



January 13, 2014

Filed Electronically

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

Dear Mr. Traversy:

Re: Broadcasting Notice of Consultation CRTC 2013-558

Call for comments on the Commission's approach to tangible benefits and determining the value of the transaction

Introduction

The Writers Guild of Canada (WGC) is the national association representing more than 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. While the WGC's mandate is to represent our members, in advocating a strong Canadian broadcasting system that offers Canadians a variety of programming, we also play a role in balancing competing interests in the broadcasting system.

The WGC generally supports the Commission's proposals outlined in Broadcasting Notice of Consultation CRTC 2013-558 (the Notice). The WGC agrees with the Commission's objectives as listed at paragraph 3 of the Notice. However, while the WGC agrees with the Commission's proposal to direct a percentage of tangible benefits to the Canada Media Fund (CMF) and the various certified independent production funds (CIPFs), we believe that certain aspects of the Commission's current approach to tangible benefits remain important and should be retained, so that the funds disbursed by the CMF and CIPFs continue to reflect the underlying principles of the Commission's tangible benefits policies and the *Broadcasting Act*.

Given the nature of the WGC's membership, we make no comment on the Commission's questions or proposals regarding radio.

Executive Summary

E1. The WGC's primary concern is that changes to the tangible benefits policy should not result in fewer benefits dollars going to the development and production of Canadian television programming. The Commission has historically required that the majority (approximately 85%) of the benefits should result in on-screen programming, with the majority of that going to incremental Canadian television production. The WGC submits that this approach is consistent with the objectives of the *Broadcasting Act* and should be continued.

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- E2. The Commission's current approach to tangible benefits requires approximately 85% of benefits monies to go to on-screen initiatives, with no more than 10% of that amount being spent on digital media. This is to ensure that benefits are not used to unduly subsidize unlicensed sectors at the expense of the regulated broadcasting system. The CMF and the CIPFs do not necessarily mirror this approach. The WGC submits that it would be appropriate to maintain the Commission's current approach to digital media in this respect, at least as long as it remains exempt from licensing. We also submit that this principle should be kept in mind in respect of both the 80% allocation to the CMF/CIPFs and the 20% discretionary allocation, such that they do not inadvertently work together to unduly reduce the amount of benefits monies going to Canadian television programming. We submit that this could be best realized by requiring the CMF/CIPFs to direct 100% of benefits monies they receive to the development and production of television programming.
- E3. The WGC agrees that benefits should be allocated in proportion to the language of the undertakings acquired. As such, the WGC proposes, should the Commission adopt its proposed approach to tangible benefits, that it require the CMF and the CIPFs to expend benefits money in the official-language markets in a manner consistent with the Commission's current approach.
- E4. The Commission has traditionally required that approximately 85% of benefits monies go to on-screen initiatives, which has generally meant the development and production of television programming (subject to a maximum of 10% to digital media production). The WGC submits that this aspect of the tangible benefits policy should be retained, and that funding to any "off-screen" initiatives of the CMF/CIPFs, such as industry partnerships and industry research, are not considered "on-screen initiatives". We submit that our proposal that 100% of any benefits monies received by the CMF/CIPFs be directed to the development and production of television programming is a clear, transparent and easily implementable way to ensure that the tangible benefits policy achieves its objectives with respect to on-screen initiatives.
- E5. The Commission has traditionally required that benefits monies not be subject to administration fees deducted from the benefits package. The WGC agrees with this approach, and submits that it should continue in the Commission's proposed new benefits policy, including with respect to monies contributed to the CMF/CIPFs.
- E6. The WGC generally agrees that the proposed allocation of funds between the CMF and the CIPFs is appropriate.
- E7. The WGC is of the view that reporting on the implementation of tangible benefits through the Commission's Communications Monitoring Report would be appropriate, but submits that, if the Commission chooses this route, it should be complementary to the tangible benefits reports currently provided by broadcasters, and ultimately the level of detail provided in reports should not be diminished.
- E8. Consistent with our primary concern regarding the Commission's benefits proposal, the WGC submits that the allocation to discretionary initiatives should ultimately ensure that at least 85% of all television benefits result in on-screen programming.
- E9. Subject to a review of the comments of others, the WGC is of the preliminary view that the Commission's proposed criteria are sufficient to ensure that the discretionary initiatives proposed by the applicants will not be self-serving.
- E10. Subject to a review of the comments of others, the WGC is of the preliminary view that the Commission's proposed criteria for discretionary initiatives are generally sufficient. However, we propose that the Actor's Fund of Canada be specifically included as an eligible discretionary initiative.

