Writers Guild of Canada

June 14, 2019 **Filed Electronically**

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

Dear Mr. Doucet:

Re: Application 2019-0242-9 – Blue Ant Television General Partnership – Condition of Licence Amendment

1. The Writers Guild of Canada (WGC) is the national association representing approximately 2,200 professional screenwriters working in English-language film, television, radio, and digital media production in Canada. The WGC is actively involved in advocating for a strong and vibrant Canadian broadcasting system containing high-quality Canadian programming.

2. In this application, Blue Ant Media Inc. ("Blue Ant") seeks to amend the existing conditions of licence (COLs) for A.Side, BBC Earth, Cottage Life, HIFI, Love Nature, Makeful, T + E, and Smithsonian Channel (the Blue Ant Group):

> [W]ith respect to expenditures on programs of national interest ("PNI") to 5% of the previous year's gross revenues of the undertaking as of September 1, 2019, the beginning of the second year of the licence terms for the affected services.[1]

3. Blue Ant Group's existing PNI expenditure requirement is 13.5% of broadcasting revenues. As such, this represents a 63% decrease in Blue Ant Group's PNI, or a decrease of almost two-thirds.

4. The WGC strongly opposes this application.

5. Blue Ant itself proposed a 13.5% PNI in its August 31, 2017 licence renewal application.[2] Blue Ant refers to "uncertainty surrounding the Commission's treatment of PNI expenditures" at the time, and makes reference to the fact that the Governor in Council had just sent back for reconsideration the licence renewal decisions for Bell Media Inc. (Bell), Corus Entertainment Inc. (Corus), and Rogers

[1] Blue Ant Licence Amendment Application, Cover Letter, April 9, 2019, para. 2.
[2] Blue Ant Licence Amendment Application, Cover Letter, April 9, 2019, para. 5.

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Media Inc. (Rogers) a few weeks prior to Blue Ant's licence renewal application deadline. But what Blue Ant doesn't say, is what relevance this "uncertainty" has to the question of Blue Ant Group's own PNI. As the WGC stated in the 2017/2018 renewal proceeding—and reiterated in greater detail below—PNI levels, where applicable, must be set at their historical spending levels, whether the broadcasters in question are part of a large corporate group or not. In the WGC's view, the question with respect to Blue Ant Group's PNI should be what best achieves the objectives of the *Broadcasting Act* [the Act], as appropriate to the nature of the service(s) in question, not the PNI of other groups. The historical PNI spending of Blue Ant Group and the objectives of the Act should have been most relevant and were more-or-less certain in August, 2017. The ultimate PNI levels of large broadcast groups should have been irrelevant to Blue Ant, therefore, should not have created uncertainty. Blue Ant appears to be arguing that in August, 2017, it did not ask itself how it could best contribute to the objectives of the Act or the needs of its viewers, but rather asked itself what other broadcasters would be required to spend so it could seek the lowest levels amongst them. If true, then that may have been Blue Ant's corporate strategy, but it does not speak to minimum obligations the Commission should impose, as guided by the Act, and therefore created no uncertainty that the Commission should take into consideration.

6. Blue Ant also notes that it is a smaller group of services, as compared with Bell, Corus, and Rogers, and so argues that Blue Ant Group should not be held to a "higher" PNI than those services.[3] Firstly, the WGC would point out that while the *percentages* of PNI for Blue Ant Group may be higher than the large, English-language broadcasting groups, that does not make Blue Ant Group's *actual, dollar-value* PNI higher. PNI spending requirements are a percentage of revenue, and because Blue Ant has less revenue than those groups, it has a lower PNI spending requirement in real terms. Blue Ant Group's dollar-value PNI requirement remains below that of Bell, Corus, or Rogers and, in fact, it seems entirely likely that a smaller group of services could naturally see itself with a higher PNI *percentage* simply because of the ratio of that spending to its revenues, particularly in the absence of conventional broadcasting services from the smaller group. In the same way, a small corporation may spend more as a percentage of its revenues on something like office space, for example, than a large multinational corporation, not because it rents so much more office space, but simply because the multinational has so much more revenue in comparison.

