

January 23, 2018

Filed Electronically

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Doucet:

Re: Broadcasting Notice of Consultation CRTC 2017-429: Reconsideration of the licence renewal decisions for the large English-language television groups

1. These are the comments of the Canadian Media Producers Association (CMPA)¹ regarding the above-noted Notice of Consultation.

Executive Summary

2. By Order in Council P.C. 2017-1060 issued on August 14, 2017 (the Order in Council), the Governor in Council referred back to the Canadian Radio-television and Telecommunications Commission (“CRTC” or the “Commission”) for reconsideration and hearing certain aspects of the Commission’s decisions to renew the licences for the large English-language private ownership groups – Bell Media Inc. (“Bell”), Corus Entertainment Inc. (“Corus”) and Rogers Media Inc. (“Rogers”) (collectively, the “Broadcasters”).
3. The Order in Council found that certain decisions derogated from the attainment of the objectives in the *Broadcasting Act* (Canada), S.C. 1991, c. 11 (the “*Broadcasting Act*”) and directed the Commission to “consider how it can be ensured that significant contributions are made to the creation and presentation of programs of national interest, music programming, short films and short-form documentaries” and “take into consideration that creators of Canadian programming are key to the Canadian broadcasting system”.
4. This proceeding has a sole purpose: to improve or increase the contributions of the Broadcasters to programs of national interest (PNI) and Canadian music programming, short films and short-form documentaries. Proposed licence amendments that do not directly respond to this direction from the Governor in Council, such as any and all proposed changes to Canadian programming

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

expenditures (CPE), independent production spend obligations, and the duration of the licence terms, are outside the scope of this proceeding and thus ought to be given short shrift and denied.

5. In any event, the Broadcasters' proposals run contrary to the Create Policy.² While there have certainly been changes in the industry since the release of the Create Policy, there is no apparent good reason to deviate from the Commission's fact- and data- based decision on PNI and CPE expenditures today, especially given the slim evidence provided by the Broadcasters in their applications.
6. In response to the Order in Council, and Broadcasting Notice of Consultation CRTC 2017-429, the CMPA submits as follows:
 - a. In accordance with the Commission's undertaking to "maintain" current PNI requirements in the Create Policy, the appropriate expenditure levels for PNI ought to be based on the Broadcasters' historical average expenditures, namely:
 1. 8% for Bell;
 2. 9% for Corus; and
 3. 5% for Rogers.
 - b. The CMPA has no objection to a 25% credit against a Broadcaster's CPE requirements for expenditures on music programming and for short films and short-form documentaries, up to a maximum of 10% of the Broadcaster's overall annual CPE requirement; and
 - c. As a matter of principle, the Commission is entitled to adopt a different approach to each linguistic market to support the creation and presentation of music and music video programming.

Introduction

7. This process is the result of a decision made by the Governor in Council, pursuant to section 28 of the *Broadcasting Act* to refer back to the Commission for reconsideration and hearing, parts of the decisions to renew the licences of Bell, Corus and Rogers in the English-language market in Broadcasting Decisions CRTC 2017-148,³ CRTC 2017-149,⁴ CRTC 2017-150,⁵ and CRTC 2017-151⁶, which were made on May 15, 2017 (collectively, the "Decisions").

² Broadcasting Regulatory Policy CRTC 2015-86, online: <https://crtc.gc.ca/eng/archive/2015/2015-86.htm> (the "Create Policy").

³ Broadcasting Decision CRTC 2017-148, Renewal of licences for the television services of large English-language ownership groups – Introductory decision, online: <http://www.crtc.gc.ca/eng/archive/2017/2017-148.htm> (the "GLR Introductory Decision").

⁴ Broadcasting Decision CRTC 2017-149, Bell Media Inc. – Licence renewals for English-language television stations and services, online: <http://crtc.gc.ca/eng/archive/2017/2017-149.htm> (the "Bell Licensing Decision").

⁵ Broadcasting Decision CRTC 2017-150, Corus Entertainment Inc. – Licence renewals for English-language television stations and services, online: <http://crtc.gc.ca/eng/archive/2017/2017-150.htm> (the "Corus Licensing Decision")



8. The CMPA was among a number of petitioners (collectively, the “Petitioners”) who asked the Governor in Council to either set aside or refer back the Decisions on the grounds that they derogated from the attainment of the objectives of the *Broadcasting Act*. The Petitioners took issue with the Commission’s decisions to decrease the level of mandatory expenditures that the Broadcasters are required to expend on PNI,⁷ the removal of conditions of licence requiring the Broadcasters to commission independently produced non-PNI programs, the removal of evening exhibition requirements for the Broadcasters’ discretionary services and the definition of programs that are reported as being “independently produced”.
9. The Governor in Council’s decision, reflected in the Order in Council, has two key elements:
 - First, a finding that the Decisions “derogate from the attainment of the objectives of the broadcasting policy for Canada set out in subsection 3(1) of the Broadcasting Act, and in particular paragraph 3(1)(s) of that Act”; and
 - Second, a direction that the Commission “consider how it can be ensured that significant contributions are made to the creation and presentation of programs of national interest, music programming, short films and short-form documentaries” and “take into consideration that creators of Canadian programming are key to the Canadian broadcasting system ...”

