

January 11, 2019

The Broadcasting and Telecommunications Legislative Review Panel  
c/o Innovation, Science and Economic Development Canada  
235 Queen Street, 1st Floor  
Ottawa, Ontario K1A 0H5

Via email: [ic.btlr-elmrt.ic@canada.ca](mailto:ic.btlr-elmrt.ic@canada.ca)

**RE: Review of the Canadian Communications Legislative Framework**

1. Pelmorex Weather Networks (Television) Inc., the broadcasting licensee of the Canadian specialty services The Weather Network and MétéoMédia, is pleased to file the attached comments in response to the above-noted proceeding.
2. Should the Legislative Review Panel have any questions, please do not hesitate to contact the undersigned directly.

Yours truly,



Kurt Eby

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**Pelmorex Comments to *Responding to the New Environment: Review of the Canadian Communications Legislative Framework***

1. Pelmorex Weather Networks (Television) Inc. is the broadcasting licensee of the Canadian specialty services The Weather Network (“TWN”) and MétéoMédia (“MM”), Canada’s most popular weather forecast and information services on television, web and mobile. We are pleased to participate in the Broadcasting and Telecommunications Legislative Review Panel’s call for comments and overall process to identify policy and legislative changes that will maximize the benefits that the digital age delivers to Canada’s content and telecommunications industries and its stakeholders.
2. The Panel’s objective is well stated. The impact of new technology and content delivery methods on the Canadian broadcasting system has been a central consideration in broadcasting proceedings over the past decade. Harnessing the opportunities presented by new technology should always be the primary focus of such discussions. Indeed, rather than merely being “readily adaptable,” the Canadian broadcasting system should take advantage of scientific and technological change.
3. The explosion of new digital platforms has presented a tremendous opportunity for Canadian content providers to refine their content and find new audiences both in Canada and abroad. At the same time, it has challenged traditional broadcasters with additional, unregulated, competition, and the need to invest sufficiently to both maintain the quality of their existing television programming, and to access and attract audiences on an increasing variety of digital platforms. These opportunities and challenges can differ greatly among programming providers based on a number of factors, including: the type of content the broadcaster delivers; regulatory requirements; and whether the broadcaster is independently-owned or part of a vertically- integrated media company.
4. Identifying legislative changes that provide a framework under which such a variety of content providers can meet and advance policy objectives, particularly as rapid technological change is likely to continue reshaping the content industry, presents its own challenge to the Panel. In the case of Pelmorex, through decades of innovation and investment we have successfully leveraged the reach and flexibility of digital distribution for the benefit of our viewers and users, in Canada and around the world.
5. Therefore, from Pelmorex’s perspective, and based on our needs, legislative amendments should seek to improve the conditions for all Canadian content providers to innovate and compete in content delivery. This includes:
  - Prioritizing a diversity of programming providers – particularly independent content providers;
  - Promoting open and fair access to distribution platforms and options;

- Ensuring regulatory balance on distribution platforms and among all players; and
- Maintaining incentives for programming providers that make exceptional contributions to Canadian programming.

At the same time, a modern legislative framework should provide maximum flexibility for the regulator to employ innovative regulatory approaches when necessary, while taking care not to negatively disrupt any services that are already contributing to the objectives of the *Broadcasting Act* in the absence of regulation.

6. Pelmorex recognizes that our experience – due to the nature of our content and our history of innovation – is unique in many ways. But we believe our viewpoint as an independent Canadian broadcaster that has transitioned to become an integrated digital content provider, while unique, is very valuable in the context of this review. We are pleased to provide additional background on how existing legislation has influenced our business, and what future policy would best enable us to continue deliver our unique content to Canadians to global audiences.

### **Pelmorex – A Unique Weather and Public Safety Service**

7. Pelmorex is unique among Canadian broadcasters, and, as we will outline in this submission, we bring a unique perspective to this consultation. Pelmorex is one of Canada's few remaining independent specialty television broadcasters. Our television services broadcast 100% Canadian content in both official languages, almost all of which is live or near live. While many broadcasters are reducing their investments in Canadian programming, we have maintained our above-average Canadian programming expenditure requirement of 44%, and we lead the industry in first-run Canadian programming. While programming genres are disappearing, TWN and MM programming still maintain a concerted focus on delivering local weather and environmental and safety information, including emergency alerts.
8. Indeed, Pelmorex's drive to provide the essential and most-frequently updated weather information to Canadians, where and how they want to access it, is the cornerstone of our business and the single most important factor in our distribution strategy. This began in 1994 with our original localization equipment that we developed and installed at more than 1,000 BDU headends to deliver custom, community-specific weather forecasts. We followed by pioneering interactive television applications for satellite distribution, then by expanding to the web, mobile and tablet apps, smart TV apps, and new set-top-boxes that allow us to provide an enhanced experience to our core audience of television subscribers.
9. But what began in the 1990's as a strategy to explore the potential of new digital platforms to serve Canadians has become a business imperative. Pelmorex's digital content properties have transitioned multiple times from complementing our broadcasting business, to expanding sufficiently to offset television subscription and viewing declines, to being the future of our company as an integrated, multi-platform content provider. Now, with a wide and growing

reach on four continents, Pelmorex's digital content business is larger than our broadcasting operation. As a result, we are well positioned to continue to benefit from the digital age.

