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The Canadian Media Production Association (CMPA)

Submission in Response to BNOC CRTC 2012-370, Item 1: Application by BCE Inc. (BCE) on behalf of Astral Media inc. (Astral) for authority to change the effective control of Astral, and its licensed broadcasting subsidiaries - Application 2012-0516-2

SUBMISSION

Introduction

1. 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*.

2. This transaction raises significant concerns with respect to the level of ownership BCE will attain within the Canadian broadcasting system and the impact this will have on the diversity of broadcasting voices available to Canadians. From a CMPA member's standpoint, this transaction, if approved, will mean the disappearance of a highly-valued, independent purchaser and broadcaster of Canadian programs - especially feature films and children's and youth programming - and one which has throughout its history been a strong and vocal supporter of independent productions.

3. The CMPA believes, however, that the Commission can mitigate those concerns to a reasonable degree by first ensuring that BCE has properly valued this transaction[1] and then requiring BCE to contribute a corresponding benefits package that will serve to enhance support for Canadian programming in a meaningful and appropriate way. To be meaningful and appropriate in these circumstances, such a benefits package must be significant enough to offset the loss of Astral as a separate and independent program buyer and ensure a continued diversity of content, particularly in under-represented areas. This will require a real and material injection of new funds into those areas of programming that will be most affected by Astral's disappearance from the Canadian broadcasting system: for English-language programming, this means new and substantial funding support for Canadian feature films and programming for children and youth.

[1] In these circumstances, the CMPA relies on the Commission's expertise to determine the true value of the BCE-Astral transaction and the appropriate assignment of relative values to the Astral radio assets (vs. TV assets) and to properly-excluded assets.

4. In addition, the increased ownership concentration and program buying power BCE will gain from this transaction only heightens the importance of ensuring independent producers have access to *all* of BCE's various programming services on the commercially reasonable terms established in the CMPA's Terms of Trade Agreement. For example, the licence fees BCE must pay for programs will have to reflect the larger portfolio of services on which it will now be able to broadcast those programs.

5. Given that both Bell Media and Astral are signatories to the Terms of Trade Agreement and that BCE's CTV services must adhere to it by condition of licence ("COL"), attaching the same COL to the Astral English-language services will be both a natural and necessary safeguard in these circumstances.

6. It is also critical that the benefits funding flowing from this transaction are used to the maximum extent possible to create more and better Canadian programming and are not eroded through inappropriate allocations to intra-corporate transfers unrelated to broadcasting.

7. Unfortunately, by excluding the value of certain assets from the benefits calculation and by proposing to allocate substantial benefits funds to non-broadcasting intra-corporate transfers and non-incremental initiatives, BCE's application runs contrary to the Commission's benefits policy in a number of ways. Moreover, given the circumstances and nature of the English-language services BCE is seeking to acquire, the amounts it has proposed to allocate to the critical areas of English-language feature films and children's and youth programming are completely inadequate.

8. As a result, BCE's proposed benefits package does more to emphasize the disadvantages of this transaction than its potential advantages.

9. Accordingly, and for the reasons expanded upon below, the CMPA <u>supports</u> this application <u>conditional</u> upon BCE amending its benefits proposal in the manner described in this submission, so that it is fully consistent with the Commission's policy and past decisions, and provides substantially more funding to the Canadian TV programming areas most aligned with the nature of the services being acquired as well as most in need.

10. Specifically, the CMPA will outline in the following sections why the total TV benefits package flowing from this transaction should amount to *at least* **$180.5 million**, of which 85% - or *at least* **$153.4 million** - should be allocated to On-Screen Benefits. In turn, as we will explain, the On-Screen Benefits allocated to support Canadian English-language feature films and programming for children and youth should, in each case, be *at least* **$28.9 million**.

Concentration of Ownership and the Role of Transfer Benefits

11. As the CRTC noted in Public Notice CRTC 1992-42, *Assessment of the Impact of the Benefits Test Applied at the Time of Transfers of Ownership or Control of Broadcasting* Undertakings[2], it first referenced the role of transfer benefits in 1977: in Decision CRTC 77-456[3] it stated that that the

[2] http://www.crtc.gc.ca/eng/archive/1992/PB92-42.HTM.
[3] The Notice also quoted from Decision CRTC 77-275.

role of benefits was closely linked to concerns which an ownership transaction would trigger relating to "*the potential for concentration of ownership and concerns regarding any reduction in the diversity of expression available in a market.*"[4] The Commission subsequently reinforced the link between the role of benefits as a means to address concentration of ownership concerns arising from a particular ownership transaction in Decision CRTC 86-367[5]:

> "Concentration of ownership within the broadcasting system is not itself necessarily of concern to the Commission, provided that there continues to be an effective degree of diversity of ownership and of programming sources to ensure that the objectives of the Act are met. Today's highly competitive communications environment in every market as well as the high costs and risks involved dictate that the ownership structure must undoubtedly be composed of broadcasting holdings of various sizes, including larger entities with larger pools of resources, which are strong enough to compete with foreign competition and have the capacity to produce Canadian programming of competitive quality. The Commission will continue to deal with such issues on a case-by-case basis and will have to be satisfied that the purchaser demonstrates that the advantages of any such concentration clearly outweigh the disadvantages, and that the transaction is in the public interest."[6]

12. The Commission's application of its benefits policy as a means to ensure that the advantages of increased ownership concentration arising from a broadcasting transaction outweigh the disadvantages has been a prevailing theme throughout the history of the policy. For example, when codifying its approach to benefits in 1989[7], the Commission reiterated that benefits are a means for the applicant to satisfy the onus on it "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 [i.e., regarding concentration of ownership] with respect to transactions of this nature."[8]

13. Accordingly, before approving this current transaction, the Commission will have to be satisfied that the associated benefits package is appropriate and sufficient enough to ensure the advantages of BCE's increased ownership in the broadcasting system will outweigh its disadvantages. The CMPA submits that, unless amended in the manner described below, BCE's proposed benefits package fails to meet this test.

