

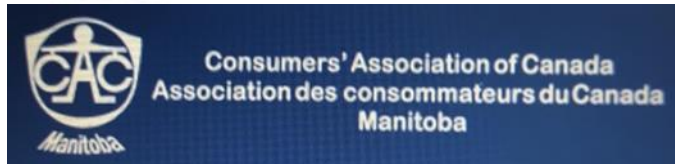


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POUR LA
DÉFENSE DE
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union
des consommateurs
LA FORCE D'UN RÉSEAU

 **OPTION
consommateurs**



2 June 2023

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

Dear Mr. Doucet,

**Re: Part 1 application 2023-0219-9 asking for an amendment to Broadcasting Decision CRTC 2022-
so that the Broadcasting Participation Fund/Le Fonds de participation à la radiodiffusion does not
cease operations in 2023 – Reply to interveners and Rogers Communications Inc.**

- 1 This is the reply¹ by Consumers' Association of Canada (Manitoba), Consumers Council of Canada (CCC), the Forum for Research and Policy in Communications (FRPC), Option consommateurs (OC), the Public Interest Advocacy Centre (PIAC) and Union des consommateurs (UdC) – 'the co-applicants' – to submissions made concerning the CRTC public proceeding in which their application (2023-0219-9) asks the CRTC to clarify the wording of a condition of approval imposed when the CRTC approved the application of Rogers Communications Inc. (Rogers) to acquire the broadcasting assets of Shaw Communications Inc. (Shaw).
- 2 The co-applicants begin by addressing interveners who participated in this proceeding, offering their unanimous support for application 2023-0219-9. In light of the enactment of the *Online Streaming Act* we then briefly address the statutory provisions that now apply to this matter. Next, we reply to the arguments made by Rogers. Our conclusions follow.

¹ As provided by subsections 27(1) and (2) of the [Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure](#) (Rules).

A. All interveners supported application 2023-0219-9

3 The seven interveners that supported the application represent diverse interests, ranging from community radio and official-language minority community (OLMC) producers, to Internet service providers and researchers:

- Quebec English-language Production Council (QEPC) (Intervention 26),
- National Campus and Community Radio Association/l'Association nationale des radios étudiantes et communautaires (NCRA/ANREC) (27),
- TELUS Communications Inc. (TELUS) (28).
- the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) (29)
- First Mile Connectivity Consortium (FMCC) (30),
- Canadian Association of Community Television Users and Stations (CACTUS) (31), and
- Ontario Library Association (OLA) (32.)

4 Six of the seven interveners supported the application and its request that the CRTC facilitate full payment of the BPF-FPR tangible benefits from Broadcasting Decision CRTC 2022-76 in 2023. Each set out facts establishing that failure to advance the BPF-FPR tangible benefits payment from the Rogers-Shaw broadcasting transaction will compromise their ability to participate in CRTC broadcasting proceedings. Specifically,

- a. QEPC commented that the enactment of the *Online Streaming Act* means that “there is no time during [the BPF-FPR’s] operation when the functioning of the BPF was more important than now” (paragraph 2), and that Rogers’ remission of the full BPF-FPR tangible benefits payment by 1 September 2023 “would enable the CRTC to enact regulations regarding costs in its broadcast proceedings” (paragraph 4).
- b. NCRA/ANREC noted that the BPF-FPR enabled it to retain regulatory experts to assist its staff in research and drafting submissions in several CRTC proceedings (paragraph 4), and
- c. CIPPIC noted that “[w]ithout the BPF-FPR, it will no longer be feasible for many consumer and public-interest organizations, like CIPPIC” to provide advocacy on behalf of the public in CRTC proceedings (paragraph 5);
- d. FMCC noted that the BPF-FPR supported its participation in the written and public-hearing phases of the CRTC’s 2014 *Let’s Talk TV* public consultation (paragraph 3);

- e. CACTUS commented that the BPF-FPR enabled it to learn how to participate in CRTC proceedings and to develop long-term relationships with consultants (paragraph 11) ; and
- f. OLA noted the depletion of the BPF-FPR fund will make it difficult for “organizations like the OLA ... to present their arguments in the public interest ...” (paragraph 2).

