Writers Guild of Canada

September 14, 2009

FILED ELECTRONICALLY

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Les Terrasses de la Chaudière
Central Building
1 Promenade du Portage
Hull, Québec J8X 4B1

Dear Mr. Morin:

Re: Broadcasting Notice of Consultation CRTC 2009-411 – Notice of consultation regarding a Policy proceeding on a group based approach to the licensing of television services and on certain issues relating to conventional television (the "Notice")

Please find enclosed the submission of the Writers Guild of Canada in connection with the above-noted hearing. WGC wishes to appear at the public hearing scheduled for November 16, 2009, to further elaborate on the points raised in this submission and to provide further detail to the Commission of its proposals contained herein.

Yours very truly,

Maureen Parker
Executive Director

366 Adelaide Street West
Suite 401
Toronto, Ontario M5V 1R9

Tel 416 979-7907
1-800-567-9974
Fax 416 979-9273
info@wgc.ca www.wgc.ca

Executive Summary

1. These comments are filed by the Writers Guild of Canada ("WGC") in connection with the above-noted Notice of Public Hearing calling for comments in support of a public hearing to consider a group-based approach to the licensing of conventional television and discretionary services and certain policy issues relating to conventional television. The WGC is the national association representing 2000 screenwriters working in English-language film, television, radio and digital media production in Canada.

2. The WGC's comments in this proceeding focus primarily on the decline in broadcaster spending on English language Canadian programming and particularly drama, documentaries and children's programming. The WGC advocates a flexible regulatory framework that can ensure that broadcasters appropriately support English language Canadian drama, documentaries and children's programming consistent with their obligations under the *Broadcasting Act* while balancing the impact of their corporate structures and the relative health of their revenues.

3. The WGC, together with its colleagues at the Canadian Film and Television Production Association ("CFTPA"), Alliance of Canadian Cinema, Television and Radio Artists ("ACTRA") and the Directors Guild of Canada ("DGC") (collectively the "Coalition") carefully considered the various options available to reach the balanced regulatory framework envisioned above, and in particular the proposals contained in the Notice. We have come to the conclusion that, while a simple formula is desirable, it will not provide for the complexity of the Canadian broadcasting system or prevent the many ways that broadcasters could seek to sidestep their obligations.

4. As set out in this paper, conventional spending on Canadian drama in particular has dropped steadily since 1999. In 1998 the English language conventional broadcasters spent in the aggregate 5.2% ($74.9 million) of their ad revenue on Canadian drama. By 2008, the aggregate expenditure had dropped to 3.2% of ad revenue ($53.8 million). Meanwhile, spending on foreign, primarily American, drama has risen from $284.5 million in 1998 to $490.3 million in 2008.

5. The existing regulatory framework has granted broadcasters sufficient flexibility to spend more money on foreign drama while still meeting their regulatory obligations. Consolidation approved by this Commission has given station groups the deep pockets needed to compete for programming in Hollywood, enjoy cost efficiencies and exploit media across different platforms. A new framework is therefore required which takes into consideration the new reality of how the Canadian broadcasting system is structured, redresses the above expenditure imbalance and reminds the broadcasters that their first priority is to uphold the principles of the *Broadcasting Act.* When it comes to the national interest, their obligation to earn their shareholders the highest possible return on investment runs a distant second.

6. The Coalition proposes a regulatory framework that takes into consideration the broadcasters' requirements for flexibility and the audience's need for choice for high-quality Canadian programming. We have tried to create a framework that is general enough that it does not micromanage the broadcasters' consolidated businesses while at the same time is specific enough to foresee and prevent gaming the system in the name of increased profits. It combines both an expenditure and an exhibition requirement because past practice has shown us that both expenditure and exhibition requirements are needed to result in a healthy Canadian broadcasting system full of popular high-quality Canadian programming.

7. The Canadian broadcasting system has experienced several massive changes in the past few years, from consolidations (e.g. CanWest purchase of Alliance Atlantis, CTV purchase of certain CHUM services) to audience fragmentation, competition from new digital platforms and the global economic downturn. Not all of these changes are challenges, and some are in fact opportunities for broadcasters. These circumstances cannot and should not be used as excuses for broadcasters to be relieved of their regulatory obligations. In fact, for too long broadcasters have been given flexibility in the expectation that they would 'do the right thing' and support Canadian programming. As our statistics have shown, only the shareholders have been benefitting. Broadcasters, and particularly conventional broadcasters, have to live up to their obligations under the *Broadcasting Act* and make their 'appropriate' contribution to the creation and presentation of Canadian programming. Only then will Canadian audiences receive the full benefit from the existence of a distinct Canadian broadcasting system.

8. Specifically we advocate the following elements of a new regulatory framework. Each element is explained in greater detail in this submission:

- A Canadian programming CPE for all conventional services owned by a corporate group, to be set at possibly 35% of gross revenues.
- Maintain existing CPE for specialty services with adjustments for increases in PBITs and elimination of allowances for the licence fee top up.
- A corporate group drama CPE phased in over the course of the licence. Such a CPE would be aimed at conventional broadcasters contributing a 6% of gross revenues drama expenditure to the group. This group CPE in drama would be adjusted to fit the actual mix of services in the group, and take into account the existing drama expenditure by the conventional services and the discretionary services. Note that 6% is a notional ratio intended only for the calculation of the group drama CPE.
- Corporate group documentary CPE or minimum hours produced, to be determined after review of financial and exhibition information provided by broadcasters.
- Corporate group children's programming CPE or minimum hours produced, to be determined after review of financial and exhibition information provided by broadcasters.
- Mandatory exhibition of all drama and documentaries produced under the framework at least once on conventional stations in the group between 8pm and 11pm, Sunday to Friday, within two years of availability. Mandatory exhibition of all children's programming produced under the framework at least once on conventional stations in the group at an age appropriate time within two years of availability.
- 75% expenditure and exhibition requirement on independent production of drama, documentaries and children's programming.
- Similar framework for VOD or PPV services to the extent that they operate in an analogous manner to linear broadcasting.
- Inclusion of new media broadcasting revenues and new media broadcasting expenses in the calculation of CPE to prevent gaming between regulated and unregulated sectors.

9. The WGC understands that the Commission is interested in pursuing a group approach to licensing and to the extent possible we have proposed such an approach. However, after economic modeling, in our considered opinion there were too many opportunities to game the system by allocating expenses to one platform and revenues to another platform for an overall group approach to Canadian programming to work. Our proposed framework should have much to recommend it to broadcasters as we have tried to consider their needs for flexibility and control over their own businesses. It is based on a percentage of revenue so that actual dollars spent would fluctuate up or down depending on the growth or dip in revenues. Fundamentally it addresses the need for more expenditure on Canadian drama, documentaries and children's programming as a percentage of revenue. We are interested in discussing the proposed regulatory framework with the Commission and the other stakeholders during the Public Hearing provided that changes or alternative proposals put forward by other

stakeholders must meet that basic need for more broadcast expenditure on Canadian drama, documentaries and children's programming.

Introduction

10. WGC members are the creators of Canadian stories including indigenous dramatic series such as “Flashpoint” and “Corner Gas,” acclaimed movies of the week such as “Mayerthorpe” and internationally successful children’s programming such as the “Degrassi” series. WGC members create the Canadian television programs that Canadian audiences want to watch. For that reason, the WGC is committed to building a strong and vibrant broadcasting industry that offers Canadian audiences the choice to watch a wide variety of Canadian television programming. The WGC is particularly concerned about the state of Canadian drama, the most popular form of television programming.

11. The WGC welcomes this hearing into both a group-based approach to the licensing of Canadian broadcasters and certain policy issues as outlined in the Notice. The WGC has been anticipating a more complete discussion of the issues since many of them were postponed until licence renewal as part of the 2007 Over the Air Television Policy Decision[1]. In fact, the WGC has been eager to address the failure of Canadian broadcasters to adequately support Canadian programming, and particularly Canadian drama, since the 1999 Over the Air Television Policy[2] (the “1999 Policy Decision”) removed expenditure requirements.

