



January 11, 2011

Mr. Robert A. Morin  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, Ontario K1A 0N2

Filed Electronically

Dear Mr. Morin:

**Re: Broadcasting Notice of Consultation CRTC 2010-926 – Application by BCE Inc. (BCE), on behalf of CTVglobemedia Inc. (CTVgm) and its licensed broadcasting subsidiaries, for authority to change the effective control of CTVgm’s broadcasting entities to BCE (Application No. 2010-1506-6)**

1. The Canadian Media Production Association (the CMPA)<sup>1</sup> welcomes the opportunity to provide these comments regarding the application announced in the above-referenced Notice of Consultation.<sup>2</sup> Given the importance of this proceeding to its members, the CMPA requests the opportunity to appear at the public hearing scheduled to commence on 1 February 2011 in Gatineau, to elaborate on its views expressed in this intervention.
2. For the reasons set out below, the CMPA urges the Commission to require BCE to substantially amend its benefits proposals so that they are fully consistent with the Commission’s policy and past decisions, and thus respond to the concerns outlined in this intervention. Absent such necessary changes, the CMPA submits that approval of the BCE application would be contrary to the public interest.

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<sup>1</sup> The CMPA represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. The CMPA’s 400 member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.

<sup>2</sup> The positions taken in this intervention were developed without conflict of interest, in accordance with the Association’s Arm’s-Length Governance Guidelines.

## Executive Summary

3. The CMPA submits that BCE's proposals regarding the benefits that should be associated with this transaction are fundamentally inconsistent with the Commission's Tangible Benefits Policy and recent Commission decisions. Accordingly, the CMPA urges the Commission to require BCE to substantially amend its benefits proposals such that it will
  - Contribute significant and unequivocal benefits commensurate with the full size of the transaction;
  - Direct 85% of the television-related benefits to on-screen programming initiatives; and
  - Direct 75% of the on-screen programming benefits to independently-produced programming.
4. Absent such necessary changes, the CMPA submits that approval of the BCE application would be contrary to the public interest.
5. The CRTC's application of its Tangible Benefits Policy has contributed enormously to the production of new, high quality and entertaining Canadian programming. Moreover, by requiring that benefits expenditures flow predominantly to independently-produced programming, the policy has played a critical role in fostering a diversity of programming voices in the Canadian broadcasting system and expanding the breadth and depth of creative ideas now presented on Canadian television and computer screens.
6. This transaction creates a unique and one-time opportunity to inject new funding into Canadian program production as an important and necessary supplement to what Canadian broadcasters will be required to invest during their next licence terms as a result of the upcoming group licence renewal process.
7. This is a clear case in which the CRTC's Tangible Benefits Policy applies since this transaction represents both a change in control of CTVgm and the acquisition of control of CTVgm by BCE. Contrary to BCE's arguments, a requirement to pay benefits in these circumstances would not be new policy, "double taxation" or unfair. Moreover, in establishing the appropriate value of the benefits payable, the Commission should reject BCE's attempts to exclude various aspects of the transaction or to apply discounts.

8. It is entirely inappropriate that BCE has ear-marked only 20% (\$40.4 million) of its proposed television-related benefits to on-screen programming initiatives, rather than the required 85%, and that the percentage of benefits funds that would actually flow to independently-produced programming could be in the single digits.
9. The Commission should reject the various proposals BCE has made to invest benefits funding in projects which do not directly support on-screen programming initiatives, since those non-programming proposals are unnecessary, self-serving, anti-competitive, non-incremental or represent normal capital expenditures which would be incurred in the ordinary course of business, and thus do not qualify as acceptable benefits under the Commission's Tangible Benefits Policy.
10. Instead, consistent with CRTC policy and past decisions, the Commission should require BCE to direct at least \$215 million in benefits to television-related initiatives. Of this amount, the Commission should direct BCE to invest at least \$183 million (85%) in on-screen programming initiatives. Moreover, consistent with the Commission's policy that such on-screen programming expenditures are to flow predominantly to third parties, such as independent producers, the Commission should require BCE to direct at least \$137 million of its programming benefits to third party-administered programs which support independently-produced programming.
11. As Terms of Trade will be addressed in the context of the upcoming group licence renewal process and the Commission has announced a proceeding to review the regulatory framework relating to vertical integration, the CMPA does not raise issues relating to those subjects in this intervention.

### **The CMPA's Position**

12. The CMPA submits that BCE's proposals regarding the benefits that should be associated with this transaction are fundamentally inconsistent with the Commission's Tangible Benefits Policy and recent Commission decisions. A Commission decision to accept BCE's proposals without considerable modifications would not serve the best interests of our broadcasting system, the Canadian independent production sector or Canadian television viewers. Accordingly, the CMPA cannot support this application as it is currently constructed.
13. For the reasons outlined in this intervention, the CMPA urges the Commission to require BCE to implement a real and substantial benefits package which is fully consistent with the Commission's policy and decisions. Specifically, the CMPA urges the Commission to require BCE

- To contribute significant and unequivocal benefits commensurate with the full size of the transaction;
- To direct 85% of the television-related benefits to on-screen programming initiatives; and
- To direct 75% of the on-screen programming benefits to independently-produced programming.

