



BNOB CRTC 2014-190 – Let’s Talk TV
CMPA Final Submission Executive Summary

E1. Throughout this process, the CMPA has focused on how to introduce Pick and Pay in a timely manner that 1) respects the government’s policy to introduce choice through channel unbundling while protecting Canadian jobs; and also 2) achieves the Commission’s key objectives of introducing choice *and* fostering compelling Canadian programming.

E2. Like the Commission, the CMPA’s goal is to ensure that all Canadians – as consumers, citizens and creators – will see real benefits from the new flexibility and control that Pick and Pay will offer. Our view is simply this: that one of those benefits should be the continued opportunity to watch new, original, high-quality and diverse Canadian programming.

E3. We fully appreciate that independent producers and others must embrace change to succeed in a more competitive, consumer-driven broadcasting world.

E4. To that end, we support many of the proposals which the Commission put forth in its August Working Document. In fact, we completely oppose only one proposed regulatory change, namely eliminating or restricting the current simultaneous substitution rules.

E5. Nevertheless, the evidence before the Commission in this proceeding overwhelmingly supports the view that maximizing choice through a Pick and Pay model will cause broadcasters’ revenues and associated Canadian program funding to drop.

E6. The current, unprecedented quality of Canadian programming cannot be sustained if there is less money available to make it. And it will be Canadian television audiences who will suffer should today’s Canadian programming quality level diminish.

E7. It is for this reason that we submit the Commission should mitigate the expected negative impact of Pick and Pay on available program funding by applying its recently simplified Tangible Benefits Policy to BDU takeover transactions.

E8. It is also for this reason that we submit that the Commission should proceed with Pick and Pay but not make additional, unnecessary regulatory changes – that is, regulatory changes that would do little, if anything, to further improve choice and flexibility for consumers but would certainly reduce revenues in the system and thus the funding available to make compelling Canadian programming.

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Benefiting Consumers

1. As an over-arching principle, the CMPA submits that consumers are best served by having multiple programming options which include the option of maintaining the current services and service packages available to them under the existing regulatory framework. There is no need to substantially dismantle that framework simply because the Internet has added new and popular programming options; the existing programming model still provides value, and can continue to do so if not undermined by regulatory changes which are unnecessary to implement Pick and Pay.
2. We would like to take this opportunity to underscore, once again, that at no time in this proceeding has the CMPA ever opposed the idea of Pick and Pay. Rather, we have always focused on how to introduce Pick and Pay in a manner that 1) respects the government’s policy to introduce choice through channel unbundling in a manner that still protects Canadian jobs; and also 2) achieves the Commission’s key objectives of introducing choice *and* fostering compelling Canadian programming. In our view, this is a constructive approach to take, particularly since the Commission specifically stated in its August Working Document that it required a more complete record on these two latter matters.
3. While the marriage of choice and the fostering of compelling Canadian programming may not be easy to accomplish, we submit that it is doable. And, to be clear, there is nothing in our submission(s) that requires the Commission to delay introducing Pick and Pay in a timely manner.
4. Therefore, contrary to what the Commission suggested at the hearing¹, the CMPA is not grudgingly accepting that Canadian consumers should be given more choice and control over their television options. In fact, we respectfully view that proposition as being so obvious that it should defy debate at this point in the evolution of TV.
5. Moreover, we stated at the outset of our initial written submission that, if the Commission’s proposed new Pick and Pay regime were “to provide the ‘right’ mix of choice, affordability and flexibility in packaging options, it could be important for promoting consumer satisfaction with the Canadian broadcasting system and reducing churn.”²

¹ Transcripts, Vol. 3, lines 5943-5944, and line 5983.

² CMPA Intervention, Answers to CRTC Questions, 26 June 2014, available at <https://services.crtc.gc.ca/pub/ListeInterventionList/Documents.aspx?ID=218210&Lang=e>, at par. 3.