12. The WGC is hopeful that the upcoming policy hearing will set the stage for licence renewal hearings in April 2010 to redress the impact of the 1999 Policy Decision which allowed broadcasters to spend less on Canadian drama and more on foreign drama and still meet their regulatory obligations. . The WGC hopes that this hearing will help the Commission create a regulatory framework that will provide the industry with much needed stability and certainty through seven-year licence terms, while at the same time providing Canadians with the choice to watch a wide variety of high-quality Canadian programming.

13. Canada has a small population compared to its neighbour to the south. Since the Canadian broadcasting system first started it has been dominated by the U.S. broadcasting system and in particular the border stations that most Canadians can easily access. Canadian broadcasters have been allowed simultaneous substitution in order to monetize the U.S. programming and retain the Canadian

[1] Broadcasting Public Notice CRTC 2007-53
[2] Broadcasting Public Notice CRTC 1999-97

audiences. In exchange for this and other benefits the Canadian broadcasters were expected to make appropriate contributions to the creation and presentation of Canadian programming. This regulatory bargain seems to be lost on broadcasters when they argue in front of their Commission that as private broadcasters their priority is shareholder profit. Canadian broadcasters would not receive a licence if they did not agree to meet the obligation to provide Canadians with the choice of diverse high-quality Canadian programming that is a distinct alternative from the U.S. broadcasters.

14. The WGC's primary goal as an organization is to 'further the professional, creative and economic rights and interests of screenwriters in Canada'[3]. The screenwriter is the original creator of Canadian programming. However, when appearing before the CRTC the WGC shares the goals of the Canadian public as enshrined in the principles of the *Broadcasting Act*. Drama is the post popular form of television programming and when Canadian drama is of the highest quality, well-promoted and consistently scheduled, Canadians love to watch it. In fact, Canadian audiences want television programming that speaks to them about their experiences, values and communities. A 2008 Harris-Decima poll[4] revealed that not only is it important to Canadians to have access to Canadian programming that distinguishes itself from foreign programs, they also want to be able to choose programming that reflects national identity. Over three-quarters of Canadians (78%) say that it is important to them to have a choice of television programs that reflect Canadian society, values and perspectives. Canadian television audiences – and those who create, produce, perform and direct Canadian television – all want Canadian programming on the Canadian broadcasting system. The WGC has been working for years to achieve that goal. A higher volume of Canadian drama will give Canadian screenwriters the opportunity to develop their individual skills and for Canada to have a diverse, sustainable talent pool. That too is good for Canadian audiences as it means more high-quality Canadian drama. Our goal of helping the Commission arrive at a regulatory framework that can guide the group licensing hearing in April -- setting the stage for seven years of stability in the industry, and growth in high-quality Canadian content – will benefit not only WGC members but most importantly Canadian audiences.

Background

[3] Constitution of the Writers Guild of Canada, Article 2(a)
[4] Canadian Attitudes Towards Canadian Programming and CTF Issues, January 25, 2008

CRTC Regulation

15. The WGC has been before the Commission on its own or as part of the Canadian Coalition of Audio-Visual Unions ("CCAU") on many occasions, setting out the problems with the 1999 Policy Decision and its disastrous impact on the hours of high-quality Canadian drama available to Canadians. The Commission may find it useful however to take a step back and look at the history of broadcasting regulation in support of Canadian programming in order to better understand what has been tried over the years and why the 1999 Policy Decision was implemented before moving forward to look at proposals for the next seven years. The Coalition commissioned the law firm McCarthy Tétrault to prepare a review of the recent history of CRTC regulation in support of Canadian programming. The study, entitled "The Story So Far," and attached as Schedule "A," demonstrates the number of strategies the Commission has employed to date with the goal of meeting the objectives of the *Broadcasting Act* and offering Canadians the choice of more Canadian drama. The study makes evident that, over the last thirty years, the Commission has struggled with how best to ensure that Canadians were offered Canadian drama reflecting Canadian themes and stories. These different strategies met with varying levels of success.

16. The *Broadcasting Act* sets out the public policy goal that the Canadian broadcasting system 'encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view'[5]. Over the years it has been clear that Canadian broadcasters need no assistance to produce and broadcast categories of Canadian programming such as news and sports. The market provides enough incentive and little foreign competition for those genres. However other genres, and particularly drama, clearly need assistance due to the low cost of high-quality U.S. drama to Canadian broadcasters and the competition with U.S. broadcasters for Canadian audiences. Canadian broadcasters earn more ad revenue simulcasting U.S. dramas which they were able to buy at a fraction of their expensive budget than they do broadcasting the more moderately budgeted Canadian drama.

[5] S.3(1)(d)(ii) of the Broadcasting Act

17. As a result, in the 1970s the Commission came to see that, in order to meet the public policy goal of offering Canadians a wide range of programming, the Commission needed to intervene to support Canadian drama. For example, in 1973 and 1976 the Commission advised CTV that it expected the broadcaster to "develop more drama programming with Canadian themes, concerns and locales"[6]. CTV did not meet those expectations however and in 1979 the Commission made it a condition of licence that CTV broadcast 26 hours of original new Canadian drama in the first year of the licence and 39 hours in the second. However, exhibition requirements alone were soon found to be insufficient in supporting high-quality Canadian drama because they did not compel broadcasters to license the more expensive high-quality drama that could compete with U.S. dramas. In 1982, the Commission set expenditure expectations for Global. In 1986, due to non-compliance by the network, the Commission formalized these expectations and imposed expenditure conditions of licence along with exhibition requirements. In 1987, CTV also received expenditure and exhibition conditions of licence for original Canadian drama. The Commission's experience revealed that recommendations and expectations were not enough. Only expenditure and exhibition requirements together would ensure both that relatively expensive high-quality Canadian drama would be produced and that there would be sufficient volume of it on the air to provide audiences with effective choices in programming.

18. We can see the result of expenditure and exhibition requirements for Canadian drama just by citing some of the Canadian television series from the 1990s. It was a golden age. "Street Legal," "E.N.G.", "Cold Squad," "Da Vinci's Inquest," "Traders," "Due South," "Road to Avonlea," "North of 60," "Black Harbour" as well as kids programs "Ready or Not," "Madison," "Degrassi Junior High" and "Adventures of Shirley Holmes." The volume meant that there was a wide variety of choice for Canadian viewers and a wide variety of professional opportunities for Canadian television talent. The sheer number of television dramas on the air each year meant that television screenwriters were able to hone their craft, and create better and better television. In fact, when work opportunities became scarce after the 1999 Policy Decision, a number of those Canadian-trained screenwriters went to Hollywood where they went on to create and/or write some of the most successful U.S. drama series (e.g. "House", "Bones", "Judging Amy", "Deadwood", "ER", "The Black Donnellys", "Crash"). But, in the 90s, they were still working at home and Canadian audiences benefitted.

[6] Decision CRTC 73-44, 22 January 1973 as cited in "The Story So Far"

1999 Policy Decision

19. By 1999, after more than a decade of targeted regulatory intervention, the Canadian television environment was so successful that in the 1999 Policy Decision preamble the Commission stated:

> *Canadian viewers appreciate the exceptional range of television services available to them over-the-air, through cable and other distribution undertakings. These sources have increased the variety of Canadian programs available to viewers and opened new markets for independent producers. Not only are Canadian programs available; they are popular. Viewing to English-language programs increased between 1993 and 1997, at a time when additional foreign channels and programming were becoming available.*[7]

20. The success of Canadian drama meant that the Commission could extend its support to priority programming (i.e. drama, documentaries, variety, entertainment magazine shows and regionally produced programming) in order to provide a greater diversity of Canadian programming to audiences. This policy also rewarded broadcasters for having achieved this success by granting them greater programming flexibility. The Commission chose to expand exhibition requirements which had been limited to Canadian drama in prime time (i.e., 8pm to 11pm) to hours of priority programming in an extended prime time (i.e., 7pm to 11pm) and remove expenditure requirements. This would again grant broadcasters more flexibility in their businesses in an increasingly competitive environment. The Commission felt that Canadians' choices for high-quality Canadian programming would be preserved by the broadcasters' need to win audience loyalty and set themselves apart from U.S. broadcasters.

