



## Broadcasting Decision CRTC 2019-431

PDF version

References: 2019-72 and 2019-72-1

Ottawa, 19 December 2019

### **Sirius XM Canada Inc.**

Across Canada

*Public record for this application: 2017-0835-6*

*Public hearing in the National Capital Region*

*16 May 2019*

### **Sirius Canada and XM Canada – Licence renewal and licence amendments**

*The Commission **renews** the broadcasting licence for the national satellite subscription radio undertakings Sirius Canada and XM Canada from 1 January 2020 to 31 August 2024. This short-term licence renewal will allow for an earlier review of the licensee's compliance with regulatory requirements.*

*The Commission **denies** the licensee's requests to amend the undertakings' conditions of licence relating to contributions to Canadian content development and to the broadcast of Canadian musical selections.*

### **Application**

1. Sirius XM Canada Inc. (SiriusXM) filed an application to renew the broadcasting licence for the national satellite subscription radio undertakings Sirius Canada and XM Canada, which expires 31 December 2019.<sup>1</sup> The licensee requested a seven-year licence renewal term for the services.
2. SiriusXM also requested amendments to the services' condition of licence relating to the percentage of revenues from its satellite subscription radio undertakings that must be contributed to Canadian content development (CCD) initiatives,<sup>2</sup> in order to decrease such contributions and to change the allocation formula.

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<sup>1</sup> In Broadcasting Decision 2012-629, the Commission renewed the authority for the operation of Sirius Canada and XM Canada through the issuance of a new broadcasting licence covering both undertakings, with an expiry date of 31 August 2018. That broadcasting licence was administratively renewed from 1 September 2018 to 31 August 2019 in Broadcasting Decision 2018-305 and from 1 September 2019 to 31 December 2019 in Broadcasting Decision 2019-300.

<sup>2</sup> Condition of licence 13 set out in the appendix to Broadcasting Decision 2012-629.

3. Finally, the licensee requested amendments to the services' condition of licence relating to the broadcast of Canadian musical selections<sup>3</sup> in order to modify the definitions of "new Canadian musical selection," "emerging English Canadian artist" and "emerging French Canadian artist."
4. The Commission received numerous interventions in support of this application from individuals, Canadian musicians, managers and record labels, all of whom stated their views on the importance of SiriusXM to the Canadian music industry, as well as from Native Communications Incorporated. It also received interventions commenting on the application from the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA), the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ), the Canadian Association of Broadcasters CEO Radio Council (CAB Radio Council), the Canadian Association of Stand-up Comedians, the Canadian Independent Music Association (CIMA) and the National Campus and Community Radio Association (NCRA). The Alliance nationale de l'industrie musicale (ANIM) also submitted an intervention, in which it opposed the amendments requested by the licensee. SiriusXM replied collectively to the interventions.

## **Issues**

5. After examining the record for this proceeding in light of applicable regulations and policies, the Commission considers that the issues it must address relate to the following:
  - the licensee's compliance with Sirius Canada and XM Canada's condition of licence relating to CCD contributions for the 2013-2014 through 2016-2017 broadcast years;
  - various issues relating to CCD contribution requirements for the next licence term;
  - requested amendments to definitions that apply to the services' condition of licence relating to the broadcast of Canadian musical selections; and
  - the length of the new licence term.

## **Non-compliance with condition of licence relating to Canadian content development contributions**

6. In Broadcasting Public Notice 2005-61 (the Satellite Radio Policy), the Commission adopted a licensing framework that recognized the uniqueness of satellite radio and took into account the limited bandwidth available on U.S.-owned satellites for Canadian programming. To offset this, the Commission established specific Canadian talent development (CTD, now known as CCD) contribution levels applicable to Canadian satellite radio services.

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<sup>3</sup> Condition of licence 6 set out in the appendix to Broadcasting Decision 2012-629.

7. In Broadcasting Public Notice 2006-158 (the Commercial Radio Policy), the Commission stated that additional emphasis should be placed on the development and promotion of Canadian talent through financial contributions by broadcasters for the development of audio content for broadcast. It indicated that such initiatives would not only help to develop and advance the careers of emerging Canadian artists, but would also increase the supply of high-quality Canadian music in a variety of genres and the demand for Canadian music by listeners. It further indicated that these initiatives would enlarge the supply of spoken word material for broadcast. The Commission also stated that such contributions should be used to fund initiatives that lead to the creation and promotion of audio content for broadcast using Canadian resources through the support, promotion, training and development of Canadian musical and spoken word talent, including journalists.
8. In terms of dollar amounts, of all licensees of commercial radio and audio services, SiriusXM makes one of the most significant contributions to CCD. As such, this licensee provides a significant and important level of support to both the Canadian broadcasting system and to Canadian artists.
9. SiriusXM's higher contributions levels are meant to balance its lower levels of Canadian content across the entirety of its channels, and requirements in this regard have been put in place to ensure that the licensee contributes in a meaningful way to the Canadian broadcasting system. SiriusXM's higher CCD contribution amounts are also largely a function of its higher revenues compared to any other individual licensee.
10. The Commission last renewed the broadcasting licence for Sirius Canada and XM Canada in Broadcasting Decision 2012-629. In the appendix to that decision, the Commission set out the following condition of licence relating to CCD contributions:<sup>4</sup>

