Writers Guild of Canada

July 23, 2019 **Filed Electronically**

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

Dear Mr. Doucet:

Re: Broadcasting Notice of Consultation CRTC 2019-91: *Call for comments on the Commission's policy on Canadian programming expenditures* – Reply Comments

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. The WGC welcomes the opportunity to submit reply comments in this proceeding.

Point of Agreement: Comprehensive, Equitable Regulatory Framework is the End Goal

3. Given the history and nature of the Canadian broadcasting system, the WGC expected that licensees—private, English-language Canadian broadcasters in particular—would be generally opposed to many of the proposals put forward by the Commission in this proceeding,[1] specifically for expanding Canadian programming expenditure (CPE) policies to digital media programming, and indeed this is the case.

4. It may be worth emphasizing, however, one thing upon which we seem to agree, which is that the ultimate goal of broadcasting regulation must be a comprehensive and equitable regime that includes both Canadian and non-Canadian programming undertakings operating within Canada, across both traditional and non-traditional/digital platforms. Blue Ant Media Inc. (Blue Ant) states, "Although we

[1] That fact never ceases to disappoint us, however. The WGC expects to never stop being disappointed that private English-language Canadian broadcasters fundamentally view serving their Canadian audiences with Canadian programming as a regulatory burden to be fought against, rather than as their core business as broadcasters, to be vigorously pursued and even celebrated.

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appreciate that adding digital revenues/expenditures to the regulatory mix for Canadian licensed services might be a first necessary step to then regulating non-licensed Canadian services and non-Canadian OTT services, the latter must occur without any further delay."[2] We agree. Adding digital revenues/expenditures to the regulatory mix for Canadian licensed services is indeed an appropriate first step. As such, we encourage the Commission to take that first step, and we submit that licensees, as the incumbent broadcasters in Canada with a long history of having received benefits from the regulatory regime in Canada over the course of decades, should be prepared to take that first step as well.

Opposition to Expanding CPE to Digital Media Programming

5. Subject to our comments below, the WGC takes the primary statement of the views of (the majority of English-language) licensees in this proceeding to be that of the Canadian Association of Broadcasters (CAB). The CAB counts within its ranks many dozens of television[3] and specialty/pay[4] services, and its Board of Directors includes representatives from Bell Media Inc. (Bell), Cogéco inc. (Cogeco), Rogers Media Inc. (Rogers), and Corus Entertainment Inc. (Corus).[5] The large English-language corporate broadcasting groups of Bell, Corus, and Rogers did not file separate comments in this proceeding, and other broadcasters[6] have voiced general, if not always complete, support for the CAB submission. As such, the WGC will focus many of its reply comments on the submissions of the CAB.

6. The CAB states that it "categorically oppose[s] expanding the definition of CPE to include digital media programming at this time."[7] The CAB states that changes to the CPE policy, "must be singularly focussed on ensuring greater flexibility and lower obligations on licensed players."[8]

7. Distribution and consumption of programming on digital platforms is undeniably the future of content. Canadian viewers will be there whether Canadian broadcasters are there or not. As such, it is disappointing that the CAB rejects out of hand any exploration of this issue. Instead, they provide only a blanket rejection of it, and at times a virtual roll call of opposition.

8. One thing in this wholesale rejection is particularly notable. The CAB opposes entirely even the *option* of including CPE on digital at the choice of licensees. At Q9 of the Notice of Consultation in this proceeding, the Commission asked intervenors to:

> Also, comment on the possibility of allowing licensees to opt-in to an approach in which they would be permitted to count expenditures made for digital media programming as eligible CPE only if their revenues from both traditional broadcasting undertakings and the above-noted digital media broadcasting undertakings are included in the calculation of their CPE requirements.

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[2] Submission of Blue Ant, para. 4, 2nd bullet.
[3] https://www.cab-acr.ca/english/links/television/default.shtm
[4] https://www.cab-acr.ca/english/links/specialty/default.shtm
[5] https://www.cab-acr.ca/english/about/board_of_directors/default.shtm
[6] E.g. DHX Television Ltd.
[7] Submission of the CAB, para. 70.
[8] Submission of the CAB, para. 40.

