



**Canadian  
Association of  
Broadcasters**

**L'Association  
canadienne des  
radiodiffuseurs**

November 2, 2004

**SENT BY EMAIL**

Ms. Diane Rhéaume  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, Ontario  
K1A 0N2

Dear Ms. Rhéaume:

**Re: Broadcasting Public Notice CRTC 2004-73: Application No. 2004-0627-4 by Star Choice Television Network Incorporated (Star Choice) and Canadian Satellite Communications Inc. (Cancom) and complaint by CTV Inc. (CTV).**

1. The Canadian Association of Broadcasters (CAB) – the national voice of Canada's private broadcasters, representing the vast majority of Canadian programming services, including private television and radio stations, networks and specialty, pay and pay-per-view television services – is pleased to submit these comments concerning the above-noted application and complaint.
2. **The CAB opposes the application by Star Choice and Cancom to offer omnibus channels providing high-definition (HD) programming from various Canadian and non-Canadian sources.** Before addressing the specific issues raised by his application, however, the CAB wishes to comment on the CTV complaint against Star Choice, which is also being considered as part of this proceeding.

## The CTV complaint

3. The application by Star Choice and Cancom was triggered by a complaint filed on June 1, 2004 by CTV against Star Choice to the effect that, by compiling and broadcasting omnibus HD channels comprised of individual programs selected from various licensed Canadian and authorized foreign programming services, Star Choice was in breach of sections 3 and 7 of the *Broadcasting Distribution Regulations* (BD Regs).
4. Section 3 of the BD Regs prohibits a licensed broadcasting distribution undertaking (BDU) from distributing programming services except as authorized under its licence or the BD Regs. Section 7 prohibits a BDU licensee from altering or deleting a programming service in the course of its distribution except in certain specific circumstances, none of which pertain to Star Choice's offering of omnibus HD channels.
5. The CAB has carefully reviewed the material filed by both CTV and Star Choice in the context of this complaint, and submits that the essential facts are not in dispute:
  - Star Choice has been distributing and continues to distribute several omnibus HD channels, as alleged by CTV, each one consisting of individual programs selected from various Canadian and foreign programming services. This offering is confirmed by the channel listings identified on the Star Choice web site and, in fact, in recent weeks Star Choice appears to have increased the number of HD omnibus channels from six to eight, with a ninth channel scheduled to launch on November 4, 2004;
  - this activity has been carried on despite the assurances made by Star Choice to the Commission at its renewal hearing that it was not offering omnibus HD channels, as well as the Commission's clear statement in Star Choice's licence renewal decision on March 31, 2004 (Decision CRTC 2004-130) that Canadian programming undertakings and foreign services providing HD programming are distinct services and, like standard definition television services, must be distributed in their entirety on dedicated channels, unless otherwise authorized by the Commission;
  - Star Choice does not provide a dedicated channel for any of the Canadian and foreign HD programming services from which it selects HD programming for its omnibus HD channels; and
  - Star Choice does not have Commission authorization for any of the omnibus HD channels that it provides.
6. Accordingly, the CAB submits that Star Choice is knowingly in breach of both sections 3 and 7 of the BD Regs. Furthermore, Star Choice has made no effort to bring itself into compliance with those sections, notwithstanding the Commission's clear statement in the Star Choice renewal decision that it must provide dedicated channels for each Canadian and foreign service that provides HD programming, unless authorized by the Commission.

7. The CAB further notes that the Johnston & Buchan legal opinion filed by Star Choice in support of its position was provided to Star Choice on March 22, 2004, before the issuance of the licence renewal decision discussed above, and should therefore be assigned no weight in this proceeding.
8. In light of the above-noted facts, **the CAB submits that the Commission should immediately issue a finding that Star Choice has been and continues to be in breach of sections 3 and 7 of the BD Regs in respect of its distribution of omnibus HD channels, and direct Star Choice to cease the distribution of omnibus HD channels until and unless it receives Commission authorization permitting such activity.**
9. Furthermore, **the CAB strongly opposes Star Choice's request that the Commission defer its determination on the CTV complaint until it issues a decision on the application filed by Star Choice and Cancom.** To agree to Star Choice's request would effectively condone Star Choice's willful disregard of clearly stated regulations and policy, undermine the Commission's authority and encourage other licensees to adopt similar tactics in the future. In the view of the CAB, such outcomes would call into question the integrity of the Commission's licensing process and its ability to exercise appropriate oversight of the Canadian broadcasting system.

