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Coalition of Canadian Audio-visual Unions

Via E-mail: procedure@crtc.gc.ca

May 30, 2005

Ms. Diane Rhéaume
Secretary General
**Canadian Radio-television and
Telecommunications Commission**
Ottawa, Ontario
K1A 0N2

Dear Ms. Rhéaume:

Re: Call for comments on a proposal to accord confidentiality to the detailed financial information provided to the Commission in the annual returns of pay and specialty programming services; Broadcasting Public Notice CRTC 2005-42, 29 April 2005

A) Introduction

1. This is a submission by the Coalition of Canadian Audio-visual Unions (the "CCAU") with respect to the disclosure of financial data by CRTC licensed pay and specialty programming undertakings. The CCAU is a coalition of ten Canadian audio-visual unions. The members of the CCAU include the following organizations that financed the preparation of this report: the Alliance of Canadian Cinema Television and Radio Artists ("ACTRA"), the Directors Guild of Canada ("DGC"), the National Association of Broadcast Employees and Technicians Local 700-CEP ("NABET"), and the Writers Guild of Canada ("WGC"). The other members of the CCAU are the American Federation of Musicians – Canada ("AFM-Canada"), Union des artistes ("UdA"), the Communications, Energy and Paperworkers Union of Canada ("CEP"), Association des réalisateurs et réalisatrices du Québec ("ARRQ"), Association Québécoise des techniciens de l'image et du son ("AQTIS"), and Société des auteurs de radio, télévision et cinéma ("SARTEC").

2. In *Broadcasting Public Notice CRTC 2005-42*, the Commission indicated that it is considering a request by the Canadian Association of Broadcasters (“CAB”) which, if approved, would have the effect of reversing the Commission’s longstanding practice of disclosing the disaggregated financial results of Canada’s specialty and pay television licensees. The CCAU believes that such a reversal would not be in the public interest.

3. The rationale being advanced by the CAB is contained in its filing in respect to *Broadcasting Public Notice CRTC 2004-64* last fall. Rather than dealing with issues of public interest, transparency, accountability, consistency, the CAB brief deals with the narrow self-interest of its pay and specialty members. It purports to offer as a rationale for non-disclosure the suggestion that programming services are being harmed because BDUs do not have the same level of financial disclosure. The CCAU has the following comments.

B) Information required for interveners and the public interest

4. It is an ongoing disappointment that the interests of the Canadian public are so rarely heard at broadcasting proceedings. Being an intervener in a broadcasting public process is a difficult and expensive proposition. Costs are not awarded, unlike other regulatory regimes (even the telecom side of the Commission permits this) and proceedings are not held under oath.

5. Under section 3(1)(s) of the Broadcasting Act, it is stated that “private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them... contribute significantly to the creation and presentation of Canadian programming...”. (emphasis added)

6. This section explicitly requires the Commission to have regard to the financial resources of licensees in setting Canadian content levels. And unless interveners have access to those financial statements, they are hamstrung in their ability to make useful submissions to the CRTC.

7. In that connection, the CCAU and its members have intervened regularly in CRTC processes over the years using financial data to advance their arguments. To pick but one example, in 2001, the Directors Guild of Canada (“DGC”), intervened with respect to the pay television renewals. The pay companies were attempting to shrink their Canadian content expenditures from the 31%-32% of revenues range down to 20%. Using disaggregated CRTC data, the DGC and others were able to persuade the Commission that it was inappropriate to grant the request. The difference, using the pay companies’ own projections at the time, was approximately an additional \$188 million in Canadian content over the proposed licence term. Given the extraordinary financial results of the pay companies since that time, the difference likely would have been even higher.

8. A second example occurred at the licence renewal hearings of the “Class of 96” specialty services. In that proceeding, interveners from the unions and from the

independent production sector had access to the financials of the services involved and argued for increases in Cancon levels. This turned out to be crucial, since the CRTC in the end decided to increase the Canadian content expenditure requirements of certain services based on their historical PBIT levels, the specifics of which were also disclosed.