### The Critical Role of Tangible Benefits in the Canadian Broadcasting System

14. As the creative and business force behind quality Canadian programming on multiple platforms, Canada's independent producers help further the Government of Canada's broadcasting and communications policy objectives. Independent producers provide Canadians with a Canadian perspective on our country, our world, and our place in it. The content they produce helps foster Canadian cultural and entertainment choices and reflect the rich diversity of this country. As such, the independent production sector plays a vital role in the Canadian broadcasting system, as recognized in the *Broadcasting Act*.
15. Throughout the years, the CRTC's application of its Tangible Benefits Policy<sup>3</sup> - in particular, its recently re-affirmed approach of requiring that some 85% of benefits be directed to on-screen programming initiatives<sup>4</sup> - has contributed enormously to the production of new, high quality and entertaining Canadian programming. Moreover, by requiring that benefits expenditures flow predominantly to third parties, such as independent producers, and to different regions of the country, the policy has played a critical role in fostering a diversity of programming voices in

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<sup>3</sup> See, in particular, Public Notice CRTC 1989-109, *Elements Assessed by the Commission in Considering Applications for the Transfer of Ownership or Control of Broadcasting Undertakings*, <http://www.crtc.gc.ca/eng/archive/1989/PB89-109.HTM>; Public Notice CRTC 1993-68, *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, <http://www.crtc.gc.ca/eng/archive/1993/PB93-68.HTM>; Public Notice CRTC 1999-97, *Building on Success - A Policy Framework for Canadian Television*, <http://www.crtc.gc.ca/eng/archive/1999/PB99-97.HTM>.

<sup>4</sup> See Broadcasting Decision CRTC 2010-193, *Vision TV- Acquisition of assets*, <http://www.crtc.gc.ca/eng/archive/2010/2010-193.htm>, at par. 29, where the Commission rejected ZoomerMedia's proposed 70%:30% ratio of on-screen to social benefits in its acquisition of the broadcasting assets of S-VOX as being "inconsistent with the Commission's general approach requiring that the majority (approximately 85%) of the benefits should result in on-screen programming". Instead, the Commission required ZoomerMedia to submit a revised benefits proposal consistent with that policy. See also Broadcasting Decision CRTC 2007-165, *Transfer of effective control of CHUM Limited to CTVglobemedia Inc.*, <http://www.crtc.gc.ca/eng/archive/2007/db2007-165.htm>, where, at par. 48, the Commission stated that "the model used to apportion the television benefits to incremental programming initiatives (85%) and social benefits (15%) is appropriate and consistent with past practice."

the Canadian broadcasting system and expanding the breadth and depth of creative ideas now presented on Canadian television and computer screens.

16. In fact, as a means to generate much needed funding to supplement the limited financial resources otherwise available in the system for program production, the Tangible Benefits Policy has, in many ways, become the “lifeblood” for Canadian programming and for the independent production sector. Indeed, every dollar of benefits which independent producers are able to invest in Canadian content creation leverages \$3 to \$4 of program production. As a result, CMPA members have turned past benefits into numerous Canadian programming success stories, including prime time shows that can compete with the best the rest of the world has to offer.
17. In the present circumstances, the CMPA has no doubt that, by continuing to require that tangible benefits are payable and that they flow predominantly to independently-produced programming initiatives, the CRTC will once again help generate a host of new and otherwise unattainable Canadian programming success stories which Canadian audiences will enjoy and celebrate for years to come.
18. This transaction also creates a unique and one-time opportunity to inject new funding into Canadian program production as an important and necessary supplement to what Canadian broadcasters will be required to invest during their next licence terms as a result of the upcoming group licence renewal process.
19. On the other hand, should the Commission permit BCE to avoid paying benefits or allow BCE to direct substantial benefits to its own non-programming and self-serving projects, the broadcasting system will lose a real opportunity to stimulate significant and incremental investments in original and varied on-screen product to better serve Canadian audiences.

**The CRTC Should Require BCE to Contribute Significant and Unequivocal Benefits Commensurate with the Full Size of the Transaction**

20. In this application, BCE, on behalf of CTVgm and its licensed broadcasting subsidiaries, is seeking authority to transfer effective control of CTVgm’s broadcasting entities to BCE. Pursuant to the terms of the parties’ Transaction Agreement, BCE, which already owns 15% of CTVgm, will acquire the remaining 85% of the voting shares in the capital of CTVgm and will therefore exercise effective control. According to the Notice of Consultation, the BCE submits that the total value of the transaction is \$3.2 billion and that the total value (100%) of the broadcasting assets is approximately \$2.9 billion.

