



Broadcasting Decision CRTC 2008-366

Ottawa, 23 December 2008

VidéOptique Inc.

Regional County Municipalities of Érables, Arthabaska and Drummond, and the municipalities of Upton, Saint-Victor, Saint-Éphrem, Saint-Hyacinthe, Notre-Dame-du-Bon-Conseil, Sainte-Perpétue, Sainte-Brigitte, Sainte-Clotilde and Sainte-Séraphine, Quebec

Application 2008-0677-1, received 8 May 2008

Public Hearing in the National Capital Region

24 September 2008

Video-on-demand service

*The Commission **approves** an application for a broadcasting licence to operate a regional video-on-demand service composed largely of feature films. A dissenting opinion by Commissioner Michel Morin is attached.*

Introduction

1. The Commission received an application by VidéOptique Inc. (VidéOptique) for a broadcasting licence to operate a regional video-on-demand (VOD) programming undertaking to serve the Regional County Municipalities of Érables, Arthabaska and Drummond and the municipalities of Upton, Saint-Victor, Saint-Éphrem, Saint-Hyacinthe, Notre-Dame-du-Bon-Conseil, Sainte-Perpétue, Sainte-Brigitte, Sainte-Clotilde and Sainte-Séraphine, Quebec. VidéOptique is a commercial corporation with authorized securities that is controlled by its board of directors.
2. The Commission received and considered two interventions in connection with this application. The interventions and the applicant's replies can be found on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

The proposed service

3. The applicant indicated that the new VOD service would consist primarily of feature films, non-live events, children's programming, archival television programming and adult programming. Programming would be predominantly in the French language, and 30% of programming could consist of English titles.
4. Because VOD services are subject to the *Pay Television Regulations, 1990* (the Regulations), including section 3(2)(d), which prohibits the distribution of programming containing any commercial message, the applicant requested to be authorized by condition of licence, as an exception to section 3(2)(d) of the Regulations, to offer on an on-demand basis programming that contains commercial messages where:

- the messages are already included in a program previously broadcast by a Canadian programming service; and
 - the inclusion of these messages as part of the VOD offering is in accordance with the terms of a written agreement entered into with the operator of the Canadian programming service that broadcast the program.
5. The applicant also requested authorization to charge subscribers for programs containing commercial messages.
 6. Lastly, VidéOptique indicated that it would provide closed captioning to serve the needs of persons who are deaf or hard of hearing. The applicant proposed that all of the titles in its inventory be closed captioned beginning in the sixth year of its licence term.

Commission's analysis and determinations

7. After examining the public file, the Commission is satisfied that the application complies with the licensing framework for VOD services set out in Public Notice 2000-172. Accordingly, the Commission **approves** the application by VidéOptique Inc. for a broadcasting licence to operate a regional VOD programming undertaking to serve the Regional County Municipalities of Érable, Arthabaska and Drummond and the municipalities of Upton, Saint-Victor, Saint-Éphrem, Saint-Hyacinthe, Notre-Dame-du-Bon-Conseil, Sainte-Perpétue, Sainte-Brigitte, Sainte-Clotilde and Sainte-Séraphine, Quebec. The terms and **conditions of licence** are set out in the appendix to this decision.
8. However, the Commission is of the view that the concerns raised by the interveners and its examination of the application warrant consideration of the following matters:
 - Should the Commission require the applicant to provide community programming?
 - Should the Commission override the applicant's decision to contribute to the Small Market Local Programming Fund?
 - Should the Commission allow the licensee to provide programs containing commercial messages?

Imposition of a condition of licence concerning the provision of community programming

9. In their interventions, the Fédération des télévisions communautaires autonomes du Québec (the Fédération) and Télévision communautaire de l'Érable asked the Commission to impose a condition of licence on VidéOptique requiring it to offer community programs produced by the three community television undertakings present in the territory in which the applicant's service would be available. In its reply,

VidéOptique indicated that it did not want to make a commitment to offer community programming, which, according to the applicant, is not suited to the type of service it intends to offer. However, the applicant indicated that it was prepared to discuss with the Fédération the possibility of offering community programming.