9. Given these cases, it is understandable why licensees do not want to allow the financial results of their services to fall into the hands of interveners. However, where these results directly affect the determination of their obligations under the *Broadcasting Act*, as they do, it is incumbent on the Commission to make the results public so that interveners can make their case.

10. Broadcasters benefit in many ways from the regulation that protects their businesses. They are offered public spectrum; the Canadian ownership and control rules prohibit non-Canadian companies from competing with them; the Eligible Satellite Lists contain restrictions that protect them; the simulcast rules (admittedly optional in the case of specialty services) ensure that when foreign services come into Canada, Canadian services can cover their signals and appropriate their “eyeballs” for advertising purposes; the *Income Tax Act of Canada* prohibits deductibility of advertising expenses on non-Canadian services; the *Radiocommunication Act* punishes decoding of services in Canada that do not have a lawful distributor in Canada, etc. Pay and specialty broadcasters are also permitted to use Canadian taxpayers’ money to satisfy their Canadian content requirements through the inclusion of top-up funds from the CTF in their expenditure calculations. In short, there are significant public benefits and barriers to entry, all designed to protect Canadian broadcasters.

11. The main quid pro quo, of course, is Canadian content production and exhibition and one primary function of the Commission is to correctly and constantly calibrate the amount of Canadian programming (and exhibition) that individual broadcasters should be required to air in exchange for these privileges. Intervenors play a key role in shining lights on certain areas and activities of the broadcasters in public proceedings in order to assist the Commission in its deliberations. One of the public interests is in having an open and transparent process, together with a complete record upon which to base public comment. Absent financial data, intervenors are clearly handicapped.

C) The CAB’s arguments

12. The CAB advanced its proposal in the context of a proceeding relating to “good commercial relations” between BDUs and programming services. That proceeding was the result of a dispute between Star Choice and The Weather Network/Metéomedia. The issue of disclosure had absolutely nothing to do with that dispute. In fact, one of the first things TWN/MM did following the receipt of the notice from Star Choice was to argue (in detail) the harm to its PBIT. It had no interest in keeping the figures secret. It seems strange that

the BDU/specialty service relationship would form the basis of the CAB's arguments as they break down on close inspection.

13. It is to be expected that every BDU will try to minimize its programming costs. Since a BDU can charge subscribers whatever it wants, programming fees are just input costs. This has nothing to do with whether a given service is profitable or not. The BDU wants the cheapest rate possible. Meanwhile, in the negotiation process, the "floor" from the perspective of most services is the rate the Commission sets for them. If a BDU is unwilling to pay that price, the service can avail itself of the Commission's dispute resolution procedures.

14. If a service has a \$0.20 cent per subscriber per month regulated "maximum" rate, most will, or ought to, expect the BDU to pay it that rate. And most deals are for multiple, if not seven, years. The notion that a given BDU will look back to see how a service did in the year ending August 31 the prior year in order to "grind" the service in negotiations is farfetched.

15. The financial harm argument is unproven, theoretical, and in the CCAU's opinion, exaggerated. First, in other fora, the CAB has complained that many affiliation agreements are not signed which seems to flow counter current to the "grinding" argument. Secondly, if one continues with the example of the class of 96 mentioned above, each of those services made projections for the next seven years in the context of their renewals and those projections were all public. Those projections had to be based on something. And then the Commission came out in its decisions and recalibrated the Canadian content expenditures based on the PBITs of the services involved, the specifics of which were also disclosed.

16. In so doing, however, the Commission required greater Canadian content expenditures which would seem to make it more difficult for BDUs to successfully argue for lower rates. The Commission does not have a problem with healthy PBITs as long as the appropriate level of Canadian content quid pro quo occurs. Neither does the CCAU. But one would expect the Commission to support the programming service in a dispute resolution situation where the argument hinged on the profitability of the programming service. This is especially true where the Commission had just used the PBIT figures to justify an increase in the percentage of revenue expended on Canadian content.