10. Finally, Pelmorex uniquely funds and operates the National Alert Aggregation and Dissemination (NAAD) System, which is the backbone infrastructure of Canada's national public alerting system. The NAAD System is a mission-critical, life-saving infrastructure that fits perfectly with, and in many way exemplifies, our innovative approach to public safety and our business strategy. It also illustrates the impact the *Broadcasting Act* has had on delivering essential services to Canadians.

#### The Legislative Impact

11. Pelmorex's successful broadcasting and digital business has been built under existing legislative and policy frameworks. The Panel is well aware of TWN/MM's status as an essential service subject to mandatory distribution on the basic television package under section 9(1)(h) of the *Broadcasting Act*, but it is worth reiterating here that this policy has delivered significant benefits to Canadians. Pelmorex has continually committed to delivering more – more Canadian content, more customization through regional feeds, and a free-to-consumers-and-governments public alerting system – to maintain TWN/MM's place on the basic television service.
12. Although the cost of remaining on the basic service has increased, our continued pursuit of 9(1)(h) status has been a business decision. Because TWN/MM deliver local content they are best suited to being available to all Canadians. And the consistent and predictable revenue stream provided by basic distribution has helped enable us to aggressively pursue other distribution options so we can better respond to changing consumer demands. This regulatory arrangement provides a clear example of how the *Broadcasting Act* can be leveraged to deliver essential services in a manner that benefits broadcasters and is broadly accepted by Canadians – 83% of Canadian television subscribers prefer TWN/MM to remain available on the basic service.<sup>1</sup>
13. Our approach to our traditional broadcasting business has always been based on meeting the needs of Canadians, but it has, particularly in recent years, been shaped by how those needs are defined in the *Broadcasting Act* and interpreted by the CRTC. Conversely, legislation has played a passive role in our digital strategy; the digital media exemption order and Canada's net neutrality policy have underscored the openness of the Internet that has allowed us to freely experiment on nearly every available platform. With our TWN/MM specialty television services providing a base, our approach to digital distribution for the past two decades has been that 'if we are not available on every platform, our competitors will be.' Looking at the current media and content landscape, it is hard to envision any legislation or policy that could help us 'catch up' had we not invested and innovated to be where we are today.

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<sup>1</sup> Earncliffe Strategy Group - National Public Awareness and Attitudes Survey - Conducted on behalf of Pelmorex. May 2017.

14. As it stands, Pelmorex is Canada's fourth largest digital network across desktop and mobile, behind only Google, Facebook and Instagram.<sup>2</sup> And we're continuing to innovate to deliver an enhanced viewing experience to our TWN/MM television subscribers. As well, we effectively program 100% Canadian content on television and our digital properties in Canada. Therefore, we do not believe broad legislative changes are necessary to enable Pelmorex to benefit from the digital age at this time. Nor are they needed to ensure we continue to contribute to the current cultural policy objectives of the *Broadcasting Act*. That said, we believe the *Broadcasting Act* needs to be updated to not only reflect the current state of our broadcasting industry, but to provide the proper authority and direction for the CRTC to act in the future when necessary.
15. We therefore submit that the legislation should be reviewed and amended so it, and the subsequent regulatory policies, can continue to support a vibrant Canadian content sector in an age of increasing technological disruption and unprecedented concentration of ownership. As we mentioned above, Pelmorex believes that the most important objective is to ensure Canadians are served, or can be served, by a diversity of content providers (or a plurality of ownership within the industry), which can be facilitated by a number of policies, including: promoting open and fair access to distribution platforms; ensuring regulatory fairness among all content providers; and maintaining incentives for programming providers that make exceptional contributions to Canadian programming.
16. We are pleased to elaborate on our recommendations throughout the remainder of our submission. Our comments have been organized to generally address the themes identified by the Panel and then to provide more specific recommendations on legislative amendments in response to those questions from the Panel's terms of reference that are relevant to Pelmorex's operations.

## Themes of the Review

17. Of the four themes identified in the call for comments, "Theme B: Supporting creation, production and discoverability of Canadian content" is most relevant to Pelmorex, and we will therefore focus on it in the greatest detail in this submission. As the other three themes do touch on our business in some way, we will address them briefly here:
18. Theme A. Reducing barriers to access by all Canadians to advanced telecommunications networks: Apart from the overwhelming personal and work-related benefits of broadband Internet, universal access to advanced telecommunications will ensure content policies can serve all Canadians. As a content provider, increased broadband and mobile penetration increases the number of Canadians that can access all of our services. However, for many Canadians – due to geographical, personal or financial circumstances – subscription television service from a BDU remains the most accessible news and entertainment platform. Therefore, despite the rapid growth of content consumption on digital platforms, subscription television

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<sup>2</sup> Based on Monthly Active Users.

will continue to be important platform to ensure all Canadians are served. While Pelmorex fully supports measures to increase access to advanced telecommunications networks, the importance of traditional television service as a content delivery mechanism must still be recognized in legislation and policy. Further, access to weather news reporting is becoming more important every year due to the increased instance and severity of active and catastrophic weather events.

