



October 29, 2020

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 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 – Reply Comments**

1. The Writers Guild of Canada (WGC) is the national association representing approximately 2,400 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. With respect to broadcasting, the screenwriters who make up the WGC's membership work primarily in the production of Canadian television programming in the genres of drama and comedy, including children's and youth programming, both live action and animation, as well as long-form documentary. As such, our comments here focus exclusively on television, primarily on Canadian programming expenditure (CPE) obligations, and especially those with respect to programs of national interest (PNI), which apply predominantly to larger broadcaster ownership groups.
3. The WGC has reviewed the comments of other intervenors in this proceeding, and is pleased to provide these comments in reply. Given the make-up of our membership, the WGC will focus its comments on the interventions of the Canadian Association of Broadcasters (CAB), and the three large, English-language broadcaster groups, namely, Bell Media Inc. (Bell), Corus Entertainment Inc. (Corus), and Rogers Media Inc. (Rogers) (collectively, the English-language Broadcaster Groups).

## **The comments of the CAB and large English-language Broadcaster Groups still fail to acknowledge that CPE and PNI obligations already adjust to broadcaster revenues**

4. There is no question that the COVID-19 pandemic has resulted in a public health crisis of historic proportions. The impacts of the coronavirus outbreak in Canada—and around the world—have been significant and wide-ranging. The health and safety consequences have been felt by a great number of Canadians, and even those not directly touched by the virus have experienced the stress and anxiety of uncertainty for the future while watching daily case numbers rise. To this has been added the economic impacts, which are undeniable, from lost GDP, to business closures and layoffs. Canadian screenwriters have also experienced these impacts, as our membership saw earnings drops and a number of members sought assistance from programs like the Canada Emergency Response Benefit (CERB) to help them pay their bills. Nobody would expect Canadian broadcasters to have remained untouched by the pandemic and, indeed, it appears clear they have not, with revenue declines reported in various areas of their business. The WGC does not doubt there have been impacts on broadcasting due to the pandemic and that they have been significant.
5. The fact remains, however, that with respect to expenditure requirements for Canadian programming, including on PNI, the CAB and the English-language Broadcaster Groups have come to the Commission in search of a solution that already exists, and in pursuit of a goal that we believe is ultimately not about the pandemic, but about reducing CPE and PNI requirements generally.
6. As the Commission stated in the Notice of Consultation in this proceeding (the Notice), financial requirements are calculated based on the previous year's revenues.<sup>1</sup> Spending obligations for Canadian programming for 2019-2020 were based on revenues earned in 2018-2019. Spending obligations for Canadian programming for 2020-2021 are based on revenues earned in 2019-2020. Declines in revenue that were experienced last year due to the pandemic have already been reflected in the spending obligations for the broadcast year we're currently in, and this is by operation of the existing policy, as it is. These declines will be in proportion to the severity of the revenue challenges faced. It is a fundamental feature of the CPE and PNI regimes that they follow the fortunes of the broadcasters. Those fortunes have declined in 2019-2020 due to circumstances beyond broadcasters' control. The CPE and PNI formulae have already responded with lower CPE and PNI spending levels in dollar-amounts. If CPE and/or PNI requirements could not be met in 2019-2020 due to the pandemic, then that is already a *fait accompli* because that broadcast year ended on August 31, 2020, so the only question now is what time frame broadcasters need to make up spending due that year, which was in turn based on real revenues actually earned by them the year before.
7. Reading the submissions of the CAB and the English-language Broadcaster Groups in this proceeding, you would not know that they know this is how CPE and PNI works. Corus, for example, says, "Like other Canadian businesses, broadcasters should have the opportunity to write off our pandemic-related losses and move on."<sup>2</sup> "We are unaware of other Canadian businesses, regulated or not, that may be required to treat a six-month shut down of operations essentially as though it never happened for forward planning purposes," Corus states.<sup>3</sup> These are bizarre statements to us because they bear no meaningful relation to Corus's current CPE and PNI conditions of licence, nor the CAB application,

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<sup>1</sup> Notice, para. 15.

<sup>2</sup> Corus, para. 16.

