



## Broadcasting Public Notice CRTC 2007-104

Ottawa, 20 September 2007

### **Request to add USA Network to the lists of eligible satellite services for distribution on a digital basis**

*The Commission **denies** a request to add USA Network to the lists of eligible satellite services for distribution on a digital basis.*

#### **Introduction**

1. The Commission received a request dated 24 January 2007 from Shaw Communications Inc. (Shaw) for the addition of USA Network, a non-Canadian, English-language satellite service, to the lists of eligible satellite services for distribution on a digital basis (the digital lists). Shaw described the service as follows:

USA Network is a cable network programming service from the United States with over 90 million American household subscribers. USA Network is a general interest English-language service offering original and acquired programming from a broad spectrum of categories and genres, such as music, drama, sports, and comedy. USA Network is also the leading cable network programming service in the U.S. for blockbuster theatrical movies.

2. In its submission, Shaw also requested that the Commission amend its approach to the addition of non-Canadian services to the digital lists. Specifically, Shaw proposed that the Commission automatically approve the addition of all general interest non-Canadian services, and that it permit broadcasting distribution undertakings (BDUs) to distribute services on the eligible lists on either an analog or digital basis. However, Shaw indicated that the Commission did not need to consider these proposed amendments before considering the proposed addition of USA Network to the digital lists. In this context, Shaw submitted that USA Network is not competitive with any Canadian pay or specialty service.
3. In Broadcasting Public Notice 2007-29, the Commission called for comments on Shaw's request to add USA Network to the digital lists under its existing approach to the addition of such services. The Commission stated that it would consider Shaw's proposed changes to the existing approach in a future proceeding.
4. In response to Broadcasting Public Notice 2007-29, the Commission received comments from individuals, programming undertakings, BDUs and industry associations. Having reviewed and considered the submissions of all parties, which are available on the CRTC Web site at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings," the Commission is of the view that the primary issue to be addressed is whether USA Network is totally or partially competitive with Canadian pay or specialty television services.

## **The Commission's approach**

5. The Commission's approach to the addition of English- and French-language non-Canadian services to the digital lists is set out in Public Notice 2000-173. Under this approach, proposals for the inclusion of a non-Canadian service on the lists are assessed in the context of the Commission's policy that generally precludes the addition of new non-Canadian satellite services if the Commission determines them to be either totally or partially competitive with Canadian specialty or pay television services. In applying this policy, the Commission takes into account all specialty and pay television programming undertakings whose licence applications have been approved by the Commission.
6. The Commission uses a case-by-case approach to determine whether or not a non-Canadian service proposed for addition to the lists would be competitive with an authorized Canadian service. Factors considered by the Commission in its assessment of the competitiveness of a non-Canadian service include the nature of the service, its language of operation, the genres of programming provided by the Canadian services with which it might compete, and its target audience. The Commission also considers relevant the extent to which a proposed non-Canadian service may be a program supplier for an authorized Canadian service.
7. The Commission assesses the factors noted above in order to determine the amount of overlap between the sponsored non-Canadian service and the relevant Canadian services, and thus the extent to which the non-Canadian service might compete with the Canadian services. The more significant the overlap, the more likely it is that the non-Canadian service will be found to be competitive with the Canadian services.
8. In Broadcasting Public Notice 2007-29, the Commission stated that it would rely primarily on the comments filed to identify the Canadian pay and specialty services with which USA Network might be totally or partially competitive and which therefore should be included in the assessment of the competitiveness of the service. The Commission asked that parties wishing to argue that USA Network would be competitive to name the specific Canadian pay or specialty services with which they considered the service would compete, and to provide details such as nature and genre of service, programming schedule, programming sources and supply, and target audience.