6. That being said, we reiterate that, if Pick and Pay is done wrong – such that all that most consumers end up getting is less for about the same price – the Commission will have failed. That failure would then have negative consequences for the whole industry in terms of the number of compelling shows that can be financed and the creative and skilled jobs that support these productions.³
7. We would also note that our submissions reflect our view that, to achieve the varied (and sometimes conflicting) objectives established in the *Broadcasting Act*, the Commission’s determinations flowing from this proceeding should ensure that the Canadian TV system not only responds to the demands of Canadians as cost-conscious consumers, but promotes their engagement as citizens; meets their unique needs as individual members of diverse households and communities; and best serves their collective interests as part of the broader “public”.
8. Moreover, as the representative of the Canadian English-language independent production industry, we are also well aware that our members need to address consumers as *audiences*; this is because, if they do not produce content that Canadian (and, increasingly, global) audiences like and watch, they simply won’t have a business. The CMPA fully appreciates that broadcasters commissioning shows today are not interested in “tonnage”, only in measurable success. And, in today’s market, shows that don’t succeed in attracting and engaging audiences get cancelled.
9. The good news is that there is lots of evidence that Canadian independent producers are not only making programs that resonate with Canadian audiences but they are selling more content to markets around the world. As the CMF observed during its appearance:

We have never witnessed such broad base successes in Canadian television and in particular, in Canadian drama as in the past ten years.

For the first time, English-Canadian drama series such as *Rookie Blue*, *Orphan Black*, *Murdoch Mysteries*, *Flashpoint* and *Saving Hope* are consistently attracting audiences in Canada of more than one million viewers in prime time, not to mention audiences in other countries.⁴
10. In fact, Canadians are now producing popular, successful and compelling programs across a variety of genres, for example in the drama sub-category of Science Fiction

³ In the Environmental Scan that the CMPA (and others) filed in evidence, its author, Peter Miller, ran scenarios to show the impact on Canadian jobs should the Commission impose additional disruptive changes at the same time it introduces Pick and Pay. Mr. Miller is an acknowledged expert in a number of areas of broadcast policy but, to ensure that his numbers would be economically sound, he used the same model to measure job creation as employed for the past decade in *Profile*, the annual report which Nordicity produces for the industry under the direction of Canadian Heritage, the CMPA and the AQPM. Mr. Miller also confirmed with Nordicity that his methodology was consistent with theirs.

⁴ Transcripts, Vol. 1, lines 1465-1466. See also the CMF’s 2013-2014 Annual Report, which states that “26 CMF-funded programs achieved audiences of over 1 million viewers on average”: <http://ar-ra13-14.cmf-fmc.ca/>.

(e.g., Continuum, Lost Girls and the aforementioned Orphan Black); in Lifestyle (e.g., Income Property, Property Brothers); in Reality (e.g., Eat Street, Amazing Race Canada) and in Children’s (too many shows to count!)

11. In our view, the objective for this proceeding of “fostering compelling Canadian programming” means maintaining and building on these success stories.
12. Like the Commission, the CMPA’s goal is to ensure that all Canadians – as consumers, citizens and creators – will see real benefits from the new flexibility and control that Pick and Pay will offer. Our view – which is shared by a broad range of participants in this proceeding, including individual Canadians – is simply this: that one of those benefits should be the continued opportunity to watch new, original, high-quality and diverse Canadian programming.

Embracing Positive Change

13. Again, contrary to the Commission’s unfortunately mistaken perception⁵, the CMPA is not seeking to delay changes that may make sense or be necessary in the evolving television landscape. We fully appreciate that stakeholders – including independent producers – must embrace new business approaches and models to succeed in a more competitive, consumer-driven broadcasting world. Moreover, we believe that stakeholders are already embracing such changes, and will continue to do so. The status quo will not work; change is our only option.
14. In fact, if one looks at how TV has changed over a generation, it is clear that the status quo has never really been an option. Since 2000, the industry has experienced the shift to digital and then to HD; addressable technology and VOD; hundreds of micro-channels; broadband TV, PVRs, SVOD and OTT; and telco IPTV competition. All of these changes have radically altered the consumer value proposition, and they continue to accelerate.
15. That is why the Canadian independent production industry is also changing, and doing so rapidly, putting more emphasis now on treaty co-productions and co-ventures with US broadcasters; expanding into international markets and distribution; investing in digital content; consolidating; and exploiting multi-channel network (MCN) opportunities online. While their business strategies may vary, Canadian independent producers have long understood the need to think “outside the box”; this is particularly the case now that a very small number of vertically integrated broadcasters make nearly all the program purchasing decisions in Canada. In this respect, many independent producers have recently consolidated and expanded into different lines of business: into broadcasting and online; internationally; and as distributors. These business strategies are based on an understanding that markets are in a high period of

⁵ *Ibid.*, above note 1, at line 5945.

disruption and that regulation in any country will only provide partial support going forward.