7. Secondly, Blue Ant's argument that its higher PNI percentage puts it at a competitive disadvantage in the market runs directly contrary to the very reconsideration for Bell's, Corus', and Rogers' PNI levels that Blue Ant itself cites. At the very core of that reconsideration was the question of whether different broadcasters' PNI levels must be the same (as a percentage of revenues), for reasons of competitive and regulatory parity,[4] or whether they could be different (as a percentage of revenues), for reasons reflective of their history and asset mix and so as not to reduce PNI spending overall. Order in Council P.C. 2017-1060 to reconsider the large, group-based renewals was, we submit, a clear rejection of the former, and the Commission's reconsideration decision in Broadcasting Decision CRTC 2018-335 was a clear acceptance of the latter.[5] Yet, now Blue Ant essentially makes the same "competitive parity" arguments that have been rejected twice now, both by the federal Cabinet and

[3] Blue Ant Licence Amendment Application, Cover Letter, April 9, 2019, paras. 9-12.

[4] For broadcasters, "the same" meant "the lowest common denominator". "Parity" could just as easily have been obtained by setting PNI at an average amount, or even at the *highest* existing PNI levels, but broadcasters never argued for that approach, which suggests that "parity" was not truly their priority.

[5] The Commission itself alludes to this in Broadcasting Procedural Letter addressed to Astrid Zimmer (Blue Ant Television General Partnership), 9 May 2019, para. 1.

by the Commission. The WGC submits that there is no reason for the Commission to now accept what has already been rejected in multiple instances, including in Broadcasting Decisions CRTC 2018-291 and CRTC 2018-335.

8. We also note the Blue Ant Group is not alone in being a smaller broadcasting group that has a higher PNI obligation (as a percentage of revenues) than the larger vertically integrated groups. Family Channel, Family CHRGD and Télémagino—together owned DHX Television Ltd. and regulated as a group by the Commission—are subject to a 13% PNI spending requirement.[6]

9. The WGC is concerned that approval of Blue Ant Group's application would set a precedent and very likely "invite" similar applications from the DHX Television group or other broadcast groups.

10. As the WGC stated in Blue Ant's most recent renewal proceeding, the Commission set out its general approach to Canadian programming expenditure (CPE) and PNI requirements in Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV: The way forward - Creating compelling and diverse Canadian programming* (the Create Policy). With respect to CPE, discussed at paragraphs 213-225 of the Create Policy, the Commission noted that: Canadians expect content of high quality from their television system, and the creation of compelling high-quality productions by Canadians requires financial investment; CPE requirements provide necessary incentives to create virtuous cycles of production, and are important tools to fulfil the objectives of the *Broadcasting Act*; CPE requirements are particularly important in light of the determinations elsewhere in the Create Policy reducing exhibition requirements; CPE requirements will be expanded to apply to all licensed programming services; and, this overall approach takes into account the possible impacts of other changes to be implemented in the Create Policy and other related determinations in the Let's Talk TV proceeding. As such, the Commission stated:

> In light of the above, in the English-language market (including third-language services), the Commission will apply CPE requirements to all licensed services. Services that do not currently have a CPE requirement will be assigned one at licence renewal. The CPE levels will be based on historical expenditure levels.[7]

11. Regarding independent broadcasters—i.e. those not part of the large private broadcast groups subject to Broadcasting Regulatory Policy CRTC 2010-167: *A group-based approach to the licensing of private television services* (the Group Policy) and subsequent decisions—the Commission stated:

> Since independent over-the-air stations will have a CPE requirement for the first time, the appropriate level of CPE will be set at the time of licence renewal, based on historical levels of expenditure. It will take into account any relevant outcomes of the proceeding reviewing local and community programming as announced in Broadcasting Regulatory Policy 2015-24.
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> With respect to English- and third-language discretionary services, CPE requirements will be implemented for all services with over 200,000 subscribers. As discussed later in this document, all discretionary services under 200,000 subscribers will be exempt from

[6] Broadcasting Decision CRTC 2018-228.

