

The Canadian Media Producers Association’s Comments Respecting Broadcasting Notice of Consultation CRTC 2016–225: Renewal of television licences held by large English– and French–language ownership groups

1. The CMPA supports the renewal of the licences held by the three large English–language ownership Groups, Bell Media Inc. (Bell), Corus Entertainment Inc. (Corus) and Rogers Media Inc. (Rogers) (collectively, the Groups).¹
2. As outlined in this submission, however, our support is contingent on the Commission continuing to implement the Group–based licensing framework so as to ensure that there is stable, continued support for the creation of compelling and diverse Canadian programming and that, as important players in the system, both broadcasters and independent producers can face the future with confidence.

EXECUTIVE SUMMARY

- E1. Independent producers operate in the most fiercely competitive part of the Canadian broadcasting system. They embrace this competition and regard it as key to their success. Competition drives innovation in business models, technology, and storytelling. It also imposes market discipline on producers to focus on meeting the needs of broadcasters and audiences.
- E2. The CMPA’s proposals outlined below are designed to maximize regulatory flexibility for Bell Media Inc. (Bell), Corus Entertainment Inc. (Corus) and Rogers Media Inc. (Rogers) (collectively, the “Groups”) in a manner that is aligned with the Commission’s *Let’s Talk TV* “Create Policy” and Group Licensing Framework (GLF), and is supportive of the

¹ Since the CMPA represents independent producers of English–language content, we take no position regarding the renewal applications filed by the large French–language ownership Groups.

Broadcasting Act's objectives. At the same time, our proposals aim to preserve competition within the independent production sector, so that Canadian and global audiences benefit from the very best and most diverse Canadian programming. This is most effectively achieved by ensuring that producers remain truly independent and continue to produce content in a variety of genres and for a wide spectrum of audiences.

A New Test for Demonstrating Compliance with Independent Production Obligations

- E3. In order for independent producers to be able to work in partnership with the Groups to create and present compelling Canadian programming which will garner more success both domestically and internationally, the Commission needs to establish new and more effective definitions of “independently produced program” and “independent production company”. Increasingly, the Groups are exploiting the limitations of the current definition of “independent production company” to structure – and claim for regulatory purposes – projects which they effectively own and control and so are “independently produced” in name only. It is therefore critically important to establish the new test we propose to ensure that programs the Groups claim for regulatory purposes as “independently produced” are indeed independently produced.

A Successor to Terms of Trade

- E4. Despite our repeated invitations to do so, the Groups have declined to meet with us to explore mutually satisfactory ways to achieve a renewed partnership by renegotiating the Terms of Trade Agreement. The CMPA therefore requests that the Commission impose, as a condition of licence, that the Groups conclude a new Terms of Trade agreement with the CMPA, with such agreement to come into force as of the beginning of the Groups' new licences (i.e. September 1, 2017).

Restoring an Evening Exhibition Requirement for Discretionary Services

- E5. The more opportunities Canadian programs on discretionary services have to be broadcast in the evening, the better the chance Canadians will have to view those programs. This highlights the importance of evening exhibition obligations for discretionary services to achieve the regulatory policy objective of facilitating “the provision of Canadian programs to Canadians”. Moreover, history has proven that Canadian TV programs will only succeed in both the Canadian and international



marketplace if they are given an opportunity to appeal to large Canadian audiences, and not buried in the broadcasters' daytime schedules.

- E6. The Commission should therefore reinstate evening exhibition requirements for discretionary services in order to facilitate Canadians' access to Canadian programs and to give those programs a chance to succeed both domestically and internationally.

Ensuring Stable, Continued Support for the Creation of Canadian Programming

- E7. A fundamental objective of the GLF is to ensure "substantial stable funding for Canadian programming" in a time of change. In implementing the new GLF CPE obligations, the Commission established that each Group's spending floor would be 30% of revenues. The Commission has now stated that it will maintain the current CPE percentages to which the Groups are subject. Therefore the Commission should maintain the 30% Group CPE. Also, individual CPE levels for each service in each respective Group (including television stations and all discretionary services) should be set at the same 30% level to ensure that individual services contribute appropriately to their Group's overall CPE level.

Maintaining Current Levels of Support for PNI

- E8. Similar to what it did with respect to the Group CPE level, the Commission has stated that it intends to maintain the spending level for Programs of National Interest (PNI).
- E9. The CMPA appreciates that, unlike the case with CPE, none of the Groups has sought to reduce the PNI level below the 5% floor initially applicable to Bell and now applicable to Rogers. This being said, acceptance of the lowest PNI floor would mean, in practical terms, a substantial reduction in actual total PNI spending within the system. In turn, this would mean a substantial reduction in the actual PNI spending to be allocated to independently produced programming.
- E10. Based on existing PNI requirements, historical spending for both Bell and Corus, based on the make-up of their respective new proposed Groups, averaged out to about 8% of their respective revenues, which is higher than the standard 5% level the Groups propose for the next licence term.
- E11. In order to maintain PNI spending levels going forward, and consistent with standardization, the Commission should set the PNI level for all Groups at an average of



the historical levels of the three Groups. Alternatively, the Commission should require each Group to maintain its respective historical PNI level.

Maintaining Current Support for Independently Produced Programming (PNI and Non-PNI)

- E12. The requirements established in the GLF respecting support for independently produced programs are twofold: at least 75% of PNI spending is to be allocated to independently produced programs; and Individual services are to retain their specific requirements relating to independent productions.
- E13. The CMPA appreciates that the Groups have confirmed their willingness to maintain the obligation to allocate at least 75% of their PNI spending to independently produced programs. We support maintaining this obligation.
- E14. In implementing the GLF, the Commission confirmed the importance of the individual service requirements to ensure support for independently produced programming that would not qualify as PNI. Accordingly, the Commission should reject the Group's attempts to amend the GLF by eliminating their obligations to support independently produced non-PNI. Instead, each Group should be subject to an obligation that at least 25% of its original, first-run Canadian programs other than news sports and current affairs be independently produced programs. Consistent with the manner in which they may meet their CPE and PNI obligations, the Groups could be given the flexibility to allocate all or part of each service's standard 25% independent production exhibition obligation to one or more other services within their Group.

An Alternative, Expenditure-based Approach to Ensuring a Significant Contribution from the Independent Production Sector

- E15. The CMPA acknowledges that the Commission is shifting its regulatory approach from one based on exhibition quotas to one based on expenditures. We therefore propose an alternative, expenditure-based approach to ensuring that both PNI and non-PNI programming in the system includes a significant contribution from the independent sector.
- E16. Specifically, we recommend that, as an alternative to imposing our proposed standard 25% Group independent production exhibition obligation, the Commission require the Groups to maintain the level of spending they have historically allocated to all independent production (i.e., both PNI and non-PNI).



- E17. We are fully prepared to work with the Commission and the Groups to develop a common and standardized independent production spending obligation which, like the Commission's goal respecting CPE and PNI, would maintain current spending levels going forward.
- E18. To be clear, in proposing an "all program" independently produced programming expenditure obligation, we are not proposing that the Groups' PNI obligations be eliminated. We submit that it would still be necessary and appropriate to impose on the Groups both an overall Group PNI spending obligation and the requirement to allocate 75% of their PNI spending to independently produced programs in order to maintain their current levels of support for the creation of programs that clearly serve the national interest.

Supporting Original Programming

- E19. The CMPA agrees with the Commission that original first-run Canadian productions add more value to the system than excessive repetition and recycling of programming. We therefore submit that there should be appropriate regulatory measures, such as specific spending requirements, respecting original, first-run programming. To that end, we would be pleased to work with the Commission and the Groups to determine both a common definition of original, first-run programming and a common approach to assigning expenditures to such programming so that we can propose appropriate regulatory measures which would advance the goal of promoting the creation and presentation of original programming in the system.

Maintaining The Special Role and Obligations of Children's Services

- E20. Because of the particular audience, the manner in which the Commission has historically regulated children's services and children's programming has differed from its approach to other services whose target audience is adults.
- E21. The Commission should continue to treat children's services as a "unique case". To that end, the Commission should construct a model for the regulation of children's services within the Corus Group which, while incorporating standardization and the flexibility of the GLF where possible, would still retain current, specifically-targeted Canadian programming requirements and advertising limitations. This would ensure our broadcasting system continues to best serve this special audience.



- E22. There are different ways to construct this model, which we suggest would be worth exploring in this proceeding. One model would simply require Corus's children's services to maintain their current unique obligations and limitations as long as the services' target audience continues to be children.
- E23. An alternative model would allow Corus to operate its stable of children's services as a "mini-Group". Consistent with the Commission's stated intention to maintain Group CPE and PNI spending levels, this model would require Corus to maintain its historical Canadian spending level across its mini-Group of children's services, but would give Corus the flexibility to move that spending around and within (but not outside) that mini-Group. Other obligations or limitations unique to Corus's children's services would be standardized across the services in the Corus children's mini-Group.

Group Make Up: Exclusion of all News Services

- E24. In establishing the GLF, the Commission ruled that news services would not qualify for inclusion in the Groups. This was so the Groups could not use the attendant CPE flexibility to direct significant amounts of spending into profitable news programming to obtain a competitive edge. The Commission also determined that news services do not require regulatory support as they have amongst the highest levels of CPE and exhibition of Canadian programming.
- E25. These reasons Groups remain valid and, moreover, apply equally to other discretionary news services, including BC News 1, CP24 and BNN. Accordingly, the Commission should rule as part of this current process that all of those services are ineligible for Group status.
- E26. This being said, we note that, if the Commission were to adopt our proposal to maintain spending levels on all independent production, we would have less concern about inclusion of news services in the Groups.



Exhibition Requirements for TMN/TMN Encore

E27. With Corus's shuttering of its pay television services, Bell's TMN remains the only Canadian television service within the Groups whose longstanding programming mandate has included supporting new Canadian feature films. Indeed, Bell attributes its current lower Canadian exhibition requirement for TMN in part to "the difficulties associated with producing...Canadian feature films." Accordingly, the Commission should only grant TMN and TMN Encore relief from the new standard exhibition obligation if they are required to continue to support Canadian feature films.



I. Introduction: Shared Goals

3. As referenced in Broadcasting Notice of Consultation CRTC 2016–225 (the Notice), the Commission established its Group-based Licensing Framework (GLF) in Broadcasting Regulatory Policy CRTC 2010–167² to better prepare the broadcasting industry and the Commission for the changing reality of Canada's broadcasting system. Importantly, as the Commission also referenced in the Notice, the GLF “aims to ensure stable, continued support for the creation of Canadian programming, particularly in regard to programming that is under-represented in the Canadian broadcasting system.”³
4. In its 12 March 2015 Let’s Talk TV decision (the Create Policy)⁴, the Commission announced policy changes which are intended to support the creation of compelling and diverse Canadian-made programming, while facilitating the transition to a more and more on-demand environment. To that end, changes announced in the Create Policy are intended, among other things, to support “[a] robust Canadian production sector better able to offer compelling high-quality content to Canadians and to global markets.”⁵
5. The CMPA supports these objectives.
6. In the Notice, the Commission stated its view that the GLF “remains appropriate for ensuring the stability of the Canadian television system and for enabling the players in the system to face the future with confidence.”⁶
7. The CMPA shares this view, provided that the Commission continues to implement the GLF so as to ensure that there is stable, continued support for the creation of compelling and diverse Canadian programming and that, as important players in the system, both broadcasters and independent producers can indeed face the future with confidence.

² Broadcasting Regulatory Policy CRTC 2010–167, *A group-based approach to the licensing of private television services*, <http://www.crtc.gc.ca/eng/archive/2010/2010-167.htm> (2010–167).

³ The Notice, at par. 11.

⁴ Broadcasting Regulatory Policy CRTC 2015–86, *Let’s Talk TV – The way forward – Creating compelling and diverse Canadian programming*, <http://www.crtc.gc.ca/eng/archive/2015/2015-86.htm> (2015–86).

⁵ 2015–86, at par. 120.

⁶ The Notice, at par. 23.