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[4] Emphasis added.
[5] *Applications for Authority to Transfer Effective Control of Télé-Métropole Inc. to Power Corporation of Canada*, http://www.crtc.gc.ca/eng/archive/1986/DB86-367.HTM.
[6] Emphasis added.
[7] Public Notice CRTC 1989-89, *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.
[8] See also, for example, Broadcasting Decision CRTC 2003-205, A*stral Media inc., on behalf of 9122-8106 Québec inc., a corporation composed of TVA Group Inc. and Radio Nord Communications inc.*, http://www.crtc.gc.ca/eng/archive/2003/db2003-205.htm, at par. 34.

The Proper Total Quantum of Television Benefits

14. For the purpose of calculating the appropriate level of television benefits payable, BCE has valued the Astral television assets at $1.393 billion, and has thus proposed a television benefits package valued at $139.3 million (representing 10%, as required).

15. The CMPA submits, however, that BCE has improperly excluded from this calculation the $412 million it has attributed to the value of the Astral specialty services of which it will acquire an equal, 50% ownership as part of this transaction ("the Equal Ownership Services").[9] Thus, without including any other increases that may result from the Commission's re-allocation of the value BCE has assigned to the Astral radio assets or to other excluded assets, the proper value of the Astral TV assets for the purpose of calculating the TV benefits is *at least* **$1.805 billion** ($1.393 billion + $412 million), meaning the TV benefits package should be worth *at least* **$180.5 million**.

Valuation for Benefits Purposes: Including the Equal Ownership Services

16. BCE argues that including the Equal Ownership Services in the value of the transaction calculation would not be "consistent with numerous past decisions".[10] In support of this position, BCE argues that the Commission has "routinely *excluded* minority interests from the calculation of the value of the transaction".[11]

17. As BCE acknowledges[12], however, the CRTC's most recent statement on this subject, contained in its 2011 decision approving Bell's purchase of CTV, is that "...it is the Commission's practice in transactions involving multiple assets to include minority interests in broadcasting undertakings in the transaction value."[13] It is notable that, when discussing the value of the CTV transaction during the oral hearing phase of that 2011 proceeding, Commissioner Duncan put it to BCE's representatives that inclusion of minority interests was the Commission's practice and that, in response, BCE requested that the Commission reconsider that position[14]; accordingly, the statement in the subsequent decision represents a confirmation of the Commission's practice after due consideration of BCE's comments on the matter.

18. The CMPA also wishes to point out that, contrary to BCE's current argument, the Commission has not "routinely" excluded minority interests from the value of a transaction. As identified in a paper presented at the April 2012 Communications Law and Policy Conference:

> "In the BCE-CTV Decision of 2000, the Commission noted that CTV Inc. had "controlling and minority interests in a large number of licensed pay and specialty television

[9] Historia, Séries+, TELETOON English, TELETOON Français, TELETOON Retro English and TELETOON Rétro Français.
[10] Bell Supplementary Brief, at par. 81.
[11] Ibid., at par. 85. BCE's original emphasis.
[12] Ibid., at par. 84.
[13] Broadcasting Decision CRTC 2011-163, *Change in effective control of CTVglobemedia Inc.'s licensed broadcasting* subsidiaries, http://www.crtc.gc.ca/eng/archive/2011/2011-163.htm, at par. 12, second bullet.
[14] *Transcripts*, Volume 1, 1 February 2011, http://www.crtc.gc.ca/eng/transcripts/2011/tb0201.html, lines 506-512.

undertakings", and went on to accept as the value of the transaction "[t]he amount paid by BCE for the shares of CTV Inc. [which] totals approximately $2.3 billion." In the TQS transaction the following year, in which Cogeco and CTV (as BCE's subsidiary) purchased TQS assets following Quebecor's required divestiture, minority interests were again included in the share purchase price and, as a result, in the value of the transaction, and the decision again did not address this issue directly." [15]

19. We would also add to these examples the Commission's more recent decision approving Shaw's purchase of Canwest, where the Commission's revised valuation of the transaction for benefits purposes covered all of Canwest's services, regardless of ownership levels.[16]

20. In any event, it is important to recognize that BCE's interest in the Equal Ownership Services will represent more than a "minority interest"; instead, as noted, BCE will be acquiring an equal, 50% interest in each of the various services. BCE has not provided any evidence that the Commission has "routinely" - indeed, if ever - excluded equal, 50% ownership interests from the calculation of the value of a transaction.

21. In fact, the Commission included the value of equal, 50% ownership interests in the calculation of the value of the 2007 Canwest-Alliance Atlantis transaction. In Broadcasting Decision CRTC 2007-429[17], the Commission approved the transfer to Canwest of Alliance Atlantis's 18 broadcasting specialty television services as well as the transfer of a minority interest in three other services and a 50% partnership interest in Historia and Séries+, s.e.n.c.

22. In response to a CRTC Deficiency Letter[18], BCE has acknowledged that the Commission included the 50% interests in Historia and Séries+ in the value of the Alliance Atlantis transaction. BCE tries to suggest, however, that Canwest had offered up the inclusion of those services as a voluntary enticement to obtain CRTC approval of the transaction. With respect, there is nothing in the extensive record of that 2007 proceeding to lend any credence whatsoever to such self-serving speculation. To the contrary, it is perfectly clear from the application and supporting valuation report, the applicant's responses to numerous deficiency letters, and the hearing transcripts, that Canwest assumed from the start - and never questioned - that the 50% interests it was acquiring in Historia and Séries+ would be included in the valuation for benefits purposes.[19]

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[15] *Tangible Benefits and the "Value of the Transaction": Lessons Learned*, by Grant Buchanan *et al*., paper presented at the Sixteenth Biennial Communications Law Conference, Law Society of Upper Canada/Canadian Bar Association, April 26-27, 2012, Ottawa Ontario, at par. 106. The referenced CRTC decisions are Broadcasting Decision CRTC 2000-747, http://www.crtc.gc.ca/eng/archive/2000/DB2000-747.htm, and Broadcasting Decision CRTC 2001-746, http://www.crtc.gc.ca/eng/archive/2001/db2001-746.htm.