9. The CAB responded, "As we believe the Commission should not take into consideration either digital media broadcasting expenditures or revenues for CPE purposes, we do not believe an 'opt-in' approach should be adopted."[9] It should go without saying that this represents the antithesis of the "flexibility" that the CAB claims to be so important—so important that they say it is a "singular" focus, and use the word "flexibility" or variant thereof nearly thirty times in their written comments. Yet the CAB, when asked whether licensees should be granted the flexibility to include digital media programming within CPE (under certain conditions), says no. They don't want that flexibility. In the circumstances, then, we conclude that the CAB, despite what they say, is not interested in flexibility as a principle after all. They are simply interested in reducing Canadian programming obligations, to the near-certain impoverishment of Canadian programming in the Canadian broadcasting system.

10. The CAB states that changes to the CPE policy, "must be singularly focussed on ensuring greater flexibility and lower obligations on licensed players."[10] We submit that that is simply incorrect. Changes to the CPE policy must be singularly focused on implementing the objectives of the *Broadcasting Act*.

Proposal of the CAB to Eliminate the Programs of National Interest (PNI) Policy

11. In its submission, the CAB urges the Commission to, "begin the process of reviewing current restrictions in the CPE Policy, including reducing and phasing out required PNI contributions".[11]

12. The WGC emphatically opposes any proposal to reduce, eliminate, or "phase out" minimum PNI spending obligations.

13. PNI has been a central element of the current broadcasting regulatory framework for nearly a decade, and it has been reconfirmed as such multiple times since. The creation and presentation of Canadian programming has been at the centre of the Canadian broadcasting system—and the centre of the *Broadcasting Act*—from its earliest days. The concept of Canadian programming is expressed at least a dozen times in section 3(1) of the Act, as very arguably the primary manner in which its various social and cultural objectives are given effect. Indeed, it's virtually impossible to imagine a distinct, meaningful "Canadian broadcasting system" without Canadian programming. The creation of Canadian programming has long been the key challenge of the English broadcasting system, faced as it is with the multiple difficulties of being produced for a small market while sharing the language of and being geographically proximate to the largest media production centre on the planet.[12]

14. PNI has long been a central component of Canadian programming. In creating the category, the Commission said, "Drama programs and documentary programs are expensive and difficult to produce, yet are central vehicles for communicating Canadian stories and values."[13] PNI was preceded by earlier regulatory concepts such as "priority programs"[14] and "under-represented programs",

[9] Submission of the CAB, para. 81.
[10] Submission of the CAB, para. 40.
[11] Submission of the CAB, para. 16.
[12] The WGC went into further detail on these challenges in our written submission to Broadcasting Notice of Consultation CRTC 2017-359: *Call for comments on the Governor in Council's request for a report on future programming distribution models*, at paras. 26-37. (http://www.wgc.ca/files/WGC%20Submission_BNC%202017-359_Future%20programming%20models_FINAL.pdf)
[13] Broadcasting Regulatory Policy 2010-167, para. 71.
[14] Public Notice CRTC 1999-97.

which also included drama and documentary.[15] The notion that these genres are of special importance in the Canadian broadcasting system is well established and supported by numerous parties, including the WGC.

15. It is no surprise, then, that a key goal of the Commission is and has long been to respond to the challenges faced in the creation of CPE and, in particular, PNI. In Broadcasting Regulatory Policy CRTC 2010-167 (the Group Policy),[16] the Commission examined the policy tools available in this respect and, among other things, turned from exhibition requirements for private English-language broadcasters to expenditure obligations, expanding CPE requirements and creating the PNI category, each with their own spending obligations. The WGC has applauded this move by the Commission, and agrees it is one of the best ways to ensure the creation of new Canadian programming. In Broadcasting Regulatory Policy CRTC 2015-86, *The way forward - Creating compelling and diverse Canadian programming* (the Create Policy),[17] arising from the "Let's Talk TV" consultation, the Commission went further, scaling back exhibition requirements while expanding expenditure obligations. Given a number of other policy changes made by the Commission following the Let's Talk TV proceedings, the WGC perceived that the Commission was turning to expenditure rules as *the* primary support for Canadian programming. In the oral phase of the Let's Talk TV proceeding, we said that if the Commission was going to rely primarily on expenditure requirements to support Canadian programming—while relaxing or eliminating regulation on things like exhibition, genre exclusivity, and preponderance, with unbundling also added in—then those expenditure requirements must be at sufficient levels and the rules must be ironclad.[18] We continue to believe that today.

