

March 27<sup>th</sup>, 2018

***Filed via Intervention/Comment/Answer Form***

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

Dear Mr. Doucet:

**RE: Allarco Entertainment Limited Partnership’s Broadcasting Licence Renewal Application for Super Channel (Application no. 2017–0743–1) – Intervention from the Canadian Media Producers Association**

**Introduction**

1. The Canadian Media Producers Association (CMPA) is pleased to provide the following comments with respect to the broadcasting licence renewal application for Allarco Entertainment Limited Partnership’s (“Allarco”) discretionary service Super Channel (Application no. 2017–0743–1).
2. The CMPA is the country’s leading member–based advocacy organization for independent producers. We represent hundreds of companies engaged in the development and distribution of English–language content made for television, cinema, and digital media channels. The CMPA works to promote the continued success of the Canadian production sector and to ensure a future for the diverse content made by Canadians for both domestic and international audiences.

3. Based on the evidence on the public record, the CMPA is unable to support Allarco's renewal application for Super Channel. In the event a public hearing is called for this licence renewal proceeding, the CMPA requests to appear.

### Executive Summary

4. The public record for Super Channel's broadcasting licence renewal appears to demonstrate that Allarco has not met its conditions of licence (COLs) relating to expenditures on Canadian programming, regional outreach programs, and script and concept development, as well as the exhibition of Canadian programs. Due to this apparent and serious non-compliance in the current licence term, a history of serious non-compliance with its COLs in the previous licence term, and its current precarious financial position in bankruptcy protection, the CMPA submits that a hearing is required in the public interest. As such, the Commission is legally bound pursuant to section 18(2) of the *Broadcasting Act* (the "Act") to call Allarco to a public hearing for the renewal of Super Channel's broadcasting licence. Specifically, this licensee should be required to meet all of its current COLs relating to expenditures and explain how it will meet expenditure COLs in the new licence term at a public hearing. It is only once these steps have been taken that the CMPA can comment on whether or not it can support Allarco's renewal application.
5. The CMPA further submits that, if the Commission is satisfied that a renewal of the licence is appropriate following a public hearing, the Commission must, at a minimum, make the following determinations and impose the following COLs:<sup>1</sup>
  - require Allarco to adhere to its current COLs relating to expenditures on Canadian programming, regional outreach programs, and script and concept development by no later than August 31<sup>st</sup>, 2018; provide evidence of full payment to the Commission by no later than September 30<sup>th</sup>, 2018; warn the licensee that failure to meet these required expenditures will result in a mandatory order to do so by no later than December 31<sup>st</sup>, 2018; and if the licensee fails to comply with the mandatory order by that date, the Commission will call for an immediate "show cause" hearing which may result in the suspension or revocation of its licence;

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<sup>1</sup> The CMPA reserves the right to amend these recommendations should the Commission call a public hearing or otherwise vary the procedures for Super Channel's licence renewal application.



- warn the licensee that any further appearance of non-compliance in the new licence term will immediately trigger a “show cause” hearing which may result in mandatory orders or the suspension or revocation of its licence;
  - grant a short-term licence renewal of no more than three years;
  - deny Allarco’s proposal to reduce its Canadian programming expenditures (CPE) from 30% of its previous year’s gross revenues to 25%;
  - impose various safeguard COLs or mechanisms to ensure the licensee fully conforms to its COLs in the new licence term, including:
    - that no more than 3% of Super Channel’s broadcast schedule shall be devoted to filler programming that can be used to fulfill Canadian program exhibition requirements;
    - that the licensee shall ensure that Canadian programming is evenly scheduled throughout the broadcast day; and
    - that Super Channel shall be given equitable carriage by broadcasting distribution undertakings (BDUs).
6. Finally, the CMPA is taking the opportunity provided by the licence renewal process to emphasize the importance of transparent reporting by broadcasters and the monitoring of digital media broadcasting revenues.

### **The impact of Super Channel on the Canadian broadcasting system**

7. Super Channel should play an important role in the Canadian broadcasting system as the only independent premium discretionary service. It is a rare non-vertically-integrated “door” to knock on for independent producers and an equally rare and important potential acquirer of Canadian feature film and documentary productions.
8. Unfortunately, as outlined in Allarco’s supplementary brief, Super Channel has faced considerable challenges in the ten years since its launch that have limited its ability to fulfill the promise of a second competitive national premium television service. Among other



things, Super Channel points to difficulty in securing carriage from certain BDUs and being forced to seek protection from creditors through the *Companies' Creditors Arrangement Act* (CCAA).