19. Theme C. Improving the rights of the digital consumer: Protecting the rights of consumers, including allowing them to make informed choices about the disclosure of use of their user information, is a core aspect of Pelmorex's digital business. Our digital properties provide various levels of service depending on the needs of our users and their comfort level with exchanging some of their user information. Most obviously, access to location information allows us to send users the most accurate and location-specific weather whenever they open our app, and can also be used to send targeted weather alerts to those users that opt-in for this service. Pelmorex submits that Canada's clear, principles-based privacy legislation is working for Canadians and businesses. Additionally, industry-specific rules in broadcasting or telecommunications legislation can unnecessarily complicate compliance and restrict innovation. Legislation or policy intended to curtail undesirable activities with respect to the rights of the digital consumer should take care not to inadvertently harm the business of those that do not engage in these activities.
20. Theme D. Renewing the institutional framework for the communications sector: Pelmorex submits that the division of authority between the regulator and the government, with recourse to the courts, as legislated in the *Broadcasting Act*, and its practical application, have generally struck an appropriate balance between government direction and regulatory independence. While an elected government should certainly be afforded a role in helping shape Canada's broadcasting sector, regulatory independence with respect to issuing specific decisions is critical.

## **Theme B: Supporting creation, production and discoverability of Canadian content**

21. As mentioned above, this theme is the most relevant to Pelmorex's current and future operations. Maintaining access to audiences, and by extension the discoverability of our content, is likely to pose the greatest challenge to Pelmorex's business going forward. The most important prerequisite for Pelmorex to create and produce Canadian content is access to platforms and audiences. Our ability to achieve this, and to continue to do so in the future, differs depending on the distribution platform. We outline here our thoughts on content creation and discoverability on the various platforms that we use to reach Canadians.
22. It is important to note, however, that the differences in the various distribution platforms (BDU carriage; exempt digital platforms; and BDU set-top boxes) are largely defined by the way they are regulated, and subsequently managed. From a technological standpoint, there is little distinction between subscription television platforms and those digital platforms covered by the

Commission's *Exemption order for new media broadcasting undertakings* ("exempt platforms"). The software solutions being used by BDUs (e.g. Mediaroom, Xfinity and Android TV) are just operating systems for television the way iOS and Android are operating systems for mobile devices. Indeed, Bell subscribers can access its BDU service through an Apple TV device without the need for a traditional set-top box. Recognizing that BDU service is technically another distribution option analogous to other unregulated operating systems will be an important step for a modern legislative and regulatory framework.

Access on traditional television services (BDU carriage)

23. In the case of our TWN/MM specialty services, we have undertaken significant technical and programming investments to maintain our status as an essential service made available to all Canadians as part of the basic television service. This CRTC's use of section 9(1)(h) of the *Broadcasting Act* provides an effective incentive and support for Canadian content and it, or a similar provision, should be maintained to serve this purpose. While our digital services are becoming increasingly important to Canadians and to our business, our TWN/MM specialty channels remain the solid anchor of our service. As many Canadians still cannot, or choose not to, access our services on digital platforms, traditional television distribution will continue to be a critical platform to ensure we can reach all Canadians.
24. Ironically, access to consumers through traditional television distribution is, in many ways, less efficient and more tenuous than it is on digital services. While Pelmorex enjoys a particular level of regulatory protection in the form of a mandatory distribution order, there is no certainty of renewal at the end of each licence term. As mentioned above, with each licence renewal Pelmorex continues to invest and commit more in exchange for mandatory distribution. We submit that this option should remain within a revised *Act*. But as the 9(1)(h) criteria are subjective, we can never be assured of maintaining our essential service status and our general terms and conditions of carriage. Indeed, in our most recent licence renewal the CRTC reduced our wholesale rate by 5%, despite receiving no requests from Canadian cable and satellite subscribers to do so.
25. Further, although distribution of TWN/MM on the basic service is overwhelmingly supported by Canadian consumers and industry stakeholders, were our mandatory distribution order not renewed, our BDU partners could stop carrying our services entirely at their discretion. While this may be unlikely, it is possible and, at the very least, the threat of losing distribution could impact our negotiations with each individual BDU. This scenario stands in stark contrast to the standard digital access regime where we have been able to reach tens of millions of Canadians with limited interference from third-party gatekeepers.
26. Pelmorex therefore supports identifying fixed, objective criteria (e.g. Canadian programming expenditure and exhibition percentages) that, if met, would ensure distribution by regulated BDUs. While we support maintaining and using the 9(1)(h) provision to ensure all Canadians can access essential services on the basic package, general mandatory distribution criteria at least

ensures that services would remain available for those who choose to subscribe, even while wholesale rate and other negotiations take place. Such a provision is particularly important, and could be reasonably limited, to independent programming services, which face greater barriers to negotiating access with BDUs.