### **The Star Choice/Cancom application**

10. In its application, Star Choice/Cancom seek Commission authorization, retroactively to March 31, 2004, for the continued distribution of six omnibus HD channels to Star Choice's direct-to-home (DTH) subscribers and Cancom's BDU affiliates. Star Choice/Cancom create these channels by selecting individual HD programs broadcast by Canadian conventional television stations, Canadian specialty and pay services and the two sets of US 4+1 network services, and then compiling the selected programs into a number of HD channels that are distributed to DTH subscribers and BDU affiliates.
11. As noted above, while the Star Choice/Cancom application refers to the distribution of six HD omnibus channels, it is apparent from the channel listings provided on the Star Choice web site that Star Choice has in fact been distributing eight HD omnibus channels since October 14, with plans to provide a ninth HD channel on November 4. The fact that the current application, which is intended to "regularize" Star Choice's historical non-compliance, is inconsistent with Star Choice's actual HD lineup going forward, further calls into question Star Choice's intentions with respect to future compliance with its licence and Commission regulations.
12. The CAB supports the goal of making more HD programming from Canadian licensees available to viewers. The CAB submits, however, that the current proposal for BDU-created HD omnibus channels raises a number of fundamental issues that, if not addressed, would in fact harm the ability of Canadian television services to continue their progress towards digital transmission and the provision of HD programming.

### **Contrary to Commission policies re HD services**

13. The Commission clearly stated in Star Choice's licence renewal that Canadian programming undertakings and foreign services providing HD programming are distinct services and, like standard definition television services, must be distributed in their entirety on dedicated channels, unless otherwise authorized by the Commission.
14. The CAB strongly supports this fundamental policy position, which is essential to maintaining an orderly development of HD broadcasting in Canada. Yet Star Choice's proposal would in fact promote the further distribution of U.S. services in Canada, to the potential detriment of Canadian HD services.
15. Star Choice/Cancom argue that, given their capacity constraints, there is insufficient HD programming available from Canadian licensees to justify the provision of a dedicated HD channel for each such service. In support of this, they list the fourteen services from which they would choose HD programming for the six omnibus channels.
16. The services include both sets (eastern and western feeds) of the U.S. 4+1 network signals, or 10 services in total, and only four Canadian services – The Movie Network, CITY-TV, Rogers Sportsnet and Movie Central. It is clear that Star Choice/Cancom would rather supply duplicated versions of HD programming carried on U.S. networks, because of the additional time-shifting opportunities such programming represents, rather than provide all of the HD programming available from Canadian services.
17. There are numerous Canadian services now providing HD programming that apparently would not benefit from distribution by Star Choice/Cancom because of their intention to restrict the number of channels devoted to HD programming to six. The CAB intervention filed in June 2004 with respect to a similar application by Vidéotron ltée listed the significant progress being made by Canadian conventional broadcasters and specialty and pay services in increasing the supply of HD programming. Since then, even more HD programming is being made available by Canadian programming services, and many licensees are now investing heavily, not only in programming, but also in marketing and branding their HD services. Omnibus HD channels provided by BDUs undermine such activities by Canadian programming undertakings.
18. Furthermore, BDU-operated omnibus channels, such as those proposed by Star Choice/Cancom with their heavy reliance on U.S. HD programming, could encourage the development of a North American rights market for HD programming. In such a case, the unavailability of Canadian HD rights for U.S.-originated programming would be devastating to the further development of Canadian HD services.
19. Accordingly, the CAB submits that the continued development of HD broadcasting in Canada will be significantly hindered if the Commission allows BDUs to unilaterally determine what HD programming they will provide, with a preference for programming from U.S. network stations, rather than provide dedicated channels for each Canadian broadcasting service providing HD programming.

20. Given the importance of maintaining an appropriate regulatory framework that encourages Canadian broadcasters to continue increasing the amount of HD programming they provide, the CAB submits that the Commission must maintain its existing policy requiring the provision of dedicated channels for the distribution of services that provide HD programming.
21. The CAB notes that, when presented with the serious policy implications associated with its application to create its own HD programming service, Vidéotron ltée revised its plans and indicated its agreement to provide dedicated channels for each HD service it distributes. Star Choice/Cancom should be expected to do the same.

