Writers Guild of Canada

January 11, 2011

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

Submitted via E-Pass

Dear Mr. Morin,

Re: Broadcasting Notice of Consultation CRTC 2010-926 – Application No. 2010-1506-6 by BCE Inc. ("BCE") on behalf of CTVglobemedia Inc. ("CTVgm") for authority to transfer the effective control of CTVgm's broadcasting entities to BCE (the "Application")

1. The Writers Guild of Canada (the WGC) is the national association representing over 2000 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. The WGC wishes to **support** BCE's acquisition of CTVgm's broadcasting assets subject to issues raised in this intervention.

2. The WGC requests the opportunity to appear at the public hearing scheduled to commence on February 1, 2011 in order to further elaborate on the following issues from the perspective of creators of Canadian programming.

Executive Summary

3. The WGC sees no impediments to BCE's acquisition of CTVgm broadcasting assets other than the appropriate application of the Commission's Tangible Benefits Policy and an appropriate valuation of the broadcasting assets. There may be intangible benefits to the Canadian broadcasting system from the acquisition of CTVgm by a broadcasting distribution undertaking with deep pockets. There may also be synergies that will benefit Canadian audiences looking for content on any and all platforms. However, as CTVgm was not in financial distress or failing to live up to its obligations to the Commission and the Canadian public, the intangible benefits to the Canadian broadcasting system of CTVgm's acquisition by BCE are not as easy to demonstrate as in other recent acquisitions. However, consolidation and vertical integration does appear to be inevitable, particularly as both BCE and CTVgm need to remain competitive with newly integrated Shaw Media. A balanced Canadian broadcasting system with several equally healthy stakeholders is a clear intangible benefit to Canadians.

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4. The WGC's support of this transaction is conditional upon the Commission's detailed review of the valuation of the broadcasting assets taking into consideration several issues outlined below and BCE filing a revised benefits package that is a clear commitment to pay tangible benefits consistent with Commission policy. In particular, the WGC recommends that the tangible benefits be amended to reflect the following elements of Commission policy and precedent:

    - 10% of the value of the transaction for all television assets
    - Pre-existing overdue benefits belonging to the seller to be expended according to an accelerated payment schedule
    - Incremental and based on clearly identified allocations
    - No expenditures which are the cost of doing business
    - 85% allocation to onscreen expenditures
    - 85% allocation to independent production
    - 65% of onscreen expenditures allocated to drama
    - Spent over a 7 year term
    - Spent equally over the term after a first year for start up

Valuation

5. As a small non-profit professional guild, the WGC does not have the financial resources to provide the CRTC with a detailed financial review of the valuation of the acquisition of CTVgm broadcasting assets. We trust that the CRTC will conduct its usual due diligence to ensure that the data provided is accurate, appropriately considered and properly accounted for and shall advise stakeholders should it determine if the valuation requires revision. In the meantime, the WGC, DGC, ACTRA and CMPA have pooled their resources to engage Joel R. Fortune, independent regulatory counsel, to prepare a report, attached as Schedule 1 (the "Joint Report"), relating to various issues in respect of the valuation and application of the Commission tangible benefits policy. In particular, in relation to the question of valuation, the Joint Report addresses BCE's calculation of the valuation of the broadcasting assets and the appropriateness and valuation of exclusions. We bring these issues to the attention of the Commission and ask that it carefully consider them.

6. In particular we draw your attention to the exclusion of New Media operations as non-broadcast assets. While 'new media' has traditionally been excluded as unregulated businesses, as this Application is testament to, there is no longer clear separation of the regulated broadcast business and unregulated digital media business. BCE wants to own all of CTVgm because it wants to be able to own and control the broadcast of content across all media platforms. They will be taking, as CTVgm already has been, a multi-platform approach to the development of business and exploitation of rights. It would be consistent with Commission policy regarding the expenditure of both benefits and BDU contributions to Canadian programming to include those digital media broadcasting activities which are directly related to licensed broadcasting activities. Commission benefits policy has always evolved to adapt to changing circumstances in the industry and this is one instance where it would be appropriate for policy to evolve. There is too much room for error or abuse when

integrated businesses are separately valued solely to be excluded from the application of a benefits policy.