8. To achieve these objectives, the Commission should, in this proceeding:
- Promote partnerships between independent producers and the Groups by ensuring that, in their licensing deals, the Groups recognize, respect and maintain the producers' true "independence". To achieve this, we propose that the Commission establish a new test that the Groups must meet in order to demonstrate compliance with their GLF-related independent production obligations;
 - Impose, as a condition of licence (COL), that the Groups conclude a new Terms of Trade agreement with the CMPA, with such agreement to come into force as of the beginning of the Groups' new licences (i.e. September 1, 2017).
 - Reinstate evening exhibition requirements for the Groups' discretionary services;
 - Maintain the Groups' current CPE percentages (30%), as the Commission said it would do;
 - Maintain current PNI expenditure levels, as the Commission said it would do;
 - Maintain the Groups' support for independently produced programming (both PNI and non-PNI) through a combination of the existing 75% of PNI spending obligation and a standardized exhibition obligation, or, alternatively, through a new "all programs" spending obligation;
 - Introduce new measures to support original programming; and
 - Maintain the special role and obligations of children's services.
9. We address these and other related matters in the submission that follows.
10. First, however, we wish to highlight the important role that independent producers play in the Canadian broadcasting system.

II. The Role of Independent Producers in the Broadcasting System

11. The role of independent producers is to create many of the programs that are broadcast in Canada and, as such they are an integral part of our broadcasting system – a fact that is specifically recognized in the *Broadcasting Act* (the Act).⁷

⁷ Section 3(1)(i)(v) states that "the programming provided by the Canadian broadcasting system should [...] include a significant contribution from the Canadian independent production sector."



12. Independent producers employ significant numbers of Canadians across the country in high-value jobs to make the programs that provide Canadian television viewers with a Canadian perspective on our country, our world, and our place in it. Specifically, the \$3 billion in independent production volume in Canada generates work for 62,100 Full-Time Equivalents across all regions of the country, contributes \$3.7 billion to the national GDP and creates \$642 million in export value (a \$48 million increase over the previous year).⁸ This high level of domestic creation and production and its impact on the Canadian economy is directly linked to the rules the Commission has put in place to ensure the Groups and other Canadian broadcasters support independently produced programming through expenditure and exhibition obligations.

13. It is the fierce competition for ideas, talent and programs that is the hallmark of the independent production sector, enabling it to make a significant contribution to the Canadian broadcasting system. The fact that independent producers have to compete for access to broadcasters' schedules means they have to be creative entrepreneurs who
 - maximize the opportunities for successful programs while minimizing costs;
 - ensure that Canadians receive a diversity of programming from a variety of different sources, in different genres and formats, and from different perspectives and regions of the country; and
 - fuel innovation in the way stories are told and the way programs are made and delivered.

14. Without the creativity and entrepreneurship of independent producers, Canadian television as we know it could not exist. In today's highly concentrated broadcasting system, where most TV programming decisions are made by a limited number of people in a few very big companies, independent producers ensure that there is real variety and diversity on our television screens. It is this diversity that makes the Canadian broadcasting system unique in the world, and is also a fundamental element of our national identity and international reputation. It has become a unique competitive advantage in the global marketplace.

⁸ Source: *Profile 2015 – Economic Report of the Screen-Based Media Production Industry in Canada*, <http://cmpa.ca/industry-information/profile>.

15. Independent producers recognize that they form a part of a larger Canadian broadcasting system, and that all key stakeholders in the system need to be healthy and strong. This includes Canadian distributors and studios, which provide important and essential sources of financing for independent production. In fact, some of Canada’s most successful production companies also have distribution arms. These distribution arms market and sell Canadian programming in both the domestic and global market, generating vital revenue streams that are then reinvested in developing the next great Canadian show. It is this virtuous cycle of production and distribution that helps ensure that all elements of the Canadian broadcasting system contribute to the creation of compelling programming for Canadian and international audiences. The CMPA therefore encourages the Commission to take a holistic view of the symbiotic relationships that make up the system, and adopt a licensing framework that enables Canadian independent producers, Canadian distribution companies and Canadian studios to build on our collective success and make even greater contributions in the future.

III. A New Test for Demonstrating Compliance with Independent Production Obligations

A. Introduction

16. In this section, we outline why and how **the Commission needs to establish new and more effective definitions of “independently produced program” and “independent production company” as the basis of a new test for determining the Groups’ compliance with their GLF–related independent production obligations. It is critically important to establish this new test is to ensure that programs the Groups claim for regulatory purposes as “independently produced” are indeed “independently” produced.**

B. Background

17. The CMPA appreciates that a goal of the Create Policy is to help build a “robust Canadian production sector” in which “sustainable, better capitalized production companies [are] “capable of monetizing the exploitation of their content over a longer period, in partnership with broadcasting services that have incentives to invest in content promotion.”⁹

⁹ 2015–86, at par. 120.



18. Here we address what we consider is needed in order for independent producers to be able to work in partnership with the Groups to create and present compelling Canadian programming which will garner even greater success both domestically and internationally.
19. As a preface to the next section, we wish to update the Commission on our efforts to engage the Groups in discussions regarding the successor to Terms of Trade.

C. Pursuing A Successor to Terms of Trade

20. Despite our repeated invitations to do so, the Groups have declined to meet with us to explore mutually satisfactory ways to achieve a renewed partnership by renegotiating the Terms of Trade Agreement. While Rogers has informed us that it does not intend to renegotiate the Terms of Trade agreement when it expires on August 31, 2017¹⁰, neither Corus nor Bell have provided us with any formal response to our invitation to renegotiate.
21. In extending our invitation to renegotiate, the CMPA expressed its confidence that the Groups share our belief that with good faith and pragmatism on all sides, we could collectively develop forward-thinking and innovative business models where everyone wins and everyone contributes to building a more robust industry. We also recognized that the Groups have concerns about the current Terms of Trade agreement, and that we were prepared to substantively address those concerns by negotiating a framework agreement that is less detailed and provides greater flexibility to broadcasters and producers.
22. The CMPA stated that concluding a framework agreement in time for the upcoming November renewal hearings would send a powerful message that broadcasters and producers have decided to chart their own collective destiny in a manner that strengthens the Canadian broadcasting system. It would also have been a vindication of the

¹⁰ The CMPA, Corus and Bell Media recently participated in an arbitration to resolve the issue of when the current Terms of Trade agreement expires. Corus and Bell argued that the agreement expires at the end of this month (i.e. August 31, 2016). The CMPA argued that the agreement expires on August 31, 2017. The arbitrator held in favour of the CMPA, and confirmed that the agreement remains in force until August 31, 2017. Rogers did not participate in the arbitration, indicating to the CMPA that it would adhere to its Terms of Trade agreement with the CMPA until August 31, 2017.

Commission's view, as stated in the Create Policy, that "broadcasters and producers now have the clarity and experience they need to negotiate any future agreement among themselves."¹¹

23. In light of Rogers' response, and in the face of silence of Corus and Bell, **the CMPA requests that the Commission impose, as a condition of licence (COL), that the Groups conclude a new Terms of Trade agreement with the CMPA, with such agreement to come into force as of the beginning of the Groups' new licences (i.e. September 1, 2017).**
24. For clarity, the CMPA is not requesting that the Commission enforce any such agreement by COL. Rather, we are asking that the Commission create the conditions that will incentivize the parties to reach an agreement, by imposing a deadline for the conclusion of negotiations.
25. We would be pleased to update the Commission at the November hearing regarding our efforts to engage the Groups in these discussions.

D. Promoting Producer–Broadcaster Partnerships by Ensuring Independently Produced Programs are Truly *Independently* Produced

26. In our view, a prerequisite for independent producers forming solid and constructive partnerships with the Groups is that, in their licensing deals, the Groups recognize, respect and maintain producers' true independence. To do otherwise is to effectively read out the word "independent" from Section 3(1)(i)(v) of the Act, and its requirement that the Canadian broadcasting system should include a significant contribution from the independent production sector.
27. The Commission is also clearly concerned about the importance of ensuring the independence of producers. In the Create Policy, it expressed the concern that, in the current environment, independent producers are often incited "to behave like production contractors operating in a service industry... unable [to exploit] their content and intellectual property."¹²

¹¹ 2015–86, at par. 141.

¹² 2015–86, at par. 119.

28. This is obviously a serious concern for independent producers as well. Indeed, to be truly “independent” and not merely a broadcaster’s service company or an adjunct to a broadcaster’s in-house production team, a producer must meaningfully own and control both its production company and the content it creates, and must meaningfully reap the economic benefits of its efforts.
29. While service work certainly has its place in the system, a producer’s long-term incentive to innovate and invest in the production sector is directly tied to its “independence”, without which producers would have virtually no incentive to take on the risks and costs associated with creating new, innovative programming. This lack of independence would, in turn, undermine the quantity, quality and diversity of programming available in the market and reduce consumer choice. It would also negatively impact on employment in the sector, and particularly in the regions; indeed, smaller, regional production companies (and those working for them) could be the hardest hit if they are unable to reinvest in their companies due to a loss of their independence.
30. In the Notice, the Commission indicated that, “[i]n accordance with the objectives of Broadcasting Regulatory Policy 2015-86 and section 3(1)(i) of the Act, the Commission has asked the groups to describe their plans with respect to offering diversified programming, including a significant contribution from the Canadian independent production sector...”. In their applications, the Groups provide various descriptions of such plans; missing from their submissions, however, are any details as to how they distinguish “independently produced” programs from other types of programs, such as service productions or those they would create in-house.
31. To be fair, the Groups were not asked to address such distinctions, presumably since the Commission has long defined independently produced programs by reference to the definition it long ago established for “independent production company”. That definition is as follows:

An “independent production company” is a Canadian company that is carrying on business in Canada with a Canadian business address, that is owned and controlled by Canadians, whose business is the production of film, videotape or live programs

for distribution and in which the licensee and any company related to the licensee owns or controls, directly or indirectly, in aggregate, less than 30% of the equity.”¹³

32. The CMPA notes that the Commission has relied for at least 15 years on what appears to be a share ownership definition of “independent production company” to measure broadcasters’ compliance with their independent production programming obligations. However, we submit that, had the Commission considered the many types of *de jure* and *de facto* controls that broadcasters have exerted (whether directly or indirectly) over production companies and the actual programming they have produced over this period, it might have concluded that the share ownership test did not adequately assess whether a given production company was, in fact, “independent”.
33. As the Commission recognized and addressed in the Create Policy, the Canadian broadcasting system has undergone fundamental changes over the last several years and is facing many more changes going forward. Substantial consolidation has occurred over the last decade, new technologies have emerged, new business models have been adopted and a number of new broadcasting policies have been established and then updated or even entirely replaced.
34. Among the changes that have occurred in the system and which will continue to evolve is the manner in which the Groups commission programming from outside, third party sources, including the terms they impose for such arrangements and the methods they employ to advance their business interests in the face of their associated regulatory obligations. For example, Corus has made it quite clear that, with its recent purchase of Shaw, it intends to take full advantage of its increased market power over independent producers by taking ownership and control of their programs.¹⁴
35. This “own and control” strategy is consistent with the approach taken by the vertically integrated US networks since the elimination of the Financial Interest and Syndication Rules (the so-called “fin-syn rules”) by the Federal Communications Commission. The fin-

¹³ See, for example, Broadcasting Decision CRTC 2011-444, *Bell Media Inc. – Group-based licence renewals*, <http://www.crtc.gc.ca/eng/archive/2011/2011-444.htm> (2011-444), Appendix 3 (Definitions).