27. We submit that the concept of setting objective thresholds for warranting mandatory distribution, which has been previously presented many times, is particularly relevant now and would logically be included in a modern legislative framework. Modern distribution network technology has largely eliminated capacity issues. But more importantly, access to audiences on exempt platforms has been open and predictable, which allows for more experimentation and customization. An objective-based model for access to regulated BDU platforms would increase certainty and efficiency, while simultaneously providing an incentive to contribute to objectives of the *Broadcasting Act*.

#### Access on exempt digital platforms

28. With respect to digital services, Pelmorex has benefited from the open nature of the Internet to reach Canadians on our websites and with our mobile apps. This open access to audiences has been successfully backstopped by section 36 of the *Telecommunications Act*. However, the direction of the maturing digital content market is troubling for companies like Pelmorex. At a macro level, the prevalent digital content business model has been a mass audience migration towards a handful of increasingly dominant platforms (e.g. Google and Facebook), which continues to increase the control of access to audiences by only a few companies. This is particularly the case in mobile, where users spend the vast majority of their time engaging with only a few different apps. Canadians now turn to these platforms as their primary distribution vehicle for content of all types.
29. As a result, it is becoming increasingly difficult for Canadian programmers to, at a minimum, maintain consistent viewership by attracting audiences on exempt platforms. To do so they must invest heavily to compete with these much larger, dominant providers. Or, as is increasingly the case, they must negotiate directly with these few companies to purchase traffic or enter revenue sharing arrangements for content distribution. Further, a main component of this pay-to-play model is that global players are 'buying' global distribution from global operating system providers. This dynamic is putting, and will continue to put, pressure on Canadian programmers' ability to access audiences and deliver their current levels of Canadian programming.
30. Pelmorex already experiences the impact of this trend in a meaningful way. Recent market research conducted for Pelmorex<sup>3</sup> shows that 43% of Canadians use the weather app or widget that came preloaded on their wireless device (most often, the preloaded weather information comes from US providers The Weather Company or AccuWeather). Although the TWN/MM app is the most popular weather information app in Canada, nearly half of the market is captured by

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<sup>3</sup> Brand Equity Research. Maru/Blue, May 2018.



the content providers that have either paid or partnered to access audiences, rather than through open competition based on the quality of their product. Smart speakers and voice-enabled search, which default to provide results from content partners, are similarly disintermediating consumers from content decisions and distorting the competitive marketplace.

31. From a policy perspective, these new business models are eroding the openness and neutrality of digital distribution and disrupting the competitive dynamic as platform operators become the new audience gatekeepers. While Pelmorex can still freely launch apps on the most popular app stores, operating system providers and vertically-integrated media companies have the advantage of promoting or favouring their own services, or the services of those that have paid them, before we can begin to attract users. If foreign digital 'BDU-like' services were to enter Canada unregulated (or with no incentive to contribute to the Canadian system), Pelmorex could very well experience the same audience access challenges, or be shut out of such systems altogether.
32. Fully unregulated digital distribution best serves content providers and consumers when the principles of open access to open networks and platforms are maintained. The benefits of regulatory exemption are significantly diminished when these principles are replaced by pay-to-play and restricted access. Pelmorex is working hard to establish and deepen its own partnerships to compete under the current market conditions, but these efforts would be undermined if access to digital platforms became more restrictive. A modern *Broadcasting Act* should empower the regulator to intervene when necessary to prevent abuses and ensure a diversity of content providers can access platforms and compete for audiences based on the quality of their content. Additional downstream intervention such as ensuring Canadian content is merchandised to consumers in an equitable, if not preferential, manner may also be required and the *Act* should provide the direction and the authority for the CRTC to implement such measures.

#### Access on set-top boxes

33. Next generation set-top-box technology provides a significant opportunity to enhance our traditional broadcasting service – for both television subscribers and advertisers – and generate new revenue. Interactive and customizable set-top box apps can also bridge the gap between traditional and digital services and help slow the erosion of television subscribers. However, deploying a next-generation set-top-box app requires cooperation from each individual BDU, which results in an inconsistent product rollout and user experience. Our apps additionally have to be developed and customized to suit the variety of software used in the various set-top boxes themselves. By comparison, Pelmorex could build and launch new apps in Apple's App Store and Google Play, automatically making them available to tens of millions of Canadians.
34. While the adoption of more standardized IP-based BDU platforms will help streamline app development, negotiating actual deployment will remain a challenge. Maintaining, bolstering or

expanding the section of the *Broadcasting Act* that requires distribution undertakings to give priority to the carriage of Canadian services (3(1)(t)(i)) to explicitly include set-top boxes and TV operating systems would help encourage continued innovation in Canadian content delivery for all providers.