9. Allarco first filed for CCAA protection in June 2009 and emerged in September 2010. It then filed for CCAA protection for a second time in May 2016. At that time the broadcaster had 135 active program licence agreements,<sup>2</sup> including agreements with Canadian producers and distributors for Canadian titles such Shaftesbury's *Slasher*, New Metric Media's *What Would Sal Do?*, Nomadic Pictures' *Van Helsing*, and Incendo's France/Canada co-production *Versailles*. By October 2016, Allarco had disclaimed 96 of those 135 contracts.<sup>3</sup> In February 2018, an Alberta court approved a "plan of compromise" where Allarco will pay \$2.95 million to 142 affected creditors to prevent its liquidation.<sup>4</sup> The court has approved the plan for Allarco to pay 45% on the first \$25,000, and 6% on any amount above \$25,000, on proven claims from affected accreditors.<sup>5</sup> This means that many Canadian producers and distributors now find themselves receiving a substantially reduced payment from this broadcaster for their projects – in some cases this amounts to as little as six cents on the dollar.
10. Canada's independent producers' views have evolved from optimism at the launch of Super Channel to disappointment at how this broadcaster's survival has all too often been at their expense. From the two rounds of CCAA protection to the Commission's approval of reduced requirements for CPE and regional outreach programs and script and concept development at the last licence renewal (even though the licensee had failed to meet those COLs),<sup>6</sup> Canada's independent production sector has suffered substantial harm due to Allarco's failures as a broadcaster.

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<sup>2</sup> Please refer to the Allarco Creditor Listing, May 26<sup>th</sup>, 2016, (available: [https://www.pwc.com/ca/en/car/allarco/assets/allarco-004\\_060216.pdf](https://www.pwc.com/ca/en/car/allarco/assets/allarco-004_060216.pdf)) Canadian producers and distributors represent the vast majority of unsecured creditors, with total identified amounts owing as at May 26, 2016, amounting to close to \$10 million.

<sup>3</sup> Under CCAA protection, a debtor company can unilaterally disclaim or resiliate agreements that are deemed too burdensome.

<sup>4</sup> Pinto, Jordan, "Allarco to pay almost \$3M to affected creditors in CCAA proceedings," *Playback*, February 21, 2018, (available: <http://playbackonline.ca/2018/02/21/allarco-to-pay-almost-3m-to-affected-creditors-in-ccaa-proceedings>).

<sup>5</sup> Monitor's Seventh Report to the Court dated February 5, 2018, (available: [https://www.pwc.com/ca/en/car/allarco/assets/allarco-063\\_020618.pdf](https://www.pwc.com/ca/en/car/allarco/assets/allarco-063_020618.pdf)).

<sup>6</sup> Broadcasting Decision CRTC 2013-468 (BD 2013-468), paras. 17-28.



11. Currently, Super Channel is broadcasting independently-produced programs that have not been paid for to date, and will only eventually be paid at a substantial discount through the CCAA proceeding. This is a perversion of the objectives of Canada’s broadcasting policy, including the declaration that each element of the system must contribute to the creation and presentation of Canadian programming.<sup>7</sup>
12. As of today, Allarco remains under CCAA protection and reports that it has been unable to re-negotiate affiliation agreements with a number of important BDUs. This broadcaster faces fierce competition from a myriad of online subscription video on-demand services, as well as a now single national premium discretionary service, The Movie Network (TMN), owned by Bell Media. Despite these challenges, Allarco states that it “remains optimistic in looking towards the future” and has proposed various amendments to its COLs in the new licence term.

### **The public interest demands that Super Channel be called to a public hearing**

13. Pursuant to section 18(2) of the Act, “[t]he 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.” While the Commission has recently implemented a “more efficient” procedure for licence renewal applications generally,<sup>8</sup> it remains imperative that the Commission determine whether or not the public interest requires a public hearing with respect to applications to amend or renew broadcasting licences.
14. The Commission is charged with the supervision and regulation of the Canadian broadcasting system.<sup>9</sup> As such, it has a duty to monitor broadcasting licensees to ensure they are operating in compliance with their COLs. In the event of non-compliance, the Commission may inquire into any failures to meet COLs and determine the matter.<sup>10</sup> This means that the Commission may determine whether or not it should adopt various measures to ensure that licensees meet their obligations, such as mandatory orders and

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<sup>7</sup> *Broadcasting Act*, s. 3(1)(e)

<sup>8</sup> Preamble to Broadcasting Information Bulletin CRTC 2015-116, *New procedures for licence renewal applications* (BIB 2015-116).

<sup>9</sup> *Broadcasting Act*, s. 5(1).

