Appendix 1 to the CMPA's Intervention to Broadcasting Notice of Consultation CRTC 2010-926:

Joint Report

ANALYSIS OF THE CRTC'S TANGIBLE BENEFITS POLICY

IN THE CONTEXT OF

**BCE INC.'S APPLICATION TO ACQUIRE
EFFECTIVE CONTROL OF CTVGLOBEMEDIA INC.**

(Broadcasting Notice of Consultation CRTC 2010-926)

A JOINT REPORT FROM:

ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS (ACTRA),

CANADIAN MEDIA PRODUCTION ASSOCIATION (CMPA),

DIRECTORS GUILD OF CANADA (DGC), and

WRITERS GUILD OF CANADA (WGC)

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I. <u>INTRODUCTION AND EXECUTIVE SUMMARY</u>

BCE Inc. ("BCE") has applied on behalf of CTVglobemedia Inc. ("CTVgm") and its broadcasting subsidiaries for approval of the Canadian Radio-television and Telecommunications Commission ("CRTC") for a change of effective control of CTVgm's broadcasting entities (the "Application"). The Application contemplates that BCE will acquire effective control of CTVgm through the acquisition of the 85% of the voting shares of that company that it does not yet own.

This Joint Report from the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), Canadian Media Production Association (CMPA), Directors Guild Of Canada (DGC), and Writers Guild Of Canada (WGC) considers BCE's proposed approach to tangible benefits set out in the Application.

BCE argues that no tangible benefits should be payable in connection with its acquisition of effective control of CTVgm and that, even if they are payable, the level of tangible benefits payable on CTVgm's conventional and specialty television assets should be less than 10% of the value of the transaction accepted by the Commission – based on certain claimed discounts and exclusions.

BCE's valuation of the transaction also discounts and excludes certain properties and items to arrive at a valuation for the transaction for the purposes of tangible benefits that is materially less – in the magnitude of <u>hundreds of millions of dollars</u> – than can be justified based on BCE's public statements regarding the value of the transaction and the level of consideration, including assumption of debt, identified by BCE as being payable in connection with the transaction.

This Joint Report demonstrates that:

1. Tangible benefits are payable in connection with this transaction.

    - This transaction represents both a change in control of CTVgm <u>and</u> the acquisition of control of CTVgm by BCE. The CRTC has determined that its tangible benefits policy applies to all transactions involving the acquisition of control of broadcasting undertakings by entities. This transaction involves such an acquisition of control.

    - BCE's continued minority ownership interest in CTVgm after 2006 did not constitute an inevitable "pathway back to control", as suggested by BCE. In any event, the CRTC did not give its prior approval to BCE following any such pathway. A review of the Unanimous Shareholders Agreement and other commercial arrangements relied on by BCE shows that:

        - The shareholders expressly contemplated the need for further CRTC approval for any transactions involving shares of CTVgm entered into by the shareholders.

- The rights of BCE as a minority shareholder of CTVgm in the Unanimous Shareholders Agreement and other agreements did not make BCE's acquisition of control, let alone 100% ownership of CTVgm, inevitable.

- BCE's divestiture of control in 2006, and its acquisition now of shares resulting in 100% ownership of CTVgm are both far more than corporate reorganizations, as suggested by BCE. Both transactions involve substantial financial payments to (and from) the affected shareholders and reflect strategic and even "imperative" corporate decisions. The current transaction reflects, in effect, the liquidation of Woodbridge's interest in CTVgm.

- The fact that BCE and Woodbridge have owned a majority of the shares of CTVgm on an aggregate basis since 2000 is not relevant. BCE and Woodbridge have never owned or voted those shares jointly or exercised joint control of CTVgm. They have, rather, acted as individual shareholders independent of each other.

- The fact that no one other than BCE has acquired control of CTVgm since 2006 is not relevant. At any point up to BCE's announcement of its agreement with the other shareholders of CTVgm, any number of possible outcomes regarding CTVgm's ownership were possible with willing purchasers and sellers.

- BCE's claim that it already paid benefits with respect to its acquisition of control of CTV Inc. (which subsequently became CTVgm) in 2000 and that the payment of benefits now would be "double taxation" is contrary to CRTC policy and is not consistent with the history of BCE's ownership interest in CTVgm. BCE is required as part of its Application to demonstrate that its proposed acquisition of control of CTVgm is in the public interest. Proposing tangible benefits in accordance with CRTC policy is part of the requirement to demonstrate that the transaction is in the public interest.

2. BCE's exclusions and deductions in respect to particular conventional and specialty television broadcasting assets are, similarly, contrary to CRTC policy. In particular:

- There is no basis to exclude CTVgm's television assets that were owned by CTVgm when BCE first acquired control of that company, or subsequently acquired before BCE divested of control (which BCE identifies as the "CTV Legacy" assets). BCE divested of control for its own corporate reasons and received substantial consideration as a part of that transaction.

- There is no basis to exclude CTVgm's Category 2 specialty television services from the valuation. It is now well established based on CRTC policy and on previous CRTC decisions that tangible benefits should be payable upon the acquisition of control of Category 2 specialty television services.

- Last, there is no basis to discount the tangible benefits payable on CTVgm's conventional television assets. BCE is acquiring CTVgm at a time when the company is operating as a going concern and owns numerous large and profitable television broadcasting services. The CRTC's decision to discount the tangible benefits payable in connection with Shaw's acquisition of Canwest's television assets was expressly related to Canwest's creditor protection proceedings and bears no similarity to BCE's acquisition of control of CTVgm.

3. BCE has proposed that the total value for the transaction as it relates to broadcasting assets for the purpose of the CRTC's benefits policy should be $2.468 billion (not including the deductions proposed by BCE for CTV Legacy assets or Category 2 assets noted above). Based on the materials filed by BCE, there is reason to conclude that the valuation should be significantly higher.

   - The total consideration to be paid by BCE for the 85% interests of CTVgm that it does not currently own, plus BCE's apparent assumption of the entire $1.7 billion proportionate debt of CTVgm, is equal to $3.0 billion and <u>not</u> approximately $2.72 billion, as suggested by BCE.

   - The synergies and economies to be realized through BCE's acquisition of control of CTVgm should be taken into account.

   - The CRTC should examine the effect of inter-company and other corporate transactions related to CTVgm's excluded business activities and the novel exclusion of tax loss carry forwards, particularly at the operating company and broadcasting licensee level.

   - For consistency, the CRTC should include within the value of broadcasting assets the value of digital media broadcasting activities, such as on-line operations, that are directly related and an integral part of licensed broadcasting activities and that are not accounted for separately by the broadcaster. This would make the CRTC's approach to valuation consistent with its requirement that tangible benefits for new media initiatives be integral to other regulated television broadcasting activities.

4. It is important to the integrity of the CRTC's process that the CRTC apply its well-developed and long-established tangible benefits policy to this transaction. Applying the policy to this transaction would be consistent with past practice and would not be in any way unfair to BCE. Applying the benefits policy is essential to ensure that the transaction is in the public interest.

II. TANGIBLE BENEFITS ARE PAYABLE

BCE argues in the Application that no benefits are payable under the CRTC's benefits policy with respect to BCE's acquisition of control of CTVgm. BCE provides three principal reasons for its argument:

(a) if the CRTC were to require the payment of benefits in this transaction, then this would amount to the implementation of a new policy in the context of an individual transaction and be unfair to BCE;

(b) BCE "never exited" CTVgm – and retained an ownership interest amounting to a majority of the shares when considered together with the shares held by Woodbridge Company Limited ("Woodbridge") – and has also retained a "pathway to regain control" through its contractual arrangements with other shareholders of CTVgm; BCE argues that the current transaction should be viewed as being analogous to a corporate reorganization or movement of shares within a single corporate family; and

(c) requiring BCE to pay benefits on acquiring sole control over the same company would be "punitive" and amount to "double taxation".

These arguments are elaborated upon by BCE in deficiency responses to the CRTC.[1] As demonstrated below, however, none of these arguments warrants an exception to the CRTC's policy regarding the payment of benefits upon the acquisition of control of broadcasting undertakings.