10. Although the Commission acknowledges the importance of community programming, it notes that VOD undertakings currently are not required to offer community programming. However, the Commission also notes the applicant's statement that it is prepared to discuss with the Fédération the possibility of offering community programming. Accordingly, the Commission directs VidéOptique to discuss the question of the provision of community programming with Télévision communautaire des Bois-Francis, Télévision communautaire de l'Érable and Télévision communautaire de Saint-Victor and to file a report detailing all discussions between the parties no later than 120 days from the date of this decision.
11. The Commission also invites the Fédération to raise the issue of the distribution of community programming by VOD undertakings in the proceeding pertaining to the Commission's study of community programming announced in its 3-Year Work Plan 2008-2011.

Contributions to the Small Market Local Programming Fund

12. In response to a question from the Commission, the applicant indicated that it intended to contribute 5% of its gross revenues to the Small Market Local Programming Fund. Under the policy announced by the Commission in Public Notice 1997-83, this amount must be earmarked for financial assistance to independent production.
13. The interveners asked the Commission to override the applicant's decision to contribute to the Small Market Local Programming Fund. According to the interveners, the Commission should instead encourage the applicant to contribute financially to the creation of community programming produced by independent community television undertakings in its territory. In its reply, VidéOptique noted that the Commission's policy on contributions to an existing Canadian production fund as set out in Broadcasting Public Notice 2000-172 is clear on this issue and that the fund in question is on the Commission's list of certified independent production funds.
14. In light of the foregoing, the Commission is satisfied that the applicant's contribution to the Small Market Local Programming Fund complies with the requirements of the policy set out in Public Notice 2000-172 because the fund is on the Commission's list of certified independent production funds and is administered independently of VidéOptique.

Broadcast of commercial messages

15. The applicant requested to be authorized by condition of licence, as an exception to section 3(2)(d) of the Regulations, to offer on an on-demand basis programming that contains commercial messages. The applicant also requested authorization to charge subscribers for programs containing commercial messages.

16. The Commission notes that it has approved a number of applications for amendments to the broadcasting licences of VOD programming undertakings to permit them to offer programming that includes commercial messages subject to the same criteria proposed by VidéOptique. In these decisions, the Commission indicated that approval of the applications “would not represent a significant departure from the Commission’s framework for the licensing of VOD undertakings.” Also, in view of the nature of VOD services, the Commission determined that it was appropriate for Canadian VOD services to charge for these programs.
17. In light of the foregoing, the Commission considers that it is appropriate to authorize the applicant to distribute programming that contains commercial messages where those messages are already included in a program previously aired by a Canadian programming undertaking and where the program’s inclusion as part of the VOD offering is in accordance with the terms of a written agreement entered into with the operator of the Canadian programming service that broadcast the program. A **condition of licence** to this effect is set out in the appendix to this decision.

Social issues

18. The Commission notes VidéOptique’s proposal to provide closed captioning to make its VOD service accessible to persons who are deaf or hard of hearing. The applicant proposed that all of the titles in its inventory be closed captioned beginning in the sixth year of its licence term.
19. However, in response to a question from the Commission, the applicant made a commitment to comply with the closed captioning requirements set out in Broadcasting Public Notice 2007-54. The applicant indicated that it would strive to ensure that its VOD service is accessible to persons who have a visual impairment by providing audio description and by working with its suppliers to comply with industry standards pertaining to programming with described video.
20. Consistent with the framework set out in Public Notice 2007-54, the Commission is of the view that the service should provide closed captioning for 100% of its programs beginning in its first year of operation. A **condition of licence** to that effect is set out in the appendix to this decision.

