Broadcasting Decision CRTC 2020-189

PDF version

Reference: Part 1 application posted on 12 April 2019

Ottawa, 15 June 2020

8946337 Canada Limited and Blue Ant Media Solutions Inc., partners in a general partnership carrying on business as Blue Ant Television General Partnership
Across Canada

8946337 Canada Limited and Blue Ant Media Solutions Inc., partners in a general partnership carrying on business as Blue Ant Television General Partnership, and SN Channel ULC, partners in a general partnership carrying on business as SN Channel General Partnership
Across Canada

Public record for this application: 2019-0242-9

Blue Ant – Discretionary Services – Licence amendment

*The Commission **denies** an application by Blue Ant Media Inc. to reduce the percentage of the previous broadcast year's gross revenues that the Blue Ant group, which comprises the national, English-language discretionary services A.Side, BBC Earth, Cottage Life, HIFI, Love Nature, Makeful, T + E and Smithsonian Channel, is required to expend on programs of national interest.*

Regulatory Framework

1. In Broadcasting Regulatory Policy 2010-167, the Commission adopted a group-based licensing approach for large private television ownership groups. As part of that approach, as a means of supporting the policy objectives set out in section 3(1) of the *Broadcasting Act* (the Act), the Commission established an expenditure requirement relating to programs of national interest (PNI),[1] which it deemed necessary for encouraging spending on key genres of Canadian programming. This requirement has since been imposed on all designated groups,[2] and requires the groups to devote at least 75% of PNI expenditures to independently produced

[1] In the English-language market, PNI are defined as programming from program categories 2(b) (Long-form documentary) and 7 (Drama and Comedy), as well as Canadian award shows that meet the criteria set out in Broadcasting Regulatory Policy 2010-808.

[2] Broadcasting Regulatory Policy 2010-167 defined designated groups as "ownership groups that generate more than $100 million in annual revenues from private, English-language conventional television stations and own at least one English-language specialty and/or pay programming service."

programs. In addition, in accordance with the group-based approach, designated groups may allocate certain expenditures, such as PNI expenditures or Canadian programming expenditures (CPE), among their various services to allow those services to quickly adapt to consumer and market needs.

2. In Broadcasting Decision 2013-465, the Commission approved a modified group-based licensing approach for the discretionary services addressed in that decision and operated by Blue Ant Television Ltd. and Blue Ant Media Partnership.[3] Based on historical expenditures,[4] the Commission imposed on that group of services PNI expenditure requirements that increased over a three-year period from 9% to 13.5% of the previous broadcast year's gross revenues. The Commission also imposed on the services comprising that group various CPE requirements as well as a condition of licence specifying the percentage of Canadian programs broadcast that may be produced by independent production companies.

3. In Broadcasting Regulatory Policy 2015-86, the Commission concluded that PNI expenditure requirements remained an appropriate tool for ensuring access to diverse programming and that continued regulatory support was required. The Commission therefore maintained the minimum threshold for PNI expenditures.

4. In Broadcasting Decision 2018-291, the Commission renewed the licences for the group of discretionary services addressed in that decision and operated by Blue Ant Television General Partnership[5] and SN Channel General Partnership.[6] The licensees proposed to maintain 13.5% PNI expenditure requirements for those services, as this level of spending, in their view, continued to be appropriate and was consistent with historical expenditures.[7] After examining that proposal, the Commission imposed conditions of licence that maintained a requirement for the licensees to devote 13.5% of the previous broadcast year's gross revenues to PNI expenditures, with 25% of those expenditures (that is, 3.375% of the previous broadcast year's gross revenues) to be allocated to independently produced programs, as well as a condition of license that set out a 21% CPE requirement.

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[3] At the time, this partnership comprised Blue Ant Media Solutions Inc. and 8182493 Canada Inc., partners in a general partnership carrying on business as Blue Ant Media Partnership.

[4] PNI expenditure requirements and CPE requirements are normally based on historical expenditures.