7. We also object to the exclusion of 'CTV Legacy' assets as these are assets that BCE sold for substantial consideration and is now paying substantially to re-acquire. As outlined in the Joint Report, there is no basis for the exclusion of Category 2 specialty services from valuation. There is also no basis for discounting the conventional services in the calculation of tangible benefits. We objected to Shaw receiving a discount in the Shaw-Canwest Decision[1] but the Commission made that decision based on the argument that a discount was warranted given that the conventional assets had been under CCAA protection. There is no similar situation here. While the 2010 aggregate annual returns recently posted on the Commission's website demonstrate that CTVgm's conventional stations incurred a loss in 2010, a review of data demonstrates that ad revenue increased over 2009 revenue yet sports programming expenses increased by over $134 million. CTVgm's conventional stations cannot be said to be suffering financially when it appears to be due in large part to the allocation of 2010 Winter Olympics programming expenses. Accordingly, the full value of the CTVgm broadcasting assets must be included in the assessment of tangible benefits payable under Commission policy.

8. We look forward to the Commission's detailed financial review of the valuation of the CTVgm assets. We respectfully submit that, as set out in the Joint Report, BCE's valuation is conservative at $2.468 billion and we expect that the Commission will find that it would be consistent with Commission policy to increase it, taking into consideration the issues addressed above and in the Joint Report. The required benefits package would necessarily have to be increased based on the increased valuation.

<u>Tangible Benefits Policy</u>

9. BCE has asserted that the Commission's benefits policy is applied on a 'case-by-case' basis and when applied to the circumstances of this case the determination should be that no benefits are payable. As set out in the Joint Report, we agree that the Commission takes a 'case-by-case' approach but only within a consistent policy framework that governs its deliberations. This policy framework does not excuse BCE from the payment of benefits in this case.

10. This transaction clearly is an acquisition of control of CTVgm by BCE, therefore triggering the application of the Commission's Tangible Benefits Policy. BCE's previous ownership is not relevant as it sold off its control position in 2006. Its reacquisition of control puts it in the same position as any third party who might be acquiring control and as such BCE should be treated as any third party would be.

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[1] Broadcasting Decision CRTC 2010-782 (the "Shaw-Canwest Decision")

11. Further, unlike the recent Shaw acquisition of Canwest, BCE is not saving a broadcaster for the good of the Canadian broadcasting system. This acquisition is for the benefit of BCE and their shareholders, allowing BCE to take greater advantage of synergies between distributor and broadcaster and be more competitive with Shaw Media. As the intangible benefits to the Canadian broadcasting system are therefore less obvious, the necessity for BCE to pay tangible benefits of clear benefit to the entire Canadian broadcasting system are even greater.

12. The WGC is greatly concerned with this recent trend towards purchasers arguing against the application of the Commission's clear Tangible Benefits Policy. Numerous aspects of the policy were upheld by the Commission during the Shaw-Canwest Decision yet here we are again arguing that the Commission needs to apply its Tangible Benefits Policy in a consistent manner for the certainty and fairness of all stakeholders. As outlined in our submission to the Shaw-Canwest public hearing, the Commission's benefits policy has been outlined in numerous Policy documents and Decisions. It is often adapted to circumstances and the changing industry. However, it is important for the integrity of the Commission that Tangible Benefits Policy continue to be applied consistently when control of broadcasting assets are acquired. Tangible benefits are clearly payable as a condition of approval of this transaction.

