



September 14, 2009

Mr. Robert A. Morin
Secretary General
CRTC
Ottawa, ON K1A 0N2

Online: <http://support.crtc.gc.ca>

CRTC Broadcasting Notice of Public Hearing CRTC 2009-411
“Policy proceeding on a group-based approach to the licensing of television services and on certain issues relating to conventional television”

Dear Mr. Morin,

1. This is the intervention of the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) in the matter of Public Notice CRTC 2009-411.
2. ACTRA would like the opportunity to appear before the Commission at the public hearings commencing November 16, 2009.
3. ACTRA is the voice of more than 21,000 professional performers who live and work in every corner of Canada. Our members are English-speaking artists whose audio-visual performances cross all delivery platforms; film, television, sound recordings, radio and digital media. ACTRA is responsible for negotiating and administering collective agreements establishing minimum conditions of engagement and a framework for how producers engage individual performers. ACTRA Performers Rights Society secures and disburses Use Fees, royalties, residuals and all other forms of performers' compensation. In 1997, ACTRA created the ACTRA Recording Artists Collecting Society, which is a member of the Neighbouring Rights Collective of Canada. RACS has administered the royalty and private copying levy due to performers in sound recordings.
4. This intervention is also supported by the American Federation of Musicians, Canada which represents more than 17,000 members.
5. ACTRA's submission is focused on English-language services and programming. We do not comment on French-languages services or programming.

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6. ACTRA believes it is essential to ensure that Canada has an independent and robust domestic television, film and new media production, distribution and exhibition system. It is equally critical for Canadians to have access to a reasonable supply of high-quality English-language programming choices, particularly scripted drama, in every medium. Some argue that these objectives are incompatible. ACTRA submits they are mutually dependent. A 'robust' domestic broadcasting system must present Canadians with the opportunity to distribute and to view our own television programs, otherwise it is a failure. What use is a Canadian broadcasting system if it only brings us foreign content?
7. Canada's broadcasting system faces numerous challenges: our vast geography, our relatively small population, the high-cost of producing quality audio visual programs, among others. We are also the only country with a majority English-speaking population with the challenge of living next door to the world's largest producer of recorded entertainment and information programming. This unique combination of challenges has led to Canada's sophisticated system of regulatory measures, public institutions and funding programs designed to ensure that Canadian choices are available to both domestic and global audiences. These critical regulations are widely supported by Canadians and often emulated around the world.
8. In November 1970, the CRTC announced that all Canadian television broadcasters would be required to show at least 60 percent Canadian content each broadcast day effective in 1972. In announcing the rule, CRTC Chair Pierre Juneau said, "Canadian broadcasting should be Canadian."
9. In the years since the Cancon rules were adopted, Canada has implemented other policies, programs and funding mechanisms. All of them are directed at ensuring that we can tell Canadian stories in the most powerful and pervasive medium: television. While this regulatory system has achieved some of the objectives, it is far from perfect.
10. ACTRA has been critical of some aspects of Canada's broadcasting regulations and has been most vocal in respect to the failure of the CRTC's *1999 Television Policy*. We therefore welcome this policy review and applaud the Commission for acknowledging that the status quo is no longer working. However, instead of tearing down our regulatory system, we should work together to improve and build on it. Regulation of broadcasting remains absolutely essential.
11. We urge the Commission to seize the opportunity presented by these hearings to take a bold and creative approach. The importance of this process cannot be overstated. What is being decided is whether Canadians have the right to see themselves on their own TV networks and whether Canada's indigenous television industry has a future. The *Broadcasting Act* is very clear on these questions – yes, and yes.

12. ACTRA is embarking on this process in a spirit of partnership with Canadian audiences, the Commission, broadcasters, distributors and our colleagues in the creative community. It has become apparent that our fates are interconnected; one part of the system can't succeed if another is weak.
13. Together we can, and must, develop a contemporary television policy that will meet the dual objectives of strengthening Canada's domestic broadcasting industry and providing Canadian audiences with the opportunity to enjoy the best television programming that Canadian creators and performers have to offer.

EXECUTIVE SUMMARY

14. The broadcasting landscape is dramatically different from what it was 10 years ago and it is sure to be different again in another 10 years. Despite these changes, we reject suggestions put forward by Canada's private broadcasters that the over-the-air (OTA) television model is broken beyond repair. Instead what is desperately needed is a refinement of our regulatory system that takes a holistic approach, building on what works and fixing what doesn't. It must serve the interests of all stakeholders, be forward-thinking and flexible.
15. Unfortunately, in the context of broadcasting regulations the word 'flexibility' has essentially become tantamount to 'reduced Canadian programming obligations'. Broadcasters asked for – and got – such 'flexibility' in the *1999 Television Policy* (the actual *Policy* uses the word 15 times). Canadian programming expenditure (CPE) requirements were eliminated. Out of a total 28 hours per week of prime time, only eight had to be 'priority programming', a new term that gave broadcasters even more flexibility by allowing them to count low-cost, and very often low-content, entertainment magazine, variety and reality shows in those eight hours.
16. It is time to turn the page. We need to look at 'flexibility' in a new light and find innovative ways for the system to work for Canadian audiences and for **all** industry stakeholders, not just the few. In the Commission's own words in outlining this process: "While flexibility may have a positive impact on the viability of the Canadian television industry, it is also appropriate that this flexibility should result in greater support for Canadian programming."¹
17. ACTRA proposes a modern regulatory framework for Canadian television that provides broadcasters with flexibility while giving Canadians wide access to a variety of genres of indigenous programming including underrepresented forms such as drama and long-form documentary. ACTRA's proposal for a modern regulatory framework for Canadian television was created in partnership with the

¹ CRTC PN 2009-411.