21. BCE's initial submission is that no tangible benefits are required in these circumstances. Alternatively, in the event the Commission requires such benefits, BCE proposes two possible tangible benefits packages flowing from the \$2.468 billion in value it attributes to the 85% of CTVgm's broadcasting assets it is now acquiring. Its first proposed package is valued at \$70.3 million, a figure it arrived at by excluding many aspects of the transaction from its benefits calculations and applying other discounts.<sup>5</sup> Its second proposed package, valued at \$220.8 million, is substantially larger, but still reflects BCE's attempt to apply a discount to its calculations.<sup>6</sup>
22. The CMPA disagrees entirely with BCE's argument that the Commission's Tangible Benefits Policy should not apply in these circumstances. In the CMPA's view, this is a clear case in which the policy does indeed apply.
23. Moreover, the CMPA submits that, in establishing the appropriate value of the benefits payable, the Commission should reject BCE's attempts to exclude various aspects of the transaction or to apply discounts. Without these inappropriate exclusions and discounts, the total benefits package would be significantly higher, as would the portion to be directed to television-related benefits.
24. With the expert help and input of Mr. Joel Fortune, an Ottawa-based lawyer with extensive experience in communications law, regulation and policy, the CMPA worked together with our union and guild partners (ACTRA, the Directors Guild of Canada, and the Writers Guild of Canada) to undertake a detailed analysis of BCE's arguments relating to application of the Commission's Tangible Benefits Policy in these circumstances, as well as its arguments that certain exclusions and discounts should apply in the event benefits are payable (the "Joint Report"). The Joint Report is included as part of this intervention as "Appendix 1".
25. The Joint Report demonstrates that tangible benefits are payable since this transaction represents both a change in control of CTVgm and the acquisition of control of CTVgm by BCE. Specifically:
- 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;

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<sup>5</sup> BCE Letter to CRTC dated 25 October 2010.

<sup>6</sup> BCE Letter to CRTC dated 3 December 2010.

- 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 since 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; and
  - 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 was possible with willing purchasers and sellers.
26. The Joint Report also demonstrates that 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.
27. Moreover, as the Joint Report demonstrates, 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;

- 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. As it did in respect of the Commission's consideration of the Shaw-Canwest transaction, the CMPA urges the Commission, when assessing BCE's claims regarding the financial position of CTVgm's conventional broadcasting assets (including the A Channels), to take into account the increasing evidence that the advertising market is rebounding and the overall economic situation is improving in the broadcasting industry<sup>7</sup>;
  - The CRTC's decision to discount by 5% the tangible benefits payable in connection with Shaw's acquisition of Canwest's conventional television assets was expressly related to Canwest's creditor protection proceedings and bears no similarity to BCE's acquisition of control of CTVgm.
28. In fact, as the Joint Report suggests, there is reason to conclude that, for the purpose of the CRTC's Tangible Benefits Policy, the value of the transaction should be significantly higher than what BCE has proposed.
29. As a result, not only are benefits payable in these circumstances, the application of the Commission's standard 10% rate to *all* of CTVgm's television assets means such benefits should be at least \$13.1 million higher than BCE has offered up in its second benefits proposal<sup>8</sup>, for a total of *at least* \$234.1 million<sup>9</sup>, of which *at least* \$215 million would be television-related benefits.<sup>10</sup>

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<sup>7</sup> See an excerpt in this respect from the CMPA's 23 August 2010 submission to the CRTC regarding the Shaw-Canwest transaction, attached as "Appendix 2".

<sup>8</sup> Applying a rate of 10% rather than 5% to the claimed value of CTVgm's conventional TV assets (\$262 million) increases the benefits payable by \$13.1 million.

<sup>9</sup> Representing \$26.2 million for conventional TV (10% of \$262 million) plus \$188.8 million for specialty television (10% of 1.888 billion) plus \$19.1 million for radio (6% of \$318 million).

<sup>10</sup> Total of \$234.1 million minus \$19.1 million (radio benefits) equals \$215 million.



### **The CRTC Should Require BCE to Direct 85% of the Television-Related Benefits to On-Screen Programming Initiatives**

30. Under BCE's second proposed (\$220.8 million) benefits package<sup>11</sup>, it would direct \$19.1 million (representing 6% of the value it has attributed to the radio assets contemplated in the transaction) to radio-related initiatives. It would direct the remaining \$201.7 million to television-related benefits. Of this amount, it would direct only \$40.4 million to "Onscreen Programming and Multi-Platform Content"; the rest would be directed to the following, primarily non-programming, initiatives:
- \$84 million for "Support for Local Television Stations Through Satellite Carriage";
  - \$24.5 million for "Enhanced Local News Production in HD and HD Conversion of Specialty Services";
  - \$27 million to "Sustain Local Programming in A Channel Markets";
  - \$10.8 million to "Satellite Delivery of Local Stations in Non-Mandatory (DTV Transition) Markets"; and
  - \$15 million for a "Platform for Digital Distribution".
31. Under the CRTC's Tangible Benefits Policy, the onus is on the applicant to prove that it offers the best possible proposal "in the public interest". Among other things, the applicant is required to propose a package of "significant and unequivocal benefits" that will result in measurable improvements to the communities served by the undertaking(s) and to the Canadian broadcasting system as a whole. As noted above, where the transaction relates to television undertakings, the Commission recently re-affirmed that 85% of the benefits are to be directed to on-screen programming initiatives. Moreover, even though CMPA was disappointed that the Commission made an exception to this policy in last October's Shaw-

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<sup>11</sup> As argued in the Joint Report, the CRTC should reject BCE's attempts to exclude items from the transaction or apply discounts in order to lower the value of the benefits package that would be required under the Commission's Tangible Benefits Policy. Since BCE's first proposed benefits package of \$70.3 million was based on these proposed exclusions and discounts, the CRTC should reject it too. Accordingly, the CMPA does not comment on the first proposed benefits package. While the CMPA argues that the Commission should also reject the discount BCE has applied to arrive at the value for its second proposed benefits package, that second proposed package nevertheless represents the only other proposal currently on the record and so will be referenced in this section.