Adult programming

21. The Commission notes that VidéOptique did not include, as part of its application, an internal policy on adult programming, as required in Broadcasting Public Notice 2003-10. However, the applicant made a commitment to file a copy of its internal policy with the Commission before it begins to operate its service. The Commission therefore expects the licensee to submit its internal policy on adult programming for Commission approval at least one month prior to the implementation of the service. The Commission further expects that any future changes made by the licensee to this policy will be submitted for Commission approval prior to their implementation.

Other matters

22. As indicated in Broadcasting Public Notice 2008-101, the Commission is currently reviewing its regulatory framework for VOD services. Once it announces its new regulatory framework for VOD services, the Commission expects the licensee to file an application to amend the broadcasting licence to ensure that its terms and conditions of licence comply with the new regulatory framework.
23. Currently, the Commission expects VOD licensees to offer audio description and video description of their programming and to ensure that their customer services respond to the needs of visually impaired subscribers. As set out in Broadcasting Notice of Public Hearing 2008-8 and Telecom Public Notice 2008-8, the Commission is currently reviewing matters pertaining to the accessibility of telecommunications and broadcasting services to persons with disabilities. The Commission notes that upon completion of this proceeding, it may impose additional requirements on some or all licensees.

Secretary General

Related documents

- *Call for comments on a proposed regulatory framework for video-on-demand undertakings* – Notice of consultation, Broadcasting Public Notice CRTC 2008-101, 30 October 2008
- *Unresolved issues related to the accessibility of telecommunications and broadcasting services to persons with disabilities* – Notice of consultation, Broadcasting Public Notice CRTC 2008-8 and Telecom Public Notice CRTC 2008-8, 10 June 2008
- *A new policy with respect to closed captioning*, Broadcasting Public Notice CRTC 2007-54, 17 May 2007
- *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, Broadcasting Public Notice CRTC 2003-10, 6 March 2003
- *Introductory statement to Decisions CRTC 2000-733 to 2000-738 – Licensing of new video-on-demand and pay-per-view services*, Public Notice CRTC 2000-172, 14 December 2000

- *Licensing of new video-on-demand programming undertakings – Introduction to Decisions CRTC 97-283 to 97-287, Public Notice CRTC 1997-83, 2 July 1997*

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: www.crtc.gc.ca.

Appendix to Broadcasting Decision CRTC 2008-366

Terms, conditions of licence, expectations and encouragement

Terms

Issuance of the broadcasting licence to operate a regional video-on-demand programming undertaking to serve the Regional County Municipalities of Érable, Arthabaska and Drummond and the municipalities of Upton, Saint-Victor, Saint-Éphrem, Saint-Hyacinthe, Notre-Dame-du-Bon-Conseil, Sainte-Perpétue, Sainte-Brigitte, Sainte-Clotilde and Sainte-Séraphine, Quebec

The licence will expire 31 August 2015.

The licensee shall, at least one month prior to the implementation of the service, submit its internal policy on adult programming for Commission approval. Any future changes made by the licensee to its internal policy on adult programming shall also be submitted for Commission approval prior to their implementation.

A licence for this undertaking will be issued once the applicant has informed the Commission in writing that it is prepared to commence operations. The undertaking must be operational at the earliest possible date and, in any event, no later than 24 months from the date of this decision, unless a request for an extension of time is approved by the Commission before 23 December 2010. In order to ensure that such a request is processed in a timely manner, it should be submitted at least 60 days prior to that date.

Conditions of licence

1. The licensee shall adhere to the *Pay Television Regulations, 1990*, with the exception of section 3(2)(d) pertaining to commercial messages and section 4 pertaining to logs and records.
2. The licensee shall not include, as part of its video-on-demand offering, any program containing a commercial message except where:
 - a) the message was already included in a program previously broadcast by a Canadian programming service; and
 - b) the program's inclusion as part of the video-on-demand offering is in accordance with the terms of a written agreement entered into with the operator of the Canadian programming service that broadcast the program.