21. This approach made sense in theory but not in the context of the history of CRTC regulation. Neither trusting the broadcasters nor trusting market forces had worked to the benefit of Canadian drama during the 1970s and 1980s. Only enforceable expenditure and exhibition requirements as conditions of licence led to a successful domestic broadcasting system popular with Canadian audiences. The introduction of priority programming exhibition requirements and the elimination of expenditure requirements as part of the 1999 Policy Decision together provided broadcasters with the opportunity to save costs by commissioning inexpensive drama and other programming that was cheaper to produce than drama. Broadcasters were still able to meet their regulatory

[7] Public Notice CRTC 1999-97

obligations but with less expenditure and less production of quality programming. They could now divert even more dollars to an increased spend in Hollywood.

Impact of Elimination of Expenditure Requirement

22. While we have set out these figures for the Commission many times, it is an important part of the story that we are telling here today. In 1999 there were 186 hours of one-hour 10 point Canadian drama series on conventional television. In 2008 there were just 119 hours. In 1998, the last year full year before the 1999 Policy Decision was implemented, the conventional broadcasters spent, in the aggregate, 5.2% ($74.9 million) of their ad revenue on Canadian drama. Despite drama credits and the drama incentive program of 2006[8], by 2008 the aggregate expenditure had dropped to 3.2% of ad revenue ($53.8 million) with some conventional broadcasters spending even less[9].

23. For a time, the broadcasters explained the drop in spending on Canadian drama by saying that Canadian audiences now wanted reality television. Drama in general and Canadian drama in particular was not popular. However, any review of the weekly top 30 programs in Canada will demonstrate that this is not the case, as the top 30 list is dominated by shows like “House,” “Grey’s Anatomy” and the “CSI” franchise. While certain reality programming is popular, i.e., “American Idol” and “So You Think You Can Dance,” it has never replaced well-crafted drama. Even during the summer months when fewer people are watching television and the schedule is full of repeats more than half of the top 30 programs are dramas (this number generally increases to about 2/3 during the fall and winter seasons).[10] There have been a number of highly successful Canadian dramas that have managed to win sizeable audiences, proving that when high-quality Canadian drama is well promoted and broadcast in a consistent time slot when people are watching television, Canadians will watch it in droves[11]. Recent programs like “Corner Gas,” “Little Mosque on the Prairie,” “Rick Mercer Report,” “Flashpoint”

[8] Public Notice CRTC 2006-11

[9] In 2008 Rogers spent only 1.3% of its revenues on Canadian programming according to their licence renewal application.

[10] BBM Top 30 Programs for July 13 – 19, 2009, 16 of the top 30 are dramas. Note that the most popular program, “So You Think You Can Dance” had an audience of 1.6 million. Only two of the dramas were originals, “Merlin” and “The Listener”. Contrast this with BBM Top 30 Programs for March 9 – 15, 2009 when 21 of the top 30 were dramas, the most popular program, “House”, had an audience of 2.3 million and most of the programs were originals.

[11] In the BBM Top 30 for July 13 -19, 2009 for example, “The Listener” was 19th with an audience of 871,000. In March 9 – 15, 2009 “Flashpoint” was 16th with an audience of 1.350 million and “Rick Mercer Report” was 22nd with an audience of 1.123 million.

and movies of the week like “Mayerthorpe” all prove that point. If the Canadian broadcasting system does not provide audiences with high-quality Canadian dramas, audiences are driven to the U.S. dramas to satisfy their appetite for this form of programming.

24. The drop in spending cannot be explained away as the result of a change in audiences' tastes. What broadcasters were doing was choosing to meet their exhibition requirements by spending the least amount of money possible to produce the necessary hours of priority programming. Exhibition hours could now be met with low cost programming genres like entertainment magazine shows, and it also meant the freedom to commission low budget dramas. In one notable case, Global filled its priority programming hours with the extremely low budget drama “Train 48.” In fact, it was Global's only drama series for two years in a row. Global licensed 318 half-hour episodes of “Train 48” over three years at an approximate budget of $30,000 per half hour. Average budgets for half hour drama at that time were $475,000. According to reports at the time,[12] it earned an average audience of 200,000, much less than the entertainment magazine show “eTalk Daily” (475,000) which was airing in the same slot on CTV. It was slotted into early prime time when fewer people are watching than in the 8pm – 11pm slot. One need not be overly cynical to conclude that “Train 48” was not intended to earn audiences but simply to fulfill exhibition requirements at the lowest possible cost.

25. It only took a few years before the impact of the elimination of the drama expenditure requirement became apparent. In May 2004, the Commission called for comments on a proposed incentive program noting that conventional broadcasters were only spending 4% of their revenues on drama and that the appropriate contribution would be 6%. The Commission then attempted to stem the tide in 2006 by instituting its Drama Incentive Program[13], aimed at gradually moving broadcasters to the end goal of spending 6% of revenue on Canadian drama. The Program granted broadcasters more advertising time in exchange for reaching specific expenditure targets. This program had not yet had a chance to have an impact before the Commission effectively cancelled it by lifting restrictions on advertising minutes in the 2007 Television Policy[14]. And drama spending never reached the Commission's target.

[12] Playback December 15, 2003 “Train 48: Fast, cheap and on track”
[13] Public Notice CRTC 2006-11
[14] Public Notice CRTC 2007-53

26. As the Commission is also well aware, the drop in spending on Canadian drama is only half the story. The complementary problem is a startling increase in spending on foreign drama. In 1999, English conventional television broadcasters spent $304.5 million on non-Canadian drama. This figure had risen to $490.3 million by 2008. The ratio between spending on foreign drama to Canadian drama increased from 5.2 to 1 in 1999, to 9.1 to 1 in 2008. But more telling than this is the fact that what was a slow gradual increase in spending on foreign drama hit a watershed moment in 2006, when spending on Canadian drama dropped 25% while spending on foreign drama increased 19.7% (please see the chart below). This kind of seismic shift in spending cannot be explained away by the suggested increase in cost of U.S. drama or the excuse of needing U.S. drama to subsidize the cost of unprofitable Canadian drama.

27. So what else was going on around 2006? From 2000 to 2007, BCE acquired CTV and The Globe and Mail, became Bell Globemedia, then acquired CHUM assets and became CTVglobemedia. During the same time period, CanWest acquired the Southam newspapers and then the Alliance Atlantis Broadcasting specialty services. Before being acquired by CTV and Rogers, CHUM had expanded by acquiring the Craig Media stations. There was a flurry of mergers and acquisitions of all sizes as media companies felt the need to grow and diversify in order to thrive. The CRTC approved these consolidations, and the WGC supported them, because we all believed that consolidation into a few strong media companies was necessary for Canadian broadcasting to survive in the global marketplace. We thought that the independent production sector and Canadian audiences would benefit from the deeper pockets and cost efficiencies of the consolidated companies. The opposite seems to be true as it appears that this consolidation allowed the Canadian broadcasters to spend more in Hollywood in order to increase ratings and shareholder profits and in a competitive drive to try to dominate the marketplace – all at the expense of Canadian programming.

Chart 1

Canadian and Non-Canadian Drama Programming Expenditures by English-language Private Conventional Television Broadcasters as a Proportion of Advertising Revenues* ($ millions)

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Ad revenues (% of total revenues)	1,453.2 (96.6%)	1,461.2 (96.2%)	1,477.3 (96.7%)	1,502.5 (97.1%)	1,473.4 (96.4%)	1,607.6 (95.6%)	1,610.6 (95.3%)	1,679.2 (95.4%)	1,688.9 (96.4%)	1,720.8 (95.9%)	1,683.7 (95.7%)
Canadian drama programming (% of ad revenues)	74.9 (5.2%)	58.6 (4.0%)	62.1 (4.2%)	63.6 (4.2%)	57.5 (3.9%)	63.1 (3.9%)	53.2 (3.3%)	53.4 (3.2%)	39.9 (2.4%)	40.3 (2.3%)	53.8 (3.2%)
Non-Canadian drama programming (% of ad revenues)	284.5 (20.0%)	304.5 (20.8%)	325.7 (22.0%)	340.4 (22.7%)	349.5 (23.7%)	364.4 (22.7%)	355.1 (22.0%)	382.7 (22.8%)	458.0 (27.1%)	484.9 (28.2%)	490.3 (29.1%)

- Source: CRTC Statistical and Financial Summaries for Private Conventional Television. Given that the CRTC does not publicly release English-language data separate from total data, we have estimated the English-language data as 105% of Canadian data outside Quebec to reflect the fact that there are only a handful of English-language TV stations in Quebec. Advertising revenues in our calculations include “Local Time Sales”, “National Time Sales”, “Network Payments”, and “Infomercials”.