- E11. The WGC agrees with the Commission's preliminary view that the requirement to provide tangible benefits should generally apply to all transactions involving the transfer of ownership or control of television programming undertakings.
- E12. In addition, the WGC submits that tangible benefits should be required as part of the transfer of ownership or control of broadcasting distribution undertakings (BDUs), as was the Commission's policy prior to Public Notice CRTC 1996-69. We submit that the broadcasting distribution industry and the regulatory landscape have changed significantly since Public Notice CRTC 1996-69. The Commission's rationale in PN CRTC 1996-69 was based on the belief that a loosening of regulation would result in significant new BDU entrants into the marketplace. This was thought likely to happen due to new distribution technologies then coming on the market. However, many of these technologies did not live up to their promise. As such, BDU competition did not blossom from deregulation, and the WGC submits that the rationale for exempting BDUs from the tangible benefits policy no longer applies. We also submit that the regulatory focus has shifted since 1996, so that exempting BDUs would be inconsistent with the Commission's currently proposed approach. While prior to 1996 benefits packages in relation to BDU transactions included capital expenditures, we submit that the Commission of 2013 would not accept such packages because they would be considered "self-serving" and "part of the cost of doing business". As for the contributions of BDUs to the CMF and its predecessors, broadcasters must contribute to Canadian programming through, among other things, the Canadian programming expenditures (CPE) and programs of national interest (PNI) requirements of the group-based licensing framework. As such, we submit that merely contributing to Canadian programming as part of their baseline regulatory obligations should not exempt an organization from the tangible benefits policy. In addition, the significant vertical integration that has occurred in the Canadian broadcasting sector since 1996 has made it increasingly difficult to parse the value of BDU assets versus other assets in valuing transactions involving vertically integrated companies. As such, there may be an incentive to value the transaction in a way that overweights the BDU assets, so as to pay less in tangible benefits on the television assets. Finally, the approach we recommend would provide an important counterbalance to the negative impacts on the Canadian system should the foreign ownership rules be relaxed such that a non-Canadian entity could purchase all or a part of a Canadian BDU.
- E13. The WGC sees value in requiring that benefits be payable in roughly equal amounts over 5 years, since it encourages stability in the production sector, moderating a potential for "boom and bust" cycles and supporting a consistent volume of content in the broadcasting system. We submit that this requirement should be continued.
- E14. The WGC submits that ensuring that all outstanding tangible benefits from a previous purchase be expended in advance of a new transaction in which any broadcasting undertaking changes ownership would be appropriate and help ensure the tangible benefits policy is administered in a clear, predictable and transparent manner.
- E15. The WGC does not have the expertise to effectively comment on the manner in which the Commission should value transactions, and therefore makes no substantive comments in this regard.

Tangible Benefits: Television

1. The WGC's primary concern is that changes to the tangible benefits policy should not result in fewer benefits dollars going to the development and production of Canadian television programming. The Commission has historically put the production of Canadian programming front and centre in benefits packages, requiring that approximately 85% of benefits monies go to on-screen initiatives, with the majority of that going to incremental Canadian television production,

such as programs of national interest (PNI)¹. The WGC submits that this approach is consistent with the objectives of the *Broadcasting Act*—in particular section 3(1)(e) regarding the creation and presentation of Canadian programming, and section 3(1)(f) regarding the maximum and no less than predominant use of Canadian creative and other resources—and we submit that this approach should be continued. The WGC’s understanding is that the Commission’s objectives as stated in paragraph 3 of the Notice speak primarily to *how* the benefits policy should be implemented, and do not indicate an intention to fundamentally change *what* the benefits policy is intended to achieve. As such, we submit that the Commission should be mindful that in pursuing clarification, codification and simplification, the fundamental components and objectives of the benefits policy are not unduly altered.

2. We see no fundamental barrier to this approach. We understand that the Commission could attach conditions to monies directed to the CMF and/or CIPFs—perhaps in an agreement between the funders and the Commission—and that these conditions need not be extensive or onerous for the CMF/CIPFs. The WGC believes that these conditions do not conflict with the CMF or CIPF’s essential mandates, and we would hope that any technical or practical barriers could be resolved in minimal negotiations with the necessary parties. The WGC strongly believes that retaining certain principles of the current tangible benefits policy, and of the *Broadcasting Act*, is worth those minor—and likely one-time—discussions.

Q.1 Is it appropriate to require purchasers to direct a percentage of tangible benefits to the CMF and CIPFs as set out in the Commission’s proposal? If not, what other approach would be appropriate?