16. Like producers, broadcasters and BDUs must also deal with change or be out of business. That is why they, too, will continue to aggressively explore and embrace new consumer-driven business models and practices – and will do so even if the Commission chooses not to push them in that direction through regulatory action.
17. In light of all of this, our point is simple: there is no need to blow up the dam because of a perceived leak. Equally, as our evidence demonstrates, there is no reason to assume multiple business models cannot co-exist for the next few years.
18. For all these reasons, we submit that the Commission should proceed with Pick and Pay but not make additional, unnecessary regulatory changes – that is, regulatory changes that would do little, if anything, to further improve choice and flexibility for consumers but would certainly reduce revenues in the system and thus the funding available to make compelling Canadian programming.

The CMPA’s Positions on the Working Document Proposals

19. We reiterate that we are not against more choice, nor are we seeking to delay it. Indeed, as the following chart demonstrates, we support many of the proposals which the Commission put forth in its August Working Document⁶:

Theme	CMPA Position
1. Small Basic	We <u>support</u> Option B, provided children’s services are included and the rate cap is sufficient for BDUs to recover their legitimate technical and programming costs.
2. Pick and Pay	We <u>support</u> .
3. Build-your-own-package	We <u>support</u> on the assumption Pick and Pay would effectively permit subscribers to build their own packages.
4. Preponderance	We <u>support</u> Option A.
9. Maintaining current approach to the distribution of non-Canadian services	We <u>support</u> .
10. Redefining broadcasting revenues	We <u>support</u> .
11. Programs of National Interest (PNI)	We <u>support</u> .

⁶ Other than Commission’s proposed options regarding Simultaneous Substitution (#4), which we address in pars. 20 and 21 herein, we do not take a position on proposals set out in the Working Document which are not identified in this chart.

12. Programming requirements	We <u>support</u> , subject to the maintenance of daytime exhibition requirements for children’s services.
13. Genre protection	We <u>support</u> , subject to the Commission conducting a further proceeding to address how to establish appropriate Canadian programming obligations when services change genres (see below).
15. Audience Measurement	We <u>support</u> , subject to the CMPA being part of the STB working group.
17. Community programming	We <u>support</u> .
28. Consolidation of programming services licences	We <u>support</u> , subject to the Commission conducting a further proceeding to establish appropriate Canadian programming obligations (see below).
29. Implementation	We <u>support</u> , subject to the Commission conducting the further proceeding(s), as noted above, associated with implementing the removal of genre protection and the consolidation of programming services licences.

20. In fact, we completely oppose only one regulatory change as proposed in the August Working Document, namely eliminating or restricting the current simultaneous substitution rules. Simultaneous substitution permits broadcasters to exploit their legitimate territorial program rights so that they can continue to generate the advertising revenues necessary to fund a range of local, regional and national programming to serve their communities. It does not limit consumer choice in any significant way⁷ and, in fact, is much more consumer-friendly than its alternative, namely program blackouts.

21. We submit that the right to exploit one’s intellectual property is critical to any properly functioning broadcasting system. Accordingly, the current simultaneous substitution rules should be maintained.

Balancing the Objective of Maximizing Choice with the Objective of Fostering Compelling Canadian Programming

22. As the Chairman correctly observed during our appearance⁸, the CMPA does not envisage that Canadian’s television consumption habits will dramatically change overnight, notwithstanding the increasing availability of on-demand opportunities and options. Amongst other reasons, this is because many of the on-demand options are already built into the system; it is also because it is the licensed, linear system that still produces the vast majority of original long-form content that feeds the most popular

⁷ Except with respect to watching certain US commercials during the actual televised broadcast of the Super Bowl.

⁸ *Ibid.*, above note 1, lines 5934-5936.

on-demand services. This being said, our evidence demonstrates that introducing too many regulatory changes would pose a greater risk to achieving Canada’s broadcasting policy objectives than the evolution of content on-demand that market forces are now driving.