[5] This partnership comprises 8946337 Canada Limited and Blue Ant Media Solutions Inc., partners in a general partnership carrying on business as Blue Ant Television General Partnership.

[6] This partnership comprises 8946337 Canada Limited and Blue Ant Media Solutions Inc., partners in a general partnership carrying on business as Blue Ant Television General Partnership, and SN Channel ULC, partners in a general partnership carrying on business as SN Channel General Partnership.

[7] The public records for these renewal applications are 2017-0841-3 and 2017-0842-1.

Application

5. Blue Ant Media Inc. (Blue Ant), on behalf of the partners of Blue Ant Television Partnership and the partners of SN Channel General Partnership, filed an application to amend condition of licence 7 set out in Appendix 2 to Broadcasting Decision 2018-291 in order to reduce the PNI expenditure requirements for the eight discretionary services that compose the Blue Ant group, that is, A.Side, BBC Earth, Cottage Life, HIFI, Love Nature, Makeful, T + E, and Smithsonian Channel,[8] from 13.5% to 5% of the previous broadcast year's gross revenues as of 1 September 2019, the beginning of the second year of the current licence term for those services.

6. In its application, Blue Ant referred to Broadcasting Decision 2018-335,[9] wherein the Commission, in response to Order in Council P.C. 2017-1060 (the OIC), reconsidered decisions in which it had renewed the licences and had implemented 5% PNI expenditure requirements for the services of the large English-language private television ownership groups, specifically, those operated by Bell Media Inc. (Bell), Corus Entertainment Inc. (Corus), and Rogers Media Inc. (Rogers). The applicant also submitted that the issuance of the OIC on 14 August 2017 created uncertainty around the Commission's treatment of PNI expenditures at the time of submission of the renewal applications addressed in Broadcasting Decision 2018-291, since the OIC was issued two weeks before the deadline for submitting those applications. Moreover, in Blue Ant's view, the Commission has not yet made any determinations regarding the appropriateness of the Blue Ant group's PNI expenditure requirement, since those licence renewal applications did not request that it be reduced.

7. Blue Ant submitted that the requested decrease is appropriate in light of the fact that the 13.5% PNI expenditure requirement for the Blue Ant group is higher than those for the three above-mentioned groups.

8. The applicant added that a reduced PNI expenditure requirement would allow each of the services of the Blue Ant group to better respond to increased competition for Canadian viewership from both traditional and over-the-top services. Blue Ant indicated that it requires as much flexibility as possible to produce and commission programs that reflect the viewing habits and appetites of Canadian audiences. Additionally, Blue Ant argued that its existing PNI requirement significantly

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[8] The composition of this group is set out in Appendix 1 to Broadcasting Decision 2018-291. SN Channel General Partnership is the licensee of Smithsonian Channel. Blue Ant Television Partnership is the licensee of the other seven services.

[9] The Commission determined that it was appropriate to base PNI expenditure requirements on historical expenditures. Accordingly, as of 1 September 2018, it increased the PNI expenditure requirements for the groups operated by Bell and Corus to 7.5% and 8.5%, respectively, of the previous broadcast year's gross revenues. The requirement for the group operated by Rogers was not changed and remained set at 5%.

impedes its ability to deliver programming that interests the audiences for its eight services.

9. Given that the Blue Ant group is subject to expenditure requirements relating to CPE, PNI and independent production, and that these are interrelated, Blue Ant was asked in a letter dated 9 May 2019 whether it would accept a higher CPE or independent production expenditure requirement if the Commission were to approve the requested decrease in the group's PNI expenditure requirement. In its reply dated 3 June 2019, Blue Ant opposed changes to its other conditions of licence but indicated that it would instead accept a reduced PNI expenditure requirement of 7%, the average of those imposed on the large English-language television groups in Broadcasting Decision 2018-335, if the Commission were to determine that the requested reduction to 5% was not appropriate.

10. The Commission received opposing interventions from the Writers Guild of Canada (WGC), the Canadian Media Producers Association (CMPA) and the Director's Guild of Canada (DGC), to which Blue Ant replied.