3. The WGC agrees in principle with the Commission’s proposal to require purchasers to direct a percentage of tangible benefits to the CMF and CIPFs. However, we submit that the Commission should ensure that the CMF and/or CIPFs use the benefits monies they receive in a manner that aligns with the objectives of the Commission’s current tangible benefits policy, in particular with respect to: a) digital media; b) allocation by official-language market; c) on-screen initiatives; and d) administrative fees.

a) Digital Media

4. The Commission’s current approach to tangible benefits requires approximately 85% of benefits monies to go to on-screen initiatives, with no more than 10% of that amount being spent on digital media. This is to ensure that benefits are not used to unduly subsidize the non-regulated sector at the expense of the regulated broadcasting system.² The CMF and the CIPFs do not necessarily mirror this approach.
5. The CMF’s allocations to television and digital media content are not made according to a set formula, but rather are at the discretion of its Board of Directors³. The CMF’s funding to digital projects has changed in each of the three fiscal years since the CMF’s inception, and has trended consistently upward, from \$34 million (or 11% of total funding commitments) in 2010-2011, to \$42.4 million (or 13% of total funding commitments) in 2011-2012, to \$57.5 million (or 18% of total funding commitments) in 2012-2013.⁴ 18% to digital content is almost double the

¹ See Broadcasting Decision CRTC 2013-310, *Astral broadcasting undertakings – Change of effective control*, <http://www.crtc.gc.ca/eng/archive/2013/2013-310.htm>, at paragraph 157.

² See Broadcasting Decision CRTC 2011-163, *Change in effective control of CTVglobemedia Inc.’s licensed broadcasting subsidiaries*, <http://www.crtc.gc.ca/eng/archive/2011/2011-163.htm>, at paragraphs 29-33.

³ Canada Media Fund 2012-2013 Annual Report, Board and Committee Activities: http://ar-ra12-13.cmf-fmc.ca/about/board_members_and_activities

⁴ Canada Media Fund, *Industry Consultation Presentation, 2013*: <http://www.cmf-fmc.ca/documents/files/about/ind-outreach/consultation-2013.pdf>, slide 27. “Digital” in this context refers to both funding to the Experimental Stream, which generally has no connection to television, and the “Digital Media Component” within the Convergent Stream, which funds television-convergent content.

Commission's current 10% limit, and given the CMF's commitment to digital this upward trend may continue.

6. While the WGC understands the CMF's mandate to support convergent content and digital media, and supports the development of digital content, we submit that benefits money is derived from the regulated broadcast sector, and therefore should remain in the regulated broadcast sector, where it clearly and identifiably supports Canadian talent. We submit that the Commission's 10% limitation for on-screen benefits money to digital media reflects this principle. As the Commission knows, digital media is currently exempt from licensing⁵, and we submit that it would be appropriate to maintain this aspect of the Commission's current approach to digital media, at least as long as it remains exempt.
7. We also submit that this should be kept in mind with respect to the Commission's overall approach, regarding both the 80% directed to the CMF/CIPFs, and the 20% discretionary portion. At paragraph 24 of the Notice, the Commission provides a list of proposed discretionary initiatives that could comprise up to 20% of a tangible benefits package, and this list includes "digital media content production". At paragraph 18 of the Notice, the Commission says, "The contributions to the CMF would benefit creators since the CMF supports the production of a variety of programming and other content across all audiovisual media platforms." [Emphasis added.] This suggests that benefits monies to the CMF could also be used to fund digital content. It is not clear to us whether, reading these paragraphs together, the Commission effectively contemplates allowing up to 32%⁶ or more of tangible benefits monies to be directed to unlicensed digital media projects at the expense of regulated television programming. We submit that the Commission should ensure that the interaction between these two aspects of its proposed approach are carefully considered, and we submit that in any case, the Commission should not effectively decrease the amount of benefits monies available to the development and production of television programming, due to increased spending on digital media, or otherwise.
8. We understand that the interactions of the Commission's benefits policy with the funding programs of the CMF and CIPFs could be complex. As such, the WGC proposes that the Commission simply require that 100% of any benefits monies received by these funding bodies be directed to the development or production of television programming. We submit that this would align with the Commission's objectives stated at paragraph 3 of the Notice, and provides the CMF and CIPFs with a clear, transparent and easily implementable rule for benefits monies. It would also allow the Commission to better control how much benefits monies are dedicated to digital media content production by ensuring that digital falls entirely within the 20% allocated to "discretionary" initiatives.
9. Alternatively, the Commission could alter its proposed formula, directing 85%-90% of tangible benefits monies to the CMF and/or CIPFs. This would better provide that Canadian television production is not unduly diminished in favour of digital production. It is, however, a less precise approach, since it ultimately relies on the discretion of entities such as the CMF Board of Directors, who are free to considerably increase the CMF's focus on digital initiatives if and when it sees fit. While the CMF and its Board of Directors—and the CIPFs—are expert bodies in media funding, the WGC submits that the appropriate body to craft the key parameters of the benefits policy is the Commission.