13.(a) During each broadcast year, the licensee shall contribute a minimum of 4% of gross revenues from its satellite subscription radio undertakings reported in its annual returns for the previous broadcast year to eligible initiatives for the development of Canadian content development (CCD).

(b) During each broadcast year of the licence term, the licensee shall allocate its contribution under (a) above as follows:

- no less than 20% to FACTOR;
- no less than 10% to MUSICACTION;

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<sup>4</sup> The term "gross revenues from satellite subscription radio undertakings" was not defined in Broadcasting Decision 2012-629, in which the current 4% contribution level was imposed by condition of licence. As such, it is unclear which revenue sources the licensee must include when determining the revenue base for its services for the purposes of the CCD requirement. The Commission intends to review the definition of "gross revenues" as it applies to satellite subscription radio undertakings as part of a future proceeding.

- no less than 5% to the Community Radio Fund of Canada; and
- the remainder to other eligible initiatives (discretionary contribution).

(c) No more than 5% of the discretionary contribution during any broadcast year shall be devoted to expenses and salaries for CCD coordination staff (i.e. the Ambassador/l' Ambassadeur pour la musique canadienne).

(d) At least 45% of the licensee's discretionary contribution shall be allocated to initiatives for the development of Canadian French-language content, and no less than 45% shall be allocated to initiatives for the development of Canadian English-language content.

For purposes of this condition of licence, "eligible initiatives" shall have the meaning set out in section 15(1) of the *Radio Regulations, 1986*, as amended from time to time.

11. In Broadcasting Notice of Consultation 2019-72, the Commission noted that it had found SiriusXM in non-compliance with condition of licence 13(a) for the 2013-2014 broadcast year, resulting in a CCD contribution shortfall of \$313,021, and that it had informed the licensee of this non-compliance in a [letter](#) dated 5 April 2017. This non-compliance stemmed from a variety of factors including the ineligibility of certain CCD contributions, the provision of insufficient proof of eligibility, and expenditures that the Commission did not consider to be above and beyond promotional activities.
12. In that same notice of consultation, the Commission noted that SiriusXM was in apparent non-compliance with the above condition of licence for the 2014-2015 through 2016-2017 broadcast years. The Commission also noted that it was in the process of auditing the licensee's CCD contributions for the 2014-2015 broadcast year to determine its compliance with its CCD condition of licence for that broadcast year. In regard to this audit, in a [letter](#) dated 26 April 2019, the Commission found the licensee in non-compliance with condition of licence 13(a), resulting in a CCD contribution shortfall of \$567,621 for the 2014-2015 broadcast year. As indicated in the notice of consultation, that decision was added to the public record for this proceeding and the results were taken into account in evaluating the licensee's performance over its current licence term.
13. In regard to the non-compliance for the 2013-2014 and 2014-2015 broadcast years, the licensee disagreed with the Commission's findings of non-compliance and disputed the Commission's conclusion that any shortfall incurred during the current licence term results in non-compliance with the condition of licence. Nevertheless, the licensee paid the shortfall amounts in full as directed by the Commission in the above-noted letters.
14. In their interventions, ACTRA and CIMA expressed concerns regarding SiriusXM's compliance with its CCD contribution obligations. ADISQ stated that the licensee

should be required to rectify any shortfalls relating to payments to initiatives the Commission deems ineligible for CCD funding.

15. In its reply, SiriusXM disputed the findings of non-compliance, arguing that all of its discretionary CCD expenditures are responsive to the current features of the Canadian creative industry and provide maximum benefit to Canadian artists in the manner that they wish to be supported. The licensee argued that any past findings of non-compliance are for amounts that are not material given the importance of its overall CCD contributions. It further stated that any past re-payment of CCD shortfalls were a show of good faith, not an admission of non-compliance.
16. Despite the licensee's contention that it was not in non-compliance with its CCD obligations, the Commission confirms its findings regarding SiriusXM's non-compliance with its condition of licence relating to CCD contributions for the 2013-2014 and 2014-2015 broadcast years.