(a) This Transaction Results in the Acquisition of Control and Triggers Tangible Benefits

The CRTC has set out its policy on tangible benefits in transactions involving a transfer of ownership or control of broadcasting undertakings in various documents over the years. One of the more concise statements of the policy is set out in *Public Notice CRTC 1989-109*:

> The Commission has stated on numerous occasions in public notices and decisions involving applications for authority to transfer the ownership or effective control of broadcasting undertakings that because the Commission does not solicit such applications and because there is, thus, only one proposal presented to the Commission, the onus is on the applicant to demonstrate to the Commission that the application filed is the best possible proposal under the circumstances, taking into account the Commission's general concerns with respect to transactions of this nature.

In that policy statement, the CRTC noted that, among other factors to be considered, "an applicant is expected to propose a specific package of significant and unequivocal benefits that will yield measurable improvements to the communities served by the broadcasting undertaking and to the Canadian broadcasting system."

[1] Letter to CRTC dated October 25, 2010.

The CRTC has added greater clarity to its policy since this time. In 1999, the CRTC revised the policy to establish a specific expectation for the quantum of proposed benefits for the acquisition of control of television broadcasting undertakings. The quantum was fixed at 10% of the value of the transaction. The CRTC stated the following:

> The Commission hereby amends its benefits policy in respect of all transfers of ownership or control involving television broadcasting undertakings, including conventional, pay, pay-per-view and specialty television undertakings. It will generally expect applicants to make commitments to clear and unequivocal tangible benefits representing a financial contribution of 10% of the value of the transaction, as accepted by the Commission. This policy will apply to any application filed on this date or after.
>
> All other policies with respect to transfer of ownership or control will remain in place. Specifically, the existing policy respecting the fulfilment of benefit commitments, as set out in PN 1993-68, will continue to be applied.[2]

More recently, in *Broadcasting Decision CRTC 2006-309*, the CRTC found that its policy applied to applications involving the *acquisition* of control of broadcasting undertakings. This finding was, of course, made in the context of BCE's divestiture of control of CTVgm in which BCE argued that no benefits were payable because no other entity was acquiring control of CTVgm. After repeating the 1999 statement of the benefits policy, the CRTC continued:

> The Commission considers that the Benefits Policy . . . **applies in cases involving the acquisition of control of a licensee by a person** (as defined in the applicable regulations), where such person has, for example, the ability to cause the licensee or its board of directors to undertake a course of action.[3] (emphasis added)

In summary, the CRTC's benefits policy applies to "<u>all</u> transfers of ownership or control involving television broadcasting undertakings, including conventional, pay, pay-per-view and specialty television undertakings" (emphasis added). In 2006, the CRTC clarified that a transfer of ownership or control would be understood to have occurred "in cases involving the acquisition of control of a licensee by a person".

The benefits policy applies, therefore, to BCE's acquisition of control of CTVgm. BCE is undoubtedly a "person" within the meaning of the *Television Broadcasting Regulations, 1987* and the *Specialty Service Regulations, 1990*, which are the "applicable regulations" in this case. BCE is also, undoubtedly, acquiring the 85% of the voting shares of CTVgm that it does not currently own and which will enable BCE to elect, on its own, all of the directors of that company and to exercise control over CTVgm. There is no doubt that BCE will control CTVgm if the Application is approved.

There is no exception in the benefits policy for a transfer of control that involves an existing minority shareholder that previously controlled an undertaking entering into a transaction to re-

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[2] *Public Notice CRTC 1999-97*, paragraphs 23 and 24.
[3] At paragraph 43.

acquire control. On its face, such a transaction involves the "transfer of ownership or control" of the undertaking and an acquisition of control by a person, and therefore the CRTC's benefits policy applies.

It is noteworthy, as well, that there is at least one instance in which the CRTC required benefits to be paid on assets that a licensee previously controlled, divested of control, and then reacquired control at a later date. That precedent involved the "Strategic Merger" of Baton Broadcasting Incorporated ("Baton") and Electrohome Limited ("Electrohome"), which was approved by the CRTC in *Decision CRTC 97-527*. In that instance, Baton and Electrohome had each, approximately one year earlier, contributed certain television broadcasting stations to companies that were jointly owned by them pursuant to a "Strategic Alliance". The CRTC approved this first transaction in *Decision CRTC 96-251*. Similarly to BCE's divestiture of control of CTVgm in 2006, the CRTC found that no benefits were payable in connection with that transaction because no person actually acquired control. Each of Baton and Electrohome held "negative control".

Approximately one year later, Baton applied to the CRTC to acquire sole control of the entire joint venture as a part of the "Strategic Merger". Baton assumed the sole controlling position (although Electrohome acquired a minority interest in Baton). Tangible benefits were paid in that transaction. In reviewing *Decision CRTC 97-527*, it is apparent that the quantum of the benefits (close to $10 million) was based on the stated value of that transaction ($106 million), without distinguishing between the value of the assets that had previously been owned by Baton, as opposed to the assets that had previously been owned by Electrohome.

The Baton/Electrohome "Strategic Merger" decision involves a company acquiring control of assets that it had previously controlled and paying benefits on that acquisition. No exception was made for the assets that it had previously controlled on its own, as opposed to those that it did not. Moreover, in that instance, the transaction involved a company going from a position of negative control to a position of sole control. The current BCE/CTVgm transaction involves BCE going from a position of "no control" as a minority shareholder, to a position of sole control – arguably, a more significant step. Last, the Baton/Electrohome decision, just like the current transaction, involved a situation in which the company now acquiring control had previously divested of control in a manner in which no benefits were payable.

Given the statements made by the CRTC regarding the application of its benefits policy to all transfers of ownership of control, the clarification later provided by the CRTC that the policy applies in situations in which a person acquires control, and the fact that the policy has applied in a case that is similar to the present case, the CRTC tangible benefits policy applies to BCE's acquisition of control of CTVgm.

Requiring benefits to be paid in this instance would not amount to a "new" policy or be unfair to BCE. Quite the contrary, if benefits were not payable now, then this would introduce a new exception to the CRTC's existing, long-established policy. The CRTC's requirement that applicants propose clear and unequivocal benefits, including a tangible benefits package, has been in place, literally, for decades.

BCE also claims in its submissions that the CRTC reviews ownership applications and the tangible benefits proposed by applicants on a "case by case" basis. This argument is put forward, presumably, as a way to support the suggestions that benefits should not be required in this instance, or to make the tangible benefits that should be payable as low as possible.

The CRTC must, of course, consider each application that it receives on its own merits. But this is not the same as considering each application on a case by case basis. As a matter of policy, the CRTC has not followed a case by case approach to considering tangible benefits packages in connection with the transfer of television assets since the release of *Public Notice CRTC 1999-97*, quoted above, in which the CRTC expressly amended its tangible benefits policy to specify the expected quantum of benefits in television transactions at 10% of the value of the transaction.

In fact, the CRTC has summarized its current policy and expectations for tangible benefits proposals in the current *Notice of Consultation*:

> [T]he tangible benefits expenditures for all television assets should be: (1) incremental; (2) directed to projects and initiatives that would not normally be undertaken or realized in the absence of the transaction; and (3) generally flow to third parties, such as independent producers.

It is not fully accurate, therefore, to argue that tangible benefits are reviewed by the CRTC solely on a case by case basis. Rather, individual applications are considered within the CRTC's express policy framework and guidelines, as well as numerous precedents and have been for many years.

BCE is one of Canada's longest established and largest communications companies and it is acquiring one of Canada's most important broadcasting businesses. BCE is well aware of the CRTC's established policy on tangible benefits and is fully capable of meeting the requirements of that policy. There is no question of any procedural unfairness in applying this policy to BCE's acquisition of control of CTVgm.

(b) BCE's Minority Interest in CTVgm Does Not Change the Fact that BCE would be Acquiring Control in this Transaction and this Transaction Is Not Just a "Corporate Reorganization"

BCE argues that the ownership history of CTVgm – and in particular BCE's maintenance of a minority ownership interest in the company and the maintenance of what BCE calls a "pathway back to control" – means that no *further* benefits are payable with respect to the Application. This argument is summed up in the heading on page 13 of BCE's Supplementary Brief, which reads as follows: "BCE Never Left and is Simply Re-Acquiring Sole Control Consistent with Exercising the Contractual Rights that the Commission Approved in 2006".