⁵ See *Exemption order for digital media broadcasting undertakings*, Broadcasting Order CRTC 2012-409, <http://www.crtc.gc.ca/eng/archive/2012/2012-409.htm>

⁶ 32% = 20% of tangible benefits (i.e. all of the discretionary portion) going to digital media content production + 18% (being the current level of support to digital media from the CMF) of the minimum portion going to the CMF (i.e. 80% of 80%), and assuming that none of the allocation to the CIPFs goes to digital. The WGC recognizes that it's unlikely that applicants will allocate the entirety of their discretionary benefits package to digital, and we stress that we are not opposed to digital content production per se. This is simply a theoretical calculation, apparently possible within the Commission's proposed approach, to emphasize how aspects of the policy could work together to significantly reduce money to television production.

b) Allocation by Official-Language Market

10. In the Notice, the Commission stated that it “considers that the policy should continue to ensure that transactions provide clear and unequivocal benefits to the broadcasting system as a whole and to the communities served by the undertakings to be acquired.” The Commission’s policy with respect to the official-language market(s) is that the English- and French-language allocations for on-screen benefits should be consistent with the linguistic markets of the services to be acquired.⁷
11. The CMF and the CIPFs do not necessarily apportion funding in a comparable manner. The CMF, for example, generally allocates one-third of its funding to the French-language market and two-thirds to the English. As such, were the Commission to direct tangible benefits money to the CMF with no stipulations in this regard, it would be possible that a transaction entirely within the English market would see one-third of its tangible benefits to the CMF directed to the French market. Similarly, a transaction entirely within the French market would see two-thirds of its tangible benefits to the CMF directed to the English market.
12. The WGC agrees with the Commission’s statement in the Notice that benefits should be allocated in proportion to the language of the undertakings acquired. As such, the WGC proposes that, should the Commission adopt its proposed approach to tangible benefits, it require the CMF and the CIPFs to expend benefits money in the official-language markets in a manner consistent with the Commission’s current approach.

c) On-Screen Initiatives

13. As noted above, the Commission has traditionally required that approximately 85% of benefits monies go to on-screen initiatives, which has generally meant the development and production of incremental television programming (subject to a maximum of 10% to digital media production). Typically this has been accomplished through direct spending by the applicant on incremental television development and production, or as a contribution to a fund that in turn is spent on television development and production.⁸ The WGC understands that the Commission’s proposed approach to tangible benefits essentially seeks to expand the latter option.
14. As we have said, the WGC generally supports this approach, however we submit that benefits monies earmarked for on-screen initiatives, via a contribution to the CMF/CIPFs, should be spent entirely on-screen. Currently, not all CMF/CIPF spending is to on-screen initiatives. The CMF, for example, funds a variety of things that we submit are not on-screen initiatives, such as industry partnerships, at \$1.2 million in 2012-2013⁹, and industry research¹⁰.
15. The WGC recognizes the importance of these initiatives, as well as the fact that they make up a relatively small portion of the CMF’s overall budget. However, we submit that the amounts are not nominal and that the initiatives they support are not on-screen ones. We therefore submit that our proposal at paragraph 8 above—that 100% of any benefits monies received by the CMF/CIPFs be directed to the development or production of television programming—is also a clear, transparent and easily implementable way to ensure that the tangible benefits policy achieves its objectives with respect to on-screen initiatives.

⁷ See Broadcasting Decision CRTC 2013-310, *Astral broadcasting undertakings – Change of effective control*, <http://www.crtc.gc.ca/eng/archive/2013/2013-310.htm>, at paragraph 159.

⁸ See for example Broadcasting Decision CRTC 2013-310, *Astral broadcasting undertakings – Change of effective control*, <http://www.crtc.gc.ca/eng/archive/2013/2013-310.htm>

⁹ CMF 2012-2013 Annual Report: Financial Overview, Management Discussion and Analysis: http://ar-ra12-13.cmf-fmc.ca/finance/management_discussion_and_analysis

¹⁰ CMF 2012-2013 Annual Report: About the CMF, Industry Research: http://ar-ra12-13.cmf-fmc.ca/about/industry_research/

d) Administrative Fees

16. The Commission has traditionally required that benefits monies not be subject to administration fees deducted from the benefits package.¹¹ The WGC agrees with this approach, and submits that it should continue in the Commission's proposed benefits policy. With respect to the CMF and CIPFs, we do not expect that additional monies will attract additional administration fees, since they will presumably not result in new programs, but rather will simply add to existing programs—which, in the case of the CMF's largest program, the Performance Envelope Program, is largely "automatic" and therefore doesn't have significant incremental administrative costs attached. The WGC proposes that the Commission ensure that funding provided to the CMF/CIPFs pursuant to the tangible benefits policy will not attract additional administration fees.