[16] Broadcasting Decision CRTC 2011-782, *Change in the effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries*, http://www.crtc.gc.ca/eng/archive/2010/2010-782.htm.

[17] *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.

[18] BCE Response to CRTC Deficiency Letter dated 31 May 2012, at Q6.

[19] We have reviewed the extensive Alliance Atlantis transaction file and note that while the Commission presented Canwest with numerous opportunities to indicate that it was including the value of its 50% ownership in Historia and Séries+ as an added but not required offer, it never did so. To the contrary, in Appendix A to its Supplementary Brief (Document 757810-2007-0700-5), Canwest identified Historia and Séries+ in the list of those

23. BCE tries to make much of the fact that, in the Alliance Atlantis decision, the Commission excluded the value of three services, One, Scream and The Score. However, Canwest was acquiring a minority interest in each of those services - 37.77%, 49% and 23.3%, respectively[20] - and not an equal, 50% interest as it was acquiring in Historia and Séries+, which is the same level of ownership BCE is now acquiring in those same services (plus others).

24. In these circumstances, concentration of ownership concerns arise as equally with respect to the Equal Ownership Services as they do with respect to the other broadcasting assets BCE is acquiring - because those services will now be half-owned by Canada's largest vertically integrated broadcasting company rather than by the independent, non-vertically integrated and smaller Astral.

25. Therefore, contrary to Bell's arguments, the CMPA submits that inclusion of the Equal Ownership Services in this case would be entirely consistent and in full accordance with the Commission's benefits policy, its rationale and its application over the years.

26. As a result, the value of the TV assets in this transaction subject to the benefits policy should be increased by the $412 million BCE has attributed to the value of the Equal Ownership Services.[21]

The Proper Amount of On-Screen Television Benefits: at least 85%

27. BCE proposes to allocate roughly 69% of its proposed television benefits, amounting to $95.8 million, to "On-Screen Benefits". This includes $4.9 million it proposes to spend on film festivals.

28. The remainder of BCE's proposed TV benefits package - what the CRTC has historically characterized as "Social Benefits"- is made up of $40 million which BCE proposes to spend on improving Northwestel's wireless telecommunications infrastructure, and $3.5 million for promoting Bell's annual *Let's Talk Day* public relations campaign. This $43.5 million represents roughly 31% of BCE's proposed TV benefits package.

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services "included in this transaction that are operational and require prior Commission approval for transfer of ownership or control."

[20] It is important to recognize that, in the Alliance Atlantis decision, the Commission's statement that Canwest's valuators (Ernst & Young) had included all three of One, Scream and The Score as non-regulated assets appears to have been a mistake. From our reading of the Canwest application and valuation report, the three minority-owned services Ernst & Young had identified as non-regulated assets were The Score as well as OUTtv (at 2.2%) and Hard ON Pridevision (at 2.2%): see Appendix D to the Canwest Supplementary Brief, ibid. Ernst & Young had actually included One and Scream in the list of regulated assets which Canwest then described in Appendix A to its Supplementary Brief as operational and requiring prior Commission approval for transfer of ownership or control, along with Historia and Séries+. On this basis, it appears the Commission itself made the specific decision to exclude the minority interests in One and Scream; the fact it did not similarly choose to exclude the equal, 50% ownership of Historia and Séries+ further supports the argument that their inclusion was consistent with Commission policy and not something Canwest had volunteered.

[21] Or some other higher figure the Commission may attach to these assets in its review of BCE's valuations.

29. As the Commission confirmed in a Deficiency Letter to BCE[22], its general practice is "to require that the majority (approximately 85 to 90%) of television tangible benefits should result in on-screen programming". While the Commission approved a lesser percentage of On-Screen Benefits in the 2010 Shaw-Canwest decision[23] and in the 2011 BCE-CTV decision[24], it is clear that those decisions constituted exceptions to the Commission's usual practice, since, subsequent to the BCE-CTV decision, the Commission has on at least 2 occasions re-confirmed that its "…general approach is to have the majority (approximately 85%) of the tangible benefits package directed to onscreen programming."[25]

30. The CMPA notes that, while the Shaw-Canwest and BCE-CTV transactions resulted in increased vertical integration in the broadcasting system, neither reduced the number of program purchasers with whom producers can do business - or "doors to knock on": they simply replaced the entities owning the doors. However, given the degree of concentration that will arise in the market as a result of BCE's purchase of Astral and the consequent loss of another independent window to license and exhibit content, the CMPA submits that it is critical that *at least* 85% of the BCE-Astral benefits is allocated to on-screen productions. In fact, unless the On-Screen Benefits are maximized to the greatest extent possible, it is hard to see how this transaction would not result in less diversity on-screen in the long run.

Re-allocating the Northwestel Telecommunications Funds to On-Screen Broadcasting Initiatives

31. BCE should be required to re-allocate to On-Screen Benefits the funds it has improperly earmarked for improving Northwestel's wireless telecommunications infrastructure.

32. In this respect, the CMPA joins the many other interveners who have voiced their opposition to BCE's proposal to use $40 million in *public* benefits to instead benefit its shareholders through to an intra corporate transfer to its subsidiary, Northwestel.

33. We understand that arguments will be presented by interveners more familiar with the telecommunications background in the North and that these will directly relate to the Commission's expectations regarding Northwestel's infrastructure problems and its regulatory obligation to implement a "network modernization plan". We do not intend to repeat those arguments. Suffice it to say that, while the CMPA is sympathetic to the telecommunications needs of the residents of Canada's North, we submit that BCE's proposal to use broadcasting benefits funds to subsidize the wireless telecommunication infrastructure improvements which the CRTC has required its subsidiary to undertake is self-serving and inappropriate. The proposal should be rejected in its entirety as an attempt to use public benefits to bolster BCE's private competitive telecommunications interests.