Issues

11. After examining the record for this application in light of applicable regulations and policies, the Commission considers that the issues it must address are the following:

- whether the requested amendment is consistent with the Commission's group-based policy approach; and
- whether Blue Ant has demonstrated a compelling need justifying the requested amendment.

Consistency with the Commission's group-based policy approach

12. In accordance with section 3(1)(s) of the Act, the Commission seeks to support the creation and presentation of diverse programming, while also balancing the creative sector's need for support and television groups' need for flexibility. In an effort to create a balance that maximizes the contribution to the broadcasting system while recognizing the unique situation of each licensee, consistent with section 3(1)(e) of the Act, and that ensures a contribution from the Canadian independent production sector that is consistent with section 3(1)(i)(v) of the Act, the Commission has taken a holistic approach in regard to the imposition of requirements relating to PNI expenditures, CPE and support for independent production. PNI expenditure requirements are, therefore, generally imposed in concert with expenditure requirements relating to Canadian programming and to independently produced programming. This holistic approach ensures stable and sustainable funding while also offering flexibility and remaining consistent with the historical spending and financial resources of the various groups.

Interventions and reply

13. In regard to the request to reduce the 13.5% PNI expenditure level for the Blue Ant group, both the CMPA and the WGC noted that Blue Ant requested the reduction after the issuance of the OIC. The CMPA also expressed the view that Blue Ant should have known that the PNI expenditure requirements addressed in the OIC would either be maintained or increased, although they would also be likely to remain lower than its own. The WGC added that Blue Ant had not explained why any uncertainty relating to the PNI expenditure requirements for the large television groups would be relevant to the requirement for the Blue Ant group. Additionally, the DGC submitted that Blue Ant, despite having opportunities to do so, had chosen not to address any such concerns during its previous licence renewal application process or the reconsideration process.

14. In its reply, Blue Ant stated that, since August 2017, which is when it filed the licence renewal applications approved in Broadcasting Decision 2018-291, not only did the Commission issue Broadcasting Decision 2018-335, in which PNI levels for the English-language private ownership groups were modified, but the Canadian broadcasting industry continued to experience dramatic change, particularly in regard to the penetration of additional streaming services in Canada. Noting that it has had to alter its business model to respond to the business environment and react to the increase in competition, Blue Ant submitted that its ability to effectively respond to such changes under its current PNI level is extremely and unduly limited.

15. The WGC further submitted that PNI expenditure requirements, where applicable, must be set based on historical spending. In its view, anything less than that would be contrary to the approach set out in Broadcasting Regulatory Policy 2015-86, both in letter and spirit, as well as inconsistent with the Act and Broadcasting Decision 2018-335. The CMPA submitted that Blue Ant's PNI expenditure proposal is arbitrary, as it ignores the Blue Ant group's historical requirements, composition and mix of assets.

16. In its reply, Blue Ant stated that in proposing a 5% PNI expenditure requirement, it considered an expenditure level that would be appropriate for its group, while also considering the PNI expenditures levels in place for the large private television ownership groups. The applicant argued that a decrease to the Blue Ant group's current 13.5% PNI expenditure requirement would have a meaningful impact on the services' ability to remain relevant and to effectively compete in the marketplace. Blue Ant also reiterated its position that its proposal is consistent with the approach used by the Commission in Broadcasting Decision 2018-335 and with sections 3(1)(s) and 9(1)(b) of the Act.

17. Finally, the CMPA submitted that the Commission provided more than sufficient flexibility to the Blue Ant group by imposing an independent production requirement comprising only 25% of that group's PNI expenditures, a third of the 75% required of the large English-language television groups. In this regard, it argued that since independently-produced programming expenditures are calculated

as a percentage of PNI expenditures, the request to reduce the Blue Ant group's required PNI expenditures also effectively constitutes a request to reduce its required expenditures on independently-produced programming, specifically, from 3.375% (that is, 25% of 13.5%) to 1.25% (that is, 25% of 5%) of the previous broadcast year's gross revenues. In the CMPA's view, a reduced commitment to independently-produced programming would fail to uphold the policy approach set out in the Act as well as the requirements set out in Broadcasting Regulatory Policy 2010-167 and reaffirmed in Broadcasting Regulatory Policy 2015-86. In its reply, Blue Ant indicated that it would adhere to a condition of licence requiring it to maintain its current minimum level of spending on independent production (that is, 3.375% of the previous broadcast year's gross revenues).

