



Broadcasting Decision CRTC 2018-91

PDF version

Reference: 2017-114

Ottawa, 16 March 2018

Sirius XM Canada Inc.
Across Canada

Public record for this application: 2017-0560-0

Tangible benefits proposal by Sirius XM Canada Inc.

*The Commission **approves** Sirius XM Canada Inc.'s (Sirius XM) proposal to contribute \$1 million to the Broadcast Participation Fund (BPF), paid in two equal installments of \$500,000 in years 1 and 2 as part of the tangible benefits approved in Broadcasting Decision 2017-114.*

*The Commission **denies** Sirius XM's proposal to allocate \$3.79 million to the proposed Sirius XM Amp'd Fund/Fond Survolté. Instead, the Commission **directs** Sirius XM to contribute \$1,596,667 to FACTOR and \$1,596,667 to MUSICACTION, to be expended in equal amounts over seven consecutive broadcast years. In addition, the Commission **directs** Sirius XM to contribute an additional \$596,666 to the BPF, expended in equal amounts over the following five consecutive broadcast years from years 3 to 7.*

Background

1. In Broadcasting Decision 2017-114, the Commission approved the application by Sirius XM Canada Holdings Inc., on behalf of Sirius XM Canada Inc. (Sirius XM),¹ for authority to effect a change in its ownership structure. In accordance with Broadcasting Regulatory Policy 2014-459, the Commission directed the company to pay \$28.7 million (6% of the transaction value) in tangible benefits, with \$4.79 million (1% of the transaction value) of that amount to be allocated to eligible Canadian content development (CCD) initiatives as the discretionary portion.
2. Since Sirius XM did not submit a tangible benefits proposal during that proceeding, the Commission provided the company with the option to allocate the discretionary portion to the Broadcast Participation Fund (BPF). Accordingly, the Commission directed Sirius XM to provide one of the following by 26 May 2017:
 - written acceptance of the Commission's proposal to allocate \$4.79 million to the BPF (paid in two installments, one in year 1 and one in year 2); or

¹ Sirius XM is the licensee of the two undertakings Sirius Canada and XM Canada, which offer national satellite subscription radio services under the terms and conditions of one licence.

- a proposal for the Commission's approval regarding the discretionary portion of the tangible benefits.

Application

3. In response to the Commission's directive, Sirius XM submitted a proposal to allocate the \$4.79 million in discretionary tangible benefits as follows:
 - \$1 million to the BPF paid in two equal installments of \$500,000 in year 1 and 2; and
 - \$3.79 million to the Sirius XM Amp'd Fund/Fond Survolté (the Proposed Fund), a new fund which would subsidize the costs to produce and promote Canadian musical and spoken word content.
4. Sirius XM submitted that the Proposed Fund would benefit French-, English- and Indigenous-language musical and spoken word artists by directly funding professional recordings, mentorship, promotional support and access to publicists. Additionally, recipients of the Proposed Fund would be provided with airtime on Sirius XM's North American platform.
5. The company provided the allocation of the \$3.79 million, broken down by years and main components, as well as information describing the elements of the Proposed Fund.

Interventions

6. The Commission received interventions from Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ), the Canadian Association of Community Television Users and Stations (CACTUS), the Community Media Advocacy Centre (CMAC), the Forum for Research and Policy in Communications, House of Sound and Story, Media Access Canada (MAC), NewWest.tv, Public Interest Advocacy Centre (PIAC), the Toronto Community Media Network and one individual.
7. No interveners opposed Sirius XM's proposal to contribute \$1 million to the BPF. However, all interveners opposed the company's proposal to allocate \$3.79 million to the Proposed Fund.

Issues

8. As stated in Broadcasting Regulatory Policy 2014-459, the Commission requires that tangible benefits "yield measurable improvements to the communities served by the broadcasting undertaking to be acquired, as well as the Canadian broadcasting system as a whole". This requirement is part of what is referred to as the "benefits test" and one way of ensuring that the public interest is served following an ownership transaction. To be considered a benefit under the benefits test, the proposed contribution must **i)** flow primarily to third parties, such as independent producers, **ii)** be directed to initiatives that would not be undertaken in the absence of the transaction (i.e. incremental to the normal cost of doing business) and **iii)** not be self-serving.