Canwest decision<sup>12</sup>, it is still notable that the Commission nevertheless required Shaw to devote 79% of its benefits package to on-screen and/or programming-related initiatives.

32. It is for these reasons that it is entirely inappropriate that, of the \$201.7 million BCE has proposed as television-related benefits, it has ear-marked *only 20%* (i.e., \$40.4 million for “Onscreen Programming and Multi-Platform Content”) for on-screen initiatives.
33. To put BCE’s proposed Canadian programming commitment into perspective: paid out over a 7-year period, this proposal equates to \$5.7 million per year, which could support *about 25% of the cost of producing one high-quality, one-hour television drama series per year*. Such a proposal makes a mockery of the CRTC’s policy to direct 85% of tangible benefits to on-screen programming initiatives.
34. In the following sections, the CMPA outlines why the Commission should reject the various proposals BCE has made to invest benefits funding in projects which do not directly support on-screen initiatives. In each case, the CMPA argues why the BCE proposal should not qualify as an acceptable benefit under the Commission’s Tangible Benefits Policy. Thus, CMPA submits, the Commission should reject each of these proposals in its own right; this in turn would make more funds available to be invested in directly supporting on-screen initiatives.
35. Consistent with the Commission’s Tangible Benefits Policy, and assuming, as stated above, that BCE should allocate *at least* \$215 million to television-related benefits, BCE should be required to direct *at least* \$183 million to on-screen programming initiatives.<sup>13</sup>

#### **“Support for Local Television Stations through Satellite Carriage” (\$84 million)**

36. BCE proposes to allocate \$84 million towards upgrading its DTH capacity in order to add the local OTA stations eligible to access the Local Programming Improvement Fund (LPIF) which it is not already distributing. Specifically, BCE proposes to replace MPEG-2 set-top boxes (STBs) used by a segment of its subscriber base with MPEG-4 compatible STBs.
37. The funds BCE proposes to allocate to this project represent the largest component of its proposed TV benefits package and, at 42% of the total expenditures, *more than twice* what it has proposed to direct to on-screen programming initiatives and third parties.

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<sup>12</sup> Broadcasting Decision CRTC 2010-782, *Change in effective control of Canwest Global Communications Corp.’s licensed broadcasting subsidiaries*, <http://www.crtc.gc.ca/eng/archive/2010/2010-782.htm>.

<sup>13</sup> 85% of \$215 million = \$182.75 million.

38. This particular proposal is intended to respond to the Commission's desire, expressed during the November 2010 DTH satellite distribution policy review hearing<sup>14</sup>, that all LPIF-eligible stations receive DTH carriage. The Commission has yet to issue its decision following that process; however, consistent with its usual approach in policy matters, it will likely apply its chosen means for meeting this objective equally to all of Canada's DTH providers.<sup>15</sup> Thus, allowing BCE to be the sole DTH provider to use benefits to meet the Commission's objective would be prejudicial to the other DTH providers and anti-competitive.<sup>16</sup> For this reason alone, the Commission should reject this self-serving proposal.
39. It is the CRTC's policy to reject as tangible benefits proposed expenditures that fall within the parameters of what can be considered normal capital expenditures which would be incurred in the ordinary course of business. The CMPA submits that investments by DTH providers in building satellite capacity are a cost of doing business. Both FreeHD and Shaw acknowledged this reality at the recent DTH policy hearing. For its part, FreeHD observed that "the wholesale migration to MPEG-4 should be a business imperative for all DTH operators or they will not have sufficient capacity to migrate their services to HD and remain competitive."<sup>17</sup>
40. Similarly, Shaw acknowledged that it is the market that is driving its capacity expansion plans and the need for more bandwidth to carry the services customers want:
- This is all in line with what you said, sir, about -- we have incentives. The market is driving us to that already. The sooner we can get there, certainly the better, and the more flexibility we have as a company.
- So all of those incentives already exist, and we work under them.<sup>18</sup>
- This view is likely why Shaw did not propose investments in satellite capacity as tangible benefits in its Canwest application.
41. Others in the broadcasting distribution sector share the view that building satellite capacity is a cost of doing business for DTH providers. As Rogers observed in its Reply submission in the recent DTH policy proceeding:

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<sup>14</sup> Broadcasting Notice of Consultation CRTC 2010-488, *Review of the direct-to-home satellite distribution policy*, <http://www.crtc.gc.ca/eng/archive/2010/2010-488.htm>.

<sup>15</sup> Bell Satellite TV, Shaw Direct and FreeHD.

<sup>16</sup> This would particularly be the case given that the benefits package which the Commission approved in its recent Shaw-Canwest decision does not allow for Shaw to divert funds away from programming-related initiatives to subsidize its satellite capacity, as BCE proposes to do.

<sup>17</sup> CRTC Transcripts, 18 November 2010, line 2415.

<sup>18</sup> *Ibid.*, lines 2487-2488.