¹⁴ Corus Presentation, FISCAL 2016 FIRST QUARTER EARNINGS AND TRANSACTION CONFERENCE CALL, 13 January 2016, <http://seekingalpha.com/article/3808496-corus-entertainment-cjref-ceo-doug-murphy-on-q1-2016-results-earnings-call-transcript>.

syn rules, adopted in 1970, prohibited the “Big Three” broadcast networks (ABC, NBC and CBS) from owning any of the programming they aired in Prime Time. The aim of the rules was to promote programming diversity by having Prime Time programming be exclusively supplied by independent producers. The FCC’s elimination of the rules in 1993 sparked a wave of industry consolidation, and the progressive squeezing out of independent productions from the Prime Time schedules of the major networks. Commissioning decisions became increasingly tilted in favour of in-house studio production, and where independent productions were commissioned, the deal terms were overwhelmingly favourable to the network.¹⁵

36. What both Corus’s strategy and the US experience demonstrate is that the Commission’s longstanding equity ownership-based definition of “independent production company” is no longer appropriate and is insufficient for meeting the independent production policy objective in the Act. In order to ensure that Canadians receive programming from different sources, particularly in the heavily concentrated broadcasting environment that now exists, the system must include programming that comes from sources that are truly independent from the few broadcasters that remain.
37. Increasingly, however, the Groups are exploiting the limitations of the current definition of “independent production company” to structure – and claim for regulatory purposes – projects which they effectively own and control and so are “independently produced” in name only.
38. For example, as the CMPA has previously advised the Commission¹⁶, the now Corus-owned Shaw services are increasingly licensing programming from independent producers through “Producer of Record” (POR) deals.¹⁷ It is our understanding that, as the successor

¹⁵ Mara Einstein, “The Financial Interest and Syndication Rules and Changes in Program Diversity “. The Journal of Media Economics, 17. no. 1 (2004): 1–18. Austan Goolsbee, Vertical Integration and the Market for Broadcast and Cable Television Programming. Chicago: University of Chicago, (2007). Commissioned by the FCC. William M. Kunz, “Prime-Time Television Program Ownership in a Post-Fin/Syn World”. Journal of Broadcasting & Electronic Media 53. no.4 (2009): 636–651.

¹⁶ See our intervention in response to the recently-approved Corus-Shaw application, available at http://cmpa.ca/sites/default/files/documents/gr-and-regulatory/crtc/2016-02-18-BNOC%202016-22-Corus-Shaw%20Media_CMPA%20Submission.pdf.

¹⁷ This is the term the broadcasters use for these arrangements.

in ownership to Shaw, Corus is claiming POR programs as being “independently produced” in order to meet its independent production obligations (e.g. that 75% of its PNI spending is to be allocated to independently produced programming). This POR deal structure is clearly contrary to the Commission’s policy objectives in establishing independent production requirements.

39. As illustrated in **Appendix A**, in the typical POR commissioning model, Corus selects the producer, who will own 100% of the copyright in the produced program itself. Corus, however, will at all times own and control 100% of all rights in the concept, concept materials and format underlying the program. This means that Corus alone will control whether and when additional episodes, sequels or spinoffs of the program will be produced, and by whom.
40. Further, in the typical POR commissioning model, Corus will acquire, in addition to Canadian broadcast licence rights to the produced program, all related worldwide distribution rights and all related ancillary rights, such as merchandising, for the life of the program’s copyright. Not only does this provide Corus alone with control over whether, when and where the program may be licensed, but it also provides Corus with the ability to earn valuable commission-based revenues in priority to the producer on all such licensing opportunities. Finally, in the typical POR commissioning model, Corus will also acquire profit participation of as much as 75% of the net distribution revenues, leaving the producer with only 25% of the net profits on the program.
41. It is important to note that, in the typical POR commissioning model, Corus does not require ownership of any shares in the producer’s production company (or in the single-purpose subsidiary production company that would invariably be incorporated for the program).
42. In other words, in the case of a POR program, despite the Commission’s current “independent production” test, Corus will not only own and control the underlying rights to an entire television franchise, including all project extensions to other media; it will also reap substantially all of the economic benefit to each individual program that the “independent” producer may be engaged to produce.
43. Our concerns are not limited only to Corus and its POR commissioning model. There is a growing trend among all broadcasters to pursue commissioning strategies that are serving to erode producers’ independence. The POR commissioning model, however, perfectly illustrates how ineffective the Commission’s definition of “independent

production company” has become for advancing diversity of programming in the system and ensuring a significant contribution from the independent production sector.

44. Producers have also been advised (and are required to specifically acknowledge in the POR deals) that POR programs do not qualify as “independent productions” and are therefore not subject to Terms of Trade, notwithstanding that Terms of Trade is specifically “applicable to all independent productions produced by English-language Canadian independent television producers.”¹⁸
45. We submit this is not the kind of “partnership” between independent production companies and broadcasters which will lead to a robust Canadian production sector “able to exploit longer-term revenue opportunities of content (including international sales)” and which will “result in higher-quality Canadian programming with more success both domestically and internationally.”¹⁹ Rather, such a partnership should be one in which both the commissioning broadcaster and the producer shape the creative direction of a program and equitably share in the risks and rewards of producing and broadcasting it.

i) A New Test to Put “Independent” Back in “Independent Producer”

46. The CMPA submits that the Commission should establish a new test to establish when a program is “independently produced”, based on a functional definition of an “independently produced program” which incorporates by reference a redefinition of “independent production company”. The new test would address the changes to the broadcasting environment as well as to the Groups’ business models and program commissioning practices that have occurred since the Commission established its current equity ownership-based definition of “independent production company”.

a. A New Definition of “Independently Produced Program”

47. Specifically, we recommend that the Commission define an “independently produced program” to mean:

¹⁸ Terms of Trade Agreement, <http://cmpa.ca/sites/default/files/documents/terms-of-trade/2011-04-26-Terms-of-Trade-Agreement-Astral-Bell-Rogers-Shaw.pdf>, Art. 1 a).

¹⁹ 2015-86, at par. 121.

a Canadian program produced by an independent production company in respect of which the licensee of a programming undertaking, or an affiliate of (or other entity related to) the licensee, is not identified as the producer in the program's credits and does not own or control, directly or indirectly, and cannot exploit or acquire to its benefit any of the following:

- The copyright in the program;
- Any rights upon which the program is based (the "underlying rights");
- Any non-Canadian distribution or licence rights to the program, or to any products or projects ancillary or derivative to the program;
- A share of net profits, or revenue share, unless derived from the exploitation of the program, or any products or projects ancillary or derivative to the program, and provided that such share does not exceed, on a percentage basis, the licensee's (including any affiliated or related entities) cash contribution that is over and above the licensee's (including any affiliated or related entities) fair market value cash licence fee contribution to the financing of the program's budget; and
- An equity share in the program, or in any products or projects ancillary or derivative to the program, unless such share does not exceed, on a percentage basis, the licensee's (including any affiliated or related entities) cash contribution that is over and above the licensee's (including any affiliated or related entities) fair market value cash licence fee contribution to the financing of the program's budget.

48. This definition addresses the most important characteristics of a program that is truly "independently produced". At the same time, the definition does not preclude the Groups from making equity investments in independently produced programs. The CMPA agrees with the Commission that equity investments are one of the "mechanisms that contribute to solid partnerships between producers and broadcasters, and to virtuous cycles of production."²⁰ Such investments are optimized when the profit participation and return on equity entitlements they trigger are proportionate to the amount invested in the production. This also prevents the "crowding out" of investments from other sources and therefore maximizes the available financing for a production.

²⁰ The Notice, at par. 38.

b. Redefining “Independent Production Company”

49. Notably, the above definition of “independently produced program” refers to an “independent production company”. As stated above, the Commission needs to redefine this term in light of recent industry developments.
50. Since a fundamental purpose of the new test we propose here is to ensure that Canadians have access to a diversity of Canadian programming, we submit that it should be consistent and align with the Commission’s approach to ensuring BDU subscribers have access to a diversity of Canadian programming services.
51. In that respect, we note that, for the purpose of establishing rules to ensure BDUs provide fair access to independent programming services, the *Broadcasting Distribution Regulations* define an “independent programming undertaking” as one in which no BDU has any ownership interest whatsoever:
- “independent programming undertaking” means a programming undertaking for which no licensee of a distribution undertaking or operator of an exempt distribution undertaking, or an affiliate of the licensee or operator, holds, directly or indirectly, an interest or right in the assets.²¹
52. The CMPA sees great value for the purpose of promoting real programming diversity in the system in defining an “independent production company” in a manner similar to the way in which the Commission defines an “independent programming undertaking”. To that end, we propose that the Commission redefine “independent production company” to mean a company “for which the (programming undertaking) licensee, or an affiliate of (or other entity related to) the licensee, holds, directly or indirectly, no interest or right in the assets.”
53. Alternatively, the Commission could adopt a definition similar to its definition in the *Broadcasting Distribution Regulations* of an “unrelated exempt programming undertaking”. This approach would generally permit a licensee to own up to a maximum of 10% of the undertaking:

²¹ *Broadcasting Distribution Regulations*, s. 19(1).

“unrelated exempt programming undertaking” means
(a) an exempt programming undertaking of which the licensee or an affiliate, or both, controls 10% or less
(b) an exempt programming undertaking of which the licensee or an affiliate, or both, controls more than 10% but less than 15% and whose programming services the licensee was distributing on October 30, 2008.²²

54. Use of this approach as an alternative basis for redefining “independent production company” would, in the interest of flexibility, still permit some broadcaster ownership (albeit at a level substantially less than the current 30%, which is no longer appropriate).

ii) Implementation

55. It would be easy for the Commission to implement and enforce the new test we propose above (i.e., based on a new definition of “independently produced program” which incorporates a redefinition of “independent production company”).
56. First, the new definition of “independent production company” would replace the current definition in the COLs for each of the Groups’ respective services.
57. Second, each Group would be required to attest in its Annual Return, Annual PNI Report and any other associated report it may be required to file²³, that any and all information provided respecting expenditures on or exhibition of “independently produced programs” (including information required to demonstrate its compliance with any associated regulatory or licence obligations) relates to programs which meet the newly established test for such compliance.

iii) No Restrictions on Programs not Claimed as “Independently Produced”

58. The CMPA’s purpose in advancing this new test is to ensure that any programs the Groups claim as “independently produced” are in fact truly independently produced. This, in turn, should discipline the business practices of the Groups such that, in their licensing deals, they will recognize, respect and maintain producers’ true independence.

²² Ibid.

²³ For example, Benefits Reports.

59. To be clear, however, we are not proposing that the restrictions or obligations contained in the test must apply to other programs the Groups may commission or create, such as true service productions or programs produced in-house, provided there is no attempt to claim to the Commission that any such programs are “independently produced.”
60. Having these clear rules in place is a prerequisite to independent producers being able to form solid and constructive partnerships with the Groups. Those partnerships will then in turn strengthen the solid and constructive partnerships independent producers already have with the unions and guilds and with the institutions that develop and train Canada’s future producers and creative talent.
61. That being said, we caution the Commission that it will still be difficult for independent producers to create high-quality programs that will best serve Canadian viewers and garner success internationally unless the Groups schedule the programs when they will have the greatest chance to be discovered and build audiences. We address this issue in the next section.

IV. Restoring an Evening Exhibition Requirement for Discretionary Services

62. In this section, we outline why **the Commission should reinstate evening exhibition requirements for discretionary services** in order to facilitate Canadians’ access to Canadian programs and to give those programs a chance to succeed both domestically and internationally.
63. The CMPA agrees with the Commission’s regulatory focus on expenditures rather than on exhibition quotas. We also acknowledge that the Commission’s goal in deciding to reduce exhibition quotas (as announced in the Create Policy) is to promote the airing of original first-run Canadian productions, which we agree add more value to the system than excessive repetition and recycling of programming. Nevertheless, in the time since the Commission issued its Create Policy, we have had the opportunity to gain a greater appreciation of the negative impact that the proposed exhibition reductions – particularly the elimination of evening obligations for discretionary services – will have on achieving

the Commission's goal of promoting a robust Canadian production sector better able to offer compelling content to Canadians and to global markets.