<sup>10</sup> *Ibid.*, s. 12(1).



short-term renewal, suspension, non-renewal, or revocation of the licence. However, other than a short-term renewal, these measures to ensure compliance may only be imposed after a public hearing is held.<sup>11</sup>

15. In this case, the public interest demands that Super Channel be called to a public hearing because it appears that the licensee is in serious non-compliance with all of its COLs relating to expenditures as well as those relating to the exhibition of Canadian programs. Moreover, this licensee has a history of non-compliance with its COLs relating to expenditures and is currently in CCAA protection and it is not yet clear that it will emerge from that process.
16. Without a public hearing to examine the seriousness of this licensee's current apparent non-compliance and consider its history of non-compliance and current CCAA proceeding, the Commission is unable to contemplate appropriate measures to ensure that this broadcaster complies with its current or future COLs.
17. For all of the above reasons, the CMPA requests that the Commission call a public hearing in the broadcasting licence renewal application proceeding for Allarco's discretionary service Super Channel.

**Super Channel is in apparent non-compliance with its conditions of licence relating to expenditures on Canadian programming, regional outreach programs, and script and concept development**

18. Super Channel's current COLs relating to expenditures require that the licensee:
  - expend on the acquisition of, or investment in, Canadian programs 30% of its revenue for the previous broadcast year (i.e. COL #5), including at least \$500,000 on regional outreach programs (i.e. COL #6) and \$500,000 on script and concept development (i.e. COL #7) in each broadcast year;
  - in addition to the above expenditures, it must expend as payment of the shortfall on expenditures on regional outreach programs and on script and concept development

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<sup>11</sup> *Ibid.*, s. 18(1).



from the previous licence term an amount equal to \$500,000 and \$1 million respectively in each broadcast year for a total of \$6 million by August 31, 2017 (i.e. COL #8); and

- submit annual reports to the Commission detailing the amount spent on the payment of the shortfall on expenditures on regional outreach programs and on script and concept development as well as the initiatives that received funding until the total amount of the shortfall has been paid (i.e. COL #9).

19. Based on the evidence on the public record through the current licensing renewal process, the Commission's statistical and financial summaries of individual discretionary services for the broadcasting sector,<sup>12</sup> and Allarco's annual reports pursuant to COL #9, it appears that Allarco has not achieved any of its COLs relating to expenditures.

20. The Commission's statistical and financial summary for Super Channel shows that this broadcaster has not met its COL that 30% of its previous year's gross revenues go to CPE for any reported year in the licence term<sup>13</sup> and that it expended absolutely no money on script and concept development even though it is required to spend \$500,000 on development as part of its CPE on an annual basis.<sup>14</sup> As well, there is no way to tell from Super Channel's statistical and financial summary or its licence renewal application whether or not it spent \$500,000 on regional outreach programs annually as part of its CPE requirements.

21. The CMPA acknowledges that the Commission permitted Allarco to use the cash method of accounting in order to fulfill COLs #5, 6, 7, and 8, but also indicated that it must use the accrual method of accounting when reporting on its CPE until August 31<sup>st</sup>, 2016, (i.e. COL #10). As a result, it is possible that the licensee may have met its 30% CPE requirement even though it appears from its annual returns not to have done so. However, there is no indication in the Part 1 licence renewal application filing that Allarco has met its CPE obligation and as a result, it is unclear to the public, including the CMPA, whether or not this COL has been achieved.

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<sup>12</sup> Individual Discretionary and On-Demand Services – Statistical and Financial Summaries 2012–2016, Super Channel, (available: <https://crtc.gc.ca/eng/publications/reports/BrAnalysis/psp2016/individual/ipsp183.htm>).

<sup>13</sup> Super Channel's actual CPE percentages (based on previous year's revenues) are 25.82% in 2014, 27.53% in 2015, and 28.72% in 2016. These shortfalls exceed the permissible flexibility of a 5% lower than minimum expenditure, and do not abide by the requirement that shortfalls must be made up in the subsequent broadcast year.

<sup>14</sup> Please see the "script and concept" expenditures line item which shows that no money has been spent from 2012–2016.



22. We also note that there is no explanation regarding Allarco's ability to meet its CPE requirements since it filed for CCAA protection in 2016 and disclaimed the majority of its program licence agreements. It is through payment of those program licence agreements that a broadcaster meets its CPE requirements so it seems highly unlikely that this licensee will be in compliance with COL #5 since it entered into CCAA protection.
23. Additionally, Allarco was required to make \$6 million in shortfall payments on script and concept development and regional outreach programs (\$1 million and \$500,000 respectively on an annual basis) by August 31, 2017. However, its annual reports demonstrate that Allarco spent \$2.13 million on script and concept development (out of a total \$4 million) and \$2 million (out of a total of \$2 million) on regional outreach programs as of August 31, 2017. In other words, it appears Allarco met its obligations regarding regional outreach programs but that it has a shortfall of \$1.87 million on script and concept development expenditures.
24. The CMPA seriously questions if this broadcaster has actually met its COL related to shortfall payments on regional outreach program expenditures and if it owes an even greater amount in script and concept development expenditures. These expenditures must be incremental (or in addition) to Allarco's required expenditures on Canadian programming. However, it appears from Super Channel's financial and statistical summary that this broadcaster spent no money on script and concept development expenditures and there is no evidence of any payments on regional outreach programs were made inclusive of CPE, thus \$500,000 of each of these shortfall expenditures on an annual basis may not be incremental.
25. To summarize Allarco's apparent and serious non-compliance in the current licence term, it appears that this broadcaster:
- failed to meet COL #5 to expend on the acquisition of, or investment in, Canadian programs 30% of its revenue for the previous broadcast year;
  - either failed to meet COL #6 to expend at least \$500,000 annually on regional outreach programs as part of its CPE requirements or COL #8 to expend an additional \$500,000 on regional outreach programs on an annual basis until it reaches a total of \$2 million by August 31, 2017;