## Questions as set out in the Terms of reference

### ***3.1 Net Neutrality - Are the current legislative provisions well-positioned to protect net neutrality principles in the future***

35. Section 36 of the *Telecommunications Act* has, to date, protected the principles of net neutrality well. Or more specifically, the Commission has used its interpretation of Section 36 to protect those principles. Pelmorex submits that it should be able to continue to protect those principles going forward. Certainly, the current wording that puts the ability of a Canadian carrier to “control the content or influence the meaning or purpose of telecommunications carried by it for the public” at the discretion of the Commission is reasonable. There are certain instances where it serves the greater good for digital content to be blocked by ISPs (e.g. certain types of criminal content), and an independent CRTC is well-positioned to determine when such instances have occurred.
36. Pelmorex does question though whether the limitations placed on “Canadian carriers” are well enough defined to guard against all potential abuses. Specifically, as we mentioned above, one of the greatest risks facing independent content providers in the future is being shut out of popular digital platforms so the platform providers can favour their own, similar, content, or the content of another provider that has paid for that privilege. Can the principles of net neutrality be extended to content platforms (e.g. app stores, operating systems, BDU-like services)? And what if those platforms are owned and controlled by vertically-integrated media companies that are also large ISPs? We submit that open access principles – to platforms as well as networks – should be backstopped by the *Telecommunications Act* or *Broadcasting Act* in some manner.

### ***8.1 How can the concept of broadcasting remain relevant in an open and shifting communications landscape?***

37. The *definition* of broadcasting in the *Broadcasting Act* (to paraphrase, any transmission of sounds or visual images, or a combination of sounds and visual images, by radio waves or other means of telecommunication for reception by the public) and the subsequent related definitions remain quite relevant today. An Amazon Prime Original is a *program*, as defined by the *Act*. Netflix is a *broadcasting undertaking*. Certainly, the definitions have remained relevant in a shifting communications landscape.
38. Pelmorex also submits that the ‘concept’ of broadcasting has been made no less relevant by streaming services and video-rich mobile apps than it was by direct-to-home satellite, digital cable or video-on-demand. It has long been accepted that broadcasting encompasses more than

just over-the-air signal distribution to rooftop antennas and rabbit ears. Accepting that the concept of broadcasting has expanded once again is part of a logical evolution. Further, many popular streaming services include in their catalogues seasons of programs that previously aired on traditional television. Similarly, some programs originally developed for distribution on a streaming service have found a second window on traditional network television. As we mentioned above, software solutions being used by BDUs (e.g. Mediaroom, Xfinity and Android TV) are just operating systems for television the way iOS and Android are operating systems for mobile devices. So while the concept of broadcasting has clearly expanded due to new distribution models, it remains clearly recognizable, is captured by the definitions in the *Broadcasting Act* and is relevant from a legislative point of view.

**8.2 How can legislation promote access to Canadian voices on the Internet, in both official languages, and on all platforms?**

39. The openness and reach of the Internet has allowed Pelmorex to deliver its unique weather and public safety content to more Canadians, in both official languages, than ever before. As previously mentioned, the vast majority of the content on our TWN/MM websites, mobile apps and smart TV services is Canadian content. Of course, this is dictated by the nature of our services that focus on accurate local weather to our viewers and users – similarly, the majority of the content on our El tiempo digital services is Spanish content.
40. Therefore, from Pelmorex’s standpoint, as long as access to digital platforms remains open and transparent, and downstream access to users is not unduly disrupted, we will continue to make Canadian content available in both official languages. There are no legislative changes that we can identify that we believe would further our ability to do so at this time, or increase our incentives to deliver Canadian content to Canadians. Rather, we submit that the regulator should be sufficiently empowered to intervene if the principles that currently allow Canadians and Canadian content providers to benefit from the digital age (e.g. open access) are threatened.
41. Pelmorex believes that the *Broadcasting Act* currently provides the general authority for the Commission to intervene. As previously mentioned, we submit that the definitions in the *Act* continue to capture modern forms of content distribution. Therefore, the sections of the *Act* that encourage access to Canadian voices (e.g. 3(1)(d)(ii); 3(e); and 3(1)(t)(i)) are relevant and could be applied to exempt platforms if necessary. If it is debatable whether the *Act* provides the Commission such powers, we submit that amendments should be made to sufficiently close that debate.

**9.1 How can the objectives of the *Broadcasting Act* be adapted to ensure that they are relevant in today's more open, global, and competitive environment?**

42. The objectives of the *Broadcasting Act* need to be adapted to allow maximum flexibility in their application to ensure the broadcasting system overall is meeting the *Act*’s cultural policy aims.

Rigid objectives, or the rigid application of objectives, are not relevant in such a rapidly evolving market. Nor can they help further the Panel's broader goal of maximizing the benefits that the digital age delivers to Canada's content and telecommunications industries and its stakeholders.

43. For example, a rigid interpretation of section 3(1)(a) of the *Act* would seemingly make it impossible for a foreign-owned streaming service to operate in Canada in a regulated (e.g. non-exempt) manner. At its core it presents an all-or-nothing proposition that would require structural changes so significant that certain programming providers may be as likely to exit the Canadian market rather than comply. As well, such a requirement would be challenging to enforce.
44. Pelmorex, specifically, is concerned that expanding the scope of broadcasting regulation, and maintaining a rigid interpretation of the objectives, could negatively impact our digital business. Because Pelmorex's TWN/MM apps and websites deliver primarily Canadian content, and contribute to the objectives of the *Act* in a variety of other ways, we believe that they should be able to continue operating without interference regardless of the legislative or regulatory context. More simply put, in our view a suitable regulatory regime that captured digital content activities would recognize the contributions of our digital services and ultimately rubber stamp them as being fully compliant. Any attempt to regulate that imposed disruptive requirements on our digital services would therefore be viewed as a legislative or regulatory failure.
45. An adapted *Broadcasting Act* should therefore primarily seek to ensure that the broadcasting system is benefiting Canadians, but should allow maximum flexibility in how it is doing so. Prescriptive sections such as 3(1)(a) should be loosened to remain relevant in today's more open, global, and competitive environment (e.g. ensure a substantial portion of the Canadian broadcasting system is effectively owned and controlled by Canadians). Conversely, section 3(e) stands out as being particularly relevant in the current context as it provides an objective that could potentially be met in a variety of ways (e.g. "contribute in an appropriate manner").