<u>Allocation of Tangible Benefits Policy</u>

<u>Previous Benefits</u>

13. Before getting into the allocation of benefits that BCE proposes to pay if it is required to pay benefits, we would first like to address the unpaid benefits from previous transactions which BCE will be assuming as part of this transaction. While we are pleased that we do not have to argue about the appropriateness of assuming unpaid benefits in addition to payment of new benefits we are concerned about BCE's unwillingness to propose a payment schedule for the old benefits. Commission staff noted that almost $10 million of tangible benefits from the previous BCE transaction (Decision CRTC 2000-747) were still unpaid ten years after the approval of the transaction. In the deficiency letter dated November 25, 2010, Mirko Bibic, Senior Vice-President, Regulatory and Government Affairs of BCE advised:

    "At this time, we cannot commit to a specific timeline for the expenditure of these funds, as finding the right project, creatively, and then assembling the requisite financing is not easily accomplished or predicted."

14. From our experience with the television industry, every broadcaster is challenged to find the right project and, led by the independent producer, assemble the necessary financing to produce it. Every tangible benefits package is based on the idea that broadcasters will find projects to licence and spend the benefits money on, within the time frame approved by the Commission. We do not see how these basic requirements of television production should be the basis for exempting BCE from making any commitment to spend the outstanding benefits monies when they are already three years past the end of the licence term. If third party financing is the problem then BCE could easily pay the full costs of

production. BCE could apply for approval to allocate the money to other forms of television production. The money must be spent and it must be spent now.

15. Benefits are to be paid by the end of the licence term. Due to past avoidance of payment of benefits the Commission has started to require payment schedules to ensure that benefits are paid roughly equally over the course of the term. We do not see any reason why the Commission should not require the same payment schedule from BCE. In particular, as these unpaid benefits are at least three years overdue, we would request that the Commission require an expedited payment schedule to ensure that these benefits are paid out as soon as possible. To do otherwise would be to create an uneven playing field between broadcasters.

Calculation of Benefits

16. BCE calculated the benefits as 6% on radio, 10% of specialty service assets and 5% on conventional television assets. As pointed out in the Joint Report, the 5% calculation is not consistent with Commission policy. In the Shaw-Canwest Decision, Shaw was granted the discount of 5% on conventional assets because they were distressed and under CCAA protection. There are no similar circumstances with CTVgm's broadcasting assets. In fact as set out above, if CTVgm's conventional assets are still experiencing a loss, it appears to be in large part due to the allocation of 2010 Winter Olympics programming expenses. We therefore request that the Commission find that the value of all of the television assets is subject to the 10% calculation for benefits. At the current valuation of television assets that would mean a television benefits package of $215 million rather than $201.7 million, however we do anticipate that the Commission will find that the overall value of the television assets should be increased and therefore the television benefits package will be increased. We have no comments on the radio benefits allocation.

Allocation of Tangible Television Benefits

17. It is very difficult to assess the actual proposal for tangible television benefits as it is exceedingly vague and in places combines what have been called in the past 'social' benefits with those that are 'on-screen' benefits. We ask that the Commission require BCE to refile its benefits proposal so that it is consistent with Commission policy both in its structure and its allocation of funds. Not only does the proposal need to more closely align with Commission policy but it also needs to be easier for Commission staff and stakeholders to assess and measure compliance.

18. One of the principle elements of the benefits policy is that the majority of benefits should be spent on onscreen programming, one of the elements of broadcasting which requires the most financial assistance. This allows the benefits funding to clearly benefit the entire Canadian broadcasting system and not just the purchaser. When CTVgm acquired the CHUM specialty services it allocated 85% to programming initiatives[2]. Canwest allocated 90% of its benefits package to onscreen programming when it acquired the Alliance Atlantis broadcasting