Q2. Is the proposed allocation of funds between the CMF and CIPFs appropriate? If not, what allocation would be appropriate?

17. The WGC generally agrees that the proposed allocation of funds between the CMF and the CIPFs is appropriate.
18. However, we note that if the Commission retains the policy that tangible benefits are allocated in proportion to the language of undertakings acquired, the CIPFs that are eligible to receive portions of particular benefits packages may be limited. It may be difficult for a CIPF that serves solely or primarily one language market to deliver funding to the other language market. Certainly, there are CIPFs that focus primarily on each market, and CIPFs that focus equally on both markets. As such, this issue should not prevent the Commission from implementing its proposed 80/20 allocation. We simply note that the Commission may have to clarify that the maximum 20% to CIPFs must respect the language market allocation of the overall benefits package, and therefore may be limited to only those CIPFs capable of delivering funding to the applicable market.

Q3. Would reporting on the implementation of tangible benefits through the Commission's Communications Monitoring Report be appropriate and adequate?

19. The WGC is of the view that reporting on the implementation of tangible benefits through the Commission's Communications Monitoring Report would be appropriate, but submits that such reporting should be complementary to the detailed tangible benefits reports that broadcasters are currently required to file with the Commission annually, and should not reduce the current level of detail provided in broadcasters' reports, for the following two reasons.
20. Firstly, as the Commission is aware, broadcasters' benefits reports are typically submitted to the Commission by November 30 and posted on the Commission's website a month or two thereafter, while the Communications Monitoring Report is released about a year after the end of the previous broadcast year (e.g., the 2013 Communications Monitoring Report containing data for the 2011-2012 broadcast year was released in late September 2013). This 8-9 month difference is significant to the creative and independent production community, and represents a real delay in when we can obtain relevant data on tangible benefits packages. From a timeliness perspective, the WGC submits that broadcasters should still report on benefits packages as they currently do. We do not believe this should cause an additional burden to broadcasters or the Commission, since in any event broadcasters must still report on benefits, and the Commission must still process those reports, whether the data are included in the Communications Monitoring Report or not. To the extent that, as the Commission states in paragraph 11 of the Notice, reports are not provided in standard format, we submit that the Commission could require that

¹¹ See Broadcasting Decision CRTC 2010-782, *Change in the effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries*, <http://www.crtc.gc.ca/eng/archive/2010/2010-782.htm>, at paragraph 36.

standardization from broadcasters. Even were that not the case, the WGC would prefer detailed reporting in non-standard formats than minimal reporting or none at all.

21. Secondly, the WGC submits that reporting should continue to reflect the detail currently provided in broadcasters' tangible benefits reports, as well as the components of the tangible benefits policy ultimately determined by the Commission. As the Commission knows, the current Communications Monitoring Report provides primarily the value of television transactions and corresponding benefits for a five-year period, in English and French.¹² Benefits reporting by broadcasters provides detail on the specific initiatives supported with benefits monies, and how much was spent on such initiatives each year. We submit that, while the shift to a significant portion of benefits monies going to the CMF/CIPFs will change the nature of reporting somewhat, for the discretionary benefits packages similar reporting should be provided as is currently the case.
22. In addition, to the extent that benefits reporting will be done by the CMF/CIPFs themselves, either on their own or through the Communications Monitoring Report, we propose that any reporting on benefits should provide information, to the extent possible, on how benefits conform to the parameters that the Commission imposes upon the CMF and/or CIPFs.

Criteria for Discretionary Initiatives

Q.4 Is the proportion of tangible benefits that may be allocated to discretionary initiatives appropriate? If not, what proportion would be appropriate, and why?

23. Consistent with our primary concern regarding the Commission's benefits proposal—that changes to the tangible benefits policy should not result in fewer benefits dollars going to the production of incremental Canadian television programming—the WGC submits that the allocation to discretionary initiatives should ultimately ensure that at least 85% of television benefits result in on-screen programming.
24. As such, the WGC submits that the Commission should clearly stipulate that “the 85/15 rule” continues to apply. The Commission could accomplish this by requiring that at least 25% of the 20% allocation to discretionary initiatives—or 5% of the entire tangible benefits package for television—be directed to on-screen initiatives. Alternatively, the Commission could lower the allocation to discretionary initiatives from 20% to 15%, and correspondingly increase the allocation to the CMF/CIPFs from 80% to 85%, so that the split between third-party funds and discretionary initiatives matches the split between on-screen initiatives and social benefits.