16. Since then, the Commission has continually reaffirmed the importance of PNI. In 2017, the Commission renewed the broadcasting licences of the large, English-language ownership groups in Broadcasting Decisions CRTC 2017-148 to 2017-151, and retained PNI spending obligations, albeit at significantly reduced levels. The WGC and others sought the reconsideration of those levels, and by Order in Council P.C. 2017-1060, issued on 14 August 2017, the Governor General in Council referred the matter back to the Commission for reconsideration and hearing. In Broadcasting Decision CRTC 2018-335, the Commission issued its reconsideration decision, and increased the PNI spending requirements of Bell and Corus to 7.5% and 8.5% of the previous broadcast year's gross revenues, respectively. In Broadcasting Decision CRTC 2018-228, the Commission renewed the services owned by DHX Television Ltd. (DHX), and in Broadcasting Decision CRTC 2018-291, the Commission renewed the services owned by Blue Ant Media Inc. (Blue Ant), in both cases retaining PNI spending obligations as a condition of licence.

17. Since 2010, the Commission has consistently maintained and reaffirmed PNI as a central component of its broadcasting regulatory framework. The WGC submits that PNI continues to be a highly relevant and effective policy tool in carrying out the objectives of the *Broadcasting Act*, and the CAB's request to "phase out" the policy should be rejected.

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[15] Public Notice CRTC 1994-10.

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

[17] Broadcasting Regulatory Policy CRTC 2015-86, *Let's Talk TV: The way forward - Creating compelling and diverse Canadian programming*.

[18] Broadcasting Notice of Consultation CRTC 2014-190, *Let's Talk TV*, Transcript, September 11, 2014, 9410-9411.

18. In addition to the above, the WGC would like to respond to some of the particular arguments made by the CAB in support of its proposal.

19. The CAB repeatedly raises concerns about the ability of Canadian licensees to compete with other unregulated, typically foreign digital programming services, such as Netflix. "Canadian broadcasters face intense competition from growing international online program distribution models," the CAB notes.[19] "Given that exempt foreign digital undertakings are not included in the CPE framework, the Commission should take action to empower licensed Canadian broadcasting undertakings to better compete with their larger foreign counterparts."[20] Yet the CAB presents no strategy to actually compete with these entities, which feature robust catalogues of PNI genres on their services. What the CAB presents, with respect to PNI, at least, is to throw in the towel. It seems reasonable to conclude, therefore, that their strategy for competing with the compelling, high-quality drama, children's, and documentary programming on over-the-top (OTT) services like Netflix and Amazon Prime is simply not to compete. If this is true, then we submit that the Commission cannot facilitate that approach given the Broadcasting Policy for Canada set out in the *Broadcasting Act*. These broadcasters have benefitted, and continue to benefit, from a variety of regulatory protections and flexibility, including those provided in their most recent licence renewal decision. Their most fundamental remaining obligation is to invest a fraction of their revenues in Canadian programming, including PNI. The WGC submits that they must continue do so. Otherwise, we question what role they have to play at all in the Canadian broadcasting system.

20. The CAB says that PNI programming "is uniquely challenging for Canadian broadcasting businesses".[21] Indeed, PNI has long been recognized as uniquely challenging. That's why the PNI policy exists. PNI genres—drama in particular—are also amongst the most popular with Canadian audiences,[22] which is why it is so puzzling that the CAB seemingly wishes to vacate the space. How would that be "modernizing"[23] the regulatory framework? The CAB notes that, "for every dollar of revenue that Canadian broadcasters earned in 2017, $0.10 was spent on PNI."[24] Does the CAB think that Netflix spends only ten cents to the dollar of its revenue on original drama programming? What other broadcaster in the world spends so little on national dramas or documentaries? Is this the CAB's vision for competing?

21. The CAB says that, "PNI requirements no longer align with regulatory policy and its priorities."[25] The CAB goes on to claim that PNI requirements are inconsistent with the elimination of genre exclusivity, local news, and the *Broadcasting Act* itself. In the WGC's view, these arguments are long in the tooth and threadbare. The Commission eliminated genre exclusivity in 2015, and retained the PNI policy at the same time. The PNI policy was retained and reaffirmed repeatedly since then, as described above. The Commission has recently examined the challenges facing local news in Canada, and created new regulatory tools to address them in Broadcasting Regulatory Policy CRTC 2016-224: *Policy framework for local and community television*. Again, the Commission found no inconsistency between PNI obligations and local news. Indeed, we submit that Broadcasting Decision CRTC 2018-335, the PNI

[19] Submission of the CAB, para. 32.
[20] Submission of the CAB, para. 12.
[21] Submission of the CAB, para. 61.
[22] See 2018 Communications Monitoring Report, Fig. 9.9.
[23] Submission of the CAB, para. 14.
[24] Submission of the CAB, para. 62.
[25] Submission of the CAB, para. 63.

reconsideration decision, and the Order in Council leading up to it, was and is a firm rejection of the CAB's entire line of argument. Finally, the CAB claims that PNI must be "balanced" against other policy objectives in the Act.[26] And yet what the CAB proposes is the opposite of balance—eliminating supports for crucial genres of programming entirely with no countervailing measures. There is no misalignment between PNI and other broadcasting policies or priorities. PNI is and remains a priority, and it is entirely consistent with other current aspects of the regulatory framework.

