



## Broadcasting Decision CRTC 2008-312

Ottawa, 18 November 2008

### **Complaint by the Canadian Broadcasting Corporation against Star Choice Television Network Incorporated**

*In this decision, the Commission finds that Star Choice Television Network Incorporated (Star Choice) is not distributing the programming service of Le Réseau de l'information (RDI) to all digital subscribers living in anglophone markets as part of the digital basic service, pursuant to the Commission's Distribution Order 2007-3 set out as appendix 4 to Broadcasting Decision 2007-246. The Commission directs Star Choice to include RDI in all of the basic service packages that it offers in anglophone markets, including English Essentials, Essentiels en Français and the two bilingual basic packages, Essentiels Bilingues and Bilingual Essentials. The Commission further directs Star Choice to come into compliance with Distribution Order 2007-3 within 10 days of the date of this decision.*

#### **The complaint**

1. On 14 May 2008, the Canadian Broadcasting Corporation (CBC) filed a complaint with the Commission against Star Choice Television Network Incorporated (Star Choice). The CBC alleged that Star Choice is not distributing Le Réseau de l'information (RDI) on the digital basic service to subscribers living in anglophone markets.
2. The CBC noted that, in appendix 4 to Broadcasting Decision 2007-246, the Commission issued a Distribution Order that grants limited mandatory distribution to RDI on the digital basic service (Distribution Order 2007-3). The CBC added that Distribution Order 2007-3, which was made pursuant to section 9(1)(h) of the *Broadcasting Act* (the Act), specifies that direct-to-home (DTH) undertakings are “required to distribute RDI’s programming service to all digital subscribers living in anglophone markets as part of the digital basic service, effective 24 January 2008 ....”
3. According to the CBC, despite repeated efforts on its part, it has been unable to secure distribution of RDI as part of Star Choice’s “English Essentials” basic service package in anglophone markets. The CBC submitted correspondence in which Star Choice confirms that RDI is not currently available and will not be made available in the future on its “English Essentials” basic service package.<sup>1</sup> The CBC argued that this course of action is contrary to the objectives in the Act, undermines the ability of RDI to fulfill its mandate and violates Distribution Order 2007-3.

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<sup>1</sup> In this correspondence, Star Choice states, “This is to advise that we will continue to carry RDI in both our basic packages, Essentiels en Français and Essentiels Bilingue effective March 11, 2008.”

4. The CBC requested that the Commission direct Star Choice to comply immediately with Distribution Order 2007-3 and distribute RDI to all digital subscribers residing in anglophone markets.
5. On 23 May 2008, Commission staff sent a letter to Star Choice asking it to provide the Commission with any comments it might have with regard to this complaint. The CBC subsequently filed a reply to Star Choice's comments.

### **Star Choice's comments**

6. On 12 June 2008, Star Choice filed its comments with the Commission. Star Choice submitted that it is in compliance with Distribution Order 2007-3 because it includes RDI in two of its basic service packages – Essentiels en Français and Essentiels Bilingue – which are distributed to all anglophone markets.
7. Star Choice noted that, as a national, digital service, it has the technical ability to design different basic services and that the three basic service packages offered by Star Choice (English Essentials, Essentiels en Français and Essentiels Bilingue) comply with the *Broadcasting Distribution Regulations* (the Distribution Regulations). Star Choice added that these basic services are an example of the efficient delivery of programming services permitted by digital DTH technology and respond to the need to focus on consumers and deliver the value that they expect.
8. Star Choice argued that forced payments to RDI by customers who do not want to receive or watch the service would amount to an improper subsidy to the CBC at the expense of non-French-speaking customers who live in anglophone markets across Canada. According to Star Choice, this would be tantamount to a Parliamentary appropriation that is funded by taxpayer dollars.
9. According to Star Choice, Distribution Order 2007-3 must accord with the reasons the Commission has given for making it. Star Choice submitted that this can be accomplished by interpreting Distribution Order 2007-3 in the context of and by reference to the Commission's determinations in Broadcasting Decision 2007-246.
10. Star Choice argued, in particular, that the Commission's statement in Distribution Order 2007-3 should be read as a requirement that BDUs must provide access to RDI's programming service to all digital subscribers living in anglophone markets as part of "a digital basic service." Star Choice submitted that, as decided by the Supreme Court of Canada in *Schachter v. Canada* [1992] 2 S.C.R. 679, this interpretative approach of "reading in" is appropriate because it will:
  - further the Commission's stated objective of ensuring that linguistic minority communities have access to programming in the minority official language, and its express finding in Broadcasting Decision 2007-246; and

- ensure, at the same time, that anglophone basic service subscribers are not forced by the Commission to buy services that they will not use – an action that would undermine consumers’ perception that the Canadian broadcasting system responds to their demand for value and choice.

11. In conclusion, Star Choice stated, “The CBC complaint, based as it is on a factual error, and the fact that Star Choice is in compliance with Order 2007-3, should be dismissed.”