Writers Guild of Canada, the Canadian Film and Television Production Association, and the Directors Guild of Canada and contains the following key elements:

- I. Retain all scheduling, niche and CPE expenditures for specialty/discretionary services
- II. Re-instate a CPE for OTA services
- III. Introduce a drama CPE floor for all broadcasting groups, regardless of whether they have OTA services
- IV. Eliminate the concept of 'priority programming'
- V. Implement a scheduling safety net on OTA services for underrepresented programming categories, in particular, drama
- VI. Require that at least 75% of the Canadian drama, documentaries and children's programming be acquired from independent producers, measured both by number of hours and by expenditures.
- VII. Ensure OTA broadcasters are compensated fairly by BDUs for use-of-signal

18. ACTRA believes this proposed framework meets the Commission's goals of bringing increased flexibility for broadcasters, while ensuring greater support of Canadian programming. It takes lessons from the successful regulation of pay and specialty services and proposes to capitalize on the financial strength of this sector and the broadcasting distribution undertakings to balance the current challenges of the OTA sector.

THE KEY CHALLENGES

19. Performers want private Canadian broadcasters to succeed; our culture and our industry depend on it. ACTRA also understands that a healthy system is one in which broadcasters are able to make profits. But in exchange for permission to use the public airwaves and to benefit from other supportive public policies, broadcasters have a public service obligation. In exchange, they are required to contribute to our cultural identity by supporting, promoting, airing and celebrating fully Canadian stories. On that, the *Broadcasting Act* is clear:

"Each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming; ...each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming."

20. Canadians must have access to our own stories – fiction and non-fiction – on our TV screens. Canadians are the only ones who can, and will, celebrate our own history and our own heroes. An ACTRA member recently described how he learned about Canada by watching Canadian TV drama when he immigrated

from the U.S.: “If it wasn’t for Canadian drama I wouldn’t know who Canada was.” That sentiment could just as easily come from someone who had spent their entire life here.

21. Dramatic TV programming continues to be the most influential cultural experience of modern times. Despite the exponential growth of the Internet, TV remains the most popular cultural medium and the most effective way of learning about ourselves, our neighbours and our world. According to *Communications Monitoring Report*, Canadians watched an average of 26.6 hours of television per week in 2008, down only 12 minutes per week from the year earlier.
22. Canadians are not content to watch a flood of U.S. programming. A Harris-Decima poll commissioned by ACTRA and our industry colleagues showed that 71% of Canadians believe it is important to have access to Canadian television programming distinct from American programs. Over three-quarters of Canadians (78%) said that it is important to them to have a choice of television programs that reflect Canadian society, values, and perspectives.²
23. Acclaimed Canadian performer Wendy Crewson is a tireless fighter for Canadian TV drama. She has worked extensively in the U.S. but chooses to tell Canadian stories whenever she has the opportunity, winning critical acclaim playing Canadian heroes such as Sue Rodriguez and Louise Arbour. At the recent Heritage Committee Hearings on the Issue and Challenges Related to Local Television, Ms. Crewson encapsulated why having indigenous TV drama is so critical to Canada’s strength as a mature nation:

“Drama is the linchpin of popular culture. It is the one thing that we all turn to. It is the voice that can go from one end of the country to another. It is our humour, it is our fears, it is our hopes. It is our dreams. It tells our stories to us and to our children. So that we grow up in a country that is heroic and informs who we are instead of constantly being chipped away at by American programming and American drama and having your kids every time you turn on the TV, watching some American show about some American dream of an American reality that is not going to be theirs.

It diminishes us to not have our stories on television in prime time in the form of drama and unless this turns around we are truly becoming a branch plant of American culture and that’s all we’ll ever be, we will lose our identity.”

24. The need for distinct Canadian content is becoming increasingly critical as the digital media shrinks our world. With access to a virtually unlimited supply of content from around the globe, Canadians must have the opportunity to see our own stories, dance, art and music celebrated, or it risks being drowned out altogether. ACTRA also believes that Canadian stories must be available to the

² Harris-Decima. *Canadian Attitudes Towards Canadian Programming and CTF Issues Prepared for the CFTPA, WGC, DGC, and ACTRA, 2008.*

widest audiences possible, and that can only happen through conventional, over-the-air broadcasting.

