



May 10, 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 2017-429-1 – Reconsideration of the decisions relating to the licence renewals for the television services of large English-language private ownership groups – Second Phase

1. The Writers Guild of Canada (WGC) is the national association representing approximately 2,200 professional screenwriters working in English-language film, television, radio, and digital media production in Canada. The WGC is actively involved in advocating for a strong and vibrant Canadian broadcasting system containing high-quality Canadian programming.
2. Given the WGC's nature and membership, our comments are limited to the referral back to the Commission for reconsideration and hearing the decisions, contained in Broadcasting Decisions CRTC 2017-148 to 2017-151 of May 15, 2017, to renew the broadcasting licences for the television services of large **English-language** ownership groups, namely, Bell Media Inc. (Bell), Corus Entertainment Inc. (Corus), and Rogers Media Inc. (Rogers).

Programs of National Interest

3. In this phase of the proceeding, the Commission asked Bell, Corus, and Rogers the following question with respect to programs of national interest (PNI):

Q1. In their interventions, Friends of Canadian Broadcasting, the Canadian Media Producers Association (CMPA), the Directors Guild of Canada (DGC) and On Screen Manitoba proposed that the groups' PNI expenditure requirements be based on their respective historical level of spending (i.e., 9% for Corus, 8% for Bell and 5% for Rogers).

- a) Considering that under the Order the Commission has to take into account that significant contributions should be made to the creation and presentation of PNI, and that in creators' view historical PNI levels of spending are the most appropriate regulatory tool to meet this objective, please comment on this proposal.

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- b) If you disagree with this proposal, explain why your group's historical PNI level of spending would not be the most appropriate tool to ensure that the Canadian creative sector remain dynamic and vital to the system's competitiveness and to Canada's economy.
4. Bell and Corus both oppose this proposal and maintain their view that 6% is an appropriate PNI spending level.
 5. In light of this, the WGC first reiterates its core comments in the first phase of this proceeding. This proceeding is about the continuing attempt by Bell and Corus to drastically reduce—or seek the “flexibility” to drastically reduce—their level of investment in PNI to well below their historical spending on this type of programming. This massive reduction undergirds an apparent strategy to “compete” with foreign “over-the-top” (OTT) services like Netflix by largely abandoning Canadian programming in PNI genres, in favour of some other, undisclosed programming strategy, but one which clearly does not place Canadian drama, children’s programming, or documentary at the fore. The Commission should place the current proceeding in its historical context. In 2010, the Commission examined the television policy that had been in place since 1999 and concluded that it had not worked effectively to generate a sufficient level of investment in Canadian programming by private, English-language broadcasters. Broadcasters were significantly underinvesting in Canadian content. As such, the Commission developed Broadcasting Regulatory Policy CRTC 2010-167 (the Group Policy),¹ which was intended to *grow* such investments from these sub-optimal levels. The mechanism chosen to do this—expenditure requirements set as a percentage of broadcasting revenues—was premised on the growth of those revenues, and it was ultimately ineffective, unfortunately, due to stagnation and/or decline of revenues. The intention, however, to *increase* broadcaster investment from these historical levels, was clear. Today, even as the denominator of the PNI equation (revenues) is under threat, Bell and Corus continue to seek to reduce the numerator (the percentage) itself—a “double whammy” for PNI spending that would see these requirements plummet in real dollar terms. A percentage-based spending requirement like that for PNI *already* accounts for revenue decreases by its very nature. Yet broadcasters still seek to lower the percentage itself. The 6% PNI level now advocated by both Bell and Corus is still *significantly below* their historical PNI spending of 8% and 9% respectively. This is the antithesis of the spirit and intent of the Group Policy, it is contrary to the logic of the Let’s Talk TV proceeding, and it is a repudiation of this reconsideration proceeding and of the federal Cabinet order that precipitated it. The WGC submits that it is therefore still unacceptable.
 6. The WGC submits that in this second phase, neither Bell nor Corus have provided any compelling new arguments or information as to why the groups' PNI expenditure requirements should be lower than their respective historical level of spending (i.e., 9% for Corus, 8% for Bell and 5% for Rogers).

¹ Broadcasting Regulatory Policy CRTC 2010-167, *A group-based approach to the licensing of private television services*.

“Historical Spending” versus “Historical Obligations”

7. Both Bell and Corus emphasize in this phase their recent historical *obligations* on PNI expenditures, as opposed to their actual *spending* on PNI.² Corus in particular characterizes the setting of PNI regulatory levels on *spending* as “penalizing” them for above-minimum PNI expenditures in the past.
8. Firstly, it is not and has not been the Commission’s policy or practice to calculate or recalculate Canadian programming expenditure (CPE) or PNI obligations based on the basis of prior obligations. It has always done so on the basis of prior spending. For example:

In Broadcasting Decision 2013-310, the Commission confirmed that the proposed divestiture of some of Astral’s services would substantially change the composition of the Astral group of services. In that decision, the Commission also noted that Astral’s CPE requirement was determined based on the individual CPE requirements for various Astral services that were in place prior to the renewal of their broadcasting licences under a group-based approach. Consistent with that approach, an average of the three previous broadcast years (i.e., 2009-2010 through 2011-2012) was used to determine the appropriate CPE requirement. Similarly, the group’s PNI expenditure requirement was determined based on the average PNI expenditures of the three previous broadcast years of the services within the group. Based on the above, the Commission set out the preliminary view that a minimum CPE requirement of 32% and a minimum PNI expenditure requirement of 18%, instead of the requirements imposed in Broadcasting Decision 2012-241, would be appropriate.

