



4 August 2017

Filed online

Ms. Danielle May-Cuconato
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

Dear Secretary General,

Re: Sirius XM Canada Inc., *Tangible benefits proposal filed in response to Broadcasting Decision CRTC 2017-114, Part 1 Application 2017-0560-0 (26 May 2017)*

I Introduction

1. The Forum for Research and Policy in Communications (the Forum) is a non-profit and non-partisan organization established to undertake research and policy analysis about communications, including broadcasting and telecommunications. The Forum supports a strong Canadian communications system that serves the public interest.
2. We appreciate the opportunity to comment on the application made by Sirius XM Canada Inc. (Sirius) this past May, with respect to the allocation of tangible benefits resulting from a change in ownership which the CRTC approved in April 2017.

II Background

3. Sirius filed an application on 27 May 2016 seeking the CRTC's approval of what Sirius described as a corporate reorganization in which American company Sirius XM would increase its economic interest in Sirius. Sirius described the impact of its service on Canada's broadcasting system as follows:

SiriusXM Canada has provided financial and promotional support to hundreds of artists, many of whom were heard for the first time in North America directly as a result of airplay on the SXM-US satellite network. Its significant Canadian Content Development (CCD) contributions and its other programming and promotion initiatives (all of which amount to more than \$13 million per year) ensure that Canadian artists benefit from ongoing visibility and growth their audiences both in Canada and the U.S.

SiriusXM Canada continues to innovate in its distribution of Canadian content. Recent examples of its introduction of new Canadian talk content, include Everything is Political: Campaign 2015 with Evan Solomon; National Post Radio in partnership with PostMedia; Canadian Business News in partnership with the Business News Network (all of which are or were daily shows); and The Feed with Amber MacArthur, a weekly Canadian technology, social media show. It recently signed a new 7 year agreement with the NHL to provide a Canadian hockey channel to a North American audience. SiriusXM Canada also introduced a new Canadian country music channel in partnership with the CBC, and now distributes both English and French language Canadian country music channels. Finally, SiriusXM Canada has partnered with Native Communications Inc. of Winnipeg to provide Aboriginal content for SiriusXM Canada's multicultural radio channel. SiriusXM Canada strives at all times to meet the wants and needs of Canadian consumers for top-quality and diverse audio content.

4. One of the issues raised by the CRTC with respect to Sirius' application involved ownership. Applications that involve a change in ownership or control are subject to the CRTC's *Simplified approach to tangible benefits and determining the value of the transaction*, Broadcasting Regulatory Policy CRTC 2014-459 (Ottawa, 5 September 2014), <http://crtc.gc.ca/eng/archive/2014/2014-459.htm> (2014 Tangible Benefits Policy). It requires broadcasters to allocate tangible benefits expenditures to a variety of specific initiatives, while granting broadcasters the discretion to direct tangible benefits expenditures to certain eligible discretionary initiatives (see *e.g.* para 31 of the policy), including the Broadcasting Participation Fund. The policy also explains that the CRTC may "exercise its discretion and depart from this policy where called for to meet the public interest and based on the record before it at the time" (*Ibid.*, paragraph 10).
5. Sirius argued throughout the 2016 application process that as its proposed transaction did not represent a change in control, the CRTC's 2014 Tangible Benefits Policy was inapplicable (paragraph 71 of Application 2016-0539-6, Supplementary Brief). Even without tangible benefits, though, Sirius said that approval of its application would ensure "that Sirius XM will have the financial resources to continue to contribute to the production of Canadian programming", serving "the interests of Canadians as citizens, consumers and creators" (*Ibid.*, paragraph 77). It went on to say that

Approval of this application and the associated support of the ongoing viability of SiriusXM Canada will ensure that the licensee is able to continue its significant financial contributions to eligible third parties in the Canadian creative sector pursuant to the conditions of licence of SiriusXM Canada.

(*Ibid.*, paragraph 78).

6. The CRTC nevertheless asked Sirius on 22 September 2016 to
... please confirm the following

...