25. Unfortunately, the current regulations governing conventional television are not serving the public interest. The effect of the centerpiece of the current regulations, the *1999 Television Policy* has been particularly disastrous for English-language drama.
26. In its *1999 Television Policy*, the Commission eliminated the drama expenditure requirements and allowed broadcasters to count cheap reality and entertainment magazine TV shows as 'priority programming.' Out of the 28 hours a week of prime time (7-11:00 p.m. nightly) the *Policy* requires only eight to be priority programming.
27. The definition of priority programming includes drama, music, dance and variety, long-form documentary programs, entertainment magazine programs, in addition to any regionally-produced programs in categories other than news and information, and sports.
28. There is nothing in the 1999 *Policy* protecting original Canadian drama. Given that drama is the most expensive form of programming to produce, it is only natural that broadcasters would choose the cheapest programs they can get away with and still meet their obligations. And that's exactly what happened.
29. The resulting fate of English-language Canadian TV drama since 1999 has been well-documented by ACTRA and many of our industry colleagues in previous submissions as well as in several reports produced by ACTRA and our partners in the Coalition of Canadian Audiovisual Unions.³ Essentially, English-language Canadian TV drama has all but disappeared as broadcasters have been able to fill their schedules with attractive made-in Hollywood programs they acquire for only a fraction of their production value while satisfying their Canadian content obligations with cheap reality and magazine programming. The devastating impact of the *Policy* may not have been intended, but it cannot be disputed.
30. Since 1999, while overall program spending by private broadcasters has increased, spending on Canadian drama has declined significantly. In 2000, English-language private OTA broadcasters spent \$62.1 million on Canadian drama. By 2008, that number had **declined** to \$53.8 million. At the same time, spending on foreign and U.S. programming increased from \$422.3 million in 2000 to an all-time high of \$737.7 million in 2008. That's 61% more on foreign programming than on Canadian – \$739.7 million versus \$452.8 million – in

³ See CCAU reports *The Need for a Regulatory Safety Net: Broadcasting Policy and Canadian Television Drama in English Canada in the Next Five Years*, June 2005 and *The Crisis in English-Language Drama*, March 2003.

2008.⁴

31. Spending as a portion of ad revenues provides a clear picture of the growing imbalance of spending on foreign programming than Canadian. In 2000, spending on Canadian and Foreign programming was almost at par. English-language conventional broadcasters spent 24.8% of their ad revenues on Canadian programming versus 28.6% on foreign/U.S. Eight years later, and the scale had tipped dramatically – 26.9% on Canadian programming, 43.9 on foreign programming.⁵

32. The Chair has acknowledged that this trend is worrisome on several occasions, including at the CFTPA Prime Time Conference in February:

“The Broadcasting Act calls for no less than the predominant use of Canadian creative and other resources in the creation and presentation of programming, so this is a matter of concern for us.”⁶

33. The Commission must intervene and take steps to correct the balance. Silence on this issue will be interpreted by private broadcasters as a licence to carry on with this unacceptable and untenable practice of shipping millions of dollars and previous primetime shelf-space out of Canada.

34. To tell the complete story of what has happened to Canadian TV drama, we have to look at more than just spending but also when broadcasters do spend on drama, where, and when is it appearing on broadcasters' schedules? Research commissioned by ACTRA, WGC, CFTPA, DGC and DOC shows that when left to their own devices, broadcasters will rely on repeats and dump Canadian drama to the shoulder periods to meet their priority programming requirements. The study appended to this submission, *A Survey of Priority Programming trends 1999-2008*,⁷ shows while that conventional private broadcasters are meeting their average eight hours per week of priority programming obligations, there are two glaring problems in the way they are doing it:

- It has become accepted practice to ‘average’ out the programming, OTA broadcasters have loaded up Cancon on Saturday nights, the December holiday season and in the summer months – in short, when no one is watching.

⁴ CRTC. *Statistical and Financial Summaries for Private Conventional Television, 2004-2008*, February 10, 2009. Given that the CRTC has not publicly released 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.

⁵ Ibid.

⁶ Konrad von Finckenstein, Q.C., Chairman, CRTC, Speech. “Prime Time in Ottawa”, February 19, 2009

⁷ A copy of the study, *Survey of Priority Programming trends 1999-2008*, has been filed with the Writers Guild of Canada’s submission to these proceedings.

- Without Canadian programming expenditure requirements, broadcasters are relying heavily on repeats, which directly results in lower spending on original drama and drives viewers to U.S programming when they want to see something new.⁸
35. Despite assurances from private broadcasters that they will air Canadian programming without being told to through regulations, it has become painfully obvious that, in fact, they do need to be ‘told’. Only in the past 10 months in advance of anticipated the licence renewal process, have private OTA broadcasters finally begun to increase their investments in producing new Canadian drama, thanks in large part to money they are obligated to invest due to Transfer Benefits.
36. It is no secret that private OTA broadcasters view Canadian programming as a burden and they will only invest in it to the extent they are obligated by regulation. Even the general public knows that regulations are necessary to ensure they have access to their own dramatic programming; 42% of Canadians believe the CRTC has the primary responsibility to preserve Canadian content on TV and only 16% trust private broadcasters to do it.⁹
37. In the last several months, private broadcasters have increased the volume of their complaints about Cancon obligations. They have deluged the Commission and the public with tales of woe and declared the conventional television model broken and in a state of crisis. They’ve sold off or threatened to close local TV stations. Canwest Global is constantly facing creditors in court as it struggles to meet its debt obligations.
38. ACTRA rejects any charges that the current ‘crisis’ in conventional broadcasting is related to Cancon regulations. Broadcasters are taking advantage of the economic downturn to rid themselves of regulations they never wanted in the first place. We are especially mindful of some of the victims of this approach, including the hundreds of workers who have lost their jobs and communities who have lost their local voice due to cut backs and station sell-offs. It is our view that while the economic downturn has played a role, the root of the problem is that broadcasters have over-spent on U.S. programs and – especially in Canwest’s case – have been overzealous in their use of debt to acquire new assets. Canadians shouldn’t lose our right to see ourselves on our own airwaves because of a few bad business decisions by private broadcasters. In short, the troubles facing the conventional private broadcasters are overstated and largely self-inflicted.