**Apparent non-compliance for the 2015-2016 broadcast year**

17. SiriusXM's apparent non-compliance with the CCD condition of licence during the 2015-2016 broadcast year relates specifically to the discretionary initiatives discussed below. The Commission acknowledges that some of these initiatives outlined below provide value to the Canadian artistic community and to the specific artists that participate in the events. However, the Commission has concerns regarding the specific activities supported through SiriusXM's CCD funding and, in some instances, the resulting benefits received by the licensee.
18. The Commission takes the issue of compliance seriously and relies heavily on licensees to provide evidence to support their claims. The onus in this regard is on the licensee, and if insufficient data is provided, the Commission has little choice but to deny the claims.

***Just for Laughs Festival in Montréal***

19. As part of a sponsorship contract, SiriusXM made a contribution of \$285,000 to Gestion Juste Pour Rire inc. for the Just for Laughs Festival in Montréal and claimed that amount as a CCD contribution. Pursuant to the conditions of that sponsorship contract, the licensee received 35 professionally recorded and edited spoken word segments. These segments totalled 17.5 hours of audio content, which aired for a total of 347 hours during the period beginning 1 September 2015 and ending 31 August 2017. SiriusXM aired this programming on its Canada Laughs channel, an original Canadian-produced channel that contributes to fulfilling its condition of licence relating to the production of Canadian-produced channels (i.e., condition of licence 1 set out in the appendix to Broadcasting Decision 2012-629). The licensee stated that no value is to be applied to programming created as part of this initiative given that it does not pay for Canadian programming that airs on its Canadian channels, and given that all such content would normally not have been recorded as part of its programming operations.

20. The Commission considers that the programming received by the licensee was useful for promoting Canadian comedians. However, it was also used to cover expenses that were not above and beyond normal programming expenses, since the licensee received content that was used to meet its condition of licence relating to the provision of Canadian-produced content on original Canadian-produced channels. In the Commission's view, this contribution was therefore self-serving. Consequently, the Commission determines that the \$285,000 expenditure is ineligible as a CCD expenditure.

#### ***Social promotion for Canadian artists***

21. As part of the CCD expenditures it claimed in regard to social promotion for Canadian artists, SiriusXM made an expenditure of \$37,081 to Facebook and Touché. The licensee stated that this expenditure related to paid promotion for improving the reach of social media posts featuring videos of Canadian artists at the Pemberton, Osheaga and Boots and Hearts music festivals, and SiriusXM's Metric Radio. It claimed that these posts do not act as self-serving marketing messages for its brand as no offers were included in any messaging and no content was available exclusively to subscribers. The licensee added that all content is available to the artists to use and share as they wish, and would not have been created without SiriusXM's contribution.

22. For expenditures to be considered eligible CCD contributions, they must be directed to projects that go well above and beyond promotional activities. In regard to the Commission's examination of SiriusXM's CCD contributions, the licensee was asked to provide all supporting media as evidence of the eligibility of the above-noted expenditure. After reviewing screenshots that were taken from the social media video posts and that were provided by the licensee, the Commission found that SiriusXM derived a significant benefit from those posts in the form of the promotion of its own brand. Furthermore, although the licensee provided screenshots for Commission analysis, it did not submit the complete videos from which those screenshots were taken. In addition, the captions for certain videos were illegible, which further impeded the Commission's ability to accurately assess the eligibility of the posted videos for CCD funding. Finally, none of the media that the licensee did provide made mention of any specific Canadian artists. Consequently, the Commission determines that the \$37,081 expenditure is ineligible as a CCD expenditure.

#### ***Headspace Marketing***

23. SiriusXM paid Headspace Marketing, a strategic consulting firm in the province of Quebec, \$4,445 to develop program advertisements to appear in a brochure for Le Premier Gala de l'ADISQ. The licensee noted that the printed materials highlighted its support of that gala and of Canadian musicians. It submitted that the amount paid was an eligible CCD contribution given that it related to a third-party organization producing website, social media and promotional materials for artists, and to the production of music video and audio recordings to be used to promote artists and their works on various communication platforms. The licensee further

submitted that participation by a third-party agency to create, manage and oversee advertising was necessary given that French-language expertise was required but was not available in-house. SiriusXM added that all promotional material directly benefited the artists and Le Premier Gala de l'ADISQ.

24. While the presence of a company's logo in the marketing materials at an event will generally not make any associated expenses paid ineligible as a CCD contribution, the materials commissioned by SiriusXM focused entirely on announcing the partnership between itself and Le Premier Gala de l'ADISQ, and did not mention any specific Canadian artist. Consequently, the Commission determines that the \$4,445 expenditure to Headspace Marketing was self-serving and, therefore, is ineligible as a CCD expenditure.

