



Broadcasting Decision CRTC 2021-366

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Ottawa, 4 November 2021

Ebox Inc.

Province of Quebec

Public record for this application: 2020-0704-6

Complaint against 9303-4338 Québec inc. alleging failure to comply with the exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers

The Commission finds that 9303-4338 Québec inc. is now in compliance with the terms and conditions of the exemption order to which it is subject.

The Commission will follow up with 9303-4338 Québec inc. in the coming year to ensure that it remains in compliance.

Background

1. In Broadcasting Order 2017-320 (the broadcasting distribution undertaking (BDU) exemption order), set out in the appendix to Broadcasting Regulatory Policy 2017-319, the Commission set out the terms and conditions that BDUs serving fewer than 20,000 subscribers must meet in order to operate as exempt undertakings.
2. Among these requirements, the Commission established basic service requirements that are similar to those set out in the *Broadcasting Distribution Regulations* (the Regulations) and that apply to licensed BDUs.
3. The BDU exemption order also requires any BDU operating in a market with one or more licensed BDUs to submit a variety of information to the Commission by completing and submitting a registration form no later than three months before commencing operations in a new service area. As such, following a review by Commission staff, these businesses are listed on the Commission's website as exempt BDUs.

The parties

4. Ebox Inc. (Ebox) operates several exempt BDUs serving Montréal, Rivière-du-Loup, Sherbrooke, Gatineau, Québec, Rimouski, Saguenay and Trois-Rivières, Quebec.

5. 9303-4338 Québec inc. (hereinafter Oxio) operates several exempt BDUs serving Lotbinière, Lévis, Québec, L'Ange-Gardien (Rouville), Saguenay, Gatineau, Montréal, Sherbrooke, Rivière-du-Loup, Quebec and Ottawa, Ontario.
6. Ebox and Oxio are both listed on the Commission's website as exempt BDUs.

The complaint

7. On 21 October 2020, Ebox filed an undue preference complaint alleging that Oxio was in violation of certain requirements set out in the BDU exemption order in several of the markets in which it provides services under that same order.
8. Specifically, Ebox noted that Oxio does not carry all of the required local channels in several of the markets it serves, contrary to paragraph 6(a) of the BDU exemption order. For example, Ebox specified the local channels TVA Gatineau (CHOT-DT) and ICI Télé Gatineau (CBOFT-DT), which are not available as part of Oxio's basic service in the Outaouais Region.
9. Ebox also noted that in the Montréal market, it appears that other local television stations are not distributed as part of the basic service, and that ICI Montréal (CFHD-DT) is not distributed as part of the basic service in accordance with Broadcasting Mandatory Order 2019-173.
10. Ebox also filed a screenshot dated 20 October 2020, displaying the list of channels available to users of Oxio's service, which can be found on its website, showing only channel and television network logos, and in which some channels appear to be missing.
11. Ebox therefore requested that the Commission direct Oxio to:
 - comply with the terms and conditions set out in the BDU exemption order under which Oxio operates its BDUs; and
 - temporarily cease marketing its distribution services until it is able to rectify the situation; otherwise this would, in Ebox's view, constitute an undue preference that Oxio is granting itself in the marketing of its services.

Interventions

12. On 17 December 2020, Télé Inter-Rives ltée (Télé Inter-Rives) and RNC MEDIA Inc. (RNC MEDIA) filed a joint intervention with the Commission in this proceeding. In their intervention, Télé Inter-Rives and RNC MEDIA (the interveners) expressed their support for Ebox's approach.
13. The interveners added that the omission of local and regional signals from the basic service is a widespread practice among many BDUs, if not most Internet Protocol Television (IPTV) signal distributors, and provided several other examples of exempt

BDUs that in their view are also in non-compliance with this requirement. The interveners indicated that their allegations are based on email exchanges with certain BDUs or on the distribution grids on the BDUs' websites.

14. The interveners also noted that many of the exempt BDUs' websites have a distinct lack of information on the origin of the signals, and that the locations associated with local or regional stations are rarely mentioned. Finally, the interveners added that these BDUs offering their service through IPTV and contravening the BDU exemption order are causing local stations to lose market share and are affecting their advertising revenues, along with their ability to produce local content.
15. The interveners therefore requested that the Commission issue, as soon as possible, clear and explicit direction to all small exempt BDUs given that, in their view, the BDU exemption order does not appear to be achieving its objectives, and given that the loss of audience due to the failure to carry their television signals is resulting in lost revenues for their stations and a loss of local information for their viewers.