⁸ Sarah Dearing, *A Survey of Priority Programming Trends 1999-2008*, September 2009. Study Commissioned by ACTRA, CFTPA, DGC, DOC, WGC. The research and difficulty in obtaining the date required also raises concerns about the ability of Commission staff to efficiently and adequately monitor regulatory compliance by broadcasters.

⁹ Pollara. *Canadians’ Views On De-regulating Cable and Other TV Distributors*, Prepared for ACTRA, CEP, Friends of Canadian Broadcasting, Stornoway Communications, and WGC, March 2008.

39. While revenues for English-language conventional broadcasters fell by 2% from 2007 to 2008, given the severity of the economic recession, this is modest and hardly surprising. Furthermore, in 2008 private conventional television broadcasters in Canada made a profit on their operations. While low by historical standards, a profit before interest and taxes of 0.38% cannot be considered a disaster in light of the current economy. If broadcasters had properly organized their financial affairs in the decades of double-digit growth, they could easily have weathered the current downturn.
40. The fact remains that conventional television remains a significant vehicle for advertisers. While the areas of significant advertising growth are now specialty services and the Internet, conventional TV will remain the principal vehicle to deliver a mass audience to advertisers, whether the programs are delivered over the air or over the Internet. Canadians will still want to tune in for their local news and event drama. Specialty channels are still niche services. YouTube, however mesmerizing and ingenious as a distribution device, will not replace CTV or NBC as a means of mass advertising any time soon.
41. We are also mindful of the Commission's decision to create a new fund, Local Programming Improvement Fund (LPIF) and peg that fund at 1.5% of BDU revenues for this year. This fund will generate upwards of \$100 million directly in the pockets of private broadcasters to help them produce local programming. ACTRA supports this fund, and notes that it is almost double the amount that Canadian private broadcasters spent on English-Canadian TV drama last year. Combined with a possible 'value-for-signal' regime as ACTRA and others are urging, private broadcasters will be well-placed to meet strong requirements for both local and dramatic programming.
42. Private broadcasters have long blamed Canadian programming obligations for their inability to reap maximum profit and in the recent licence renewal process, sought to have obligations reduced, and in some cases, eliminated altogether. Despite paying some of the lowest licence fees in the world,¹⁰ Canadian broadcasters claim they lose money on their Canadian programs, particularly drama. To date, we have had to take their word for it as the public has not been given access to the data needed to evaluate the claim.
43. ACTRA recently joined with WGC and CFTPA to debunk the myth of Canadian programming being a money-losing burden. The research undertaken by Nordicity presented in the report *Analysis of the Economic of Canadian Television Programming* demonstrates that in fact, airing Canadian programming is a profitable activity for private broadcasters, when you amortize the costs over the useful life of the program and the range of services that will use the program.

¹⁰ Nordicity Group Ltd., *Analysis of the Economic of Canadian Television Programming*, September 2009. Nordicity's analysis of 133 Canadian fiction television series produced in 2006/07 and 2007/08, shows the average Canadian broadcast licence fee during this period was \$409,000; the median broadcast licence fee was \$402,000. This represents an average of 35% of production budgets.

The report that supports this intervention has been expanded from the original report published in March 2009. This updated report looks at a full slate of programming genres and adds additional evidence to support assumptions regarding repeat airings on both conventional and specialty services.

44. Canadian broadcasters can make more money broadcasting U.S. drama than Canadian drama. This is inevitable given that the high-quality U.S. programs, which come complete with a global promotional machine, are dumped into Canada at a fraction of the actual cost of production. However, the Nordicity study proves that when one accounts for repeat viewings and airings by affiliated group services, broadcasters not only recoup their investment on Canadian programming, they can make a profit on it, when they schedule and promote it properly.
45. As well, as a result of increased consolidation, it is now common practice among Canada's broadcasting groups to acquire rights to conventional and specialty television windows through their initial broadcast licence fee. This makes it even more appropriate to review our broadcasting system and regulations in the context of a corporate group. They pay once – but go on to reap revenues on multiple platforms for years through extensive reruns. As Nordicity reports, it is not uncommon for specialty services to air one episode of a Canadian TV drama 30 or 40 times over a span over several years.
46. The end result, according to Nordicity's analysis is:

“Over the past decade, the structure of the Canadian broadcasting industry has evolved from one where most conventional and specialty television services were under separate ownership to one where they are under common ownership. Today, Canadian broadcasting groups have more opportunity to air numerous repeats of Canadian programming across conventional and specialty television services under the terms of their original first-window broadcast licence. Our analysis finds that, within the current industry structure and broadcast licence environment, Canadian television programming can be profitable for Canadian broadcasting groups, under reasonable assumptions that reflect current practices among Canadian broadcasting groups.”