- failed to meet COL #7 to expend at least \$500,000 annually on script and concept development as part of its CPE requirements; and
- failed to meet COL #8 to expend an additional \$1 million on script and concept development on top of its CPE requirements on an annual basis until it reaches a total of \$4 million by August 31, 2017.

26. The CMPA submits that this quantum of apparent and serious non-compliance with COLs is deserving of a public hearing to consider appropriate measures for current and future compliance.

### **Appropriate measures should be imposed to address Super Channel's non-compliance**

27. Non-compliance in the current licence term appears to include a shortfall on CPE, a shortfall on regional outreach programs and script and concept development, and a shortfall on required Canadian program exhibition requirements. Additionally, non-compliance in the previous licence term consisted of a significant CPE shortfall, which was in part forgiven due to the licensee's financial situation.

28. The Commission has always taken compliance with COLs very seriously, especially those relating to Canadian programming expenditures and exhibition. Partially forgiving non-compliance in 2013 was a huge concession given to Allarco, made only because of serious concern over the service's viability.

29. The integrity of the Commission's licensing process demands that no such concessions be made at this licence renewal. Moreover, given that Allarco is now in a position of repeated non-compliance, it is essential that the Commission put in place appropriate measures to ensure that there will be no further such incidents by this licensee.

30. Consistent with Commission precedent,<sup>15</sup> the CMPA urges the Commission to grant a short-term licence renewal of no more than three years and warn the licensee that any tangible evidence of non-compliance in the new licence term will result in an immediate "show

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<sup>15</sup> See for example, Aboriginal Voices Radio history per Broadcasting Decision CRTC 2015-282.



cause” hearing to determine whether a mandatory order should be issued to ensure compliance or whether the licence should not be suspended or revoked.

31. Allarco’s “business model” of repeatedly seeking CCAA protection, and relief from its COLs, should not be accepted by the Commission as normal operating procedure. Whatever its legitimate challenges, should Super Channel repeatedly fail to meet its COLs then it should face the same consequences as those faced by other licensees in similar situations, including being called to a “show cause” hearing to explain why its licence should not be suspended or revoked. To do otherwise brings Canada’s broadcasting licensing system into disrepute.

**Super Channel has provided no compelling rationale for a reduction to its required expenditures on Canadian programming**

32. In its licence renewal application, Allarco proposes a reduction to its CPE requirements from the current 30% of its previous year’s gross revenues to 25% in the new licence term. In arguing for a lower CPE requirement for Super Channel in the new licence term, Allarco states that:

*[We] are proposing a CPE of 25% for our new licence period in order to stabilize our financial situation all the while contributing to offer Canadian consumers another programming choice. Such a level of CPE would give us more flexibility in an increasingly competitive market particularly in considering the challenges of acquiring programming rights and/or streaming rights etc., for prime programming – such as Series – which consumers are asking for. In addition, a lower CPE for an independent broadcaster such as us, would compensate for the advantage Group licensees have in being able to amortize their CPE over multiple services.*

33. Allarco has made this request for a reduced expenditure requirement notwithstanding that it appears to be out of compliance with its existing CPE requirements. While suggesting that it is “quite sensitive to the Commission’s views on CPE,” Allarco has made no compelling arguments as to why:

- the Commission should depart from its standard practice to deny applications seeking to amend COLs for which the licensee is in a situation of non-compliance, especially when the Commission already did so in 2013;
- its CPE requirements should be different from those of its principal competitor, TMN; and
- Allarco's financial situation warrants a reduction in CPE.

34. As well, Allarco should be required to make up any shortfalls on Canadian programming, regional outreach programs, and script and concept development expenditures. A broadcaster should not be permitted to enter a new licence term without having met its COLs relating to expenditures and with no plan to require a licensee to make up for its non-compliance with shortfall expenditure COLs or mandatory orders in the new term.