Reply from Oxio

16. In its reply dated 17 December 2020, Oxio first stated that it wished to correct certain factual errors made in the complaint regarding its presumed non-compliance. Oxio indicated that it offers RNC MEDIA's local channels, CHOT and CFGS, in the Outaouais Region.
17. However, Oxio confirmed that it does not yet offer Télé Inter-Rives' channels, but explained that it has been in communication with the latter since October 2020 with a view to obtaining its channels, and that technical problems are slowing down the process. Oxio reiterated its desire to offer the Télé Inter-Rives channels on its service, indicated that the technical problems have now been resolved, and stated that it is continuing its efforts to offer these channels as quickly as possible.

Additional requests for information

18. Given the nature of certain assertions made by Oxio, particularly in regard to talks between itself and Télé Inter-Rives, and given that Oxio and the interveners filed their respective comments on the same day, Commission staff, on 5 February 2021, sent to both Oxio and Télé Inter-Rives requests for additional information.

Additional information filed by Oxio

19. In its response dated 12 February 2021, Oxio provided its distribution grids showing the channels offered on the basic service in each of the following localities: Québec, Saguenay, Rivière-du-Loup, Sherbrooke, Montréal and Gatineau. Oxio also specified some of the instances of non-compliance in which it felt it found itself at the time. In particular, it stated that it was not distributing the following channels, but that it expected to be able to offer them on or about 1 April 2021:

- CPAC (in English and in French) in all the above locations;
- CityTV Montréal in Montréal;
- CBC Television Montréal, City TV Toronto, CTV Montréal and Global Montréal in Gatineau and Ottawa.¹

20. Oxio also confirmed that, contrary to what Ebox alleged in its complaint, it distributes CFHD-DT (ICI Montréal) to its Montréal subscribers.

21. Finally, in response to a question regarding its website, which indicated that the channel lineups by location were not available, Oxio stated that as of 12 February 2021, it was working to update the channel lineup on its website and that the work should be completed by 15 March 2021.

Additional information filed by Télé Inter-Rives

22. In its response dated 12 February 2021, Télé Inter-Rives confirmed that talks had indeed taken place between Oxio and itself and that those talks were spread out over several months. Télé Inter-Rives confirmed that discussions were held regarding technical problems with the transport of IPTV by its supplier and that Oxio had proposed a solution with another supplier. Télé Inter-Rives stated that it had validated this solution, but that other technical problems had subsequently arisen.

23. Télé Inter-Rives added that Oxio then decided to turn to a terrestrial relay distribution company (TRDC) to carry the signals.

24. Finally, Télé Inter-Rives noted that, following discussions, Oxio indicated that it would be able to distribute the missing Télé Inter-Rives channels by 12 February 2021.

Reopening of the proceeding

25. In light of the depth of this new information, the Commission initiated a new intervention period to allow interested parties to comment on the additional information filed by Oxio and Télé Inter-Rives.

New intervention by Télé Inter-Rives

26. In its intervention dated 30 April 2021, Télé Inter-Rives indicated that it was aware of the additional information filed by Oxio on 12 February 2021. Télé Inter-Rives also indicated that it was unable to verify that Oxio was actually carrying the Rivière-du-Loup stations CKRT-DT, CIMT-DT and CFTF-DT, since Oxio's website did not display the distribution grids by community served, contrary to the requirement set out in paragraph 25(g) of the BDU exemption order.

¹ The Commission notes that the signals identified by Oxio are neither local nor regional in the Gatineau and Ottawa region.

New intervention by Oxio

27. In its submission dated 30 April 2021, Oxio stated that the optical transport link had been deployed and was in service, allowing it to add the missing channels to its service, but that it was waiting for its provider to activate the service. Oxio added that the commissioning date was postponed by the supplier due to an embargo on its side.
28. Oxio indicated that it expected its service to be activated within the next few days and noted that the channels mentioned in Ebox's complaint have already been available to its subscribers for several months.
29. Oxio added that it would update its website once the missing channels it identified have been added.

