



CFTPA

Representing television, film
and interactive production in Canada

ACPFT

Porte-parole de l'industrie de la production télévisuelle,
cinématographique et interactive au Canada

www.cftpa.ca

July 19, 2010

Via CRTC comments/interventions form

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Dear Mr. Morin:

Re: Broadcasting Notice of Consultation CRTC 2010-379, Item #1 – Application by Rogers Broadcasting Limited, on behalf of The Biography Channel (Canada) Corporation, for authority to amend the tangible benefits associated with the national English-language Category 1 specialty programming undertaking known as Biography Channel (Application No. 2009-1271-8)

1. The Canadian Film and Television Production Association (the “CFTPA” or the “Association”), which will soon officially change its name to the Canadian Media Production Association (CMPA), welcomes the opportunity to provide these **comments** with respect to the above-referenced Notice of Consultation.
2. The CFTPA represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. Our almost 400 member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.

The Application

3. Rogers Broadcasting Limited (“Rogers” or the “Applicant”) has filed an application (the “Application”) seeking authority to amend the tangible benefits associated with its acquisition of 100% ownership of Biography Channel, which was approved pursuant to streamlined procedures (*Broadcasting Public Notice CRTC 2006-107*). The Applicant is requesting to redirect the entire amount of \$500,000 in benefits from the Rogers Documentary Fund to a new, self-administered fund that it proposes to establish to be known as the Biography Programming Initiative.
4. Rogers argues that the programming developed through the proposed Biography Programming Initiative would enhance the current schedule and provide Canadian audiences with new and exciting biography-related series and personality docu-soaps. Such programming would be consistent with the Biography Channel’s nature of service and biographical format.
5. The Applicant states that the benefit expenditures would be incremental to the Biography Channel’s Canadian program expenditure requirements and would flow to third-party independent producers for the creation of high-quality Canadian documentary

programming. Program proposals would be welcome and encouraged from producers across Canada for the purpose of ensuring regional reflection. Rogers confirms that none of the tangible benefits will be used for administration costs.

6. The Applicant agrees to spend a minimum of \$125,000 each year to ensure all funding is expended by the end of the original term of August 31, 2013. It is also prepared to file annual reports with the Commission detailing all expenditures and the incremental nature of the funding.

The CFTPA's Comments

7. The CFTPA is of the view that the most advantageous approach for the system as a whole would be for the Biography Channel tangible benefits to be distributed via an arm's-length fund, such as the Rogers Documentary Fund, in the absence of Terms of Trade between Rogers and the CFTPA (on behalf of independent producers). In addition, we believe the Application brings to light certain aspects of the benefits policy that need to be reiterated and stated with clarity to ensure future benefits packages are implemented as intended by the policy. The CFTPA's rationale for these statements is set out below.

In the absence of Terms of Trade, arms-length funds are more appropriate

8. Three main policy statements set out what the CRTC expects in regards to tangible benefits in ownership transactions involving a change of ownership or control of television undertakings.¹ They state that because the CRTC does not solicit competing applications and because just one proposal is put forward, the onus is on the applicant to prove that its plan is the best possible proposal "in the public interest".
9. Among other things, the applicant is required to propose a package of "significant and unequivocal benefits" that will result in measurable improvements to the communities served by the undertaking(s) and to the Canadian broadcasting system as a whole. [emphasis added]
10. The tangible benefits policy furthers the diversity of voices in the Canadian broadcasting system by requiring that a majority of television benefits flow to third parties, such as independent producers. As such, the policy has become the "lifeblood" for Canadian programming and the independent production sector.
11. However, this is diminishing in an environment where self-directed benefits have become the norm in television benefits packages, as opposed to contributing the money to a third-party, independent fund such as the Rogers Documentary Fund or an endowment. The overall impact of self-directed benefits is a move away from measurable improvements in the system as a whole. These benefits necessarily focus on only the specific genre or program format of choice of the particular broadcaster (sometimes an under-represented format and sometimes not) and the established processes and partners of choice. As a result, the recent experience has been that only a handful of independent producers have benefited from the self-directed benefit approach by virtue of the fact that the broadcaster controls which program genre or format is the focus, which projects to support, and the producers with whom to work.
12. Moreover, self-directed benefits packages have given broadcasters an increasing amount of power over producers wishing to access benefits funds with respect to licence terms. Since benefits funds provide an injection of rare incremental money into the system for the creation of Canadian programming, and producers are eager to access the funds given the limited