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[22] CRTC Deficiency Letter dated 24 May 2012, at Q7.
[23] Ibid., above note 16.
[24] Broadcasting Decision CRTC 2011-163, *Change in effective control of CTVglobemedia Inc.'s licensed broadcasting subsidiaries*, http://www.crtc.gc.ca/eng/archive/2011/2011-163.htm.
[25] See Broadcasting Decision CRTC 2011-585, *AUX TV, BITE Television and travel + escape – Change of effective control*, http://www.crtc.gc.ca/eng/archive/2011/2011-585.htm, at par. 18; and Broadcasting Decision CRTC 2012-381, *Change in effective control* [Blue Ant Media Inc], http://www.crtc.gc.ca/eng/archive/2012/2012-381.htm, at par. 20.

34. Instead, the Commission should require BCE to re-direct the $40 million it has tried to earmark for this non-broadcasting private subsidy program to incremental on-screen Canadian programming initiatives that would truly constitute significant and unequivocal benefits that will yield measureable improvements to the communities served by the broadcasting undertakings and to the Canadian broadcasting system.

Film Festival Funding: A Social Benefit, Not On-Screen

35. In addition, and consistent with past practice, the Commission should rule that BCE's proposed funding for film festivals does not qualify as an On-Screen Benefit, and require BCE to replace that initiative in the On-Screen category with more appropriate expenditures.

36. The CMPA acknowledges that the CRTC has accepted contributions to film festivals as benefits in the past, and we see value in providing such financial support. However, to our knowledge, the Commission has always classified funding contributions to film festivals as "Social Benefits" rather than "On-Screen Benefits".[26] We submit this makes perfect sense, as film festivals do not directly lead to Canadian films being broadcast. Indeed, film festivals are dominated by foreign rather than Canadian films; moreover, we note that BCE has not linked the proposed film festival funding in any way to supporting, acquiring or promoting and showing Canadian films at the festivals themselves, let alone ensuring any Canadian films at the festivals get shown elsewhere, including on Canadian TV.

37. Accordingly, while we support permitting BCE to help film festivals with a portion of the 15% of its package properly allocated to Social Benefits, the CMPA submits that film festival contributions should not serve to reduce the 85% of benefits funding that is more properly allocated to on-screen initiatives which actually support the creation and broadcasting of Canadian feature films.

On-Screen Benefits: At Least $153.4 Million

38. As a result, based on a TV benefits package that, for the reasons described above, should total *at least* $180.5 million, BCE should be required to allocate *at least* $153.4 million (85%) to appropriate On-Screen Benefits. The remaining $27.1 million (15%) of other, "Social Benefits" should include the $4.9 million proposed for film festivals; however, it should not include any funds for improving Northwestel's wireless telecommunications infrastructure, as that initiative does not qualify as a TV benefit in any capacity.

39. In the section that follows, we propose how best to allocate the On-Screen Benefits funds to new Canadian programming in order to reflect the nature of the services in this transaction and

[26] This was clearly the case with three of the four examples BCE provided in its Response to CRTC Deficiency Letter dated 24 May 2012, namely at footnote 3: Decision CRTC 2001-647, http://www.crtc.gc.ca/eng/archive/2001/db2001-647.htm; at footnote 5: Decision 2004-502, http://www.crtc.gc.ca/eng/archive/2004/db2004-502.htm; and at footnote 6: Decision CRTC 2007-360, http://www.crtc.gc.ca/eng/archive/2007/db2007-360.htm. While the Commission did not distinguish between "On-Screen Benefits" and "Social Benefits" in BCE's remaining example at footnote 4, Decision CRTC 2001-752, http://www.crtc.gc.ca/eng/archive/2001/db2001-752.htm, the film festival contribution was only $50,000 over 5 years.

make the most appropriate and the biggest positive contribution to the Canadian broadcasting system.

Appropriately Allocating the Television Benefits to Meet the Biggest Needs: Feature Films and Children and Youth Programming

40. Other than Astral's two very small conventional television stations, the English-language broadcasting undertakings which BCE is acquiring in this transaction are either movie-based (TMN, Mpix, Viewers Choice) or devote their entire or a substantial part of their schedules to programming for children and youth (Family Channel, Disney XD, Disney Junior, TELETOON, TELETOON Retro). To satisfy the Commission's benefits test, BCE must demonstrate that its purchase of these English-language movie and children/youth services "will yield significant and unequivocal benefits to the communities they serve."[27] Those communities are the subscribers to those services, who are primarily Canadian movie fans on the one hand, and children/youth/families on the other.

41. BCE has proposed to allocate $4 million to support the creation and production of Canadian English-language feature films. The CMPA appreciates that BCE has chosen to direct those funds to the Harold Greenberg Fund ("HGF"). We fully agree with BCE that, in these circumstances, the HGF - an established, respected and independent fund - is the most appropriate recipient of benefits funding intended to support feature films.

42. BCE has also proposed to allocate $7 million to support independently-produced English-language programming for children and youth.

43. While BCE's Valuation Report does not assign values to individual services, Astral's English-language movie and children/youth services combined represent *more than 35%* of the value BCE has attributed to the television assets it is acquiring in this deal.[28] Yet the amount BCE currently proposes to allocate to supporting Canadian English-language feature films and children/youth programming represents *less than 8%* of its proposed television benefits package.[29]

44. The contributions BCE proposes to make to support Canadian feature films and children and youth programming completely fail to satisfy the Commission's benefits policy. They are wholly inadequate given the size and nature of this transaction and entirely ignore "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."[30] Frankly, these aspects of BCE's benefits proposal represent nothing more than token nods to Canadian feature film audiences and children and youth, and will do little if anything meaningful to "yield measurable improvements

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[27] Ibid., above note 7.
[28] In fact, the CMPA believes that BCE has undervalued both the overall television component of this transaction as well as the English-language television assets; nevertheless, BCE's valuations are as follows: [English-language Pay TV (457) + Specialty (29) + VCC (8)]/All TV Assets (1394) = 494/1394 = 35.4%.
[29] [$4M + $7M]/$139.3M = 7.9%.
[30] Ibid., above note 7.

to the communities served by the broadcasting undertaking being transferred"[31] or result in "programming [that] is new or enhances that offered by the existing licensee."[32]

45. The Commission should not permit BCE to short-change the communities served by Astral's movie and children/youth services by refusing to allocate substantially more benefits funding to support programming for those communities.