<sup>3</sup> Corus, para. 38.

nor Corus's own proposals. To be clear, Corus and other broadcasters are *not* seeking to "write off pandemic-related losses"—they are seeking to write off obligations based on *pre*-pandemic revenues. Neither the current regulatory obligations nor the WGC's proposals<sup>4</sup> would "treat a six-month shut down of operations essentially as though it never happened"—it is Corus who is seeking to treat the 2018-2019 revenue year as though it never happened. The CAB and English-language Broadcaster Groups seem quite content to treat the 2019-2020 pandemic-stricken year as though it happened for revenue purposes. It is the *good* revenue year that they seek to "write off", not the pandemic year.

8. This is further evidenced by Corus's stated concerns that, "CPE obligations are likely to rise sharply again in the subsequent broadcasting year ('BY2021-22')." <sup>5</sup> This, Corus says, "could generate significant new under-expenditures."<sup>6</sup> Yet this "sharp rise" in CPE obligations can only result from a proportionally sharp rise in broadcasting revenues. And here we see the pattern. Revenue declines are a problem for broadcasters, from which they seek regulatory relief. But revenue increases are somehow also a problem requiring the Commission's attention. Taken together, Corus is proposing that the Commission recognize depressed revenues in 2019-2020 as a cause of regulatory relief, yet be relieved from the obligations incurred by 2018-2019's very real strong revenue year, and then be concerned again that Corus might make "too much money" again going forward.
9. The rhetoric of the CAB and the English-language Broadcaster Groups are at odds with the substance of their proposals. In substance, they are *not* saying, "Give us regulatory relief due to our bad year(s);" they are predominantly saying, "Protect us from the regulatory consequences of our good year(s)." This proposition should be flatly rejected on its face.
10. We submit that the Commission should also reject broadcasters' alternative proposals that seek substantially the same objective. This includes Corus's "adjusted CPE baseline" proposal. Corus says that it:

...recommends the Commission calculate compliance with expenditure obligations for the 2019-2020 broadcasting year using an adjusted Canadian Programming Expenditure ("CPE") baseline for that year (actual regulated revenues for 2019-2020), rather than the previous year's regulated revenues.<sup>7</sup>

11. This, we submit, is simply another approach to accomplishing what the CAB's "deemed compliance" proposal seeks. The request here is *not* to adjust future obligations in relation to diminished revenues due to the pandemic. Because the existing system already does that. The request is to diminish the regulatory obligations arising from the relatively strong revenue year of 2018-2019. Again, this is not about pandemic-year losses, it is about pre-pandemic gains. Broadcasters, we submit, should not be able to cherry-pick which revenue years they wish to see recognized for CPE purposes.
12. Similarly, we submit that the Commission should reject Rogers' "PNI-to-news" proposal. "Under Rogers' proposal, we will direct PNI underspends to CPE and, in particular, to news and information

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<sup>4</sup> Nor those of any English-language Canadian programming producer or creator group that we are aware of.

<sup>5</sup> Corus, para. 21. See also paras. 36 and 49.

<sup>6</sup> *Ibid.*

<sup>7</sup> Corus, para. 4.

programming,” Rogers says.<sup>8</sup> Rogers’s proposal unfairly pits one type of important Canadian programming against another, with little-to-no evidence in support of it, at the same time as it has existing flexibilities to support news programming,<sup>9</sup> the leverage and synergies of a vertically integrated company, and the smallest PNI obligations of any large, English-language Broadcaster Group, at 5% of broadcasting revenues.

13. Finally, Bell claims that, “CPE obligations that were established for the broadcasting industry in 2017 were set based on the revenue licensees were expected to generate during the licence term.”<sup>10</sup> Bell states that:

...the annual CPE amount was based on what we projected our revenues would be given reasonable assumptions made during our last licence renewal. Obviously, it did not include the impact of a global pandemic. Our revenues have dropped precipitously and are nowhere near the levels we had projected.<sup>11</sup>

