Writers Guild of Canada

June 27, 2023 **Filed Electronically**

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

Dear Mr. Doucet:

Re: Reply Comments to Broadcasting Notice of Consultation CRTC 2023-139: Call for comments – Proposed Regulations for the Registration of Online Streaming Services and Proposed Exemption Order regarding those Regulations; and, Broadcasting Notice of Consultation CRTC 2023-140: Call for comments – Review of exemption orders and transition from conditions of exemption to conditions of service for broadcasting online undertakings

1. The Writers Guild of Canada (WGC) is the national association representing approximately 2,500 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 written reply, the WGC is combining our comments on Broadcasting Notices of Consultation CRTC 2023-139 and -140, given the overlap in issues covered by both Notices.

Parties that are better positioned to provide evidence upon which to base determinations regarding monetary thresholds

3. Broadcasting Notices of Consultation CRTC 2023-139 and -140 proposed monetary thresholds for the application of registry requirements and particular conditions of service, respectively, of $10 million. As we stated in our written comments in both proceedings, the WGC cannot effectively comment on this $10-million threshold because we lack access to the data upon which it may have been based or, indeed, to any data that would help us understand what this threshold means in reality.

4. Since then, we see that numerous interveners have also commented on the appropriate level(s) of monetary thresholds, often proposing to raise them above $10 million but, in our assessment, none of those proposing such increases have also provided detailed evidence, data, or analysis for reaching their conclusions, including when those very intervenors may have access to such evidence or data.

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Such intervenors include the Canadian Association of Broadcasters (CAB), the Motion Picture Association-Canada (MPA-Canada), Google LLC (Google), and Apple Canada Inc. (Apple), among others.

5. In light of this, the WGC believes that the Commission should note the asymmetry of information available to the parties here. There are broadcasting undertakings participating in this proceeding, both online and traditional, which presumably have access to data that would be relevant to this discussion, including annual revenues and subscriber numbers, but they are not providing it on the public record of this proceeding. At the same time, they are commenting on an issue that would directly benefit from access to such data. Given this, the WGC believes the Commission should bear in mind the reverse onus provisions of section 9(2) of the *Broadcasting Distribution Regulations* dealing with undue preference or disadvantage.[1] This section provides that, "the burden of establishing that any preference or disadvantage is not undue is on the licensee that gives the preference or subjects the person to the disadvantage." The Commission has explained the rationale for this provision as being that, "it is the party conferring a preference or a disadvantage that will have the necessary information required for the Commission to determine the facts of the case in order to issue a ruling."[2] In this instance, the Commission has recognized the issue of information asymmetry and addressed it by requiring the party that has the information to be the one who bears the burden to prove their case.

6. In this case, the informational asymmetry is also at issue. Several parties that are proposing higher thresholds than the $10 million proposed by the Commission are also the ones that have the necessary information required for the Commission to determine the facts in order to issue a ruling. While this is not an undue preference/disadvantage case as between two specific parties, the theme of informational asymmetry is at issue, and the WGC submits that in the absence of its own information upon which to base a decision, the Commission should make an adverse inference against broadcasters, streamers, platforms, or any other broadcasting undertaking that asserts a higher threshold, but which does not provide data to support that assertion when it could do so.

The $10-million threshold

7. Further to the Commission's proposed $10-million threshold for the application of registry requirements and particular conditions of service, interveners have provided numerous proposals to both raise and lower this threshold.

8. Having considered the comments of others, the WGC can speak further to this issue.

9. Firstly, we do not object to having different thresholds for various purposes. In particular, it may be reasonable to have different thresholds for registration purposes, for information-gathering purposes, and for the purposes of imposing particular substantive regulatory requirements.

10. Such a consideration may not necessarily be a binary one. Some interveners appear to consider that there be two thresholds—one for registration, and another for the imposition of substantive regulation. In fact, regulation is a spectrum, that may involve various steps along a continuum, from

[1] https://laws.justice.gc.ca/eng/regulations/SOR-97-555/page-3.html#h-1010718
[2] Broadcasting Regulatory Policy CRTC 2011-601, para. 109.

simple registration at one end, to the highest levels of contribution to the objectives of the *Broadcasting Act* at the other. In between, there may be varying levels of regulatory obligations, such as reporting requirements, targeting and/or minimal contribution obligations, or more robust but not quite maximal obligations. We are speaking in the abstract, of course, but such principles-based discussion appears necessary given the reconsideration of the Canadian broadcasting system that we are currently undertaking.