22. The CAB claims that the, "Canadian independent production sector managed without mandated, industry-wide broadcaster expenditure quotas prior to 2010, and we are confident that it can do so going forward."[27] But the WGC has already pointed out that the television policy prior to 2010 was seriously flawed. That's why we got the Group Policy in 2010—a policy which gave broadcasters additional benefits and flexibilities at the same time. The WGC does not look to the pre-2010 environment fondly and, by the same token, we could claim that broadcasters have "managed" post-2010 as well. For an organization that claims to be forward looking, we submit that the CAB should not be looking to the decades past for policy solutions.

23. The WGC was particularly disappointed by the CAB's suggestion that PNI programming "can't compete" in Canada or in international markets.[28] We are not sure whether to focus on whether this is merely wrong or is deeply insulting to Canadian creators and artists as well. Canadian TV shows have an important Canadian and global audience—they regularly reach over one million Canadian viewers at a time, and our series are sold to upwards of 200 countries and territories.[29] *19-2* was nominated for best drama in 2016, in competition with the top series in the world from Argentina, Germany and the United Arab Emirates. *Anne/Anne with an E* made the top-10 list of most "devoured" shows on Netflix world-wide.[30] *Annedroids* tied *Sesame Street* as the most nominated kids series at the 2016 Daytime Emmy Awards with 10 nominations, including Outstanding Writing in a Children's or Preschool Children's Series.[31] This year, *Odd Squad* won three Emmy Awards, including for outstanding directing and writing for a children's, preschool children's or family viewing program.[32] *Cardinal* was a critical hit.[33] *Killjoys* was in the Top 10 best-rated shows on SyFy, a cable channel that reaches 94.8 million American subscribers.[34] *Orphan Black* was an international hit, and lead Tatiana Maslany won the Primetime Emmy Award for Outstanding Lead Actress in a Drama Series for her work on the series.[35] *Wynonna Earp* won the People's Choice Awards: Sci-Fi/Fantasy Show of 2018.[36] *Schitt's Creek* was just nominated for four Emmy Awards.[37] The list goes on.

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[26] Submission of the CAB, para. 65.
[27] Submission of the CAB, para. 68.
[28] Submission of the CAB, para. 61. "As such, precious production resources must be re-directed away from other categories of programming where Canadian content has more consistently demonstrated an ability to compete, in Canada and in international markets."
[29] http://playbackonline.ca/2017/01/04/the-top-rated-canadian-tv-of-2016/
[30] https://fortune.com/2018/12/11/these-are-netflixs-10-most-binge-watched-tv-shows-of-2018/
[31] http://playbackonline.ca/2017/03/23/sinking-ship-lands-27-daytime-emmy-nominations/
[32] http://kidscreen.com/2019/05/06/pbs-netflix-top-the-kids-emmy-categories/
[33] https://www.theglobeandmail.com/arts/television/article-the-superb-cardinal-returns-for-a-third-season-rich-with-quiet/
[34] https://www.pastemagazine.com/articles/2018/03/the-best-syfy-tv-shows-of-all-time.html
[35] https://www.indiewire.com/2016/09/emmys-2016-tatiana-maslany-wins-best-actress-drama-1201726376/
[36] https://comicbook.com/tv-shows/2018/11/13/peoples-choice-awards-2018-best-sci-fi-fantasy-show-wynonna-earp/
[37] https://www.cbc.ca/arts/holy-schitt-the-emmy-nominations-are-really-good-and-really-queer-1.5213450

24. Finally, we note that not all private, English-language Canadian broadcasters agree with the CAB's position on PNI, and even one of the CAB's own members, DHX, believes that "this proceeding is not well suited to an examination of the complex issues surrounding appropriate support for PNI programs."[38]

25. The CAB says, "when Canadian broadcasters fail…who will tell Canadian stories that actually feature Canadians and are about Canada?"[39] Yet the CAB is telling us that broadcasters won't be providing those things, whether they succeed or not, because they seek to eliminate their obligations to do so as a condition of their success. The CAB's definition of "success" for them, is our definition of failure for the entire Canadian broadcasting system. Simply put, we submit that the Commission should not entertain the CAB's request to "phase out" or otherwise eliminate or reduce PNI requirements.