9. After examining the public record for this application in light of applicable regulations and policies, the Commission considers that the issues it must address are the following:
- whether the Proposed Fund would yield measurable improvements to the Canadian broadcasting system;
 - whether the contributions are incremental to Sirius XM's normal cost of doing business;
 - whether the Proposed Fund is self-serving; and
 - whether the Proposed Fund constitutes a complete proposal.

Would the Proposed Fund yield measurable improvements to the Canadian broadcasting system?

10. Sirius XM submitted that the Proposed Fund would address underserved Canadian artists and content. It stated that while the local nature of commercial radio results in many "local" discretionary CCD initiatives and the evolution of the national non-discretionary CCD recipients have been segmented by language and influenced by the state of the broadcasting and music industries as they were at the time of their inception, the Proposed Fund takes an approach that is national and continental, multilingual, multi-genre and that focuses on emerging and Indigenous artists.
11. In addition, Sirius XM argued that the Proposed Fund would complement existing CCD initiatives and provide unique direct benefits to artists and the Canadian broadcasting system since it would:
- offer a recording studio or recording at a live show for spoken word artists, a sound engineer, a producer and a publicist through third parties independent of the company;
 - offer more accessibility to emerging artists who may be ineligible for other CCD funding programs;
 - offer genre-specific grants and support Canadian spoken word artists;
 - dedicate a portion of funding to Indigenous artists;
 - allocate funding reserved for artists under the age of 18;
 - equally fund English and French artists and content;
 - offer guaranteed airtime on one of Sirius XM's Canadian channels and pay royalties for all broadcast performances; and
 - offer space on the Proposed Fund's website to feature artist profiles and provide links to their recordings and social media platforms.

Positions of interveners

12. Overall, the interveners submitted that the Proposed Fund would not offer sufficient or significant incremental benefits and that existing funds offer comparable benefits to the Canadian broadcasting system while giving more flexibility to the supported artists.
13. ADISQ stated that the Proposed Fund would not complement existing CCD initiatives or overcome flaws that exist in the current system and does not differentiate itself from current programs with respect to supporting emerging artists. It added that existing funds support a wide variety of musical genres, do not discriminate against artists under the age of 18 and ensure support for Indigenous artists. Further, ADISQ highlighted that offering guaranteed airtime on one of Sirius XM's Canadian channels and web promotion to artists is not an incremental benefit since Sirius XM is already required to broadcast Canadian artists on its channels.
14. PIAC submitted that while other funds may not provide specific resources such as a producer, the programs allow the artist to allocate the funding they receive to acquire tools and resources such as studio time or a publicist based on the artist's preference. PIAC maintains that, given the ambitious mandate of the Proposed Fund, the \$3.79 million would be spread thinly over various initiatives over several years, therefore resulting in minimal incremental impact, if any.

Sirius XM's reply

15. Sirius XM submitted that its proposed allocation of \$3.79 million would fund the creation and distribution of new Canadian talent, make a real impact in the lives of Canadian creators and be incremental to its other CCD obligations.
16. Further, it stated that the framework of the Proposed Fund subsidizes the costs of creating, marketing and distributes new works on a variety of platforms while connecting artists with mentors in the industry. It added that artists supported by the Proposed Fund could supplement it with other sources of support, giving them the flexibility to take control of their careers.
17. Lastly, Sirius XM submitted that there is bound to be some minimal overlap in the mission and activities of funds, as well as potential recipients, since the basic premise of every fund is to fulfill the Commission's policies regarding CCD and tangible benefits in order to meet the objectives set out in the *Broadcasting Act*.

Commission's analysis and determinations

18. The Commission considers that to yield measurable improvements within the Canadian broadcasting system, an eligible CCD initiative in the context of a tangible benefits contribution does not necessarily need to be completely unique from other existing initiatives. The Commission recognizes that there is bound to be some overlap in the objectives and activities directed at CCD and tangible benefits. In this case, the Proposed Fund would contribute \$3.79 million to the creation and promotion of Canadian content.