[7] Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV: The way forward - Creating compelling and diverse Canadian programming* (the Create Policy), para. 217.

licensing under a new exemption order. CPE for licensed services will be established in a case-by-case manner and based on historical levels. However, given the great variation in the revenues and expenditures of discretionary services and the fact that certain services make little or no expenditures on Canadian programming, the minimum level of CPE applied will be 10%. In the Commission's view, this level represents an attainable floor for any discretionary services that still ensures some contribution to the creation and presentation of Canadian programming. Currently, 19 services have CPE of less than 10%, with an average of 5%.[8]

12. The Commission was therefore clear that CPE was a central pillar of the regulatory policy framework for Canadian television broadcasting, and that the guiding principle for setting CPE levels for independent broadcasters is historical spending levels, subject to the above-noted criteria.

13. With respect to PNI, the Commission stated the following in the Create Policy:

> The Commission considers that PNI expenditure requirements continue to be an appropriate tool for ensuring that Canadians have access to the maximum number of programs from program categories that are of national interest and that require continued regulatory support. This view was also shared by a vast number of interveners, including individual Canadians who participated in the proceeding.
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> PNI requirements were introduced in the English-language market in 2011, in the French-language market in 2012 and for CBC services in 2013. When the broadcasting licences for Rogers' services were renewed in 2014, the PNI requirements were made consistent with the other English-language ownership groups. Given the relatively short timeframe in which the PNI requirements have been in place, the Commission considers it would be premature to alter the policy at this time. The current requirements relating to PNI including the specific program categories in each linguistic market will therefore be maintained.[9]

14. Minimum PNI levels, like CPE, have also been calculated on the basis of historical spending on PNI.[10] As such, the Commission's approach to setting PNI levels has been consistent with its approach to CPE.

15. Given all of the above, the WGC submitted that the approach to setting CPE and PNI levels for Blue Ant, and the other renewal applications dealt with at the same time, was simple: CPE requirements must be set at their historical spending levels, as a percentage of revenue, or 10%, whichever is greater; and PNI levels, where applicable, must similarly be set at historical spending levels. We submit that anything less than that, for any licensed service, would have been contrary to the Create Policy, both in letter and spirit, as well as inconsistent with the Act and the 2018 reconsideration decision of the large English-language private groups.

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[8] The Create Policy, paras. 220-221

[9] The Create Policy, paras. 288-289

[10] E.g. The Group Policy; Broadcasting Decision CRTC 2013-310: *Astral broadcasting undertakings – Change of effective control*; Broadcasting Decision CRTC 2018-335: *Reconsideration of licence renewal decisions for the television services of large English-language private ownership groups*.

16. The Commission—rightly, in our view—essentially did just that. Blue Ant Group's current PNI of 13.5% was set out in Broadcasting Decision CRTC 2018-291, released on August 21, 2018, which renewed the broadcasting licences for the group's services for a five-year term, to 2023 and maintained the PNI percentages that Blue Ant already had. Yet Blue Ant is now seeking to amend a key COL less than 8 months later. The WGC submits that nothing material has changed in the interim, and Blue Ant's PNI requirements remain appropriate.

17. Subsequent to posting the present application, in Broadcasting Procedural Letter addressed to Astrid Zimmer (Blue Ant Television General Partnership), 9 May 2019, the Commission asked the following question:

> If the Commission approves a 5% PNI requirement, would Blue Ant accept a higher CPE requirement and a higher proportion of PNI that it must devote to independent production companies as conditions of licence?[11]

18. In its filing dated June 3, 2019, Blue Ant Group said it would not accept a higher CPE requirement nor a higher proportion of PNI that it must devote to independent productions.