***Repeated non-compliance should not be rewarded***

35. In partially approving Allarco's application for relief from Super Channel's CPE requirements in 2013, the Commission stated:

*The Commission's standard practice is to deny applications seeking to amend conditions of licence for which the licensee is in a situation of non-compliance. It is concerned with Allarco's non-compliance and the fact that a number of these proposed amendments regard commitments made by Allarco at the time of the licensing of its Super Channel service. The Commission is therefore disappointed with Allarco since it based its licensing decision on these commitments and that Allarco is now seeking significant reductions.*

*However, given that Super Channel will continue to contribute to the creation of new Canadian programs and to the creative sector, though to a lesser extent, and maintain an independent voice in the pay television sector, the Commission approves the licensee's request that Super Channel be granted a reduction in its requirements relating to regional outreach and script and concept development. Conditions of licence to that effect are set out in Appendix 1.*

*With respect to Super Channel's non-compliance, notwithstanding its financial challenges, the Commission notes that Super Channel made these commitments as part of a competitive process. As such, the Commission is of the view that the licensee should be required to pay a portion of the shortfall. As a result, Allarco is directed to pay \$6 million over the next licence term.<sup>16</sup>*

36. In this application, it appears that Allarco once again arrives in a position of non-compliance, requesting relief. While proposing to satisfy its \$6 million expenditure requirements for regional outreach programs and script and concept development by August 31, 2018 – that is one year late – it requests their elimination and a reduction in overall CPE to 25% on a going-forward basis.
37. This proposed reduction in CPE comes only three years after the Commission expressly rejected Allarco's request that its partial payment of shortfalls relating to regional outreach programs and script and concept development be treated as part of its 30% CPE.<sup>17</sup> The CMPA urges the Commission to deny the proposed reduction to CPE and require Allarco to achieve its shortfall payments on regional outreach programs and script and concept development. To do otherwise would be to reward a non-compliant licensee for its failures.
38. The CMPA requests that – only if the Commission is satisfied that Allarco is entitled to a licence renewal following a public hearing – the Commission require Allarco to fulfill COLs #5, 6, 7, and 8 by August 31<sup>st</sup>, 2018, and provide evidence of full payment by September 30<sup>th</sup>, 2018. We further request that the Commission warn the licensee that failure to make any of these payments by August 31<sup>st</sup>, 2018, will result in a mandatory order to do so by December 31<sup>st</sup>, 2018. Finally, should the licensee fail to adhere to this mandatory order then it will trigger an immediate “show cause” hearing which may result in the suspension or revocation of its licence.

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<sup>16</sup> BD 2013-468, paras. 19-21.

<sup>17</sup> The Decision noted in particular that “[t]he Commission has examined the financial projections submitted by Allarco LP in its application. Although the proposed amendment would be beneficial to Super Channel, the Commission is of the view that the financial viability of the service is not dependent on approval of the present application. Further, expenditures on production, in particular on script and concept development, may result in benefits to the service should these expenditures result in the production of attractive new programming.” Broadcasting Decision CRTC 2014-547, para. 18.

***Super Channel's Canadian programming expenditure requirements should not be different from those of its principal competitor, TMN***

39. Similar to its 2014 licence amendment application, Allarco has argued that it should have a lower CPE than its competitors to “compensate for the advantage Group licensees have in being able to amortize their CPE over multiple services.”

40. The Commission’s summary rejection of Allarco’s 2014 request on this basis remains equally valid today:

*In regard to the flexibility provisions of the group-based licensing approach, the Commission considers the licensee’s arguments to be a mischaracterization of that approach. The flexibility provisions in place allow for the allocation of spending between different types of services, and do not reduce a group’s overall CPE level. As a consequence, a licensee that is unable to take advantage of allocating spending across multiple services is not necessarily disadvantaged in terms of the requirements relating to its CPE level.<sup>18</sup>*

41. The current 30% CPE requirement of Super Channel is completely in line with the other premium television service. TMN’s CPE of 30% was confirmed in Bell Media’s Group Renewal Decision.<sup>19</sup> Accordingly, it remains appropriate.

42. As well, in respect of the fact that, unlike Bell Media, “Allarco does not at this time benefit from a broadcaster envelope with the Canada Media Fund,”<sup>20</sup> the Commission should be aware that this situation was solely brought about by Allarco’s failure to meet the concerns of the CMF Broadcaster Business Policy Guidelines. Far from these rules being “stringent,” they are merely designed to ensure the broadcasters that receive a CMF broadcaster performance envelope are financially sound and that producers get paid, and paid in a timely manner – something Allarco has unfortunately and repeatedly demonstrated that it is unable or unwilling to do.

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<sup>18</sup> *Ibid.*, para. 14.

<sup>19</sup> Appendix 4 to Broadcasting Decision CRTC 2017-149, COL #3.