## Comments received

9. The Canadian Cable Systems Alliance (CCSA), Rogers Cable Communications Inc. (Rogers) and the Bell Video Group (Bell, comprising Bell ExpressVu and the Bell Canada Class 1 BDU) filed comments in support of the addition of USA Network. These parties argued that USA Network was not partially or totally competitive with Canadian pay or specialty services. In their view, USA Network would complement existing services, expand diversity and choice in services and contribute to the reduction of signal piracy in Canada.
10. Bell's support for the service was conditional on USA Network being made available to all BDUs on a fair and equitable basis.
11. Some individuals commented that USA Network provided compelling programming and that viewers need different choices from a wide variety of sources. One individual conditionally supported the request but was concerned about the amount of programming that may have to be blacked out due to conflicting programming rights with Canadian programming services.
12. Parties who filed comments in opposition to the addition of USA Network were primarily concerned with the following issues:
  - competitiveness of USA Network
  - program rights
  - the addition of non-Canadian services at a time when overall BDU distribution capacity is limited
13. As to the first point, parties such as the Canadian Film and Television Production Association (CFTPA), the Coalition of Canadian Audio-visual Unions (CCAU),<sup>1</sup> the Canadian Association of Broadcasters (CAB), Allarco Entertainment Inc. (Allarco),<sup>2</sup> CHUM Limited (CHUM) and the Canadian Association of Film Distributors and Exporters (CAFDE) considered that the programming on USA Network would largely duplicate programming that is already available to Canadians via licensed Canadian programming services. Parties expressed concern that, given its current schedule, the addition of USA Network could lead to audience erosion and audience fatigue due to multiple plays of certain hit programs.
14. For instance, the CAB examined USA Network's schedule and concluded that USA Network's programming overlaps considerably with that of a number of licensed Canadian programming services, and that the vast majority (i.e., 92%) of programming on USA Network is already available on existing Canadian services. According to information supplied by the CAB, the majority of original programming (eight series) on USA Network are carried by Canadian programming

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<sup>1</sup> CCAU is a coalition of ten Canadian audio-visual unions including ACTRA, NABET, and the Writers Guild of Canada.

<sup>2</sup> Allarco Entertainment Inc. is a licensed but as yet unlaunched national English-language pay television service.

services such as Space, Mystery TV, CMT, The Score, and conventional stations such as A-Channel, Citytv, CH, NTV and CTV. Allarco added that programming on USA Network appears on Canadian pay and specialty services and conventional broadcasters, if not during the same seven-day period, then within weeks or months, depending on the release cycle of the Canadian services.

15. In CHUM's view, USA Network's reliance on feature films, significant amounts of live sports coverage (i.e., tennis and golf), series in the science fiction genre such as *The 4400* and *The Dead Zone*, and its two *Law & Order* series clearly make it competitive with Canadian pay and specialty services.
16. With respect to specific pay and specialty services, The Sports Network (TSN) stated that USA Network broadcasts the Masters Golf Tournament and US Open Tennis, two marquee sports events that TSN also broadcasts. TSN noted that these events form an essential part of its programming schedule. Allarco stated that, in addition to those events, USA Network carries sports events such as WWE Raw, which have been licensed to Canadian broadcasters. Allarco stated that, in one 13-day period in August-September 2006, USA Network devoted 110 hours (approximately one third of its schedule) to sports programming.
17. CanWest MediaWorks Inc. (Canwest), the CAB and Allarco cited nature of service and programming overlap between USA Network and Canadian services such as TMN, Moviepix and Encore Avenue. According to the CAB, 47% of USA Network's schedule is devoted to Hollywood movies from the eighties and nineties, as well as more recent titles as they become available for broadcast. Allarco stated that many of the feature films on USA Network are recently released films that are broadcast during the same time period as they are broadcast by the Canadian pay television services noted above. Allarco listed eight films aired during April 2007 on USA Network that it submitted were also under licence to Canadian programming undertakings and had been aired by them during the past 12 months. Allarco also stated that USA Network has licensed and aired identical film titles within the same months and, in some cases, the same week as they were aired by Canadian specialty and pay services.
18. Canwest, Allarco and the CCAU argued that USA Network is at least partially competitive with Mystery TV, a Category 1 specialty service, due to its similar nature of service and degree of programming overlap. Allarco submitted a programming schedule from USA Network for the period August 2006 to April 2007 indicating that more than 19% of the schedule for Mystery TV was duplicated on USA Network. The CCAU and Canwest noted that two thirds of USA Network's evening schedule is comprised of *Law & Order* programs that also appear on Mystery TV.