The Effect of the Order in Council

10. The effect of the first element of the Governor in Council’s decision is self-evident. The Decisions have been found to derogate from the objectives of the *Act*; therefore, they cannot stand. The nature of the derogation that concerned the Governor in Council is evident from the second element of the Order in Council: namely the treatment of PNI, music programming, short films and short-form documentaries and the important role of “creators of Canadian programming”.
11. In the result, this proceeding has a clear purpose: to increase the contributions of the Broadcasters to PNI and Canadian music programming, short films and short-form documentaries, and in so doing, to recognize the key role that creators of Canadian programming play, of which independent producers play a central and “significant” role.⁸
12. The implications of this determination should be clear. Licence amendments that do not directly concern PNI, music programming, short films and short-form documentaries are outside the scope of this proceeding. Similarly, proposed licence amendments that do not result in increases to the Broadcasters’ contributions to those genres of underserved programming are unresponsive to the Order in Council.

⁶ Broadcasting Decision CRTC 2017-151, Rogers Media Inc. – Licence renewals for English-language television stations, services and network online: <http://crtc.gc.ca/eng/archive/2017/2017-151.htm> (the “Rogers Licensing Decision”).

⁷ In the English-Language market, PNI includes “dramas, long-form documentaries and award shows, which are more costly to produce and the main vehicles for showcasing Canadians’ values and stories”; online: <http://www.crtc.gc.ca/eng/archive/2017/2017-148.htm>, para. 4.

⁸ Pursuant to s. 3(1)(i)(h) of the *Broadcasting Act* which states that “the programming provided by the Canadian broadcasting system should ... include a significant contribution from the Canadian independent production sector”.



13. The Commission's questions of the Broadcasters and interested parties have appropriately sought comment only on matters within the parameters of the Order in Council. The CMPA appreciates and respects the Commission's recognition of the intent of the Order in Council, and, in turn, will not introduce any other issues of concern to our membership that fall outside its scope.
14. In contrast, while notionally recognizing that this proceeding "is necessarily limited in scope",⁹ the Broadcasters have still attempted to 'push the envelope' and propose amendments that are clearly outside of any reasonable view of the intent and scope of this proceeding. The Broadcasters' proposals, which would result in a diminishment of support for the creation and presentation of Canadian programming, the creators of Canadian programming and the identified genres, are directly contrary to, and clearly outside of, the Order in Council. As explained further, approval of any licence amendments outside the scope of the Order in Council would constitute an inappropriate reconsideration of these aspects of the Decisions. The scope of this hearing must be limited to applying the direction of the Order in Council.
15. We respond to the Commissions questions below, and then briefly comment on the proposals of the Broadcasters that we submit fall outside the scope of this proceeding.

Responses to Commission Questions

Q1. If the Commission decides to make changes to the requirements imposed on large English-language ownership groups regarding programs of national interest, what would be an appropriate expenditure level for each individual group or for all groups?

Response:

16. Recognition of the policy importance of PNI, and their precursor equivalents, dates back to at least the 1980s and 1990s, when the CRTC first imposed targeted licensee-specific expenditure requirements on local TV stations in respect of underrepresented genres of programming, particularly drama series, documentaries, and children's programs (a slightly narrower definition than PNI).
17. In the intervening period, the CRTC chose different support mechanisms and introduced different definitions for these important categories of programming. This was especially the case for the largest program category within PNI: drama or fiction programming -- the most popular, hardest to produce, and most expensive type of programming.
18. In the Create Policy, the Commission undertook to "maintain" current PNI requirements. As noted by the CMPA in its Petition, requiring expenditures on PNI is one of the key ways that the CRTC fulfils the objectives of Canada's broadcasting policy. Recognizing the importance of supporting PNI for the achievement of the objectives of the *Broadcasting Act*, the Commission announced in several

⁹ Bell Media Comments, November 1, 2017, para. 5.



decisions and notices leading up to the Decisions that it intended to maintain existing PNI expenditure requirements on the Broadcasters. In the Create Policy, the Commission stated:

The objectives set out in the Act declare that the programming provided by the Canadian broadcasting system should be varied, comprehensive and encourage the development of Canadian expression by providing programming that reflects Canadian values and attitudes. The objectives also declare that the programming should include a significant contribution from the Canadian independent production sector. To ensure the fulfilment of these objectives, the Commission has encouraged the production of certain types of programs -- drama, long-form documentary, music/variety and award shows--generally through expenditure requirements. These are called programs of national interest (PNI).¹⁰

In the Create Policy, the CRTC also decided to maintain existing PNI requirements:

The Commission is *maintaining the existing expenditure requirements* on programs deemed to be of national interest. The Commission considers that Canadians must have access to certain types of programs that make an important contribution to the broadcasting system. This view was shared by many Canadians who provided comments during the Let's Talk TV proceeding;¹¹

and....

Given the relatively short timeframe in which the PNI requirements have been in place, the Commission considers it would be premature to alter the policy at this time. The current requirements relating to PNI including the specific program categories in each linguistic market *will therefore be maintained.*¹² (*emphasis added*)

19. The Create Policy was developed after years of unprecedented consultation with the industry and the Canadian public. It was released less than three years ago and provided deeply considered policy rationale based on the state of the broadcasting industry at that time. While there have certainly been changes in the broadcasting industry since the release of the Create Policy, there is no apparent good reason to deviate from the Commission's fact-and data- based policy decision on PNI and CPE expenditures today, particularly given the slim evidence provided by the Broadcasters in this proceeding. Simply put, the Broadcasters have failed to introduce any convincing evidence that indicates any material impact to their businesses that would warrant such changes in their PNI and CPE expenditure requirements.
20. In addition, the Commission is currently undergoing a significant policy review on future programming distribution models in response to Order in Council P.C. 2017-1195. While this review is ongoing, it is imperative that the existing system remain stable as we all work towards a modernized framework; one that is based on solid evidence and data.