64. In raising these concerns, we urge the Commission to review the basis for arriving at its view that the peak evening period is considerably less significant for discretionary services than it is for conventional stations.²⁴
65. The numbers tell the story (See **Appendix B**). Shortly following the Commission's release of the Create Policy, Canadian Media Research Inc. (CMRI) undertook an analysis of viewing to all pay and specialty channels in 2013–14 as reported by Numeris, and compared the figures to Canadian conventional stations. As CMRI reported, conventional stations, as expected, had higher audiences in Prime Time (7–11 pm) compared to their whole day audience. But as CMRI also reported:

Importantly, the vast majority of pay and specialty channels were similar. Conventional stations on average had about 150% larger audiences in Prime Time. Of the 148 pay and specialty channels reported by Numeris, 122 had a larger audience in Prime Time than in the whole day. A number of pay and specialty channels had larger Prime Time audiences in relative terms than conventional stations, including RDS, Sportsnet, TV5, Movie Central, Super Ecran, Vision, TMN, Book TV and Series+. A number of others, including History, TSN, bite, Slice and Discovery were similar to conventional stations.

66. More recent Numeris numbers which the CMPA has analyzed (see **Appendix C**) confirm that audiences to discretionary services continue to be significantly greater in the evening period than during the daytime. Notably, in the sample we examined, the size of the evening audiences to Bravo, Discovery, E!, Food Network, History, Space and W Network was almost or more than double the size their respective daytime audiences.
67. Both this data and producers' experience demonstrate that evening exhibition requirements for discretionary services are important both for serving Canadian audiences and for promoting global sales opportunities. The more opportunities Canadian programs on discretionary services have to be broadcast in the evening, the better the chance Canadians will have to view those programs. This highlights the importance of

²⁴ 2015–86, at par. 194.

evening exhibition obligations for discretionary services to achieve the regulatory policy objective of facilitating “the provision of Canadian programs to Canadians.”²⁵

68. Moreover, producers will find it increasingly difficult to sell shows abroad if these shows are relegated to the daytime period when most Canadian viewers are at work and not watching TV. Without the chance to expose these shows to even reasonably-sized Canadian audiences, producers won't be able to demonstrate the shows' potential appeal to international audiences. History has proven that Canadian TV programs will only succeed in both the Canadian and international marketplace if they are given an opportunity to appeal to large Canadian audiences, and not buried in the broadcasters' daytime schedules.
69. It is our expectation, however, that the Groups will exploit the removal of evening exhibition requirements for their discretionary services by scheduling their Canadian shows almost exclusively in the daytime, leaving the evening period for their in-house programming and acquired US content.
70. Prime Time scheduling – on both conventional and discretionary television services – is critical to a program's ability to be discovered in a crowded programming market and, in turn, to build an audience. Marketing dollars are focused on Prime Time programming and advertising dollars follow the resulting audiences, as do broadcasters' decisions to renew programs for subsequent seasons. Foreign buyers will rarely consider acquiring shows unless multiple seasons are available or, at least, are a real possibility.
71. Notably, from a producer's perspective, Prime Time scheduling is required in order to access certain important tax credits.²⁶ Access to tax credits is a fundamental component of program funding and thereby directly impacts program quality.
72. For these reasons, the scheduling of Canadian programs during the day rather than in the evening period will have real implications for independent producers and for the Commission's goal of a promoting a robust Canadian production sector better able to offer compelling content to Canadians and to global markets.

²⁵ The Act, s. 5(2)(e).

²⁶ For example, the Ontario Film and Television Tax Credit.

73. Accordingly, the CMPA urges the Commission to amend its planned approach to exhibition obligations on discretionary services and add to the Groups' licences a 35% evening obligation to supplement the planned standard 35% daytime obligation.

V. Ensuring Stable, Continued Support for the Creation of Canadian Programming

A. Introduction

74. In this section, we outline why the Commission should

- Maintain the Groups' current CPE percentages (30%), as the Commission said it would do;
- Maintain current PNI requirements, as the Commission said it would do; and
- Maintain the Groups' support for independently produced programming (both PNI and non-PNI) through a combination of the existing spending obligation and a standardized exhibition obligation, or alternatively through a new "all programs" spending obligation.

B. Standardization

75. In their applications, the Groups make much of the fact that, with implementation of the Create Policy, the Commission has moved to standardize the categorization of Canadian programming services and the accompanying regulatory and licensing obligations. While it is not entirely clear from their applications, it appears that the Groups' collective view is that this standardization means they should all share the same Canadian programming support obligations in some instances but they should be subject to different rules in others. Moreover, they seem to differ as to which rules they believe should apply to all Groups or services and which should only apply to their own Group.

76. The CMPA acknowledges the Commission's move to supplement the Groups' increased programming flexibility by "instituting several measures to simplify and streamline the licensing of services in order to reduce regulatory burden."²⁷ As reflected in this submission, we generally accept the notion that the resulting standardization should

²⁷ 2015-86, at par. 47.

mean consistent Canadian programming support requirements for all. Nevertheless, we submit that the Commission should retain its discretion to act on a case-by-case basis, as circumstances warrant, and further below we identify and address certain limited instances where such circumstances arise with respect to these Group licence renewals (see, for example, section VII below re “Maintaining the Special Role and Obligations of Children’s Services”).

77. **Regardless of the extent to which the Commission ultimately standardizes the Groups’ Canadian various regulatory and licensing obligations, the end result should nevertheless ensure stable, continued support for the creation of Canadian programming through the next licence term.**

C. **Canadian Programming Expenditures (CPE)**

Canadians have been clear throughout the Let’s Talk TV proceeding that they expect content of high quality from their television system. The creation of compelling high-quality productions by Canadians requires, among other things, financial investment. Investment in content of high quality that is widely available and well-promoted drives viewing and thereby generates revenues. These revenues can then be reinvested in producing future content. In the Commission’s view, CPE requirements provide necessary incentives to create such virtuous cycles of production.²⁸

i) **Clarifying Eligible Expenditures**

78. At the outset we note that, in the Notice, the Commission confirmed that it is maintaining the approach for calculating the eligibility of expenditures as set out in Public Notice 1993-93.²⁹ We further note, however, that that Public Notice is now 23 years old and much has changed in the broadcasting system over the intervening years, particularly the massive consolidation that has taken place within the broadcasting industry and the resulting vertical integration of broadcasting programming, broadcasting distribution and telecommunications activities within a small number of companies.

²⁸ 2015-86, at par. 213. Emphasis added.

²⁹ The Notice, at par. 28.

79. Accordingly, the CMPA submits that it would now be both appropriate and timely for the Commission to conduct a proceeding with a view to establishing more certainty and clarity as to what may or may not qualify as eligible Canadian programming expenditures.

ii) Maintaining the Group CPE

a. A 30% Group CPE is an Obligation not a Target

80. A fundamental objective of the Commission's GLF is to ensure "substantial stable funding for Canadian programming"³⁰ in a time of change. To achieve this objective, the Commission established the Groups' CPE levels based on the record of their actual spending over the three preceding years.³¹ The Commission stated that, "[i]n addition to encouraging effective business judgments, this would ensure that there is no reduction in overall spending on Canadian programming."³² In introducing its 2011 licence renewal decisions, the Commission confirmed that spending levels were to be "consistent with historical spending by the group, but should not act as a ceiling that might limit future expenditures beyond the group CPE level."³³
81. In implementing the new GLF CPE obligations in its 2011 licence renewal decisions, the Commission established that each Group's spending floor would be 30% of revenues. At the same time, however, the Commission established individual CPE levels for each service in each Group: should a Group's implementation of its combined individual CPE requirements result in actual, total CPE exceeding the 30% floor, the higher expenditure level becomes the Group's effective requirement.
82. However, if the combined expenditures of a Group's individual services represent less than 30% of the Group's revenues, the GLF requires the Group to make up the difference so that it meets the 30% floor.

³⁰ 2011-441, at par 29.

³¹ 2010-167, at par. 50.

³² 2010-167, at par. 35.

³³ 2011-441, at par. 21.

83. While there appears to some disagreement over this interpretation of the GLF, we do not see how the Commission could achieve its GLF objectives otherwise. In establishing the Group CPE obligation in the GLF, the Commission stated

...in order to ensure that the designated groups continue to contribute to the creation of Canadian programming, the Commission will establish a minimum, aggregate level of spending on Canadian programs for each designated group.³⁴

...

It is the Commission's preliminary view that the base spending level for each designated group, as an aggregate, should be a minimum of 30% of the group's gross revenues.³⁵

84. These statements make it clear that the Group level (ultimately confirmed as 30%) represents the hard minimum level of a Group's spending once the spending levels of individual services within the Group are aggregated; the 30% is not an aspirational target but a firm obligation. As the then-Commission Chairman stated during the 2011 licence renewal hearing, spending of anything less than 30% would be contrary to the GLF:

What you are asking here is a small variation because you have it -- but I saw what they did. To me they in effect asked for a less than 30 percent rate. So that's not an adjustment as far as I can see. That is just completely changing the system that we have...³⁶

85. In addition, when the Commission established the individual CPE levels for each Groups' collection of conventional television stations, it referred to the Groups' "30% CPE obligation":

In order to establish the appropriate CPE for the conventional television services controlled by a designated group, the Commission will calculate the dollar amount of the CPE obligations for qualifying Category A and Category B specialty services. This amount will be subtracted from the dollar amount of the group's 30% CPE

³⁴ 2010-167, at par. 46. Emphasis added.

³⁵ 2010-167, at par. 50. Emphasis added.

³⁶ Transcript of Corus's *in camera* appearance, <http://www.crtc.gc.ca/eng/transcripts/2011/tb0504x.html>, at line 992. Emphasis added.

obligation. The difference will be the dollar amount of the CPE obligation for the conventional television services controlled by the group.

The difference established in the above paragraph, calculated as a percentage of the average of the previous three years' gross revenues for the conventional television services, will constitute the CPE for the designated group's conventional television services and will be imposed as a condition of licence on those services.³⁷

86. The Commission referenced the 30% Group CPE obligation again in its 2011 renewal decisions for each Group. For example, in Bell's 2011 renewal decision, the Commission stated:

Consistent with its determinations in the introductory decision and the commitments made by the Bell Media group in this proceeding, the Commission has established a minimum group CPE level of 30% for the Bell Media group. As part of this requirement, the Bell Media conventional television stations will be required to collectively reach a minimum CPE level of 26%.³⁸

87. The interpretational mix-up over the nature of the overall 30% Group CPE obligation appears to have resulted from the manner in which the Commission implemented the obligation, namely through the imposition of spending COLs on the individual licensees controlled by the Groups. The Commission took this route because it noted that the Groups themselves are not licensees.³⁹ Unfortunately, it seems that some parties are taking advantage of this rather awkward regulatory solution to ignore the fact that the Commission's repeatedly confirmed that the 30% Group CPE was a minimum obligation, and never suggested that it was merely a soft, aspirational target. The Commission should clarify the obligatory nature of the Group CPE level in its decisions flowing from this proceeding.

88. We note that the most recent broadcaster to gain Group status – Rogers – acknowledges that adhering to an overall 30% CPE Group level is a prerequisite to benefiting from the GLF, and has structured its current renewal application accordingly.

³⁷ 2010–167, at pars 51 and 52. Emphasis added.

³⁸ 2011–444, at par. 6. Emphasis added.

³⁹ 2010–167, at par. 47.

b. Keeping the Group CPE at 30%

89. In the Create Policy, the Commission stated that, “for the large private ownership groups currently operating under the group-based policy, the Commission will maintain the group-based licensing approach and existing expenditure levels.”⁴⁰
90. Most recently, the Commission reiterated in the Notice that it “has stated that for the large private ownership groups currently operating under the group-based approach, the current CPE percentages to which they are subject will be maintained.”⁴¹
91. We regrettably note, however, that both Bell and Corus are seeking Group CPE levels (27% and 26%, respectfully) that are lower than the current 30% obligatory Group CPE floor. As noted and to its credit, Rogers has proposed to maintain the existing Group CPE floor of 30%.
92. The CMPA, along with ACTRA, the DGC and the WGC, jointly commissioned Boon Dog Professional Services Inc. (BDPS) to analyze, among other things, the impact of the Groups’ Canadian program spending proposals relative both to the 30% Group CPE the CRTC established in 2011 and to the Groups’ historical PNI requirements.⁴²
93. Because of gaps and inconsistencies it identifies in the data available on the public file of this proceeding, BDPS acknowledges in its report (the BDPS Report: see **Appendix D**) that its analysis is preliminary, limited and subject to the Commission’s confirmation using all the necessary and relevant data. Nevertheless, using the best available data, BDPS finds that the Bell and Corus proposals, if approved, would result in a significant reduction in overall spending on Canadian programming and PNI in the broadcasting system over the next licence term.