There are a number of assumptions in this statement that either do not hold up or are not relevant to the question of control.

(i) BCE Relinquished Control Fully in 2006

First, the suggestions that BCE "never left" CTVgm as a minority shareholder and is now simply reacquiring control through an "existing pathway" are not relevant to the central question of whether this transaction amounts to an acquisition of control by BCE in a situation where it did not previously have control.

BCE does not now control CTVgm. BCE did control the company (which was then known as Bell Globemedia Inc.) for a period of time between 2000 and 2006. However, in 2005 BCE decided to relinquish control by entering into an agreement to sell 48.5% of its voting interest in the company to the existing minority shareholder, Woodbridge, and to two new shareholders, Ontario Teachers' Pension Plan Board ("Teachers") and Torstar Corporation ("Torstar"). This transaction (which was entered into in 2005 but approved by the CRTC and implemented in 2006 and is referred to here as the "2006 Transaction") required prior CRTC approval under applicable regulations because it involved a change in effective control of CTVgm.[4] Upon the completion of the 2006 Transaction, BCE was left with a 20% voting interest in CTVgm. This 20% interest was further reduced to 15% in a subsequent transaction in which Teachers acquired a further 5% interest from BCE.

The question of who would control CTVgm as a result of the 2006 Transaction was reviewed extensively by the CRTC. BCE argued that the 2006 Transaction would result in a situation in which BCE would relinquish control, but no new shareholder would acquire control. Rather, BCE argued that control would be exercised by CTVgm's board of directors. The CRTC accepted this argument, which was significant because this meant that no benefits were payable on the transaction.

BCE does not currently control CTVgm and has not exercised such control, according to arguments made to and accepted by the CRTC, since 2006. The present transaction involves, therefore, the acquisition by BCE of control of CTVgm through BCE's increase in the voting interests of CTVgm from 15% to 100%.

BCE claims that it "never left" CTVgm but, in terms of exercising control over CTVgm, which is the relevant question, it did leave that controlling position and was found by the CRTC to have left.

(ii) The CRTC Did Not Approve a "Pathway Back to Control" and the Existing Agreements Are Not a Pathway

Second, the CRTC did not "approve" any mechanism under which BCE is now proposing to acquire control. The CRTC's review of the 2006 Transaction involved an analysis of the ownership structure of CTVgm which included the Unanimous Shareholders Agreement filed with the transaction. However, the CRTC did not "approve" the Unanimous Shareholders Agreement itself, any subsequent step contemplated under that Unanimous Shareholders

[4] The CRTC approved the transaction in *Broadcasting Decision CRTC 2006-309*.

Agreement or under any other agreement that would have permitted BCE or any other shareholder of CTVgm to acquire control.

Indeed, Sections 3.8 and 10.4 of the Unanimous Shareholders Agreement contemplated expressly that any transfer of shares or shareholder debt of CTVgm to a shareholder would be subject to the receipt of "Transaction Approval" (which includes CRTC approval) if it were required. Accordingly, there is no reason to conclude, based on the provisions of the Unanimous Shareholders Agreement or any other agreement reviewed by the CRTC in the context of that transaction, that the CRTC gave its approval at that time to any particular share transaction among the shareholders of CTVgm (including any acquisition by BCE of control) or that the CRTC's usual policies, including its benefits policies, would not apply to such a transaction.

Similarly, the existence of certain rights in favour of BCE under the Unanimous Shareholders Agreement and the Commercial Arrangements Framework Agreement (also filed as a part of the 2006 Transaction application) do not amount, as BCE suggests, to a bundle of rights that, by their nature, presuppose BCE's acquisition of "sole ownership again" of CTVgm.

The rights contained in those agreements are more consistent with a situation in which BCE was concerned, first, that control of CTVgm not be acquired by any other person for a period of time without BCE's prior approval and, second, that BCE retain the ability to exploit CTVgm content notwithstanding that BCE *no longer controlled the company*. For example, BCE made it clear in its correspondence with the CRTC[5] explaining certain of its rights under the Unanimous Shareholders Agreement that these particular rights were intended to protect BCE from situations in which BCE could be adversely affected by certain actions such as asset dispositions by CTVgm, particularly where those dispositions would materially reduce the content that would otherwise be available to BCE for distribution over a BCE-owned platform. This kind of protection would not, presumably, have been required if BCE continued to control CTVgm or could necessarily reacquire control at a time of its choosing.

In other words, the rights retained by BCE can be broadly characterized as defensive in nature. These rights do not amount to an unobstructed pathway back to control that BCE would inevitably follow in the future.

(iii) This Transaction is Much More than a Mere Corporate Re-organization

Third, BCE emphasizes that a majority of the shares of CTVgm have consistently been held by BCE and Woodbridge together. BCE suggests, therefore, that the current application is in the nature of a corporate reorganization rather than a change of effective control. This argument downplays the significance of BCE's decision to sell its majority interest in CTVgm in 2005 in the first place, and characterizes BCE's ongoing relationship with Woodbridge in a manner that is not consistent with the 2006 Transaction.

BCE's decision to sell its majority interest in CTVgm in 2005 was far more than an internal reorganization of the company. In pure financial terms, the value of the transaction to BCE was significant. In one press report issued at the time, BCE is noted as saying that the transaction

[5] See BCE Letter dated December 29, 2005 and, in particular, the responses to CRTC questions 9 to 13.

was expected to generate some $1.3 billion for BCE, including approximately $607 million as a return on capital.[6] From a strategic viewpoint, the Supplementary Brief filed in connection with the 2006 Transaction indicated that

> [T]he business and competitive environments for telecommunications and broadcast distribution undertakings have been marked by significant, disruptive change, the speed and breadth of which have been truly transformational. . . . As a result, and to be better able to respond to these changes, BCE has decided to reduce its stake in BGM after five years as its controlling shareholder. Business imperatives are motivating BCE to focus on its core competencies, although it will maintain a continuing relationship with BGM through its 20% ownership interest.[7]

The 2006 Transaction represented, therefore, a material financial benefit to BCE and, by its own admission, a business imperative. It did not represent merely an internal reorganization of CTVgm between BCE and Woodbridge and was not presented in that light.

The 2006 Transaction application did note that BCE and Woodbridge would together retain ownership of a majority of CTVgm's shares, but this majority ownership did not amount, by definition, to the companies controlling CTVgm together. If it had constituted "joint" control then, presumably, the control analysis for CTVgm would have been significantly different.

Specifically, had Woodbridge and BCE acquired "joint" control of CTVgm, an acquisition of control by a BCE/Woodbridge joint venture could have been deemed to occur and, in those circumstances, tangible benefits could well have been payable. It is therefore inconsistent with the 2006 Transaction to argue now, in effect, that BCE and Woodbridge have together owned a majority of the shares of, and impliedly jointly controlled, CTVgm on a continuous basis since 2000. The CRTC did not consider BCE's and Woodbridge's ownership interests on a joint basis in connection with the 2006 Transaction.

The current Application will result in BCE owning 100% of the voting interests of CTVgm, including all of Woodbridge's interest. Once again, existing shareholders of CTVgm will be paid substantially for the sale of their ownership interests in the company. The total value of this transaction is estimated to be equal to $3.2 billion and Woodbridge itself is entitled to receive consideration worth at least $750 million pursuant to the Transaction Agreement for its investment in BCE, in addition to a return to it of the Globe and Mail print assets, the value of which is not disclosed in the Application.

Moreover, even though Woodbridge is acquiring common shares of BCE in exchange for its interests in CTVgm, the proportion of these shares in relation to BCE's total capitalization is minimal. (BCE's capitalization is estimated to be in excess of $27 billion of which the consideration payable to Woodbridge represents approximately 3%.) Since BCE's shares are publicly traded, the issuance of BCE shares to Woodbridge results in the effective liquidation of Woodbridge's investment in CTVgm, subject only to the agreed to hold period. Therefore, the financial return to be realized by Woodbridge and the other minority shareholders in this

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[6] CTV.ca news story: www.ctv.ca/CTVNews/TopStories/20051202/bell_globemedia_051202

[7] Supplementary Brief to BGM Reorganization Application, page 3.

transaction is significant and cannot be characterized as the equivalent of a corporate reorganization, as suggested by BCE.

