the Owen Sound cable undertaking.
13. In its application, Rogers stated that modifying its existing network architecture to exclude CKXT-TV's substitutions from the feeds of the non-Canadian signals sent to Owen Sound would require a capital investment of at least \$100,000 in a soon-to-be obsolete technology, and would take approximately five to six months to implement. However, Rogers explained that its engineers had been investigating a more up-to-date solution that it estimated could be deployed in Rogers' systems by early 2005.
14. In approving the Rogers application, the Commission noted the relatively limited duration of the authority requested, as well as Rogers' argument that a more immediate solution would require an investment of \$100,000 in what would soon be obsolete technology. In the circumstances, the Commission considered that it was appropriate to grant the requested condition of licence for a period of one year, until 21 September 2005.
15. The Commission notes that, unlike Rogers, Vidéotron has requested authorization for an on-going and permanent departure from the generally applicable rules, and that the request is more extensive in that three Canadian television stations are involved and the substitution would apply virtually on a province-wide basis. In the Commission's view, Vidéotron has not justified such a departure on the basis of a clear benefit to the public interest, nor has it established that some unfairness would result from the application of the Regulations. With regard to subscribers, the Commission is concerned that simultaneous substitution involving Canadian stations otherwise not available in the market would lead to subscriber confusion and annoyance, and could undermine the legitimacy of the regime. The Commission notes that Vidéotron filed its application subsequent to a complaint from a subscriber in Québec.

16. The Commission further considers that \$65,000 is not an undue expenditure for Vidéotron to implement simultaneous substitution as required by the Regulations. The Commission therefore **denies** Vidéotron's application.
17. The Commission notes that Vidéotron stated that, if its application were denied, it would be able to install the necessary equipment to remedy the situation within 90 days of a decision by the Commission.
18. Vidéotron is to notify the Commission, within 90 days, that it is complying with the Regulations. However, as noted above, in Decision 2004-416, the Commission granted Rogers temporary authority until 21 September 2005 to substitute the signal of CKXT-TV for non-Canadian signals in Owen Sound in order that Rogers could investigate a more efficient and cost-effective technical solution to ensure that the signal of CKXT-TV was not substituted for such signals in Owen Sound. Should Vidéotron wish to investigate and implement more efficient technical solutions relating to simultaneous substitution, such as those being explored by Rogers, and provided that it so notifies the Commission within 90 days, the date for compliance will be 21 September 2005.

Secretary General

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

Dissenting opinion of Commissioner Stuart Langford

I disagree with the majority decision in this matter. It attempts to make a virtue out of regulatory rigidity and, in a supposed effort to minimize subscriber confusion, will almost certainly increase confusion levels. For these reasons but, more generally speaking, because Vidéotron's proposed solution is practical and harmless, I would have allowed this application.

Check out the plan

Vidéotron's plan is simple and pragmatic. It will save needless expense, streamline its operations and promote the only Canadian alternative available to affected Québec subscribers. The plan is to substitute programs now accessible only through American stations with identical programming provided simultaneously by Montréal stations. Unfortunately, as the majority decision indicates, that plan conflicts with a strict reading of the *Broadcasting Distribution Regulations* (the Regulations) which dictate that though signal substitution is permissible, it must ordinarily be done only on a local or regional basis.

Weigh the benefits

The Commission has the authority to make an exception and allow Vidéotron's proposal. I cannot think of a single valid reason for not doing so. On the other hand, the benefits of approval are many and manifest. Vidéotron would be spared an unnecessary expense. The Montréal stations in question would instantly have more viewers and might, therefore, be in a position to generate higher advertising revenues. Finally, as the Montréal stations are the **only English-language stations** in the geographic area in question, no other broadcaster could be adversely affected. As evidence of this last point, the Commission received no opposing interventions to Vidéotron's application.

Is there a downside?

There is no downside to approving Vidéotron's application. No local or regional English language station will lose audience share to Montréal stations because no such local or regional stations exist. An approval decision could easily be crafted so as to build in safeguards should this situation change. Nor could an approval set a precedent prompting similar applications in cable territories outside Québec because nowhere else in Canada does the same situation exist. Consistency with the earlier Rogers decision (Decision 2004-416) is a non-issue because the circumstances are entirely different.

Who's confused?

As a primary reason for denying Vidéotron's application the majority declares that should the substitution of Montréal for U.S. signals be allowed to continue, "...subscriber confusion and annoyance..." could result. As evidence of this it points to a subscriber complaint made on September 11, 2002. The fact is that any change brings

with it a certain amount of “confusion and annoyance”, but one complaint, particularly one made so long ago, hardly seems a cause for alarm in a situation where hundreds of thousands of subscribers are affected.

In my view, the majority should, instead, have worried about the “confusion and annoyance” levels that will almost inevitably result from a decision that forces Vidéotron to discontinue a two and a half year old substitution scheme and return to its old system. The majority’s decision to allow Vidéotron either three or eight months more to perform this volte-face can only make matters worse. Viewers who almost certainly have grown comfortable with receiving Montréal-sourced signals will awake, either in 90 days or on September 21, 2005, to find themselves watching U.S. stations, complete with American advertising. How this will further the public interest or the aims of the *Broadcasting Act* is anyone’s guess.

Let’s hear it for asymmetry

Though the *Broadcasting Act* and the Regulations may appear to be a single set of rules for all of Canada, the reality is something quite different. In many instances, the rules themselves contemplate that exceptions may be made by condition of licence. The history of Commission decisions on such things as programming deletion and substitution reveals any number of pertinent cases in point.

Variations are possible and quite often welcomed because in a country as diverse and vast as Canada the notion of a hard and fast one-size-fits-all regulation can be more harmful than beneficial. Regulators must be flexible and pragmatic if best solutions are to be the hallmark of their deliberations. Seen in that perspective, asymmetrical regulation becomes a quality not a fault. This application presents the Commission with an ideal opportunity to exercise its discretion to the benefit of Québec’s major cable signal distributor, Montréal broadcasters and most Québec cable subscribers. I cannot agree with the majority’s decision to turn its back on this opportunity.