¹⁰ Broadcasting Regulatory Policy CRTC 2015-86 (Create Policy), para. 276. Note that this definition of PNI is a reference to the French version of PNI, which includes music/variety.

¹¹ Create Policy, para. C.

¹² Create Policy, para. 289.



21. As the foundation of the Canadian broadcasting system and the basis of many continuing business models, ensuring the stability of the current system and maintaining supports for Canadian programming is critical. It is imperative that the existing contribution framework is upheld for the time being as Canada's broadcasting system evolves with the growth in online television consumption. These regulatory measures foster great Canadian content by ensuring that Canadian television tells Canadian stories and supports Canadian creators. For all of these reasons, PNI obligations that assist in the creation of Canadian content continue to be viable and must stay in place.
22. Evidence submitted by the Petitioners in the licence renewal proceeding demonstrated that historic contributions from Rogers, Bell and Corus to PNI averaged 5%, 8% and 9%, respectively.¹³ That evidence of historic PNI levels was largely accepted by the Commission.¹⁴
23. Notwithstanding this evidence, however, the Commission chose to set PNI levels for all three Broadcasters at 5%, apparently on the basis that it would "standardize" PNI levels among the major broadcast groups.
24. Evidence filed by the Broadcasters in this proceeding now place historic PNI levels at 7.6% for Bell Media, 8.5% for Corus and, based on incomplete data for all Rogers Media-owned City stations, 4.2% for Rogers.¹⁵ Attached as Appendix "A" to this submission is a report entitled, "*Analysis of Financial and CPE and PNI Spending Data Filed by the Large English-Language Broadcast Groups as Part of their Group Licence Renewal Reconsideration Applications (Broadcasting Notice of Consultation CRTC 2017-429)*", prepared by Mario Mota, Boon Dog Professional Services Inc. (the 2018 Boon Dog Report) which summarizes the evidence filed by the Broadcasters in this proceeding.
25. As discussed above, the Order in Council all but directs the Commission to increase the Broadcasters' PNI levels.¹⁶ The key issues before the Commission are therefore whether a standardized or individual group approach is appropriate, and what the increased PNI level or levels should be.

¹³ See, in particular, *Analysis of Canadian Programming Expenditure and Programs of National Interest Proposals Filed by the English-Language Broadcast Groups as Part of Their Group Licence Renewal Applications*, August 2016, by Mario Mota, Boon Dog Professional Services Inc. (the "Boon Dog Report"). Mr. Mota cited this revised 9% level for Corus at the CRTC public hearing (see, for example, Transcript, November 30, 2016, at para. 4108).

¹⁴ Broadcasting Decision CRTC 2017-148.

¹⁵ This Rogers figure cannot be correct, otherwise Rogers would be in non-compliance with their regulatory obligations. Since Rogers is not seeking any change to its PNI level of contribution, for the purpose of this proceeding the CMPA does not take issue with its incomplete data. The CMPA agrees with Rogers' proposed 5% PNI.

¹⁶ Further evidence of this and the Government's concern over declines in PNI spending can be found in the recent Creative Canada Policy Framework, and the decision to "top up" declines in CMF funding caused by declines in BDU revenues. It is highly implausible that the Government would have made such a decision, if it anticipated that the Commission would accept the dramatic reductions in PNI spending of the Broadcasters that will arise from a departure from historic spending levels.



The PNI Levels Need Not Be Standardized

26. In our submission in the Group licence renewal proceeding, the CMPA stated:

In order to maintain PNI spending levels going forward, and consistent with standardization, the Commission should set the PNI level for all Groups at an average of the historical levels of the three Groups. Alternatively, the Commission should require each Group to maintain its respective historical PNI level.¹⁷

27. At the time, the CMPA did not oppose standardization as long as PNI expenditures were maintained by setting the obligations at an average of all of the Broadcasters' historic levels. Instead, the Commission introduced standardization at the lowest of the three levels – Rogers' historic PNI expenditure level of 5%.

28. In light of this result, and having reviewed the amended applications of each of the Broadcasters, we submit that a non-standard approach would be the most appropriate outcome of this proceeding.

29. We agree with Rogers that:

[T]he *Broadcasting Act*, and paragraph 3(1)(s) in particular, does not require each programming undertaking to contribute in the exact same manner to the production of Canadian programming. Nor does it require programming undertakings to contribute to a specific category of programming, such as music programming, short films and short-form documentaries. Rather, the policy objective set out in paragraph 3(1)(s) references Canadian programming as a whole.¹⁸

30. We reject the argument that a non-standardized approach would be inherently contrary to the Create Policy or somehow too administratively difficult. In Broadcasting Decision CRTC 2017-143, the Commission specifically chose to adopt a non-standardized approach in respect of PNI commitments for French-language television groups finding that:

Expenditure levels for the groups should be determined on a case-by-case basis rather than by applying a standard level for all groups. While they share the same economic and technological context and must face the same digital challenges, the French-language groups differ greatly in terms of their financial situation, market share, composition and current regulatory requirements.¹⁹

31. The decision to impose a standardized PNI contribution requirement on all English-language groups at the lowest common denominator – that of Rogers – has resulted in Bell and Corus being subject to much lower requirements relative to their historical requirements. This imposition of a standardized requirement thus creates an imbalance among the groups. The Commission's rationale

¹⁷ CMPA submission dated August 15, 2016, para 30.

¹⁸ Rogers Response Letter dated October 21, 2017, Q 2(c)(ii).