3. The licensee shall maintain for a period of one year and submit to the Commission upon request a detailed list of the inventory available on each file server. The list must identify each program by programming category and by country of origin and indicate the period of time that each program was on the server and available to subscribers.
4. Except as authorized by the Commission, the broadcasting undertaking licensed herein shall be operated in fact by the licensee itself.
5. The licensee shall ensure that, at all times:
 - a) not less than 5% of the English-language feature films and not less than 8% of the French-language feature films in the inventory are Canadian;
 - b) the feature film inventory includes all new Canadian feature films that are suitable for video-on-demand exhibition and meet the approved *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*; and
 - c) not less than 20% of all programming other than feature films in the inventory available to subscribers is Canadian.
6. The licensee shall contribute 5% of its gross annual revenues to an existing Canadian program production fund administered independently of its undertaking.

For the purposes of this condition:

- a) “gross annual revenues” shall be 50% of the total revenues received from customers of the broadcasting distribution undertaking distributing the video-on-demand service, when the video-on-demand service is a “related service”;
 - b) a “related service” is one in which the broadcasting distribution undertaking distributing the video-on-demand service or any of its shareholders owns, directly or indirectly, 30% or more of the equity of the video-on-demand service;
 - c) “gross annual revenues” shall be the total amount received from the broadcasting distribution undertakings distributing the video-on-demand service, when the video-on-demand service is not a “related service.”
7. The licensee shall ensure that not less than 25% of the titles promoted each month on its barker channel are Canadian titles.
 8. The licensee shall remit to the rights holders of all Canadian feature films 100% of revenues earned from the exhibition of these films.

9. The licensee shall not enter into an affiliation agreement with the licensee of a broadcasting distribution undertaking unless the agreement incorporates a prohibition against linkage of its service with any non-Canadian discretionary service.
10. The licensee shall caption 100% of its programs over the broadcast day, consistent with the approach set out in *A new policy with respect to closed captioning*, Broadcasting Public Notice CRTC 2007-54, 17 May 2007.
11. The licensee shall adhere to the *Equitable Portrayal Code*, as amended from time to time and approved by the Commission. However, the application of the foregoing condition of licence will be suspended if the licensee is a member in good standing of the Canadian Broadcast Standards Council.
12. The licensee shall adhere to the *Pay television and pay-per-view programming code regarding violence*, as amended from time to time and approved by the Commission.
13. The licensee shall adhere to the *Industry code of programming standards and practices governing pay, pay-per-view and video-on-demand services*, as amended from time to time and approved by the Commission.

Expectations

Programming offered in both official languages

The Commission notes that the licensee committed to offering approximately 30% of the titles from its catalogue in English. The Commission expects the licensee to make its program offering available to the maximum extent possible to customers in both official languages.

Programming packages

The Commission expects the licensee to limit to one week the total period during which the programming in programming packages may be viewed.

Adult programming

The Commission expects the licensee to adhere to its internal policy on adult programming approved by the Commission. The Commission further expects that any future changes made by the licensee to this policy will be submitted for Commission approval prior to their implementation.

Cultural diversity

The Commission expects the licensee to endeavour, through its programming and employment opportunities, to reflect the presence in Canada of ethnocultural minorities, Aboriginal peoples, and persons with disabilities. The Commission further expects the licensee to ensure that the on-screen portrayal of such groups is accurate, fair and non-stereotypical.

Service to persons who are blind or whose vision is impaired

The Commission expects the licensee to provide an audio description of all programming that provides textual or graphic information, including programming broadcast on the barker channel. The Commission also expects the licensee to acquire and make available described versions of programming, where possible, and to ensure that its customer service responds to the needs of visually impaired customers.

Encouragement

Employment equity

In accordance with *Implementation of an employment equity policy*, Public Notice CRTC 1992-59, the Commission encourages the licensee to consider employment equity issues in its hiring practices and in all other aspects of its management of human resources.