47. With all of this in mind, we strongly support the Commission's decision to create a framework for reviewing broadcasting licences as a corporate group. While OTA regulation has been less successful, the story is much different if we look to the specialty, pay, and video-on-demand (VOD) sectors. The regulatory framework for these undertakings has succeeded in delivering both generous profits and a healthy selection of Canadian programming, including drama.
48. While conventional broadcasters have faced some challenges, specialty services have flourished and have made an enormous contribution to Canada's broadcasting system over the past 10 years. Canadians have access to a wide

array of diverse programming that offers them so much choice. Thanks to regulations, those choices include Canadian programming. It is ACTRA's view that the exhibition and spending requirements that have been placed on specialty undertakings have been a tremendous success. In 2008, Canadian specialty, pay, pay-per-view television and VOD services spent \$1.1 billion on Canadian programming. It is important to note that they made that enormous contribution while earning record revenues of \$2.9 billion, up 7.6% from the previous year.¹¹

49. Specialty channels are profitable not only because of the rapidly increasing advertising revenues but also because they enjoy fees for carriage from the cable and satellite distributors. Performers support the extension of this revenue source to conventional broadcasters through the negotiation of value-for-signal, provided that the new revenues are directed into the production of original programming.
50. The specialty sector is a model for the successful balance of being able to generate robust revenues, while contributing to the system that allows you to do that. The health of the specialty channels gives weight to the idea that you need to take a look at the industry as a whole.

THE PROPOSED 'CORPORATE GROUP' SOLUTION

51. Looking at specialty and conventional broadcasting undertakings together in their corporate groups allows us to build a forward-thinking model for television that will help bring about balance and greater strength for the system as a whole.
52. A detailed proposed framework: *Achieving Greater Support for Canadian programming within a group-based approach to the licensing of television services* is attached to this submission. This framework was developed by ACTRA, DGC, WGC and the CFTPA. While we don't claim to have all of the solutions, we believe the key components of the proposed framework taken together provide greater flexibility, balance, transparency, and choice for broadcasters and the Canadian public. Following is a brief overview of each of the key components.

- ***Retain all scheduling, niche and CPE expenditures for specialty and discretionary services***

53. The Commission posed the question whether it would be appropriate to replace individual CPE requirements for each specialty service with a harmonized CPE requirement for corporate groups. ACTRA gave this proposal extensive consideration and finds that it has some merit. Ultimately, we are swayed by the

¹¹ CRTC. *Pay Television, Pay-Per-View, Video-on-Demand and Specialty Services – Statistical and Financial Summaries 2004–2008*.

wise adage “If it ain’t broke, don’t fix it.” We urge the Commission to stand by the conclusion it came to last year in its review of BDU and discretionary services when it decided that maintaining the existing approach was preferable.¹²

54. As noted above, the current regulatory framework for specialty and discretionary services works. It respects the uniqueness of each station’s licensed mandate and audience, as well as the competitive licensing process. We believe it would not be in the public interest to permit a significant change in the nature and role of each individual service. Moreover, ACTRA believes it should serve as a model of success to be built upon and elements should be carried over to the conventional side.

55. The practice of allowing private broadcasters to claim CTF (soon to be CMF) expenditures as if they were their own, distorts the system. Instead of adding to the money being spent on the production of new Canadian programs, this practice detracts from it. We urge the Commission to eliminate the ability for CTF top-ups to count toward any CPE requirements on all services.

56. We urge two adjustments to the current individual CPE requirements for specialty services to make them even more effective and fair:

- Recalculate them at the time of licence renewal to reflect increased PBIT levels as required by CRTC 2004-2.
- Prohibit broadcasters from claiming the licence fee top-up as an expenditure.

- ***Reinstate CPE for OTA services***

57. The Commission has expressed its concern about how English-language conventional television licensees’ expenditures on Canadian programming are declining as a proportion of total programming expenditures.

58. ACTRA shares these concerns. Without question, the decline in expenditures on Canadian programming, in particular drama is disturbing especially when coupled with the wild upswing in spending on U.S. and foreign content as outlined above.

59. This trend does not serve the Canadian public, nor does it help to build a strong, independent, Canadian broadcasting industry. The Commission must let broadcasters know this is unacceptable and take regulatory action to reverse this destructive pattern and restore balance to the system.

60. The Chair has proposed the concept of a 1:1 ratio of spending on Canadian to

¹² The Commission posed a similar question of eliminating individual requirements and replacing them with a group requirement in BN CRTC 2007-10, and concluded that the status quo was preferable in BN CRTC 2008-100.

foreign programming. At first glance, ACTRA found this proposal extremely interesting because it seems like a simple and effective means of correcting the balance between Canadian and foreign spending. However, upon further consideration, we find that a ratio-approach is not the simple solution it appears to be. A 1:1 ratio would require a number of safeguards if it is to preclude game playing, meet the objectives of the *Broadcasting Act* and benefit the system as a whole.