...

The Commission notes that the group-based approach sets out that a designated group’s CPE and PNI expenditure requirements are determined based on the average expenditures of the group during the previous three broadcast years.³ [Emphasis added]

9. Secondly, as we argued at length in the first phase, it was always the *intention* of the Group Policy to *increase* spending on Canadian programming, including PNI, from where it was in 2010.⁴ As such, to the extent that a historical spending analysis achieves that result, it is entirely consistent with the Group Policy, as well as with the Commission policies that followed it.
10. Thirdly, we would simply state our disappointment with Bell’s and Corus’s apparent view that investing in Canadian programming, PNI or otherwise, is a regulatory “penalty” or otherwise a competitive liability. PNI requirements are not a penalty for anything. They are a fundamental component of the implementation of the objectives of the Act, and arguably the most meaningfully Canadian part of a “Canadian broadcasting system.” We submit that the broadcasters’ characterization to the contrary is simply another indication of their unwillingness to fully invest themselves in the business of production and distribution of Canadian programming, which has been

² Bell Response to Questions, April 6, 2018, A1, pg. 3; Corus Response to Questions, April 6, 2018, Appendix A, pgs. 1-2.

³ Broadcasting Decision CRTC 2014-62, *Astral broadcasting undertakings – Change of effective control – Follow-up to the Astral-BCE transaction*, paras. 43 and 48.

⁴ See WGC submission to the first phase of this proceeding, dated January 23, 2018, paras. 14-17.

symptomatic of their submissions in this proceeding, but which the WGC has argued should not be countenanced by the Commission, given the objections of the Act.

The Boon Dog Report

11. In its submission to the first phase of this proceeding, dated January 23, 2018, the WGC appended 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). Bell, Corus, and Rogers made comments with respect to various aspects of this report.
12. In response, the WGC has appended a reply to these comments, entitled “Boon Dog’s Response to Bell Media, Corus Entertainment, and Rogers Media’s Comments on the Boon Dog Data Analysis” (the Boon Dog Reply).

Data Not on the Public Record

13. In its April 6, 2018 response to the Commission’s letter dated March 26, 2018 seeking additional information from the broadcast groups, Bell claims that its actual historical spending on PNI was 7.3%. This number differs from that in the 2018 Boon Dog Report (7.6%, now properly 7.7% as explained in the Boon Dog Reply) because it is based on different years (3-year average spending up to 2016-2017 by Bell and 3-year average spending up to 2015-2016 by Boon Dog). As the Boon Dog Reply notes, 2016-2017 data are not yet publicly available and were not part of the record of this proceeding, so intervenors could not include that data in their analysis. The WGC submits that the Commission should not base its decisions in this proceeding on data that are not publicly available or are not on the record of this proceeding, since it denies intervenors the opportunity to review and comment on that data.

Ceiling Versus Floor

14. Bell states that, “establishing the PNI spend at historical levels – be it the actual historical spending level or the historical spending obligation – will result in the mandated contributions becoming a ceiling, and not the spending floor that we have consistently treated it as in the past.”⁵ The WGC disagrees.
15. A minimum PNI spending requirement is what it is no matter what level it is set at, and whether it is treated as a ceiling or a floor by the broadcasters is entirely up to those broadcasters. A PNI “floor” does not become a PNI “ceiling” simply by changing the percentage from 6% to 8%. Bell does not clearly explain the reasoning for its claim that we can see, but it *certainly* doesn’t explain how a PNI increase from 5% to 6% maintains its character as a “floor”, but after 6% becomes a “ceiling”. There is nothing meaningful or unique about the 6% figure, other than that it is higher than 5%, but lower than what Bell has historically spent.
16. The WGC can only surmise that when it talks about a ceiling, Bell is referring to the notion of “penalizing” them for “over-spending” on PNI discussed above. However, we believe it is clear from

⁵ Bell Response to Questions, April 6, 2018, A1, pg. 3.