28. The Commission recognized the growing disparity between spending on foreign and Canadian drama when it expressed concern about the level of spending on Canadian drama by English language broadcasters in its policy decision of 2007[15]. In the Notice of Consultation 2009-70 which initiated the conventional policy review for Spring 2009, it was noted that the Commission's earlier concern "has only intensified as a result of the 2008 data released on 10 February 2009, which show that private broadcasters' spending on Canadian programming was relatively stable, whereas spending on foreign programming rose by 7.4% over 2007 levels". Despite the conventional broadcasters best efforts they were not able to dispel the Commission's concerns during the April 2009 hearing, nor were they able to offer plausible justifications for the excessive spending on foreign programming. The Commission has maintained, as the Chair Konrad von Finckenstein has said most recently to the 2009 Broadcasting Invitational Summit, that the fall 2009 hearing must develop "appropriate measures to keep spending on foreign programming within acceptable limits"[16].

29. However, as the data in Chart 1 above shows, the real problem is not excess spending on foreign programming in general but on foreign drama specifically. Broadcasters are not going to Hollywood to spend excessively on reality shows or news programs or even sports programs. They are in competition with each other on U.S. prime time dramas. They are bidding higher and higher amounts to nab and keep the next big drama coming out of Hollywood. The broadcasters' argument is that their spending on U.S. drama is necessary to subsidize the cost of Canadian drama. But in reality, this spending takes place at the expense of quality Canadian drama.

30. In March 2009, the Coalition engaged Nordicity to prepare a report entitled "Analysis of the Economics of Canadian Television Programming." The report evaluates the broadcasters' assertions that Canadian programming never makes any money and requires indirect subsidization through foreign programming purchases. Nordicity's analysis refutes these assertions. That report was filed with the CRTC as part of Public Hearing 2009-113, and the Coalition has since asked Nordicity to expand and refine their report. An updated version is attached here as Schedule "B." The new report examines other programming genres to

[15] Public Notice CRTC 2007-53
[16] Speech by Konrad von Finckenstein to 2009 Broadcasting Invitational Summit, June 19, 2009

demonstrate that broadcasters can and do make money on a variety of programming genres by broadcasting repeats a few times on conventional services and many times on specialty services. The analysis makes very reasonable and thoroughly researched assumptions about typical advertising revenue, audience size, licence fees, overhead costs and repeat broadcasts in order to determine the necessary circumstances for a Canadian program to earn profit and to assess the reasonableness of those circumstances. There had been some concern expressed that the number of repeats required in order to demonstrate profitability was excessive. The volume of repeats have now been verified by a review of CRTC program logs which demonstrate that in fact Nordicity's analysis was conservative. Concerns about the methodology expressed by broadcasters in their reply phase to Public Hearing 2009-113 have also been addressed and the methodology and analysis have been refined.

31. We do not dispute that some types of foreign programming may generate greater profits for broadcasters, though it must be noted that not all foreign programming is profitable. For one, there is a high risk of cancellation of the program by the foreign broadcaster, leaving the Canadian broadcaster without a program that was committed to advertisers. It is also important to remember that all television is a high-risk business dependent on the tastes of the audience. U.S. broadcasters develop hundreds of pilots in order to launch a fraction of them as series each year, with only one or two surviving to be renewed. Notwithstanding those facts, given the low cost of foreign programming to Canadian broadcasters, the built-in promotion offered by simulcast and the premium offered by advertisers, in general foreign programming offers Canadian broadcasters greater revenues than Canadian programming does. We also acknowledge that not all station groups have a robust mix of conventional and specialty channels over which to repeat broadcast Canadian programming. We note, however, that only those that do (i.e., CTV and CanWest) have been arguing that their inability to earn a profit on Canadian programming is the justification for their Hollywood spending spree. The Nordicity report clearly demonstrates that Canadian programming is not always a loss leader and it can and often is profitable. The Nordicity analysis reveals that the broadcasters cannot properly use Canadian programming as an excuse for overspending in Hollywood – Canadian programming can pay its own way.

32. The WGC is heartened by the Commission's recognition of both the need for broadcasters to spend appropriate amounts on Canadian programming and the need to curb their spending on foreign programming. Should the current trend continue high-quality Canadian dramas will disappear from the air. CTV, Global,

Rogers and the smaller conventional broadcasters would cease to be distinguishable from U.S. broadcasters and hence would no longer have a reason to exist. This trend clearly undermines the public policy goals of the *Broadcasting Act*. Television is a powerful vehicle of culture – it both reflects and shapes a society. High-quality Canadian drama is where Canadians talk to each other as Canadians and define who we are as a nation. The *Broadcasting Act* recognizes that high-quality drama has the power not only to entertain but also "enrich and strengthen the cultural, political, social and economic fabric of Canada." Any solution to the problem of excessive spending on foreign programming needs to target the spending on drama.

<u>Impact of Priority Programming</u>

33. As mentioned above, the other significant policy decision from the 1999 Policy Decision was the introduction of priority programming exhibition requirements. Major OTA broadcasters were mandated to air an average of 8 hours of priority programming in prime time each week. The intent was to support a wider variety of Canadian programming and to ensure that such Canadian programming was seen when Canadians were watching television by implementing a longer prime time period. This policy has not met the Commission's goals. The definitions of priority programming, particularly documentary and entertainment magazine programs, are so broad as to allow broadcasters to meet their obligations by airing low cost programming[17] rather than the more expensive drama programs. The general definition of documentary allowed broadcasters to get exhibition credit for programs that were actually reality and lifestyle series rather than the more expensive point-of-view documentaries. As for the entertainment magazines, these shows were meant, as set out in the 1999 Television Policy, to help create an English-language Canadian star system by promoting Canadian talent. However, only after a complaint lodged by the WGC did programs like ET Canada and ETalk Daily agree to feature Canadian talent to the extent expected by the CRTC. The CRTC's rule has been that two thirds of the entertainment magazine show should promote Canadian talent and entertainment, however, in certain cases only five minutes out of the 22 minutes possible featured Canadian talent. The broadcasters expressed confusion about the CRTC's definition. They were then provided with detailed guidelines to prevent future confusion. The CRTC identified which episodes did not qualify as entertainment magazine shows and

[17] As set out in the Analysis of the Economics of Canadian Television Programming by Nordicity, the average budget of a Canadian documentary series is $237,000 per hour and the average budget of a Canadian lifestyle series is $128,000 per hour. Meanwhile the average budget of a one hour Canadian drama is $1.5 million and a hit program like "Flashpoint" is $1.7 million per hour.

therefore as priority programming and gave the broadcasters an extra year to make up the difference. Even now, however, those entertainment magazine shows tend to promote non-resident Canadian talent appearing in U.S. television programs (i.e., Sandra Oh in "Grey's Anatomy"), feature films (Rachel McAdams in "The Time Traveller's Wife"), U.S. productions shooting in Canada ("Twilight: New Moon") or Canadian musicians success abroad (i.e., Avril Lavigne's clothing line only available in U.S. stores). Resident Canadian talent, productions and activities are in the minority of stories.

34. After ten years the entertainment magazine shows have failed to help create a Canadian star system. It is the WGC's recommendation that more successful prime time Canadian dramas would do more to create a Canadian star system than these magazine shows. For example, with the recent success of "Flashpoint" and "Durham County," Hugh Dillon has quickly become a home-grown star with name brand recognition with the general public. Success builds a star system.

35. Reality, lifestyle and entertainment magazine shows are all low cost forms of programming when compared to drama. The ability of broadcasters to meet their regulatory obligations by exhibiting these genres of programming is a significant contributor to the drop in expenditures on Canadian drama. This fact was pointed out in the Dunbar-Leblanc Report of 2007 commissioned by the CRTC when it said: "[p]riority programming obligations appear to be largely satisfied by the broadcasting of entertainment magazines and reality television programming, and by scheduling priority programming during lower viewing periods."[18]

36. However, the expanded scope of Canadian programming being supported by exhibition requirements is not the only problem with priority programming. The other significant flaw in the policy is that it allows broadcasters to air repeats of a program within two years of first broadcast and still count that airing towards priority programming exhibition obligations. This aspect of the policy allows broadcasters to fill their priority programming hours with multiple repeats of a program, getting as much bang for their buck as possible. Again, it contributes to the reduction in spending on <u>original</u> Canadian drama. Equally importantly, the excessive broadcast of repeats drives audiences away from Canadian drama in favour of new, original, generally U.S. drama.