19. In light of the above, the Commission considers that the information provided by Sirius XM regarding the Proposed Fund, should it meet expectations, would yield measurable improvements within the Canadian broadcasting system by contributing to the production and promotion of content created by up to 178 Canadian artists.

Would the contributions be incremental to Sirius XM's normal cost of doing business?

20. Sirius XM indicated that the Proposed Fund would flow through to third parties that are independent of the company (including the portion associated with administrative expenses). It also indicated that the selected artists would retain all rights of the produced material, not be bound by any exclusivity to Sirius XM and be free to accept or decline Sirius XM's offer to be broadcast on one of its channels.

Commission's analysis and determinations

21. Given the above, the Commission considers that the contributions to fund the production and promotion of emerging Canadian content as proposed would not be undertaken in the absence of the transaction. Therefore, the Commission finds that they would be incremental to the normal cost of doing business for Sirius XM.

Would the Proposed Fund be self-serving?

22. As a general policy, the Commission considers that expenses associated with regular, ongoing programming and/or operations are self-serving and not eligible for CCD contribution. Likewise, beneficiaries must be independent of licensees for the associated contribution to be considered eligible.
23. While the expenses of a CCD initiative may be considered incremental to the normal cost of doing business, as considered by the Commission, the initiative itself could be self-serving. For example, in this case, if the Proposed Fund was found to be principally self-promotional in nature or if the outcome of the associated initiatives were serving the interest of Sirius XM more than the public interest or the artists benefiting from those initiatives. As noted above, the purpose of requiring tangible benefit contributions is to ensure that the public interest is served by approving the ownership transaction.

Positions of parties

24. Intervenors generally submitted that the Proposed Fund would generate marketing and publicity benefits to Sirius XM and that while such incidental benefits are not necessarily prohibited, it should be given some consideration when assessing the degree to which the proposed plan would contribute tangible benefits in the public interest.
25. ADISQ stated that the Proposed Fund intends to support the production of content that could be broadcast on Sirius XM channels and that the proposal seems to have been developed to serve the company by focusing on aspects that are specific to its service. In addition, it noted that Sirius XM is a service subject to important regulatory requirements for emerging artists, that it is the largest broadcaster of audio content and that it is

required to dedicate a channel to Indigenous artists. Lastly, ADISQ submitted that these components would be particularly supported by the Proposed Fund.

Sirius XM's reply

26. Sirius XM stated that it has proposed various measures to ensure that the Proposed Fund is in line with the policy for independent and incremental CCD. It also submitted that the Proposed Fund would help develop and nurture Canadian artists and content through independent third parties and that the company does not intend to control the artists or the use of their created works. To support its application, the company reiterated the measures it described in its application to ensure the non-self-serving nature of the Proposed Fund.

Commission's analysis and determinations

27. Although some individual elements of the Proposed Fund appear to be acceptable, such as the \$3.79 million flowing through to independent third parties, the Commission considers it necessary to evaluate the degree to which the outcome of the initiatives associated with the Proposed Fund would serve the interest of Sirius XM to that of the public interest or the artists benefiting from those initiatives. Additionally, the Commission finds it appropriate to consider Sirius XM's mandate and mission, as well as the existence of current programs funding the production and promotion of Canadian content, while examining who benefits from the Proposed Fund.
28. The Commission recognizes the interveners' concerns regarding Sirius XM's branding and notes that the Proposed Fund would be branded in a way that is similar to other existing branded funds. The company indicated that no Sirius XM brand identifiers would be embedded in the recorded and studio content. The company added that recorded content could conceivably include incidental identifiers but submitted that neither Sirius XM nor the Proposed Fund would seek to include them. In light of this and the other aspects of the Proposed Fund, the Commission considers that the principal purpose of the initiative, as proposed, would not be to promote a service that is currently owned or controlled by Sirius XM.
29. However, the Commission notes that Sirius XM is a large national broadcaster of audio content and is subject to important regulatory requirements, including a dedicated channel to emerging artists and to Indigenous artists. In this regard, the Proposed Fund could be used to create content for these dedicated channels and benefit Sirius XM's offerings. Additionally, the preliminary governance structure of the Proposed Fund indicates that Sirius XM would represent 40% (2 of 5 members) of the governance panel. The Commission notes that when the board of directors of a CCD recipient shares members in common with the board of directors of the licensee making the contribution, the independence of the initiative may be called into question. The Commission considers that Sirius XM would be in a position to influence the Proposed Fund. In light of the above, while the Proposed Fund could yield a measurable improvement to the Canadian broadcasting system, the Commission considers that it also presents a benefit to Sirius XM by giving it priority access to newly created Canadian content and therefore allowing it to improve its service offering and helping it to fulfill its regulatory obligations.