Bell's words and actions that Bell intends to treat any regulatory PNI level as a ceiling, which is the entire reason for having a regulatory requirement in the first place. As we pointed out in the first phase of this proceeding, as summarized in the 2018 Boon Dog Report, the broadcaster's own programming expense projections for the current and next five fiscal years demonstrate that they will treat their own PNI proposals as a ceiling. Bell projected it will spend on PNI 5.8%, 5.7%, 5.6%, 6% and 6% of its prior year's revenues in 2017-2018 through 2021-2022, respectively; similarly, Corus projected it will spend 6.9%, 6.1%, 5.9%, 5.8%, and 5.6% over the same period.⁶ Here was clear evidence of broadcaster spending on PNI dropping significantly—by 8% for Corus (\$7.2 million), and by a whopping 23% for Bell (\$23 million)—the very year that they received the regulatory “flexibility” to do so.

The PNI “Baseline”

17. Corus states:

This is a “reconsideration” of the May 2017 GBL decision, and, as such, we believe that the May 2017 GBL decision should serve as the appropriate baseline against which to evaluate our proposals. Indeed, the licence conditions set out in the May 2017 GBL decision are the ones that are currently in force. With that in mind, we reiterate that 6% would be an *increase, not a decrease*, over our current licence obligation.⁷ [*Emphasis in original*]

18. The WGC submits there is no reason for the Commission to treat the question of PNI levels as if it came into existence on May, 2017. On the contrary, the entire reason that this reconsideration proceeding is being held is Order in Council P.C. 2017-1060 (the OiC) sending the matter back to the Commission for reconsideration, and the entire reason that The OiC was issued was that creator and production groups petitioned the Governor in Council on the basis that a 5% PNI significantly *decreased* the PNI obligations of Bell and Corus below their historical spending levels.⁸ That is the “baseline” against which this reconsideration is set. 6% is still well below those levels, and therefore still represents a decrease in spending.

Implementation of the New Requirements

19. In this phase of the proceeding, the Commission asked Bell, Corus, and Rogers the following question:

Q3. The English-language groups' licence renewal decisions were released in May 2017 for the new licence term to begin on 1st September 2017. Further to this reconsideration process, certain conditions of licence may be amended, notably those with respect to certain spending requirements (whether PNI or CPE related). Please comment on the possibility that these amended conditions be implemented for the entire duration of the current licence term, meaning as of 1st September 2017 to 31 August 2022.

⁶ See WGC submission to the first phase of this proceeding, dated January 23, 2018, paras. 40-41.

⁷ Corus Response to Questions, April 6, 2018, Appendix A, pg. 2.

⁸ E.g. Writers Guild of Canada, Petition to the Governor in Council under Subsection 28(1) of the *Broadcasting Act* to set aside or refer back for reconsideration and hearing Broadcasting Decisions CRTC 2017-149 and CRTC 2017-150, June 27, 2017.

20. The WGC agrees that amended conditions should be implemented for the entire duration of the current licence term, as of 1 September 2017 to 31 August 2022.
21. The WGC disputes the broadcasters' claims that implementing amended conditions for the entire duration of the current licence term would be unduly onerous or difficult from an operational perspective.⁹ Broadcasters have had effective notice that PNI obligations would likely increase since at least August 14, 2017, when the OiC was issued. That was only three months after the renewal decisions themselves, and was at approximately the same time that Bell, Corus, and Rogers were publicly saying that they would likely spend at historical PNI levels anyway.¹⁰
22. Further, if amended conditions are imposed for the entire current licence term, there will be no meaningful "penalty" imposed upon Bell and Corus as a result,¹¹ nor will they be required to undertake an impossible task, such as "going back in time" to spend more money in 2017. Rather, if the broadcasters had indeed planned to treat the 5% PNI requirement as a ceiling rather than a floor, and reduce spending to 5% accordingly, then in response to a PNI increase they simply need to increase spending going forward to make up the difference, and if regulatory flexibility to do so is not currently available then the Commission can provide it. Indeed, none of the broadcasters explain in detail why this is not possible, nor do they provide sufficient evidence, in our view, to support their opposition to this proposal. This would not be a case of holding somebody to a standard that they didn't know they had to meet and "penalizing" them after the fact. It would be a case of increasing spending requirements, which broadcasters amortize over many years already, and which they themselves recently suggesting they would meet, from a 4-year period to a 5-year period. The WGC submits that there would be no meaningful hardship experienced by Bell or Corus, and that the importance of giving effect to the objectives of the Act and both the letter and the spirit of the OiC supersede any minor administrative complexity in adjusting PNI spending for the 2017-2018 broadcasting year.

Conclusion

23. The WGC is pleased to provide comments in this proceeding.

Yours very truly,



Maureen Parker
Executive Director

⁹ Bell Response to Questions, April 6, 2018, A3, pg. 6-7; Corus Response to Questions, April 6, 2018, Appendix A, pg. 8.

¹⁰ Randy Lennox (Bell), Barb Williams (Corus), and Rick Brace (Rogers), Open Letter, August, 2017 (http://playbackonline.ca/wp/wp-content/uploads/2017/08/ad_hilltimes_aug2017.pdf).

¹¹ Other than to the extent that they consider PNI itself to be a "punishment".

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