Commission's analysis and decisions

18. The Commission notes that Blue Ant submitted its licence renewal applications two weeks after the issuance of the OIC, and did not request an extension to the deadline for its renewal applications in order to address any concerns relating to its PNI expenditure requirement. Further, the Commission is of the view that the reconsideration process prompted by the issuance of the OIC had no impact on independent groups such as the Blue Ant group, given that the requirements imposed on the large television groups differ to reflect their different sizes, mixes of assets and historical expenditures. Moreover, Broadcasting Decision 2018-335 ultimately restored the expenditure requirements for the large English-language private ownership groups to historical levels and recognized the important role that PNI expenditure requirements play in supporting Canada's creative talent. The Commission determined that overall spending in PNI categories needed to be maintained, as it provides stable and sustainable funding for such programming. Furthermore, it ensures that groups contribute to the creation and presentation of Canadian programming in a manner that is consistent with their financial and other resources, as required by section 3(1)(s) of the Act.

19. Although the Blue Ant group is required to devote a higher percentage of expenditures to PNI than the large English-language television groups, it is not required to devote a comparably large portion of these expenditures to independently produced programming. Further, it also benefits from a lower CPE requirement.[10]

20. Additionally, the Commission notes that Blue Ant's request is based on only one expenditure requirement. Given its holistic approach, the Commission offered Blue Ant the opportunity to provide responses to different scenarios, including one in which its CPE requirement would increase. Blue Ant remained firm in indicating

[10] The Blue Ant group's PNI expenditure requirement, 13.5% of the previous broadcast year's gross revenues, is higher than those for the groups operated by Bell, Corus and Rogers (respectively, 7.5%, 8.5% and 5%). However, only 25% of its PNI expenditures must be devoted to independently produced programming, a third of the 75% required of the other three groups. Also, it must devote only 21% of the previous broadcast year's gross revenues to CPE, whereas the other three groups must devote 30% of them.

that it opposed an increase in its other requirements in exchange for a decrease in its PNI expenditure requirement.

21. The Commission notes, however, that subsequent to the above, Blue Ant, in a letter dated 25 June 2019, partially revised its position and indicated that it would be willing to maintain but not increase its current level of support for the independent production sector.[11] In the Commission's view, this change responds to the CMPA's concern that Blue Ant's request to reduce PNI also effectively constitutes a request to reduce that group's required expenditures on independent production, which reduces overall support for the independent production sector.

22. The Commission notes that, as set out in section 3(1)(i)(v) of the Act, "the programming provided by the Canadian broadcasting system should include a significant contribution from the Canadian independent production sector." While Blue Ant's revised position may be consistent with the achievement of this objective, the Commission finds that individual requirements cannot be viewed in isolation. Rather, the Commission is of the view that these requirements must be viewed as part of a whole, as the Commission might have come to a different set of determinations had a particular requirement been changed or removed. These requirements also operate within a larger set of regulatory obligations and related policies that, collectively, constitute a cohesive set of regulatory mechanisms meant to balance several objectives of the Act.

23. The Commission recognizes that Blue Ant addressed the CMPA's concern by indicating that it would maintain its current level of required spending on independent production. However, the Commission finds that in assessing requests to amend interrelated requirements, such as those relating to CPE, PNI expenditures and independent production expenditures, any such amendments should be examined holistically rather than separately for each requirement.

24. In light of the above, the Commission finds that the requested amendment is inconsistent with its general approach to PNI expenditure requirements and that Blue Ant has not provided sufficient justification for the Blue Ant group's PNI expenditure requirement to be based on anything other than historical expenditures.