46. Moreover, the CMPA submits that the amount BCE has offered to contribute to the HGF should not be considered incremental and thus does not qualify as a tangible benefit. Substantially more funding for Canadian feature films is necessary to satisfy the incrementality requirement.

BCE's Funding for Feature Films is Completely Inadequate

47. The CMPA has repeatedly highlighted for more than a year now that the Canadian feature film industry is facing a funding crisis because broadcasters in general no longer support Canadian feature films as they once did.

48. Indeed, research we previously submitted demonstrated a significant downward trend in the financial support provided by Canadian television broadcasters over the last eight years.[33] Specifically, the data showed that direct broadcaster support in Telefilm Canada-supported English-language films decreased from a high of $16.3 million in 2003-04 to just $3.3 million in 2010-11, representing a 79% drop. In terms of the type of financial support, the data showed that equity investments decreased by 98%, from a high of $12.8 million to just $300,000 over the same period. A similar trend was observed with regard to the total value of licence fees. Total licence fees in 2003-04 amounted to $3.6 million, but decreased by 88% to $420,000 by 2009-10. In 2010-11, total licence fees regained some lost ground, rising to $3 million.

49. Traditionally a critical supporter of Canadian feature films, Pay TV's equity contribution to English-language feature films decreased by *97%* between 2003-04 and 2010-11, dropping from $9.2 million to just $300,000. Licence fees provided by Pay TV services also experienced a dramatic decline over the same period, dropping from $2.1 million in 2003-04 to just $320,000 in 2010-11.

50. Feature films have always been an important and prominent ingredient in the diverse mix of programming in the Canadian broadcasting system, and despite what some broadcasters might say, films continue to be an important part of the system. Even with the new and different content platforms, and the opportunities for Canadians to access films from a variety of

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[31] Ibid.

[32] See par. a) of the Appendix to 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.

[33] *Canadian Television Broadcasters' Financial Participation in the Production of English-language Theatrical Films Supported by Telefilm Canada Under the Main Program of the Canada Feature Film Fund*: *see* the CMPA's 27 September 2011 intervention regarding Astral's licence renewal applications, available at http://www.cftpa.ca/government_relations/pdfs/2011-09-27-CMPA%20Astral%20GLR%20Submission.pdf, at Appendix A, http://www.cftpa.ca/newsroom/pdf/studies/2011.09.BroadcasterSupportToEnglishTFCFeatureFilms(FINAL).pdf.

sources, and on different devices, Canadian broadcasters still air movies: our previously-filed research[34] demonstrated that the number of theatrical film hours (both Canadian and foreign) broadcast on TV in Canada has increased significantly over the last many years. The reason for these increases is that broadcasters recognize that Canadians like movies and still want to see movies on TV. Unfortunately, our research showed that the Canadian films being broadcast are increasingly older films; moreover, the average number of repeats of those films doubled between 2004-05 and 2009-10.

51. In fact, research we've just undertaken specifically in respect of TMN (and its multiplex channels)[35] demonstrates that movies make up approximately *four-fifths* of its program hours, a figure that has remained relatively constant for at least the last 3 years.[36] Moreover, theatrically released films make up roughly *two-thirds* of all TMN's Canadian programming.[37]

52. Given the significance of Astral's movie services in this ownership transaction, this current regulatory proceeding represents both an appropriate and a unique opportunity to inject new and substantial funding into the production of Canadian feature films that will be broadcast on Canadian TV in the future.

53. It must be recognized that, despite the large number of ownership transactions and resulting benefits packages over the years, only a relatively miniscule amount of television benefits funding has ever been committed specifically to support Canadian feature films.

54. The CMPA engaged Boon Dog Professional Services Inc. ("BDPSI"), which undertakes the annual syndicated research study called the *Canadian Television Benefits Monitor: Tracking Spending on English--Language Television Benefits Packages*, to analyze the television benefits packages approved by the Commission since 2000 in order to identify and quantify any commitments to use benefits funds to support Canadian feature films. According to BDPSI, of the roughly $820 million in Television Benefits committed to various on-screen programming initiatives over the last 12 years, only $1.5 million has been specifically committed to support Canadian feature films.[38] This represents *less than 0.2%* of all benefits dollars in the system since 2000.

55. While the CMPA recognizes that the greatest amount of television benefits funding in the system has been, and will be, allocated to Programs of National Interest ("PNI")[39], which can include Canadian feature films, we submit the likelihood of any significant portion of those PNI funds being used to invest in or acquire new Canadian feature films is very slim. This is because the PNI benefits funds are payable by broadcasters who, because their services generally do not broadcast first-run movies, would presumably choose to allocate those funds to other

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[34] *Examination of the Levels of Broadcast for Canadian Theatrical Films*, ibid., at Appendix B, http://www.cftpa.ca/newsroom/pdf/studies/2011-05-09-Strategic_Inc-Theatrical_Release_Research_Report_final_21.pdf.

[35] See the Appendix to this submission.

[36] Excluding HBO Canada, which has a much heavier focus on dramatic series: ibid.

[37] Including HBO Canada: ibid.

[38] Ibid., above note 17.

[39] Formerly "priority programming".

categories of programming.[40] While one of those broadcasters - BCE - will acquire Astral's movie-based services as a result of this transaction, its reluctance to allocate more than a paltry amount of its current benefits package to Canadian feature films strongly suggests that it has no intention to voluntarily direct its previously-established benefits obligations (e.g., for CTV) in that way.