14. The WGC disagrees that the Commission set CPE obligations based on projected revenues. In Broadcasting Regulatory Policy CRTC 2015-86: *Let’s Talk TV, The way forward - Creating compelling and diverse Canadian programming*, the Commission stated its intention to maintain and expand the CPE regime, and said that, for services that did not have CPE requirements at the time, “CPE levels will be based on historical expenditure levels.”<sup>12</sup> For the large private ownership groups then operating under the group-based policy, the Commission said it would, “maintain the group-based licensing approach and existing expenditure levels.”<sup>13</sup> Later, in the renewal of licences for the television services of large English-language ownership groups, the Commission stated:

Accordingly, to avoid a situation in which fluctuations in the revenues of individual services and the group’s composition would affect the CPE requirement of the groups, the Commission considers that a standard 30% CPE level for each group and every service within the groups is appropriate. In the Commission’s view, such a requirement will ensure that the group collectively contributes to the creation of Canadian programming at an appropriate level. Moreover, such a requirement will not have an undue impact on the groups, while providing them with the flexibility to remain competitive. Accordingly, the Commission has adopted a standard 30% CPE requirement for every service being renewed within the groups.<sup>14</sup>

15. There is no mention of the Commission basing CPE levels on projected revenues in the above-noted quotations, nor anywhere else in the Commission’s decisions, and we submit that the Commission did not do so. As noted above, the Commission based the 30% CPE level on historical spending and past precedent, not on predictions of future revenues. Furthermore, it is unclear what relevance

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<sup>8</sup> Rogers, para. 17.

<sup>9</sup> E.g. Broadcasting Regulatory Policy CRTC 2016-224 – *Policy framework for local and community television*

<sup>10</sup> Bell, para. 11.

<sup>11</sup> Bell, para. 16.

<sup>12</sup> Broadcasting Regulatory Policy CRTC 2015-86, para. 217.

<sup>13</sup> *Ibid.*, para. 218.

<sup>14</sup> Broadcasting Decision CRTC 2017-148, *Renewal of licences for the television services of large English-language ownership groups – Introductory decision*, para. 30.

projections would have given that CPE levels are percentage-based (and therefore are dollar-adjusted to revenue fluctuations), not dollar amounts. The Commission clearly did *not* say, “Broadcasters are predicting \$X in revenues over the licence term, therefore they must spend \$Y towards CPE based on those projections.” The Commission did not set dollar amounts as CPE conditions of licence at all. Rather, the Commission said to Bell and the other large English-language groups, “You must spend 30% of whatever your previous year’s revenues turn out to be towards CPE.” Predicting and projecting revenues is irrelevant to that, percentage-of-*actual*-revenues-based approach.

### **Lack of evidence in support of the CAB application—Broadcasters must show their math**

16. Still conspicuous by its absence is any substantial evidence to support the expenditure-related proposals of the CAB and the English-language Broadcaster Groups, “deemed compliance” or otherwise.<sup>15</sup> This is notable because the issue at hand is fundamentally a question of numbers and math. A given broadcaster or broadcaster group had \$“A” of CPE and PNI requirements in 2019-2020, as a result of the revenues it earned in 2018-2019. The pandemic resulted in \$“B” of economic impacts that prevented broadcasters from meeting those requirements in 2019-2020, resulting in a CPE and/or PNI shortfall of \$“C”.  $A - B = C$ . \$“D” is CPE and PNI requirements of 2020-2021, based on the previous year’s revenues. And \$“E” is the economic impact of ongoing challenges to production of Canadian programming. Comparing C, D, and E provides a basis for understanding the scope of the overall challenges, the ability of broadcasters to make up any under-expenditures, and on what timeline.
17. Instead of numbers, however, the broadcasters have largely provided only rhetoric. Corus, for example, says:

The current regulated expenditure framework for television is vulnerable to sharp annual revenue fluctuations. That is why licencees are afforded a limited degree of under-expenditure flexibility. However, COVID-19 does not represent an average fluctuation that can be corrected within the current system. It is a disruptive event of an unprecedented scale. To reiterate, non-news, audiovisual productions across Canada stalled completely for half of the last broadcasting year. This has produced substantial shortfalls, which cannot be effectively filled by carrying them forward, against a backdrop of continuing volatility. A new baseline is required.<sup>16</sup>

18. What are “sharp” fluctuations? Is the “limited degree” of existing flexibility sufficient to deal with “sharp” fluctuations, or not? What does it mean to “correct” a fluctuation in this context, and why can’t the current system do so? Non-news “stalled” for how long, to what extent? What is a “substantial shortfall”? Why can’t they be “effectively filled” in the future? What degree of “continuing volatility” and for how long?