11. Secondly, the WGC does not support increasing of the thresholds from $10 million. In particular, we disagree with parties that seek to raise thresholds to those applicable to the Annual Digital Media Survey. Following from our comments above regarding parties that are better positioned to provide evidence upon which to base such determinations than we are, the WGC sees no compelling evidence or argument for higher thresholds than the Commission has already proposed in these proceedings. The Annual Digital Media Survey was a first initiative by the Commission under the 1991 *Broadcasting Act* to collect information in the context of a near-complete absence of it. Following passage of Bill C-11, the *Online Streaming Act*, we now have a new *Broadcasting Act* with new powers and objectives and are entering upon a new process to modernize the Canadian broadcasting system. There is no reason for the Commission to tie itself to a previous threshold established in a different context under different legislation.

12. If the Commission's rationale for creating a public registry of online broadcasting undertakings is to "keep track of online undertakings operating in Canada", as it states in Broadcasting Notice of Consultation CRTC 2023-139, then the threshold should be set as low as possible in order for the Commission to best attain that objective.

"Unique transactions"

13. As the WGC said in its written interventions in Broadcasting Notices of Consultation CRTC 2023-139 and -140, the WGC does not understand, and does not agree with, the proposal to exempt, "online undertakings whose single activity and purpose consists of providing unique transactions."

14. Having reviewed the interventions, we see that others share this concern, including Netflix Services Canada ULC (Netflix), the CAB, and the CBC/Radio-Canada (CBC).

15. Those that support the exclusion of "unique transactions" do not, in our view, provide compelling reasons in support of their argument. For example, Amazon states that:

> The Commission should focus any regulation on broadcasting activities where: (a) there is an ongoing service relationship between the online undertaking and the viewer or listener, (b) the undertaking has the opportunity to curate and/or control the specific service offering, and (c) the offering is not a marketplace or aggregator of third-party content. Service-based, curated, and branded offerings give rise to contributions of all kinds, including investments of time and money in content creation, promotion, and interaction with consumers.
>
> By contrast, transactional services are content marketplaces. Consumers use transaction-based undertakings as a kind of online video or record store. Transaction-

based undertakings are not only a different content monetization model; they are an entirely distinct service model, which allows consumers to pay for specific content or subscribe to a catalog of content. Without a dynamic, ongoing relationship with the consumer and the rights holder, transactional services are not in a position to make meaningful contributions to the broadcasting system.[3]

16. In our view, Amazon has made a series of statements and claims here, but not a coherent argument. The list of things that Amazon says the Commission "should focus any regulation on" are provided without any link, express or implied, to the broadcasting policy for Canada set out in section 3(1) of the *Broadcasting Act*, nor to any other language of the Act, or to any discernable policy.

17. Moreover, the distinctions Amazon seeks to make are unclear or, in fact, untrue. What is an "ongoing service relationship" and why doesn't one exist in respect of services providing "unique transactions"? Do not customers and the online services or "stores" they regularly transact with have just such an "ongoing service relationship," such as a customer account with that customer's payment and other information, even if such a relationship is maintained one "unique transaction" at a time? Online stores *do* have "the opportunity to curate and/or control" their specific service offering. Subscription-based streaming services also have "third-party content" in addition to their own "original" programming. The fact that "transaction-based undertakings" may use a "different content monetization model" has no bearing to the Act or whether it should be regulated under it. What does a "dynamic, ongoing relationship with the consumer" even mean and why *isn't* the relationship between consumers and "transactional" services not "dynamic" or "ongoing"?

18. Some other intervenors, such as Apple, do not even say why they support the exemption, simply that they do.[4]

19. The WGC also rejects any suggestion that transactional services are not in a position to make material contributions to the Canadian broadcasting system simply by virtue of being transactional. According to data contained in the Commission's Communications Market Reports Open data files, based on estimates from Omdia, transactional services or transactional video-on-demand (TVOD) services as a whole operating in Canada had estimated revenues of $320.7 million in 2021. This is materially higher than the revenues of the Rogers Media Designated Group in 2021 ($263.5 million) or about the same as Corus Entertainment's revenues for the basic TV (conventional TV) services included in its English-language Designated Group in 2021 ($309.7 million). Both the Rogers Media and Corus Entertainment Designated Groups *are* required to make contributions to the Canadian broadcasting system, as they should.