5 While TELUS did not take a position on the details of the 2023-0219-9 as to whether the entire \$725,439 in BPF-FPR tangible benefits should be paid immediately, it supported the application’s general request for relief through an advance payment in the tangible benefits approved in Broadcasting Decision CRTC 2022-76 (paragraph² 2). It noted that

[t]he participation of consumer advocacy groups is an important part of the public discourse in consultations and proceedings that affect Canadian consumers. It is particularly important to ensure the ability of consumer advocacy groups to participate in public proceedings now, given the recent announcement of the CRTC’s plans to modernize the Canadian broadcasting system, and the launch of three initial consultations to review the framework for online streaming services.

6 The co-applicants appreciate the time taken by the interveners to provide the Commission with their views about the application.

B. Applicable statute

7 The co-applicants filed their application with the CRTC on 17 April 2023. At that time the 1991 *Broadcasting Act*, as amended to that date, was in force.

8 On 27 April 2023 the *Online Streaming Act* received Royal Assent³ and amended the 1991 *Broadcasting Act*.⁴ The CRTC subsequently posted application 2023-0219-9 on 1 May 2023.

9 In the remainder of these pages the co-applicants distinguish between the 1991 *Broadcasting Act* as amended to 26 April 2023 (‘former Act’), and the 2023 *Broadcasting Act* (‘Broadcasting Act’, ‘current Act’ or ‘Act’) as amended on 27 April 2023 by the *Online Streaming Act*.

10 Subsection 90 of the *Broadcasting Act* requires the CRTC to continue application 2023-0219-9 “in conformity with this Act” – as amended – and also deems that Broadcasting Decision CRTC 2022-76 was made under the current Act:

² The paragraph numbers in brackets refer to the paragraph numbers in interveners’ submissions or Rogers’ answer.

³ [S.C. 2023, c. 8.](#)

⁴ [S.C. 2023, c. 8.](#)

...

Pending proceedings

(2) Any proceedings pending before the Commission or Executive Committee on the day immediately before the coming into force of this subsection shall be taken up and continued before the Commission under and in conformity with this Act.

Continuation of previous orders, etc.

(3) Every decision, order, rule and regulation issued, rendered or made under the former Act by the Commission or Executive Committee that is in force on the coming into force of this subsection and that is not inconsistent with this Act or any other Act of Parliament shall be deemed to have been issued, rendered or made by the Commission under this Act.

- 11 The co-applicants also note that section 11.1 of the current *Act* specifically empowers the CRTC to make an order regarding Rogers' payment of expenditures to the BPF-FPR:

Regulations — expenditures

11.1 (1) The Commission may make regulations respecting expenditures to be made by persons carrying on broadcasting undertakings for the purposes of

...

(c) supporting participation by persons, groups of persons or organizations representing the public interest in proceedings before the Commission under this Act;

....

Order — particular broadcasting undertaking

(2) The Commission may make an order respecting expenditures to be made by a particular person carrying on a broadcasting undertaking for any of the purposes set out in paragraphs (1)(a) to (d).

...

Recipients

(5) Regulations and orders made under this section may provide that an expenditure is to be paid to any person or organization, other than the Commission, or into any fund, other than a fund administered by the Commission.

- 12 Subsection 18(2)(b) of the current *Act* gives the CRTC the discretion not to hold a public hearing when making an order under subsection 11.1(2):

Public hearings — specific matters

(2) The Commission shall also hold a public hearing in connection with the following matters unless it is satisfied that such a hearing is not required in the public interest:

...

(b) the making of an order under subsection ... 11.1(2); ...

- 13 The co-applicants note as well that section 5.2 of the current *Act* now requires the Commission to “alter” or vary decisions that “could adversely affect” official-language minority communities (‘OLMCs’):

Consultation

5.2 (1) The Commission shall consult with official language minority communities in Canada when making decisions that could adversely affect them.

Objectives of consultations

(2) When engaging in consultations required by subsection (1), the Commission shall

...

(f) be prepared to alter those policies, decisions or initiatives; and

C. Co-applicants’ agreement with Rogers

- 14 Rogers and the co-applicants agree on two important points – namely that “Decision 2022-76 was not a licensing decision that invoked the Commission’s licensing authority under section 9 of the *Act*” (Rogers’ reply, paragraph 5, underlining in original) and that this decision “included a variety of conditions of approval” (Rogers’, paragraph 9).

- 15 It is because Broadcasting Decision CRTC 2022-76 imposed conditions of *approval* rather than conditions of *licence* that the CRTC is able to consider the proposals set out in application 2023-0219-9: neither the former nor the current *Act* sets any limits on the CRTC’s authority regarding conditions of approval.