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<sup>15</sup> In this respect, we concur with the comments of the Forum for Research and Policy in Communications (FRPC), which said, at para. ES 3 of its submission in this proceeding, “the CAB’s application offers next to no evidence to support its application or to show the cumulative impact of its requests on private broadcasters’ financial position and ignores the possibility that ownership groups with discretionary income could allocate some of that income to support conventional programming services.”

<sup>16</sup> Corus, para. 57.

19. The CAB application is about a quantifiable issue. It deals in real revenues and real expenditures which can and should be expressed in numbers. These numbers are sorely lacking, despite broadcasters presumably having direct access to them. As we stated in our initial submission in this proceeding, the CAB proposal is overbroad, sweeping, and extreme. We submit that the Commission cannot effectively suspend the operation of a core element of the regulatory regime—itsself rooted in the objectives of federal legislation, namely, the *Broadcasting Act*—on rhetorical bases. And if the broadcasters’ response is, “Well, things are so unpredictable that we can’t know these numbers,” then they equally can’t know if they truly have a crisis in need of a solution, in which case they should be held to the existing (and self-adjusting) CPE and PNI formulae and issues of non-compliance can be dealt with at licence renewal, based on a much better evidentiary record.
20. Further, where broadcasters do provide numbers in support of their arguments, they have largely been redacted from the public record. For example, Bell states:
- Finally, with respect to our CPE underspend from the 2019-2020 broadcast year, for the Commission's information, we project that our annual returns to be filed 30 November 2020 will show a CPE deficit at the end of that year in the range of # #, which is the combined shortfall for TSN and our English-language group.<sup>17</sup>
21. Other broadcasters similarly have redacted other relevant data in their submissions.<sup>18</sup> We fail to understand why. Broadcasting revenues at the aggregate level are currently public information. CPE and PNI numbers are currently public information. This information goes to the heart of this application. On what basis are broadcasters claiming confidentiality in this data? How are intervenors expected to comment on an application as significant as this without the basic information on which it is based?
22. The WGC does not expect to be able to successfully challenge the broadcasters’ claims of confidentiality on these numbers in time to meet the deadline for the reply phase in this proceeding. We can only state, therefore, that not only is there not sufficient evidence on the record of this proceeding to support the relief sought, but what little has been provided to the Commission has not been made available to intervenors, who therefore cannot even comment on what is there.
23. Finally, existing evidence suggests that some broadcasters may already have the necessary flexibility. For example, according to data filed in its aggregated annual returns, Bell spent \$46.2 million more on PNI than required in the 2017-2018 broadcast year and \$15.4 million more on PNI than required in the 2018-2019 broadcast year. This means the Bell Media English group could use this total \$61.6 million overspend accumulated to date to cover its required minimum PNI spend for 2019-2020 and/or any shortfall in PNI spending it experienced in the 2019-2020 broadcast year due to the pandemic, if any shortfall actually exists.
24. Similarly, according to data filed in its aggregated annual returns, Corus spent \$36 million more on PNI than required in the 2017-2018 broadcast year but \$10.8 million less on PNI than required in the 2018-2019 broadcast year. With 2018-2019 group revenue of \$1,138,363,000, Corus is required to spend \$96,760,855 on PNI in 2019-2020, plus the \$10.8 million amount underspent in the previous

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<sup>17</sup> Bell, para. 23.

<sup>18</sup> E.g. Rogers, paras. 8, 27.

year. Assuming the \$36 million overspent on PNI in 2017-2018 was not used to reduce its required PNI spending in 2018-2019,<sup>19</sup> the \$36 million overspent on PNI in 2017-2018 could be used to cover its required minimum PNI spend for 2019-2020 and/or any shortfall in PNI spending it experienced in the 2019-2020 broadcast year due to the pandemic, if any shortfall actually exists.<sup>20</sup> No matter how the spending is allocated, Corus has a \$25.3 million PNI surplus it can allocate to meet its PNI spending obligations during the COVID-19 pandemic.