Q.5 Do the criteria set out above ensure that the discretionary initiatives proposed by applicants will not be self-serving? If not, what other criteria would be appropriate?

25. Yes. Subject to a review of the comments of others, the WGC is of the preliminary view that the Commission's proposed criteria are sufficient to ensure that the discretionary initiatives proposed by the applicants will not be self-serving.

Q.6 Is the proposed list of discretionary initiatives sufficient? If not, what additions should be made and why?

26. Subject to a review of the comments of others, the WGC is of the preliminary view that the Commission's proposed criteria are generally sufficient. However, we propose that the Actor's Fund of Canada be specifically included as an eligible discretionary initiative. The Actors' Fund of Canada describes itself as “the lifeline for Canada's entertainment industry. Over 10,000

¹² Communications Monitoring Report 2013, Table 2.1.4

professional members of the industry from all over Canada and in the fields of film & TV, theatre, music and dance have been helped by the Fund, which provides emergency financial aid to assist cultural workers in recovering from an illness, injury or other circumstances causing severe economic and personal hardship.”¹³ We believe that contributions to the Actor’s Fund of Canada would be incremental, not self-serving and yield measurable improvements to the communities served by the undertakings to be acquired or to the Canadian broadcasting system as a whole.

Exemptions from the Requirement to Provide Tangible Benefits

Q.8 Should tangible benefits generally be provided as part of the transfer of ownership or control of all radio or television programming undertakings? What are the advantages and disadvantages to such an approach?

27. Yes. The WGC agrees with the Commission’s preliminary view that the requirement to provide tangible benefits should generally apply to all transactions involving the transfer of ownership or control of television programming undertakings. In particular, the WGC agrees with the view stated at paragraph 34 of the Notice regarding television programming undertakings with less than \$10 million in annual revenues, including the Commission’s rationale stated therein.
28. In addition, the WGC submits that tangible benefits should be provided as part of the transfer of ownership or control of broadcasting distribution undertakings (BDUs), as per the Commission’s benefits policy prior to Public Notice CRTC 1996-69.
29. We submit that the broadcasting distribution industry and the regulatory landscape have changed significantly since Public Notice CRTC 1996-69. The Commission provided its rationale in that Public Notice as follows:

Given that entry to the cable industry has been restricted to date, and in the absence of competing applications for authority to transfer the ownership or effective control of existing cable undertakings, the benefits test has served the purpose of ensuring that the Commission, in dealing with such transfers, is presented with the best possible proposal, taking into account the size and nature of the proposed transaction. However, with adoption by the Commission of a policy that removes all or most of the existing licensing restrictions on market entry and which, in fact, encourages the imminent entry of new competitors using a variety of distribution technologies, the underlying rationale for applying the benefits test in considering future applications for authority to transfer the ownership or control of distribution undertakings has essentially disappeared.

30. The Commission’s rationale was based on the belief that a loosening of regulation would result in significant new BDU entrants into the marketplace. This was thought likely to happen due to new distribution technologies then coming on the market. Earlier in the same Public Notice, the Commission said:

Consistent with this approach, the Commission recently licensed new broadcasting distribution undertakings that will use direct-to-home (DTH) satellite and multipoint distribution system (MDS) technologies to provide competition to cable, as well as to provide service to currently unserved areas. Applications from other parties to carry on DTH and MDS undertakings are now being considered, and new applications proposing use of similar technologies or other forms of broadband wireless distribution

¹³ <http://www.actorsfund.ca/about-us/what-we-do>

systems, such as local multipoint communications systems (LMCS), are likely to be submitted in the coming months.