### **Use of a broadcaster's programming without consent and compensation**

22. With the exception of those few conventional broadcast services that Star Choice is required to distribute as part of its basic service, Star Choice/Cancom would select HD programming at their discretion from any of the other conventional broadcast stations that they distribute. They would be making use of a television station's signal when it broadcasts an HD program, without obtaining the consent of the broadcaster for such use. In effect, Star Choice/Cancom would be expropriating for their own commercial use, without any compensation, HD content for which the originating broadcaster has acquired exclusive broadcast rights.
23. The CAB submits that such "cherry picking" of selected programs from a broadcaster's over-the-air signal for the purpose of creating an entirely new programming service is clearly inappropriate. The Commission's original DTH licensing framework of 1995 recognized that, even when considering the distribution of the complete unaltered broadcast signal of a distant television station, there had to at least be "no objection" on the part of the originating station. The Star Choice/Cancom proposal goes much further inasmuch as it entails the selection and rebroadcast of individual programs from the schedules of several different stations, but it makes no provision for obtaining the consent of the originating broadcasters for the use of specific portions of their broadcast schedules.
24. The CAB submits that such an approach is fundamentally inequitable and inconsistent with existing Commission policy.

### **BDU as Programmer**

25. Approval of the Star Choice/Cancom application would authorize Star Choice and Cancom to act as programming undertakings, but without any of the obligations normally required of such undertakings – for example, holding a separate licence for each service and meeting specified levels of Canadian programming exhibition and expenditures.
26. Approval would effectively position Star Choice and Cancom as full-fledged programmers, responsible for the creation of six new HD services. They would be responsible for selecting individual programs and deciding how and with what other programs they would be combined onto six new and distinct services.

27. The CAB submits that such an important programming function should not be bestowed on BDUs. The provisions of sections 3 and 7 of the BD Regs are intended, in part, to ensure that the key roles and functions of BDUs and programmers remain distinct under the Commission's regulatory framework. The creation of these HD channels would not only blur that distinction, it would also impact the continued development of HD programming in Canada and, as such, should not be left in the hands of BDUs to determine.
28. Moreover, Star Choice appears to be specifically making an exception for pay television in the proposed terms and conditions of the authorization that it is seeking with respect to the omnibus HD channels. It notes at paragraph 42 of its application that all HD programming would be distributed at the same time as the traditional version of the programming being distributed by Star Choice, "other than that of Canadian pay services". The proposed conditions of licence listed in paragraph 52 further suggest that Star Choice does not require specific Commission approval to distribute programming from a licensed "pay television programming undertaking or a pay television network" that is not distributed contemporaneously with the low definition or analog version of the programming.
29. In other words, Star Choice appears to be of the view that it has unfettered authority to distribute pay services on a non-simultaneous basis without specific authorization. The CAB submits that this view is erroneous. Moreover, such action would be contrary to the programming rights that all services, including pay television services, generally acquire from program rights holders.
30. This issue underscores the danger of leaving what is essentially a programming function in the hands of a BDU. The licensees of programming undertakings have specific contractual obligations in relation to rights holders that must be respected, all of which are reflected in the affiliation agreements entered into with BDUs. Star Choice appears to be seeking a "blank cheque" to distribute programming as it sees fit, contrary to program rights and regulations.

### **Application is premature**

31. In addition to the significant policy issues outlined above, the CAB submits that this application by Star Choice is premature given that the Commission has not completed the development of HD policy guidelines for all licensed Canadian programming services. As noted above, the Commission has a proceeding underway to consider the licensing and distribution framework for HD programming provided by specialty and pay services.
32. Without a degree of certainty as to the regulatory framework for these services (e.g. access rules) it is impossible to assess the appropriateness of competing unlicensed HD services, which the Star Choice/Cancom proposal would represent, and the extent to which such services would hinder the development of HD services of licensed programming undertakings by removing the incentive to invest in HD programming.

33. The CAB further notes that this application is contrary to broadcasting policy objectives set out in the *Broadcasting Act*. For example, the Star Choice/Cancom proposal to offer several omnibus HD channels, each consisting primarily of non-Canadian HD programming, is inconsistent with the policy requirement of section 3(1)(t)(i) that distribution undertakings should give priority to the carriage of Canadian programming services.
34. The CAB submits that the Commission should complete the development of its licensing and BDU distribution framework for specialty and pay services, before considering any application by a BDU to operate its own HD service.

## Conclusion

35. For the reasons outlined above, the CAB **opposes** the application by Star Choice/Cancom to operate and distribute six omnibus HD programming services.
36. The CAB submits that Star Choice/Cancom could ensure that its subscribers and BDU affiliates are able to benefit from the HD experience by distributing all Canadian HD programming services that are or will become available, in their entirety on separate dedicated channels. This is the approach adopted by other BDUs, including those who compete directly with Star Choice/Cancom. In the CAB's view, it is the best means to promote the continued transition to digital/HD transmissions and is the approach that best serves the interests of all elements of the Canadian broadcasting system.
37. The CAB appreciates the opportunity to provide its comments with respect to this matter.

Yours sincerely,



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