[18] Lawrence Dunbar and Christian Leblanc, *Review of the Regulatory Framework for Broadcasting Services in Canada* (Report to the CRTC, 31 August 2007) at page 8.

37. The Coalition, together with its partner, the Documentary Organization of Canada ("DOC"), engaged an independent researcher, Sarah Dearing, to review selected weeks of conventional broadcasters' program schedules to see if trends in scheduling could be identified. Her resulting report, together with an update, is attached hereto as Schedule "C". While data was often hard to obtain or verify, she came to the conclusion that priority programming obligations were being fulfilled through a heavy use of repeats and loose program genre definitions that allowed for the inclusion of low cost programming that was never intended to be priority programming. The unexpected result of the research was the discovery of just how difficult it was for either stakeholders or CRTC staff to effectively monitor aspects of the priority programming regulations, particularly the use of repeats. This is yet another reason for the CRTC to abandon the experiment with priority programming in favour of direct support of drama, documentaries and children's programming.

Group Licensing

38. Much has changed in Canadian broadcasting since 1999. New platforms have developed and become successful from many new discretionary services to video on demand ("VOD), pay per view ("PPV") and new media broadcasting. Consolidation has led to fewer but bigger media companies, with most companies owning services on multiple platforms in order to create economies of scale and bring in the added revenues and audiences from specialty services. Given this integrated corporate structure, it would be artificial to deal with these companies on a platform-specific basis, with one set of regulations, reporting requirements and public hearings for their conventional services, another for discretionary and yet another for VOD and PPV. The WGC strongly supports the Commission's decision to address licence renewal on a group basis in April 2010, thereby reflecting the new reality of large consolidated media companies that share revenues and expenses while reporting to a common group of shareholders. The goal of this public hearing should be the creation of a rational regulatory framework that recognizes the integration of a given company's consolidated media assets while still accounting for the inherent differences between the platforms.

39. Our proposals will identify specific instances where asymmetrical regulation is required. At this point it is important to outline why media assets should not share common regulation at all times. Conventional, discretionary, VOD and PPV broadcasting all target different aspects of the Canadian television audience and

therefore serve different purposes. Conventional broadcasting is mass market broadcasting. It has the largest audience because it offers the audience general interest programming that serves the needs of the majority of the audience. This includes evening news, national sports and mainstream dramas like “Flashpoint” and “Corner Gas.” Discretionary services are by their conditions of licence restricted to specific genres that serve either distinct audiences (e.g. ethnic programming) or specific interests (e.g. science fiction). Audiences for discretionary services are therefore smaller than for conventional services as they are addressing specific niche markets. As well, not all Canadians choose to subscribe to the specialty services on top of their basic cable or satellite package.

40. Though penetration is growing, not all Canadians have access to or are interested in VOD and PPV. VOD can mimic linear broadcast but can also be more analogous to PPV, offering a wide selection of titles for audiences to choose to watch at their convenience. Both platforms were originally driven by feature film driven but are now covering a wider range of programming. However, not all forms of programming suit VOD or PPV. For example, ephemeral programs such as news or magazine shows have little life on VOD and PPV platforms.

41. Any attempt to create a regulatory framework that treated all platforms alike would inevitably result in unintended consequences. Care must be taken when developing this framework to consider issues such as the larger, general interest audience draw of conventional services, the smaller, niche audience of specialty services and the more limited programming and audience of VOD and PPV.

42. We do believe that the CRTC should licence broadcasters by station group, enabling it to review regulatory obligations, revenues and expense by station group where it makes sense. As you will see from our proposals however, we do envision situations where regulation does need to adapt to the specific needs of particular platforms.

Canadian Programming Expenditure Requirement

43. The Commission has asked stakeholders to comment on the appropriateness of a group-based Canadian Programming Expenditure (“CPE”) requirement. The members of the Coalition have worked together to explore how a group-based CPE would work and whether that would have the best result for the Canadian

broadcasting system. We have come to the conclusion that a group CPE would not meet the public policy goal of increasing broadcaster overall spending on Canadian programming nor would it limit their spending on foreign programming as it does not target the conventional broadcasters' insufficient expenditure on Canadian drama. The Coalition's full proposal is attached here as Schedule "D" and entitled "Achieving greater support for Canadian programming within a group-based approach to the licensing of television services: A proposed framework". While the proposed framework is not the only way that these problems can be solved, the Coalition does believe, after a great deal of thought and economic modelling, that the proposed solutions offer a regulatory framework that is targeted, balanced and meets the public policy goals of the *Broadcasting Act*. However, we are open to discussing the merits and pitfalls of our proposal and look forward to hearing the thoughts of the Commission and the other stakeholders.

44. The basis of the proposed framework is that the CPEs on specialty services are working and do not need to be changed conceptually. In 2008, while all specialty services in both languages spent $973 million or 42% of revenues on Canadian programming, in the same year the private conventional services in both languages only spent $619 million or 29% of revenues on Canadian programming. Specialty services spent more on Canadian programming than conventional broadcasters because they were compelled to do so through CPEs as conditions of licence. These CPEs were arrived at during competitive licensing hearings and over the years increased in relation to the profitability of the services. It must also be noted that certain specialty services by the nature of service as well as their CPE level must have high expenditure on Canadian programming. For example SportsNet, which has a nature of service focused on local and regional sports, has a CPE of 54%. HGTV Canada needed to ensure that it was distinct from minority owner HGTV in the U.S. and therefore has a CPE of 50%.

45. As CPEs on specialty services have been successful, it seems rational to extend that policy to OTA services and other discretionary services that do not have a CPE. The Commission has suggested that a group CPE might be appropriate and we did evaluate this concept. We concluded, however, that a group CPE would not improve the current situation but would instead allow broadcasters to keep their OTA CPE low, thus allowing them to spend more on foreign drama for their conventional services, and shift more CPE to the lower cost programming found on sports and business channels. Individual specialty services would no longer have the CPEs which are in many cases dependent on their nature of service.

This would weaken genre exclusivity which was, with the exception of news and sports, maintained in the Specialty/BDU decision CRTC 2008-100. The Commission's test for future competition in a genre, specifically economic health, would be harder to apply with a group CPE. The individual service's economic health would be dependent on how a group CPE would be allocated. In our view there is too much room to 'game' the system (e.g. allowing broadcasters to allocate programming costs to lower cost categories such as news) with a group CPE and it has the potential for too many unintended negative consequences. The real problem is the need to address OTA expenditure on high cost Canadian drama. The specific problem must be addressed with specific regulatory remedies.

46. The WGC and its colleagues are therefore proposing a CPE level for all OTA stations in a group. We are not proposing a specific expenditure for all Canadian programming on OTA services at this time, but suggest that it could be arrived at by the Commission or through the licence renewal process by examining existing expenditures for each group of OTA stations and setting or phasing in an increase that would put OTA stations where they should be in terms of their contribution to Canadian programming by at least the end of the renewal term. For example, in 2008 CTV spent 25% of revenues on Canadian programming, CanWest spent 26.6% and Rogers spent 26.8%. Note that other than news and music video services, all specialty services have higher CPEs than what is being spent by OTAs, with Canal Histoire at 35% and Treehouse at 36%. We suggest that the Commission consider phasing in a common CPE for all OTA station groups that at least meets the lowest non-news and music video specialty CPEs of 35% of gross revenues.

47. The historical spending percentages for OTAs mentioned in the paragraph 45 above are a percentage of ad revenue. Please note that for all future Canadian programming CPEs, we propose that the percentage be based on gross revenues including the LPIF and any value for signals compensation that might be negotiated. Because those added revenues are authorized to create new programming whose expenditures would be included in CPE, it is logical to include those revenues in the calculation of CPE. We also suggests that the Canada Media Fund licence fee top up should not be credited as part of a broadcaster's CPE since these are not funds actually spent by broadcasters.