It is clear that DTH operators will have to migrate to MPEG 4 to meet all their future capacity demands. This has been the experience in other jurisdictions. In the U.S., both Dish Network and DirectTV already make use of MPEG 4 encoding. In the case of Dish Network, its entire system is based on MPEG 4.4. In the UK, Sky first announced its HD upgrade plans using MPEG 4 in 2005. Sky Italia unveiled its HD launch plans, using MPEG 4, in 2006, while Tata Sky in India introduced MPEG 4 in 2009... Canada's DTH operators have fallen behind and need to accelerate their upgrade plans in order to catch up with the rest of the world and to ensure they can offer programming services in HD.<sup>19</sup>

42. Even the CRTC Chairman seemed to assume that, due to the competitive nature of the broadcast distribution market, BCE would ultimately be required to assume the costs of expanding its satellite capacity:

Combining any one of these methods with the need to bring these LPIF-conforming stations on, surely you can envision a date. If you want to file it in confidence, that's fine, but I mean you want to file your -- MPEG conversion for you is a necessity, it's not something that we impose on you, you are going to do it anyway, all we are asking is for you to do it in such a way as to keep in mind our stated goal which reflects the Act that those local stations are up and are really receivable by people.<sup>20</sup>

43. For all the foregoing reasons, the CMPA submits that the Commission should reject BCE's proposal to allocate \$84 million to its plans to expand Bell Satellite TV's DTH capacity.

**“Enhanced Local News Production in HD and HD Conversion of Specialty Services”  
(\$24.5 million)**

44. The CMPA notes that the Commission has in the past rejected as a tangible benefit the upgrading of production facilities to create the capacity to process HDTV programs on the basis that such an initiative is part of the normal course of doing business.<sup>21</sup>
45. The CMPA also notes that the Commission has in the past rejected proposed benefits which fail to take into account the fact that, because the technology and communications environment continues to evolve, what may once have been considered new and cutting edge is now

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<sup>19</sup> See Broadcasting Notice of Consultation 2010-488 – Review of the direct-to-home satellite distribution policy - Final Comments of Rogers Communications, 25 November 2010, at par. 8.

<sup>20</sup> *Ibid.*, above note 17, line 3018.

<sup>21</sup> Decision CRTC 2001-621 (Rogers and CTV SportsNet), <http://www.crtc.gc.ca/eng/archive/2001/db2001-621.htm>.

considered the normal course of business.<sup>22</sup> The CMPA submits that, while once cutting edge, producing programming in HD and the HD conversion of broadcast signals is now, in 2011, the normal course of business for broadcasters like CTVgm.

46. In this respect, the CMPA points to the fact that the vast majority of CTVgm’s specialty services have been authorized since 2007-2008 to make their programming available in HD<sup>23</sup> and that, in 2008, CTVgm applied for authority to provide BDUs with a direct feed of the HD signal of a number of its OTA stations.<sup>24</sup> In that 2008 application, CTVgm stated that it was “greatly interested in the growth of High Definition in Canada” and noted that, “[f]rom a Specialty perspective, both TSN and Discovery Channel were the first to launch in HD in their given genres and each has grown tremendously since.” CTVgm also argued that it was in the public interest to ensure that it was able to provide its OTA viewers with HD signals given they could already access HD programming from numerous foreign television services.
47. These statements and the fact that CTVgm and many others have already sought and obtained the regulatory authority to make their programming widely available in HD indicates that, for some years now, broadcasters have regarded HD production and signal conversion as necessities in this day and age. This is why, for example, in recently announcing that Winnipeg is the fifth Global Television market to move to HD (following Vancouver, Calgary, Edmonton, and Toronto), Shaw Media claimed “The move to HD affirms our position as a market leader... [and] is the next logical step in providing an enhanced viewing experience with superior audio and video quality.”<sup>25</sup> Accordingly, BCE’s goal of “enhancing local stations and specialty services with HD production and exhibition capacity” is now a cost of doing business, and thus should not qualify as a tangible benefit in these circumstances.

#### **“Sustain Local Programming in A Channel Markets” (\$27 million)**

48. Under this proposal, BCE would allocate funds to the CTVgm A Channel stations to support their digital transition and HD infrastructure, and to partially fund their continued provision of local programming. The CMPA submits, however, that none of the following four projects BCE

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<sup>22</sup> See Broadcasting Decision CRTC 2007-429, *Transfer of effective control of Alliance Atlantis Broadcasting Inc.’s broadcasting companies to CanWest MediaWorks Inc.*, <http://www.crtc.gc.ca/eng/archive/2007/db2007-429.htm>, at par. 90.

<sup>23</sup> See, for example, Broadcasting Decisions CRTC 2008-199 to 2008-203 and Broadcasting Decision CRTC 2007-172.

<sup>24</sup> Broadcasting Public Notice CRTC 2008-112, <http://www.crtc.gc.ca/eng/archive/2008/pb2008-112.htm>. CRTC approval granted in Broadcasting Decision CRTC 2009-482, <http://www.crtc.gc.ca/eng/archive/2009/2009-482.htm>.

<sup>25</sup> *Global Winnipeg goes HD*, 30 December 2010, <http://www.cartt.ca/news/FullStory.cfm?NewsNo=11067>.

proposes to fund in this area<sup>26</sup> qualifies as a tangible benefit under the Commission's benefits policy.