19. Finally, the CCAU submitted that, in light of similarities in programming, the Commission should take into account in its competitiveness analysis the impact that USA Network might have on Canadian conventional television services such as CTV, A-Channel, Canwest's CH stations and Global TV.
20. As to the issue of program rights, opposing parties including the CAFDE, the CFTPA, CHUM and the CAB argued generally that, since most of the programming on USA Network is already available on licensed Canadian programming services, the addition of USA Network to the lists could affect the ability of Canadian services to secure Canadian rights to certain non-Canadian programming in the future or could devalue rights where USA Network purchases non-exclusive rights to distribute the same programming in Canada.
21. With respect to capacity concerns, the CAB noted that the addition of more non-Canadian services such as USA Network absorbs BDU capacity that broadcasters require for new digital services and for launching high definition (HD) versions of their services. In the CAB's view, adding USA Network at this critical juncture would be contrary to the principle of providing priority to the distribution of Canadian services. Stornoway Communications Inc. and some individuals expressed similar concerns with respect to capacity.

### **Shaw's reply**

22. In reply, Shaw stated that, because USA Network is a general interest service, its format is too broad to have a competitive impact on any individual Canadian programming service. Shaw was of the view that USA Network does not compete with any specific specialty or pay service in any specific genre or for any specific target audience.
23. Further, Shaw submitted that the Commission uses a service-by-service comparison to assess competitiveness and does not consider the aggregated overlap between a proposed non-Canadian service and multiple Canadian services. Shaw was of the view that the Commission's service-by-service assessment of direct overlap is logical and correct.
24. In terms of competitiveness with specific specialty services, Shaw submitted that Mystery TV is a niche mystery and suspense service with a nature of service that differs considerably from that of USA Network. Shaw was of the view that the overlap between the two services is limited to syndicated repeat programming. In the case of the specialty service, Space, Shaw stated that Space's nature of service was quite distinct from that of USA Network, and that there is minimal program overlap between the two services. In terms of sports specialty services, Shaw stated that the relatively small amount of sports programming on USA Network is not sufficient to conclude that the service is competitive with Canadian sports services.

25. In terms of USA Network's competitiveness with pay services, Shaw noted that the licensees of Canada's launched pay services did not file comments in this proceeding. Further, Shaw stated that movies make up a much smaller fraction of USA Network's broadcast schedule than Canada's pay movie services, that competition for distribution rights is non-existent since Canada's pay services have an earlier exhibition window for first-run movies, and that USA Network will rarely broadcast a theatrical film in the same broadcast period as TMN or Movie Central.

### **The Commission's analysis and determinations**

26. USA Network describes itself as a general interest service that provides programming from a variety of genres, including feature films, music, sports, comedy, and drama series. A review of the quarterly schedule provided by USA Network indicates that a significant amount of its schedule consists of feature films (about 40%) and drama programming (about 40%). Specifically, crime drama represents 34% of its schedule, including such programs as Law & Order SVU, Law & Order Criminal Intent, Walker Texas Ranger, Monk and Psyche. Sports programming makes up, on average, less than 1.8% of USA Network's overall quarterly schedule. There is little comedy programming such as sitcoms (less than 5%) or music programming (less than 3%) and no news or documentary programming.
27. Based on the programming schedule submitted by USA Network, the Commission would describe the service as focusing predominantly on feature films and crime drama programming, as opposed to a typical general interest service.
28. With respect to its potential competitiveness with sports services, a review of USA Network's schedule for the nine-month period from August 2006 to April 2007 indicates that, on average, approximately 4.5% of the overall schedule consists of sports programming, including WWE weekly events and two major sporting events that pre-empted the regular schedule (U.S. Open and the Masters Golf Tournament). Based on this, the Commission considers that there is minimal overlap between USA Network and the two sports specialty services and therefore concludes that USA Network would not be competitive with TSN or The Score.
29. With respect to other specialty services identified by parties, the Commission has reviewed the programming schedules and natures of service for Bravo, Space, Showcase Action, Showcase Diva, W and CMT, and concludes that, although all of these services offer some programming that is also aired on USA Network, the level of duplication is minimal. Further, the nature of service definitions for these Canadian services are more niche-oriented, and the services differ significantly from USA Network.