⁴⁰ 2015–86, at par. 218. Emphasis added.

⁴¹ The Notice, at par. 28. Emphasis added.

⁴² Boon Dog Professional Services Inc., *Analysis of Canadian Programming Expenditure and Programs of National Interest Proposals Filed by the English-Language Broadcast Groups as Part of their Group Licence Renewal Applications*. .

94. Respecting CPE, the BDPS Report finds that if the Bell and Corus proposals were to apply for the current broadcast year (2015–2016) using 2014–2015 revenues for the services in their respective new proposed Groups:
- Bell’s actual required CPE under the various CPE levels it proposes would be \$40.2 million less (or 10% lower) than would otherwise have been required under its existing individual service CPE levels. When Bell’s proposed 27% Group CPE level is compared to the 30% Group CPE level established by the Commission in 2011, the shortfall in spending would be \$40.8 million (or 10% lower); while
 - Corus’s actual required CPE under the various CPE levels it proposes would be \$18.5 million less (or 5% lower) than would otherwise have been required under its existing individual service CPE levels. When Corus’s proposed 26% Group CPE level is compared to the 30% Group CPE level, the shortfall in spending would be \$50.2 million (or 13% lower).
95. If Bell’s 27% Group CPE proposal were to apply for the current broadcast year (2015–2016) using 2014–2015 revenues for the services in all three new proposed Groups, their combined actual required CPE would be \$87 million less than would otherwise be required under the 30% Group CPE requirement.⁴³
96. If Corus’s 26% Group CPE proposal were to apply, the combined actual required CPE for the three Groups would be \$116 million less than would otherwise be required.⁴⁴
97. The CMPA opposes the Bell and Corus proposals to reduce current expenditure levels. Their proposals are contrary to the Commission’s clear statements that expenditure levels are to be maintained, and would undermine the creation of compelling and diverse Canadian programming over the next licence term.
98. We note that the reasons Bell and Corus advance for seeking CPE reductions are generally based on the changing environment and regulatory regime and the potential negative impact of these changes on broadcasters’ revenues. We are equally concerned that market developments and changes to the BDU regulatory framework flowing from the

⁴³ Bell Revenues @ \$1,360M + Corus Revenues @ \$1,255M + Rogers’ Revenues @ \$282M = \$2,897M x .30 = \$869M. \$2,897M x .27 = \$782M. \$869M – \$782M = \$87M. Source: BDPS Report.

⁴⁴ \$2,897M x .26 = \$753M. \$869M – \$753M = \$116M. Source: BDPS Report.

Commission's Let's Talk TV decisions (e.g., new packaging obligations) could have a negative impact on revenues in the system. However, it is important to appreciate that the revenue-based Group CPE formula already takes this possibility into account. Specifically, if a Group's revenue drops, so will its required spending on Canadian programming. Accordingly, the Group CPE formula already adequately insulates the Groups in the event of decreases in their revenues.

99. Thus, any argument that the current obligatory 30% Group CPE level should be reduced because of potential revenue reductions is simply an attempt to cut support for Canadian programming (likely in order to free up more funds to spend on foreign programming). This is unsupportable and in direct conflict with both the GLF and the Create Policy.
100. We would also note that the Create Policy has provided the Groups with substantially increased programming flexibility as a result of, for example, the significant reduction in the Canadian programming exhibition levels for most services⁴⁵ and the removal of genre restrictions. We also note that the Groups' online broadcasting activities as well as their owned or affiliated Hybrid VOD services, shomi and CraveTV, are currently completely free of any Canadian programming support requirements. This new programming flexibility introduced in the Create Policy is, of course, in addition to the spending flexibility the GLF already offers the Groups, which they may (and do) exploit to their financial and programming benefit. There is therefore no need or justification for the Commission to deviate from its clear and repeated position on maintaining the Group CPE spending level in order to grant the Groups even further relief from their Canadian programming obligations through reduced spending requirements.

iii) Standardizing CPE Requirements for all Services at 30%

101. The CMPA agrees with the Groups that, consistent with standardization, individual CPE levels for each service in each respective Group should be set at the same level. We submit that this is the most efficient way to ensure that, as the Commission intends, individual services contribute appropriately to their Group's overall CPE level.⁴⁶ For the

⁴⁵ This would still be the case even if the Commission were to reinstate evening exhibition obligations for the Groups' discretionary services, as we recommend: see section IV, above.

⁴⁶ The Notice, at par. 28.

reasons set out above, the overall CPE level should remain at 30%; therefore, the standard CPE for all services in a Group should also be 30%.

102. Moreover, for the reasons that follow, the individual CPE level for each Group's conventional television stations (now designated as "television stations") and for all discretionary services included in a Group should also be the standard 30%.
103. In advancing this position, we acknowledge that, unlike the Commission's current approach which sets individual CPE levels for each service, the standard 30% Group CPE going forward would become not only the regulatory floor but also the regulatory (and likely practical) ceiling. This is because adding up the standard individual service 30% CPEs would only achieve the 30% floor rather than potentially something higher, as has been the potential under the current non-standardized regime. We accept this result as a natural outcome of the new level of standardization the Commission has introduced into the system.

a. Standardized 30% CPE for all Television Stations

104. The CMPA supports Bell's proposal to subject the Groups' respective television stations to a standardized CPE requirement.⁴⁷ We agree that there is no justification for applying different CPE levels for the different Groups' television stations, as the Commission did in 2011. That approach, we note, created the anomaly that Corus's few small market television stations had the highest television station CPE of all the Groups – higher than either the CTV and Global collections of stations.
105. However, we oppose setting the standard television station CPE level lower than the obligatory overall 30% Group level. Setting the television station rate at a something less than 30% would only serve to lower the overall Group CPE rate below the required 30%: this is clear from Bell's proposal which, because of its low proposed television station rate, would lower the Group rate to 27% notwithstanding that Bell actually proposes a standard 32% rate for the vast majority of its discretionary services.
106. We note that, with removal of the 25% restriction on television services' spending flexibility, as Corus has proposed (and which we support: see below), the Groups would

⁴⁷ Although we oppose the rate Bell proposes. See Bell Supplementary Brief, at pars 54 and 66.

be free to allocate spending away from their television stations to their discretionary services as they wish, thus reducing if not eliminating any perceived need for a lower assigned CPE rate for their television stations.

b. Standardized 30% CPE for all Discretionary Services included in a Group

107. Bell and Corus propose a 10% CPE level for each of the services currently without a CPE obligation which they wish to add to their respective Groups. Rogers proposes that such new services in its Group take on the same 30% CPE level as applicable to all other services in its Group and consistent with its proposed overall Group CPE level. The CMPA opposes the Bell and Corus proposals; we agree with Rogers' logic, which is based on the Commission's Create Policy and standardization.

108. According to the Create Policy, the Commission established two different, new CPE obligations for licensed services with more than 200,000 subscribers (previously not subject to a CPE requirement), depending on whether they would be included in a Group or not. Those new services not previously subject to CPE requirements that are operated outside a Group are to have their new CPE level established in a case-by-case manner, based on historical expenditures, with the minimum level being 10%.

109. Specifically, in the Create Policy, the Commission stated:

In light of the above, in the English-language market (including third-language services), the Commission will apply CPE requirements to all licensed services. Services that do not currently have a CPE requirement will be assigned one at licence renewal. The CPE levels will be based on historical expenditure levels.⁴⁸

110. In the next paragraph of the Create Policy, however, the Commission established another, different obligation for any programming service that is part of a Group, namely, that such a service will have a CPE requirement that will contribute to the overall Group CPE:

Further, for the large private ownership groups currently operating under the group-based policy, the Commission will maintain the group-based licensing approach and existing expenditure levels. The programming services that are part

⁴⁸ 2015-86, at par. 217.

of a group will have CPE requirements that contribute appropriately to that group's overall CPE level.⁴⁹

111. Given that the Commission has confirmed the Groups' current CPE percentages (i.e., 30%) will be maintained, the CPE level for new services added to the Group would also have to be 30% and not something dramatically lower; otherwise, the CPE level for services already in the Group would have to be raised, perhaps substantially, to compensate and maintain the current 30% level.
112. Moreover, substantially raising the CPE level for certain services in a Group so that others could have dramatically lower CPE levels would run directly counter to the notion of standardization which the Groups otherwise rely on to advance their licence renewal proposals.
113. In order to contribute appropriately to its Group's overall 30% CPE level in a standardized licensing and regulatory regime, any new service added to a Group – including those previously without CPE obligations – would have to take on the same 30% obligation as other services in the Group. To its credit, Rogers recognizes and accepts this; Bell and Corus should also do so.
114. Notably, given the spending flexibility that comes only with inclusion in a Group, applying the consistent, standard 30% Group CPE level to new services in the Group would not present the hardship claimed. This is because each new service could allocate any or all of its spending obligations to other, more established services in the Group, thereby still permitting the new services to "ramp up" in their initial years within the Group.
115. Ultimately, inclusion within a Group brings privileges which are matched with associated obligations. If Bell or Corus do not wish to take on the Group-based obligations for their smaller services, they are free to operate those services outside their Groups.

iv) Removal of the Restriction on CPE Flexibility for Conventional Television Services

116. The CMPA supports Corus's proposal to delete the provision that limits to a maximum of 25% the required CPE for television services that may be attributed to any other qualifying

⁴⁹ 2015-86, at par. 218.

discretionary services within the same designated Group. We agree with Corus that, going forward, it (and by, extension, the other two Groups) should have the flexibility to direct spending to quality and compelling content where and when audiences demand it.⁵⁰

117. This being said, we note that removal of the 25% restriction would provide the Groups with yet even more programming flexibility, and would thus further undermine any arguments advocating that the Commission abandon its repeated position that the current 30% Group CPE level is to be maintained.

v) CPE for the Groups' Online Services

118. As a part of the Let's Talk TV proceeding, the Commission had originally proposed to include in the broadcasters' CPE base any revenues they generate from offering programming online and, in turn, to allow broadcasters to count towards their CPE requirements their expenditures on original online-only programming. In the Create Policy, however, the Commission announced that it would not implement this proposal because, in its view, doing so "could stifle innovation and inhibit the ability of licensees to offer new online-only programming, in competition with online video services." Instead, the Commission stated that "the industry should be given the opportunity to further develop these platforms without requiring contributions from these services at this time."⁵¹
119. If not now, there will certainly come a time when the Groups' online activities will be at a stage where they should be required to contribute to the creation and presentation of Canadian programming. Having data regarding how the Groups' online services are developing will be key to making that assessment. In that respect, we note that both CraveTV (Bell) and shomi (Rogers/Shaw) will be required to file reports by November 30 which are to include information on the number of subscriptions, the expenditures on original Canadian content and the inventory of Canadian content offered to subscribers. These reports are intended to permit the CRTC (and, presumably, the public) "to monitor new developments in the on-demand world, including how Canadian programming is

⁵⁰ Corus Application, Appendix B. Group issues – CPE and PNI, response to 6. b).

⁵¹ 2015-86, at pars 78-106.

performing in that area in the absence of contribution requirements or obligations for inventory.”⁵²

120. Notably these reports are to be filed for the first time two days after the renewal hearing for the large English–language Groups is scheduled to commence. The information in the reports should offer important insights into how the services are contributing (or not) to Canadian programming. Accordingly, we urge the Commission to advance the reports’ due date so that they will be available to the public sufficiently in advance of the hearing to allow interested parties to review them and comment at the hearing on their possible implications for the applicable Groups’ Canadian programming support obligations over the next licence term.