49. *Investing in digital rebroadcast transmitters in Barrie, Ontario in order to extend A Channel Barrie programming throughout Southwestern Ontario and serve local audiences in the region:* the CMPA cannot foresee any incremental benefit that would arise by extending A Channel Barrie programming to markets in Southwestern Ontario already served by A Channel stations in London and Windsor. This would only serve to duplicate existing A Channel programming in that region while providing viewers with Barrie-focused local programming that would be irrelevant to them. If BCE wishes A Channel Barrie to be "on a level playing field with all other over-the-air stations in the Greater-Toronto-Area", its investments to put it into this competitive position should be considered a normal cost of doing business.
50. *Transition to digital A stations in Ottawa, London, Windsor, Barrie and Victoria:* as all these markets are mandatory digital transition markets, each of these A Channel stations is already required to make the transition to digital. Accordingly, this project would not be incremental, and it would be a cost of doing business.
51. *Invest in HD conversion of all A station master controls to facilitate the availability of digital content in those markets:* again, as the A Channels operate in mandatory digital transition markets, they are already required to make the transition to digital. Moreover, as argued above, HD production and conversion are costs of doing business for broadcasters like CTVgm.
52. *Dedicate resources to local programming on A stations to off-set some of the losses that are expected to continue:* as re-confirmed in the Shaw-Canwest decision, contributions to local programming must be incremental to existing contributions and result in new or improved local programming in order to qualify as a tangible benefit. This proposal, however, seems to envisage simply supporting existing local programs for the A Channels and therefore does not qualify.

**"Satellite Delivery of Local Stations in Non-Mandatory (DTV Transition) Markets"  
(\$10.8M)**

53. The CMPA recognizes that, in the Shaw-Canwest decision, the Commission allowed Shaw to allocate a portion of its benefits package to provide a "local television satellite solution" initiative for households that are outside the mandatory digital transition markets, in order to maintain their free access to the programming of local and regional stations that will no longer

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<sup>26</sup> *Ibid.*, above note 6, Schedule 1, par. 5.

be available over the air after the digital transition. Following suit, BCE has proposed to direct \$10.8 million of its benefits to doing the exact same thing.

54. In approving the Shaw initiative, the Commission noted that it will benefit the approximately 31,500 households that now rely solely on OTA reception to access at least one local and/or regional television station operating on channels 52 to 69 outside mandatory markets, and that will cease OTA transmission due to the transition. Once those households have had an opportunity to avail themselves of Shaw's program, the Commission expects Shaw to provide households, both inside and outside mandatory markets, which will have lost access to at least one OTA signal with satellite reception equipment until the allocated funds have been exhausted. The Commission expects Shaw to make its local television satellite solution available to affected households three months prior to the digital transition date of 31 August 2011, that is by 30 May 2011.
55. Given that the Shaw initiative is intended to serve all households that may wish to avail themselves of such a solution, and that the Commission seems to contemplate that Shaw's allocation of its benefit funds will be more than enough to meet the anticipated demand, the CMPA questions the value of allowing BCE to allocate a portion its own benefits simply to duplicate what Shaw will already be doing.
56. Moreover, BCE has advised that it would not be able to launch its version of the Shaw initiative until 7-9 months after the release of the Commission's decision on its application.<sup>27</sup> This means, therefore, that should the Commission release its decision on this application 90 days following the 1 February 2011 public hearing<sup>28</sup>, namely by 1 May 2011, BCE would not be able to launch its program until 1 December 2011, and perhaps not until 1 February 2012 - in other words, not until 3 to 5 months after the digital transition date, and 6 to 8 months after Shaw has launched its program. Given this reality, the CMPA questions whether there will be any households interested in this type of program that will not already be served by the time BCE is ready to launch.
57. The CMPA appreciates that, in the event the Commission approves this particular proposal, BCE has undertaken to reallocate any surplus funds to the development, creation and promotion of incremental, independently-produced programming of national interest.<sup>29</sup> However, the CMPA submits that, rather than allocate *any* funds to such a duplicative initiative - for which, by the

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<sup>27</sup> BCE Letter to CRTC dated 17 November 2010, par. 19 a).

<sup>28</sup> New hearing date announced in Broadcasting Notice of Consultation CRTC 2010-926-2, <http://www.crtc.gc.ca/eng/archive/2010/2010-926-2.htm>.

<sup>29</sup> *Ibid.*, above note 27, par. 11 c).

time it could be launched, there will likely be no demand - BCE should direct the entire \$10.8 million to independently-produced programming of national interest, which would better serve the Canadian broadcasting system and the public interest.