<sup>20</sup> Allarco Supplementary Brief, para 17.

43. Moreover, Super Channel remains an eligible licensed Canadian broadcaster for the purposes of other CMF funding programs such as the English POV program. Provided that Super Channel continues to license and program productions which align with the guidelines of these programs and CMF's Broadcaster Business Policy Guidelines (including, but not limited to, the broadcaster payment schedule provisions) it may still provide support to producers wishing to access these CMF funds outside of the broadcaster performance envelope program.

***Allarco has provided no evidence of worse financial viability than when the Commission rejected a similar request in 2014***

44. While not specifically arguing for a lower CPE on the basis of economic need, Allarco has argued for relief on CPE "in order to stabilize our financial situation" and to "give us more flexibility in an increasingly competitive market." These are simply not adequate reasons for deviation from the re-imposition of an equitable and reasonable 30% CPE requirement. Moreover, one would assume that Allarco's CCAA filing has and will provide it with the stability it seeks.

45. The Commission's standard test for such deviation is economic need based on impact on financial viability.

46. In the current proceeding, Allarco's arguments are weaker than similar arguments made for a lower CPE level, and rejected by the Commission, in 2014. At that time, Allarco argued that the net effect of its then CPE COLs was to impose an inequitable overall CPE level of 34%. The CMPA submits that the Commission's 2014 rationale for rejecting Allarco's proposed licence amendment remains equally if not more valid today:

*The Commission has examined the financial projections submitted by Allarco LP in its application. Although the proposed amendment would be beneficial to Super Channel, the Commission is of the view that the financial viability of the service is not dependent on approval of the present application. Further, expenditures on production, in particular on script and concept development, may result in benefits to the service should these expenditures result in the production of attractive new programming.*

*In light of the above, the Commission finds that Allarco LP has not demonstrated that the proposed licence amendment is necessary for the financial viability of its service.<sup>21</sup>*

### **Use of filler programming and apparent non-compliance with Canadian program exhibition requirements**

47. Allarco's renewal filing record, including numerous deficiency questions and responses, reveals the Commission's concern over Allarco's practice of counting television program category 15 filler programming as "Canadian programming" for the purposes of meeting its COLs relating to Canadian program exhibition.
48. Commission Staff's analysis of Super Channel's program logs reveal a situation of apparent non-compliance with the COL requiring 30% Canadian programming from 6 p.m. to 11 p.m. (i.e. prime time) and 25% for the remainder of broadcast day for the 2014-15 and 2015-16 broadcast years and 2014-15 broadcast year respectively. With respect to its prime time 30% Canadian program exhibition requirement, Super Channel generally achieved between 22% and 23%; and with respect to its 25% overall requirement, Super Channel achieved approximately 21%.<sup>22</sup>
49. It appears that the majority of this shortfall is a result of filler programming. Indeed, given the licensee's belief that, with filler programming, it actually exceeds its Canadian program exhibition requirements,<sup>23</sup> it appears that filler is currently making up approximately 25% of Super Channel's overall Canadian program exhibition requirement or fully one third of Super Channel's prime time Canadian programming.

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<sup>21</sup> BD 2014-547, paras. 18, 19.

<sup>22</sup> Commission letter dated August 18, 2017, as referenced in Allarco Counsel Response dated August 31, 2017.

<sup>23</sup> Allarco Counsel Response, dated January 30, 2018, to Commission letter dated January 16, 2017, Attachments - Annual Performance Evaluations 2013-2015. Based on logs filed by Allarco, these show Cancon exhibition levels of 33% -36% in respect of prime time; and 26-28% and higher in respect of overall.

50. Filler programming also represents a disproportionate amount of Super Channel's expenditures on Canadian programming – averaging more than 10% of its total Canadian programming in each of the 2013–14, 2014–15, and 2015–2016 broadcast years.<sup>24</sup>
51. As these promotional filler programs are produced in-house, such levels of expenditure and exhibition directly contradict Allarco's repeated claim that "virtually all of Super Channel's programming is acquired from independent producers."<sup>25</sup>
52. In exchanges with the licensee, Commission Staff have been clear that, pursuant to the *Pay Television Regulations, 1990*, (then under effect), filler programming does not count as Canadian programming for exhibition purposes.<sup>26</sup> In particular, as Commission Staff have noted, filler consisting of promotional material of foreign productions (i.e. that would be made up predominantly of existing footage of foreign productions), is not Canadian programming, even if assembled or edited in Canada.<sup>27</sup> We agree with the position taken by Commission Staff.
53. Allarco has argued that the use of filler programming to meet Canadian program exhibition requirements is a long-standing, and previously Commission-sanctioned, practice. Allarco suggests that filler programming should be considered Canadian programming because these filler programs are short promotional announcements, which are akin to advertisements broadcast by non-pay television services.
54. Presumably, the Commission will render a decision on this matter in the context of its licence renewal decision in this process. However, more important to the CMPA than a retroactive pronouncement on Canadian program exhibition – given that shortfalls in Canadian program exhibition cannot realistically be made up for in a new licence term – is what this means for a new licence term if Allarco is granted its renewal. It is the CMPA's position that filler is not Canadian programming and we respectfully request that the Commission make that clear to the licensee.