(iv) The Fact that No One Else Has Acquired Control of CTVgm Since 2006 is Not Relevant

Last, BCE attempts to buttress its arguments by noting, in its deficiency correspondence with the CRTC, that no other party acquired control of CTVgm since the 2006 Transaction and suggesting that no other party *could* have acquired control pursuant to the Unanimous Shareholders Agreement and other documents filed with the CRTC in connection with the 2006 Transaction.

The relevance of these observations to the current transaction is not clear. This is the first instance since the 2006 Transaction was approved in which a change in effective control of CTVgm might occur, subject to CRTC approval. This is not remarkable.

It is worth noting that, in 2008, BCE itself underwent a potential change in control (the privatization transaction approved by the CRTC in *Decision CRTC 2008*-69) that, had it been implemented, would have had an effect on CTVgm's ownership structure and resulted in Teacher's owning more than 30% of CTVgm. In other words, CTVgm's ownership has "been at play" in the period since the 2006 Transaction even if no change of control has occurred. It is mere speculation to imagine all of the scenarios that could have taken place had BCE's own ownership changed, as had been planned, just as it is speculative for BCE to rely on scenarios that didn't take place involving CTVgm since 2006.

Moreover, the suggestion that no one other than BCE *could* have obtained control fails to take into account that ownership transactions may well involve agreements with all, or a majority, of shareholders outside of the framework of existing agreements. The current transaction, for example, has been structured outside of the framework of the existing Unanimous Shareholders Agreement. Also, under the Unanimous Shareholders Agreement, there are provisions for all of the minority shareholders to liquidate their interests after a period of time if certain events had not occurred (see Article 8 of the Unanimous Shareholders Agreement). At any point up until and after the moment of BCE's announcement of its acquisition of 100% ownership of CTVgm, any number of possible outcomes regarding CTVgm's ownership could have been possible with willing purchasers and sellers.

The history of BCE's ownership interest in CTVgm does not, therefore, as BCE argues, weigh against the payment of tangible benefits by BCE in connection with the Application. It is clear that BCE sold its controlling interest in CTVgm in 2006 for material consideration and for its own business reasons. BCE's subsequent reacquisition of control was neither inevitable nor approved, at that time, by the CRTC and should be subject to the CRTC's policies regarding the acquisition of control, including its benefits policy.

(c) Requiring Benefits would not be "Punitive" or "Double Taxation"

In addition to relying on its continued minority ownership interest in CTVgm, BCE argues that since the CRTC reviewed BCE's ownership of CTVgm in 2000 and required the payment of benefits in connection with that application, it would be "double taxation" and "punitive" if the CRTC were to apply its benefits policy to the current transaction. In making this argument, BCE refers to what it calls a "key 1978 document" in its Supplementary Brief. Among other things, the CRTC noted in that document that the transfer of effective ownership and control of a licensee "has the effect of altering significantly the original Commission licensing decision" and, therefore, should be subject to the same kind of scrutiny that would have taken place in a competitive process for the licence.

Based on this statement, BCE argues that it already "submitted to this process" in connection with its application to acquire CTVgm in 2000 and was approved as a *purchaser* of CTVgm. Accordingly, BCE reasons, since BCE "has already been approved as an acceptable owner of CTVgm and has never exited from having an equity position" there is no basis for the CRTC to re-consider its analysis of the suitability of BCE as an owner. BCE states that the current Application does not alter significantly the original Commission licensing decision.

BCE has conflated the CRTC's rationale for its benefits policy into an analysis of the suitability of individual purchasers over individual assets. This is a selective view of the rationale for the CRTC's policy. In addition, BCE has minimized the significance of the 2006 Transaction in which BCE divested of its controlling interest of CTV and of the many changes that have taken place in the broadcasting system since 2000.

The CRTC's benefits policy is not related only to the suitability of the purchaser for particular ownership assets. Rather, the CRTC's concerns reach much further and, expressed in the most general terms, have sought to ensure that the transaction is, as a whole, in the public interest. As noted above, the CRTC's first codification of the benefits policy is set out in *Public Notice CRTC 1989-109*. It is worthwhile setting out in full the rationale for the policy and the factors considered by the CRTC in reviewing ownership applications:

> The Commission has stated on numerous occasions in public notices and decisions involving applications for authority to transfer the ownership or effective control of broadcasting undertakings that because the Commission does not solicit such applications and because there is, thus, only one proposal presented to the Commission, the onus is on the applicant to demonstrate to the Commission that the application filed is the best possible proposal under the circumstances, taking into account the Commission's general concerns with respect to transactions of this nature.
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> Among other things, the applicant must satisfy the Commission that approval of the transaction would neither result in a reduction in the existing level of service nor create a financial burden which might impair the ability or willingness of the licensee to provide a quality service and to meet its obligations under the Broadcasting Act. In the case of transactions involving cable undertakings, the Commission wishes to be assured that the cost of financing the purchase will not result in proposed subscriber fee increases.

> The applicant must also demonstrate that the proposed transaction is in the public interest. As well as considering such matters as concentration of ownership, cross-media ownership and local participation in ownership, the Commission, in its deliberations as to how the public interest would best be served, must be satisfied that the strength of the applicant's human and financial resources are sufficient to give it the capability to improve the undertaking in question and to make a contribution to the enhancement of the Canadian broadcasting system.
>
> In addition to demonstrating that it has sufficient resources, an applicant is expected to propose a specific package of significant and unequivocal benefits that will yield measurable improvements to the communities served by the broadcasting undertaking and to the Canadian broadcasting system. The Commission must be satisfied that the proposed benefits package is commensurate with the size and nature of the transaction and takes into account the responsibilities to be assumed, the characteristics and viability of the broadcasting undertakings in question and the scale of programming, management, financial and technical resources available to the prospective purchaser.

The CRTC's evaluation of ownership transactions includes not only the question of the identity of the purchaser, but also the particulars of the application, the context in which the application is made and the specific and unequivocal benefits proposed by the applicant. Obviously, the CRTC is now reviewing these factors in the context of BCE's current Application – in 2010-2011.

The CRTC did review an application by BCE in 2000, this is true, but the context of that application was different. Among other factors, BCE had not at that point previously divested of its controlling interest in the same company, apparently for financial and strategic reasons. At that point, BCE had not effected synergies between the broadcasting operations of CTV and Canada's largest national newspaper and also brought in a second newspaper owner, Torstar, as a minority shareholder. BCE had not yet become the owner of one of Canada's largest BDUs, which it now is, due to the growth of its satellite distribution business. Also, the ownership and regulatory environment within the broadcasting system in which the transaction occurred was significantly different in 2000 – not characterized, as it is now, by unprecedented levels of cross ownership interests between all of Canada's major conventional television networks and Canada's largest broadcasting distribution undertakings, a significantly more robust specialty and pay television industry, a Local Program Improvement Fund and, of course, a much expanded new media environment.

All of these circumstances make it appropriate that the CRTC review BCE's Application to acquire effective control of CTVgm in the current environment to ensure that, at this point in time, it is the best possible in the circumstances and in the public interest. This analysis should include a review of the applicant's proposed tangible benefits, and an evaluation of whether the benefits are consistent with the CRTC's policy.

There is no policy rationale for the CRTC to conclude that just because a particular company once exercised effective control over a particular group of broadcasting assets a decade in the past, the acquisition again of effective control by that same company – having relinquished it for financial and strategic reasons in the interim – remains in the public interest. As noted above, many factors may have changed – as indeed they have done in the current case – in the intervening period. It is incumbent on the CRTC, in these circumstances, to review all aspects of the specific application against its current policies and to consider the merits of the application in light of the public interest – including the applicant's proposed tangible benefits.