61. ACTRA submits that re-instating a CPE on OTA broadcasters is the simplest and most effective way to go. As we have witnessed in the success of the specialty side, a CPE requirement is enforceable, reduces loopholes and potential for gaming, and is self-adjusting. CPE works for broadcasters by giving them fairness and flexibility. When times are good and their revenues are up, they are able to contribute more to Canadian programming, when times are tough and revenues decline, their contribution to Canadian programming also goes down.

62. ACTRA would defer to the Commission to determine an appropriate level of CPE based on a percentage of the services' gross revenues.¹³ Looking at previous spending on Canadian programming by OTA broadcasters, it would seem that the level should be at least 26%; however, we see great room for improvement and urge the Commission to consider a higher expectation. We also recommend that each service have the same CPE as a percentage of their revenue in order to create a level playing field.

- ***Introduce a group drama CPE floor on all groups***

63. Drama is the most challenging form of programming to produce. It is the most expensive and financing is often risky. However, while broadcasters may be tempted to shave dollars off the bottom line by running cheaper reality-style programming, it is scripted drama that still consistently pulls in the largest numbers. Even with more entertainment choices than ever before, on the Internet and on mobile devices, TV is still the most popular and influential cultural medium, and drama is still the most watched form of TV content.

64. Private broadcasters need to understand that producing original Canadian drama is part of the cost of having a licence and doing business; and they need to be doing more of it. The result of the *1999 Television Policy* made it clear that, without a safety net for drama, broadcasters will abandon it and move to cheaper programming.

65. As a solution, the proposed group framework suggests a group floor for programming expenditures reserved for original Canadian drama. This would apply to all corporate groups regardless of whether they have an OTA service

¹³ Revenues used to calculate CPE should include all PBIT including all potential revenues from BDUs for use-of-signal.

and would rise over time.

66. In our appended analysis, we present a possible model for calculating the group drama CPE to demonstrate feasibility. The most straightforward way would be to see how much each service spends on Canadian drama as a proportion of its gross revenues, and then weight each service according to gross revenues. Such a formula would make it easy to recalculate the group drama CPE if the group gained or lost a service.
67. This formula results in a different drama CPE for each corporate group. For example, in our modeling, CTV Globemedia's drama CPE would be 6.2% in 2015, while Canwest would be at 9.5%, Corus at 12.1% and Astral at 18.4%. This is appropriate because each group is composed of a different mix of niche programming services with different conditions of licence that should be respected and encouraged. Keys to our proposal include that each OTA service should be required to increase their contribution to the group CPE calculation, reaching a minimum of 6% of gross revenues prior to the end of their licence term, and reporting the licence fee top-up would be disallowed.
68. The Commission has previously stated as an objective that English-language conventional television broadcasters should increase their spending on drama to 6% of total revenues.¹⁴ Broadcasters have failed to reach this target. In 2008 CTV spent 4.1% of OTA revenues on Canadian drama, CanWest 2.5% and Rogers 1.3%. We agree with the 6% objective and believe it should be implemented in steps over the next licence renewal term. ACTRA recommends that the group drama CPE be set in the first year of renewal with a higher level imputed for each OTA service than their current level.
69. A group CPE to produce original Canadian drama delivers on the Commission's key objectives in outlining the scope of this policy review, greater flexibility that results in greater support for Canadian programming. We also note that it would deliver numerous benefits for each of the key stakeholders:
 - a. Flexibility. It does not propose costs per hour or a number of hours. Licensees can opt for a few more expensive programs or additional less expensive programs. It also doesn't impose new requirements for exhibiting drama on services where it does not make sense.
 - b. Reactive. Like the general CPE, the drama CPE would be based on the previous year's revenues, the amount would be self-adjusting.
 - c. Transparent and easy to administer. The Commission would not need to worry about how or where the money is spent, so long as no double counting occurs.
 - d. Balance. This approach takes advantage of the increased consolidation of the industry, allowing licensees to draw on the strength of more profitable parts of their corporate group to support others.

¹⁴ Broadcasting PN CRTC 2004-93. *Incentives for English-language Canadian Television Drama*.

- e. Quality. Since broadcasters will have to spend the money on drama, the question moves from “How do I produce the cheapest programming?” to “How do I produce the best programming, and how do I schedule and promote it to maximize audience levels and potential advertising revenue?”
- f. Choice. Canadians will benefit from increased options to watch the type of programming they enjoy most – drama – that reflects our own experiences.

- ***Eliminate the concept of ‘priority programming’***

70. The broad concept of ‘priority programming’ has done nothing to protect the most vulnerable genres of programming such as drama and long-form documentaries; on the contrary, it has put them squarely in the back seat while cheaper forms of programming that don’t require ‘protection’ in the first place have filled prime time schedules.

71. If OTA services are given a CPE and safety nets are provided for drama, long-form documentaries and children’s programming, then priority programming requirements could be eliminated.

72. The removal of priority programming requirements would also benefit licensees by giving them more flexibility in their prime time schedules.