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[2] Broadcasting Decision CRTC 2007-165

assets[3]. Most recently Shaw allocated 78.9% of its benefits package to onscreen programming when it acquired Canwest[4]. It is difficult to arrive at the ratio for BCE's proposed benefits as they mix programming and non-programming benefits in a number of proposed allocations however even if both Onscreen Programming and Multi-Platform Content ($40.4 million) and all of Sustain Local Programming in /A\ Channel Markets ($27 million) were considered onscreen programming it would still only be 33.4% of the tangible television benefits. Onscreen Programming on its own is only 20% of the tangible television benefits. Satellite Delivery, Satellite Carriage, HD Conversion and a Platform for Digital Distribution cannot in any way be considered spending on onscreen programming. In fact, they all clearly come under the heading of internal infrastructure costs, which should be a cost of BCE and CTVgm doing business and therefore not eligible as benefits to the Canadian broadcasting system. BCE is proposing, if it has to pay benefits, an unprecedented low allocation to onscreen programming with most of the benefits going to internal infrastructure costs. This misses the whole point of the Tangible Benefits Policy that it is intended to benefit the entire Canadian broadcasting system to ensure that the transaction is not solely of benefit to the shareholders. The WGC therefore recommends that the CRTC require BCE to refile its benefits proposal with a more appropriate allocation of 85% - 90% to be spent on onscreen programming. If the benefits package were to be $215 million then the allocation to onscreen benefits would then be $182.75 million to $193.5 million.

19. The WGC does not object to the allocation of $10.8 million to satellite delivery of local stations in non-mandatory markets. We did object to it in the Shaw-Canwest hearing on the basis that it was an infrastructure cost however the Commission did approve it[5]. It would be consistent with that decision to approve it here. We would only ask that the Commission also require, as it did in the Shaw-Canwest Decision, that any surplus to the actual cost be re-allocated to onscreen programming initiatives.

20. BCE has proposed that $84 million be allocated to replacing MPEG-2 set-top boxes with MPEG-4 set-top boxes for an unknown segment of its subscriber base to allow BCE's DTH system to increase its capacity so that it can carry more local television systems. BCE's justification for including this proposal in the benefits package is that Bell Satellite has a long history of financial losses and Bell has chosen to focus its capital expenditures on other BDU platforms. This allocation raises several issues. The WGC is not privy to Bell Satellite's financial information but we do note that the aggregate DTH and MDS sector has had a positive PBIT margin for 4 out of the past 5 years according to the CRTC's financial summaries[6]. Benefits are to 'generally flow to third parties' however this allocation would go to BCE to help it pay for the new set-top boxes. We also question BCE's commitment to general broadcasting public policy which aims at all subscribers having access to local stations. Canadian broadcasting

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[3] Broadcasting Decision CRTC 2007-360
[4] Broadcasting Decision CRTC 2010-782
[5] ibid
[6] PBIT margin of 3.1% and operating margin of 21% in 2009, CRTC Statistical and Financial Summaries 2005-2009

distribution undertakings on all platforms should be required to prioritize local services over such other services as adult entertainment and interactive gaming. If not required to do so by Commission policy it further undermines general broadcasting public policy to allow BCE to reap the financial reward of distributing adult entertainment and interactive gaming and use benefits money to finance their carriage of local services. Finally, replacement set-top boxes are analogous to replacement transmitters which were clearly identified by the Commission as capital expenditures[7].

> "Capital expenditures for items such as replacement transmitters are also usually viewed by the Commission as being part of a normal capital expenditure program. If replacements are needed, they are required irrespective of a transfer, if they are not needed, there is no discernible benefit to the public."

21. Another benefits proposal is the allocation of $24.5 million to the conversion of local station and specialty services production facilities to HD. These are not onscreen benefits as the funds are to be spent on the conversion of the production facilities rather than the creation of any HD programming. Again, these are internal infrastructure costs and if they are necessary should be spent by BCE.

22. As mentioned above $27 million was allocated to Sustain Local Programming in /A\ Channel markets. The breakdown of the $27 million is unknown but covers both onscreen programming (local programming for /A\ channels) and infrastructure costs (digital rebroadcast transmitters, transition to digital stations, and conversion to HD station master controls). The non-programming allocations are clearly internal infrastructure costs aimed at using the benefits money to upgrade the /A\ channels. The programming expenses are also not eligible as the allocation is to 'offset losses that are expected to continue' and therefore not incremental. These are very self-serving expenses and do little to benefit the Canadian broadcasting system as a whole. If they are necessary expenses then BCE should undertake them. Benefits monies are not intended to benefit only the bottom line of the purchaser. These funds should be re-allocated to incremental onscreen programming.