2. Will the applicant agree to propose a tangible benefits package pursuant to Broadcasting Regulatory Policy CRTC 2014-459?

....

(CRTC, 22 September 2016 letter to Sirius)

7. On 3 October 2016 Sirius indicated that it was aware of the contents of Broadcasting Regulatory Policy CRTC 2014-259. It told the CRTC that

If the Commission were to determine that there has been a change of control, the actual value [of the transaction] would be lower since, according to Broadcasting Policy CRTC 2014-259, it is the only consideration paid by the 'controlling' party that would be taken into account. ...

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8. The CRTC ultimately approved Sirius' 2016 application in *Sirius Canada and XM Canada – Transfer of shares*, Broadcasting Decision CRTC 2017-114 (Ottawa, 26 April 2017), <http://crtc.gc.ca/eng/archive/2017/2017-114.htm> (CRTC Decision 2017-114). It held that approval of the \$479 transaction was in the public interest because it

... would ensure the sustainability of satellite radio in Canada for the foreseeable future and would ensure that Canadian consumers continue to benefit from the service as well as from future service enhancements. The Canadian broadcasting system would also continue to benefit from the elements of diversity, coverage and monetary support that the Commission highlighted when it first licensed satellite radio in Canada.

(CRTC Decision 2017-114, paragraph 64)

9. The Commission also decided that Sirius' application constituted a change in effective control, and required Sirius to allocate \$28.7 million, or 6% of the value of the ownership transaction, to tangible benefits expenditures. Although Sirius had acknowledged its awareness of the terms of the 2014 Tangible Benefits Policy, it decided not to identify any initiatives that it would fund through discretionary tangible benefits (CRTC Decision 2017-114, paragraph 80). The CRTC therefore decided that Sirius should, in the first two years of its licence term, allocate \$4.79 million (1% of the value of its transaction) to the Broadcasting Participation Fund (BPF), "an independent fund that helps public interest and consumer groups that represent non-commercial user interests and the public interest to offset the costs of participating in the Commission's broadcasting proceedings" (*Ibid.*). The CRTC said this would "ensure that the voices of Canadians continue to be reflected on the record of broadcasting proceedings in the short and medium term" (*Ibid.*, paragraph 82).

10. The CRTC also said, however, that Sirius could submit its own proposal for the use of this money.
11. Sirius now proposes to allocate \$1 million to the BPF in the next two years, and to reallocate the remaining \$3.79 million to a new fund to support music and spoken-word content, artists and recording studios.

III Concerns about Sirius' proposal

12. The BPF was established in 2011 to support public-interest participation in broadcast proceedings, by reimbursing applicants' costs in those proceedings, provided these fall within the BPF's guidelines. As currently constituted (and as approved by the CRTC) the BPF does not rubberstamp applications, but evaluates them and then either denies applications, or grants them in whole or in part. The Forum has applied to the BPF on several occasions for the reimbursement of its broadcast proceeding costs.
13. As the BPF is under financial pressure, the \$4.79 million proposed by the CRTC to support its work would have provided much-needed stability to the BPF, enabling public-interest organizations to continue to provide specialized expertise and knowledge on behalf of the public in CRTC proceedings.
14. Sirius is now proposing, however, to divert \$3.79 million of the \$4.79 million proposed by the CRTC for the BPF, to a new 'SiriusXM Fund' that will pay recording studios to record musical and spoken-word artists.
15. The Forum has three concerns with Sirius' proposal.
16. Our first concern is that Sirius has offered very little or no evidence to justify the creation of a new fund to support musical and spoken word content. In fact, Sirius' 2016 application clearly stated that it had provided significant support to Canadian musical and spoken-word content in the past, and that the CRTC's approval of its application would enable that support to continue (see paragraphs 3 and 5, above) – implying that it did not require a separate and new fund to support such programming. What changed between 2016 and 2017 that demands the creation of a new fund – and if a new fund is created, will Sirius keep its 2016 commitment so that its new fund provides truly incremental financial support for Canadian artists? The Forum respectfully submits that the absence of evidence about these issues makes it impossible for the CRTC to approve Sirius' proposal for a new fund.
17. Our second concern is that Sirius has offered next to no evidence to establish how the \$3.79 million it proposes to spend over seven years on a new fund – an average of