**“Platform for Digital Distribution” (\$15 million)**

58. At the outset, the CMPA questions how BCE can include this item as a benefit for the Canadian broadcasting system while, at the same time, argue that the “online” operations of CTVgm’s conventional television stations and specialty services are non-broadcasting in nature and therefore should be excluded from the value of the broadcasting assets in this transaction.<sup>30</sup>
59. In CMPA’s view, BCE has these items mixed up. The “online” operations of CTVgm’s conventional television stations and specialty services are indeed *broadcasting* in nature to the extent they offer programming.<sup>31</sup> On the other hand, this vaguely described “platform for digital distribution” appears to be another name for BCE’s Internet and mobile networks and thus in large part constitutes telecom facilities.
60. While the CMPA appreciates BCE’s recognition of the importance of supporting the creation and distribution of independently-produced content on digital platforms, a more practical, efficient and impactful way to achieve this goal would be to collaborate with pre-existing funders of multi-platform Canadian content.
61. The CMPA notes, for example, that the Canada Media Fund (CMF) now requires that broadcasters allocate at least 50% of performance envelope funding to television projects that have a “rich and substantial” digital media component.<sup>32</sup> At the same time, however, broadcasters are only required to contribute 10% of their own funds to the financing of the digital media component.<sup>33</sup> The result is a “financing gap” for the digital media component that often cannot be closed through other sources of financing, such as through the Bell Broadcast and New Media Fund.
62. The CMPA further notes that the CMF’s Experimental Stream is severely oversubscribed. For its first round of funding in the Fall of 2010, the CMF received over 250 applications requesting

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<sup>30</sup> See BCE letter dated 25 November 2010, response to Request #11.

<sup>31</sup> Indeed, CTVgm claims that CTV properties stream more than twice the video than its closest broadcasting competitor: “CTV’s Online Properties Celebrate Third Straight Year as Canada’s #1 Video Online Network”, 30 December 2010, [http://www.ctv.ca/servlet/ArticleNews/corp/CTVShows/20101231/ctv\\_release\\_12302010/20101231?hub=announce](http://www.ctv.ca/servlet/ArticleNews/corp/CTVShows/20101231/ctv_release_12302010/20101231?hub=announce) .

<sup>32</sup> See Canada Media Fund, *Performance Envelope Guidelines 2011-2012*, section 3.2DM.

<sup>33</sup> *Ibid.*, section 3.2.DM4.



almost \$90 million against \$16.2 million in available funding.<sup>34</sup> Similarly, the CMF announced that for its second round of funding, it had received applications totaling almost \$72 million against a funding budget of \$10.8 million.<sup>35</sup> The result is that many worthy and innovative projects are not being supported due to a lack of funds.

63. The CMPA therefore proposes that some or all of the \$15 million that BCE proposes be used for the creation of a new digital platform instead be directed to support the financing of the digital media component of television projects funded under the CMF's Convergent Stream and/or the financing of eligible projects under the CMF's Experimental Stream. Rather than allocate these funds directly to the CMF itself, the Commission could direct that they be allocated instead to the Bell Broadcast and New Media Fund to be used for one or both of the above-noted purposes.
64. At a minimum, however, the CMPA asks the Commission to investigate what BCE means by its "platform for digital distribution". Consistent with the Commission's Tangible Benefits Policy, the CMPA submits that the building of any such platform with benefits funds should contribute to the strengthening of the Canadian broadcasting system as a whole. The CMPA therefore proposes that the Commission clarify with BCE whether it is proposing to build an "open access" digital platform for all independently-produced content (which could potentially be accomplished under the auspices of a third party, such as the Bell Broadcast and New Media Fund), or whether it is intended to be for BCE's exclusive use. If it is the latter, the CMPA considers this to be an inappropriate use of benefits funds, as it would have the effect of granting to BCE a competitive advantage in the marketplace.
65. The CMPA also requests that the Commission exclude from BCE's benefits package expenditures that would serve to enhance BCE's provision of telecommunication services to its own customers rather than benefit the Canadian broadcasting system as a whole.

### **85% for On-Screen Initiatives, not 20%**

66. For all these reasons, the CMPA submits the Commission should reject each of BCE's proposed non-programming benefits in its own right, and instead require BCE to make the identified funds available to be invested in directly supporting on-screen initiatives.

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<sup>34</sup> CMF Press Release, *CMF Announces Experimental Stream First Round Results*, October 13, 2010, [http://www.cmf-fmc.ca/news-actualites.html?page\\_mode=innovate](http://www.cmf-fmc.ca/news-actualites.html?page_mode=innovate).

<sup>35</sup> CMF Press Release, *CMF Receives Nearly 200 Experimental Stream Applications*, December 8, 2010, [http://www.cmf-fmc.ca/news-actualites.html?page\\_mode=innovate](http://www.cmf-fmc.ca/news-actualites.html?page_mode=innovate).

67. Regardless, the Commission should reject BCE’s attempt to depart so drastically from the benefits policy and require it to re-cast its benefits package to direct 85% - representing *at least \$215 million* - to on-screen programming initiatives.