23. The allocation of $15 million to a Platform for Digital Distribution is confusing. On the one hand it says that this investment would 'serve an important role in protecting the Canadian broadcasting system from piracy' yet it also refers to 'investing in CTV's digital broadcast infrastructure'. If the proposed investment is only in CTV's digital distribution platform then this would only serve an important role in protecting CTV from piracy – not the entire Canadian broadcasting system. Further, this is clearly an internal infrastructure cost that is required by BCE in order to fully exploit its intended multiplatform strategy. If there were no benefits monies we are fairly certain that BCE would find the funds necessary to upgrade the CTV digital distribution platform as it is a central element in that

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[7] Public Notice CRTC 1989-109 Elements Assessed by the Commission in Considering Applications for the Transfer of Ownership or Control of Broadcasting Undertakings

multiplatform strategy. "The present Application . . . will permit BCE to leverage its significant broadband network investments, and accelerate its growth across all three screens – mobile, online and TV, while maintaining a competitive cost structure."[8]

24. Perhaps our biggest concern is the allocation of $40.4 million to Onscreen Programming and Multi-Platform Content. Not only is this allocation insufficient as set out above in paragraph 18 above, but there are several elements of this allocation which are inappropriate.

25. Funding of Programs of National Interest is acceptable however the term 'predominantly created by independent producers' is too vague. As pointed out in the Public Notice for this transaction benefits should 'generally flow to third parties, such as independent producers'. There has traditionally been a commitment of at least 85% of programming to be produced by independent producers and that ratio should be maintained here. There has been no specific allocation to funding of Programs of National Interest. As well, there is a reference to 'opportunities for complementary and/or original content on new media platforms' with no specific allocation. Traditionally drama has received 65% of onscreen benefits but in this proposal there is no way of assessing if drama will receive any funding at all. We ask that the Commission consider requiring a specific allocation for Canadian drama. Programs of National Interest have been designated as such by the CRTC because they are the hardest to finance and require specific support in order to provide Canadians with sufficient choice of Canadian programming. At a minimum, Programs of National Interest should have a specific allocation which should be at least 65% of on-screen benefits, with those benefits being 85% - 90% of television benefits.

26. 'Large scale Nation-Building Multi-Platform Events and Sports Initiatives' appears to be a euphemism for Olympic programming. It may also cover other large sports events such as NHL play-offs or The Brier curling championship. As BCE and CTVgm are already very active in rolling out multi-platform sports events[9] this allocation does not qualify as 'directed to projects and initiatives that would not normally be undertaken or realized in the absence of the transaction'. Given that one of BCE's stated goals behind this acquisition is to 'accelerate the delivery of content as part of a multi-screen experience' it appears to us that BCE needs no financial assistance to continue to undertake these activities. If anything, they now have easy, low or no-cost access to more content than previously. Finally, sports has never been an acceptable initiative for benefits funding as sports is a genre which pays for itself in the Canadian broadcasting

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[8] Supplementary Brief to Application, September 24, 2010, para 54

[9] The 2010 Brier was available on TSN, a CTVgm service, on demand on TSN.ca and live streaming in partnership with Curltv.com. The 2010 Winter Olympics was available on CTV, ctvolympics.ca for on demand and live streaming and on Bell Mobility. The NHL entered into an exclusive deal with Bell Mobility to offer clients added NHL content accessible through their Bell Mobility cell phones. As well, TSN sports broadcasts are available on mobile through a Mobile TV Sports package.

system. Again, benefits are to be spent on 'initiatives which would otherwise not be undertaken' and 'nation-building multi-platform events and sports initiatives' clearly do not qualify. These allocations should be removed from the proposal.