20. As such, we continue to see no reason why services providing "unique transactions", whether that is their single activity and purpose or not, should be exempt.

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[3] Amazon submission to Broadcasting Notice of Consultation CRTC 2023-140, paras. 17-18.
[4] Apple submission to Broadcasting Notice of Consultation CRTC 2023-139, para. 12.

Broadcasting groups

21. A number of intervenors, including the CAB,[5] Google,[6] and Apple[7] oppose the Commission's proposal to consider monetary thresholds in relation to broadcasting groups.

22. The WGC disagrees with these intervenors, and continues to support the Commission's proposal for the same reasons we set out previously in this process. As we stated in our initial comments, the Commission's proposed approach would recognize the synergies that exist within ownership groups, including the ability of undertakings within such a group to share costs, cross-promote services and content, and consolidate resources that can be made available to multiple undertakings within that group. This approach would make it more likely that "smaller players" that are exempt are truly smaller, in that they lack such synergies and access to resources, as opposed to merely having been created by the drawing of arbitrary lines within a broadcasting corporate group.

23. In particular, we are puzzled by the following statement by the CAB:

> At a time when the regulation of the Canadian broadcasting system needs to be moving toward leveling the playing field between Canadian broadcasters and foreign online streaming services, this proposal further entrenches the asymmetrical treatment of these two groups that exists today.[8]

24. This statement appears to presume that only Canadian broadcasters can or will form "broadcasting ownership groups" as the Commission proposes to define it. Yet there is nothing in the Commission's definition that would limit a broadcasting ownership group to traditional Canadian broadcaster groups, nor is there any reason to believe that such groups cannot or will not be formed by foreign online streaming services. The CAB appears to presume that a "broadcasting ownership group" can only mean its (current) members. Such a view is unfounded. Any broadcasting undertaking, including an online undertaking, could decide to diversify its offerings into multiple services for any number of reasons, such as providing specialized content to consumers who seek only or predominantly that type of content. Indeed, given the opposition of Google and Apple to this proposal, it certainly seems that they believe such a proposal could apply to them, as online undertakings.

25. For these reasons, it is our view that the Commission's proposal does not "entrench asymmetrical treatment" as between Canadian broadcasters and foreign streamers as claimed by the CAB.

MPA-Canada Proposal to exclude "thematic services"

26. In its submissions to both Broadcasting Notices of Consultation CRTC 2023-139 and -140, the MPA-Canada proposes to exclude "thematic services" from requirements for registration and particular conditions of service. The MPA-Canada states:

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[5] CAB submission to Broadcasting Notice of Consultation CRTC 2023-139 and -140, para. 23.
[6] Google submission to Broadcasting Notice of Consultation CRTC 2023-140, paras. 24-27.
[7] Apple submission to Broadcasting Notice of Consultation CRTC 2023-139, para. 17.
[8] CAB submission to Broadcasting Notice of Consultation CRTC 2023-139 and -140, para. 23.

> We are generally supportive of the notion that classes of broadcasting undertakings that due to their size, scale or other unique attributes such as thematic services, should be excluded from conditions of service and other regulatory obligations, where the Commission is satisfied that such services would not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the Act.[9]

27. The MPA-Canada defines "thematic services" to mean, "services that due to their nature or theme of the service will not contribute in a material manner to the implementation of the broadcasting policy objectives."[10]

28. The concept of "thematic services" exists nowhere in the *Broadcasting Act*, nor does it have a precedent or analogue anywhere in the Commission's policies or regulations to our knowledge. It is unclear what the MPA-Canada even means by the term. If it simply means, following the language of sections 5(2)(h) and/or 9(4), "services that will not contribute in a material manner to the implementation of the broadcasting policy objectives," then it is unclear what the word "thematic" has to do with anything. Services for which the imposition of regulatory obligations will not contribute in a material manner to the implementation of the broadcasting policy are simply that: Services for which the imposition of regulatory obligations will not contribute in a material manner to the implementation of the broadcasting policy. The words "theme" or "thematic" are not in sections 5(2)(h) or 9(4), are not in the *Broadcasting Act* generally, add nothing to the meaning of those sections or of the Act, and are therefore entirely superfluous.