***L'État Brut Inc.***

25. SiriusXM made payments totalling \$2,264 to l'État Brut Inc. for the services of a photographer in order to promote, through the licensee's website and social media pages, all of the Canadian artists attending Le Premier Gala de l'ADISQ. The licensee submitted that \$1,251 of the total amount was eligible as a CCD contribution given that it related to a photographer creating promotional material to promote Canadian artist performances at music festivals/concerts/events. In regard to the remaining \$1,013, SiriusXM only provided a receipt for a photographer and was unable to provide any further information regarding the expenditure.
26. Expenses relating to hiring the services of a photographer can be eligible as a CCD contribution. However, given that the responses provided by SiriusXM to questions on the payments made to l'État Brut Inc. were vague and lacked supporting documentation regarding the content that was created and how that content was used to support Canadian artists, it was not possible for the Commission to properly assess whether the payments made were eligible CCD contributions. Consequently, the Commission determines that the \$2,264 expenditure to l'État Brut Inc. is ineligible as a CCD expenditure.

***Studio SiriusXM Canada Interview Series***

27. SiriusXM made expenditures to the Studio SiriusXM Canada Interview Series, described by the licensee as a series of one-minute promotional interview segments presented during primetime hours on television, the SiriusXM website, La Presse + digital and other social media outlets, to expand the profile of French-language artists. One of the videos created for this initiative during the 2015-2016 broadcast year featured an interview with Mr. PK Subban, a professional hockey player in the National Hockey League. The total claimed expenditure amounted to \$199,869 (an ad buy expense of \$163,416 plus related production expenses of \$36,453). SiriusXM stated that the interview was intended to be a variation on the series by exploring Mr. Subban's favorite Canadian artists and musical tastes. The licensee acknowledged, however, that due to production issues, this interview failed to meet the objectives set for the initiative, and that the amount of the media spend allocated to it was mistakenly included in the CCD submission. The licensee also

acknowledged that the additional production expenses for the promotion of this interview could be considered ineligible.

28. In the Commission's view, although the discussion involving Mr. Subban was meant to highlight Canadian musical artists, Mr. Subban himself is not a Canadian musical artist. As such, the Commission finds that the interview with Mr. Subban does not meet the criteria for an eligible CCD initiative as set out in the Commercial Radio Policy. Consequently, the Commission determines that the \$199,869 expenditure for the production of the video featuring Mr. Subban is ineligible as a CCD expenditure.

**Commission's decisions**

29. In light of the above, the Commission finds SiriusXM in non-compliance with its condition of licence relating to CCD contributions for the 2015-2016 broadcast year. The total shortfall amounts to \$528,659, broken down as follows:

| Funding recipient                       | Shortfall        |
|---|------------------|
| Gestion Juste Pour Rire inc.            | \$285,000        |
| Social Promotion for Canadian Artists   | \$37,081         |
| Headspace Marketing                     | \$4,445          |
| L'État Brut Inc.                        | \$2,264          |
| Studio SiriusXM Canada Interview Series | \$199,869        |
| <b>Total</b>                            | <b>\$528,659</b> |

30. The Commission **directs** SiriusXM to pay the shortfall amount of \$528,659 for the 2015-2016 broadcast year by no later than **6 April 2020**, to be allocated in the manner set out below, and to file proof of payment by no later than **5 May 2020**:

- \$211,464 to FACTOR;
- \$211,464 to MUSICACTION; and
- \$105,731 to the Community Radio Fund of Canada (CRFC).

31. A **condition of licence** to that effect is set out in the appendix to this decision.

32. The Commission reminds SiriusXM that the onus of proving an expenditure is eligible as a CCD expenditure rests with the licensee. Accordingly, SiriusXM is required to provide the Commission with the necessary information, such as the cost breakdown for every individually created piece of media or marketing tool, so that the Commission is able to properly assess the associated value and eligibility for CCD funding.

### **Non-compliance for the 2016-2017 broadcast year**

33. SiriusXM's apparent non-compliance with the CCD condition of licence during the 2016-2017 broadcast year relates specifically to the discretionary initiatives discussed below. The Commission acknowledges that some of the initiatives outlined below provide value to the Canadian artistic community and to the specific artists that participate in the events. However, the Commission has concerns regarding the specific activities supported through SiriusXM's CCD funding and, in some instances, the resulting benefits received by the licensee.
34. The Commission takes the issue of compliance seriously and relies heavily on licensees to provide evidence to support their claims. The onus in this regard is on the licensee, and if insufficient data is provided, the Commission has little choice but to deny the claims.

#### ***Nat Corbeil***

35. SiriusXM paid \$6,000 to Nat Corbeil, a public relations and communications agency in Quebec, for content created for ten blog posts on the SiriusXM website. A blog post was created for each artist featured on Les Concerts SiriusXM,<sup>5</sup> which consists of ten concerts that featured French-Canadian emerging and established artists and that were recorded in front of a public audience in Montréal.<sup>6</sup> According to the licensee, these blogs serve as a platform where background information on artists and songs chosen for recorded performances is provided. It noted that the material that was created, along with the media campaign, offered visibility for each artist. SiriusXM argued that since the material was essential to the program, the expense made was not self-serving.
36. In the Commission's view, the creation of blog posts for the SiriusXM website is, in principle, self-serving in nature. Further, the screenshots provided by SiriusXM were of poor quality, and the actual texts of the blog posts were illegible, making it impossible for the Commission to accurately assess the eligibility of the blog posts. Consequently, the Commission determines that the \$6,000 expenditure to Nat Corbeil is ineligible as a CCD expenditure.