25. As such, it appears from the data that the large English-language Broadcaster Groups may already have sufficient flexibility to meet at least some of their regulatory obligations during the COVID-19 pandemic.

**The CAB and large English-language broadcaster groups still fail to acknowledge positions of different types of broadcasters and different types of programming**

26. The above-noted, redacted statement by Bell further illustrates another flaw in the proposals of the CAB and the English-language Broadcaster Groups, which is to continue to conflate the circumstances of various types of broadcasters as if all broadcasters and/or channels faced identical challenges. In Bell's case, it provides the Commission (but not intervenors) with a projected CPE deficit that combines the shortfall for TSN and Bell's English-language group.

27. Why? TSN is a sports service, and many of the live sporting events that normally comprise much of its programming were cancelled or suspended in the spring and summer due to the pandemic. It is natural, then, to presume that TSN's CPE on sports programming was substantially affected in the period from approximately mid-March to midsummer. If that occurred, then it is a sports-specific issue affecting a sports channel with respect to sports-related CPE. Why should Bell then get a reduction on PNI for its English-language group due to impacts on TSN, which isn't even part of that group?

28. Bell is not alone in this,<sup>21</sup> and it continues to be an issue with respect to independent broadcasters versus large broadcaster groups, news versus sports, news and sports versus PNI, vertically integrated broadcasters versus those unaffiliated with broadcasting distribution undertakings or other communications services, and so on. The failure of the CAB and the English-language Broadcaster Groups to distinguish between broadcasters and/or services which have truly been hit hard, and those who may have faced more moderate impacts that are manageable within existing regulatory parameters, continues to make their proposals overbroad, sweeping, and extreme, and is another reason we submit they should not be granted by the Commission.

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<sup>19</sup> Given limitations on how broadcasters report spending, we are unable to determine how much any overspend from previous years is applied to meet minimum spending requirements in any given future year.

<sup>20</sup> Moreover, in Broadcasting Decision CRTC 2020-220, dated July 10, 2020, the Commission approved Corus' request for additional regulatory flexibility by increasing its maximum allowable yearly under-expenditure for CPE and PNI from 5% of the minimum required CPE/PNI for each year of the licence term to 10% of the minimum required CPE/PNI for each year of the licence term.

<sup>21</sup> E.g. Rogers, para. 13.

## **The CAB and large English-language broadcaster groups proposals bears little relation to the Act or the impacts for Canadian audiences**

29. The submissions by the CAB and the English-language Broadcaster Groups make little-to-no reference to the objectives of the *Broadcasting Act*, nor to the Canadian audiences whose interests are ultimately sought to be furthered therein. Reading broadcaster submissions, it's difficult to see much, if any, acknowledgement of the role they play in the production and distribution of Canadian programming for the benefit of Canadian audiences and the betterment of Canada as a nation.
30. Interestingly, Corus initially might have seemed the exception, quoting Broadcasting Regulatory Policy CRTC 2015-86 in its submission, and the emphasis therein on the creation of compelling high-quality productions by Canadians as being in the interest of Canadian audiences.<sup>22</sup> Upon closer examination, however, Corus seems more interested in challenging the Commission's approach to this proceeding as being incompatible with the 2015 policy,<sup>23</sup> than it is with Canadian audiences themselves. Strangely, having characterized the interests of Canadian audiences as being "paramount,"<sup>24</sup> Corus then goes on to say, "It is difficult to imagine how deeming broadcasters compliant with their expenditure obligations for BY2019-20 will have an 'unreasonable impact' on Canadian audiences."<sup>25</sup> And, "Furthermore, it is difficult to imagine how other beneficiaries of the obligations – Canadian audiences and communities – would be impacted by the Commission's proposal any differently than the CAB's proposal."<sup>26</sup>
31. Corus appears to be effectively saying that the interests of Canadian audiences are paramount, and yet at the same time those interests are somehow not served by having access to Canadian programming, and/or they wouldn't be affected by its reduction. In our view, this flies in the face both of the *Broadcasting Act* and simple common sense. Canadian programming is for the benefit of Canadian audiences. It's why we have an Act. Reducing or eliminating Canadian programming impacts Canadian audiences, and the greater the reduction, the greater the impact. It may be difficult for Corus to imagine, but it is not difficult for us, nor are we the only ones.<sup>27</sup>