48. As mentioned above in paragraph 43, specialty CPEs would be maintained at existing levels, provided that at licence renewals PBITs are reviewed and CPEs

adjusted to reflect any changes in PBITs in accordance with CRTC Decision 2004-19. We also suggest a CPE for Category B services that are in their second term. This ‘holiday’ from Canadian Content obligations allows Category B services time to get established. This policy would be consistent with the policy of allowing Category A services a ‘holiday’ of one year at the beginning of their first licence term to get established before their CPE obligations kick in. Category B services have a harder struggle to get established as they need to negotiate carriage with broadcasting distribution undertakings, have lower budgets and smaller target audiences. Not all Category B services will be sufficiently established after one licence term but it is within the Commission’s discretion to extend the holiday for a further term or part thereof. It is important however to extend CPE to the now profitable Category B services.

49. As set out in the proposed framework, a minimum CPE for all OTA stations in a group is a partial solution to the need to limit foreign expenditure. The other tool needed to address the over expenditure on foreign is group drama CPEs as set out below in paragraphs 51 and 52. The ‘specialty’ model of managing programming expenses by first spending their CPE and then, with what is left over, buying foreign programming would become the approach. This would ensure a truly Canadian broadcasting system and put a brake on unnecessary competitive spending in Hollywood. Basing the CPE on gross revenues also is self-correcting. When revenues are down the expenditure required to meet regulatory obligations automatically goes down. When broadcasters are more prosperous, then the expenditure goes up. In this way, the proposal has built-in flexibility and fairness.

Canadian Drama Programming Expenditure Requirement

50. Canadian drama, documentaries and children’s programming are the three program genres that need specific regulatory intervention in order to ensure that broadcasters support them and thereby meet the intentions of the *Broadcasting Act*. As set out above, the Commission knows from experience that broadcasters will not invest in these more expensive categories of programming unless required to by regulation. While we have been able to demonstrate the drop in spending on Canadian drama since the 1999 Policy Decision, we do not have the same statistical analysis for documentaries and children’s programming due to CRTC reporting requirements and program categories. However, as set out below, the case can be made for enhanced regulatory support for all three categories rather than continuing with the status quo. Space on the conventional broadcast

schedules currently being occupied by repeats, reality programming and entertainment magazine shows should be occupied by high-quality original Canadian drama, documentaries and children's programming.

51. Various parties have suggested that an overall CPE for OTA broadcasters will increase their overall spending on Canadian programming to appropriate levels sufficient to ensure that spending on Canadian drama, documentaries and children's programming increases. However, an overall CPE does not prevent OTA broadcasters from finding other ways to game the system and allocating more of their Canadian programming expenditure requirements to lower cost forms of programming like news, sports or lifestyle programming and freeing up their prime time schedule and expenditure for U.S. dramas and reality shows. Canadian drama, documentaries and children's programming continue to need direct intervention in order to be maintained at adequate levels to fulfill the public policy goals of the *Broadcasting Act*. The Coalition puts forward specific proposals to support these three programming genres. They rely on the twin policies of a group genre expenditure requirement and an exhibition requirement, which are both required in order for audiences to have access to sufficient volume of a variety of high-quality drama, documentaries and children's programming on the Canadian broadcasting system.

52. First, we propose a group drama CPE. The drama CPE would apply to each corporate group regardless of the composition of their television assets (i.e., Astral and Corus as well as CTV and CanWest). A group drama CPE provides broadcasters with scheduling and accounting flexibility while allowing broadcasters the freedom to decide how to spend their drama CPE without worrying about meeting any target of hours. The Coalition could not see how to prevent gaming in a group overall CPE and therefore concluded that a more fair and transparent solution would be an OTA CPE and existing specialty CPEs for all Canadian programming. There is little risk of gaming to lessen regulatory obligations outside the genres of drama, documentaries and children's programming as all other genres (i.e., news, sports, information, variety, general interest) are low cost programming sufficiently supported by the marketplace. Taking a look at drama first (see below for documentaries and children's programming) the solution to prevent gaming for a group drama CPE is to pair it with exhibition requirements, which will be discussed in greater length in paragraph 54. The result is flexible regulation that balances the needs of the broadcasters for control over their schedules with the need of the audience for the choice of more Canadian drama.

53. The suggested calculation of the group drama CPE is set out in the proposed framework attached hereto. It is a complicated formula that proposes to solve the problem of the lack of spending on high-quality Canadian drama by increasing the OTA services' contributions to drama and taking into account the actual expenditure by specialty services on drama. It also provides for changes of ownership and joint ownership of services. As you can see from Table 4 on page 16 of the proposed framework, the proposal involves a phase-in period to meet OTA targets by the end of the licence term. As the Commission itself has said,[19] the OTA services should be spending 6% of their revenues on Canadian drama. Under our proposal, by the end of the licence term that 6% target has been factored in to a group drama CPE calculation. Any mandated increases in the CPE of discretionary services due to PBIT increases which are attributable to drama are also factored in. Note that each group ends up with a drama CPE that reflects the mix of OTAs and specialties within their corporate group. For example, CTV owns fewer specialties that air drama and therefore has a lower group drama CPE than CanWest. A common drama CPE percentage would either unfairly penalize CTV or unfairly benefit CanWest. This modelling was done with available data on broadcasters' drama expenditure and revenues. We expect that the Commission has access to more detailed and historical data and is in a position to create a more accurate model as our model was based only on the one year of disaggregated data available from the 2009 licence renewal applications.

54. As mentioned above in paragraph 20, the policy of priority programming was introduced as part of the 1999 Policy Decision to encourage more diverse Canadian programming was available when Canadians were watching television, i.e., prime time. As we have described, the policy of priority programming has not been successful in meeting that goal. The definition of priority programming has allowed broadcasters to fulfill their obligations by airing repeats and low cost programming such as entertainment magazine shows. As well, priority programming has been difficult to administer and monitor as we discovered when we commissioned the Scheduling Survey. Scheduling has been a challenge for broadcasters as they balance the competing requirements of simulcasting U.S. programming and living up to their regulatory obligations of 8 hours of priority programming per week. It is the Coalition's considered opinion therefore that priority programming should be eliminated and replaced with specific prime time genre exhibition requirements which can target the genres which truly require regulatory support.

[19] Broadcasting Public Notice CRTC 2004-93 Incentives for English-language Canadian television drama

55. We propose that any programming produced as a result of the drama CPE should be required to be exhibited at least once between 8pm and 11pm, between Sunday and Friday, on the group's OTA services within two years of delivery to the broadcaster. An OTA drama prime time exhibition requirement will provide broadcasters with more flexibility in scheduling while ensuring that programs funded under the drama CPE are seen by the widest possible audience. The drama CPE will ensure that there is sufficient original programming being produced to guarantee that Canadian broadcast schedules have enough high-quality Canadian drama to be distinct from U.S. broadcast schedules. Broadcasters would have flexibility in budgets to commission different formats and budgets of Canadian drama (i.e. movies of the week, sitcoms, serials, one-hour dramas) but, with an overall obligation to spend, it would be in their best interests to commission high-quality Canadian drama popular with audiences. The exhibition requirement thereby acts as a brake on any attempt to satisfy regulatory obligations with licensing and broadcasting only low cost programming. In fact, the opposite would be more likely as high budget, high-quality programming would take up fewer hours because broadcasters could afford to license fewer programs at higher budget levels. These higher quality programs would have a higher chance of earning large audiences. All parties including audiences would have the potential to gain in that event.

56. The Coalition has suggested that the exhibition requirement for programming produced under the group drama CPE be for 'true' prime time, or in other words 8pm to 11pm, and limited to Sunday to Friday. This is when the largest audiences are watching television. BBM's Top 30 programs rarely include programs from the 7pm time slot. As well, Canadian dramas will have a better chance of getting in to the 10pm time slot. The 10pm time slot is a coveted time slot for challenging, complex adult dramas but is rarely available to a Canadian program due to simulcasting. For example, CTV's winter schedule had "CSI: Miami" (Monday), "Law and Order: SVU" (Tuesday), "CSI: New York" (Wednesday), "ER" (Thursday) and "Criminal Minds" (Friday) in the 10pm slot. Currently "The Listener" has the Thursday 10pm time slot but only because "ER" is no longer being broadcast and its replacement has not yet premiered. The 10pm lockout of Canadian programming means that, creatively, Canadian screenwriters cannot aspire to write challenging, complex adult Canadian dramas, and therefore audiences are limited to American versions written for American audiences. Those screenwriters who aspire to write this kind of sophisticated drama may have to leave the country to do so.