- 16 The co-applicants also note that Rogers has not contradicted any of the facts in application 2023-0219-9, in particular the basic fact that during its existence the BPF-FPR has granted costs applications totaling an average of \$479,196 per year. The three annual payments of \$241,813 indicated in Broadcasting Decision CRTC 2022-76 represent half the funding granted by the BPF-FPR in an average year – at a time when all concerned agree that 2023 and 2024 will be extremely intense years for broadcast regulation.

D. Co-applicants’ disagreements with Rogers

- 17 Apart from the two points above the co-applicants disagree with the arguments set out by Rogers’ answer.

- 18 As set out in application 2023-0219-9, the co-applicants’ basic concern is that the CRTC’s decision to spread the \$725,439 tangible benefits payment to the BPF-FPR over three years, ostensibly to support public-interest organizations’ fulsome participation, actually leaves these organizations worse off than before. While the decision’s text offers hope that the BPF-FPR may have funding to pay approved applications the decision then reduces this funding to half of what the BPF-FPR over its existence granted in a typical year: a single payment of \$241,813 is 50.5% of \$479,196.

- 19 Rogers has not disputed the co-applicants' arguments that, without action by the CRTC, the BPF-FPR may have to suspend operations again in early 2024 (due to the size of costs applications anticipated from the 2023-138 proceeding). It is silent regarding the ironic result that if the CRTC invites public comments on a new costs-application regime for broadcasting, the public-interest organizations that have the most experience in this area will be forced to work for free or will be unable to participate.
- 20 The co-applicants note, moreover, that the lack of clarity in Broadcasting Decision CRTC 2022-76 about the specific date on which Rogers should make the BPF-FPR's tangible benefits actually gives Rogers the discretion to begin making these payments whenever it wishes. Rogers did not dispute the lack of a BPF-FPR tangible benefits start date in Broadcasting Decision CRTC 2022-76 and did not explain how the absence of a start year for the BPF-FPR tangible benefits payment is not a 'manifest error' (paragraph 34): without legal certainty as to the benefits' start year Rogers could make its first tangible benefits payment at any time of its choosing, regardless of other statements it has made or makes (as the only legally enforceable requirements under the *Act* are orders [previously issued as conditions of licence]).
- 21 In fact, this is precisely what has happened. On 3 May 2023, Rogers told the Commission that because the Rogers-Shaw transaction did not close until 3 April 2023, it would complete all tangible benefits payments by August 31 of each Broadcast Year, starting with the 2023/2024 Broadcast Year (i.e. by August 31, 2024)".⁵ While Rogers then also told the CRTC that it "will begin making tangible benefits payments to the ... BPF-FPR... and the Broadcast Accessibility Fund (BAF) ... by August 31, 2023"⁶ the lack of specific timelines in Broadcasting Decision CRTC 2022-76 has given Rogers complete discretion over the timing of the BPF-FPR tangible benefits payments. Even if, moreover, the CRTC clarifies that the first payment of the BPF-FPR tangible benefits shall be 31 August 2023, public-interest organizations are no better off because, as noted above (paragraphs 18 and 19), a payment of \$241,813 covers only half of the \$479,196 typically granted by the BPF-FPR to cost applicants in an average year. All applicants and most of the interveners have also stated their expectation that 2023 and 2024 are anticipated to be very heavy years for BPF-FPR applications due to present and future proceedings to implement the current *Act*'s requirements.
- 22 The co-applicants therefore disagree with the four arguments made in Rogers' 14-page reply over the course of 45 paragraphs. In the remaining pages we will show that
- a. The amendments made to the 1991 *Broadcasting Act* through the *Online Streaming Act* do "authorize the Commission to reopen or revisit the determinations it made in Decision 2022-76" (paragraphs 3 and 45 in Rogers' answer)

⁵ DM#4349395, at paragraph 1.6.

⁶ *Ibid.*, at paragraph 1.7.

- b. The CRTC's further approval of Rogers' revised tangible benefits package is necessary because the latter is not merely a filing requirement (paragraph 5 and 10 in Rogers' answer)
- c. Approving Application 2023-0219-9 will not breach requirements for procedural fairness as application 2023-0219-9 did identify the specific statutory or regulatory provisions empowering the CRTC to act (paragraphs 4-5, 6, 9, 11 in Rogers' answer), and
- d. The CRTC has authority to act with respect to the application because the doctrine of *functus officio* must be interpreted to give administrative flexibility (paragraphs 2-3, 7, 12-44, and 45-46 in Rogers' answer) 'to complete its statutory task' – in this case, to respond to Parliament's clear desire that public-interest organizations' CRTC participation costs be reimbursed.