31. Of course, many of these technologies did not live up to their promise. MDS and LMCS—so-called “wireless cable” at the time—failed to catch on. And while DTH did become a viable technology, it has remained a marginal competitor in the system, with only 23.6% of subscribers in 2012¹⁴, and its market share is now declining. As the Commission well knows, the new distribution technology that has really emerged since 1996 is the Internet, which the Commission has chosen to exempt from licensing¹⁵. As such, despite the hopes of the mid-1990s, BDU competition did not blossom from deregulation—the top Canadian distributors, who had 86.3% of all subscribers in 2012¹⁶ were either around in 1996 or are owned by companies that were around in 1996. Certainly, many BDUs grew beyond their traditional geographic footprint, and there is competition in several markets, including with regard to new technologies. Existing BDU companies have rolled out new services such as IPTV, which has grown significantly since 2008¹⁷. But overall, the emergence of entirely new and viable entrants (i.e. companies) has been limited. Nowadays, many BDU markets across the country are essentially duopolies, dominated by incumbent cable companies and hybrid IPTV/satellite companies (i.e. Bell and Shaw). And while some BDUs may claim that they are investing in their networks because of competition, with communications services—BDU, ISP and telephony—largely converged in the same companies and using the same networks, it’s difficult to know exactly which side of the business the competitive pressure is coming from. It is possible, and even likely, that the pressure is largely from the growth of the ISP side, with IPTV providing synergies with broadband Internet access. If the current investments in the networks are more the result of competition in telecom, and not the BDU sector itself, they should not be relevant from the perspective of broadcasting policy. In short, we submit that Public Notice CRTC 1996-69 contemplated a propagation of BDU technologies resulting in the growth of meaningful competition from new BDU entrants and new BDU companies; today, with most markets being dominated by two players, over 86% of Canadian subscribers being with the same large communications companies, and most competitive pressure coming from the ISP side, we submit that things have not turned out as imagined in 1996.
32. As such, the WGC submits that the rationale for exempting BDUs from the tangible benefits policy no longer applies. BDU licences remain valuable public “real estate” and, like licences for programming undertakings, they are not subject to a competitive process. The same conditions apply to BDUs as to broadcasters in this respect, so the tangible benefits policy should apply to both.
33. We also submit that the regulatory focus has shifted since 1996, so that exempting BDUs would be inconsistent with the Commission’s proposed approach. The Commission has stated in the Notice its intention with respect to discretionary initiatives to require that they not be self-serving, with proposed criteria for defining a “self-serving initiative” such as monies retained in-house and “an initiative that would normally be considered the cost of doing business including: technological upgrades;...or other capital expenditures”. While the Commission has always sought to exclude “self-serving initiatives”, we submit that it has transitioned over time—correctly, in our view—to a more stringent test. Prior to 1996, benefits packages in relation to BDU transactions included capital expenditures. In Public Notice CRTC 1992-42, the Commission noted that “[a]pproximately two-thirds of all benefits accepted in cable transactions involved

¹⁴ Communications Monitoring Report 2013: Broadcasting System, Table 4.4.2

¹⁵ We refer here to the so-called “open Internet”, and not IPTV. IPTV services are regulated by the Commission as BDUs, but IPTV is functionally identical to cable television—it simply uses Internet protocol technology to deliver a BDU service.

¹⁶ Communications Monitoring Report 2013: Broadcasting System, Table 4.4.3

¹⁷ IPTV has demonstrated a 45.3% compound annual growth rate (CAGR) in subscribers from 2008 to 2012, compared with CAGRs for cable, DTH and MDS in the 0%-1.1% range. See Communications Monitoring Report 2013: Broadcasting System, Table 4.4.2

capital expenditures to upgrade or consolidate the systems...”. In Public Notice CRTC 1996-96, the Commission said:

In reaching its determination to eliminate application of the benefits test in the case of transfers of ownership or control involving broadcasting distribution undertakings, the Commission has taken into account the fact that, in the past, accepted benefits have largely related to technical upgrades to a cable licensee's infrastructure, or to financial contributions to various programming initiatives, including a number of production funds. With respect to technical upgrades, the Commission considers that the need to prepare for a competitive environment will provide an effective incentive to all distributors to make the necessary investments to ensure that their infrastructures are technically advanced, while maintaining affordable rates for their subscribers.

34. The increased competition introduced in the mid-1990s may well have resulted in some capital expenditures and technical upgrades. But while the Commission in 1996 considered such expenditures to be a “tangible benefit”—and therefore substitutable for competition—we submit that the Commission of 2014 does not.

35. Further, the Commission in Public Notice CRTC 1996-96 said:

With regard to concerns about a possible reduction in funding for program production resulting from the elimination of the benefits test, any such impact would be offset by the increased level of support for program production resulting from the new requirement, outlined in section IV of this notice, that all distributors contribute a minimum of 3% of their gross annual revenues derived from broadcasting activities to an independently-administered production fund.

36. While this remains true, it is also true that broadcasters must contribute to Canadian programming through, among other things, the Canadian programming expenditures (CPE) and programs of national interest (PNI) requirements of the group-based licensing framework. As such, we submit that merely contributing to Canadian programming as part of their baseline regulatory obligations should not exempt an organization from the tangible benefits policy.

37. In addition, we would point out the significant vertical integration that has occurred in the Canadian broadcasting sector since 1996. As the Commission knows, all major private broadcasters are now commonly owned with major BDUs. It is conceivable, if not likely, that future transactions will involve transfer of both programming undertakings and distribution undertakings. Where the tangible benefits policy applies to only one of those, there may be an incentive to value the transaction such as to overweight the BDU assets, so as to pay less in tangible benefits on the television assets. Increasingly, the value of media corporations comes from the synergies generated by their vertical integration. A tangible benefits policy that excludes part of that value may increasingly be divorced from the realities of the market.