30. With respect to pay services, in particular TMN and Movie Central, a review of USA Network's quarterly schedule indicates that approximately 40% of its weekly schedule is devoted to what it describes as "blockbuster theatrical movies." USA Network clarified that "it is not a classics movie programming service." USA Network added that its movie programming consists of "library material" or films in later exhibition windows and that it rarely broadcasts a theatrical film in the same broadcast period (week, month, or even year) as TMN or Movie Central. According to USA Network and Shaw, TMN and Movie Central acquire earlier exhibition rights for first run movies and "overlap is extremely rare." The Commission notes that parties did not provide specific examples including dates and times where the same film was aired during the same exhibition window on both USA Network and the Canadian pay services. In the absence of evidence to the contrary, the Commission has no reason to dispute USA Network's claim that there is little likelihood of program overlap with Canadian pay services.
31. In the case of Movie Central and Encore Avenue, these services are classic movie services and can acquire films from a huge library of classic film titles. Consequently, the potential for overlap is limited given that USA Network is not a classic movie service and will not rely on these types of movies exclusively for its film programming. Furthermore, the Commission has previously added two non-Canadian classic movie services to the lists – Turner Classic Movies and American Movie Classics – as potential packaging partners for Canadian pay services.
32. The Commission is of the view, however, that there is evidence to conclude, as parties also argued, that USA Network is at least partially competitive with the Category 1 specialty service Mystery TV. The nature of service for Mystery TV states, among other things, that it:
- ... will offer a national English-language specialty television service dedicated to programming offering suspense, espionage, thrillers, police drama and classic mysteries. The programs will include movies, dramatic series, short films and documentaries.<sup>3</sup>
33. A review of the programming schedules for both USA Network and Mystery TV indicates there is a considerable overlap in the types of programming that the two services offer. Both services provide a significant amount of drama programming, particularly crime drama. The Commission notes that crime drama programming makes up approximately 40% of Mystery TV's overall schedule and 34% of USA Network's quarterly schedule. Further, the Commission notes that there are specific

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<sup>3</sup> Mystery TV was initially licensed as a Category 1 service called "13th Street" in Decision 2000-449.

programs that overlap between the two services, including the two Law & Order series (SVU and Criminal Intent) and the medical mystery series House. Based on the sample program schedules submitted in this proceeding, these overlapping programs represent approximately 28% of Mystery TV's weekly schedule and 19% of USA Network's weekly schedule.

34. In light of the above, the Commission is of the view that there is sufficient overlap between USA Network and Mystery TV with respect to program genres in general, and programming in the crime drama category in particular, for it to conclude that USA Network would be competitive with Mystery TV.
35. Accordingly, the Commission **denies** the request to add USA Network to the lists of eligible satellite services for distribution on a digital basis.
36. As to arguments pertaining to the potential competitiveness of USA Network with Canadian conventional television stations, the Commission notes that to take such arguments into account would be inconsistent with its current approach to assessing requests to add non-Canadian services to the digital lists. Accordingly, the Commission has not considered conventional television stations as part of its assessment of competitiveness.
37. The Commission also notes that, given that it has denied the addition of USA Network for the reasons noted above, it is unnecessary to address concerns raised by parties with respect to program rights and BDU capacity.

### **Other matters**

38. As noted earlier, Shaw proposed that the Commission automatically approve the addition of all general interest non-Canadian services to the lists, and permit BDUs to distribute services on the eligible lists on either an analog or digital basis.
39. Despite the Commission's statement in Broadcasting Public Notice 2007-29 that it would consider this aspect of Shaw's request in a future proceeding, several other parties also proposed changes to different aspects of the Commission's approach to the distribution of non-Canadian services in Canada.
40. In Broadcasting Notice of Public Hearing 2007-10, the Commission announced a review of the regulatory frameworks for BDUs as well as pay and specialty services, including the possibility of changes with respect to the authorization of non-Canadian services. Parties may wish to include proposals such as those made in this proceeding in any comments they file as part of the proceeding announced in Broadcasting Notice of Public Hearing 2007-10.

Secretary General

**Related documents**

- *Review of the regulatory frameworks for broadcasting distribution undertakings and discretionary programming services*, Broadcasting Notice of Public Hearing CRTC 2007-10, 5 July 2007
- *Call for comments on the proposed addition of USA Network to the lists of eligible satellite services for distribution on a digital basis*, Broadcasting Public Notice CRTC 2007-29, 23 March 2007
- *Call for proposals to amend the lists of eligible satellite services through the inclusion of additional non-Canadian services eligible for distribution on a digital basis only*, Public Notice CRTC 2000-173, 14 December 2000
- *13<sup>th</sup> Street – a new specialty channel*, Decision CRTC 2000-449, 14 December 2000

*This document 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>*