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<sup>24</sup> This compares with TMN which has averaged less than two percent over the same period.

<sup>25</sup> Allarco Counsel Response dated October 12, 2017, to CRTC Question #4 in Commission letter dated October 11, 2017.

<sup>26</sup> Commission staff have not raised the issue of what this means for CPE compliance purposes.

<sup>27</sup> Commission letter dated November 16, 2017, as referenced in Allarco Counsel Response dated January 10, 2018. (Section J of Appendix I of PN CRTC 2000–42).

## **Safeguards should be imposed to ensure Super Channel adheres to the spirit of Canadian program exhibition requirements**

55. Under the recently amended *Discretionary Service Regulations*, the default overall Canadian program exhibition level is 35% for discretionary services calculated over the course of a broadcast year.<sup>28</sup> In its application, Allarco has accepted this default level. TMN currently has the same exhibition requirement.
56. The *Discretionary Service Regulations* also deem that “the time devoted to the broadcasting of a program includes any time devoted to advertising material.”<sup>29</sup> As, in a new licence term, Super Channel will be entitled to run advertising per the Commission’s standard discretionary service COLs,<sup>30</sup> this creates both a new revenue stream for the service, and an opportunity to further reduce the exhibition of “real” Canadian programming.
57. The risk in this new Canadian program exhibition regime is that legitimate Canadian programming will be further marginalized – particularly to late morning hours – with little left in prime time.
58. Whether Allarco was out of compliance with its COLs in using filler as Canadian programming, or whether it has just been pushing the limit, the notion that a third (or more) of Super Channel’s Canadian programming in prime time can legitimately be comprised of in-house produced filler – most of it assembled promotions of U.S. footage productions being aired by the licensee – is offensive.
59. Not only does filler produced by the licensee to promote U.S. shows do nothing for real Canadian programming, the resources used to produce it are taken from resources that could produce real Canadian programming. Using filler to meet Canadian program exhibition requirements goes against the spirit of the licensee’s obligation to provide genuine and tangible contribution to the creation and presentation of Canadian programming.

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<sup>28</sup> *Discretionary Service Regulations*, s. 2(1).

<sup>29</sup> *Ibid.*, s. 2(3). It appears that, pursuant to CRTC 2017-434, promotional announcements previously logged as Category 15, would now be “advertising material.”

<sup>30</sup> Appendix 2 to Broadcasting Regulatory Policy CRTC 2016-436, s. 18.



60. The CMPA accordingly recommends that, should the Commission accept Allarco’s argument that filler or promotional material be counted as Canadian programming, a limit be placed that a maximum of 3% out of the total 35% Canadian programming exhibition level be filler programming. In addition, and to avoid any further future “confusion,” consistent with Section J of Appendix I of Public Notice CRTC 2000–42, the Commission should direct Allarco that filler or promotional material of foreign productions, that consists predominantly of existing footage of foreign productions, cannot be logged as Canadian programming, even if assembled or edited in Canada.
61. As a further safeguard to ensure Canadian programming is reasonably scheduled by Allarco, the CMPA urges the Commission to impose a further requirement that the licensee accept a COL requiring that its Canadian programs be scheduled evenly throughout the broadcast day.<sup>31</sup> Such an “evenly” scheduled requirement is relatively common in past Commission decisions. It gives reasonable flexibility, and is especially appropriate here, given non-compliance and heavy historic use of filler programming in prime time.

#### **Safeguards relating to equitable carriage**

62. Given that this non-compliance may have been exacerbated, at least in part, by the licensee’s historic challenges in securing stable and equitable carriage from certain BDUs, and given that the licensee reports that it has been unable to re-negotiate affiliation agreements with a number of important BDUs, the CMPA believes that safeguards to the benefit of Super Channel may also be appropriate.
63. As noted by Allarco, in the new licence term, Super Channel will operate without the “must carry” status it initially had as a Category A service. Super Channel will, however benefit from the Wholesale Code, and the standstill and reverse onus undue preference provisions in the *Broadcasting Distribution Regulations*.

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<sup>31</sup> See, for example, Broadcasting Decision CRTC 2004–14 and Broadcasting Decision CRTC 2011–444 (MuchMusic & MuchMoreMusic).