56. Accordingly, BCE's suggestion that a "safety net" of available funds exists in the system, supplemented by an "unprecedented" quantum of benefits[41], certainly does not apply to funding for Canadian feature films, if that suggestion applies at all.

57. BCE proposes to allocate *less than 3%* of its television benefits package to supporting Canadian English-language feature films.[42] This is unacceptable as it bears no relationship to the nature of this transaction, the characteristics of the broadcasting undertakings in question and the community they serve.

58. Given the importance and scope of the movie services BCE is acquiring, and the lack of benefits funding in the system for Canadian feature films, the Commission should require BCE to increase the benefits flowing to such programming from this transaction by a meaningful amount. Further below we provide our proposal for an appropriate level of benefits funding to be allocated to the HGF to support Canadian feature films.

BCE's Current Feature Film Proposal is Not Incremental

59. In addition to the above concerns regarding the inadequate level of benefits funding BCE proposes to allocate to support Canadian feature films, the CMPA submits that BCE's current proposal would fail to provide incremental funding and so does not qualify as a tangible benefit.

60. As the Commission is aware, prior to the recent Astral licence renewal decisions, TMN had long been required by condition of licence ("COL") to expend not less than $1.3 million each year on script and concept development. The Commission removed this obligation when it brought Astral within the group-based licensing approach.[43]

61. When subject to the above-noted COL, Astral contributed the required $1.3 million annual script and concept development funding to the HGF. The $400,000 BCE now proposes to contribute annually to the HGF for English-language feature films[44] would therefore represent less than one-third of TMN's former regulatory obligation. While perhaps "incremental" in a very narrow, technical sense, in reality BCE's contribution to the HGF will not lead to any

[40] We note that, in the decision approving Corus' purchase of SexTV (now W Movies) and Drive-In Classics (now Sundance Channel), the Commission approved $2.74 million in benefits generally for "Canadian programming"; however, BDSPI reports that none of these funds have been spent yet, so there's no telling if any will be used to invest in or acquire Canadian English-language feature films.
[41] Ibid., above note 10, at par. 98.
[42] $4M/$139.3M = 2.87%.
[43] Broadcasting Decision 2012-241, *Astral Media inc. – Group-based licence renewals*, http://www.crtc.gc.ca/eng/archive/2012/2012-241.htm.
[44] BCE's proposal is $4 million over 10 years.

programming "that is new or enhances that offered by the existing licensee."[45] Thus, the Commission should rule that BCE's currently-proposed HGF contribution does not qualify as a tangible benefit.

62. To be truly incremental, BCE's contribution to the HGF must be large enough to make a real difference in the creation and production of new English-language feature films.

More Benefits Funding for Programming for Children and Youth

63. As with BCE's feature film proposal, BCE's proposal to allocate *only 5%* of its television benefits package to supporting new and enhanced English-language programming for children and youth is fundamentally inconsistent with the nature of this transaction, the characteristics of the broadcasting undertakings in question and the community they serve.

64. Again, given the significance in this ownership transaction of the Astral's services that provide programming for children and youth, this current regulatory proceeding represents both an appropriate and a unique opportunity to inject new and substantial funding into the production of new program series for that important and underserved audience.

65. The CMPA also engaged BDPSI to analyze the television benefits packages approved by the Commission since 2000 in order to identify and quantify any commitments to use benefits funds to support Canadian children/youth programming. According to BDPSI, of the roughly $820 million in Television Benefits committed to various on-screen programming initiatives over the last 12 years, *no benefits funding* has ever been specifically committed to support Canadian children/youth programming. In other words, despite the number of ownership transactions over the years, the Commission has *never* approved a television benefit package which specifically committed funding to support Canadian children/youth programming.

66. And, while PNI can include such programming, it is again unlikely that a significant portion of PNI benefits will be used for that purpose as the broadcasters subject to PNI benefits obligations generally do not operate children/youth services. A notable exception has been CTV's support of the successful Degrassi series - which goes to show what benefits can accomplish if used for children/youth programming. However, similar to our observation above regarding the likelihood of BCE voluntarily allocating benefits to support feature films, the fact BCE is only willing to direct a very small percentage of its current benefits proposal to Canadian children/youth programming strongly suggests that it plans to use the lion's share of its previously-established benefits obligations (e.g., for CTV) in other ways.

67. Again this means that BCE's suggestion that a "safety net" of available funds exists in the system, supplemented by an "unprecedented" quantum of benefits[46], certainly does not apply to funding for Canadian children/youth programming, if that suggestion applies at all.

68. Given the importance and scope of the children and youth services BCE is acquiring, and the lack of benefits funding in the system for children and youth programming, the Commission should require BCE to increase the benefits flowing to such programming from this transaction

[45] Ibid., above note 32.
[46] Ibid., above note 41.

by a meaningful amount. We provide our proposal for an appropriate level of children/youth programming benefits below.

A Clear, Unequivocal and Appropriate Television Benefits Package: The CMPA Model

69. As addressed above, the CMPA submits that, with the proper inclusion of the value of the Equal Ownership Services, the Television benefits package arising from this transaction should be worth at least **$180.5 million** (rather than $139.3 million, as BCE has proposed), and that, consistent with the CRTC's practice, the On-Screen component should equal at least 85% of this amount, or at least **$153.4 million** (rather than the $95.8 million, as BCE has proposed). Since, under our model, BCE's proposed $4.9 million for film festivals would not qualify as an On-Screen Benefit, the total of additional On-Screen Benefit funding, above BCE's proposal, would be $62.5 million.[47]

70. We propose that the extra $62.5 million be added to the amounts BCE has proposed for feature films ($10 million) and programming for children/youth ($14 million) for a total of $86.5 million. We then propose that this amount be divided evenly between contributions to the HGF to support feature films and support for independently-produced children/youth programs, such that the new totals for each would be roughly $43.3 million.