- ***Implement programming safety nets on OTA services for underrepresented programming categories, in particular, drama.***

73. In the absence of any specific requirement to schedule drama on OTA services, a corporate group might be tempted to use its drama programs exclusively on its specialty services. This would leave the schedules of OTA services wide open for U.S. simulcasts and large quantities of cheap, reality-style programming produced to meet Cancon obligations. This would be disastrous public policy. ACTRA asserts that it is not good enough to have drama relegated to discretionary services. In order to serve the public interest, all Canadians must have access to original drama programming on free, over-the-air TV. OTA is where programming finds its greatest audiences and where ‘event’ television can bring the country together.

74. ACTRA proposes the following measures to ensure that Canadians have the choice of watching original Canadian drama on OTA services:

New Canadian dramatic programming produced as a result of group drama CPE must air at least once on a group’s OTA services, within two years of delivery, resulting in a minimum of two hours of dramatic programming per week between 8-11:00 p.m.

75. The definition of prime time introduced in the *1999 Television Policy* of 7-11 p.m. Monday to Sunday is too broad. We urge the commission to re-define prime time as 8-11 p.m. Sunday to Friday for dramatic programming. As demonstrated by the scheduling survey attached to this submission, Canadian dramas are too-often buried in the time-slots with the least viewers.

76. These minimal requirements are not onerous. Replacing ‘priority programming’ rules with more genre-specific scheduling requirements would be more effective in ensuring an adequate amount of drama on OTA services while giving broadcasters more overall programming flexibility.

77. We also urge the Commission to implement measures to ensure an adequate amount of other vulnerable genres, namely long-form documentary and children’s programming on OTA services. These important genres have become increasingly relegated to specialty services and it is critical that OTA services offer all Canadians the choice to see these types of programs. ACTRA supports the implementation of programming requirements and/or expenditure requirements in line with the safety nets for drama we have proposed.

- ***Require that at least 75% of the Canadian drama, documentaries and children’s programming be acquired from independent producers, measured both by number of hours and by expenditures.***

78. ACTRA supports the current rules requiring that at least 75% of priority programming be produced by independent producers. This is in keeping with the *Broadcasting Act*, Section 3, which states that “the programming provided by the Canadian broadcasting system should...include a significant contribution from the Canadian independent production sector.”

- ***Ensure OTA broadcasters are fairly compensated by BDUs for use-of-signal***

79. ACTRA supports the Commission’s conclusion that a negotiated solution for compensation for the free market value of local conventional television signals is now appropriate. BDUs need to make an even greater contribution to the broadcasting system. It is only fair, and in conformity with the *Broadcasting Act*, that those profiting most from the system should be required to contribute to its ongoing vitality.

80. While this proposal is not part of the appended *Framework* we believe that compensation for use-of-signal is not only a question of fairness, but is critical to the future health and growth of Canada’s independent broadcasting system.

RESPONSES TO THE COMMISSION QUESTIONS

Group-based Canadian Programming Expenditure Requirements

a) ***Would it be appropriate to implement a single, flexible CPE requirement for integrated corporate undertakings? If not, what would be an appropriate minimum CPE for each service that makes up the group and should transferability be permitted among the services? Should there be exclusions when considering minimum spending levels (such as sports or news services)?***

81. ACTRA believes that the CPE and scheduling requirements of specialty/ discretionary services should be retained, with appropriate adjustments, and that a drama CPE and scheduling requirement should be reintroduced on all OTA broadcasters. The drama CPE should reach 6% of revenues of each OTA broadcaster by the end of the next licence term.

b) ***If required, by what method could the Commission set such a CPE requirement for integrated corporate undertakings? If there is a need to transition VOD contributions from that of payments to programming funds to a new common CPE requirement, how should that be accomplished?***

82. ACTRA's essential proposition is to maintain existing CPE requirements for the Category A services, to introduce new ones for Category B services, and to reintroduce a CPE for OTA licensees.

c) ***What measures might be required under such a framework to ensure appropriate financial support for the production of programs of national interest, such as dramas and documentaries?***

83. ACTRA submits that it is essential for OTA broadcasters to schedule at least two hours of original drama in the 8-11:00 pm time slot, Sunday-Friday, along with appropriate exhibition requirements for other programs of national interest, long-form documentaries and children's.

Group-based Exhibition Obligations

a) ***How can the various exhibition requirements currently in effect be simplified, streamlined or amalgamated?***

b) ***By what method could the Commission establish flexible exhibition requirements for integrated corporate undertakings and what should they be?***

***Should there be a minimum level established for each service within a group?
If so, what should it be?***

c) What measures might be required under such a framework to ensure appropriate exhibition of programs of national interest, such as dramas and documentaries?

84. ACTRA's proposed corporate group framework concentrates on the need to ensure both adequate funding, and appropriate scheduling, of drama, long-form documentary and children's programs.

Appropriate level of independent production

a) One measure to ensure the place of Canadian independent creative talent and production in the broadcasting system could be the imposition of a spending and/or exhibition requirement related to independently-produced programming. Would such an expenditure and/or exhibition requirement be appropriate and if so, what would be the appropriate level? Should minimum levels be established for specific programming categories and if so, what should those levels be and how should they be determined?

85. ACTRA submits that each broadcasting group should be required to obtain 75% of their Canadian programs, as measured both by expenditure and time, from independent Canadian producers.

b) What other measures might be required under such a framework to ensure there continues to be a diversity of programming?