Dissenting opinion of Commissioner Michel Morin

Background

VidéOptique Inc. (VidéOptique), a new video-on-demand (VOD) programming undertaking, applied to the Commission for a broadcasting licence to operate a regional VOD service offering programming that would consist primarily of feature films.

According to the rules governing the issuance of such licences, VOD programming undertakings are not obligated to offer a community programming component.

In its decision, the Commission refused to require, by condition of licence, that VidéOptique offer a community programming component.

A free service that enhances the offering to subscribers

Aware of the legal loophole that would allow it to require the applicant to offer a programming component that includes community television programs, the Commission “directs VidéOptique to discuss the question of the provision of community programming with Télévision communautaire des Bois-Francs, Télévision communautaire de l’Érable and Télévision communautaire de Saint-Victor.”

And while the Commission does not explain why it wants the parties to discuss this issue, it gives them 120 days to do so!

What will ultimately happen? Will VidéOptique agree with the proposal put forth by the three community television stations? And if it refuses, what will the Commission do? Is this a veiled threat or an encouragement? The Commission would be wise to lay its cards on the table. I wonder if the Commission would have added this requirement had VidéOptique not itself opened the door by proposing (and I cite the Commission) “to discuss with the Fédération [des télévisions communautaires autonomes du Québec] the possibility of offering community programming.”

Why leadership is required

In my opinion, the Commission is beating around the bush and displaying a flagrant lack of leadership.

- 1) We know that the *Broadcasting Act* (the Act) gives us the flexibility to deal with these types of cases.

After acknowledging the community element of the Canadian broadcasting system, the Act states in section 3(1)(d)(ii) that the broadcasting system should “encourage the development of Canadian expression by providing a wide range of programming...”

With respect to the Commission's mission, the Act states in section 5(2)(c) that the system should be regulated and supervised in a manner that "is readily adaptable to scientific and technological change."

Finally, with respect to the Commission's general powers, the Act specifies that "the Commission may, in furtherance of its objects [...] require any licensee who is authorized to carry on a distribution undertaking to give priority to the carriage of broadcasting" and "require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission" (sections 9(1)(g) and (h)).

Of course, mediation is one of the tools available to the Commission, but it is not the only one. With reference to the Commission's jurisdiction, paragraph 12(1)(a) states that where it appears that "any person has failed to do any act or thing that the person is required to do pursuant to [...] any licence [...] the Commission may inquire into, hear and determine the matter."

- 2) As custodians of the Act, we are obliged to do everything in our power to promote community television just as we promote private and public television, but we must recognize that community television is unique in that it has limited access to financial resources, be they advertising revenues or government subsidies.
- 3) The proposed service would offer a few hours per week of programming and would be free of charge to VidéOptique subscribers.
- 4) To use a euphemism, the service would incur only marginal distribution costs for VidéOptique and would in no way limit its ability to offer feature films to its subscribers. In other words, imposing a requirement that VidéOptique offer community television programs would in no way be prejudicial to the undertaking. On the contrary, in my opinion, it would enhance its brand.
- 5) Given their size, the four broadcasting distribution undertakings (BDUs) carrying VidéOptique are unable to offer a full community television service to their subscribers.
- 6) If negotiations were to fail on this issue, subscribers would be deprived of a free community television service in their vicinity.
- 7) According to *Mesure d'impact social et profil d'auditoire des télévisions communautaires autonomes du Québec*, February 2007, a recent study conducted by Lynda Binhas, Ph.D. with a margin of error of $\pm 5\%$, 41% of television viewers watch their community station once to twice a week, and 25% of them tune in three to four times a week. The author considers that the study's results can be generalized across Quebec. Accordingly, we can confidently say

that at least one-third, if not one-half, of subscribers to the four BDUs would take advantage of these free community television services.