It is difficult to appreciate how expecting BCE to propose a tangible benefits package could be considered double counting or punitive, as claimed by BCE. BCE was not required by CRTC policy to divest of its controlling interest of CTVgm after five years of ownership; and BCE was not required by the CRTC to subsequently reacquire control by buying out all of the minority shareholders four years later. These are business decisions that were made by BCE for its own financial and strategic reasons. It is appropriate for the CRTC to evaluate those reasons, and the merits of BCE's application, in light of all of the CRTC's existing policies, including its policy with respect to tangible benefits. Simply put, the CRTC's benefits policy is one of the central aspects of the CRTC's review of ownership transactions to ensure that the transaction is in the public interest.

III. BCE APPLIES INAPPROPRIATE DISCOUNTS AND EXCLUSIONS TO REDUCE BENEFITS

BCE presents a number of arguments, in the alternative to the position that no benefits are payable at all, to reduce the benefits that would otherwise be payable in this transaction. BCE argues that:

(a) No benefits should be paid on broadcasting assets that were owned or acquired by CTVgm at the time when BCE controlled the company;

(b) No benefits should be payable in respect to services in competitive genres (i.e. Category 2 services); and

(c) The benefits payable on CTVgm's conventional television assets should be reduced to 5% of the value of those assets.

These arguments have no merit and will be addressed in turn.

(a) Benefits Should Be Paid on All CTVgm Assets, Regardless of BCE's Previous Control or When Those Assets Were Acquired

BCE's argument to exclude the assets owned or acquired by CTVgm when BCE controlled the company is simply a variation on its larger argument that no benefits should be payable at all on this transaction. BCE argues that it has already paid to acquire control of these assets – either when it first acquired CTVgm or through benefits paid on transactions between 2000 and 2006 when CTVgm was controlled by BCE.

This line of argument does not consider the facts, as discussed in detail above, that BCE itself chose to sell its controlling stake in CTVgm as a part of the 2006 Transaction for its own financial and strategic reasons and that it has decided now to acquire control of CTVgm for its own financial and strategic reasons. Similarly, BCE does not take into account that the current Application to acquire control again is taking place in a different industry context than the acquisition that took place in 2000 – some ten years ago.

Given these factors, it is entirely appropriate for the CRTC to review the Application and to apply its standard policies to ensure that the Application is the best possible in the circumstances, now, at the time it is made. Tangible benefits proposed by applicants are an integral part of the CRTC's overall analysis.

It is not necessarily relevant to the public interest whether a particular applicant once controlled a particular broadcasting asset in the past. The question to be addressed is whether the acquisition of control of that asset now, pursuant to the current Application, is in the public interest.

There is, in fact, already one instance considered by the CRTC, the Baton and Electrohome Strategic Merger discussed above, in which a company paid benefits to acquire effective control of assets that it had, only a relatively short time earlier, controlled exclusively.

It would be consistent with that past decision to adopt a similar approach in the present circumstances. Indeed, the present circumstances are even more compelling because in the Baton/Electrohome transaction, before it re-acquired effective control, Baton had retained a full 50% ownership interest and negative control in the television undertakings it had previously owned outright, Baton does not appear to have received a large cash payment and return on capital when it originally divested of its controlling interest (at least it is not apparent that it did from the CRTC decisions), and the intervening period was only approximately one year. Even still, benefits appear to have been assessed and paid by Baton on the entire $106 million value of the transaction.

It should also be noted that the Baton/Electrohome transaction included the television assets of CFCN-TV (Calgary) that had been acquired by Baton from Rogers Communications Inc. at the time of the Strategic Merger with Electrohome. Benefits were payable on the original acquisition of CFCN-TV (as approved in *Decision CRTC 96-251*). No deduction for the benefits paid on its initial acquisition was apparently made from the value of the transaction when Baton reacquired control of CFCN-TV as a result of the Strategic Merger (approved in *Decision CRTC 97-527*). This scenario – in which control of broadcasting assets are acquired by an entity within one ownership structure (and on which benefits were paid) – and subsequently re-acquired a short term later through another ownership structure (on which benefits were paid), resembles BCE's re-acquisition of control of those assets of CTVgm that were acquired between 2000 and 2006. There is no reason why benefits should not also be paid for the acquisition of control now by BCE of these broadcasting assets.

(b) Tangible Benefits are Payable for Category 2 Services

BCE has reiterated an argument that the CRTC has considered and rejected previously (both expressly and by implication) to the effect that tangible benefits should not be payable on services in competitive genres, notably Category 2 services.

This argument is based on what is described as the CRTC's rationale for exempting broadcasting distribution undertakings from the tangible benefits policy in 1996. BCE quotes from the CRTC's policy document in its deficiency response dated October 25, 2010. However, BCE neglects to include in that quotation the key part that distinguishes the CRTC's treatment of tangible benefits as between competitive BDUs, and the application of that policy to television programming services. The relevant statement reads as follows:

> In reaching its determination to eliminate application of the benefits test in the case of transfers of ownership or control involving broadcasting distribution undertakings, the Commission has taken into account the fact that, in the past, accepted benefits have largely related to technical upgrades to a cable licensee's infrastructure, or to financial contributions to various programming initiatives, including a number of production funds. **With respect to technical upgrades, the Commission considers that the need to prepare for a competitive environment will provide an effective incentive to all distributors to make the necessary investments to ensure that their infrastructures are technically advanced, while maintaining affordable rates for their subscribers. With regard to concerns about a possible reduction in funding for program production resulting from the elimination of the benefits test, any such impact would be offset by the increased level of support for program production resulting from the new requirement, outlined in section IV of this notice, that all distributors contribute a minimum of 3% of their gross annual revenues derived from broadcasting activities to an independently-administered production fund.**[8] (emphasis added)

In other words, the CRTC took into account the fact that increased competition in the BDU sector would likely result in increased spending by BDUs on the kinds of technical improvements to their networks that had previously been supported by tangible benefits. Further, the "shortfall" in benefits to production funding would, the CRTC noted, be offset by a new requirement that BDUs make specific contributions to independent production funds. It was not merely the introduction of competition in the BDU sector that resulted in the removal of the requirement for tangible benefits – the question of competition was coupled with the nature of the benefits previously paid, and the imposition of new regulatory obligations.

The CRTC recently reviewed the issue of the continued applicability of the tangible benefits policy to the television broadcasting sector generally in the context of its diversity of voices hearing. In its Diversity of Voices policy, the CRTC noted that, "Large broadcasters questioned the relevance and fairness of the benefits policy. They argued that they also operate in a competitive environment like BDUs, which are exempt from the obligation to provide a benefits

[8] *Public Notice CRTC 1996-69.*

package."[9] Notwithstanding these comments by large broadcasters, the CRTC reiterated its policy to require that applicants propose benefits in connection with the acquisition of radio and television undertakings, which include Category 2 services operating in competitive genres.

Since that time (and on numerous occasions before), the CRTC has considered applications for the transfer of control of Category 2 services and has required that benefits be paid on those assets in appropriate circumstances. For example, the CRTC required benefits to be paid in connection with Corus' acquisition of the Category 2 services Sex TV: The Channel and The Drive-In Classics Channel in *Broadcasting Decision CRTC 2009-706*. The CRTC also included Canwest Global's Category 2 channels (or did not exclude those channels) in its analysis of the value of that transaction for the purpose of Shaw's acquisition of Canwest Global's specialty assets as approved in *Broadcasting Decision CRTC 2010-782*.

Given, therefore, the full rationale for the CRTC's policy to exclude BDUs from the payment of tangible benefits, the CRTC's reiteration of its tangible benefits policy as it applies to television programming undertakings (including Category 2 services without exception) in its Diversity of Voices policy, and the CRTC's subsequent and consistent application of the policy to transfers of control of Category 2 services, BCE's proposal to exclude Category 2 services from its valuation for the purposes of this transaction would clearly be contrary to the CRTC's established policies.

(c) Benefits Payable on CTVgm's Conventional Television Stations should be Assessed at 10%, Not 5%

BCE argues that the benefits payable on its acquisition of CTVgm's conventional television stations should be reduced to 5%, rather than the usual expected 10%. The basis for this argument is the CRTC's treatment of Shaw's acquisition of the Canwest Global conventional television stations, and of various other small or unprofitable radio or television stations in the application of its benefits policy.