57. Focusing on ‘true prime time’ also means scheduling Canadian dramas and documentaries when the largest audiences are watching television. 7pm audiences tend to be smaller and more interested in magazine shows, the news and game shows. This is not the time slot for Canadian drama and documentary programming if broadcasters truly want to build audiences. The WGC proposes further refining the definition of prime time to limit it to Sunday to Friday, eliminating Saturday night from the definition. Again as we can see from the BBM Top 30 listings each week, very few Canadians watch television on Saturday night and all too frequently that is when Canadian programs are broadcast.

58. We are optimistic that a requirement to exhibit Canadian dramas in true prime time, coupled with an expenditure requirement will help Canadian broadcasters to break the stranglehold that U.S. broadcasters have on the prime time schedule. At the same time it offers flexibility and avoids micromanagement by setting overall goals of exhibition rather than weekly or annual goals. The broadcast group has the flexibility to premiere a program on either conventional or a specialty service according to the strategy that they think best for the program and station, provided that it has been broadcast at least once on a conventional service within the broadcast group within two years of availability.

59. The Commission has proposed a reduction in overall Canadian programming levels for conventional broadcasters from 60% to 55%. We can agree with this proposal provided that the overall regulatory framework addresses problem areas such as ensuring that Canadians can choose from sufficient high-quality Canadian dramas. We also believe firmly that the evening rule of 50% Canadian programming must be maintained. While we are open to broadcasters having more flexibility in scheduling, it would not be consistent with public policy to allow more than 50% non-Canadian programming when the largest audiences are watching television, i.e., prime time.

60. There is no need to make a similar reduction in the overall Canadian programming levels in the specialty sector. Exhibition rules for specialty services are unique to each service and have been arrived at during the competitive licensing process and with consideration for the specific needs of the service and its audience. For example, History Television is limited in the number of feature films that it can air in any year and each week in order to foster original series related to history. Treehouse must air preschool programming between 6am and 9pm as that is

when its primary audience is watching television. No more than 25% of the drama and comedy on Bravo! between 7pm and 11pm may have been produced in the U.S. in order to distinguish the Canadian Bravo! channel from its counterpart station in the U.S., despite any obligations that Canadian Bravo! might have to broadcast U.S. programming under its licence agreement with U.S. Bravo!. For this reason those unique exhibition rules should be maintained.

Documentaries

61. True documentaries are disappearing from our television screens and being replaced by cheaper reality and lifestyle programming. As the Commission recognized when it added documentaries to priority programming, true high-quality point of view documentaries need support in order to be commissioned and exhibited in prime time. Proposing regulation to foster true point of view documentaries, as opposed to reality or lifestyle programming, is a challenge as the CRTC does not report on documentary expenditures or hours. Documentaries can be 2(a) Analysis and interpretation or 2(b) long form documentaries – but these categories can also cover lifestyle and reality programs. The WGC strongly recommends that the CRTC refine its definition of documentary to provide clarity to its regulations and reporting. We note that the Canada Media Fund has been struggling with this issue and has come up with a very detailed definition of what can be funded as a documentary and what cannot. If their definition[20] was adopted by the Commission it would provide consistency in funding and exhibition rules.

62. In the absence of any reliable data on what documentary programming is being broadcast by either conventional or discretionary broadcasters, the WGC suggests, as outlined in the Coalition document, that the Commission require broadcasters to provide data on long form documentaries as part of the group licence renewal process. The industry and the Commission can at that time consider what would be an appropriate measure for ensuring a minimum amount of Canadian true documentaries are available and then set either a CPE or a requirement for a minimum number of original hours broadcast. Without any data it is difficult to say which strategy would be more effective.

[20] The WGC endorses the CMF definition for documentaries with the minor exception of advocating the exclusion of ‘docusoaps’, which are more appropriately reality programming. Note that the WGC has brought this to the attention of the CMF through their public consultation on next year’s CMF guidelines.

63. We support a group target for documentaries in order to give broadcasters scheduling and licensing flexibility, provided that documentaries funded under this policy are broadcast at least once within prime time on the conventional stations within the station group as set out in paragraph 55 above in relation to drama.

Children's Programming

64. Children's programming has almost disappeared from private conventional television, the platform which reaches the largest audiences in Canada. By its definition a mass market conventional broadcaster should be serving the major segments of its audience and that includes children. The Commission has recognized this over the years with 'expectations' that the broadcasters air children's programming. Despite these stated expectations that they will broadcast children's programming, the private conventional broadcasters have to a great degree abandoned the children's programming audience. CTV airs twenty-year-old episodes of "Owl TV" and 8-year-old episodes of "Anne of Green Gables: The Animated Series" on weekends. CanWest Global has no children's programming. The teen audience is served by both broadcasters in early prime with series like "Degrassi: The Next Generation" and "Renegadepress.com," but preschool, early school and tween audiences (and their parents) have no choice but to pay for discretionary services such as YTV, Teletoon, Family Channel and Treehouse in order to have a wide variety of current children's programming[21]. It appears that the return on children's programming is not as high as the return on a morning magazine show or "Live with Regis and Kelly". This pattern of exhibition ignores the conventional broadcasters' obligations to Canada's youth, the obligation to provide Canadian children with low cost access to stories that reflect their world and their experiences, educate and entertain and remind them of the unique culture that they live in. Canadian conventional broadcasters have obligations under the *Broadcasting Act*, including obligations to the needs of children[22], which prevent them from determining their programming schedules solely in reference to profit. We urge the Commission to set exhibition or expenditure requirements for children's programming.

65. At this time, an assessment of the state of children's programming in Canada can only be made by reviewing broadcasters' schedules because children's programming is not separately reported to the CRTC. In the absence of any reliable data on what children's programming is being broadcast by either

[21] CBC is active in the preschool market however has little programming for school age children
[22] S. 3(1)(d)(iii) of the Broadcasting Act

conventional or discretionary broadcasters, the WGC suggests, as outlined in the Coalition document, that the Commission require broadcasters to provide data on children's programming as part of the group licence renewal process. The industry and the Commission can at that time consider what would be an appropriate measure for ensuring a minimum amount of Canadian children's programming is available and then set either a CPE or requirement for minimum number of original hours broadcast. Without any data, it is difficult to say which strategy would be more effective.

66. Any children's programming produced under this requirement would have to be exhibited at least once on the conventional stations within a station group within two years of delivery at the appropriate time for the target age group. As with drama and documentaries, both an exhibition and expenditure requirement are necessary to ensure sufficient high-quality children's programming is available to Canadians.

Alternatives to Funding Canadian Drama, Documentaries and Children's Programming

67. We recognize that the proposed regulatory framework is quite complicated. The Coalition arrived at this proposal after a great deal of thought and economic modelling. The issues involved are quite complex and in our view prevent adoption of a catch-all set of rules if they are also to be even-handed to all parties and mindful of potentials for gaming. We are trying to balance the needs of Canadians for high-quality Canadian drama with the reality of consolidation. In return for opportunities for cost savings and additional revenues, these large station groups should step up to the plate with commitments to high-quality Canadian content that will be popular with Canadians. However, while the proposed regulatory framework is our first choice, the Commission may find that there are other solutions, and we would be happy to discuss those alternatives. To date, other proposed solutions have carried with them inherent problems and unintended consequences, but we remain open to exploring new options.

68. As the Commission is aware, for many years the CCAU proposed a very simple 7% of revenues drama expenditure requirement for OTA broadcasters. We would be happy to return to that proposal as it met the need to force OTA broadcasters to spend money on Canadian drama and worked on a sliding scale based on revenue. No OTA broadcaster is meeting that target as last year Rogers spent

1.3% of revenues on Canadian drama, CanWest spent 2.5% on Canadian drama and CTV spent 4.1%. A simple 7% of OTA revenues on Canadian drama would target the core of the deficiency in spending on Canadian programming. However, this proposal originated before the spate of consolidation and accordingly does not reflect accounting and scheduling practices based on group ownership. The Coalition's proposed framework is more complicated but does provide for group licensing, broadcast on various platforms over different windows, ownership of a wide variety of services and is structured to prevent a number of potential avenues for gaming. We cannot ignore that the Canadian broadcasting system has changed and regulatory policy needs to adapt to it.