### **Amortization cuts both ways**

32. In its submission, Corus states:

CRTC conditions of licence require CPE to be reported on an amortization basis, and Generally Accepted Accounting Principles ("GAAP") dictate that programs cannot begin to be amortized until they air (i.e. it is not related to the actual cash outlay). Accordingly, when budgeting, Canadian broadcasters must not only plan for amortization expenses for their next fiscal year, they also must anticipate needs for subsequent years.<sup>28</sup>

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<sup>22</sup> Corus, para. 14.

<sup>23</sup> Corus, para. 15.

<sup>24</sup> Corus, para. 14.

<sup>25</sup> Corus, para. 29.

<sup>26</sup> Corus, para. 40.

<sup>27</sup> E.g. FRPC, para. ES 4.

<sup>28</sup> Corus, para. 22.



33. Corus further states that, “Since licence fees are typically paid throughout production, the following years’ programming requirements have a direct and significant impact on the estimated cash programming payments in the fiscal budget.” In this way, Corus appears to seek to emphasize that amortization “reaches into the future” for planning purposes. What they do not mention, however, is that amortization also “reaches into the past,” as cash payments made in previous (non-pandemic) years are also recognized during the pandemic-induced downturn. The WGC pointed this out in our initial submission in this proceeding.<sup>29</sup> We find Corus’s comments then, to be, at best, an incomplete picture of how amortization affects broadcasters’ ability to meet their expenditure requirements, either as they come do or on a “make-up” basis. Just as amortization requires broadcasters to consider future requirements in current planning, it also allows them to count past spending towards current expenditure obligations. Both of these facts must be recognized in assessing the impact of amortization on the issues currently at hand.

**Clarity and predictability are best achieved by allowing the existing expenditure regime to operate as designed**

34. Corus says that, “a key benefit of [the “deemed compliance”] approach is the clarity it would offer broadcasters in their complex multi-year program budgeting process, which must be undertaken on an amortization basis.”<sup>30</sup> Rogers states that, “predictability in terms of costs going forward is paramount in the current volatile financial environment.”<sup>31</sup>

35. The WGC submits that the clearest and most predictable way forward is for the Commission to maintain the (self-adjusting) approach to CPE and PNI that already exists for the English-language Broadcaster Groups and has existed for many years. This approach is clear and familiar to all parties. Maintaining an existing approach results in greater predictability than changing that approach mid-licence-term. The latter would increase the possibility for new rules or procedures to generate new questions of interpretation, thereby reducing clarity and predictability. If broadcasters are seeking clarity and predictability, then an existing formula is preferable to the uncertainty of a new and different regulatory approach introduced in haste, amidst a crisis, in the middle of a licence term.

**Competition from foreign Internet-based content providers is not a relevant factor**

36. Bell and Corus, for example, note the issue of unregulated foreign digital content services operating in Canada in their submissions.<sup>32</sup> Corus states that CPE under-spending last year should not be treated as an ongoing obligation, “as our foreign digital competitors have continued to increase their subscriber base during the pandemic, and they will carry no pandemic-related expenditure obligations into the future.”<sup>33</sup>

37. We submit that the current regulatory asymmetry between traditional Canadian broadcasters and Internet-based, largely foreign content providers should have no bearing on this proceeding. This regulatory asymmetry has existed, and has been recognized as such, for many years. The WGC, among

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<sup>29</sup> WGC, paras. 18-21.

<sup>30</sup> Corus, para. 31.

<sup>31</sup> Rogers, para. 12.

<sup>32</sup> E.g. Bell, para. 11; Corus, para. 16.

<sup>33</sup> Corus, para. 16.

others, has long advocated for it to be resolved in favour of extending regulatory obligations to appropriate digital content platforms, not by reducing or elimination such obligations for Canadian broadcasters. By every account, we are finally in a position where that will soon happen, with new broadcasting legislation expected to be tabled within months, if not weeks.<sup>34</sup> The Commission cannot move to dismantle the existing regulatory regime, even in part, at the very moment that it is being expanded to create greater equity for Canadian broadcasters.