23. In our view, the licensed broadcasting system may well co-exist with OTT options and the two may increasingly overlap for many years.
24. Based on this view, the CMPA also accepts that, while many of today’s younger generation will likely always remain “cord-nevers”, a critical mass of current BDU subscribers is unlikely to abandon the existing BDU-delivered bundled packages particularly with newly mandated Pick and Pay options, provided there continues to be value in subscribing to those or similar packages.
25. Nevertheless, the evidence before the Commission in this proceeding overwhelmingly supports the view that maximizing choice through a Pick and Pay model (even where BDUs may offer other packaging options) will cause broadcasters’ revenues and associated Canadian program funding to drop. According to the overwhelming evidence, this drop *will* happen; if not overnight, it will only be a matter of time. And the drop could be significant.
26. As we highlighted in our initial written submission and reinforced above, the Canadian broadcasting system has never provided Canadians with higher quality Canadian programming than it does now. This is good for Canadian television audiences, and so it is in their interest that we all do what we can to maintain and build on this programming success. The simple, undeniable truth, however, is that it takes money to make high quality, compelling programming, regardless of its national source. Similarly, the simple truth is that a drop in available program financing will lead to a drop in program quality. Program production is a risky business: there is no magic formula that helps producers and broadcasters pick what is going to be a hit. Perhaps one out of 15 shows may become a hit – but money is needed to make those 15 shows to achieve that one success.
27. Accordingly, the current, unprecedented quality of Canadian programming cannot be sustained if there is less money available to make it. And it will be Canadian television audiences who will suffer should today’s Canadian programming quality level diminish.
28. It is for this reason – to continue to be able to provide Canadian audiences with high quality, compelling Canadian programming options – that we recommend the Commission establish other, new Canadian program funding sources to supplement what the evidence demonstrates will be reduced contributions from BDUs and broadcasters.

29. To that end, and as noted in the above chart, we support the Commission’s proposal to redefine broadcasting revenues for licensees to include revenues from programming offered online or on other exempt platforms. This will help sustain Canadian program funding as licensees increasingly move their content online. It will also preclude the possibility for broadcasters to allocate their revenues to their online services in order to reduce their revenue-based Canadian spending obligations, which we fear is increasingly happening under current rules.
30. Also to the same end, we submit the Commission should mitigate the expected negative impact of Pick and Pay on available program funding by applying its recently simplified Tangible Benefits Policy⁹ to BDU takeover transactions. Such transactions will inevitably occur in the future because the market is opening up to global players and Canadian companies will argue they need scale to compete.
31. In our view, applying the new simplified Benefits Policy to BDU transactions would not only offset the anticipated negative funding impact of Pick and Pay, but also provide a new source of financial support both for the development of future Canadian hit shows on both linear and SVOD platforms *and* for promoting our hits at home and abroad.
32. While the Commission and the Competition Bureau ultimately assess the public interest impact of major broadcasting transactions, there is compelling logic to suggest that, when BDU licenses are acquired, there should be a resulting tangible benefit to the broadcasting system as is required when programming service licenses are traded.
33. We implore the Commission not to simply shut the door on this idea. We submit that, in order to achieve its objective of fostering compelling Canadian programming, and to increase the promotion of such programming, the Commission needs to look at how those expensive initiatives will be funded. And to the extent we can generate success on a larger or different stage, the more likely we will also attract the private investment and co-ventures that will shift us from a country geared to producing content just for Canadian audiences to one exporting Canadian creativity and intellectual property to the world.

Lower Exhibition Obligations Won’t Necessarily Mean Better Quality

34. While, as stated, more funding will beget better quality programming, we caution the Commission against assuming that eliminating or reducing exhibition obligations will do the same.
35. We do not offer this caution as an effort to preserve or support a “tonnage” approach to Canadian programming – indeed, as noted above, we support the elimination of daytime exhibition requirements (except for children’s services). Instead, we wish to

⁹ <http://www.crtc.gc.ca/eng/archive/2014/2014-459.htm>.

ensure the Commission has a realistic appreciation for what reducing exhibition obligations will and will not accomplish. In our view, the Commission should not simply assume that eliminating or reducing exhibition obligations will cause broadcasters to re-direct their CPE or PNI spending to “fewer but better” shows, thereby mitigating the impact of the expected Pick and Pay-generated funding drop on program quality.