Ebox's reply

30. In its reply dated 3 May 2021, Ebox noted that despite the passage of time, Oxio has yet to remedy the instances of non-compliance that it itself had highlighted in the supplemental information provided, and that Oxio instead placed the blame on its TRDC provider for allegedly not yet activating the channel transport service.
31. In addition, Ebox mentioned that since Oxio is operating without complying with its regulatory obligations, it benefits from an undue preference that has allowed it to gain significant market share since it markets its BDU service at a lower rate due to below-cost pricing.
32. Ebox took note of Télé Inter-Rives' comments dated 30 April 2021, regarding the inability to verify whether Oxio is in fact distributing its channels in compliance with the BDU exemption order. Ebox also noted that Oxio offers its subscribers, for an additional fee, the ability to replay programs from TVA Group, from Noovo, as well as from all the channels on its channel line-up, including the Télé Inter-Rives stations. According to Ebox, Télé Inter-Rives should have access to specific subscriber data for each of Oxio's BDUs in order to determine billable royalties. Ebox therefore concluded that the fact Télé Inter-Rives does not appear to have this data suggests that Oxio does not pay these special royalties to the programming services concerned, but nevertheless allows itself to make these special rights available to these end users.
33. Ebox noted that the distribution grids filed by Oxio contain other instances of non-compliance relating to mandatory distribution, and mentioned, by way of example, Canal M, which does not appear on its grids.
34. Ebox also noted that Oxio, despite the fact that it did not indicate anything in this regard in its replies, would market its service in the Mauricie region, and that Oxio should also offer local channels there. Ebox added that it is not certain whether Oxio offers its service in Rimouski, but that if it does, it must distribute the local and regional signals in that service area.

35. Finally, Ebox, supported by a screenshot from the Commission's website, noted that Oxio is not currently registered as an exempt BDU in several locations where it actively markets its service: Rivière-du-Loup, Sherbrooke, Ottawa, Trois-Rivières and Montréal.

Procedural request

36. On 20 May 2021, Oxio filed a procedural request with the Commission to address Ebox's reply dated 3 May 2021. Oxio submitted that Ebox made new allegations that need to be addressed or corrected.

37. First, Oxio denied not complying with the requirements of the BDU exemption order, but admitted that as a new player in the telecommunications and distribution landscape, some adjustments were required on its part. In this regard, Oxio indicated that since 14 May 2021, it has been offering all the channels required for its basic service in the communities identified in Ebox's complaint, including Canal M in all communities served, as well as the channels of Télé Inter-Rives and RNC MEDIA in the appropriate communities. Oxio also provided a link to its website, where its distribution grids by service area can now be found.

38. Next, Oxio responded to the various new allegations made by Ebox in its 3 May 2021 letter by:

- denying that it has given itself an unfair advantage through its basic service;
- denying that it offers its BDU service in the Charlevoix, Centre-du-Québec and Mauricie regions, and in Rimouski; and
- indicating that it has taken the necessary steps to register the exempt BDUs it operates and which are currently not on the Commission's list of exempt BDUs.

39. In view of the relationship between the non-compliance complaint and Oxio's procedural request, the Commission added the procedural request to the public record of the proceeding and took into consideration the information set out therein in making its decision.

Commission's analysis and decisions

Nature of the complaint

40. The Commission considers that it must first address the nature of the complaint filed by Ebox since Ebox presented its complaint as an undue preference complaint. A reference to what constitutes undue preference is also addressed by Ebox in its reply dated 3 May 2021.

41. The Commission notes that licensed BDUs are subject to section 9 of the Regulations, as the licensee:

Undue preference or disadvantage

9(1) No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

(2) In any proceedings before the Commission, the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage.

42. However, the Commission further notes that exempt BDUs are not subject to the Regulations; rather, they are subject to the terms and conditions set out in the BDU exemption order. This order does not set out requirements that are equivalent to those set out in section 9 of the Regulations.

43. Consequently, Ebox's complaint against Oxio cannot be an undue preference complaint. However, given the facts alleged in Ebox's complaint, the Commission will consider this complaint to be a complaint of non-compliance by an exempt BDU with respect to another exempt BDU.

44. In light of the above, the Commission does not need to rule on the allegations of undue preference and disadvantage that were made by Ebox in the complaint, as they are not applicable to the present situation.