¹ See *Public Notice CRTC 1989-109*, ELEMENTS ASSESSED BY THE COMMISSION IN CONSIDERING APPLICATIONS FOR THE TRANSFER OF OWNERSHIP OR CONTROL OF BROADCASTING UNDERTAKINGS, September 28, 1989; *Public Notice CRTC 1993-68*, Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings, May 26, 1993; *Public Notice CRTC 1999-97*, BUILDING ON SUCCESS - A POLICY FRAMEWORK FOR CANADIAN TELEVISION, June 11, 1999.

amount of funding in the system, broadcasters are able to dictate licence terms to producers even more than usual, particularly in light of the lack of independent guidelines for many self-directed funds, beyond a level of expenditure requirement on independent production.

13. It is for this reason that, in the absence of Terms of Trade agreements between broadcasters and the CFTPA, the Association has advocated for a better balance between benefits initiatives that support the Canadian broadcasting system in general (system-wide benefits such as contributions to arms-length funds or endowments) and those intended solely for the television markets in question or to benefit the applicant's own programming services (self-directed benefits).
14. The CFTPA notes that, in approving Rogers' acquisition of the Citytv stations in 2007, the Commission expressed an expectation that Rogers "take a lead role in negotiating Terms of Trade agreements with independent producers", as Rogers pledged to do at the public hearing.² In the absence of such a Terms of Trade agreement between Rogers and the CFTPA, we respectfully submit that it is more appropriate to require the Biography Channel benefits to be distributed via an arm's-length fund like the Rogers Documentary Fund.

Is it appropriate to fund "docu-soaps" with public benefits funds?

15. The Association also notes that, generally, public benefits have gone to support Canadian programming in under-represented categories, such as documentaries. Rogers' proposal to now use Biography Channel benefits dollars to fund "biography-related series and personality docu-soaps" would appear to be inconsistent with the traditional focus placed on under-represented programming.
16. It is possible that the type of programming that Rogers now wants to support with the Biography Channel benefits monies would be ineligible under the Rogers Documentary Fund. The CFTPA respectfully submits, therefore, that the simplest way to guarantee that benefits monies go to fund true documentaries, as originally proposed, would be to require that benefits be directed to the Rogers Documentary Fund.

The need to establish a baseline for incrementality

17. The CFTPA notes that under the original benefits proposal whereby monies would be directed to the independently administered Rogers Documentary Fund, there was no need to establish a baseline spending level to ensure that benefits expenditures are incremental to Biography Channel's existing, on-going Canadian programming expenditure requirements. However, should the Commission agree with Rogers' request to redirect benefits expenditures to a self-directed benefits package, there is a need to determine an appropriate baseline spending level to ensure the incrementality of benefits spending.
18. In this regard, there is a question as to what broadcast year or Canadian spending level is appropriate to use for setting a baseline given that Rogers' Application comes four years after the original transaction. It is well known that broadcasters generally reduced their overall costs, including Canadian programming expenditures, to the maximum extent possible under their conditions of licence during the past couple of years during the challenging economic environment.
19. Accordingly, the CFTPA encourages the Commission to use an approach, such as a three-year average if appropriate, that results in the establishment of a baseline for the maximum benefit of the system as a whole and one that reflects Rogers' privileged position as a large corporate ownership group.

² *Broadcasting Decision CRTC 2007-360*, Transfer of effective control of 1708487 Ontario Inc., 1738700 Ontario Inc. and CHUM Television Vancouver Inc. to Rogers Media Inc., September 28, 2007, Expectation #3.