36. Under Terms of Trade, the signatory broadcasters successfully negotiated for themselves the right to repeat each qualifying program as often as they like on any of their licensed broadcasting services for a single licence fee. This means that those large broadcasters can repeat their Canadian programs essentially for free – and so will be motivated to continue to broadcast repeats (e.g., during the daytime) even if not required to do so to meet exhibition obligations. It also means that eliminating or reducing exhibition obligations will not “free up” any significant amount of funding to invest in the quality of other programs.
37. Moreover, contrary to what some broadcasters have argued, eliminating evening exhibition obligations in favour of a standard “broadcast day” obligation will not benefit Canadian programming: instead, it will just mean the near if not total replacement of Canadian programming with US programming during prime time blocks – which are still when most Canadians watch television¹⁰ and thus remain, in Shaw’s words, “peak scheduling periods.”¹¹

Roadmap

38. As noted in the above chart, we are generally supportive of the Commission’s proposed implementation date for most of the proposals in the August Working Document, namely 15 December 2015.
39. As also noted, however, we submit that it will be critical for the Commission to conduct a further proceeding (or proceedings) before implementing the elimination of genre protection and the consolidation of programming service licences. This is because, in both cases, the Commission will have to determine what constitutes the appropriate, associated Canadian programming obligations. Presently, those obligations are established on a service-by-service basis and can vary considerably based on criteria like genre. This raises the question as to what obligations will apply to a service which changes to another genre: will they be its existing obligations or the obligations of any service(s) already operating in the other genre? Similarly: will the Commission standardize programming obligations when it consolidates programming service licences and, if so, at what level(s)?

¹⁰ Hence the reason broadcasters continue to put so much value on simultaneous substitution.

¹¹ See Shaw Undertaking, Proposed Roadmap – Theme 12 – Programming Requirements – What this means for Canadians?

40. In our view, a service changing to another genre should be required to adopt the Canadian programming obligations of the service(s) operating in that other genre, if they are greater. Further, any standardization of obligations associated with the consolidation of programming service licences should not result in a net decrease in Canadian programming contributions in the system.
41. In both cases, interested parties will need the opportunity (neither provided¹² nor practically possible in the current, broad-ranging process) to focus on and provide constructive input concerning these important implementation issues.
42. Also, in both cases, the related decisions will have important implications for the next round of Group licence renewals, currently scheduled for 2016.
43. Note that we do not suggest a roadmap for implementing changes to the current simultaneous substitution rules since we submit there is no need or compelling reason to initiate any changes. In other words, there is no need or reason to “phase in” changes which should not be made at all.

Responding to Certain Positions Advanced by Other Parties

Terms of Trade

44. It is unfortunate that, while the Commission addressed aspects of Terms of Trade with some parties who appeared after us¹³, it never indicated to us that it would do so or broached the subject with us.
45. Accordingly, we must now reiterate the importance of Terms of Trade, and emphasize once again that they will take on even greater importance in a Pick and Pay world to ensure fair treatment for producers in their dealings with the large broadcasters which, as the Commission has acknowledged, have greater bargaining power.¹⁴
46. The CMPA notes that, on a number of occasions, the Commission raised the issue of share of backend; while it is clearly a point of contention, we wish to point out that the narrative discussed was unfortunately misleading. It is important for the Commission to appreciate that there are opportunities for international backend under the super-licence fee profit sharing clause of the Terms of Trade Agreement¹⁵, and numerous examples of different types of equity structure for producer and Canada/US

¹² For example, the CMPA was not even questioned on these important issues.

¹³ Rogers: Transcripts, Vol. 4, lines 7740-7764, and The Writers Guild of Canada: Transcript, Vol. 4, lines 9492-9518.

¹⁴ See Broadcasting Decision CRTC 2013-465, <http://www.crtc.gc.ca/eng/archive/2013/2013-465.htm>, at par. 29.

¹⁵ Terms of Trade Agreement, <http://www.cmpa.ca/sites/default/files/documents/terms-of-trade/2011-04-26-Terms-of-Trade-Agreement-Astral-Bell-Rogers-Shaw.pdf>, Article 8.

broadcaster co-ventures. We would accordingly caution the Commission against focusing on one point of the “trade” without looking at the others.