64. Even as a Category A service, Super Channel had to resort to Commission dispute resolution in respect of “an undue disadvantage” in regard to the marketing of the channel in 1999.<sup>32</sup>

65. And, unfortunately, in eliminating “must carry” in BRP CRTC 2015–96 (the “Choice Policy”), the Commission sent a distinctly mixed message:

*This means that there will be an increased reliance on market forces for the distribution and packaging of such services. Some services may not survive in an environment marked by greater subscriber choice, while others will adapt and thrive. However, the Commission is prepared to intervene where it finds that parties are acting in an anti-competitive manner. Such targeted intervention may be necessary to ensure a healthy, dynamic retail market that maximizes consumer choice and flexibility and provides Canadians with access to a diverse range of programming.*<sup>33</sup>

66. It is therefore disconcerting that Allarco is still looking to “re-negotiate affiliation agreements with a number of important BDUs” for Super Channel.

67. In these circumstances, the CMPA believes it important that the Commission remind BDUs that any situation in which Super Channel is not provided with equitable distribution relative to TMN in particular would, *prima facie*, be seen as anti-competitive behaviour that may result in a finding of undue preference. While vertically integrated BDU/Broadcasters are prohibited under the Wholesale Code from tied selling, the incentive to prefer TMN over Super Channel nevertheless exists for all vertically integrated companies.

68. To be clear, the CMPA is not suggesting Super Channel be guaranteed success by the Commission – especially when it appears that much of the financial difficulty faced by the licensee stems from its own miscalculations of the marketplace. This would be directly contrary to the Choice Policy, and long-standing Commission policy and practice.<sup>34</sup> However, if Allarco seeks future relief or fails entirely, it should not be because of anti-competitive conduct of vertically integrated entities.

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<sup>32</sup> Broadcasting Decision CRTC 2009–588.

<sup>33</sup> Broadcasting Regulatory Policy CRTC 2015–96, para 97.

<sup>34</sup> Including the failure of arts and culture C Channel, which launched February 1<sup>st</sup>, 1983, and was off air by June 30<sup>th</sup>, 1983. See <https://torontoist.com/2012/06/historicist-post-mortem-of-a-pay-tv-channel/>.

## **Transparent reporting by broadcasters is integral to the public interest and the broadcasting licensing process**

69. The CMPA wishes to draw attention to the critical importance of transparent public reporting by broadcasters in the licence renewal process and annual reports. The public reporting of COLs by Allarco on Super Channel relating to CPE, regional outreach programs, and script and concept development allows the public to monitor broadcaster compliance and instills public confidence in the regulation of the broadcasting system. It also allows interveners to provide informed and meaningful feedback in policy and licensing proceedings. It appears from Super Channel's annual returns that this broadcaster failed to meet its 30% CPE requirement as well as its script and concept development expenditures. Moreover, the licence renewal application itself provides no data on Allarco's compliance with its COLs relating to CPE, including regional outreach programs and script and concept development. Without this information, it is impossible for the Commission and the public to know that this broadcaster achieved its COLs in the current licence term. This is unacceptable in a broadcasting licensing process.

70. It is also important that the Commission gather data regarding broadcasters' digital media revenues. Given the digital shifts in the market, it is important that the Commission use its information gathering power to obtain accurate, up-to-date data regarding broadcasters' digital media revenues to both monitor the evolution in the market and to ensure that the Commission has the latest data to inform its policy decisions. This data request is in accordance with the Commission's information gathering requirements as articulated in section 4 of the DMEQ.<sup>35</sup> The Commission possesses an information gathering power with respect to digital television services and we request that the Commission use this power to collect this important data. We acknowledge and commend the Commission's request for this type of data in its consultation on future programming distribution models (BNC 2017-359) but urge the Commission to begin collecting this data from Canadian broadcasters on a regular basis to monitor the Canadian broadcasting system.

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<sup>35</sup> Broadcasting Order CRTC 2012-409, *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*.

## Conclusion

71. Based on Allarco's apparent and serious non-compliance in the current licence term with Super Channel's COLs, a history of serious non-compliance in the previous licence term, and its current precarious financial position in bankruptcy protection, the CMPA requests that the Commission call a public hearing for the renewal of Super Channel's broadcasting licence in order to meet the public interest. Without a public hearing to examine Allarco's broadcasting licence renewal application and the imposition of the various COLs requested above, the CMPA is unable to support the renewal of Super Channel.
72. The CMPA appreciates the opportunity to share our comments regarding the broadcasting licence renewal application for Super Channel in this proceeding. Should the Commission require any additional information regarding this intervention, please do not hesitate to contact me directly.

Sincerely,

*[Filed Electronically]*

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cc. Mark Lewis, Counsel for Allarco, Lewis Birnberg Hanet LLP, mlewis@lbhmedialaw.com

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