- 8) Most community television services do not own the means of distribution for their content; that is the very nature of non-profit organizations. For them, access is fundamental. There is no doubt that VOD is a new, attractive and practically cost-free option for the VOD programming undertaking. Consequently, approving the request is in the interest of the entire broadcasting system; it would benefit the viewers and it would increase the audience share of community television.
- 9) VOD services, like conventional community channels, can also be vehicles for community-produced programs. In the past, two Canadian Prairie undertakings, MTS Communications Inc. (MTS) in Manitoba (Broadcasting Decision 2003-590) and Saskatchewan Telecommunications (SaskTel) in Saskatchewan (Broadcasting Decision 2003-451), indicated that they could offer, as part of their VOD services, a range of free services to enhance the availability of Canadian content. As potential services, they had listed concerts, music videos, sports programs, educational and children's programs and television programs. Of course, the term "television program" encompasses community television programs. The Western Canadian undertakings even added that although the programming would be offered mainly in English, their programming could include films in French or in other languages to meet demand. Why and in the name of what principle would these four small and no doubt dynamic undertakings refuse to give a boost to the Canadian broadcasting system, particularly when they themselves are not able to offer community television worthy of the name?

If the Commission has required these parties to again discuss offering this service, it is because it believes, rightly so, that community television services provide a unique, value-added service consistent with the objectives of the Act.

In my opinion, the Commission, as the overseer of the broadcasting system, had an obligation to send an even clearer and uncompromising signal given that the undertaking is not voluntarily considering offering this service in any way. A refusal by VidéOptique would not be an option, particularly when the service costs practically nothing. A refusal would be neither in the interest of the system nor in the interest of VidéOptique's customers.

Now, not in one year

While waiting for VOD regulations, the Commission could very well have shown leadership and added that in the absence of an agreement between the parties, it would resolve this particular lapse in the Act until regulations adapted to technological change plug the current legal loophole.

VidéOptique's subscribers could then have received community television programming that, at no extra charge, would have enhanced the feature film service offered.

Furthermore, given the Commission's schedule, the precedent thus created would have been extremely limited in time and could have been acknowledged in the Commission's decision.

I do not believe that the Commission needs to hold a lengthy hearing to confirm what is already happening in Western Canada. Two large Prairie VOD services did not hesitate to offer the service free of charge to their subscribers. Why would it be otherwise for VidéOptique, which is driven by the same objective of offering its customers the best service possible at the lowest cost?

If the Commission determined, as is the case here, that it is in the interest of all parties to offer this service, why did it limit its intervention to requiring negotiation rather than requiring programming?

Should common sense not prevail when an undertaking is able to give its subscribers community content with no harm done?

This is not the first time that the Commission has had a legal loophole revealed and that programming undertakings have not hesitated to take advantage of it. Under the circumstances, in making a ruling, it should keep the entire system in mind rather than weigh the interests of individual players who try to test the regulations and the Act.

For example, take the recent case in which the Commission restored Société Radio-Canada's RDI news service on Shaw Communications Inc.'s basic service. The Alberta undertaking had withdrawn RDI from its basic service without warning and in a completely arbitrary fashion, causing a prejudice to the public service. Despite Shaw's cavalier actions, the Commission, in a majority decision, refused to force the undertaking to reimburse losses of over \$600,000 that RDI had suffered since the beginning of 2008. This situation is a clear example of what I mean when I write that the Commission lacks leadership and refuses to step up to the plate. I, for one, don't back away from the pitch!

As regulators, we have to do more than follow to the letter the rules currently governing VOD services. I believe that if the service can be delivered by the company to its customers with no harm or additional cost and in full compliance with the objectives of the Act, we have a duty to ensure that the enhanced service is offered without delay so that more consumers benefit from it and have access to programs produced by community stations in their vicinity.

Now that VidéOptique has been asked to negotiate, I do not see how it could justify its opposition in terms of a VOD service. Non-existent regulations aside, the Commission had all the flexibility it needed in the Act to promote greater diversity in the Canadian broadcasting system.

In light of all of the above reasons, I disagree with the decision by my distinguished colleagues.