23 The co-applicants' arguments are set out below.

1. *Bill C-11 allows the CRTC to revisit and amend Decision CRTC 2022-76*

24 Rogers argued that the amendments made to the 1991 *Broadcasting Act* through the *Online Streaming Act* do not "authorize the Commission to reopen or revisit the determinations it made in Decision 2022-76" (paragraphs 3 and 45).

25 Yet subsection 90(2) of the current *Broadcasting Act* specifically requires the CRTC to deal with application 2023-0219-9 in conformity with its (new) provisions.

26 Insofar as 'reopening' or 'revisiting' determinations is concerned, moreover, subsection 5.2(2)(f) expressly empowers the CRTC to "alter" decisions that could adversely affect OLMCs, without limiting the outcome of this power solely to OLMCs. The co-applicants submit that closure of the BPF-FPR due to Rogers' apparent desire to spread a payment of \$745,439 over three years will adversely affect OLMCs in at least two ways. First, the BPF-FPR's closure will prevent qualified public-interest organizations representing official-language communities from participating in the CRTC's proceedings – thereby limiting the evidence and arguments made with respect to programming and distribution issues affecting OLMCs. Second, the BPF-FPR's closure will prevent qualified public-interest organizations that focus on issues affecting all communities from participating in CRTC proceedings whose outcomes nevertheless also affect OLMCs.

27 Rogers also argued that Broadcasting Decision CRTC 2022-76 was not issued pursuant to the former *Act*, but "pursuant to the BD Regulations and the DS Regulations" (paragraph 41). As the CRTC's legal authority to issue licences under the former *Act* was in fact set out in section 9 of that statute, Rogers' argument is at best unclear and at worst, inapplicable as the CRTC's regulations cannot empower it to issue licences or to impose conditions of licence.

- 28 To avoid adversely affecting OLMCs the CRTC should ensure that its decision in this matter – application 2023-0219-9 – enables the BPF-FPR to continue operations and, in light of the number of important CRTC proceedings now underway, should ensure that Rogers makes the full tangible benefits payment to the BPF-FPR by 1 September 2023, by clarifying Broadcasting Decision CRTC 2022-76.
2. *Rogers requires CRTC's approval of the 2022-76 tangible benefits*
- 29 Rogers argues that “[t]here was no requirement for Rogers to obtain the Commission’s further approval for that revised package. The condition of approval was simply a filing requirement and that requirement was satisfied ... on April 25, 2022” (paragraph 5 and also 10).
- 30 The co-applicants note first that as application 2023-0219-9 explained in paragraphs 11 to 15 and 17 and showed in Appendix 3, the conditions of approval imposed by the CRTC are not mere ‘filing requirements’. First, if the conditions of approval were simply ‘filing requirements’, it is unclear why Rogers stated in paragraph 10 that it “fully complied with the direction and the condition of approval on April 25, 2022” [underlining and italics added]: does a simple filing requirement really require ‘full compliance’?
- 31 Second, even if the conditions of approval could be summarized as mere ‘filing requirements’ – and the co-applicants say this is not so – the fact that Rogers ‘merely’ filed materials does not negate the fact that the CRTC required Rogers to file a revised tangible benefits proposal (Broadcasting Decision CRTC 2022-76, paragraphs 62 and 70) as well as amendments of the conditions of licence of its television programming services regarding discretionary initiatives (paragraph 67).
- 32 Third, the co-applicants note the publication by the CRTC on 31 May 2023 of application [2023-0275-1](#) in which Rogers makes nine applications to amend conditions of licence of the Rogers or Shaw undertakings – as the CRTC “directed Rogers, in Appendix 2 to Decision CRTC 2022-76 to file”⁷ The application includes a letter from the CRTC to Rogers dated 29 May 2023 in which the CRTC states that it “will now consider the applications filed on 3 May 2023,⁸ along with the request related to the tangible benefits reporting requirement as a condition of licence that Rogers filed on 25 April 2022”: clearly the CRTC does not consider approval of Rogers’ application as simply confirming receipt of materials it had previously requested, and the CRTC has also not yet made a determination about this matter.