69. Prior to the 1999 Policy Decision broadcasters were subject to dollar expenditure caps on drama and documentaries. The WGC would support a return to that system if the dollar cap was regularly monitored. The advantage of a dollar expenditure is that the sum that needs to be spent is clearly articulated and can be budgeted. However, we suspect that fluctuations in revenue from year to year are now so common that it would be impractical to suggest a dollar cap that would not at some point either be excessive for the available revenue due to a downturn or insufficient due to an economic upswing. A percentage expenditure obligation would more adaptable to changing circumstances and therefore more even-handed in its impact on broadcasters.

70. The Commission floated the idea of a 1:1 expenditure ratio for Canadian programming over a corporate group's assets. As mentioned above in paragraph 26, over-expenditure on foreign programming is not a relevant problem for all forms of Canadian programming, but is specifically an issue with drama. The minimal foreign spending on news is counter-balanced by the excessive spend on drama, and brings the ratio quite close to 1:1. As well, there are specialty services with high expenditure on Canadian and low expenditure on non-Canadian due to either their CPE or their nature of service (e.g. local sports) or both.

71. We do not have access to disaggregated data by station group on foreign expenditure however a review of the aggregated data is illustrative. OTA programming expenditure in 2008 was a ratio of 2.33:1[23] comparing non-Canadian expenditure to Canadian. Meanwhile the specialty/pay/VOD/PPV programming

[23] OTA Canadian programming expenditure less licence fee top up of $593,479,689 compared to non-Canadian programming expenditure of $1,382,717,253. Source CRTC Statistical and Financial Summaries

expenditure in 2008 was a ratio of 0.38:1[24] comparing non-Canadian expenditure to Canadian. When the entire Canadian broadcasting system is combined the ratio is only 1.14:1[25] foreign to Canadian. Given how close the overall programming ratio is for the combined platforms we suspect that broadcasters would have no problem with an overall 1:1 expenditure ratio. In fact, at the OTA licence renewal hearing in May 2009, CanWest did say that they were almost at that ratio, despite the fact that they only spend 2.5% of conventional revenues on Canadian drama. An overall 1:1 expenditure ratio would therefore not meet the desired goal of creating a brake on foreign expenditure, addressing under-represented categories like drama, or ensuring a minimum amount is spent on Canadian programming. It would, in effect, be another benefit handed to broadcasters. Should the Commission wish to develop a 1:1 expenditure ratio at a minimum safeguards or specific ratios for drama or for OTA broadcasters would have to be developed in order to prevent broadcasters from taking advantage of spending in other categories or on other platforms.

72. Australia has a model that attempts to solve similar issues. In that model, also known as an Exhibition Points System, each broadcaster must hit a certain number of points (e.g. 250 points) which can be made up of all types of programming. Programs with a higher budget get a higher point count. The Point System does give broadcasters a great deal of flexibility in scheduling and licensing. However, before the Point System was implemented Australian broadcasters were commissioning high cost dramas. After the Point System these broadcasters lowered their programming hours to meet the lower point threshold as there is no incentive for exceeding the threshold. The Point System did nothing to specifically address the problem that it is cheaper for Australian broadcasters to buy cheap American drama than to commission the more expensive high-quality Australian drama. We have the same problem here in Canada but it is exacerbated by our physical proximity to U.S. broadcasters and their programming. As well, there are significant differences in size and composition between the different station groups in Canada and these differences would need to be built into such a system. It is unlikely that the point system could be simply adapted to the Canadian broadcasting system.

[24] Specialty/Pay/VOD/PPV Canadian programming expenditure less licence fee top up of $940,565,000 compared to non-Canadian programming expenditure of $361,134,000. Source CRTC Statistical and Financial Summaries

[25] Combined Canadian programming expenditure less licence fee top up of $1,534,044,689 compared to combined non-Canadian programming expenditure of $1,743,851,253. Source CRTC Statistical and Financial Summaries

Independent Production

73. Independent production is essential to a vibrant production community, ensures the highest level of creativity and has been enshrined in the *Broadcasting Act*. The Commission's current policy is that 75% of priority programming be produced by independent producers. We suggest that after shifting to targeted support of drama, documentaries and children's programming and eliminating priority programming, the 75% independent production requirement should be imposed on all drama, documentaries and children's programming commissioned as a result of the expenditure requirement. We do not anticipate that this would be difficult as few broadcasters have the capacity to produce these challenging and expensive categories of programming in-house. However, in order to prevent gaming, the threshold should be both for expenditure and exhibition. As pointed out by Peter Grant in his paper delivered to the 2009 Broadcast Invitational Summit on June 19, 2009, a 75% rule applying to hours only, as it is currently with priority programming, can be fulfilled with repeats. There is also the potential to license a program from an affiliated independent producer for a higher licence fee than from an unaffiliated independent producer. Pairing exhibition requirements with expenditure requirements prevents this potential gaming, and delivers a more vibrant and diverse programming schedule.

VOD and PPV

74. To the extent that a subscription VOD service or PPV service is analogous to a scheduled broadcast service, it should be subject to similar regulation. These matters are currently subject to an existing public hearing. We suggest that they should be regulated so as to fit within the regulatory framework that is arrived at through this public hearing. That would mean that to the extent that a subscription VOD service or PPV service is part of a station group, it would be subject to and could participate in group targets for expenditure on drama, documentaries and children's programming. They should also be subject to a platform-specific overall CPE.

New Media Broadcasting

75. As discussed in the proposed framework, should new media broadcasting revenues generated by broadcasters remain unregulated it would be quite easy for broadcasters to allocate cross-platform advertising revenues more to the unregulated and unreported platform (i.e. new media) than to the regulated and reported platform (i.e. television). As advertising is being sold increasingly on a

cross-platform basis this is a very real possible tactic. Our suggestion is that new media broadcasting revenues should be included in any calculation of broadcaster revenue. In exchange, broadcasters would be entitled to count their expenditures on new media content (but not infrastructure, programming, or software) as part of their overall CPE. One of the factors holding back broadcaster spending on new media has been their need to focus funding on costs that contribute to CPE or priority programming hours. Provided that new media broadcasting revenues are included in revenues creating a balanced system, including new media content in CPE would provide broadcasters with added flexibility and encourage the creation of more original Canadian content on broadcaster websites.

Public Broadcasting

76. The Public Notice asked that stakeholders be mindful of the “role of public and educational broadcasters in an evolving communications environment.” Public and educational broadcasters are not part of this hearing process. The CBC will have its licence renewal hearing in Fall of 2010. However, the WGC feels that in the interest of a level playing field for broadcasters, any policies arrived at during this public hearing process should apply, where applicable, to the CBC and educational broadcasters. They do have very different mandates than private, for-profit broadcasters, but the public broadcasters should also have higher expenditures on domestic programming due to those mandates. There are other considerations as well, such as adequate funding, changing mandates, meeting those mandates and governance. In respect of the CBC many of the issues were discussed at the Standing Committee on Canadian Heritage’s review of the CBC’s mandate. The WGC supports the Heritage Committee’s recommendation that the CBC receives an enhanced parliamentary appropriation and enter into a contract with the public in order to have certainty in regards to its mandate. A number of the other recommendations were also of interest. Specific public hearings are necessary to adapt the group policies to the public broadcasters and address other issues, and we look forward to participating in those hearings.

Conclusion

77. The WGC has worked long and hard over the years to build the case that the 1999 Policy Decision was a disaster for Canadian programming and in particular for Canadian drama. After several postponements of this discussion the Commission is now addressing the problem of the broadcasters’ appropriate contribution to Canadian programming. This is the Commission’s opportunity to reverse the

decade long decline in Canadian drama and set the stage for the next decade. It is time to ensure that Canadians have real choices for high quality Canadian drama, documentaries and children's programming.

Schedule "A"
["The Story So Far" – McCarthy Tétrault]

Schedule "B"
[Nordicity – "Analysis of the Economics of Canadian Television Programming"]

Schedule "C"
[Sarah Dearing - Scheduling Survey]

Schedule "D"
[Proposed Regulatory Framework]

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