### **Require BCE to Direct 75% of the On-Screen Programming Benefits to Independently-Produced Programming**

68. As noted above, the CRTC’s Tangible Benefits Policy contributes to the diversity of voices in the Canadian broadcasting system by requiring that expenditures proposed as tangible benefits flow predominantly to third parties, such as independent producers.<sup>36</sup>
69. As inappropriately low as is BCE’s proposed 20% allocation of benefits to on-screen initiatives, the amount actually flowing under its proposal to independently-produced programming would be even substantially less. Of the \$40.4 million for on-screen initiatives, BCE proposes to spend \$35.4 on programming for CTV’s conventional stations and specialty services and allocate the remaining \$5 million to complementary new media content. However, of the \$35.4 million, BCE proposes to direct some undisclosed amount *to itself* to produce “large scale Nation-Building Multi-Platform Events”, vaguely described as including “thematic programming initiatives that bring issues of great importance or relevance to the forefront.”<sup>37</sup> BCE also proposes to direct a further undisclosed portion of these funds *to itself* to produce “sports initiatives” which “could be comprised of sports documentaries and amateur sports programming”. It also proposes to direct some portion of these funds *to itself* to enhance its local news.
70. Finally, BCE offers to spend some other unidentified portion of the \$35.4 million - presumably whatever may be left after all these self-directed expenditures - on programs of national interest “predominantly” created by independent producers.<sup>38</sup> As a result, it appears that, under BCE’s proposals, the percentage of benefits funds that would actually flow to third-parties, such as independent producers, could be in the single digits. This is entirely inconsistent with the Commission’s benefits policy; put more directly, it is simply unacceptable.

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<sup>36</sup> Again, in this respect, it is notable that, while the CMPA believes a larger share of the benefits package for the Shaw-Conwest transaction should flow to third parties, the package ultimately approved will see 56% of the funds for on-screen and/or programming-related initiatives flow to the development, creation and promotion of incremental, independently-produced programming of national interest.

<sup>37</sup> *Ibid.*, above note 27, at par. 12. According to BCE, “nation-building programming themes could involve a national health initiative, or celebrations and profiles of Great Canadians in any filed that reflects Canadian values.”

<sup>38</sup> *Ibid.*, above note 6, Schedule 1, par. 1.

71. The CMPA therefore calls on the Commission to correct this egregious situation by directing BCE not only to boost substantially its benefits expenditures on on-screen programming to at least \$183 million<sup>39</sup>, but to ensure a predominant portion of those funds - namely 75%, or roughly \$137 million<sup>40</sup> - flows to third parties for the production of programs of national interest. To allow BCE instead to keep for itself a predominant portion of its on-screen benefits funds to use for in-house CTV productions would severely undermine the goal of ensuring Canadians have access to a diversity of Canadian programming from a variety of sources and regions of Canada.
72. The CMPA is also concerned that the diversity of voices in Canadian programming is diminishing as a result of the Commission increasingly permitting benefits for on-screen programming to flow to broadcasters' self-directed initiatives, as opposed to being funneled into third-party, independent funds or endowments. Since self-directed benefits necessarily focus on only the specific genre or program format of choice of a particular broadcaster and its established processes and partners of choice, they ultimately serve the interests of specific broadcasters and not the system as a whole.
73. Moreover, self-directed benefits packages have given broadcasters an increasing amount of power over producers wishing to access benefits funds. Since benefits funds provide an injection of rare incremental money into the system for the creation of Canadian programming, and producers are eager to access the funds given the limited amount of funding in the system, broadcasters are able to dictate licence terms to producers even more than usual, particularly in light of the general lack of guidelines for many self-directed funds.
74. For these reasons, the CMPA also asks the Commission to require that the benefits to be allocated to independently-produced Canadian programming are administered by a third party, and are not limited to projects that are ultimately broadcast only on CTVgm's television properties.

### Terms of Trade

75. The CMPA notes and appreciates that, in its notice announcing the upcoming Group Licence Renewal process<sup>41</sup>, the Commission has adopted the language it employed in the Shaw-Canwest decision regarding Terms of Trade, namely that, in the event that any of the broadcasting groups identified in the notice (which includes CTVgm) have not reached terms of

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<sup>39</sup> *Ibid.*, above note 13.

<sup>40</sup> 75% of \$183 million.

<sup>41</sup> Broadcasting Notice of Consultation CRTC 2010-952, <http://www.crtc.gc.ca/eng/archive/2010/2010-952.htm>.

trade agreements with independent producers before the 4 April 2011 group licence renewal hearing, the Commission will require those groups to file substantive proposals as part of the record of that hearing and will then establish appropriate provisions for terms of trade as part of its determinations in the licence renewal decisions for the services operated by those groups.

### **Vertical Integration**

76. The CMPA notes that the Commission has announced a proceeding to review the regulatory framework relating to vertical integration.<sup>42</sup> Accordingly, the CMPA has chosen to wait until that process to raise any concerns it may have respecting this transaction and vertical integration.

### **Conclusion**

77. BCE's approach to the payment of benefits arising from this transaction represents a very significant departure from what the CRTC's long-standing Tangible Benefits Policy requires. It is also blatantly self-serving, which is another inconsistency with the policy.
78. Accordingly, the CMPA urges the Commission to require BCE to substantially amend its benefits proposals so that they are fully consistent with the Commission's policy and past decisions, and thus respond to the concerns outlined in this intervention. Absent such necessary changes, the CMPA submits that approval of the BCE application would be contrary to the public interest.

Yours truly,

*[Original signed by Norm Bolen]*

Norm Bolen  
President & CEO

Attach.

cc: Mirko Bibic, [mirko.bibic@bell.ca](mailto:mirko.bibic@bell.ca)

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<sup>42</sup> Broadcasting Notice of Consultation CRTC 2010-783, <http://www.crtc.gc.ca/eng/archive/2010/2010-783.htm>, and 2010-783-1, <http://www.crtc.gc.ca/eng/archive/2010/2010-783-1.htm>.