Demonstration of compelling need

25. The onus is on licensees to provide evidence to the Commission in support of any relief they may be seeking in their applications. Blue Ant, in its application, indicated that the amendment is not necessary to ensure the financial viability of the services of the Blue Ant group. In response to a Commission request, Blue Ant, in a letter dated 3 June 2019, provided financial projections based on PNI expenditure requirements of 5%, 7% and 13.5% of the previous broadcast year's gross revenues. Each of these projections indicates the same total number of subscribers, the same subscriber revenues, and varying degrees of decrease in the group's total expenses.

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[11] As noted above, this requirement is currently calculated as a percentage of PNI expenditures.

As such, all three projections indicate that the financial viability of the services of the Blue Ant group would not be affected and, moreover, that the group would remain profitable. In particular, the profits projected under all of the scenarios are consistent with the group's historical financial performance.

Interventions and reply

26. In their interventions, the CMPA and the DGC submitted that the applicant did not provide evidence to substantiate its submission or to explain how a reduced PNI expenditure requirement would mitigate any such impact. These interveners further submitted that Blue Ant did not offer evidence of financial non-viability or of any relevant changes to the services' circumstances that would warrant approval of the request. According to the CMPA and the DGC, approval of Blue Ant's request would set a precedent. In its reply, Blue Ant reiterated that denial of its application would not result in its services becoming completely financially unviable. However, it also reiterated its view that competition for Canadian viewership from traditional and over-the-top services has increased since the licences for the services of the Blue Ant group were last renewed.

Commission's analysis and decision

27. The Commission examined the licensees' overall broadcasting and production activities to determine what may have changed to trigger the requested amendment. In the Commission's view, these activities have not fundamentally changed since the licences for the services composing the Blue Ant group were last renewed. In regard to programming, the licensees have neither acquired new services, nor rebranded existing services, nor provided evidence of a change in the programming approach of those services. Additionally, the financial projections provided by Blue Ant, whether under an approval, approval in part or denial scenario, indicate that the financial viability of the services of the Blue Ant group would not be affected.

28. Finally, although Blue Ant argued that over-the-top services have an impact on all licensed services, the services of the Blue Ant group have been able to remain profitable. Blue Ant provided no evidence to substantiate the impact of over-the-top services in the context of its request to reduce the Blue Ant group's PNI expenditure requirement.

29. In light of the above, the Commission finds that Blue Ant has not demonstrated a compelling need justifying the requested amendment.

Conclusion

30. In light of all of the above, the Commission **denies** the application by Blue Ant Media Inc. on behalf of 8946337 Canada Limited and Blue Ant Media Solutions Inc., partners in a general partnership carrying on business as Blue Ant Television General Partnership, licensee of the discretionary services A.Side, BBC Earth, Cottage Life, HIFI, Love Nature, Makeful, and T + E, and on behalf of 8946337 Canada Limited and Blue Ant Media Solutions Inc., partners in a general

partnership, and SN Channel ULC, partners in a general partnership carrying on business as SN Channel General Partnership, licensee of the discretionary service Smithsonian Channel, to amend condition of licence 7 set out in Appendix 2 to Broadcasting Decision 2018-291 in order to reduce the PNI expenditure requirements for these undertakings.

Secretary General

Related documents

- *Reconsideration of licence renewal decisions for the television services of large English-language private ownership groups*, Broadcasting Decision CRTC 2018-335, 30 August 2018

- *Blue Ant – Discretionary services – Licence renewal*, Broadcasting Decision CRTC 2018-291, 21 August 2018

- *Let's Talk TV: The way forward – Creating compelling and diverse Canadian programming*, Broadcasting Regulatory Policy CRTC 2015-86, 12 March 2015

- *Various specialty Category A and B Services – Licence renewals and modified group-based licensing approach*, Broadcasting Decision CRTC 2013-465, 30 August 2013

- *Definitions for television program categories*, Broadcasting Regulatory Policy CRTC 2010-808, 1 November 2010

- *A group-based approach to the licensing of private television services*, Broadcasting Regulatory Policy CRTC 2010-167, 22 March 2010