\$685,000 per year – will incrementally benefit the broadcasting system. Sirius has previously said that it is “by far the largest single CCD contributor” in commercial radio (Sirius 26 May 2017 letter, at 3). Yet beyond wanting to support Canadians whose music is Canadian and who are consistently dedicated to their artistic careers (Sirius 27 June 2017 letter to the CRTC, at 7), Sirius has not yet developed eligibility criteria for its fund – or explained just how its new fund would exceed (be incremental to) the benefits its current CCD requirements yield.

18. While the average annual funding of \$685,000 for the proposed fund does represent 3.6% of the \$19.243 million allocated by broadcasters (excluding ‘Other eligible initiatives’) in 2014-2015 for their ownership-related Canadian content development contributions (Table 4.1.22 of the CRTC’s 2016 *Communications Monitoring Report*), Sirius’ funding would be directed mainly to recording at studios or live events. The benefits of the fund for Canadian artists would therefore be indirect, and difficult to evaluate empirically. The fund’s indirect funding approach would perpetuate (rather than work to eliminate) the romantic but highly objectionable trope of the impoverished artist expected to donate his or her gift to society. The Forum respectfully submits that the absence of clear evidence demonstrating the numbers of performers to benefit from its new fund each year and the financial benefits they will obtain, as well as the number and duration of new recordings created because of the fund annually, make it impossible for the CRTC to approve Sirius’ proposal.
19. Our third concern has to do with the absence of clear commitments towards Canada’s Indigenous artists. Sirius has previously admitted that its decision to include Indigenous artists in a ‘multicultural’ channel was likely confusing – but the fund it proposes does not in any way demonstrate any new understanding of or commitment to Canada’s first peoples. The Forum respectfully submits that the absence of true ‘tangible’ benefits in Sirius’ proposed fund which do more – in concrete terms – for Indigenous artists make it impossible for the CRTC to approve Sirius’ proposal.

IV Conclusion

20. The BPF has enabled the Forum and other public-interest organizations to participate in a number of important CRTC broadcasting proceedings. While members of the public are always free to participate in CRTC public proceedings, the BPF’s existence helps to level the playing field, so to speak, between broadcast applicants and members of the public. Broadcast law, regulations, policies, arguments and evidence have become highly specialized: most broadcasters are able to employ in-house or external specialists to support their applications, and the existence of the BPF permits public-interest organizations to access a similar level of expertise on behalf of the public. This expertise

also benefits the Commission, permitting it to hear focussed evidence and arguments that are directly relevant to broadcast proceedings, and enabling it to weigh the diverse interests represented by section of the *Broadcasting Act*.

21. Lack of funding for the BPF would have a serious and negative impact on the ability of public-interest organizations to continue their work on behalf of the public, leaving an unbalanced record (of CRTC proceedings) consisting almost entirely of the submissions, evidence and arguments of broadcasters. Reductions in the BPF's ability to approve applications (where the applicants have met the BPF's criteria for funding) will mean – to paraphrase the CRTC's statement in Decision 2017-114 at paragraph 82 - that 'the voices of Canadians will no longer continue to be reflected on the record of broadcasting proceedings in the short and medium term'.
22. To avoid this result, and given the paucity of evidence on the public record as to the incremental benefits that Sirius' proposed fund would yield for the broadcasting system, the Forum respectfully submits that the CRTC should direct Sirius to allocate the full discretionary benefits amount of \$4.79 million to the BPF, in line with the Commission's original determinations in CRTC Decision 2017-114. This funding will support and strengthen the ability of Canadians to participate effectively in CRTC broadcast proceedings – a true tangible benefit for Canada's broadcasting system.

Sincerely yours,



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