## ***9.2 Should certain objectives be prioritized? If so, which ones? What should be added?***

46. At a time when the broadcasting system is marked by both increased fragmentation of audiences and program distribution, and increased concentration under vertically-integrated Canadian media companies and dominant international tech companies, the availability of a variety of programming from a diversity of programming providers and regulatory fairness should be a prioritized objectives.

### Diversity of programming providers.

47. The *Act* currently calls for a system that results in a wide variety of programming (e.g. "drawn from local, regional, national and international sources"; and "a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity"). But, perhaps because it was written before our communications industry underwent significant concentration, it does

not ensure a variety or diversity of programming providers, particularly from an ownership perspective. Indeed, ownership is not mentioned in the *Act*.

48. Adding an objective to the *Act* to ensure the Canadian broadcasting system always includes a plurality of owners (across all forms of programming) will help safeguard the system against over-concentration and its inherent harms. The success of independent programming providers can also provide a litmus test for the success of the objectives of the *Act* (and subsequent regulation) as independent providers face the greatest hurdles when negotiating access and distribution.
49. Independent broadcasters also make a significant contribution to the Canadian economy. In 2017, independent television broadcasting activities in Canada directly generated 5,100 jobs and \$481 million in GDP. When including all activities (television, audio/radio, distribution and brand licensing, and other operations), Canada's independent broadcasters generated 28,440 jobs and more than \$2.54 billion in GDP for the Canadian economy in 2017.<sup>4</sup> As well, independent broadcasters make an irreplaceable contribution to Section 3(1)(d) of the *Act* by providing cultural, creative and educational programming in English and French, Indigenous languages, and a variety of third-languages that fully reflect our national diversity. Pelmorex therefore submits that an objective be added to the *Act* that ensures the Canadian broadcasting system should support a diversity of programming providers from an ownership perspective.
50. An overarching objective of ensuring a diversity of programming providers in the Canadian broadcasting system is best accomplished through clear, objective access requirements. This should include an objective-based regime for mandatory distribution by BDUs, as well as rules that ensure open and fair access to platforms, including set-top boxes, and incentives to merchandise Canadian programming in a way that reaches Canadians.

#### Regulatory fairness

51. Increased audience fragmentation due to the availability of digitally-based distribution platforms has resulted in a significant regulatory imbalance in the Canadian broadcasting system. Canadian broadcasters and distributors are subject to a variety of obligations – program spending and exhibition levels; closed captioning and described video requirements – that foreign providers are not. This increases the financial and administrative burden on Canadian providers, but also, more importantly, means that foreign providers are not contributing to the Canadian system and are not serving all Canadians in an adequate manner.
52. Pelmorex therefore strongly supports regulatory fairness for the benefit of all Canadians and believes it should be prioritized as an objective in the *Act*. Doing so will prevent the growth of a dual content market where only some content providers contribute to the objectives of the *Act*, while others do not. The *Act* currently directs the CRTC to regulate in a manner that is “sensitive

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<sup>4</sup>Nordicity. *Economic Contribution of the Canadian Independent Broadcasting Sector*. January 2019.

to the administrative burden<sup>5</sup> of regulation, but we submit that this no longer sufficient considering the current competitive industry dynamics. Rather, as a specific objective, we submit that the concept of regulatory fairness in the *Act* should seek to generally ensure that no Canadian broadcasting undertaking is regulated in a manner that unduly disadvantages them relative to their competition.

53. Maintaining flexibility in determining regulatory fairness is also important as balanced regulation is not limited to ensuring that like services are regulated in a like manner. Creating an incentive-based regime that attracts players to opt-in to regulation is another example of regulatory fairness. For example, Pelmorex opts in to the strict and costly requirements of maintaining mandatory distribution on the basic service because it suits our business, while most other services elect to operate under looser regulatory requirements, but with less market certainty. These options should be maintained. As well, while producing and exhibiting Canadian content should continue to be considered, other means of contributing to the objectives of the *Act* such as merchandising Canadian programming in a way that increases discoverability are also extremely beneficial.