#### ***BLVD Media Group***

37. SiriusXM paid \$2,000 to the creative studio BLVD Media Group for the development of two online contests to publicly promote on the SiriusXM website the Canadian artists associated with the High Valley and Wolf Parade shows. The licensee stated

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<sup>5</sup> In 2017, Les Concerts SiriusXM replaced SiriusXM's initiative known as Studio SiriusXM Interviews.

<sup>6</sup> For each artist, over a one-week period, a thirty-second promotional segment was presented through promoted posts on Facebook, Twitter and YouTube. Traditional media coverage through Le Journal de Montréal and its associated brands was also created to feature all ten artists. Further, promotional clips of the ten artists were featured during on-air segments of Le Show de Rousseau, a late-night Canadian talk show with a strong focus on culture and music. All songs recorded during the concert were available on the SiriusXM website and the SiriusXM Franco YouTube page and broadcast on SiriusXM's satellite radio and Internet services.

that it hosted the contests on its website to be cost-effective, and not to bring attention to the website. It argued that it amplified exposure to the artists by promoting the contests online and on the air, and by promoting the purchase of tickets to the shows to the public.

38. Although the contests noted by SiriusXM were not exclusive to subscribers to its services, the online contest pages were created by BLVD Media Group specifically for the SiriusXM website, which users were required to visit in order to enter the contests, thereby driving increased user traffic to the website. As such, the Commission considers that the creation of the contest pages for SiriusXM was self-serving. Consequently, the Commission determines that the \$2,000 expenditure to BLVD Media Group is ineligible as a CCD expenditure.

#### ***Canadian Music Week Events***

39. SiriusXM made expenditures totalling \$238,000 to sponsor various Canadian Music Week (CMW) events. As part of CMW, the licensee hosted two events at SiriusXM House, including performances by High Valley and Wolf Parade. Tickets were available directly through CMW and through contests on the SiriusXM website, which was promoted on SiriusXM's social media accounts. The licensee stated that it hosted the contests on its website to be cost-effective, and not to bring attention to the website, that it did not retain any revenues from CMW activities, and that no tickets or contests were exclusive to SiriusXM subscribers. Further, SiriusXM submitted that pursuant to the Commercial Radio Policy, these expenditures contributed to supporting, developing and promoting Canadian musical talent through artist payment, promotion or production for the SiriusXM House shows at CMW.
40. The Commission considers the expenditures made directly to CMW for event sponsorship and payments to artists, which amounted to \$186,100, were eligible CCD contributions. However, in regard to expenditures of \$41,200 for video recordings and \$9,616 for audio recordings, the licensee failed to provide the necessary documentation that would allow the Commission to determine whether they were eligible CCD contributions. In addition, SiriusXM paid \$1,867 to Facebook to promote the above-noted contests on the SiriusXM website. The Commission considers this expenditure to be self-serving given that the licensee hosted the contests directly through its platforms, thereby driving increased traffic to its platforms through its CCD contributions. In addition, although the licensee claimed that the above-noted contests were open to the public, it did not provide documentation relating to the ticket distribution that would allow the Commission to evaluate whether the event was indeed open to the public. In light of the above, the Commission determines that the expenditures made for video and audio recordings as well as those made to Facebook for promotional purposes, which amount to \$52,683, are ineligible as CCD expenditures.

#### ***Canadian Country Music Association Awards 2017***

41. SiriusXM made expenditures totalling \$184,005 to sponsor various events at the 2017 Canadian Country Music Association Awards (CCMAs), and to create promotional

content for the show. The licensee stated that these expenditures were made to support artists at the CCMAAs (for example, recording expenses for performances by Jess Moskaluke, Leaving Thomas and Bobby Wills, and video content produced by Moment Communications Inc. (\$31,400) and by Touché (\$88,800)).

42. The Commission considers that the expenditures related to the three above-noted performances were eligible CCD contributions, given that the events were open to the public and the artists supported were all Canadian. Further, the licensee provided adequate documentation supporting the eligibility of these performances. The Commission also considers that the video content produced by Moment Communications Inc. was eligible for CCD funding given that its main focus was showcasing artists, with only a minor focus on SiriusXM branding. However, the video content created by Touché focused heavily on SiriusXM. As such, the Commission finds that the creation of that video content was not well above and beyond promotional activities and, therefore, that the expenditure was self-serving. Consequently, the Commission determines that the \$88,800 expenditure to Touché is ineligible as a CCD expenditure.