38. Regulatory asymmetry is a continuing structural issue. It was not caused by the pandemic, and should not be dealt with as if it were. The solution is at the legislative level and it is on the way. It should not be a factor in this proceeding, which is about the crisis caused by the pandemic.

### **Holding broadcasters to regulatory requirements does not create a “windfall” to content creators**

39. Corus states:

We trust [certain government COVID-19 assistance measures], on top of amounts from federal assistance programs like the Canada Emergency Wage Subsidy (“CEWS”) and Commercial Rent Relief program, have helped to compensate the independent production and creative groups for productions that did not take place in BY2019-20. When addressing the second outcome above, the Commission should consider the degree to which these groups’ losses have already been addressed by government funding. The Commission should aim to avoid providing a windfall to these groups in respect of any relief measure.<sup>35</sup>

40. The WGC does not understand this comment. Existing COVID-19 relief measures have eligibility criteria, and these generally include the loss of revenue, income, and/or employment. To be eligible for the CERB, broadly speaking, applicants must have had reduced work hours, have stopped working, or be unable to work, all because of COVID-19.<sup>36</sup> To be eligible for COVID-19 Emergency Relief Funds – CMF Allocation, an applicant must affirm and attest, among other things, that it has been, “negatively impacted by COVID-19, which has resulted in financial hardship and is therefore in need of Emergency Relief Funds to ensure a continuity of operations and to safeguard jobs.”<sup>37</sup>
41. Existing COVID-19 government relief measures are targeted to individuals and companies that are not working and earning income due to COVID-19. CPE and PNI obligations result in creators and others working and earning income. These are two different, mutually exclusive things. If people are working, they don’t need relief, and if they need relief, it’s because they’re not working. It’s almost as if Corus had asked the Commission to ensure that their CPE obligations don’t result in a “windfall” to some beneficiaries because Employment Insurance or other social benefits also exists.

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<sup>34</sup> Townsend, Kelly. “Updated Broadcasting Act to be tabled in fall, says Heritage minister”, Playback (June 17, 2020), (<https://playbackonline.ca/2020/06/17/updated-broadcasting-act-to-be-tabled-in-fall-says-heritage-minister/>).

<sup>35</sup> Corus, para. 17.

<sup>36</sup> <https://www.canada.ca/en/revenue-agency/services/benefits/apply-for-cerb-with-cra/who-apply.html>

<sup>37</sup> COVID-19 Emergency Relief Funds – CMF Allocation Criteria, Canada Media Fund, section 3.1 (<https://cmf-fmc.ca/getattachment/cec40b98-1450-43bd-9f06-e4caf2100ac4/attachment.aspx>).

42. Alternatively, Corus may be implying that members of the production community may be improperly abusing the system by accessing government benefits that they are not entitled to. We would certainly hope, however, that Corus is not making that suggestion without an evidentiary basis upon which to do so. In the absence of such evidence, we would hope that Corus would not make such a suggestion. Moreover, we do not see a role for the Commission in policing unemployment benefits, pandemic-related or otherwise, within the broadcasting system, nor do we see a link between such benefits and regulatory obligations to support Canadian programming.

#### **“Absent bad faith” is not a workable regulatory approach**

43. The WGC continues to believe that “absent bad faith” would not be an efficient or effective method of assessing regulatory compliance under the CAB proposal. We note that Corus has suggested that the Commission could:

...adopt explicit guidelines or indicia of ‘bad faith’ for licencees who benefit from ‘deemed compliance.’ For example, the Commission may consider it to be an act of ‘bad faith’ where it obtains clear evidence that a licencee provided misleading or incomplete information, or that a licencee took the measure or course of action based on facts that its senior management knew or ought to have known was untrue had they made reasonable enquiries. ‘Bad faith’ could be assessed at licence renewal.<sup>38</sup>

44. In addition to transferring the burden of proving regulatory compliance from broadcasters to the Commission or others, Corus’s comments, in our view, demonstrate the significant added complexity that such an approach would represent, involving multiple indicia and potentially lengthy investigations of what senior management knew or ought to have known.