¹⁹ CRTC 2017-143, para. 22.



with respect to setting different CPE levels for the French-language groups ought to apply equally to PNI obligations for the English-language groups. Put simply, Bell and Corus are different than Rogers, particularly in terms of financial situation and market share. There is simply no rationale for treating all three Broadcasters as though they are the same when they are decidedly different in terms of their financial situation, market share, and composition.

32. Both Bell and Corus argue that the elimination of genre exclusivity prevents the Commission from establishing different PNI levels for the Broadcasters. While the absence of genre exclusivity gives the regulatory flexibility for groups to change service genres or programming emphasis, it does not require them to do so, or mean that they will. In fact, the genre and service mix of the large groups has actually changed very little since genre exclusivity was eliminated, and what has changed does not support a standardized PNI approach. For example, Bell is now the dominant provider of pay TV services in Canada – a position enhanced by Corus’ decision to exit that field. PNI requirements for pay services have always been higher than most other types of service. To allow Bell to dominate Pay TV, without commensurate historic obligations, would compromise PNI support for no policy benefit whatsoever.²⁰
33. Finally, as discussed below, the creation and presentation of Canadian programming is far better supported if PNI requirements are established case-by-case based on the historical gross revenues and expenditures for each Broadcaster.

The Levels of PNI that Should be Established

34. As noted above, the Commission stated in the Create Policy that it intended to maintain the spending level for PNI.²¹ The issue now before the Commission, by virtue of the Order in Council, is not how to change this policy, but how to respect it.
35. In finding that the Decisions “derogate from the attainment of the objectives” of the *Act* and directing the Commission to “consider how it can be ensured that significant contributions are made to the creation and presentation of programs of national interest”, the Governor in Council is effectively requesting that the Commission increase aggregate PNI levels. There is no other reasonable interpretation of the plain wording of the Order in Council.
36. This is a message that the largest of the Broadcasters could not ignore. Both Bell and Corus have proposed an increase in PNI levels from 5% to 6%. Bell and Corus make much ado about a so-called \$27 million (for Bell) and “tens of millions of dollars” (for Corus) increases in PNI spend over three years as compared to the Decisions, conveniently ignoring the fact that their proposals would still amount to an average annual decrease of approximately \$72.5 million (or \$290 million over four years) from their annual average PNI spend. While directionally correct, a 6% PNI level for Bell or

²⁰ As outlined by the Commission in the GLR Introductory Decision, pursuant to Broadcasting Regulatory Policy [2010-167](#) (the group-based policy), the Commission established PNI expenditure requirements of 16% of revenues for Astral, 5% for Bell and Shaw, 9% for Corus and 5% for Rogers. After that, Bell acquired the assets of Astral (including Bell’s Pay assets), and Corus acquired the assets of Shaw. The proposed PNI levels simply reflect those asset acquisitions.

²¹ Create Policy, at para. 289.



Corus is not responsive to the Order in Council in terms of quantum. None of these Broadcaster proposals would amount to significant contributions to the creation and presentation of programs of national interest, nor would they “take into consideration that creators of Canadian programming are key to the Canadian broadcasting system” as required by the Order in Council and the objectives of Canada’s broadcasting policy.

37. Consistent with the Commission’s own Create Policy, and historical averages, the CMPA requests the CRTC to set PNI levels as follows:

1. 8% for Bell;
2. 9% for Corus; and
3. 5% for Rogers.

38. In such a result, the CMPA estimates that spending on PNI over the remainder of the licence term by all three Broadcasters would amount to approximately \$876 million.²² Adopting the Bell and Corus proposals would result in a reduction of PNI spending of \$256 million over the remainder of the licence term.²³ The difference is significant.

Operating Context

39. The applications filed by the Broadcasters make much of the so-called dramatic changes in operating environment that have occurred since the Commission considered their licence renewals a mere year and a half ago.

40. But, the expectation of gradual, predictable, manageable and relatively modest annual revenue declines confirms the genius and self-adjusting nature of percentage of revenue expenditure commitments to CPE and PNI.

41. The system, particularly the Canadian content funding system, has been designed to accommodate gradual changes in the revenues of the Broadcasters and BDUs. It was originally designed to accommodate increases in revenue (and commensurate increases in contribution or CPE), but it can equally accommodate decreases in revenue. As such, the Broadcasters’ expectations of revenue declines and competitive threats, no matter the magnitude, are a red herring when considering what the appropriate CPE and PNI levels should be.

42. Moreover, a review of the evidence suggests that the magnitude of alleged recent changes in the Broadcasters’ operating environment has been significantly overblown.

43. As noted in the CMPA’s first phase submission on future distribution models, even with the growth in online video consumption, most Canadians still watch television by traditional means. Whether it be over-the-air television stations or through BDU subscriptions to cable, DTH satellite, or IPTV. The average amount of broadcast television viewed by Canadians was 28.2 hours per week in 2016

²² 2018 Boon Dog Report, p. 21.

²³ That is, assuming implementation of new PNI expenditure requirements effective September 1, 2018.



compared to 3.1 hours spent viewing internet television.²⁴ The penetration rate for BDU services remains high in Canada: in 2016, 76.2% of Canadian households still subscribed to a BDU.²⁵ While viewer behaviour is changing, it is clear that Canadians still watch a significant amount of content on broadcast television.

44. Bell claims that the “daunting competitive environment” has, in the 18 months since it filed its original application “transformed beyond expectations and the challenge is even more urgent”, claiming that:

At the time of the initial filing, broadcasters expressed concern about the presence of one international streaming juggernaut, Netflix, in the market. By 2018, there will be three ... It is a sign of what is to come that domestic success led these US players to expand into the Canadian market. As the OTT competition in the US continues to intensify, many services see Canada as the next frontier. These recent developments send a clear message: Netflix is only the beginning.