27. It is unclear what is meant by the allocation to CTV's Local News. Is it only intended for local news on new media platforms? There is some precedent for such a funding allocation however it would also seem to be a cost of doing business as increasingly audiences are going online for access to timely, local news.

28. Any new media allocation should only be for content initiatives as set out in the Shaw-Canwest Decision. It should also only fund complimentary or original content related to Programs of National Interest and if approved, local news. Again, there needs to be a specific dollar allocation to new media initiatives in order to assess incrementality and performance.

29. As benefits are to be spent on 'initiatives which would otherwise not be undertaken' it would be appropriate to allocate funds to the development of Programs of National Interest and specifically drama. There is insufficient development funding in the Canadian broadcasting sector and as a consequence projects frequently are not fully developed before being put into production. It is cheaper to fix and refine a television program in development than to find out during production or worse, after broadcast, that it is not working with its audience. More development would mean that more Canadian television is successful. The WGC has worked with CTVgm on the creation of development envelopes for both of the last two CTV benefits packages. With the WGC's assistance CTV created the Writer Only program which supports the development of scripts working directly with writers before a producer is attached to the project. It is our understanding that these development initiatives have been successful for CTVgm and we would be happy to work with BCE in the creation of a similar initiative or extending the existing ones.

30. Finally, we ask that the Commission require BCE to file a payment schedule for the tangible benefits that demonstrates a plan to spend the benefits roughly equally over the licence term. This has become Commission policy over the last few transactions and is an attempt to avoid exactly what has happened with the BCE benefits under Decision CRTC 2000-747 and happened with the CHUM acquisition of Craig under Decision CRTC 2004-502, when almost no benefits had been spent by the time the Craig television assets were then acquired by Rogers (Decision CRTC 2007-360). It is essential that purchasers actually spend the money that they commit to as a condition of CRTC approval of the transaction. It is equally essential to the stability and predictability of the television production industry that benefits monies are spent equally over a licence term.

Vertical Integration Issues

31. The WGC is concerned about the size and media consolidation of the new BCE-CTVgm media company. We think that for the most part the Commission has the tools necessary to prevent abuse of its market domination and ask that the

Commission monitor BCE's performance closely over the coming licence term. We are specifically concerned about BCE's intention to offer wireless customers content deals for programs that have been funded with public monies (e.g. "Dan For Mayor", "Hiccups", "Flashpoint" and "The Listener") under what we assume would be exclusive arrangements for Bell Mobility customers. We will be addressing this concern specifically at the upcoming vertical integration public hearing as well as considering other public policy tools available to ensure that publicly funded programs have the greatest possible Canadian audience.

<u>Conclusion</u>

32. The WGC supports BCE's acquisition of CTVgm subject only to BCE and the Commission positively addressing the issues raised in our intervention. With the Commission's due diligence we expect the Commission to arrive at an appropriate valuation for the transaction and subsequently a fairly calculated tangible benefits package allocated according to Commission policy. Tangible benefits should adhere to CRTC policy and precedent, covering the following essential elements:

    - 10% of the value of the transaction for all television assets
    - Pre-existing overdue benefits belonging to the seller to be expended according to an accelerated payment schedule
    - Incremental and based on clearly identified allocations
    - No expenditures which are the cost of doing business
    - 85% allocation to onscreen expenditures
    - 85% allocation to independent production
    - 65% of onscreen expenditures allocated to drama
    - Spent over a 7 year term
    - Spent equally over the term after a first year for start up

33. We look forward to working with BCE and CTVgm as we all work towards the goal of a strong Canadian broadcasting system offering Canadian audiences the choice a wide variety of high quality Canadian programming.

34. We thank you for this opportunity to provide you with our comments.

Yours very truly,

Maureen Parker
Executive Director

c.c.: National Council, WGC
Kelly Lynne Ashton, Director of Policy, WGC
Mirko Bibic, Executive Vice-President Regulatory Affairs, BCE

Schedule 1

Joint Report of ACTRA, CMPA, DGC and WGC

(see attached)

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