C. Maintaining Current Levels of Support for PNI

121. Similar to what it did with respect to the Group CPE level, the Commission stated in the Create Policy that it intended to maintain the spending level for PNI:

Given the relatively short timeframe in which the PNI requirements have been in place, the Commission considers it would be premature to alter the policy at this time. The current requirements relating to PNI including the specific program categories in each linguistic market will therefore be maintained.⁵³

122. Also similar to what it did respecting CPE, the Commission confirmed this approach in the Notice:

For groups in the English–language market, the Commission has concluded that the current PNI requirements will be maintained, including the specific program categories, as well as the condition of licence requiring that at least 75% of PNI expenditures be dedicated to independent producers.⁵⁴

⁵² Broadcasting Regulatory Policy CRTC 2015–355 and Broadcasting Order CRTC 2015–356, *Revised exemption order for certain classes of video-on-demand (VOD) undertakings and updated standard conditions of licence for licensed VOD undertakings*, <http://www.crtc.gc.ca/eng/archive/2015/2015-355.htm>.

⁵³ 2015–86, at par. 289. Emphasis added.

⁵⁴ The Notice, at par. 30. Emphasis added.

123. The CMPA appreciates that, unlike the case with CPE, none of the Groups has sought to reduce the PNI level below the 5% floor initially applicable to Bell and now applicable to Rogers.
124. This being said, acceptance of the lowest PNI floor would mean, in practical terms, a substantial reduction in actual total PNI spending within the system. In turn, this would mean a substantial reduction in the actual PNI spending to be allocated to independently produced programming.
125. The reason for these twin spending reductions is that, while the Commission set the Group PNI level at 5% for Bell and Shaw Media (Shaw) in 2011 and for Rogers when Rogers qualified as a Group in 2014, Corus's initial Group PNI level was 9%, which the Commission raised to 12% in 2013 when it approved Corus's purchase of TELETOON.⁵⁵ In addition, the Commission set the PNI level for TMN and TMN Encore at 18% when it approved Bell's purchase of Astral in 2013.⁵⁶
126. The attached BDPS Report finds that, based on existing PNI requirements, historical spending for both Bell and Corus, based on the make-up of their respective new proposed Groups, averaged out to about 8% of their respective revenues, which is higher than the standard 5% level the Groups propose for the next licence term.
127. The BDPS Report finds that, if the Bell and Corus Groups were subject to a standard 5% PNI rate for the current broadcast year (2015–2016) using 2014–2015 revenues for the services in their respective new proposed Groups:
- Bell's actual required PNI spending would be \$17.5 million less (or 21% lower) than would otherwise be required under existing PNI levels; while
 - Corus's actual required PNI spending would be \$23.2 million less (or 27% lower) than would otherwise be required under existing PNI levels.

⁵⁵ Broadcasting Decision CRTC 2013–737, *TELETOON/TÉLÉTOON, TELETOON Retro, TÉLÉTOON Rétro and Cartoon Network – Change of effective control -- TELETOON/TÉLÉTOON, TELETOON Retro and TÉLÉTOON Rétro – Licence renewal and amendment*, <http://www.crtc.gc.ca/eng/archive/2013/2013-737.htm>.

⁵⁶ Broadcasting Decision CRTC 2013–310, *Astral broadcasting undertakings – Change of effective control*, <http://www.crtc.gc.ca/eng/archive/2013/2013-310.htm>.

128. The BDPS Report also notes that, at 5%, Rogers' actual required PNI for its new proposed Group would be about \$944,000 (or 7%) higher than would otherwise have been required for its current Group; this additional PNI spending is directly attributable to adding FX and FXX to the Rogers Group.
129. At a standard 5% level, the actual required PNI spending for all three new proposed Groups combined would be almost \$40 million less than would otherwise be required under existing PNI levels.⁵⁷ This means that the PNI spending to be allocated to independently produced programming would be \$30 million less than would otherwise be required.⁵⁸ This loss of PNI spending in the system would be contrary to the goals of the Create Policy.
130. **In order to maintain PNI spending levels going forward, and consistent with standardization, the Commission should set the PNI level for all Groups at an average of the historical levels of the three Groups. Alternatively, the Commission should require each Group to maintain its respective historical PNI level.**

D. Maintaining Current Support for Independently Produced Programming (PNI and Non-PNI)

131. The requirements established in the GLF respecting support for independently produced programs are twofold:
- At least 75% of PNI spending is be allocated to independently produced programs; and
 - Individual services are to retain their specific requirements relating to independent productions.
- i) **Support for Independently Produced PNI**
132. The CMPA appreciates that the Groups have confirmed their willingness to maintain the obligation to allocate at least 75% of their PNI spending to independently produced programs. **We support maintaining this obligation.**

⁵⁷ (Bell @ \$17.5M + Corus @ 23.2M) – (Rogers @ .944M) = \$39.8M.

⁵⁸ 75% of \$40 million = \$30 million.

ii) Support for Independently Produced non-PNI

133. In implementing the GLF, the Commission recognized that support for independently produced non-PNI is an important factor in supporting the independent production sector. We agree. Not all independent producers focus on drama or documentaries; instead, many have built their businesses producing other types of programming that speaks to Canadians and adds diversity to the system. Others supplement their work on dramas or documentaries by producing other kinds of shows. Therefore, like support for PNI, support for independently produced non-PNI is important to help build a robust Canadian production sector and sustainable, better capitalized production companies which can succeed domestically and internationally and continue to employ Canadians and invest in infrastructure across the country.

a. Current Individual Service Obligations

134. The specific requirements for individual services relating to independent production are typically either a COL requiring that at least 25% of the service's Canadian programming other than news, sports and current affairs is produced by non-related production companies⁵⁹, or an Expectation that a minimum of 75% of all original, first-run Canadian programming other than news and current affairs is acquired from non-related producers.⁶⁰ In implementing the GLF with the 2011 licence renewal decisions, the Commission confirmed the importance of these requirements to ensure support for independently produced programming that would not qualify as PNI. In that process, as is the case now, the Groups sought the deletion of their individual requirements relating to independent production. However, the Commission rejected the Groups' requests, stating:

⁵⁹ Imposed on newly-licensed Category 1 digital services: see Public Notice CRTC 2000-171, *Introductory statement – Licensing of new digital pay and specialty services*, <http://www.crtc.gc.ca/eng/archive/2000/pb2000-171.htm> (2000-171).

⁶⁰ Imposed at the 2004 licence renewals of services originally licensed in 1996: see Broadcasting Public Notice CRTC 2004-2, *Introduction to Broadcasting Decisions CRTC 2004-6 to 2004-27 renewing the licences of 22 specialty services*, <http://www.crtc.gc.ca/eng/archive/2004/pb2004-2.htm>.

The Commission remains of the view that the individual obligations imposed on specialty services are an important factor in supporting the independent production sector and that they will contribute to the ongoing support of independently produced content in categories other than drama, documentaries and award shows. Consequently, and consistent with its determinations set out in the group-based policy, the Commission determines that it is appropriate to retain the existing requirements relating to independent production.⁶¹

135. In the Create Policy, the Commission highlighted the PNI-related obligations as a means to ensure a significant contribution from the independent production sector. Contrary to Corus's assertion⁶², however, the Commission has not considered the PNI obligations to be the only means to do so. As the Commission stated clearly in the above-quoted passage from its introductory statement to the 2011 Group licence renewal decisions, the obligations intended to ensure support for independently produced non-PNI are also "an important factor in supporting the independent production sector."
136. The Commission stated in the Create Policy that "the condition of licence requiring that at least 75% of the spending requirement for PNI be allocated to independently produced programs is one of the means by which the objective in the Act relating to the independent sector is fulfilled and should therefore be maintained."⁶³ In other words, it's not the only means. More recently, in denying Bell's 2015 request to delete the non-PNI independent production obligations for some its services, the Commission identified such obligations as "one means of ensuring" the applicable services would contribute to the presence of independently produced programming in the system⁶⁴ (i.e., in addition to the PNI obligations).
137. The Commission's decision in the Create Policy to eliminate access rights for discretionary services does not lessen the need for, or appropriateness of, the independently produced non-PNI obligations. While the 2015 Bell decision referenced in the preceding paragraph

⁶¹ 2011-441, at par. 101. Emphasis added.

⁶² See Corus's 30 May 2016 Response to the Commission's 19 May 2016 Deficiency Letter, Appendix A, Programming Issues, 2.

⁶³ 2015-86, at par. 291. Emphasis added.

⁶⁴ See, for example Broadcasting Decision CRTC 2015-549, *Book Television – Licence amendments*, <http://www.crtc.gc.ca/eng/archive/2015/2015-549.htm>, at par. 17.

notes that those non-PNI obligations were originally imposed in 2000 on services “which benefited from mandatory distribution”, the Commission actually made no link between the obligations and the services’ distribution status at that time. Instead, in 2000, the Commission stated that it imposed the obligations to ensure the services “make appropriate contributions to the independent production sector.”⁶⁵ The Commission also did not make a link to the services’ distribution status when it included the non-PNI independent production obligations as an important part of the GLF in 2010, or when it confirmed adherence to the obligations in the 2011 Group licence renewal decisions.

138. In fact, as part of the GLF, the Commission attached new expenditure obligations to “Category B” services within a Group, notwithstanding that they were licensed under an open entry approach, were not assured distribution by BDUs and did not enjoy genre protection vis-à-vis other Canadian services. The Commission noted, however, that those services enjoyed genre protection from foreign services, and considered that, as they became more popular and profitable, their contribution to the Canadian broadcasting system should be adjusted to reflect their new position in the system.⁶⁶ Similarly, existing, longstanding and popular services should not escape from obligations to make appropriate contributions to the independent production sector solely on the basis they will no longer have access privileges.
139. The CMPA reiterates that the Commission has been clear that it considers support for independently produced non-PNI to be as much a part of the GLF as any other aspect of that framework. Moreover, the Commission established the GLF during a time of mandatory carriage privileges: thus removal of those privileges now as part of the Create Policy is no more a basis for abandoning support for independently produced non-PNI than it would be a basis for removing the GLF’s CPE or PNI obligations, which the Commission has confirmed will be maintained.
140. Accordingly, the Commission should reject the Group’s attempts to amend the GLF by eliminating their obligations to support independently produced non-PNI. Eliminating support for independently produced non-PNI would be contrary to the GLF and to the Commission’s goals in the Create Policy.

⁶⁵ 2000-171.

⁶⁶ 2010-167, at par. 123.

b. Ensuring Support for Independently Produced Non-PNI through a Standard and Flexible Exhibition Obligation

141. All of this being said, the CMPA acknowledges the Groups' arguments that attaching specific obligations to certain services and not to others would generally be inconsistent with the Commission's most recent moves to standardize licence obligations.
142. In the CMPA's view, however, the appropriate way to address any such inconsistency in these circumstances is not to eliminate support for independently produced non-PNI altogether by deleting the longstanding associated obligations. Instead, given that the Commission has repeatedly asserted the importance of such support for achieving Canada's broadcasting policy objectives, it should standardize its approach by attaching the same obligation to support independently produced non-PNI to all services within the Groups.
143. **To that end, each Group should be subject to an obligation that at least 25% of its original, first-run Canadian programs other than news sports and current affairs be independently produced programs.**⁶⁷ As with the Group CPE and PNI obligations, this 25% independent production obligation should be implemented by way of an appropriately-worded COL imposed on each service with a Group.
144. Moreover, consistent with the manner in which they may meet their CPE and PNI obligations, we accept that the Groups could be given the flexibility to allocate all or part of each service's standard 25% independent production exhibition obligation to one or more other services within their Group. This flexibility would ensure support within the system for independently produced non-PNI while reflecting that, based on their nature of service, certain services within a Group would typically rely more on in-house production than on independently produced programs. And, as with CPE and PNI flexibility, it would allow the Groups to focus on the quality of content provided.⁶⁸
145. Standardizing support for independently produced non-PNI programming in this way would actually be consistent with the manner in which the Commission first imposed the 25% independent production COL in 2000 (albeit absent the added flexibility we accept

⁶⁷ Using the new "independent production" we propose in Section III, above.