45. It is unclear as to why Bell makes the claims that competition has intensified over the last 18 month period since the characteristics of the current competitive environment have been in place for many years. The Broadcasters were well aware of the competition in the market at the time they filed their original licence renewal applications. BCE's 2012 Annual Report recognized the current competition and business risk in the media industry at that time:

We need to anticipate technological change and invest in or develop new technologies, products and services that will gain market acceptance. ... We are challenged to generate more revenue from our media and telecom network assets by constant market and technological changes such as the proliferation of cheaper IP-based communications, OTT delivery mechanisms, the influence of global brands such as Apple, Google, Netflix, YouTube and Facebook, the introduction of cloud services and new technologies such as IP-based PVRs... New products or services that use new or evolving technologies could reduce demand for our existing offerings or cause prices for those services to decline, and could result in shorter estimated useful lives for existing technologies...²⁶

46. Corus, similarly, gave evidence at the hearing in the licence renewal proceeding that, “In 2011 Netflix had but a few hundred thousand subscribers. It is now in more than five million Canadian homes. Now we have many other players in the unauthenticated marketplace such as Crave TV, Google/YouTube, Amazon, Apple and others. More competition is on the horizon. Audience

²⁴ 2017 CMR, Figure 4.2.16 Average number of hours Canadians watched traditional television (2011-2012 through 2015-2016 broadcast years) and Internet television (2010 to 2016), per para 14, CMPA intervention dated December 1, 2017, Broadcasting Notice of Consultation CRTC 2017-359.

²⁵ 2017 CMR, Table 4.3.6 Percentage of households subscribing to BDUs.

²⁶ BCE. Annual Report 2012. Online: <http://www.bce.ca/annual-reports/2012-annual-report/managements-discussion-and-analysis/risks-that-could-affect-our-business-and-results>

fragmentation is now a fact of life. In fact, we have seen a steady erosion of people watching television over the licence term”.²⁷

47. It is indeed surprising that the Broadcasters are not doubling down on local content given the clear direction of successful global players, who are consistently increasing their program budgets in order to compete in the global market. While recognizing that “Canadians want content – they don’t distinguish between platforms”,²⁸ the Broadcasters’ apparent business strategies of decreasing their level of funding for Canadian productions is the antithesis of what is happening around the world and is harmful to the creation, development, distribution and export of Canadian content.
48. Finally, one cannot lose sight of the fact that Bell and Rogers are divisions of two of Canada’s largest publicly traded corporations, BCE Inc. and Rogers Communications Inc., with vertically integrated operations that include cable, telephone, wireless and broadband services.
49. The operating revenues of Bell’s parent company, BCE, were up 1.0% and its adjusted EBITDA was up 2.8% to a very healthy \$8.79 billion from 2015 to 2016. BCE’s net earnings increased a whopping 13.1% from 2015 to 2016.²⁹ The combined revenues of BCE Inc. and Rogers Communications Inc. were \$35.4 billion in 2016.³⁰ While Corus is not a vertically integrated company, Corus and Shaw Communications Inc. are under the common control of JR Shaw.³¹ Shaw Communications Inc. is vertically integrated and offers cable, telephone, wireless and broadband services. Taken together, the combined revenues of Corus and Shaw Communications Inc. were \$6.05 billion in 2016.³²
50. The Broadcasters enjoy overwhelming dominance of the English-language television market. In 2016, their combined audience viewing share was 83.1%³³ - in a market where Canadians still watch an average of 28.2 hours of traditional television weekly.³⁴ This dominance gives the Broadcasters privileged access to Canadian audiences. It also enables the Broadcasters to exercise extraordinary control over which, when, and how many, Canadian creative voices and television programs are accessible to those audiences.
51. The CMPA is not suggesting that expenditure obligations be tied to the overall revenues of these vertically integrated or diversified companies. Rather, when considering the Broadcasters’ claims of financial hardship, the larger context and reality of how these businesses operate must be critically examined. The Broadcasters draw arbitrary distinctions between different lines of business when it suits them, such as the case here where it is beneficial to claim financial hardship. But, when reporting on the health of their companies to investors and shareholders, each of BCE, Rogers and

²⁷ Corus Transcript, l. 818

²⁸ Bell Response letter dated November 1, 2017, para. 7.

²⁹ <http://www.bce.ca/investors/AR-2016/2016-bce-annual-report.pdf>

³⁰ BCE Inc. BCE Inc. 2016 Annual Report, online: <http://www.bce.ca/investors/AR-2016/2016-bce-annual-report.pdf>. Rogers Communications Inc. Rogers Communications Inc. 2016 Annual Report, online: <http://netstorage-ion.rogers.com/downloads/IR/pdf/annual-reports/Rogers-2016-Annual-Report.pdf>.

³¹ CRTC, Ownership Charts, online: <http://www.crtc.gc.ca/ownership/eng/cht032c.pdf>.

³² https://www.shaw.ca/uploadedFiles/Corporate/Investors/Financial_Reports/2016-Annual-Report.pdf

³³ CRTC Communications Monitoring Report 2017, Table 4.2.18, online: <https://crtc.gc.ca/eng/publications/reports/policymonitoring/2017/cmr4.htm#s42>

³⁴ CRTC, Communications Monitoring Report, 2017, Table 4.2.16.



Corus report total overall earnings, demonstrating the strength of their vertically integrated or diversified corporate activities. These businesses are integrated for a reason. When considering the Broadcasters' claims, the broader financial health of their companies must be taken into context.