71. We further propose that the total funds in each of these categories then be allocated to English-language programming and French-language programming based on the historical two-thirds: one-third (2/3:1/3) split which has long been the accepted approach of Telefilm Canada and the Canada Media Fund (and its predecessor, the Canada Television Fund), and which is similar to the method of allocation the Commission adopted for the Local Programming Improvement Fund ("LPIF").[48]

72. As a result, of the $43.3 million now in our model for the HGF, $28.9 million would be allocated to support English-language feature films and $14.4 million would be allocated to support French-language feature films.

73. Under our model, the same relative amounts would be allocated to English- and French-language independently-produced children/youth programs, respectively.

74. Our model leaves the total amount allocated to independently-produced "Other PNI" unchanged from BCE's proposal, at $60 million. This reflects the fact that, while the nature of the Astral services means the majority of On-Screen Benefits should be allocated to feature films and children/youth programming, Astral operates French-language services in other genres, and its movie services in both official languages supplement their feature film

[47] $153.4M - [$95.8M - $4.9M] = $62.5M.

[48] In Public Notice CRTC 2009-406, *Policy determinations resulting from the 27 April 2009 public* hearing, http://www.crtc.gc.ca/eng/archive/2009/2009-406.htm, the Commission determined that one third of the LPIF would be allocated equally to stations across both francophone and anglophone markets, and the remaining two thirds would be divided such that 30% would be directed to francophone markets and 70% to anglophone markets.

programming with other forms of PNI, including "edgy" drama and comedy series, and should be encouraged to continue doing so. We use the same allocation approach to split the "Other PNI" funds between English- and French-language initiatives, such that $40 million is allocated to the former and $20 million to the latter.

75. The $7 million BCE has proposed to allocate to French-language music programming would remain unchanged in our model, as Astral's music services are all French-language.

76. The following chart summarizes the CMPA's Benefits Model:

On-Screen Benefit	English-Language Programming	French-Language Programming	TOTAL
Feature Films: Harold Greenberg Fund	$28.9M	$14.4M	$43.3M
Children/Youth Programs	$28.9M	$14.4M	$43.3M
Music Programming	$0	$7M	$7.0M
"Other" PNI	$40M	$20M	$60.0M
TOTAL	$97.8	$55.8M	$153.4M[49]

77. We note that, while our model is based on a long-established approach to dividing television programming funding fairly and objectively between Canada's linguistic TV markets, it also roughly reflects the relative number of subscribers to Astral's English- and French-language licensed programming services. We submit that this additional subscriber-based analysis lends further credence to our allocation model as it not only reflects the subscriber and demographic splits in Canada, it also ensures that the benefits flowing from this transaction will foremost yield measurable improvements to the communities served by the broadcasting undertakings being transferred.

78. We submit that our model is the fairest, most objective and transparent means of allocating benefits, and avoids the possibility of the purchaser using subjective valuations to "game" the system so as to allocate benefits in a way that will serve its own competitive interests.

[49] Differences due to rounding.

Implementation Issues

The Payment Schedule

79. The CMPA opposes BCE's proposal to spread the payment of benefits over 10 years. Instead, we submit that benefits flowing from this and future ownership transactions should be payable in roughly equal installments over **5** years.

80. Historically, the Commission has required benefits to be paid in roughly equal installments over no more than 7 years, and, as BCE acknowledges[50], rejected a request by Canwest for a 10-year payment schedule for the Alliance Atlantis benefits (which, we note, was based on many of the same arguments BCE advances now): in doing so, the Commission pointed out that tangible benefit packages in the past had been managed successfully within five- and seven-year periods.[51]

81. The seven-year payment schedule which has been most common as of late reflected the then-typical length of a broadcaster's licence term. In its 2011 group licensing decisions, however, the Commission began to impose shorter, 5-year licence terms "given the pace of change in the broadcasting industry and the desire to assess the impact of the new group-based approach".[52] Subsequently, and presumably for the same reason, the Commission also established a five-year term for Astral[53]; indeed, in recently renewing the licences for various video-on-demand (VOD) undertakings, the Commission characterized 5-year terms as its new "general approach" and, referring again to "the rapidly evolving broadcasting environment", announced that it was appropriate to adopt the same general approach for VOD undertakings.[54]

82. Since the Commission's general approach is now to license broadcasters for no more than 5 years and that BCE's existing CTV services as well as the Astral services are subject to such 5-year terms, the CMPA submits it would be appropriate to require BCE to pay out the benefits flowing from this transaction in roughly equal installments over 5 years. The rationale for shortening the term for licence renewals - the uncertain future in light of the rapidly evolving broadcasting environment - is equally applicable in respect of benefits packages. Given the rate of change that media industries are facing, anything longer than 5 years - especially a 10-year horizon - would create too uncertain a future, particularly given the immediate challenges facing under-represented program categories.

83. Moreover, contrary to BCE's suggestion that benefits funding will be needed in "the outer years"[55], funding for Canadian feature films and children/youth program series is needed *now*.

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[50] Ibid., above note 10, at par. 100.
[51] Ibid., above note 17, at par. 80.
[52] Broadcasting Decision CRTC 2011-441, *Group-based licence renewals for English-language television groups – Introductory decision*, http://www.crtc.gc.ca/eng/archive/2011/2011-441.htm, at par. 11.
[53] Ibid., above note 43.
[54] Broadcasting Decision 2012-292, *Various national and regional video-on-demand programming undertakings – Licence renewals and amendments*, http://www.crtc.gc.ca/eng/archive/2012/2012-292.htm, at par. 90.
[55] Ibid., above note 50.

Ensuring Incrementality

84. In response to Commission deficiency questions, BCE advised that it is its intention to air programming flowing from both the present benefits package as well as from the 2011 BCE-CTV benefits package on as many of the services currently operated by Astral and by Bell Media as is relevant and is feasible.[56] The CMPA generally takes no issue with BCE's plan to exploit its new, benefits-funded Canadian programs across its various licensed services since that would be consistent with the group-based licence approach as well as with the CMPA's Terms of Trade Agreement (provided BCE pays licence fees for programs which reflect the larger portfolio of services on which it will now be able to broadcast those programs).