⁷ Rogers, *Application No. 2021-0228-4 – Follow-up to Broadcasting Decision CRTC 2022-76 – Conditions of Approval and Directions*, (3 May 2023), #DM4349395 at para. 2

⁸ Director, Ownership and Acquisitions, Consumer REsearch and Communications, CRTC, *Re: Follow-up to Broadcasting Decision CRTC 2022-76 – Conditions of approval*, (Gatineau, 29 May 2023), #DM4353068.

33 Rogers did not simply file materials required by the CRTC, however: it also asked the Commission to amend the conditions of licence of several of its broadcasting services (#DM4349395, paragraphs 1.4 – 1.5).

34 As Rogers filed its application under the current *Broadcasting Act* the CRTC is empowered and, in the co-applicants' view, is required to ensure that its determinations of Rogers' application reflect Parliament's desire that public-interest CRTC participation costs be reimbursed. Given the proceedings that the CRTC has so far announced (Broadcasting Notices of Consultation 2023-138, -139 and 140 as well as a "Consultation on fee regulations"), the CRTC should grant application 2023-0219-9 by clarifying Broadcasting Decision CRTC 2022-76 to require Rogers to remit full payment of the BPF-FPR tangible benefits by 1 September 2023.

3. *Application 2023-0219-9 does not breach Rogers' right to procedural fairness*

35 Rogers also argues that because application 2023-0219-9 contravened section 22(2)(d) of the *Rules* by not identifying the statutory or regulatory provisions under which the application is made" (paragraph 4), it breaches Rogers' rights to procedural fairness.

36 In reality application 2023-0219-9 stated the specific legislative provisions under which Broadcasting Decision CRTC 2022-76 was made in paragraphs 11,12, 30, 34 and 36.

37 It is therefore unclear on what basis Rogers' procedural rights were breached.

38 The co-applicants further note that to the extent that any relevant statutory or regulatory provision were omitted – and the co-applicants deny this is so – section 7 of the *Rules* empowers the CRTC to "dispense with or vary these Rules" if it "is of the opinion that considerations of public interest or fairness permit".

39 As the co-applicants followed the CRTC's *Rules*, however, they submit that Rogers' allegation of procedural non-compliance lacks any foundation: the CRTC is therefore not precluded from granting application 2023-0219-9.

4. *Functus officio doctrine*

40 The bulk of Rogers' reply recites caselaw concerning the doctrine of *functus officio* that, if it applied to Broadcasting Decision CRTC 2022-76, could prohibit it from changing decisions once these are made (paragraphs 2-3, 7, 12- 44, and 45-46). Rogers relies in particular on the 1989 Supreme Court of Canada case of [Chandler v. Alberta Association of Architects](#), quoting it as saying that,

As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.

41 Rogers also acknowledged, though, what Justice Sopinka then went on to say about the principle of *functus officio* in the context of administrative tribunals. Specifically, he held that

... its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

[a]ccordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas, supra*.

42 As noted above, subsection 5.2(f) of the current *Act* in fact provides a type of appeal mechanism, by requiring the CRTC to vary decisions likely to adversely affect OLMCs.

43 Justice Sopinka then also went on to say that,

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.)

44 The co-applicants submit that the current *Act* permits and empowers the CRTC to ensure that the tangible benefits payment required under Broadcasting Decision CRTC 2022-76 achieves its intended purpose. As the CRTC explained in Broadcasting Decision CRTC 2022-76,

68. ... ensuring some funding for the BPF and the BAF would enable the public and consumer groups to continue to participate in Commission proceedings and in the broadcasting system in a meaningful and fulsome way. Such participation is critical, particularly in the context of the Canadian broadcasting system today and its rapid evolution. ...

45 Based on its summary of *Chandler* Rogers argues that granting application 2023-0219-9 would

... signal that licensees could no longer expect to have any finality following a broadcasting proceeding or any certainty that matters at issue in the proceeding had been finally addressed. That would be bad public policy and would unduly prejudice all parties who dutifully participate in the Commission's public processes in accordance with its established rules of procedure.