38. Finally, the Canadian broadcasting sector is subject to significant discussion on the relaxation of foreign ownership rules, so that a non-Canadian entity could purchase all or a part of a Canadian BDU. Whatever the likelihood of this happening, if it did happen under the current tangible benefits framework, a foreign corporation could take control of a Canadian BDU without any obligation to ensure there are incremental benefits to the Canadian broadcasting system. While payment of tangible benefits would not likely be the only consideration in such a scenario—nor, indeed, a complete answer to the concerns it would raise—the WGC submits that it would provide an important counterbalance to the negative impacts on the Canadian system.

39. For all of these reasons, the WGC submits that the Commission should re-apply the tangible benefits policy to BDU transactions. We submit that, consistent with the Commission's approach to programming undertakings, tangible benefits should be payable at a rate of 10% of the value of the transaction.

Q.9 Under what specific circumstances should the requirement to provide tangible benefits not apply?

40. Subject to a review of the comments of others, the WGC agrees with the Commission that the requirement to provide tangible benefits should apply to all transactions involving the transfer of control of all broadcasting undertakings. This includes, as per our discussion above, transactions involving BDUs.

Schedule for the Payment of Tangible Benefits

Q.10 Should the Commission ensure that all expenditures on tangible benefits are made in advance of the closing of the transaction as a means to ensure that initiatives are funded and for ease of administration? If not, why would such an approach not be desirable?

41. The Commission's current approach to tangible benefits includes a requirement to pay benefits in roughly equal portions over a particular period of time, usually 5-7 years.¹⁸ The WGC sees value in this approach, since it encourages stability in the production sector, moderating a potential for "boom and bust" cycles and supporting a consistent volume of content in the broadcasting system.
42. As such, the WGC proposes that the Commission retain this component of the tangible benefits policy. The 5-7 year period was chosen to mirror the typical licence terms of the broadcaster(s) in question, with 5 years being chosen in the group-based licensing policy to reflect the increased rate of change in the sector.¹⁹ For the same reasons, the WGC submits that a 5-year period for expending tangible benefits monies would be appropriate.
43. We believe that this could be accomplished by the Commission's suggestion to ensure that all expenditures on tangible benefits are made in advance of the closing of the transaction, provided that the Commission requires the recipients, such as the CMF/CIPFs, to disburse funds in roughly equal annual amounts over 5 years, wherever possible. Alternatively, the Commission could require purchasers to pay out benefits in roughly equal installments over 5 years, as per the current approach.

Q.11 When a programming undertaking changes ownership, should the Commission ensure that all outstanding tangible benefits from a previous purchase be expended in advance of the new transaction?

44. Yes. The WGC submits that ensuring that all outstanding tangible benefits from a previous purchase be expended in advance of a new transaction in which any broadcasting undertaking changes ownership would be appropriate and help ensure the tangible benefits policy is administered in a clear, predictable and transparent manner.

¹⁸ See Broadcasting Decision CRTC 2010-782, *Change in the effective control of Canwest Global Communications Corp.'s licensed broadcasting subsidiaries*, <http://www.crtc.gc.ca/eng/archive/2010/2010-782.htm>, at paragraph 36.

¹⁹ Broadcasting Decision CRTC 2011-441, *Group-based licence renewals for English-language television groups – Introductory decision*, <http://www.crtc.gc.ca/eng/archive/2011/2011-441.htm>, at paragraph 11.

Value of the Transaction

45. The WGC does not have the expertise to effectively comment on the manner in which the Commission should value transactions. We would simply reiterate our view, stated above, that excluding the BDU component of transactions involving vertically integrated media companies may make an accurate valuation of the included assets extremely complicated, and could threaten the integrity of the tangible benefits policy in those cases. As such, the WGC recommends that transactions involving BDU assets be included in the benefits policy.

Conclusion

46. In conclusion, we would like to reiterate our primary concern that changes to the tangible benefits policy should not reduce the benefits monies available to the development and production of Canadian television programming, either by being directed to the unregulated sphere or otherwise. We thank the Commission for the opportunity to provide our comments on this matter. We will review the submissions of other parties in this proceeding and look forward to providing additional comments in the reply phase as circumstances may warrant.

Yours very truly,

A handwritten signature in black ink, appearing to be 'Maureen Parker', written in a cursive style.

Maureen Parker
Executive Director

c.c.: National Council, WGC

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