Comments of Blue Ant Media on Eligible Expenses

26. In its submission, Blue Ant submits that, "any expenditure made in connection with the acquisition, production, distribution and marketing of long form Canadian programming for digital distribution to Canadians should be eligible to meet CPE requirements."[40] Blue Ant further states that, "digital programming expenditures should include the costs of developing and maintaining the relevant platforms."[41] As such, Blue Ant predicts that, "it is possible that a licensed television service's digital expenditures will exceed its digital revenues."[42]

27. The WGC opposes this proposal. As we stated in our initial submissions in this proceeding,[43] CPE is and should remain for Canadian *programming*. It should not be used to develop or maintain the platforms themselves, and allowing such costs in the digital world would be similar to allowing CPE to go to maintaining broadcasters over-the-air transmitters or other infrastructure in the traditional world. CPE should remain dedicated to content, not platforms or infrastructure.

28. Blue Ant also states:

> In order to encourage innovation with respect to digital media programming, television services should be given more flexibility in claiming programming expenses as eligible CPE then in the traditional television space. Accordingly, Blue Ant submits that as long as a digital media program is produced by a Canadian producer, then any programming expenditure on a program or a series with a budget of less than $100,000 should not require Canadian content certification to be eligible as CPE.[44]

29. The WGC opposes this proposal. The "C" in CPE refers to "Canadian", and the definition of Canadian programming has always included a meaningful role for Canadian creative talent. The WGC has

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[38] Submission of DHX, para. 2.
[39] Submission of the CAB, para. 25.
[40] Submission of Blue Ant, para. A7.
[41] Submission of Blue Ant, para. A5.
[42] Submission of Blue Ant, para. A5.
[43] See paras. 25-30.
[44] Submission of Blue Ant, para. A6.

discussed at length the importance of Canadian creative talent in other proceedings,[45] and we continue to hold this view. Canadian creators are essential to a creative industry, and cannot be excluded from it, whether for low-budget productions or otherwise.

Amortization Practices

30. The WGC is disappointed that broadcasters did not take advantage of this proceeding to provide more detail or substantive discussion on their amortization practices. The CAB, for example, did provide some basic amortization methodologies,[46] but these were of the most basic and general description, with little comment on how they apply to particular instances, how prevalent each is, or the specific numbers or percentages used. In our view, the CAB and other broadcasters have simply referred to generally accepted accounting principles (GAAP) and indicated that this information was sufficient. The CAB stated that, with respect to amortization, "there is no problem that needs to be solved."[47]

31. The WGC disagrees. The primary problem that needs to be solved is with respect to "original, first-run" and/or "new commissioned" programming, and how amortization practices do or do not interact with broadcasting reporting in that respect. There is also the simple fact that amortization, while a legitimate practice, obscures year-over-year changes in production spending, since multiple years of expenditures are "mixed together" to arrive at a particular CPE number for a particular year.

32. As such, the WGC continues to support an industry working group that could explore this issue and help the Commission and stakeholders better understand amortization and how it applies to Canadian programming expenditures.

Carrying Over Under-Expenditures

33. In response to Q16 and Q17 in the Notice of Consultation to this proceeding, the CAB proposes increasing the current under-expenditure carry-over limit for CPE expenditures from 5% to 10%.[48]

34. The WGC opposes such an increase, because of the potential to increase instability in CPE expenditures year over year, and in domestic Canadian production more broadly. Broadcasters that are subject to the Group Policy already have the flexibility associated with this approach, notably, expenditure requirements for both CPE and PNI can be allocated among services that are part of the group. This, combined with the current 5% under-expenditure carry-over policy, should be sufficient. The WGC does not oppose smaller broadcasters or broadcast groups that are not currently subject to a 5% under-expenditure rule being granted such flexibility. But an increase to 10% is not warranted, for any broadcaster, and especially for the large, private English-language broadcast groups.

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[45] E.g. https://www.wgc.ca/sites/default/files/resource/2019-01/WGCSBNC17.pdf paras. 51-52.
[46] Submission of the CAB, para. 84.
[47] Submission of the CAB, para. 92.
[48] Submission of the CAB, paras. 107-111.

Conclusion

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

Yours very truly,

Maureen Parker
Executive Director

c.c.: Council, WGC

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