### **The CBC’s reply**

12. The CBC submitted reply comments to the Commission on 19 June 2008. The Corporation argued that Star Choice’s decision to exclude RDI from its “English Essentials” basic service package is contrary to the spirit and the letter of Broadcasting Decision 2007-246, as well as a plain reading of Distribution Order 2007-3.
13. The CBC noted, in particular, that Distribution Order 2007-3 requires BDUs “... to distribute RDI’s programming service to all digital subscribers living in anglophone markets as part of the digital basic service, effective 24 January 2008.” According to the CBC, a plain reading of this order requires that all subscribers residing in anglophone markets receive RDI on the same basis as they receive all other core basic services, as set out by the Commission. The CBC added that Distribution Order 2007-3 clearly and unmistakably broadens the definition of “anglophone markets” as defined in the Distribution Regulations to grant must-carry basic status to RDI by DTH undertakings in these markets.
14. According to the CBC, the fact that Star Choice has chosen to offer various digital basic packages to accommodate subscriber language preferences does not relieve it of its obligations under Distribution Order 2007-3 to distribute RDI to all subscribers residing in anglophone markets.
15. The CBC submitted that the Commission should direct Star Choice to come into compliance with Distribution Order 2007-3 within five business days of the date of the Commission’s decision. At the same time, the CBC requested that the Commission require Star Choice to remit the authorized wholesale rate of \$0.10 per subscriber per month in anglophone markets and in markets outside Quebec where there is no incumbent cable company, retroactive to the commencement date of Distribution Order 2007-3, i.e., 24 January 2008.
16. Finally, the CBC recommended that the Commission put Star Choice on notice that, if it does not come into compliance within the specified time frame, the Commission will immediately initiate a public hearing as provided by section 18 of the Act with a view to issuing a mandatory order against Star Choice pursuant to section 12 of the Act.

## Commission's analysis and determinations

17. Distribution Order 2007-3 provides for the mandatory distribution of RDI on the digital basic service as follows:

The Commission hereby orders, pursuant to section 9(1)(h) of the *Broadcasting Act*, persons licensed to carry on broadcasting distribution undertakings of the types identified in paragraph (a) below *to distribute RDI's programming service to all digital subscribers living in anglophone markets as part of the digital basic service*, effective 24 January 2008, on the following terms and conditions (emphasis added):

a) This Order applies to DTH distribution undertaking licensees, as well as to Class 1 and Class 2 distribution undertakings, excluding multipoint distribution system undertakings that are not carrying RDI as of the date of this Order. These licensees are collectively referred to in this Order as distribution licensees.

(b) A distribution licensee is considered to be operating in an anglophone market if it is not operating in a francophone market, as set out in section 18(4) of the *Broadcasting Distribution Regulations*.

(c) In the case of a DTH distribution licensee, an anglophone market will be defined by the licensed area of an incumbent Class 1 or Class 2 cable company with which it competes. DTH undertakings are also required to distribute RDI to subscribers living outside Quebec in areas where there is no incumbent cable company.

(d) Distribution licensees are authorized to increase the basic monthly fee to be paid by their subscribers by no more than the amount authorized under the terms of RDI's licence.

18. According to Star Choice's website, it offers subscribers a choice of four basic packages: English Essentials, Essentiels en Français and two bilingual basic packages, Essentiels Bilingues (which includes RDI) and Bilingual Essentials (which does not include RDI). Therefore, subscribers who take either the English Essentials package or the Bilingual Essentials package do not receive RDI.
19. The Commission considers that Distribution Order 2007-3, as worded, requires DTH undertakings to ensure that RDI is distributed, as opposed to merely offered, to all subscribers living in anglophone markets, not just those who choose to subscribe to Star Choice's Essentiels en Français and Essentiels Bilingue basic service packages. Therefore, by not placing RDI in all of the basic service packages offered to its digital subscribers in such markets, Star Choice is not complying with Distribution Order 2007-3.

20. As to Star Choice's comment that Distribution Order 2007-3 must accord with the reasons the Commission has given for making it, the Commission notes that Star Choice makes reference to only one statement made by the Commission in the related decision, i.e., "...that all francophones and anglophones in Canada should have *access* to a Canadian news and information service in their own language," (emphasis added by Star Choice) and argued that Star Choice is fulfilling that requirement by distributing RDI as part of two of its basic service packages. However, in paragraph 52 of Broadcasting Decision 2007-246, the Commission also expressed concern for the potential loss of revenues to RDI and CBC Newsworld if they were not distributed on the digital basic service, stating:

... The Commission also notes that the bulk of the services' spending is devoted to production infrastructures and to the personnel required to produce programming, and that any reduction in revenues would have a direct impact on the services' means of production and, consequently, on their capacity to provide adequate regional, national and international news and information. The Commission considers that granting mandatory distribution on digital basic to these services would help maintain their ability to fulfill their mandates with respect to offering high-quality information and news services that aim to serve Canada's French-speaking communities in anglophone markets, and Canada's English-speaking communities in francophone markets.

21. Therefore, the Commission's reasons for issuing Distribution Order 2007-3 included providing RDI with a stable revenue source in order to ensure that it could continue to fulfill its mandate. For that reason, the Commission intended for all basic subscribers in the markets in question to receive and pay for the service.
22. Accordingly, the Commission directs Star Choice to include RDI in all of the basic service packages that it offers in anglophone markets, including English Essentials, Essentiels en Français and the two bilingual basic packages, Essentiels Bilingues and Bilingual Essentials. The Commission further directs Star Choice to come into compliance with Distribution Order 2007-3 within 10 days of the date of this decision.
23. Finally, concerning the CBC's request that the Commission order Star Choice to remit the wholesale rate of \$0.10 per subscriber per month in anglophone markets to the CBC retroactive to 24 January 2008, the Commission considers that the courts would provide a more appropriate forum for the CBC to pursue this matter, should it wish to do so.

Secretary General

**Related document**

- *New digital specialty video programming undertaking; licence amendments; issuance of various mandatory distribution orders, Broadcasting Decision CRTC 2007-246, 24 July 2007*

*This decision is to be appended to the licence. It 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>.*