Unspent benefits expenditures are unacceptable

20. The CFTPA is deeply troubled that, four years after receiving approval to acquire 100% ownership of Biography Channel, Rogers has yet to spend a single dollar of the benefits. Commission staff noted in a deficiency question to Rogers that the typical standard approach to paying benefits monies has been that these are paid on a yearly basis in roughly equal amounts.
21. While Rogers has now committed to spend a greater amount of benefits funding in equal amounts per year to ensure the entire \$500,000 is expended by the end of the original term of August 31, 2013, the CFTPA considers it unacceptable that, unless explicitly told, some broadcasters continue to be lax in meeting their benefits obligations in a timely manner.
22. It is disingenuous of Rogers to argue that it has not made any benefits expenditures because it was not an explicit requirement or expectation of the decision to approve its acquisition of Biography Channel that it do so in roughly equal amounts on an annual basis. Rogers knows, or ought to have known, that it has long been the Commission's expectation that benefits be expended in roughly equal amounts annually. The Commission has expressed this expectation in various decisions over the years. The fact that it failed to do so in this case does not relieve Rogers of that expectation. A requirement that Rogers file an annual report on its Biography Channel benefits would have made any misunderstanding of the policy clear.
23. As a result of this situation now coming to light, the CFTPA would propose that the Commission, as it has in the past, explicitly state in its decision on this matter, and generally as a matter of policy, that benefits must be expended in roughly equal amounts on an annual basis over the course of the prescribed benefits term. Furthermore, we would suggest that the commitments by Rogers outlined above in paragraphs 5 and 6 would be useful to articulate as standard criteria for benefits packages.

Conclusion

24. In summary, given the significant power that self-directed benefits packages provide broadcasters over producers wishing to access benefits funds, and in the absence of Terms of Trade agreements between broadcasters and the CFTPA to mitigate that power, the Association submits that it is more appropriate that the Biography Channel benefits be distributed via an arm's-length fund like the Rogers Documentary Fund.
25. Should the Commission approve the Application, we urge it to establish an appropriate baseline spending level to ensure that benefits expenditures are incremental to Biography Channel's existing, on-going Canadian programming expenditure requirements, and that benefits funds will flow to third-party independent producers. To avoid any confusion, the Commission should explicitly state that none of the tangible benefits be used for administration costs. It should also require, by condition of licence, that a minimum of \$125,000 in benefits funding be spent each year by August 31, 2013, and that Rogers file annual reports with the Commission detailing all expenditures and the incremental nature of the funding. These reports should be made public so interested parties can assess Rogers' compliance with its obligations.
26. The CFTPA respectfully suggests that, in light of the seeming uncertainty on the part of certain broadcasters with regard to the benefits policy, the Commission reiterate that all benefits expenditures are required to be spent in roughly equal amounts each year over the course of the prescribed benefits term and that yearly reporting is required, and that those reports be made public.

27. Finally, the CFTPA proposes that the following commitments, some of which are made by Rogers in its Application and most of which are standard to benefits policies, would be useful to clearly articulate as standard criteria under the general benefits policy:
- Benefits expenditures must be incremental to existing Canadian programming expenditure requirements;
 - At least 90% of benefits expenditures should be allocated to “on-screen initiatives”, meaning the creation of incremental, original Canadian programming;
 - The vast majority of on-screen benefits (at least 85%) must flow to Canadian independent production, with a focus, where possible, on programs of national interest;
 - Independent productions should be encouraged from across Canada for the purpose of ensuring regional reflection;
 - None of the benefits monies are to be used for administrative costs; and
 - Annual reports must be filed, detailing expenditures, incrementality, and any other information the Commission requires, and these reports should be publicly available.
28. The CFTPA appreciates the opportunity to comment on the Application. A copy of this intervention has been sent to the Applicant.

All of which is respectfully submitted.

Yours truly,

[Original signed by Norm Bolen]

Norm Bolen
President and CEO

c.c.: Susan Wheeler, Vice-President, Regulatory Affairs, Rogers Media (via email: susan.wheeler@rci.rogers.com)

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