85. We question, however, how BCE will be able to clearly demonstrate that the benefits associated with the two different transactions and the two different sets of programming services will have been spent entirely on the production and acquisition of *incremental* programming initiatives. This is particularly of concern given that the Astral services are subject to a much higher PNI obligation than are the CTV services: for BCE to demonstrate incrementality with respect to the Astral services, it will need to invest funds in excess of Astral's 16% PNI obligation, whereas to demonstrate incrementality with respect to the CTV services, it will only need to invest funds in excess of CTV's much lower 5% PNI obligation. For this same reason, we are also concerned that BCE will be incented to allocate its Astral benefits to its CTV services – where it will be easier to claim incrementality - but not vice-versa.

86. As referenced above, the purpose of benefits is to ensure that the <u>advantages of a transaction outweigh the disadvantages, and that the transaction is in the public interest</u> because it will foremost yield measurable improvements to the communities served by the broadcasting undertakings being transferred. Accordingly, BCE must be able to demonstrate, first and foremost and in a clear and transparent manner, that the Astral benefits will have yielded improvements to the communities (i.e. for the subscribers) served by the Astral undertakings (and, similarly, that the CTV benefits will have yielded improvements to the communities served by the CTV undertakings).

87. To this end, the CMPA submits that the Commission should require that any program produced or acquired using Astral benefits be broadcast *first* on an Astral service[57], and that the incrementality of the associated expenditure be measured as against Astral's existing obligations.

88. Furthermore, we note that, despite the objections of the CMPA and others, the Commission recently granted Astral the flexibility to allocate its English-language CPE and PNI obligations to its French-language services, and vice-versa. As benefits obligations must be incremental to existing and PNI obligations, and must target the communities being served by the undertakings being transferred, the CMPA calls on the Commission to ensure that BCE does not deprive English-language Canadians of the benefits of this transaction by using any benefits established for English-language programming to subsidize the production of French-language

[56] See BCE's response to CRTC Deficiency Letter dated 24 May 2012, at Q10 and Q13.

[57] This does not need to be a requirement in respect of benefits allocated to the HGF, since it is an independent fund.

programming so that BCE can better meet its stated objective of competing in the French-language television market.

89. Accordingly, we submit that the Commission must ensure that BCE allocates all the English-language Astral benefits as well as all the outstanding CTV benefits (which flow from BCE's purchase of CTV's English-language services[58]) to English-language programming initiatives. Similarly, BCE must be required to allocate all the French-language Astral benefits to French-language programming initiatives.

90. Amongst other things, these requirements will help ensure that benefits funding will still be available to support programming in underserved categories in both official languages - especially films and children/youth programs - even if BCE re-directs the CPE and PNI that Astral previously allocated to such programming to other Astral services.

Reporting and Auditing

91. Given the above-noted complexities in ensuring that the benefits flowing from this transaction are truly incremental and first and foremost accrue to the communities currently served by the *Astral* properties, it is critical that the Commission require BCE to provide annual reports which describe in a full and completely transparent manner how it has spent such benefits. Amongst other things, the report should confirm that each program supported by the benefits was first broadcast on an Astral service.

92. In addition, given these complexities, the Commission should be prepared to audit BCE's adherence to its benefits obligations in the event of complaints from interested parties regarding the accuracy, completeness or transparency of any of BCE's annual benefits reports.

Terms of Trade

93. The CMPA appreciates that the Commission has long-recognized that it is in the broadcasting industry's interest as a whole to have fair terms which provide stability and clarity for both producers and broadcasters and that, to that end, has determined that "*all* licensees" should be subject to a COL requiring adherence to the CMPA's Terms of Trade Agreement.[59]

94. Both Bell Media and Astral are signatories to the CMPA's Terms of Trade Agreement. Bell Media's CTV's services are subject to the Terms of Trade COL; however, at this time, the Astral services are not. In light of the increased horizontal integration that will result from this present transaction, and the resultant increase in BCE's program buying power, it is now more critical than ever to put teeth into the safeguards that the industry and the Commission have developed to ensure fair negotiations between broadcasters and producers regarding rights over programming and digital media.

95. Accordingly, the CMPA urges the Commission to use this opportunity to harmonize BCE's regulatory obligations respecting the Terms of Trade Agreement, by attaching to all the Astral

[58] Excluding RDS which does not typically produce or acquire PNI.
[59] Broadcasting Decision CRTC 2011-441, *Group-based licence renewals for English-language television groups – Introductory decision*, http://www.crtc.gc.ca/eng/archive/2011/2011-441.htm, at par. 119. Emphasis added.

English-language services' licences[60] the same Terms of Trade COL that is already in place for all BCE's other licensed services.[61]

Conclusion

96. As a result of this transaction, the Canadian broadcasting system will lose one of the last remaining large independent purchasers and broadcasters of Canadian programs, while BCE will increase significantly its already-substantial control over the television services Canadians watch, and the doors on which independent producers can knock.

97. It would be difficult for anyone to argue that BCE's increased concentration of ownership in the broadcasting system resulting from this transaction will not limit diversity if its acquisition of Astral's movie services will in fact lead to a further decline in broadcaster support for Canadian feature films, or Canadian children and youth will find little new or better to watch on the Astral services that are meant to serve them. Simply put, BCE must demonstrate that its takeover of Astral's movie-based and children/youth services will generate a truly meaningful level of increased support for the production of Canadian feature films and children/youth shows; based on the proposal it has tabled so far, however, BCE has failed to prove that this deal represents a net benefit for Canadians.

98. Nevertheless, this transaction can benefit Canadian television consumers and the broadcasting system as a whole if BCE - or the Commission, if required - takes the necessary steps to ensure the result is the creation and presentation of more and better Canadian programs, particularly in the Astral services' key genres, namely feature films and children/youth programming.

All of which is respectfully submitted.

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[60] Including the TELETOON services.
[61] Doing so would not increase BCE's regulatory burden since it is already subject to this COL.