**Commission’s decisions**

43. In light of the above, the Commission finds SiriusXM in non-compliance with its condition of licence relating to CCD contributions for the 2016-2017 broadcast year. The total shortfall amounts to \$149,483, broken down as follows:

| Funding recipient                              | Shortfall        |
|--|------------------|
| Nat Corbeil                                    | \$6,000          |
| BLVD Media Group                               | \$2,000          |
| Canadian Music Week Events                     | \$52,683         |
| Canadian Country Music Association Awards 2017 | \$88,800         |
| <b>Total</b>                                   | <b>\$149,483</b> |

44. The Commission **directs** SiriusXM to pay the shortfall amount of \$149,483 for the 2016-2017 broadcast year by no later than **6 April 2020**, to be allocated in the manner set out below, and to file proof of payment by no later than **5 May 2020**:

- \$59,793 to FACTOR;
- \$59,793 to MUSICACTION; and
- \$29,897 to the CRFC.

45. A **condition of licence** to that effect is set out in the appendix to this decision.

46. The Commission reminds the licensee that the onus of proving an expenditure is eligible as a CCD expenditure rests with the licensee. Accordingly, the licensee is required to provide the Commission with the necessary information, such as the cost breakdown for every individually created piece of media or marketing tool, so that the Commission is able to properly assess the associated value and eligibility for CCD funding.

**Various issues relating to Canadian content development contribution requirements for the next licence term**

47. In the sections that follow, in regard to Sirius Canada and XM Canada's CCD contribution requirements for the next licence term, the Commission addresses issues relating to the following:

- requested amendments to the services' condition of licence relating to CCD contributions;
- support for Indigenous production through CCD contributions;
- directing CCD funding to promotion;
- the use of CCD contributions to fulfil other regulatory requirements;
- providing artists with recordings of content produced through CCD funding;
- CCD expenditures made to third-party entities;
- the services' condition of licence relating to CCD ambassadors;
- performance indicators relating to CCD expenditures; and
- support for official language minority communities (OLMCs) through CCD contributions

**Amendments to the condition of licence relating to Canadian content development contributions**

48. SiriusXM requested the following in regard to Sirius Canada and XM Canada's condition of licence relating to CCD contributions:

- an amendment to condition of licence 13(a) such that the current minimum requirement to contribute each broadcast year a minimum of 4% of gross revenues from its satellite subscription radio undertakings reported in its annual returns for the previous broadcast year to eligible CCD initiatives be replaced with varying minimum requirements over the next licence term, specifically, 2.5% for Year 1, 1.5% for Year 2, and 0.5% for each of Years 3 through 7; and

- an amendment to condition of licence 13(b) that would vary the allocation percentages for CCD contributions over the next licence term, as follows:
  - for Year 1, contributions to FACTOR, MUSICACTION and the CRFC would remain at 20%, 10% and 5%, respectively, but 1% would be directed to the Canada Media Fund for allocation to the Indigenous<sup>7</sup> Program, with the remainder to eligible initiatives (discretionary contribution);
  - for Year 2, contributions to FACTOR, MUSICACTION and the CRFC would remain at 20%, 10% and 5%, respectively, but 3% would be directed to the Canada Media Fund for allocation to the Indigenous Program, with the remainder to eligible initiatives (discretionary contribution);
  - for Years 3 through 7, contribution levels would increase for FACTOR (from 20% to 50%), for MUSICACTION (from 10% to 30%), and for the CRFC (from 5% to 15%), and 5% would be directed to the Canada Media Fund for allocation to the Indigenous Program. Accordingly, there would be no discretionary contributions for these broadcast years.

49. SiriusXM did not cite financial need for the proposed amendments. Rather, in support of its request, the licensee submitted that a reduction in its required CCD contributions is necessary due to the growing regulatory imbalance between itself and its competitors that benefit from operating under the Exemption order for digital media broadcasting undertakings<sup>8</sup> (DMEO), as well as terrestrial radio licensees, which do not have the same required contribution levels as its services. It added that competing with unregulated undertakings requires enormous investments in new technology and content, which has a direct impact on its business plan. In the licensee's view, the current CCD contribution requirements for its services place it at a significant competitive disadvantage when compared with unregulated services, and not being able to compete on a level playing field with such services has a direct impact on its ability to offer competitive services in Canada.

50. SiriusXM further stated that the requested amendments would allow it to streamline the number of its CCD initiatives, and that the proposed phased-in approach will address any impact that a reduction would have on currently designated CCD contribution recipients. It added that the tangible benefits payments to FACTOR, MUSICACTION and the CRFC that it is required to make pursuant to Broadcasting

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<sup>7</sup> "Indigenous" means an individual who self-identifies as Indigenous, which includes First Nations, Metis or Inuit. In the present decision, "Indigenous" is used interchangeably with "Aboriginal," which has been used in other Commission documents and which the licensee has used in its requested amendments to its condition of licence relating to CCD contributions.