29. The WGC is concerned that in introducing the concept of "thematic services", the MPA-Canada is attempting to lay the groundwork for an argument that broadcasting undertakings that provide programming on a "theme" should somehow be exempt from regulation under the *Broadcasting Act* solely for that reason. We are concerned that they will seek to set up a distinction between "general purpose" services that provide a broad range of programming, and "thematic" services that may focus on a limited number of genres or categories of programs. This would be in line with arguments that conventional broadcasters provide a wide spectrum of programming, from news to sports to reality/lifestyle to drama and children's programs, and because streamers are "not that", they must be treated differently, or even excluded from meaningful regulatory requirements altogether. If the MPA-Canada is successful at setting up this distinction—one that is frankly meaningless to begin with—then they can muddy the waters of subsequent debate on whether a given service is "thematic" or not.

30. In either event, whether "thematic services" is a strategic Trojan horse or just a meaningless tautology of sections 5(2)(h) and/or 9(4), it should not be a factor in considering the applicability of regulation under the *Broadcasting Act*, and we submit that the Commission should not adopt the MPA-Canada's proposal in this respect.

Proposals to limit the scope of the Commission's information-gathering power

31. Some intervenors made comments seeking to limit the scope of the Commission's information-gathering powers as proposed under Broadcasting Notice of Consultation CRTC 2023-140. For

[9] MPA-Canada submission to Broadcasting Notice of Consultation CRTC 2023-140, para. 6.
[10] MPA-Canada submission to Broadcasting Notice of Consultation CRTC 2023-140, para. 8(a).

example, Apple argued that the Commission should, "only collect information that is absolutely necessary for the exercise of the CRTC's regulatory mandate,"[11] and that:

> The Proposed Condition requiring an online undertaking to provide information "regarding the undertaking's technical operations or financial affairs" is overbroad and too general. This Condition should either be made more specific (in a manner relevant to the CRTC's regulatory mandate during the interim period) or deleted in its entirety until the CRTC has made the appropriate determinations regarding the regulatory regime applicable to online undertakings;[12]

32. Similar comments have been made by Google[13] and the MPA-Canada[14].

33. We submit that the Commission should not accede to fetter its information-gathering power in such a way, particularly at this early stage of the modernization of the broadcasting system. The Commission is at the beginning of this process, and must make determinations on where to regulate and where not to based on information, much of which is in the (sole) possession of broadcasting undertakings, including online undertakings, such as Apple. This information gathering process is vital to the regulatory process and to the corporate transparency and accountability that the *Broadcasting Act* brings to the Canadian broadcasting system.

Exempting Online News

34. The CAB, along with Canadian broadcast groups such as BCE Inc. and Corus Entertainment Inc. (Corus), propose that online sites that provide text and video-based news should not be subject to registration or other substantive regulatory requirements.[15]

35. The WGC opposes this position.

36. At this stage, we are primarily talking about registration and information-gathering, not specific regulatory obligations, be they cultural in nature or otherwise. There is no good reason to exclude online news that otherwise falls under the Commission's jurisdiction under the *Broadcasting Act* from such basic requirements, and a number of reasons to include it. In general, such information increases the public transparency applicable to these services and informs the Commission's substantive regulatory decisions that may follow.

37. Beyond that, while the members of the WGC do not engage in newsgathering or production, we do find ourselves forced to respond to arguments from broadcasters who seek to pit the importance of news, including local news, against that of other types of Canadian programming, such as programs of national interest (PNI), stating or implying that they can be expected to properly support one or the other, but not both.

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[11] Apple submission to Broadcasting Notice of Consultation CRTC 2023-140, para. 19.
[12] Apple submission to Broadcasting Notice of Consultation CRTC 2023-140, para. 21.
[13] Google submission to Broadcasting Notice of Consultation CRTC 2023-140, paras. 32-34.
[14] MPA-Canada submission to Broadcasting Notice of Consultation CRTC 2023-140, Schedule A, Q10.
[15] CAB submission to Broadcasting Notice of Consultation CRTC 2023-139 and -140, paras. 28-32.