17. In sum, the idea that a BDU could successfully use historical financial results of a specialty service to reduce its affiliation payments seems unlikely for the reasons cited above.

D) Access to Financial Data in the U.S. and Canada

18. In this context, it is worth noting that in the United States, anyone can buy financial information (including ad and subscription revenues and programming costs) for all the individual U.S. pay and specialty services from Kagan and Associates. It is for sale.

19. In Canada, if the CRTC does not make that information available, interveners will have insufficient information upon which to make useful comments. In the absence of mandated disclosure, broadcasters will always be able to say that the numbers are incorrect because they will always be based on guesswork.

20. In the Public Notice that accompanied the renewal of the "Class of '96" specialty services last year (*Broadcasting Public Notice 2004-2*), the Commission noted the following:

Reporting requirements

35. The CFTPA, DGC, WGC and ACTRA, supported by CEP, recommended that the Commission impose additional reporting requirements on specialty services. Specifically, the CFTPA submitted that licensees should file annual reports on the original productions they commission or acquire, including information concerning the amounts paid as licence fees to related parties and unaffiliated producers. The DGC proposed that the Commission issue annual reports on the expenditures by licensees in each program category.

36. The Commission has considered the views of these interveners, and has concluded that the existing reporting requirements, coupled with the Commission's ability to call upon a licensee to provide additional information when such information is required, renders additional reporting requirements unnecessary at this time.

21. In other words, the Commission came down squarely on the side of the public interest in disclosing detailed financial data, broken down by service in the case of the Canadian pay and specialty services. In the CCAU's opinion, it ought to be the responsibility of those challenging the status quo to advance persuasive arguments as to why the Commission should alter its longstanding practice. In this, the proponents have failed.

E) More not less disclosure

22. The CCAU's members have for years advocated for a more open and transparent disclosure of relevant financial data. In the CCAU's view, even the previous level of disclosure by Canadian pay and specialty services was inadequate.

23. Now that the Commission has correctly pinpointed Canadian drama as a trouble spot, it makes even more sense for broadcasting programming undertakings to have their financial results, including their spending on Category 7 programs, to be made public. This



is true not only of conventional broadcasters, but of specialty and pay licensees as well. Moreover, the spending on the same genre for non-Canadian programming should also be made public.

24. This would allow for monitoring and review of the progress being made in solving the regulator's number one priority problem in Canadian television.

25. Interveners have to have the tools to do the job. With costs not being covered, information must be available without having to do copious digging, analysing and guessing.

26. In the CCAU's submission, the disclosure of the disaggregated results would result in a more open, fair, and responsible process

F) Conclusion

27. In conclusion, it can be seen that the Commission has already been over this ground before and has found that the data sought by the CCAU is appropriate for public disclosure.

28. The public interest in disclosure outweighs the private interest in withholding the information. In fact, *even if* (and that is not the case here) a licensee is able to prove that significant harm might result from the release of the information, that is still not the test. As stated by the Commission in its October 8, 1998 Practice Note,

The Commission has found that the expectation that specific direct harm might result from disclosure is not, by itself, sufficient to justify upholding a claim of confidentiality. In certain circumstances, substantial harm from disclosure may still be outweighed by the public interest in disclosure.

29. The CCAU accordingly respectfully requests that the CRTC make public on a timely basis the following information:

(a) Disaggregate financial information for all pay and specialty licensees for 2004 and for future years, as it has in the past; and

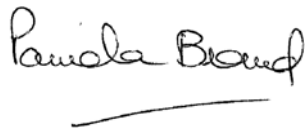
(b) A breakout of spending on both Canadian and non-Canadian programming *by programming genre* for all Canadian pay and specialty licensees.

Yours truly,

Coalition of Canadian Audiovisual-Unions (CCA)



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