<sup>8</sup> This exemption order is set out in the appendix to Broadcasting Order 2012-409.

Decisions 2017-114 and 2018-91 would help to offset the requested reductions in required CCD contributions.

51. Finally, even if its request to lower its CCD contributions is denied, SiriusXM proposed a “materiality threshold” whereby licensees are considered in “material compliance” with CCD contribution requirements as long as non-compliance with those requirements does not involve more than 2% of total required CCD expenditures.

### ***Interventions***

52. Noting that the Commission had already reduced the licensee’s CCD contribution requirement from 5% to 4%,<sup>9</sup> ACTRA expressed concern over the harm that a further reduction could cause to an already volatile industry. For its part, the CAB Radio Council noted the regulatory, operational and cost advantages granted to SiriusXM given that the vast majority of its channels are U.S. sourced, and expressed concern over the fact that the licensee did not demonstrate that the requested amendments are necessary for the viability of the service in the short or medium term. Both ACTRA and the CAB Radio Council, along with other interveners, questioned whether the licensee’s requested reductions in regard to its CCD contribution requirements should be granted in light of its previous non-compliance with such requirements.
53. The NCRA expressed concern over the impact that a reduction in funding would have on the CRFC, given that approval of SiriusXM’s request would more than halve the licensee’s current required contribution to that mandatory initiative. It submitted that based on the numbers provided by the licensee, SiriusXM’s claim that recipients would continue receiving approximately the same amount as they currently receive would be false for the campus/community radio sector. The intervener argued that a reduction of funding to the CRFC would have a significant impact on many individual campus and community radio stations given that those stations have a limited number of funding sources and cannot simply adjust their internal budgets. In regard to SiriusXM’s claim that the tangible benefits payments it is required to make to the CRFC pursuant to Broadcasting Decisions 2017-114 and 2018-91 would help to offset the requested reductions in required CCD contributions, the NCRA considered that such a claim is unfair to the campus/community radio sector given that these aggregate payments are meant to fulfill past commitments to the CRFC, not to offset reductions in new CCD funding going forward.
54. Certain interveners, including CIMA and ACTRA, opposed the licensee’s request to reduce and then eliminate funding to discretionary initiatives. In CIMA’s view, certain CCD-supported initiatives would not be possible without SiriusXM’s discretionary contributions. Noting that SiriusXM is an important partner in the Canadian music industry, CIMA argued that the licensee’s discretionary CCD

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<sup>9</sup> In Broadcasting Decision 2012-629, the Commission reduced SiriusXM’s annual required CCD contribution level from 5% to 4%.

contributions have supported many CIMA members in a variety of important events and initiatives that would not have been eligible through other means, and are therefore crucial for making a difference in their careers.

55. Both CIMA and the NCRA expressed concerns over SiriusXM's proposed "materiality threshold." The NCRA submitted that 2% of total CCD expenditures may be a small amount for a company as large as SiriusXM, but could have a large impact on the small campus/community radio sector. It added that compliance, and not material compliance, should continue to be the requirement. CIMA submitted that a history of non-compliance is not a valid reason to reduce required CCD contributions and eliminate discretionary allocations.
56. Should the Commission approve SiriusXM's request to eliminate discretionary contributions, ANIM requested that in each broadcast year, the licensee be required to allocate its required CCD contributions to mandatory initiatives as follows: 40% to FACTOR, 40% to MUSICACTION, 15% to the CRFC and 5% to the Canada Media Fund (CMF) for allocation to the Indigenous Program. Should the current requirement be maintained, the intervener requested that the non-discretionary contributions be equally distributed between FACTOR and MUSICACTION, that these annual CCD contributions be each set at a minimum of 20%, and that the Commission consider increasing this percentage. ANIM also requested that SiriusXM be required by condition of licence to ensure that at least 15% of the 45% of the discretionary contribution allocated to initiatives for the development of Canadian French-language content is allocated to initiatives for Canadian French-language content coming from or conducted in francophone minority communities.
57. For its part, ADISQ also proposed a redistribution of SiriusXM's CCD contributions such that 27.5% would be directed to each of FACTOR and MUSICACTION (with each directing 2.5% to Indigenous production), 10% to the CRFC, and 35% to discretionary initiatives. The intervener noted that following the issuance of Broadcasting Decision 2012-629, in which the Commission determined that 20% of the licensee's CCD contributions would go to FACTOR and 10% to MUSICACTION, there has been an imbalance between contributions made to these initiatives. ADISQ therefore proposed a temporary five-year distribution of the CCD contributions to recuperate the money that has been lost since that time.
58. The NCRA disagreed with SiriusXM's assertion regarding the benefits of the proposed phased-in approach, given that its stations generally operate on very thin margins and with insufficient (and sometimes no) staff, and that any increases in revenues are used to cover essential operating costs. Finally, both the CAB Radio Council and CIMA did not agree with the licensee's claim that the need for a streamlined approach to CCD justifies a reduction in CCD contributions.
59. ADISQ agreed with SiriusXM regarding the competitive imbalance between its services and unregulated services, but did not agree with the licensee's proposal for rebalancing the situation (i.e., a reduction in its CCD contribution requirements). It proposed instead that the DMEQ be reviewed such that any broadcasters providing