On closer examination, however, it is apparent that the precedents referred to by BCE do not apply to the CTVgm stations. First, Shaw's acquisition of the Canwest Global conventional television stations took place under extraordinary circumstances. The stations were owned by that part of the Canwest Global corporate group that filed for creditor protection under the *Companies' Creditors Arrangements Act* ("CCAA"). The fact that the assets were operated under CCAA protection was the determining factor in the CRTC's decision to lower the benefits threshold to 5% for those assets. The CRTC stated the following in *Broadcasting Decision CRTC 2010-782*:

> 31. The Commission has examined the particular circumstances of the proposed transactions and finds that the circumstances that have generally justified an exception to the policy in past decisions, such as the nominal or negative value of the transaction and the precarious financial situation of the broadcasting undertakings, are not applicable in this instance.

[9] *Broadcasting Public Notice 2008-4* at paragraph 127.

> 32. However, the Commission acknowledges the resulting uncertainties caused by operating under CCAA protection and the difficulty in maintaining operational performance for those assets. It also acknowledges the difficulty in maintaining employees' morale, generated by the potential loss of key personnel.
>
> 33. The Commission is therefore of the view that flexibility should be applied in this particular situation.

In other words, the CRTC's decision was not based on the rationale that the Canwest Global conventional stations were merely unprofitable or facing financial challenges. Rather, the decision was based on the critical situation faced by the Canwest Global stations and, more than anything, on the fact that they had been placed in creditor protection and the difficulties arising from that.

This is not the same thing as being financially challenged in an operational sense, a factor that the CRTC explicitly dismissed in its decision. It is apparent that the Canwest Global decision does not establish a general amendment to the CRTC's benefits policy for conventional television stations based on financial challenges.

Lack of profitability for television assets, on its own, is not relevant to the CRTC's determination of whether tangible benefits should be payable. This issue was addressed specifically by the CRTC in its 1993 statement of its benefits policy[10] in which it created an exception for unprofitable radio stations, but maintained the requirement of tangible benefits for all television programming undertakings. The issue was revisited by the CRTC in 2007 when the CRTC set out its new framework for over-the-air television services. In that policy document, rather than create a blanket exception for unprofitable television stations (and the financial challenges facing the sector at the time were front and centre in that proceeding), the CRTC created an exception for small independent television broadcasters only, with revenues of less than $10 million (and that are eligible to receive support from the Small Market Programming Fund).[11] This limited exception has remained in place since then, including following the CRTC's review of its benefits policy once again in the Diversity of Voices proceeding.

It is true that the CRTC has made some exceptions for conventional television stations in certain extraordinary situations. These exceptions[12] involved: a company in creditor protection (TQS Inc.); a company operating, in effect, as small television broadcasting undertakings in a way that was consistent with the CRTC's exception for such undertakings (CIIT-TV and CHNU-TV); television assets acquired pursuant to transactions with negative value (CHCH-TV and CJNT-TV); or television assets acquired for a nominal purchase price at a time when the station would otherwise be closed (CHEK-TV). The exceptions with respect to specialty services noted by BCE are all somewhat similar to the foregoing exceptions.[13] These situations largely involved

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[10] *Public Notice CRTC 1993-68.*

[11] *Broadcasting Public Notice CRTC 2007-53 at paragraph 112.*

[12] The exceptions are listed in footnote 13 in BCE's October 25, 2010 deficiency response.

[13] The exceptions are listed in footnote 14 in BCE's October 25, 2010 deficiency response and can be summarized as follows: *Broadcasting Decision CRTC 2009-247* (Christian Channel Inc.): the purchaser was a not-for-profit

start-up Category 2 services that had failed to achieve profitability and were transferred for relatively small value (in comparison to their losses). Even when making these exceptions, the CRTC has on other occasions reiterated the requirement to pay benefits on television undertakings even when they are unprofitable.[14]

None of these situations apply in the case of BCE's acquisition of control of CTVgm. That company is currently operating as a going concern and includes a number of large and profitable broadcasting properties. None of the television undertakings being acquired by BCE are in creditor protection and BCE has not presented its Application as the only solution to prevent existing stations from going dark – which has often been the case when the CRTC granted an exception to its benefits policy.[15]

There is, therefore, no basis in the CRTC's existing benefits policy, or in the exceptions made by the CRTC to the application of that policy, to reduce the level of benefits payable in connection with BCE's acquisition of CTVgm's conventional television assets.

In any event, the CRTC should, when assessing BCE's claims regarding the financial position of CTVgm's conventional broadcasting assets (including the A Channels), take into account the increasing evidence that the advertising market is rebounding and the overall economic situation is improving in the broadcasting industry. It appears that revenues increased significantly for conventional broadcasters in the 2010 broadcast year.[16]

Therefore, none of the factors suggested by BCE to discount or reduce the level of benefits that should be payable in this transaction can be justified based on CRTC policy or previous CRTC decisions.

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charitable corporation; *Broadcasting Decision CRTC 2002-188* (Inner Peace): given the nominal value for this unlaunched Cat. 2 service, the Commission considered that any tangible benefits would be negligible in this case; *Broadcasting Decision CRTC 2003-574* (Inner Peace): the value of the transaction was zero and so no benefits were required; *Broadcasting Public Notices CRTC 2004-78* and *2006-22* (Game TV): transactions approved pursuant to the Commission's administrative route; *Broadcasting Decision CRTC 2001-586* (Movieola): letter decision for newly licensed and (presumably) unlaunched Cat. 2 service; *Broadcasting Public Notices 2003-50* (Toronto Maple Leafs Network Ltd. and Toronto Raptors Network Ltd.): transactions approved pursuant to the Commission's administrative route; *Broadcasting Decision CRTC 2001-56* (NTI Inc.): letter decision for newly licensed and unlaunched Cat. 2 service; *Broadcasting Decision CRTC 2003-157* (MediaNet Canada Ltd.): newly licensed and unlaunched Cat. 2 services.

[14] See for example, *Broadcasting Decision CRTC 2008-144* (TVA purchase of Canal Indigo).

[15] The CRTC has recently made such an exception in connection with Bluepoint Investments Inc. acquisition of Saskatchewan Communications Network in *Broadcasting Decision CRTC 2010-965*.

[16] For example, total revenue for CTVgm's conventional television operations for the recently completed broadcast year has increased by $144.7 million over the previous year's revenue (an 18.3% increase), and revenue for Rogers' conventional stations has increased as well by $44.6 million (a 22% increase). Revenue for Canwest did not increase in total terms – which is not surprising considering that the company's assets were under creditor protection and television broadcasting assets were sold off – but the remaining assets were operated on a profitable basis, showing a PBIT of close to 7% (which is remarkable considering the disruption of the creditor protection process). See the aggregate annual returns for filed with the CRTC at http://www.crtc.gc.ca/eng/stats6.htm .

IV. VALUE OF THE TRANSACTION

The value of the broadcasting aspects of this transaction, as accepted by the CRTC, is a central question in determining the amount of the benefits that BCE should be expected to propose as a part of the Application. Determination of the value of the transaction in an acquisition of this size is a matter that requires expert analysis. The CRTC itself conducts its own detailed review of the structure of the transaction and the numerous assumptions that underlie any related valuation report that the CRTC requests for the transaction (which it has done in this case).

The purpose of the analysis in this Joint Report is not to second guess the CRTC in its review of the reasonableness and appropriateness of the many different assumptions and calculations that underlie both BCE's (and its expert valuators') presentation of its analysis of the value of the transaction. Rather, the intention is to identify broader issues that could be taken into account in determining the appropriate value of the transaction and that are raised by the Application.

We have noted the following issues that should be reviewed by the CRTC:

(a) The minimum value of the transaction should be $3.0 billion.

(b) BCE has not taken into account the value of control or the synergies to be realized from its acquisition of CTVgm in its analysis of the value of the transaction;

(c) BCE's treatment of certain assets that it excludes from valuation of broadcast assets could result in an overstatement of the value of the *non*-broadcast assets and, consequently, an understatement of the value of the broadcast assets; also, the treatment of tax losses as excluded assets seems inappropriate since these losses directly affect the overall value of broadcasting assets; and

(d) the CRTC should clarify its policy regarding the treatment of new media initiatives: it is not consistent to exclude new media initiatives from broadcasting activities for the purposes of valuation, but then include those activities for the purpose of proposed tangible benefits.