**9.2 What might a new approach to achieving the Act's policy objectives in a modern legislative context look like?**

54. Based on our comments above, we submit that a modern approach to achieving the *Act's* policy objectives should: provide flexibility in accounting for and assessing the contributions made by a service; provide incentives for contributing to the *Act's* objectives; and ensure regulatory fairness among competitors. Certainly, no one-size-fits-all policy or regulation can serve a modern, diverse broadcasting sector. More specifically, no fixed set of contribution criteria can be reasonably applied to *all* programming and distribution undertakings without ultimately disrupting their businesses, and undermining many of the contributions they are already making to the Canadian system.
55. We recognize that the concept of allowing services, as a regulatory approach, to self-identify and/or commit to achieving objectives of the *Broadcasting Act* was proposed by the CRTC in its report *Harnessing Change: The Future of Programming Distribution in Canada*. We believe the concepts behind the CRTC's binding service agreement approach are innovative and reasonable in the modern context, and would be worth investigating further. Certainly, this approach encompasses the concept of allowing maximum flexibility to achieve the objectives of the *Act*. Further to our previous comments, we believe ensuring a diversity of programming providers should be identified as a key commitment in such a regime and contributions to that end should be prioritized. As well, using an incentive-based opt-in approach can help ensure regulatory fairness by providing incentives in return for regulatory requirements.

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<sup>5</sup> Section 5(2)(g)

56. However, the adequacy of the proposed contributions of a given service provider or distributor should not be assessed in a vacuum. Rather, such an approach to regulation must also account for the negative impacts that regulated players may have on each other, and work to address such impacts. For instance, access limitations raised as limiting factors in the contributions of programming services should become relevant in the review of a distributor's proposed contributions. The impact of these access restrictions on the distributor's and the programming services' contributions to the *Act* would then be weighed against the overall proposal, and ideally resolved before the proposal is approved, particularly if it serves the objectives of the *Act*.

***10.1 How can we ensure that Canadian and non-Canadian online players play a role in supporting the creation, production, and distribution of Canadian content?***

57. As mentioned in our response to 8.2, from Pelmorex's standpoint, as long as access to digital platforms remains open and transparent, and downstream access to users and audiences is not unduly disrupted, we will continue to make Canadian content available in both official languages. Put another way, non-Canadian online players can immediately play a role in supporting Canadian content by distributing that content made available by existing Canadian players or ensuring an equal place for Canadian players on their distribution platforms.

58. Our major concern with respect to our digital properties remains the increased control of audience access by a few dominant companies and platforms. We reiterate that legislation and policy should help ensure Canadian providers can continue to access platforms and audiences in an open and reasonable manner so they will continue to create, produce and distribute Canadian content. Additional measures such as requiring or promoting the merchandising of Canadian content in a manner that increases discoverability may also be needed to equitably support Canadian content.

***10.2 How can the CRTC be empowered to implement and regulate according to a modernized Broadcasting Act in order to protect, support, and promote our culture in both official languages?***

59. As stated in our response to 8.2, Pelmorex's view is that the *Broadcasting Act* already provides the Commission with the general authority to regulate all forms of broadcasting, which we believe includes streaming and digital distribution. We recognize that other interveners to this process are likely to disagree with this interpretation. Therefore, any necessary amendments to the *Act* should be made to ensure that this point is no longer debatable.

60. Further, as we submitted in response to 9.1, the *Act* additionally needs to be amended to allow for a more flexible application by the CRTC. Rather than rigidly adhering to requirements that are likely impossible to enforce, the Commission should be empowered to focus on the objectives listed in this question – protect, support and promote our culture in both official languages. A properly empowered CRTC would have the flexibility to recognize that contributions to these objectives can come in many forms. And while it may be useful in some

contexts to pre-set contribution criteria in exchange for regulatory incentives, it is as useful to also allow broadcasting undertakings to demonstrate the other, innovative ways in which they contribute to these objectives.

61. Specifically, the General Powers provided the Commission beginning at section 9 may not be sufficient in a modern legislative context that provides for players to be regulated – or for their contributions to be recognized in exchange for incentives – a variety of ways, rather than strictly under a ‘licence.’ While these powers are likely to remain relevant for some time, the *Act* should additionally allow and empower the Commission to seek other forms of regulatory oversight over broadcasting undertakings in the future, if necessary.

***10.3 How should legislative tools ensure the availability of Canadian content on the different types of platforms and devices that Canadians use to access content?***

62. Legislative tools should generally focus on providing incentives for creating and distributing Canadian content in a way that reaches Canadians. Section 9(1)(h) of the *Broadcasting Act* provides one existing example as it has been applied in this context by the CRTC to deliver significant Canadian content benefits to Canadians. In the case of Pelmorex, our television services broadcast 100% Canadian content in both official languages, almost all of which is live or near live. We also maintain an above-average Canadian programming expenditure requirement of 44%, and we lead the industry in first-run Canadian programming. In fact, we program approximately 125 hours of original, first-run content per week across our two networks and seven feeds, which, when setting aside advertising time, is more than the equivalent of a full broadcasting schedule.
63. Pelmorex therefore submits that section 9(1)(h) remains an effective legislative tool to ensure the availability of Canadian content on subscription television services and it should be maintained for this purpose. In fact, the use of 9(1)(h) could be broadened and made more objective in the future to ensure the availability of Canadian content on traditional television platforms. Specifically, objective criteria could be established under section 9(1)(h) that would guarantee distribution in exchange for meeting certain, exceptional, Canadian content spending, exhibition or other relevant thresholds.
64. With respect to digital platforms and devices, again, Pelmorex has leveraged the openness of the Internet to successfully reach tens of millions of Canadians with our Canadian digital content. In fact, digital distribution to date has been significantly more straightforward than distribution on traditional television platforms. Legislative tools should adequately support open access to digital platforms and audiences, including ensuring that access is not reduced. A component of open access to audiences could include equitable merchandising of Canadian services so Canadians are aware that they are available.