19. The WGC also opposes the approach suggested in the Commission's question. PNI is an essential component of the regulatory support system for Canadian programming. In creating the PNI category, the Commission said:

> The Commission considers that there is a continuing need for regulatory support for key genres of Canadian programming. The Commission notes that over 40% of all viewing to English-language television in Canada is to drama programs; drama is thus the genre of programming that Canadians choose to watch more than all others. Drama programs and documentary programs are expensive and difficult to produce, yet are central vehicles for communicating Canadian stories and values.[12]

20. The WGC wholeheartedly agrees, and the Commission has continued to maintain this policy tool over the nine years since. PNI and CPE are not interchangeable policies—one cannot be "exchanged" for the other—and certainly we do not agree that the impact of reducing PNI obligations can be "offset" by increasing CPE obligations. In fact, in the initial group-based licensing renewal decisions,[13] the Commission essentially attempted this very trade-off, reducing PNI obligations for all large English-language ownership groups to a "flat" 5%, while increasing CPE levels somewhat to 30%.[14] This was not acceptable to the WGC—nor to the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the Canadian Media Producers Association (CMPA), and the Directors Guild of Canada (DGC)—and was the basis of the section 28 petition to the Governor in Council, Order in Council P.C. 2017-1060 sending back the decision to the Commission for reconsideration, and ultimately Broadcasting Decision CRTC 2018-335. We opposed that approach then and we oppose it now. Reducing PNI requirements puts at serious risk the drama programs and documentary programs that

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[11] Para. 3.
[12] The Group Policy, para. 71.
[13] Broadcasting Decision CRTC 2017-148: *Renewal of licences for the television services of large English-language ownership groups – Introductory decision*, and related decisions.
[14] Broadcasting Decision CRTC 2017-148, paras. 29-31.

are "expensive and difficult to produce, yet are central vehicles for communicating Canadian stories and values", regardless of whether other Canadian programming "takes their place".

21. The WGC would also like to express our frustration in dealing with this issue again less than a year after the Commission renewed Blue Ant Group's licences. The WGC is a small organization, with very limited resources with which to respond to regulatory matters. In our view, applications such as these are a drain on the time and resources of both the Commission, and stakeholders who participate in these proceedings. The WGC is not permitted to file applications with the Commission in the middle of licence terms seeking to *raise* CPE or PNI levels, however much we might wish to. We would hope, then, that mid-licence-term applications to reduce PNI levels would not be encouraged, especially so soon after a licence renewal proceeding has concluded.

22. Finally, we would note that the WGC read with disappointment the Commission's use of the word "punish" to describe, in part, its rationale for setting Blue Ant Group's PNI levels as it did in Broadcasting Decision CRTC 2018-91.[15] Blue Ant has now emphasized that language in its current application.[16] Notwithstanding this choice of wording, it remains apparent to us that neither PNI specifically, nor Canadian programming requirements generally, are "punishment". "Punishment" generally refers to an undesirable outcome imposed as a consequence of wrongdoing. PNI obligations are not a punishment. PNI obligations—and Canadian programming expenditures more broadly—are fundamental components of the implementation of the objectives of the *Broadcasting Act*, and support what is arguably amongst the most meaningfully Canadian parts of a "Canadian broadcasting system." Short of a formal clarification by the Commission, court of law, Parliament, or other competent authority, that broadcasting regulation and/or Canadian programming expenditure requirements are, in fact, penal in nature, we would respectfully request that the Commission reserve such language for cases which are truly punitive, and not use them to describe PNI or comparable concepts.

23. The WGC is pleased to provide comments in this proceeding, and we thank the Commission for the opportunity to do so.

Yours very truly,

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[15] Para. 37.

[16] Blue Ant Licence Amendment Application, Cover Letter, April 9, 2019, paras. 7 and 11.

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