47. It is also important to remember that Terms of Trade does involve trade-offs. For example, producers are prohibited under the Agreement from licensing SVOD rights to Netflix in Canada¹⁶, because the broadcasters see this as competitive with their affiliated BDU strategies. That is a downside of vertical integration. In our view, it is a big missed opportunity in terms of revenue and access to Canadian consumers; however, it was part of the series of trade-offs. We would be happy to pursue the opportunity to sell to Netflix in Canada as part of future negotiations.
48. The CMPA also wishes to point out that, while Rogers seemingly tries to take advantage of every available public opportunity to complain that it no longer likes the deal it negotiated in 2011 (as it did once again during its Let’s Talk appearance), it has never sought to invoke its right in the current Agreement to pursue relief. Specifically, although the Agreement contains a provision allowing Rogers (or any other signatory) to initiate a renegotiation of the terms of the deal prior to its expiry¹⁷, Rogers has never acted on its right to trigger that provision. Amongst other things, this behaviour leads us to question Rogers’ claim that it would still be willing to enter into an Agreement absent a regulatory requirement¹⁸; instead, it appears to us that Rogers would clearly prefer no agreement at all rather than a renegotiated one.
49. Lastly, we would like to make it clear to the Commission that we are prepared to begin negotiating a new Agreement as soon as Rogers and the other signatories wish to start those discussions. And since there are many more matters addressed in – or missing from – the current Agreement beyond the one issue that Rogers regularly identifies, we would fairly expect that those negotiations would be comprehensive rather than singularly-focused in nature.

CPE/PNI and Exhibition

50. As stated above, we submit that it will be necessary for the Commission to conduct a further proceeding (or proceedings) before implementing the elimination of genre protection and the consolidation of programming service licences, in order that interested parties will have the opportunity to focus on, and provide constructive input concerning the appropriate, associated Canadian programming obligations.
51. Therefore we oppose broadcasters’ proposals which seek to establish standard programming obligations as part of this process. This is particularly the case given that

¹⁶ *Ibid.*, Article 6 a).

¹⁷ *Ibid.*, Article 13 a).

¹⁸ Transcripts, Vol. 4, at lines 7751-7753.

those proposals contemplate the reduction¹⁹ or even the elimination²⁰ of such obligations while offering no evidence as to their impact or compelling arguments respecting their consistency with the *Broadcasting Act's* policy objectives.

Promotion

52. The CMPA fully agrees with other parties as to the importance of promotion for Canadian programs.
53. In our view, it would make most sense to explore how to use existing independent funding sources to support new promotional activities, both for domestic markets and internationally. To that end, we submit that Telefilm and the CMF should each look at how to modify their respective rules and formulae to make that happen.
54. We greatly prefer this approach over allowing broadcasters to allocate a percentage of their CPE to promotion. This is because there is simply no way to ensure that the broadcasters' promotional expenditures under a CPE model would be truly incremental to what they normally spend on print and other forms of advertising. Moreover, given that broadcasters are facing a growing inventory of unused advertising space, it would be quite possible for them to inflate the value they attribute to that unused inventory to simply reduce their real expenditures on Canadian programming. This is particularly troubling in the absence of more robust CPE auditing which would allow the Commission to closely track the allocation of "promotional" spending.
55. However, should the Commission still wish to pursue the notion of CPE as a source of funding for promotional activities, we submit that more evidence is necessary to assess the impact before determining the appropriate level. While Bell tabled a 10% figure, it admitted that its proposal was up for discussion.²¹ Such further discussion is indeed necessary as neither Bell nor anyone else offered any evidence as to how much money that figure would generate, how the resulting funds would be used, and how it would impact on the production and licensing of Canadian programming. In that respect, we submit that, since PNI obligations generally represent only about 17% of CPE²², allocating 10% of CPE for promotion would be too high and would have a net detrimental impact on the programming that is meant to be promoted. This is particularly the case given that overall funding for Canadian programming is predicted

¹⁹ Bell proposes a standard 25% CPE, while noting that "the current standard CPE range is in the 30 percent range." Transcripts, Vol. 3, line 453. It proposes a reduced, standard 35% exhibition requirement for specialty services.

²⁰ Rogers proposes the elimination of CPE and PNI obligations for over-the-air stations. Transcripts, Vol. 4, line 7279. It also proposes a reduced 35% exhibition obligation.

²¹ Transcripts, Vol. 3, line 4603: "Now, 10 percent or some different number is obviously open to discussion and the Commission's judgment..."

²² Based on 30% CPE and 5% PNI.

to decline absent any new mitigating strategies such as those we have recommended above.

56. Finally, should the Commission nevertheless permit broadcasters to allocate a percentage of CPE to promotion, we would still wish to echo the CMF’s caution that the objective should be to build on what broadcasters are already investing in promotion, not simply replace it with funding that would otherwise go to production.²³ Again, this speaks to the difficulty of measuring and confirming “incrementality” and further supports the use of existing independent funding sources to ensure that promotional spending practices are sound.