Q2. What approach should the Commission take to ensure support for music programming, short films and short-form documentaries?

Response:

52. The CMPA believes that specific support for music programming, short films and short-form documentaries might most appropriately take the form of an incentive approach within CPE requirements as further described in response to Q4.

Q3. If the Commission decides to reinstate contribution requirements imposed on services to support music programming, short films and short-form documentaries, which requirements should be reinstated, and to what group or groups should they apply?

Response:

53. The CMPA is on record as supporting specific requirements for particular underrepresented program categories, such as children's and youth programming.³⁵

54. We continue to believe it both possible and appropriate for the Commission to impose targeted contribution requirements in a flexible manner that does not undermine "the intent of the *Let's Talk TV* policy framework which was to allow services to compete with each other on a level playing field, with no service operating at a competitive disadvantage".³⁶

55. We discuss such potential approaches in response to Q4.

Q4. If the Commission decides to implement new measures to ensure support for the creation and presentation of music programming, short films and short-form documentaries on all platforms:

- **What should those measures be?**
- **To what groups should they apply?**

³⁵ CMPA Intervention in response to CRTC BNOC 2016-225, page 5, online: <https://services.crtc.gc.ca/pub/ListeInterventionList/Documents.aspx?ID=237801&en=2016-225&dt=i&lang=e&S=C&PA=b&PT=nc&PST=a>.

³⁶ Bell Media Comments, November 1, 2017, para 42.

Response:

56. We note that the Broadcasters have proposed two potential incentive mechanisms for supporting the creation and presentation of music programming, short films and short-form documentaries:
1. Bell and Corus have proposed a new CPE credit for all music programming and for short films and short-form documentaries; and
 2. Bell and Rogers have proposed expanding the PNI category to include music programming, short films and short-form documentaries.
57. The CMPA does not support expanding the PNI category for the Broadcasters, certainly not without a commensurate increase in baseline PNI requirements.
58. We would have no objection, however, to a 25% credit against a Broadcaster's CPE requirements for expenditures on music programming and for short films and short-form documentaries, up to a maximum of 10% of the Broadcaster's overall annual CPE requirement.

Q5. Section 3(1)(c) of the Act states that “English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements.” In light of this objective, do you think that the Commission should adopt a different approach to each linguistic market to support the creation and presentation of music and music video programming? Please justify your answer.

Response:

59. The CMPA does not have a mandate to represent French-language independent producers.
60. As a matter of principle, however, we believe the Commission is entitled to adopt a different approach to each linguistic market to support the creation and presentation of music and music video programming.
61. This is consistent with our view, expressed above, that different groups may have different obligations, depending on the circumstance.

Responses to other matters raised by the Broadcasters that are outside the Scope of the Order in Council

A. Procedural Objections to Raising Matters Outside the Scope of the Order in Council

62. Two of the specific amendments proposed by the Broadcasters include reducing the required level of CPE and reducing the well-established 75% level of independent PNI production. If accepted, such

amendments would either reduce funding of Canadian programming or the contribution of independent producers to PNI. The proposals by the Broadcasters to reduce their licence terms fall outside of the scope of the Order in Council and ought to be summarily dismissed without further consideration. Approval of any of these proposed licence amendments would be inappropriate for the following reasons.

63. First, unlike in the *Telecommunications Act*, the CRTC has no power to reconsider decisions on its own motion under the *Broadcasting Act*. Decisions of the CRTC under the *Broadcasting Act* are “final and conclusive”.³⁷ Given that the sole reason for this proceeding is the Order in Council, the Commission would be exceeding its jurisdiction if it accepted any amendments outside of the scope of the Order in Council.
64. Second, accepting amendments outside of the scope of the Order in Council would deny third party interveners, such as the CMPA, procedural fairness. This proceeding is of necessity a relatively rapid one³⁸ (and appropriately so if the scope of the Order in Council is respected). Unlike the renewal hearing, where interveners such as the CMPA were able to avail themselves of a first submission, appearance at an oral hearing and a final submission, this is our only intervention in this proceeding. To accept licence amendments outside of the scope of the Order in Council that directionally harm independent producers, particularly given the thrust of the Order in Council and s. 3(1)(i)(h) of the *Broadcasting Act*, without the due consideration that is only possible with a full public hearing process akin to the licence renewal hearing, would be grossly and procedurally unfair to the CMPA and its member companies. To consider such dramatic licence amendments would quite obviously require a hearing in the public interest.³⁹
65. Finally, the specific financial impact of such proposals has not been revealed by the Broadcasters making these proposals, nor has the Commission apparently requested or released estimates. While the CMPA was able to commission an analysis on PNI and CPE, the impact of proposals to reduce the well-established 75% level of independent PNI production is completely unknown.⁴⁰ The right of interveners to financial statements and projections on matters that directly affect them and/or their members is a reasonable expectation of a fair process.⁴¹

³⁷ S. 31(1) of the *Broadcasting Act*.

³⁸ That is, in order to allow the Commission to render decisions that can be take effect as soon as possible.

³⁹ Section 18(2) of the *Broadcasting Act* requires that “The Commission shall hold a public hearing in connection with the amendment or renewal of a licence unless it is satisfied that such a hearing is not required in the public interest.”

⁴⁰ Estimates calculated by the CMPA based solely on the Broadcasters’ independent production expenditure proposals as a percentage of the Broadcasters proposed PNI spending amount to, on average, roughly \$96 million less per year as compared to their estimated historical expenditures on independent production. All of these figures are highly speculative because the Broadcasters have not provided either their historical expenditures on independent production, nor have they provided any projections based on their proposals.