86. In addition to the measures outlined in the proposed corporate group framework, ACTRA continues to support the efforts of the CFTPA to negotiate terms of trade agreements with broadcasters. A healthy independent production industry will go far in ensuring a diversity of voices in our broadcasting system.

Group-based Licensing: A proposed model

a) Is this a feasible framework to apply to groups? If not, the Commission would welcome alternative proposals with rationale for the changes.

87. ACTRA and its partners have put forward an alternative model which we believe will be more effective. While ACTRA supports the consensus document, we would strongly discourage the Commission from moving to a 55% Cancon threshold. When it came into effect in 1972, the 60% content rule was the first of its kind in the world. It has been a cornerstone of our broadcasting system,

central to the development of our television production capacity and a benchmark for other countries.

Alternative Support Mechanisms for Local Programming

a) The Commission has waived the requirement for incremental local spending and has increased BDU contribution levels for the upcoming broadcast year. It intends to revert to the initial criteria set out in Broadcasting Public Notice 2008-100. Please comment on the appropriateness of this approach.

88. ACTRA supports this approach.

Integrity of Canadian Broadcaster Signals

a) In addition to the current mechanisms, such as simultaneous substitution and mandatory carriage, are there other mechanisms that could be implemented to ensure the integrity of Canadian broadcaster signals?

b) Should the carriage of the U.S. 4+1 signals (CBS, NBC, ABC, FOX and the non-commercial PBS network) be contingent on the successful negotiation of fair market value for Canadian signals?

89. ACTRA supports this approach.

Negotiated, Fair Market Value for Conventional Signals

a) What regulatory measures are needed to facilitate fair negotiations?

b) What methodology and criteria should be used for determining the fair market value of a conventional signal?

c) Are there any other considerations that the Commission should take into account?

d) What safeguards need to be established so that the negotiations are successful and are restricted to the issue of a negotiated fair market value for the conventional signal being distributed?

e) What is the appropriate method, if required, to achieve resolution through binding arbitration?

90. There is no doubt that BDUs are well positioned to make a greater contribution; they've done quite well with the deregulation of cable fees. Since 2002 Rogers

has increased their basic cable rates an average of 85% (in Ottawa West rates shot up by 109%) while Shaw customers are paying an average 68% more (90% for those in Winnipeg East).¹⁵ The result is that cable companies made over \$8 billion in revenues last year which is a 16% increase – an impressive return particularly during a global economic downturn.

91. Should the Commission determine that it is in the best interests of the broadcasting system as a whole, ACTRA supports the expansion of fee-for-carriage to private broadcasters. However, we would add three caveats:

- revenues from fee-for-carriage must be seen on the screen in the form of new, original local and dramatic programming.
- Cable giants must not be allowed to pass the buck on to Canadian consumers as they so outrageously done for the LPIF. The CRTC should direct them to pay from their own overflowing coffers, again, the cost of doing business. With \$10 billion in revenues, BDUs can afford it.
- The CBC must be included in any new monies being put into the conventional system.

Details Regarding Possible Digital Transition Models

92. ACTRA offers no comments.

Appropriate minimum levels of spending on Canadian programming by English-language conventional television broadcasters

a) In the context of a group-based approach, for English-language broadcasters, which would be a more effective mechanism: (i) requiring a 1:1 ratio between Canadian and non-Canadian programming expenditures; (ii) requiring Canadian programming expenditures based on a percentage of group revenues as discussed in paragraph 18 and 19; or (iii) another method?

93. ACTRA believes the most effective approach is a group CPE, augmented by a specific requirement for a drama CPE from OTA broadcasters and scheduling requirements for programs of national interest, including drama.

¹⁵ CRTC, *Broadcasting Policy Monitoring Report 2002*, at 89 (Table 3); Rogers (CSR); Shaw online (<http://www.shaw.ca/en-a/ProductsServices/Television/Cable/BasicCable.htm>).

CONCLUSION

94. The time has come for change. The landscape of our television broadcasting system is shifting rapidly through consolidation, evolving technology and new means of distribution. ACTRA believes that the way to bring about that change and to ensure that the interests of Canadians are served is not to tear down the existing regulatory framework as a whole, but to build on what is working and to eliminate what is not.
95. Current definitions and rules governing priority programming are not working. Relying on the good graces of conventional broadcasters to spend money to produce and air original Canadian drama is not working.
96. What does work are the core Canadian content requirements and the regulatory model for specialty services work. It would be shrewd to take the best parts of this thriving sector and apply them to the less successful conventional side.
97. As a package, ACTRA's proposals outline a group-based approach that gives licensees more flexibility while guaranteeing support for vulnerable genres of programming.
98. We would also like to take this opportunity to offer our support for your determination in Broadcasting Regulatory Policy CRTC 2009-560 that the disclosure of aggregate financial data by private broadcasters in the public interest. We agree wholeheartedly that "Submissions based on more complete disclosure will result in better and more informed Commission decisions and will ultimately benefit the Canadian broadcasting system." and look forward to being able to assess that data prior to the public hearings in November.
99. Thank you for this opportunity to contribute to this important process on behalf of our members. We look forward to appearing before you at the public hearings this fall.

Thank you.



Stephen A. Waddell
National Executive Director

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