(Paragraph 46)

- 46 The co-applicants have not asked and are not asking the CRTC to re-open Broadcasting Decision CRTC 2022-76 so as to change – say – the quantum or targets of Rogers’ tangible benefits package. Rather, application 2023-0219-9 asks the CRTC to exercise a reasonable degree of flexibility as to the timing of the existing payment to a single beneficiary, so as to ensure that the payment meets its stated purpose of enabling public interest organizations to participate fully and meaningfully in CRTC proceedings now and going forward.
- 47 Moreover, application 2023-0219-9 is asking the Commission to exercise the same degree of discretion that it has exercised in the past. The CRTC’s search engine identifies 96 broadcasting decisions whose outcomes were not final because the CRTC subsequently issued ‘*errata*’.⁹ Some announced minor corrections, while others made more substantial changes. Three years ago, for instance, the CRTC published [Broadcasting Decision CRTC 2020-158](#) on 21 May 2020. This 14-page long determination did not just to correct a date or timing of a condition: it provided the entire rationale “underlying the Commission’s decision and the resulting approvals” that the CRTC failed to provide in a previous decision (2020-115).
- 48 Considering the frequency with which the CRTC has ‘corrected’, amended, supplemented and simply changed its decisions after publishing them, Rogers’ argument that the CRTC’s “inability to amend its own broadcasting decisions has been settled law for decades” (paragraph 3) and that “the Courts and the Commission itself have consistently recognized that, except in limited circumstances set out in Part II of the Act (none of which apply here), every decision or order of the Commission is final and conclusive and cannot be subsequently revised” (paragraph 3) must be taken with at least a grain of salt.
- 49 In fact, among the dozens of decisions amended, modified, clarified or corrected by the CRTC, are five that involve Rogers. One of these, in fact, corrected ambiguous references to years of a licence, to specific calendar years (2005-207-1): see Appendix 1. Contrary to *Chandler* none of these decisions clarified the precise reasons for the changes, yet to the best of the co-applicants’ knowledge, Rogers did not challenge these decisions before the courts. While the decisions do not bind the Commission, they do establish that the CRTC has modified its decisions’ requirements in the past – and should therefore clarify Broadcasting Decision CRTC 2022-76 to require full payment of the BPF-FPR tangible benefits by 1 September 2023.

⁹ As the search results do not describe decisions made from 1968 to 2004, the 96-decisions figure underestimates the number of times the CRTC has ‘corrected’ its decisions after these were made. [Decision Correction of Decision CRTC 86-107](#) (showing an HTML of “DB86-107-1”), for example, changed the maximum monthly subscriber fee charged from \$10 to \$10.25; and [Decision CRTC 87-169-A](#) deleted references in two other decisions (87-169 and 87-172) to stations that had been renewed. [Decision CRTC 94-214-1](#), entitled “Correction” changed a licensee’s name.

E. Conclusion

50 The co-applicants again thank the interveners that support application 2023-0219-9.

51 The co-applicants have also appreciated the opportunity to respond to the arguments made by Rogers, especially since none of its arguments enable the Commission to ignore its new responsibilities under the current *Broadcasting Act*.

52 The lack of clear guidance in the current *Act* as to the manner in which the CRTC should weigh conflicting positions on matters of public policy is challenging. The Commission has often resorted to balancing exercises that weigh parties' interests. With that in mind, the co-applicants submit that their interest is in a public-interest participation fund that does not need to reduce payments to applications by 25% so as to squeeze a few more months of operation from its diminishing funding: requiring full payment of the BPF-FPR tangible benefits would immediately address that interest by providing a measure of financial certainty and stability until the CRTC can establish a regulatory regime for cost applications in broadcasting.

53 Rogers clearly shares the co-applicants' interest in certainty. The co-applicants also note a potential financial interest in delaying the second payment of \$241,813 until 1 September 2024, and the third payment until 1 September 2025: assuming high levels of (say, 4%) inflation over these two years, three divided payments enable Rogers to effectively 'save' just over \$27,000¹⁰ due to the declining value of money over time. The co-applicants do not believe that the Commission wanted to ensure through Decision CRTC 2022-76, and do not believe this is what Parliament expected when the current *Act* received Royal Assent and provided for the CRTC to address CRTC broadcast participation costs. The CRTC could, of course, also invite Rogers to an appearing public hearing, under section 18(3) of the *Act*, to discuss the representations it has made to the CRTC in this matter; should the CRTC so decide the co-applicants would appreciate the opportunity to appear.