We discuss these points in more detail below.

(a) The Minimum Value of the Transaction Should be $3.0 billion and <u>not</u> $2.72 billion

According to BCE, the total value for 100% of CTVgm is $3.2 billion.[17] However, since BCE already owns 15% of CTVgm, BCE then assumes that the value of the 85% it is now acquiring is equal to 85% of $3.2 billion, or $2.72 billion. The $2.72 billion figure then becomes the starting point, in effect, from which BCE deducts amounts for non-broadcasting assets and certain other items to arrive at $2.468 billion as the value of the 85% ownership interest in the broadcasting

[17] BCE Press release dated September 10, 2010. http://www.bce.ca/en/news/releases/corp/2010/09/10/75551.html

assets it is now acquiring.[18] This $2.468 billion figure is critical since, as the claimed value of the broadcasting assets in the transaction, it is the amount the Commission is to use when applying its tangible benefits policy.

It appears, however, that the minimum value of the transaction should be $3.0 billion, not $2.72 billion. This is because BCE states in the Application that the aggregate consideration *actually payable* in connection with the transaction to acquire the 85% of the CTVgm shares that it does not already own, together with assumed debt, is equal to $3.0 billion.[19] Specifically, BCE has indicated that it is assuming 100% of the $1.7 billion proportionate debt and that the value of the equity it is acquiring is approximately $1.3 billion.[20]

The CRTC's basic policy to determine the value of transactions is set out in *Broadcasting Public Notice CRTC 2008-57*. Among other things, the CRTC states that in determining the value of a particular transaction it follows an approach that is consistent with the International Business Brokers Association's definition of transaction value. That definition takes into account "The total of all considerations passed at any time between the buyer and seller for an ownership interest in a business enterprise. . .". The CRTC typically includes in its analysis certain liabilities of the target company, such as long-term liabilities and operating leases, among other things.

In the case of share purchase transactions, the CRTC adopts the following approach:

> In share transactions, the Commission determines the value of the transaction based on the economic interest of the number of shares acquired and adds elements such as assumed debt to this value in the same proportion as the economic interest. On the other hand, elements that are solely to the benefit of the purchaser, such as purchase or control premiums and break-up fees, are allocated in their entirety to the value of the transaction.

Thus, according to CRTC practices, the total amount of the consideration that a purchaser will <u>actually pay</u> is central to the question of the value of the transaction.

If the actual consideration payable by BCE for the shares to be acquired, plus debt, is, indeed, $3.0 billion as BCE states, then the figure of $3.0 billion should serve as the value of 85% of

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[18] See BCE letter to CRTC dated November 25, 2010, page 4, table headed, "Transaction Price and Transaction Value Reconciliation". The table shows that the figure of $2.729 billion as the value of the transaction was obtained by multiplying the equity transaction price <u>and the proportionate debt assumed (i.e. $3.211 billion)</u> by 85%. BCE also calculates the $2.468 billion transaction value for 85% of the broadcast assets based on valuations provided by the valuator. The above referenced table is used, as we understand it, to outline the relationship between the valuation methodology and the CRTC transaction value based on the total of all consideration paid.

[19] BCE letter to CRTC dated October 1, 2010, response to Question #4, which reads: "As indicated in the Application, BCE is purchasing the remaining 85% interest in CTV it does not already own and assuming debt **for an aggregate consideration of $3.0B**. Payment of this consideration will be funded with $2B of committed bank loans, $750M from the issuance of BCE common shares to the Woodbridge Company Limited and the balance with surplus cash on hand. . . ." (emphasis added)

[20] BCE letter to CRTC dated November 25, 2010 at pages 3 and 4. BCE states, in response to CRTC Request #7(b) (Please confirm that BCE will be assuming all of the existing $1.7 billion bank debt included in the $3.2 billion transaction value.): "BCE confirms it will be assuming $1.7B of proportionate debt."

CTVgm that BCE is acquiring, before adjustments determined by the CRTC for synergies (as discussed below) or for non-broadcast assets.

(b) The Valuation Should Take into Account Synergies and Acquisition of Control

In certain previous decisions, the CRTC has included in the value of the transaction an amount reflecting a control premium which may reflect, among other things, the synergies, and economies of scale or other strategic benefits perceived by the purchaser. Normally, the question of the allocation of a control premium may arise in the context of the acquisition of a public company, in which a purchase price is paid for publicly traded shares that exceeds their market price. For example, such an issue arose in the context of the CRTC's evaluation of the proposed change in control of BCE approved by the CRTC in *Broadcasting Decision CRTC 2008-69* (but never implemented).

Control premiums or the value of anticipated synergies are also relevant, however, to the overall valuation of broadcasting assets. For example, in the case of the CRTC's review of the acquisition by Quebecor Media inc. of Groupe TVA inc.[21], the CRTC took particular note of the strategic value that Quebecor's acquisition of TVA represented to Quebecor and increased the multiple of EBITDA used to determine the value of the broadcasting assets acquired by Quebecor. Similarly, in a recent decision in which a privately owned broadcaster was acquired, the CRTC made the following observation describing its approach in valuing broadcasting assets:

> It is the Commission's view that a purchaser acquires assets for the expected future profits and not past results, and that the valuation should reflect that reality, including expected synergies and the prospect of economic recovery.[22]

In the present instance, no account seems to have been taken of the synergies to be realized by BCE in its acquisition of control of CTVgm (one of Canada's largest broadcast groups) and the combination of CTVgm's broadcasting enterprises with BCE's own business lines. As noted by the CRTC in one deficiency question[23] BCE's news release announcing its acquisition of control of CTVgm emphasized the synergies to be realized by BCE in connection with the transaction[24]:

> Acquiring CTV's range of premier video content enhances Bell's execution of our strategic imperatives by leveraging our significant broadband network investments, accelerating Bell's video growth across all three screens - mobile, online and TV - and achieving a competitive cost structure. 100% ownership of CTV enables Bell to maximize strategic and operating synergies with CTV, including the efficiency of our content and advertising spend," said George Cope, President and CEO of Bell Canada and BCE. "Our industry is changing rapidly. Increasing vertical integration across the

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[21] *Broadcasting Decision CRTC 2001-384*.

[22] *Broadcasting Decision CRTC 2010-193*.

[23] See BCE letter to CRTC dated November 25, 2010 at page 5.

[24] BCE press release dated September 10, 2010 at http://www.bce.ca/en/news/releases/corp/2010/09/10/75551.html
See also the related BCE power point presentation to investors at
http://www.bce.ca/data/documents/BCE%20_Acquisition_of_CTV_September_10_2010.pdf

> communications landscape, ongoing technological advancement and key regulatory developments introduce new opportunities with the ownership of high-demand content by Bell. Our acquisition of CTV more than levels the playing field in our increasingly competitive industry.

Notwithstanding this public statement, the valuation report submitted with the Application does not take into account the potential impact of advantageous synergies for BCE. The valuators note that, "We have not received any information that would allow us to quantify any potential synergies that may be realized."[25] In other words, BCE has identified potential synergies publicly as one of the benefits flowing to it from the transaction, but apparently did not share the impact of those synergies with its valuators.

This lack of information could affect, among other things, the estimated growth rates and weighted average cost of capital (including the size premium) used for the purposes of the Discounted Cash Flow calculation (which would result in lower projected growth and higher a risk factor for the cost of capital), and the EBITDA multiple used by the valuator for the purpose of determining the relative values of groups of broadcasting assets (which would, presumably, be lower if synergies were not taken into account).

This issue is somewhat similar to the question of the size premium (of 1.8%) applied by the valuator to BCE's broadcasting undertakings which was discussed by the CRTC in *Broadcasting Decision CRTC 2008-69*. In that decision, the CRTC found that it was not appropriate to consider BCE's broadcasting assets as though they operated as autonomous units. Rather, the CRTC indicated that the assets were closely linked to BCE's other business operations, including its telephony business, and would benefit from the management expertise of the larger organization. Accordingly, the CRTC disallowed the 1.8% size premium for those assets. In the current instance, it should be noted, the valuator seems to have employed an even larger size premium of 2.81% for the purposes of the DCF analysis based on an implied market capitalization of $1.5 billion. BCE's market capitalization is, of course, many times greater than this (being closer to $27 billion).