38. For example, in the proceeding under Broadcasting Notice of Consultation CRTC 2020-336, *Call for comments on an application by the Canadian Association of Broadcasters requesting regulatory relief for Canadian broadcasters in regard to the COVID-19 pandemic*, Rogers Media Inc. (Rogers) stated that it wished to redirect shortfall amounts relating to PNI expenditures and contributions to FACTOR from the 2019-2020 broadcast year to news and information programs. As noted by the Commission in Broadcasting Decision CRTC 2021-274, Rogers argued that this would, "allow it to continue producing quality news and information content, which is consistent with the Commission's third expected outcome relating to the maintenance of news and information programming." As also noted in its decision, the WGC (and the Canadian Media Producers Association) opposed Rogers' proposal because it unfairly positions one type of important Canadian programming against another. The Commission noted that Rogers' proposal would contribute to the maintenance of news and information programming, but would also, "come at the expense of supporting the production of PNI, the primary vehicle for conveying Canadian values and stories," and that accepting Rogers' proposal, "would also imply that the Commission is prioritizing one type of Canadian programming (news programs) over another (PNI), whereas both types, as noted by the CMPA and the WGC, are important and essential for the support of the policy objectives of the Act." [16] The Commission decided that it would not be appropriate to adopt Rogers' proposal in that instance, yet here again we find Rogers and others making the same arguments.[17]

39. The WGC believes in the vital importance of *both* news *and* PNI, but if broadcasters are going to try to force the Commission—and the Canadian public—to choose, then they must be prepared to provide the information upon which such a choice, if it even has to be made, should be based upon.

40. All of this goes to the broader picture of how broadcasting undertakings, including online undertakings, are contributing to furthering the objectives of the *Broadcasting Act*, and should not be excluded from registration and information-gathering by the Commission as a result.

Proposals out-of-scope of this proceeding

41. The submission of Rogers in these proceedings has been particularly aggressive in seeking to push the Commission towards system-wide deregulation immediately out of the starting blocks. Rather than focus on the subject matter of the applicable Notices of Consultation, Rogers also exhorts the Commission to, among other things, "target and significantly reduce" the 5% levy applicable to broadcasting distribution undertakings (BDUs) gross revenues and the "rigid" expenditure requirements that support Canadian programming, Canadian voices, and key objectives of the *Broadcasting Act*. At the same time, Rogers asks the Commission to leap ahead in a rush to the bottom by aligning traditional broadcasters' regulatory obligations with those of foreign streamers, which effectively have no obligations whatsoever.[18]

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[16] See Broadcasting Decision CRTC 2021-274, paras. 85-88.

[17] E.g. Rogers submission to Broadcasting Notice of Consultation CRTC 2023-139, para. 19.

[18] Rogers submission to Broadcasting Notice of Consultation CRTC 2023-140, para. 18.

42. It seems clear that such arguments are consistent with the large broadcasters' current strategy to attempt to push the Commission to slash-and-burn through the existing regulatory framework before it can put in place a new one.[19]

43. The WGC submits that this is obviously not the appropriate way for the Commission to implement the new *Broadcasting Act*. Despite Rogers' or other broadcasters' selective reading, the new *Broadcasting Act* still requires broadcasting undertakings to contribute to the implementation of the objectives of the broadcasting policy for Canada in an appropriate manner.[20]

44. The WGC submits that the Commission should stay the course on the process that it announced on May 12, 2023, to modernize the Canadian broadcasting system in a way that is ordered, rational, and takes into account the entirety of the *Broadcasting Act*, including the objectives in support of Canadian culture and Canadian programming. The proposals of Rogers or others to effectively short-circuit that process for the benefit of broadcasters' bottom line is inappropriate and should be rejected.

Conclusion

45. We thank the Commission for the opportunity to comment in this proceeding, and we look forward to examining the comments of others in the ensuing phase.

Yours very truly,

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Cc: Victoria Shen, Executive Director, WGC
Council, WGC

[19] See also Corus Application No. 2022-0946-0, Rogers Application No. 2023-0373-3, and Bell Media Inc. Application No. 2023-0379-1.
[20] *Broadcasting Act*, section 3(1)(a.1).

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