⁴¹ See *Re Canadian Radio-Television Commission and in re London Cable TV Ltd*, [1976] 2 F.C. 621, 67 D.L.R. (3d) 267 (FCA), a judgement establishing the right of interveners to financial statements and projections filed by a cable system seeking a rate increase.

B. The Level of CPE Contribution is Outside the Scope of this Proceeding

66. Bell and Corus have each requested that current CPE requirements of 30% of previous year's revenues be reduced to 28% of previous year's revenues. Rogers has respected the current 30% level, and requested no change.
67. We submit that Bell and Corus' requests should be rejected outright as outside of the scope of this process.
68. As previously noted, the specific issues raised by the Order in Council did not include CPE. While the level of required CPE was an issue for the licence renewal proceedings for the Broadcasters, it is unequivocally not an issue raised in the Order in Council and therefore not an issue for this proceeding. If the Broadcasters had an issue with the levels of CPE set by the Commission in the Decisions they ought to have filed their own petitions to the Governor in Council. They did not, and are now long out of time to do so.
69. None of the petitions raised the issue of CPE. And, to its credit, none of the Commission's questions relate to CPE. As outlined above, accepting proposed reductions in CPE licence conditions would be procedurally unfair to interveners and *ultra vires*.
70. We therefore respectfully request that the Commission determine that a review of CPE levels is outside of the scope of this proceeding, and decline to consider same.
71. If, in the alternative, the Commission does decide to consider the proposed reductions in CPE levels, we note the following:
- In its Decisions, the Commission determined that a standard 30% "requirement will not have an undue impact on the groups, while providing them with the flexibility to remain competitive."
 - No one but Corus and Bell have questioned this 30% level – not the Petitioners, not the Governor in Council, not the CRTC in this process.
 - Corus and Bell have provided no evidence that a 30% CPE level cannot be sustained or will have an "undue impact". To the contrary, the Broadcasters project marginal revenue declines over the next three to four years.

There is therefore no legal or evidentiary basis to revisit the Broadcasters' CPE conditions of licence.

C. The Level of the Required PNI Expenditures to Independent Production is Outside the Scope of this Proceeding

72. In respect of the 75% level of independent PNI production, this was quite obviously not an issue raised in the Order in Council. It is thus also not an issue for this proceeding.

73. Nor has the 75% level of independent PNI production been raised as an issue previously by any of the Broadcasters. None of the Broadcasters requested a reduction in the 75% PNI level during the 2016 licence renewal hearings. As noted by the Commission in its introductory decision to the 2016 licence renewals, interveners generally agreed that at least 75% of all PNI expenditures should continue to be allocated to independently produced programming.⁴² Rightly, in the Decisions, the Commission confirmed that at least 75% of mandatory PNI expenditures must be allocated to independently produced programming. If the Broadcasters took issue with their levels of independent PNI production spend they should have raised it in the original GLR proceeding.
74. In addition, the 75% level was an established policy going into the group licence renewal proceedings. It is a matter of basic procedural practice that the Commission does not change established policy in a licence renewal hearing. Amending the 75% level of independent PNI production requirement would constitute a substantial change to an established Commission policy that was confirmed by the Commission in the policy framework decision for the renewals, the Create Policy.⁴³ As with the level of required CPE, if the Broadcasters had an issue with the level of independent PNI production, they had ample opportunity to raise it. Since they chose not to, they should not be granted such fundamental amendments in this process.
75. PNI requirements were first introduced in the English-language market in 2011, during the last round of licence renewals, pursuant to Broadcasting Regulatory Policy 2010-167. The 75% level of required PNI expenditures that must go to independent production was established at this time.⁴⁴
76. When the 75% PNI level was established in the 2011 licence renewals, terms of trade were unresolved, and the “Commission remain[ed] obligated to ensure a significant contribution of programming from the independent production sector”. Given the Commission’s decision to eliminate the requirement for terms of trade agreements, the 75% requirement has become even more important.
77. As mentioned previously, following extensive industry and public consultation, in the Create Policy, the Commission firmly and unequivocally confirmed the 75% PNI independent production level. Among other things, the Commission:
- Determined that PNI expenditure requirements continue to be an appropriate tool for ensuring that Canadians have access to the maximum number of programs from program categories that are of national interest and that require regulatory support;
 - Confirmed that current PNI requirements would be maintained; and

⁴² CRTC 2017-148, para 40

⁴³ At para. 291: “The Commission also considers that the condition of licence requiring that at least 75% of the spending requirement for PNI be allocated to independently produced programs is one of the means by which the objective in the Act relating to the independent sector is fulfilled and should therefore be maintained”

⁴⁴ Prior to this, large English-language conventional television groups had priority programming exhibition obligations and were expected to ensure that at least 75% of the priority programming they broadcast is produced by independent production companies.

- Expressed the view that the requirement that at least 75% of PNI expenditures be allocated to independently produced programs is one of the means by which the *Act*'s objective relating to the independent production sector is fulfilled and should therefore be maintained.

78. Despite all of the foregoing, all three Broadcasters have now requested that the 75% commitment to independent production be drastically reduced:

- Bell/Corus have requested that required PNI expenditures to independent productions should be decreased from 75% to 50%; and
- Rogers has requested that required PNI expenditures to independent productions should be decreased from 75% to 25%.