Non-compliance

45. The Commission conducted a compliance audit of Oxio, specifically in regard to the compliance of its website, and confirms that, based on the information now available on the website, it appears that all of the instances of non-compliance raised in the Ebox complaint have been corrected. Although Oxio required several months to implement the necessary solutions to achieve compliance, the Commission notes that Oxio has demonstrated a willingness to do so during the course of the proceeding, including through its collaboration with the Commission. In addition, as Oxio itself confirmed in a procedural letter filed with the Commission on 20 May 2021, it now meets the applicable requirements for the distribution of channels on its basic service (including the inclusion of Canal M in its basic service), as well as the requirements for its website.

46. In addition, in regard to the registration of Oxio's BDUs serving Rivière-du-Loup, Sherbrooke, Ottawa, Trois-Rivières and Montréal, the Commission notes that these BDUs have been registered as exempt BDUs.

47. Although Oxio is now in compliance with its distribution requirements, the Commission nevertheless considers that the issue of non-compliance by exempt BDUs merits its consideration.

48. In order to operate in compliance with the Act, a BDU must, pursuant to subsection 32(1) of the Act, be licensed or operate under an exemption order. Exempt BDUs are required to comply at all times with the terms and conditions of the exemption order under which they operate in order to avoid being subject to licensing requirements. Failure to comply with all of these conditions will be deemed a violation of the Act.
49. If an exempt BDU fails to comply with a term or condition of the BDU exemption order, the Commission may require it to obtain a broadcasting licence and may require it to cease operating until it obtains such a licence or is able to operate in accordance with the terms and conditions of the exemption order. In addition, the Commission could initiate proceedings for the operation of a broadcasting undertaking without a licence or under an exemption order without complying with all the requirements thereof (subsection 32(1) of the Act), or it could summon the operator of the undertaking to a hearing to investigate the matter and impose an order requiring the licensee to comply at all times with the obligations under the exemption order or to cease broadcasting.
50. In its complaint, Ebox requested that the Commission order Oxio to comply with its requirements and that the Commission prohibit Oxio from marketing its service until it complies with its distribution requirements. The Commission considers that the interruption of Oxio's service, as desired by Ebox, would have the effect of disrupting the supply of service to Oxio's subscribers and penalizing them, which would run counter to the objectives of the Act.
51. In regard to the possibility of requiring Oxio to apply for a broadcasting licence for its BDUs, the Commission considers that this option is inappropriate given that Oxio now operates its BDUs pursuant to the terms and conditions of the BDU exemption order. In addition, the administrative burden and time required for such a proceeding would be consequences disproportionate to the instances of non-compliance which, in this case, have been corrected.

Conclusion

52. In light of the above, the Commission is satisfied that Oxio is now in compliance with the requirements to which it is subject and, accordingly, that the concerns raised by Ebox in its complaint in this regard are no longer relevant.
53. Nevertheless, considering the importance of the instances of non-compliance raised by Ebox, the Commission deems it appropriate to monitor Oxio over the next year to ensure its continued compliance.

Reminder

54. In light of the deficiencies alleged by interveners in this proceeding, the Commission considers it appropriate to provide a reminder of the requirements for BDU operators under the exemption order.

55. Exempt BDUs must, at all times, meet the requirements set out in the Act, including:

- the distribution of appropriate local and regional signals in each location;
- mandatory distribution of certain services under paragraph 9(1)(h) of the Act; and,
- maintaining a website where BDU distribution grids are available by location served.

56. Failure to comply at all times with the BDU exemption order means that the exempt BDU is broadcasting without complying with its requirements and therefore should operate under a licence pursuant to the Act. Since the BDU is operating without a licence, it could be considered to be operating in violation of the Act and could therefore be required to cease broadcasting, be required to obtain a licence, or be subject to prosecution or to a mandatory order.

57. Any apparent non-compliance by an exempt BDU will be closely monitored by the Commission until the situation is corrected.

Secretary General

Related documents

- *Licensing of a national multilingual multi-ethnic discretionary service*, Broadcasting Decision CRTC 2019-172 and Broadcasting Order CRTC 2019-173, 23 May 2019
- *Review of the exemption order for terrestrial broadcasting distribution undertakings serving fewer than 20,000 subscribers*, Broadcasting Regulatory Policy CRTC 2017-319 and Broadcasting Order CRTC 2017-320, 31 August 2017