54 The co-applicants look forward to the Commission's determinations in this crucial matter.

Sincerely yours,

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¹⁰ At 4% inflation the future value in year 2 of \$241,813 is \$232,512 while the future value in year 3 is \$223,570. Adding the year 1 value of \$241,813 means that Rogers would effectively remit \$697,895 to the BPF-FPR, rather than \$725,439 – a 'savings' due to inflation of \$27,544 (or 3.7% of the \$725,439 total tangible benefits).

CAC (Manitoba
CCC
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Part 1 Application regarding the BPF
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Appendix 1 CRTC decisions that change previous decisions

Decision	Original text	Corrected text
2000-469-1	<p>[5] In each broadcast year, the licensee shall devote at least 80% of its non-Canadian programming to programs from sources outside North America.</p> <p>1(c) In each broadcast year, the licensee shall devote at least 80% of its non-Canadian programming to programs from sources outside North America.</p>	<p>[5] In each broadcast year, the licensee shall devote at least 80% of its non-Canadian programming to programs from sources outside North America.</p> <p>1(c) In each broadcast year, the licensee shall devote at least 80% of its non-Canadian programming to programs from sources outside North America.</p>
2003-139-1	<p>3. Given Rogers Cable Inc's request, the Commission revokes, pursuant to sections 9(1)(e) and 24(1) of the Broadcasting Act, the broadcasting licence issued to Rogers Cablesystems Ontario Limited for the cable distribution undertaking authorized to serve Guelph.</p>	<p>3. The Commission expects that Rogers Cablesystems Ontario Limited will request the revocation of its licence to serve Guelph</p>
2005-207-1	<p>11. The licensee shall broadcast, between 7:00 p.m. and 11:00 p.m., the following amounts of described video programming:</p> <p>a) in years 1 and 2 of the licence term, an average of two hours per week;</p> <p>b) in years 3 and 4 of the licence term, an average of three hours per week; and</p> <p>c) in year 5, and for the remainder of the licence term, an average of four hours per week.</p> <p>In fulfilling this condition, a minimum of 50% of the required hours must be original broadcasts and all of the programming must be Canadian. Further, the licensee may broadcast up to one hour per week of described children's programming at an appropriate children's viewing time.</p>	<p>11. During the 2005-2006 and 2006-2007 broadcast years, the licensee shall devote a minimum of 2 hours of programming during each broadcast month to the broadcast of programs with descriptive video.</p> <p>Beginning in the 2007-2008 broadcast year, at least 3 hours per month of descriptive video shall be provided.</p> <p>Beginning in the 2009-2010 broadcast year, at least 4 hours per month of descriptive video shall be provided.</p> <p>Over the licence term, 50% of the described programming shall be original programming.</p>
2006-395-1	<p>6. Rogers did not reply to this intervention.</p>	<p><i>6. In its reply, Rogers stated that its non-compliance with subsection 2.2(9) of the Regulations during the week of 5 October 2003 was a "one-time anomaly" that does not reflect CJAQ-FM's past performance with respect to Canadian content. Rogers added that new measures have been introduced to ensure that the problem does not re-occur.</i></p>
2007-166-1	<p>1. The licensee shall devote a minimum of 60% of its programming each broadcast month to the broadcasting of ethnic programming.</p> <p>3. The licensee shall devote a minimum of 50% of its programming each broadcast day to third-language programming.</p> <p>2. The licensee shall devote a minimum of 80% of its programming between 8 p.m. and 10 p.m. each</p>	<p>The Commission hereby deletes conditions of licence numbers 1 and 3 of the appendix to Ethnic television stations in Calgary and Edmonton, Broadcasting Decision CRTC 2007-166, 8 June 2007 (Decision 2007-166). Instead, <i>the licensee shall comply with subsections 9(1.1) and 9(2) of the Television Broadcasting Regulations, 1987.</i></p> <p>The Commission also hereby corrects conditions of licence numbers 2 and 4 of the appendix to Decision 2007-166.</p> <p>2. The licensee shall devote a minimum of 80% of its programming between 8 p.m. and 10 p.m. each broadcast <i>year</i> to the broadcasting of Canadian programs.</p>

Decision	Original text	Corrected text
	broadcast day to the broadcasting of Canadian programs. 4. The licensee shall, in each broadcast week, direct programming to a minimum of 20 ethnic groups in a minimum of 20 different languages.	4. The licensee shall direct programming to a minimum of 20 ethnic groups in a minimum of 20 different languages <i>on a monthly basis.</i>

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