79. The CMPA urges the Commission to dismiss these requests on four grounds.

80. First, the Order in Council clearly does not contemplate that the level of PNI independent production should be a matter for the CRTC's reconsideration. Reduction in support for independent production would be contrary to the Order in Council finding that the Decisions derogate from the attainment of the objectives of the broadcasting policy of the *Act*, which includes 3(1)(i)(v) ("programming provided by the Canadian broadcasting system should include a significant contribution from the Canadian independent production sector"). It would also be contrary to the Order in Council direction that the Commission "take into consideration that creators of Canadian programming are key to the Canadian broadcasting system". Reducing the key contribution of independent producers is clearly not what the Governor in Council had in mind.

81. Second, the Broadcasters have provided no substantive evidence as to why such a change is required. As it stands, the Broadcasters have not even taken advantage of the 25% affiliated production flexibility the current regime allows. Moreover, the Broadcasters have not fully exercised other industry programs that enable broadcaster production. For example, the Canada Media Fund's (CMF) current cap of 15% affiliated production is rarely reached. Neither Rogers nor Bell triggered any of their CMF performance envelope funding for in-house/affiliated production last year. This suggests that, in respect of the next four years, the request is not about more affiliated PNI production at all. Rather, the sudden increased leverage the Broadcasters would have over producers would, particularly given the absence of terms of trade, be used to extract concessions that would dramatically tilt the Canadian production marketplace in the Broadcasters' favour. If the Broadcasters were fully prepared to adhere to the current commitment for a full five years, a mere year and a half ago, it seems highly implausible that they can no longer adhere to it beyond the current year.

82. Third, to the extent the Broadcasters did commission more affiliated PNI production, this would only further exacerbate our highly concentrated broadcasting system, where most television programming decisions are made by a limited number of people in a few very big companies centralized in one city. Independent production companies of all sizes, in different genres and formats, from different perspectives and regions across Canada play a critical role in the health of

the Canadian broadcasting system, by ensuring that there is real variety and diversity on our screens. Independent producers are that key element in the system that ensures a diversity of voices⁴⁵ – including diversity in both the types of content available to Canadians and diversity in the size, shape, and structure of those who make it. The 75% PNI independent production requirement, which amounts to only 3.75% of broadcasting revenues, is a minimally intrusive regulatory intervention to that end.

83. Fourth, as discussed above, the legal basis for amending conditions of licence that reflect the established policy of a 75% PNI independent production commitment does not exist. Accepting this fundamental and damaging change in this current expedited and narrow process would be contrary to procedural fairness and outside the Commission’s jurisdiction.
84. For all of these reasons, the Broadcasters’ requests to decrease the required PNI expenditures to independent productions ought to be given short shrift and denied.

D. Duration of Licence Term

85. All three Broadcasters request that their licence terms be reduced from five years to three. Once again, the CMPA submits that this request is outside the scope of this process and should be flatly rejected. The Order in Council requested reconsideration on clearly enumerated grounds. The term of licence was not one of them. In addition, shorter terms cannot possibly benefit creators, given the uncertainty they create with respect to funding expectations.
86. The alleged degree of uncertainty anticipated by the Broadcasters over the next four and a half years does not require or warrant a shorter licence term.
87. Bell also uses the Federal Government’s announcement about its intention to review the *Broadcasting Act* as another reason to shorten its licence term, but the timing of any expected review or legislative change is pure speculation on Bell’s part. There is absolutely no indication of what sections of the legislation may be amended, or when that may happen. If unexpected fundamental changes were to occur, the Broadcasters would be in a position to apply for amendments to licence in any event.
88. While the CMPA respects the Commission’s decision to issue five year licences, rather than the historical seven year terms, there is simply no basis for shortening licence terms even further.

E. Bell’s Request to expand the Definition of PNI to Include “Special Recognition Programs”

89. Bell requests that the Commission further expand the definition of PNI to allow for “special recognition programs” to qualify as PNI. Such programs would include, for example, galas or tributes to Canadian icons. It appears that with this request, Bell is seeking to have programming that it will

⁴⁵ Broadcasting Public Notice CRTC 2008-4, para. 18, online: <https://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htm>.

have already decided to broadcast qualify under its PNI obligations. Bell seems to be missing the point of designating programs as PNI: the purpose of doing so is to incentivize the creation, production and distribution of *underrepresented* content that would make an important contribution to the broadcasting system, not to give credit for programming that would have been made in any event.

90. In addition, this case-by-case assessment would introduce a lack of clarity and instability into the regulatory definitions. One can easily imagine how quickly this type of unwarranted and unnecessary flexibility in the PNI definition could quickly go sideways. For example, on a day where CTV's unscripted reality program *The Launch* happens to include a Canadian artist promoting a new record, Bell might decide to claim *The Launch* as a "special recognition program". While artist promotion is certainly a laudable objective, clearly, this is not the type of content that PNI needs to encourage. For these reasons, we submit that Bell's request to include "special recognition programs" in the PNI definition ought to be denied.

Conclusion

91. In conclusion, the CMPA respectfully submits that:

- a. The appropriate expenditure levels for PNI ought to be 8% for Bell; 9% for Corus; and 5% for Rogers;
- b. The CMPA has no objection to a 25% credit against a Broadcaster's CPE requirements for expenditures on music programming and for short films and short-form documentaries, up to a maximum of 10% of the Broadcaster's overall annual CPE requirement; and
- c. The Commission is entitled to adopt a different approach to each linguistic market to support the creation and presentation of music and music video programming.

All of which is respectfully submitted.

Sincerely,
Erin Finlay
Chief Legal Officer

cc. Bell Media Inc., attention Kevin Goldstein
Corus Entertainment Inc., attention Sylvie Courtemanche
Rogers Media Inc., attention Susan Wheeler

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