45. The WGC also supports the comments of the FRPC in this proceeding, which notes that the CAB is making this proposal at the same time as it is arguing to reduce the reporting, and therefore the available evidence, upon which a finding of bad faith might be grounded.<sup>39</sup>

#### **Production shut-downs in the spring/summer of 2020 is not a reason to reduce regulatory obligations**

46. The CAB and English-language Broadcaster Groups have noted COVID-19 related production shutdowns as a factor supporting their application for “deemed compliance” or similar regulatory responses. Rogers, for example, states that, “production of commissioned Canadian programming has all but ceased, with only a small percentage of productions slowly resuming with very reduced production schedules under the new government safety guidelines.”<sup>40</sup>

47. Firstly, while much production was shut down in the spring and early summer, animation production was much less affected than live action, and a great deal of all types of production effectively restarted over the summer and fall.

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<sup>38</sup> Corus, para. 32.

<sup>39</sup> FRPC, paras. 53-58.

<sup>40</sup> Rogers, para. 8.

48. Secondly, some broadcasters cite not a shut-down of production, but a glut of it in support of the very same regulatory response. Bell says:

Additionally, producers are currently benefiting from the increased service production of foreign film and television companies who have booked much of the studio space available throughout Canada. Already-greenlit CPE projects are competing for scarce studio space and production crews, causing substantial backlogs.<sup>41</sup>

49. Bell does not cite data on the “increased service production” that it relies upon for this statement, and the WGC is not aware of such production being at higher levels this year than it has been in years previously. Moreover, Bell says that CPE projects are coming back at such volume that it’s creating a glut that production infrastructure cannot handle. So, which is correct: Rogers’s characterization of production as “all but ceased” and only “slowly resuming with very reduced production schedules,” or Bell’s characterization as a production glut that is causing a shortage of studio space? Where is the data to support either statement?

50. And if the issue is one of timing—i.e. there was a general shut-down of production in the spring, and a bottleneck of increased production now—then the solution is also one of timing, which would involve the Commission giving broadcasters more time to meeting their CPE and PNI obligations. It should not be resolved by cancelling those obligations altogether.

51. Finally, Bell’s reference to foreign location service production is of no relevance to the production of Canadian programming, nor is it of any help for the screenwriters and others who do not make such content. Canadian screenwriters do not write foreign service production content, they write Canadian content.<sup>42</sup> The latest Hollywood comic book movie shooting in Toronto or Vancouver is of no benefit to them, and it is not interchangeable with Canadian content production that tells Canadian stories for Canadian audiences.

**Any additional flexibility with respect to timing to fulfill spending obligations should not extend beyond the current licence period**

52. While the WGC still has seen no evidence to support the need for additional flexibility on CPE and PNI obligations—because broadcasters have not provided it—we acknowledge that some flexibility may ultimately be necessary. We nevertheless submit that the Commission should endeavour to limit such flexibility provided under this proceeding to the current licence term. As noted above, production is already resuming and the country is learning to manage with the virus while we wait for a vaccine. It may become increasingly complex for the Commission to extend obligations attached to conditions of licence beyond the terms of those licences. We submit that it’s simpler and safer to hold broadcasters to their obligations when they come due, rather than defer them to an increasingly uncertain future. If further flexibility does ultimately become absolutely necessary, however, it will be far preferable to consider it during the licence renewal proceeding, when more data will be available to the Commission and intervenors. Granting blanket flexibility of an extended period of time, well

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<sup>41</sup> Bell, para. 18.

<sup>42</sup> And if Canadian screenwriters are writing foreign location service production content, it is because they are doing so from Los Angeles, and have effectively left the Canadian industry and joined the American one.

beyond the current licence term—for upwards of five years as proposed by some broadcasters<sup>43</sup>—is premature for this proceeding, at this time.

**Closing Remarks**

53. We thank the Commission for the opportunity to participate in this proceeding.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Maureen Parker', with a stylized, cursive script.

Maureen Parker  
Executive Director

c.c.: Council, WGC

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<sup>43</sup> E.g. Bell, para. 22; Corus, para. 51.

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