⁶⁸ The Notice, at par. 11.

could benefit the Groups). Although the majority of the applicants in 2000 had advocated that “a case-by-case approach would be most appropriate for setting conditions limiting the amount of production that could be acquired from affiliated producers, noting that some types of programming lend themselves more easily to in-house production (e.g. news, current affairs, sports)”, the Commission decided to adopt “a consistent but flexible approach” – the 25% COL – to ensure that all the services would make appropriate contributions to the independent production sector.⁶⁹

146. The CMPA notes that this standardized and flexible approach would address Corus’s concerns that its individual independent production obligations limited its ability to fully utilize the GLF spending flexibility:

For example, an original first-run program that launched on Treehouse TV but was then later moved to Nickelodeon during the first-run window would no longer count towards the Treehouse TV specific expectation. Similarly, if a program first aired on YTV but was subsequently moved to TELETOON, there would be a -/+ effect on these services total numbers. This limitation artificially impacted the calculation of first-run programming on that service and unfairly impacted our performance with this expectation.⁷⁰

147. Making the standard 25% independent production exhibition obligation as flexible to implement as the Groups’ CPE and PNI obligations could mitigate Corus’s concerns in this regard.
148. Establishing a standard Group independent production exhibition obligation would also respond to Corus’s recommendation in its application that the Commission should measure compliance with its current obligations respecting its children’s services across all such services:

Looking at the past licence term across the Corus Group of services which provide children’s programming, Corus is on track to meet an overall 75% of all original, first-run Canadian programming having been acquired from independent production companies. We believe this is a more accurate view of the continued

⁶⁹ 2000-171.

⁷⁰ Corus Application, Appendix D. Discretionary Services, at p. 7.

support that Corus has offered the independent production sector than a specific individual view of only one service within the Corus kids' portfolio.⁷¹

149. The CMPA also notes that Bell confirmed that eliminating its individual independent production obligations “is not necessary to the viability of the services in question.” Bell stated that it was only seeking elimination of its individual independent production obligations “to ensure that the applicable Conditions of Licence are harmonized with those for other discretionary services, and that any pre-existing anomalies are removed.”⁷² The CMPA’s proposal described above would harmonize COLs and remove the preexisting anomalies Bell references while maintaining an important component of the GLF.

D. An Alternative, Expenditure-based Approach to Ensuring a Significant Contribution from the Independent Production Sector

150. The CMPA again acknowledges that, as initiated with the GLF and further advanced with the Create Policy, the Commission is shifting its regulatory approach from one based on exhibition quotas to one based on expenditures.

151. We therefore propose an alternative, expenditure-based approach to ensuring that both PNI and non-PNI programming in the system includes a significant contribution from the independent sector.

152. Specifically, we recommend that, as an alternative to imposing our proposed standard 25% Group independent production exhibition obligation, the Commission require the Groups to maintain the level of spending they have historically⁷³ allocated to all independent production (i.e., both PNI and non-PNI).

153. This approach would be consistent with the Commission’s intent to maintain the Groups’ Canadian programming expenditure levels going forward⁷⁴ (which we support) and its statement in the Notice that it intends to consider the necessity and relevance of

⁷¹ Ibid.

⁷² Bell’s 13 May 2016 Response to the CRTC’s 2 May 2016 Deficiency Letter, Q20.

⁷³ Based on average spending for the three previous broadcast years.

⁷⁴ The Notice, at pars 28 and 30.

implementing regulatory measures in order to ensure that the television system offers diversified programming, including a significant contribution from the Canadian independent production sector.⁷⁵

154. One way to maintain the Groups' spending on all independently produced programming would be to establish an obligation that is based on their historical expenditures measured as a percentage of their Group revenues. This approach would be comparable to the manner in which the Commission has established the Group CPE obligation (i.e., 30% of Group revenues) and the Group PNI spending obligation (i.e., 5% –18% of Group revenues).
155. Another way to accomplish the same objective would be to establish an obligation that is based on the Groups' historical expenditures measured as a percentage of their Group CPE spending. This approach would be comparable to the manner in which the Commission has established the Groups' independently produced PNI spending obligation (i.e., 75% of PNI). This approach could be also be refined by measuring historical expenditures on independently produced programming as a percentage of CPE excluding CPE allocated to news and sports. Since the Groups do not typically commission independent producers to produce their news and sports programming, this "net CPE" approach would measure how much programming that historically could be independently produced has, in fact, actually been independently produced. This "net CPE" approach would also acknowledge that certain program categories do not lend themselves to independent production and so should not be contemplated in establishing an independent production expenditure obligation.
156. Unfortunately, in exploring these various possible approaches, we found it difficult to find consistent or comparable figures to measure what the Groups have historically spent on independently produced programming. In **Appendix E**, we identify the numbers we were able to ascertain, while also describing the challenges that arise from the limitations of the publicly available data and the Groups' differing service portfolios or programming focus. As a result of these challenges, it is difficult to propose a standard independent programming spending obligation which would fit within the otherwise generally-standardized regulatory and licensing approach which the Commission has now adopted and on which the Groups rely as a basis for many of the proposals in their applications.

⁷⁵ The Notice, at pars 36–37.

157. It is nevertheless still worthwhile and appropriate to pursue a standard regulatory measure that would ensure that the television system continues to offer diversified programming by maintaining the Canadian independent production sector's current contributions to both PNI and non-PNI. To that end, we are fully prepared to work with the Commission and the Groups to develop a common and standardized independent production spending obligation which, like the Commission's goal respecting CPE and PNI, would maintain current spending levels going forward.
158. To be clear, in proposing an "all program" independently produced programming expenditure obligation, we are not proposing that the Groups' PNI obligations be eliminated. We submit that it would still be necessary and appropriate to impose on the Groups both an overall Group PNI spending obligation and the requirement to allocate 75% of their PNI spending to independently produced programs in order to maintain their current levels of support for the creation of "programs that clearly serve the national interest."
159. The CMPA offers this independent production spending obligation proposal for consideration as a way to ensure a significant contribution from the independent production sector which may better reflect the Commission's shift to a regulatory approach based on expenditures. To reiterate, however, it is intended to ensure the ongoing support of independently produced PNI and non-PNI, which is a goal of the GLF as the Commission confirmed in its 2011 licence renewal decisions. If the Commission is not prepared to adopt this expenditure-based proposal to achieve its two-pronged goal, then it should supplement the current PNI requirements with the standard Group independent production exhibition obligation we propose above, to ensure continued support for independently produced non-PNI.
160. Regardless of the approach the Commission ultimately adopts, however, it should incorporate the new "independently produced program" test we advance in Section III, above.

VI. Supporting Original Programming

161. As stated earlier, the CMPA agrees with the Commission's position as expressed in the Create Policy that original first-run Canadian productions add more value to the system than excessive repetition and recycling of programming.⁷⁶
162. We were therefore pleased that the Commission called on the Groups, as part of their renewal applications, to provide data regarding their historical expenditures on original first-run and newly commissioned programming⁷⁷ and that, at the forthcoming hearing, it intends to examine their plans in regard to original, first-run programming and to consider the necessity and relevance of implementing related regulatory measures.⁷⁸
163. **The CMPA submits that there should be appropriate regulatory measures, such as specific spending requirements, respecting original, first-run programming.** We are hindered in proposing any specific measures, however, because data regarding the Groups' historical activities in this regard is inconsistent due to their differing definitions as to what constitutes original, first-run programming. We also understand that the Groups may amortize the costs associated with their first-run programming differently, and may even apply different amortization schedules to different programs within their respective Groups.
164. **We would be pleased to work with the Commission and the Groups to determine both a common definition of original, first run programming and a common approach to assigning expenditures to such programming so that we can propose appropriate regulatory measures which would advance the goal of promoting the creation and presentation of original programming in the system.**

⁷⁶ 2015-86, at par. 191.

⁷⁷ See, for example, the 11 March 2016 *Broadcasting Commission Letter addressed to Distribution List*, <http://www.crtc.gc.ca/eng/archive/2016/lb160311.htm>.

⁷⁸ The Notice, at pars 36-37.

VII. Maintaining The Special Role and Obligations of Children's Services

A. Introduction

165. It is well understood that the many Canadians currently working in the children's programming production sector succeed at making shows that are critically acclaimed, garner Canadian audiences and are sold all over the world.
166. One reason for this domestic and international success is that the Commission has always placed a high priority on ensuring that the Canadian broadcasting system offers Canadian children and youth access to high-quality, original Canadian programming targeted to them.
167. In this section, **we recommend that the Commission consider different models to ensure that the system will continue to serve Canadian children and youth, notwithstanding the general standardization of regulatory and licensing obligations.**

B. Continuing to Treat Children's Services as a Unique Case

168. In its letters to the Groups initiating the renewal application process, the Commission stated that it "considers children's and youth programming to be an integral part of the broadcasting system."⁷⁹ The Commission asked each Group, as part of its renewal application, to list the measures the Group had taken over the course of the latest licence term to support children's and youth programming.
169. In the Create Policy, the Commission identified children's services as a specific example of services which will require a more individual approach to exhibition requirements (since, peak viewing periods are different for children's and youth programming). The Commission stated that such particular circumstances would be considered at licence renewal on a case-by-case basis as required.⁸⁰

⁷⁹ See for example, the 8 February 2016 Broadcasting Commission Letter addressed to Sylvie Courtemanche (Corus Entertainment Inc.), <http://www.crtc.gc.ca/eng/archive/2016/lb160208g.htm>, at Q.7.

⁸⁰ 2015-86, at par. 196.

170. Treehouse and YTV are currently subject to unique restrictions with respect to advertising which are based solely on the fact that they are children’s services. For instance, Treehouse may not distribute more than two minutes of advertising material during each clock hour between 6 a.m. and 9 p.m. and any paid advertising material distributed during the same time period may be no longer than 15 seconds.⁸¹ YTV may not distribute any commercial messages during programs that target an audience up to 5 years of age.⁸² The Commission determined that it was appropriate to maintain these unique restrictions on Treehouse and YTV when it last renewed the licences for Corus, notwithstanding that Corus had sought their deletion⁸³ (which Corus is once again seeking in the current proceeding).
171. It is commonly accepted that the audience for children’s programming is constantly changing as children move on to different programming as they get older. It is also commonly accepted that, since the needs of the audience for children’s programming differ from those of adult audiences, a reasonable quantity of repetition is acceptable. The downside of this reality, however, is that children’s broadcasters may thus be more inclined to rely on repeats to the detriment of offering a diversity of new and fresh programming for their young audiences. It is for this reason that the Commission has always imposed an “original hours” COL on YTV⁸⁴ and why it did so in the CBC’s 2013 licence renewal decision.⁸⁵
172. These examples demonstrate that, because of the particular audience, the manner in which the Commission has historically regulated children’s services and children’s programming has differed from its approach to other services whose target audience is adults.

⁸¹ Broadcasting Decision CRTC 2011–446, *Corus Entertainment Inc. – Group-based licence renewals*, <http://www.crtc.gc.ca/eng/archive/2011/2011-446.htm>, (2011–446), Appendix 5, COL #13.

⁸² 2011–446, Appendix 7, COL #14(c).

⁸³ 2011–446, at pars 38–40.

⁸⁴ “*In each broadcast year, the programming distributed by the licensee shall include a minimum of 90 hours of original, first-run Canadian programs that have been acquired from an independent production company by YTV, either through co-production or licensing arrangements.*” See 2011–446, Appendix 7, COL #13.

⁸⁵ Broadcasting Decision CRTC 2013–263, *Canadian Broadcasting Corporation – Licence renewals*, <http://www.crtc.gc.ca/eng/archive/2013/2013-263.htm>.