30. In addition, the Commission considers that the benefits provided to the artists funded by the Proposed Fund could also be provided through existing funds such as FACTOR or MUSICATION. In that regard, although the injection of \$3.79 million could yield measurable improvements to the Canadian broadcasting system, as noted above, Sirius XM has not demonstrated that subsidizing the costs of producing and promoting Canadian content through the Proposed Fund, as opposed to other existing funds, would yield an additional benefit to Canadian artists beyond what can be provided with existing funds. Artists could still receive essentially comparable benefits from existing funds as from the Proposed Fund.
31. In light of the above, the Commission is of the view that the outcome of the initiatives associated with the Proposed Fund includes important elements that would serve the interest of Sirius XM without much additional benefit, beyond what can be provided through existing funds, to the overall public interest or to the artists who would receive the associated contributions. Therefore, the Commission considers that the information provided by Sirius XM in its application describes an initiative that would be self-serving.

Does the Proposed Fund constitute a complete proposal?

32. Sirius XM indicated that it still has to develop the final versions of the Proposed Fund's constituting documents, rules, policies, organizational structure and eligibility criteria to assess potential recipients. The company indicated that it would submit these documents for the Commission's final approval after the approval of the current application.
33. Further, Sirius XM indicated that the development of the rules would require initial consultations with artists and music industry stakeholders to properly define musical genres and tailor the rules to the objectives of the fund. After this is completed, legal counsel would develop plain language and fair rules and eligibility criteria.
34. The Commission did not receive comments regarding this issue.

Commission's analysis

35. The Commission generally makes its determinations on ownership transactions by considering the tangible benefits proposal submitted as part of the applications. Therefore, it is expected that any tangible benefits proposal will not require additional Commission approval and further regulatory process that would delay the treatment of the ownership transaction application.
36. Due to the absence of essential information regarding the Proposed Fund, the Commission would require further regulatory process and Commission approval. The missing essential information also means that the Commission cannot conclude that Sirius XM's Proposed Fund in this application is acceptable.

Conclusion

37. The Commission considers it appropriate to direct Sirius XM to redirect the \$3.79 million aimed at the Proposed Fund to eligible third parties. In this regard, an amount should be directed to FACTOR and MUSICACTION since these two programs are well established and assist in producing and promoting musical and spoken word Canadian content. Further, given the relevance and importance of the BPF as a tool to promote the participation of Canadians in Commission radio proceedings (as noted in Broadcasting Decision 2017-114), the Commission considers that a contribution to the BPF, in addition to the \$1 million proposed by Sirius XM, is also appropriate.

38. In light of all of the above, the Commission:

- **approves** Sirius XM's proposal to contribute \$1 million to the BPF paid in two equal installments of \$500,000 in year 1 and 2;
- **denies** Sirius XM's proposal to allocate \$3.79 million to the Proposed Fund;
- **directs** Sirius XM to contribute \$1,596,667 to FACTOR and \$1,596,667 to MUSICACTION, expended in equal amounts over seven consecutive broadcast years and to contribute an additional \$596,666 to the BPF expended in equal amounts over five consecutive broadcast years starting in year 3.

Secretary General

Related documents

- *Sirius Canada and XM Canada – Transfer of shares*, Broadcasting Decision CRTC 2017-114, 26 April 2017
- *Simplified approach to tangible benefits and determining the value of the transaction*, Broadcasting Regulatory Policy CRTC 2014-459, 5 September 2014

This decision is to be appended to the licence.