Correcting the Record Regarding Retransmission Royalties

57. During their appearance on the last day of the hearing, the U.S. Television Coalition claimed that the Canadian retransmission copyright regime is “broken” and that “[t]he situation is so bad that American stations are paying around \$8 million for distribution in Canada.”²⁴
58. This is a mischaracterization of the situation. In a decision issued in November 2013²⁵, the Copyright Board of Canada determined that BDUs had overpaid retransmission royalties to the US broadcasters’ collective, BBI, for the period 2009-2013. Accordingly, the Board’s decision triggered a \$7.4 million retroactive payment for BBI (to be re-allocated to other collectives). Like other collectives, BBI was fully aware of the potential for this outcome and fully participated in the proceeding leading up to it. They were also not alone in having to make retroactive payments as a result of the Board’s decision. Far from demonstrating that the Canadian retransmission copyright regime is “broken”, the Board’s decision to re-allocate royalties and the process leading to that decision demonstrate that the regime is working as it should.

Conclusion

59. As confirmed at the outset of this submission, we support the government’s policy to introduce choice through channel unbundling in a manner that still protects Canadian jobs, and the Commission’s key objectives of introducing choice *and* fostering compelling Canadian programming.

²³ MR. CARDIN: “As I said, we’re expanding the definition of what is considered “eligible marketing expenses” and allowing more in the budgets, but, again, always looking to do so in a way that is complementary and builds on the work that is done by the independent producers, the broadcasters and the distributors, rather than replacing those costs with our funding.” Transcripts, Vol. 1, line 1583.

²⁴ Transcripts, Vol. 10, lines 21612-13.

²⁵ <http://www.cb-cda.gc.ca/decisions/2013/retrans-29112013.pdf>.

60. The CMPA agrees with the Commission's statement in paragraph 32 of its initial Notice that, taking into consideration the changing television environment, there may be risks to public policy objectives if its current television regulatory framework remains unchanged.
61. But we also submit, as supported by our evidence, that there will be greater risks if the Commission proceeds to change too much.
62. As observed in the Environmental Scan we submitted in evidence, the primary cause of a tipping point in the short-run will not come from the availability of Netflix, YouTube or other OTT options but from highly disruptive regulatory changes. This is why we remain concerned that the Commission has tabled certain proposals which it need not implement in order for the market to function and to satisfy shifting consumer demand.
63. Unlike perhaps in the past, in this proceeding the Commission has the luxury of starting at a point where there already is a high degree of programming options for Canadians – for example, Canadians already watch more video online than almost any country and are on par with the US. Adding channel unbundling arguably takes the availability of choice to a level unprecedented in other countries, including the US.
64. Investments in digital, HD, fibre, broadband, VOD, SVOD and now OTT platforms like *showmi* demonstrate that incumbents will move when they are economically incented to do so. That incentive is made more real as telco IPTV competitors increase their market share through triple- and quadruple-play bundles, and as big players like Netflix, Apple and Google exercise their own very different content strategies. All those competitive forces exist now, and the incumbents will be forced to respond regardless of any regulatory push to do so.
65. On the other hand, if regulatory changes undermine their broadcasting business, those companies able to shift their focus to other lines of business – namely the vertically integrated broadcaster/BDUs – will likely do so. In our view, it is entirely plausible that vertically integrated companies faced with regulatory actions that would cause substantial revenue declines for their broadcasting side would consider it better to cut back on that business, with its related costs and obligations, and put the savings in capital towards their wireless and broadband divisions (where their returns are 30% to 40%). Such a strategy may help the companies and their shareholders, but not Canadian television consumers.
66. This is why we argue that, in the face of the potential upside that Pick and Pay will create for Canadian consumers, the Commission should not compound the expected downside by taking additional – and, we submit, unnecessary – steps such as eliminating or restricting simultaneous substitution, altering the current

preponderance rule, precluding reasonable make-whole arrangements and jeopardizing children's programming services by precluding their carriage on basic.

67. We support consumer choice. Consumers are the audiences that watch our shows in Canada and abroad. But those audiences have diverse tastes and it will be harder to finance quality programs that appeal to their varied interests in an unbundled market. The costs associated with fostering compelling and diverse Canadian programming will not come down as revenues decline due to unbundling; indeed, we fully expect those costs to increase as it becomes even more expensive to produce quality programming that will compete both domestically and globally. That is the challenge we believe the Commission has to address to meet its objectives and its mandate. And that is why we submit that a balanced regulatory approach will best serve to increase both choice and compelling content and align with the government's policy of promoting choice and jobs.

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