173. Of the three Groups, only Corus offers children’s and youth programming; both Bell and Rogers confirmed in their applications that they do not offer children’s programming and have no intention of doing so.
174. As noted earlier, the CMPA acknowledges the Group’s arguments in favour of standardization, and we see the logic of a standardized approach in most instances. Nevertheless, we are concerned that applying such standardization to children’s services would result in the elimination of specific Canadian programming requirements and advertising limitations which the Commission has imposed for solid policy reasons associated with broadcasting to children and youth. Removal of these obligations or limitations would not and could not be justified on social or policy grounds. There is no policy rationale for suddenly abandoning longstanding objectives and associated rules for children’s services; to do so for administrative reasons only would do a disservice to Canadian children and youth.
175. For all these reasons, the Commission should continue to treat children’s services as a “unique case”. To that end, the Commission should construct a model for the regulation of children’s services within the Corus Group which, while incorporating standardization and the flexibility of the GLF where possible, would still retain current, specifically-targeted Canadian programming requirements and advertising limitations. This would ensure our broadcasting system continues to best serve this special audience.
176. There are different ways to construct this model, which we suggest would be worth exploring in this proceeding.

i) Maintaining the Current Model

177. One model would simply require Corus’s children’s services to maintain their current unique obligations and limitations as long as the services’ target audience continues to be children. These obligations include YTV’s “original hours” COL, and the limitations include those related to advertising on YTV and Treehouse, which should also be extended to Corus’s other children’s services, as appropriate.

ii) An Alternative Model: the Corus Children’s “Mini-Group”

178. Maintaining the current model for children’s services would address some issues unique to those services (e.g., a specific need to ensure a place for original Canadian programs and to protect young children from being overly exposed to advertising influences).

However, it would not actually prevent Corus from allocating its Canadian program spending away from children's and youth programming to support other genres of programming. This is a concern which the CMPA and others have previously raised with regard to the spending flexibility available in the GLF.

179. We appreciate that Corus appears not to have used its spending flexibility to reallocate large amounts of its Canadian children's and youth program spending to its other services over the last licence term. However, with its recent purchase of the large and wide-ranging portfolio of Shaw services which offer drama and other high cost programs, Corus will now have a much greater opportunity and enhanced motivation to move its children's and youth spending elsewhere within its Group. This heightens our concerns about the future of Corus's spending on children's and youth programming.
180. There is a big difference between moving program spending from one genre of programming adults watch to another genre adults watch versus moving spending from programs children watch to programs they do not, and in some instances, should not, watch.
181. So as to properly ensure the broadcasting system continues to serve Canadian children and youth, the Commission should take steps to preserve Corus's spending on Canadian children's and youth programming. We believe this objective can be accomplished while still permitting Corus to benefit to an appropriate degree from the GLF's spending flexibility.
182. Under this model, Corus would be able to operate its stable of children's services as a "mini-Group". Consistent with the Commission's stated intention to maintain Group CPE and PNI spending levels, this model would require Corus to maintain its historical Canadian spending level across its mini-Group of children's services, but would give Corus the flexibility to move that spending around and within (but not outside) that mini-Group. Other obligations or limitations unique to Corus's children's services would be standardized across the services in the Corus children's mini-Group.

C. Serving a Special Audience Justifies Special Obligations

183. In proposing these models, we acknowledge that we are seeking to solely impose on Corus certain obligations and limitations which the other Groups would not have to bear. The fact is, however, that Corus is the only one among the three Groups that operates children's services; moreover, Corus is clearly the dominant broadcaster of children's and youth programming in Canada.

184. The Commission should continue to recognize that children and youth represent a special type of audience that needs to be served by the broadcasting system differently than adults. This means that children's and youth programming services need to be regulated differently than other services.
185. The CMPA commends Corus for its service to Canada's children and youth. Our objective is not to put Corus at a competitive disadvantage. Our objective is simply to ensure that those who have made a good business of serving Canada's children and youth maintain their level of service for that audience notwithstanding the business opportunities or market pressures which might motivate them to do otherwise.
186. In proposing our children's services models, we also appreciate that, with the elimination of genre exclusivity, current children's services could change their genre at any time. If they were to do so, they should not continue to be subject to obligations and limitations specially linked to the children's genre. For this reason, any children's service choosing to change genres should be permitted to apply to the Commission for removal of its special children's service obligations/limitations and that the Commission should process such applications expeditiously provided it is clear the service is actually abandoning children and youth as its target audience.⁸⁶
187. We submit that the regulatory burden this would impose on children's services would be minimal and justifiable in light of the special considerations that apply to children's services.

VIII. Group Make Up: Exclusion of all News Services

188. In establishing the GLF, the Commission ruled that news services would not qualify for inclusion in the Groups. This was so the Groups could not use the attendant CPE flexibility to direct significant amounts of spending into profitable news programming to obtain a competitive edge. The Commission also determined that news services do not require regulatory support as they have amongst the highest levels of CPE and exhibition of Canadian programming.

⁸⁶ Similarly, any service choosing to change genres so as to become a children's service should be required to take on any special obligations/limitations associated with children's services.

189. The CMPA raised these issues when, on two occasions, we opposed applications to grant Group status to the then Shaw- (now Corus-) owned regional news service, BC News 1. The Commission also raised similar issues in denying the first such application, noting it was “not clear what effect inclusion of this service might have on Shaw’s group CPE and other spending requirements.”⁸⁷
190. In denying for the second time the repeat request to grant Group status to BC News 1, the Commission stated it would be more appropriate to consider the matter as part of this current licence renewal proceeding. In doing so, the Commission noted that this current proceeding would also provide it “with the opportunity to determine whether the inclusion of CP24 and BNN as part of Bell’s group licences is appropriate, and to adopt a consistent approach regarding the inclusion of news services as part of group licences.”⁸⁸
191. In its current application, Corus defends the proposed inclusion of BC News 1 in its Group as a means to help the service address its ongoing financial losses⁸⁹; in other words, Corus clearly wants to take advantage of the Group spending flexibility to funnel its required spending from other services and other programming to effectively subsidize its money-losing news service.⁹⁰ This is the very kind of behaviour we fear and which appears to have concerned the Commission.
192. The reasons for which the Commission initially ruled that certain news services could not be included in the Groups continue to remain valid and, moreover, apply equally to other discretionary news services, including BC News 1, CP24 and BNN. Accordingly, the

⁸⁷ Broadcasting Decision CRTC 2012-394, *Global News Plus BC – Specialty Category B service*, <http://www.crtc.gc.ca/eng/archive/2012/2012-394.htm>, at par. 24.

⁸⁸ Broadcasting Decision CRTC 2016-84, *BC News 1 – Licence amendment relating to closed captioning, and inclusion as part of the licensee’s group licences*, <http://www.crtc.gc.ca/eng/archive/2016/2016-84.htm>, at par. 47.

⁸⁹ See Corus’s 30 May 2016 Response to the Commission’s 19 May 2016 Deficiency Letter, Appendix A, Programming issues, 1a).

⁹⁰ Contrast this with Rogers’ use of its Group spending flex to allocate spending from Sportsnet 360 in order to commission five new original Canadian drama series, the majority of which premiered on City TV. See Rogers Application, B. Group Issues, 1 a).

Commission should rule as part of this current process that all of those services are ineligible for Group status.

193. This being said, we note that, if the Commission were to adopt our proposal to maintain spending levels on all independent production through a new percentage-of-revenue or percentage-of-CPE formula, as described above, we would have less concern about inclusion of news services in the Groups. This is because, with such a new spending obligation, the Groups could not divert spending to their own in-house news production which that they would otherwise allocate to independently produced programming. If our new proposed spending obligation were in place, however, the Groups would be free to allocate their in-house production spending as they deemed most strategic, which could be to their news services, if they wished. In other words, with the adoption of our new proposed spending obligation, programming diversity through independent productions would be preserved and the Groups could use their spending flexibility (with respect to in-house production spending) to support their news services as they considered necessary.

IX. Bell's Requests

A. Exhibition Requirements for TMN/TMN Encore

194. Notwithstanding reliance on standardization for other requests, including to seek a 13% lower PNI rate for TMN and TMN Encore⁹¹, Bell seeks an exception to the standard Canadian programming exhibition requirement for both those services. Specifically, Bell requests that the exhibition rate for those services be reduced from the new standard 35% to 30%. In exchange, Bell offers to accept a Nature of Service (NoS) COL requiring the services to operate as “national, general interest English-language discretionary services focused on premium dramatic and comedy series, documentaries, movies, sports and events.”⁹²
195. In support of its request, Bell argues that, historically, both TMN and TMN Encore have had an exhibition obligation lower than the new standard 35% to “reflect the specific

⁹¹ From the current 18% to 5%.

⁹² Bell Supplementary Brief, at par. 81.

genre in which these services operate (premium pay television) and the difficulties associated with producing premium dramatic series and Canadian feature film.”⁹³

196. **The Commission should only grant TMN and TMN Encore relief from the new standard exhibition obligation if they are required to continue to support Canadian feature films.**

197. With Corus’s shuttering of its pay television services, Bell’s TMN remains the only Canadian television service within the Groups whose longstanding programming mandate has included supporting new Canadian feature films. Indeed, as noted above, Bell attributes its current lower Canadian exhibition requirement for TMN in part to “the difficulties associated with producing...Canadian feature films.” However, while Bell would accept an obligation that TMN’s focus would continue to include “movies” in exchange for a lower, non-standardized exhibition requirement, its proposed NoS COL would also permit TMN to “focus” on a number of other programming genres. Moreover, by generally referencing “movies” (which could include lower budget movies-of-the-week) rather than “Canadian feature films”, Bell’s proposed NoS COL makes no link to the actual type of programming which Bell claims justifies TMN’s current lower exhibition requirement.

198. In exchange for the requested lower exhibition requirement, TMN (and TMN Encore) should be subject not only to Bell’s proposed NoS COL, but to a further COL which, similar to their current Expectation, would require each of them to “license all Canadian feature films that are appropriate for their service.”⁹⁴ Moreover, Bell should be required to report annually on how it has met this Canadian feature film COL.

199. Absent this Canadian feature film COL, the CMPA sees no reason why TMN and TMN Encore should be granted relief from the new standard exhibition requirement for discretionary services. The CMPA notes that, as a result of the new standard 35% exhibition requirement, the vast majority of Bell’s discretionary services will benefit from a substantial reduction to their Canadian programming exhibition obligations; in our view, without a continued obligation to support Canadian feature films, TMN and TMN Encore could well bear a slight increase to their exhibition requirements.

⁹³ Bell Supplementary Brief, at par. 80.

⁹⁴ See Broadcasting Decision CRTC 2012-241, *Astral Media inc. – Group-based licence renewals*, <http://www.crtc.gc.ca/eng/archive/2012/2012-241.htm>, at Appendix 11 and Appendix 12.

B. Eliminating ACCESS's Educational Mandate

200. The CMPA does not oppose Bell's request to convert ACCESS fully to a CTV Two station and to include it within the Bell Group. However, should the Commission approve Bell's request, its decision should not be regarded in any way as a precedent in the event Rogers were, at any time, to seek a similar change for City TV Saskatchewan (for example when that service's licence next comes up for renewal). The City TV Saskatchewan circumstances are substantially different from those of ACCESS and we would oppose any change to its current status as Saskatchewan's educational broadcaster.

X. Conclusion

201. Independent producers operate in the most fiercely competitive part of the Canadian broadcasting system. They embrace this competition and regard it as key to their individual and collective success. Competition drives innovation in business models, technology, and storytelling. It also imposes the market discipline of meeting the needs of their buyers – whether the Groups, other Canadian broadcasters, or foreign broadcasters – and the audiences they serve.

202. The CMPA's above proposals are designed to maximize regulatory flexibility for the Groups in a manner that is aligned with the Commission's Create Policy and the GLF and supportive of the Act's objectives. Most importantly, our proposals aim to preserve competition within the independent production sector, so that Canadian and global audiences benefit from the very best and most diverse Canadian programming. This is most effectively achieved, in our view, by ensuring that producers remain independent and continue to produce content in a variety of genres and for a wide spectrum of audiences.

203. The CMPA appreciates the opportunity to address the various issues we have identified in this submission. We look forward to reviewing the Groups' responses to our proposals and to continuing the discussion at the November 28 hearing.

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