***14.1 Does the Broadcasting Act strike the right balance between enabling government to set overall policy direction while maintaining regulatory independence in an efficient and effective way?***



65. Yes, both the *Broadcasting Act* and its application have generally struck an appropriate balance between government direction and regulatory independence. While an elected government should certainly be afforded a role in helping shape Canada's broadcasting sector, regulatory independence with respect to issuing specific decisions is critical. It is a delicate balance to strike, and one that is likely never to be considered perfect by all players. Pelmorex has had no significant issue to date with this division of authority and sees no specific reason for it to be amended.

**14.2 What is the appropriate level of government oversight of CRTC broadcasting licencing and policy decisions?**

66. Similar to the above, Pelmorex submits that the current level of oversight of CRTC broadcasting licensing and policy decisions is appropriate and should be maintained. The opportunity to petition the Governor in Council with respect to a licence decision – and the subsequent process – affords a level of recourse to parties without unduly damaging the independence of the regulator. Again, Pelmorex has had no issue to date with this division of authority and oversight and sees no reason to recommend any changes to the current situation.

**14.3 How can a modernized *Broadcasting Act* improve the functioning and efficiency of the CRTC and the regulatory framework?**

67. Pelmorex submits that it would be the regulatory framework itself, and the level of oversight or intervention required from the CRTC to maintain it, that would ultimately have the greatest impact on regulatory efficiency. A modernized *Broadcasting Act* could therefore improve such functioning and efficiency – to the extent that such improvement is necessary – by setting the direction for a flexible, objective-based framework that continues to meet the objectives of the *Broadcasting Act* and therefore requires minimal oversight.

68. For instance, in a future where broadcasting regulation was largely and appropriately incentive-based, licensees (or whatever they might be called) would be motivated to continue to meet their required commitments in order to access various incentives. As one example, if achieving certain Canadian content expenditure and exhibition thresholds ensured distribution for a programming service, it would have an incentive to meet its commitments and report to the Commission on a regular basis. Similarly, if a distribution undertaking could access specific incentives in exchange for distributing a diversity of Canadian programming services, it would also likely do so.

69. A well-functioning regulatory framework that is meeting objectives and adequately serving all players should require less oversight. Predictable access parameters, for instance, remove the need for detailed regulatory processes to determine access, and could also streamline affiliate negotiations overall. Generally, a regulatory regime that, in practice, allows Canadians and the

broadcasting industry to fully benefit from the digital age could even rely more on annual reporting and reduce the requirement for regular renewal applications.

70. Of course, a significant cause of regulatory inefficiency has been the constant need to review and update regulations to account for the extreme impacts of new distribution models on the broadcasting system. A modernized *Act* that fully accounts for the new and future broadcasting reality will best reduce the need for, and instance of, regulatory review, resulting in an efficient regulator and regulatory framework.

#### ***14.4 Are there tools that the CRTC does not have in the Broadcasting Act that it should?***

71. Beyond the necessary policy direction and general powers to regulate already mentioned, Pelmorex does not believe there are any additional tools that the CRTC does not have in the *Broadcasting Act* that it should.

#### ***14.5 How can accountability and transparency in the availability and discovery of digital cultural content be enabled, notably with access to local content?***

72. Content distribution on exempt platforms often uses algorithms and recommendation engines to put content options in front of viewers. This practice, while often appreciated by viewers, removes a certain amount of consumer choice by masking or burying many options that are available. This practice could therefore harm Canadian content by not providing an equitable opportunity for discovery. This is why we have mentioned throughout this submission that the merchandising content in an equitable manner is one component of ensuring open and fair access to audiences.
73. A similar practice exists with smart speakers and voice-enabled search. Content provided by such devices may be based on an algorithm, or it may be related to content partnerships, providing content to users from providers that have paid to be the default service provider. Often these arrangements are part of global distribution deals. Either way, this practice disintermediates consumer choice from content decisions and distorts the competitive marketplace. This is particularly harmful for Pelmorex as weather is a common voice search and consumers are not aware of the weather provider without standard visual cues. The content provider is therefore not transparent and Canadians are less likely to discover content from their preferred, local Canadian provider.
74. Pelmorex therefore submits that the *Act* should support, at the very least, regulation that ensures Canadian content providers can integrate their solutions into the operating systems of virtually any type of content device.
75. Pelmorex provides Canada's best and most preferred local weather news and information and we are ready to continue competing for viewers and users based on the quality of our product. Our track record of innovation on television and exempt digital platforms has enabled us to

continually reach more viewers and users in Canada and around the world. As we have submitted throughout this intervention, the most important component of a modern legislative framework for Canada's broadcasting industry is to ensure all players, including independent content providers, can continue to equitably access platforms and audiences and compete for viewers and users based on the quality of their content.

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