All this is to say that BCE's valuation of the transaction does not take into account the value to BCE of its acquisition of CTVgm, or the quite likely synergies and benefits to be enjoyed by CTVgm's broadcasting assets when they are combined with BCE's substantial distribution, telephony and wireless assets.

(c) Excluded Assets

The CRTC does not include in its determination of the value of transaction assets that are not regulated by the CRTC and for which benefits are not otherwise payable. In this transaction, BCE has proposed excluding certain non-broadcast assets (its Dome Production and on-line businesses), non-controlling interests in specialty and pay services, redundant land that is not used for broadcast or non-broadcast business purposes and the net present value of tax loss carry forwards. These exclusions amount to a $321 million deduction to the value of the transaction.

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[25] PriceWaterhouseCoopers valuation of CTVglobemedia Inc. at page 8, paragraph 30.

The most material of these deductions appear to be the deductions for the CTVgm non-broadcast assets and for the tax loss carry forwards. Based on the material presented in the valuation report and BCE's correspondence with the CRTC the transaction value for the non-broadcast assets is said to be $163 million and the value attributed to the tax losses is $103 million.

(i) Non-Broadcast Assets

BCE has not broken out the value attributable to Dome Productions in comparison to its on-line activities. In addition, in the past where specific business divisions have been identified for exclusion by applicants, the CRTC has examined financial statements for the applicant and determined whether cost and other allocations made by the applicant are appropriate based on those pre-existing financial statements.[26] This procedure does not seem to have been followed in the current instance so it is not known whether BCE's allocations of costs and other items to its non-broadcast businesses are consistent with its accounting practices.

It is also not known what proportion of the revenue earned by these businesses comes from non-arms' length transactions with CTVgm's own broadcast properties. Under the valuation methodology employed, if a significant proportion of these revenues were internal and non-arm's length, this could lower the relative valuation for the broadcasting assets (which would have lower EBITDA) and raise the valuation for the non-broadcasting assets (by increasing their EBITDA). Given the magnitude of valuation for these businesses in the overall transaction, the CRTC should examine these issues in more depth with BCE.

(ii) Tax Loss Carry Forwards

BCE's deduction of tax loss carry forwards raises a novel issue. There is no precedent cited, or that we have located, for the deduction of such amounts from the overall value of the transaction.

The rationale provided by BCE for making this deduction is that, according to BCE, the tax loss carry forwards

> reside at the level of CTVgm, CTV Inc., Learning and Skills Television of Alberta Ltd., and CTV Ltd. and not at the individual broadcasting asset company level. If these broadcast assets were sold individually, the tax losses would not be transferable with the broadcast assets. In other words, the tax attributes are a corporate asset and would not be transferrable on a change of control for individual broadcast assets.[27]

It is difficult to appreciate the logic in this argument because each of CTV Inc., Learning and Skills Television of Alberta Ltd, and CTV Ltd. (if that company is the same as CTV Limited) are identified in CRTC records as licensee companies.

This means that the tax losses should, presumably, be applicable to offset broadcasting revenues at that level. Among other things, this would presumably make the discount rate applicable to

[26] *Broadcasting Decision CRTC 2007-429*.
[27] BCE Letter dated November 25, 2010 at page 6.

future cash flows for applicable taxes lower for those companies.[28] Even in the case of CTVgm, it is not clear whether these tax losses represent historic losses from broadcasting activities or from other business activities. If it is the former, then it is not clear why these losses would not be characterized as broadcasting assets, used to offset revenues otherwise derived from broadcasting activities.

It does not seem that the CRTC has addressed this issue before. Therefore, it is open to the CRTC to disregard BCE's deduction of tax loss carry forwards in this instance, and to include those losses in the value of the transaction.

(d) Treatment of On-line and Other New Media Operations

As noted above, BCE has excluded the on-line activities of the various broadcasting businesses, production activities and other unregulated business activities for the purpose of the valuation.[29] The CRTC has, in the past, accepted that unregulated assets of broadcasting businesses are not included for the purposes of calculating the expected level of tangible benefits. At the same time, the CRTC has been careful to ensure that the allocation of costs and revenues to these assets is appropriate[30] and is consistent with the broadcaster's own treatment of these assets for its own purposes.

In the present instance, it is not clear how BCE has allocated the value of CTVgm's online activities as compared to that of Dome Productions. It is not possible, therefore, to evaluate the relevance of the on-line activities to the overall valuation.

In any event, the exclusion of on-line broadcasting operations that are intimately associated with more traditional broadcasting operations of CRTC licensees appears to be increasingly out-of-step with industry developments. On-line and other new media operations have, according to many broadcasters and as the direct result of government policy, become indistinguishable from core broadcasting operations. For example, it is now a requirement to obtain Canada Media Fund funding that Canadian productions obtain licences for both a broadcast window and a second distribution platform, which is typically a digital media window, or create enhanced digital media content. Broadcasters now usually seek to acquire a bundle of traditional and non-traditional broadcasting rights when they acquire programming, leveraging their power within the regulated broadcasting system to extract rights for new media platforms.

At the same time, broadcasters have included new media and digital initiatives in their proposed tangible benefits packages. In the present instance, BCE has proposed that $40.4 million in tangible benefits be allocated to "Onscreen Programming and Multi-Platform Content"

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[28] See, for example, Ernst & Young valuation filed with Canwest Mediaworks Inc.'s application to acquire Alliance Atlantis at page 18 of the valuation report (which is attached as Appendix F to the Supplementary Brief) [the application may be found at http://www.crtc.gc.ca/eng/archive/2007/n2007-11.htm#a1 .] In that analysis, Ernst & Young noted that the following assumption was made for the purpose of the DCF analysis regarding taxes applicable to future cash flow: "Tax is calculated on earnings before interest and taxes ("EBIT") and net of tax loss carry forwards. Tax loss carry forwards are assumed to eliminate taxes from 2007 to 2011 for certain channels."

[29] Valuation at page 33.

[30] *Broadcasting Decision CRTC 2007-429.*

initiatives. This initiative is, apparently, intended to support television content "as well as complementary and/or original content for new media platforms".[31]

In the past, the CRTC has been mindful to ensure that new media initiatives that qualify as a part of tangible benefits packages are directly related and complementary to more traditional, regulated broadcasting activities. For example, the CRTC required as a part of BCE's 2000 benefits package approved in *Decision CRTC 2000-747* that new media content (which it called "iTV" content) be "truly integrated with the program content, and thus of clear, significant benefit to the broadcasting system". In comparison, the CRTC stated that "iTV elements that are essentially Internet-based, and thus of predominant benefit to the Sympatico/Lycos service, would not qualify as acceptable benefits."

It appears that in the current application BCE has both excluded on-line activities that are integral to the operation of its broadcasting businesses from the valuation of CTVgm's broadcasting assets <u>and</u>, at the same time, proposed to spend benefits dollars on unregulated on-line activities that are not necessarily integrated with broadcasting activities and therefore not of direct and significant benefit to the broadcasting system.

The ultimate effect of this inconsistent approach is to weaken the regulated sectors of the broadcasting system by diverting resources to the unregulated sectors.

The CRTC should adopt a consistent approach to the valuation of broadcasting assets by including within the valuation of those assets the on-line and new media activities of licensed broadcasting services that are not clearly separated, both in operational and accounting terms, from the licensed broadcasting business. Also, benefit initiatives directed to new media initiatives that are <u>not</u> related to licensed broadcasting activities should not be eligible. This will ensure that resources and value that are generated within the regulated broadcasting system are employed towards strengthening – and not weakening – that system.

V. <u>CONCLUSION</u>

This Joint Report demonstrates that, contrary to the arguments put forward by BCE in the Application, tangible benefits, at the level of 10% of the value of *all* of the television assets in the transaction, are payable in respect to this transaction.

It is important for the public interest and to the integrity of the CRTC's process that the CRTC apply its well-developed and long-established tangible benefits policy to this transaction.

[31] BCE letter dated December 3, 2010, Schedule 1.