cultural content to Canadians participate in the funding of national cultural production and its visibility. The intervener also noted that SiriusXM benefits from the exemption order given that it offers content online yet does little to support and promote Canadian content online. For its part, the CAB Radio Council noted that other regulated broadcasting entities also experience a competitive disadvantage when compared to unregulated services, and that a competitive imbalance is not unique to SiriusXM.

60. ADISQ added that the U.S. broadcasting entity Sirius XM Holdings, Inc. which owns in part the Canadian entity Sirius XM Canada Holdings Inc., posted steady increases in revenues from 2014 to 2018, placing it in a position to make significant investments towards broadcasting initiatives.

***SiriusXM's reply***

61. In its reply, SiriusXM stated that it has disputed and continues to dispute the suggestion regarding its apparent non-compliance with its CCD obligations for the 2014-2015 through 2016-2017 broadcast years specified in Broadcasting Notice of Consultation 2019-72. The licensee further stated that it firmly believes all of its discretionary CCD expenditures are responsive to the current features of the Canadian creative industry and provide maximum benefit to Canadian artists in the manner in which they wish to be supported.
62. In its reply, SiriusXM submitted that maintaining the current regulatory burden on licensees would pose a considerable risk to the Canadian broadcasting system, and would result in licensees of audio and audio-visual services continuing to lose listeners or viewers to unregulated services that do not have any regulatory obligations and do not provide direct or indirect benefits to Canadian artists. The licensee added that continuing to impose CCD contribution requirements and other obligations at current levels would ultimately threaten its ability to provide funding for Canadian content.
63. SiriusXM reiterated its position that FACTOR, MUSICACTION and the CRFC would benefit from a projected increase in revenues over the next licence term. It further reiterated that tangible benefits payments resulting from Broadcasting Decisions 2017-114 and 2018-91 would help to offset any reductions in its required CCD contributions. Regarding ADISQ's mention of the financial resources of Sirius XM Holdings, Inc., SiriusXM indicated that the finances of the U.S. Sirius entities are not relevant to this proceeding given that they are separate from SiriusXM and do not control SiriusXM.
64. According to SiriusXM, reducing its CCD requirement would result in a further increase in revenue as it becomes more competitive with licensed terrestrial radio services and exempt services. As such, it argued that CCD funding recipients would benefit from a projected increase in revenues during the next licence term. The licensee pointed to issues relating to the responsiveness of the current regulatory framework and the continued ability of its services to compete effectively with

unlicensed services and terrestrial commercial radio stations. SiriusXM also claimed that the high cost of CCD expenditures and other regulatory requirements are borne by customers, and that it risks losing them to less costly or free services provided by unregulated competitors.

65. In regard to the NCRA's and ANIM's proposals regarding the allocation of CCD funding to mandatory initiatives, the licensee stated that it cannot control the manner in which FACTOR, MUSICACTION and the CRFC disburse their CCD funds, and that the interveners should address their desire for specific allocations directly with funding organizations themselves.
66. In regard to the CAB Radio Council's concern linking required CCD contributions with the number of U.S. channels sourced by SiriusXM for its services, SiriusXM argued that the Commission made no such link in the Satellite Radio Policy. The licensee further stated that while the number of Canadian channels cannot form the majority of channels available on its services, the reach of the Canadian channels that Sirius Canada and XM Canada do carry is substantially greater than that of any Canadian commercial radio station given that these services can be heard across North America.
67. In regard to the CAB Radio Council's and CIMA's statements that the total value of CCD contributions does not preclude streamlining, SiriusXM stated that streamlining ultimately results from the elimination over time of the discretionary component of its CCD obligation. According to the licensee, the total value of CCD contributions must therefore be reduced if streamlining is to be accomplished by eliminating the discretionary component.
68. Finally, SiriusXM questioned the utility of reviewing the DMEO as a way of addressing the competitive imbalance between its services and unregulated services rather than considering steps that would alleviate the regulatory burden it is presently facing. The licensee submitted that any review of the DMEO would be lengthy, and that there is nothing stopping the Commission from addressing the competitive imbalance by focusing on the rules that apply to licensees.

***Commission's analysis and decisions***

69. In Broadcasting Decision 2012-629, the Commission reduced SiriusXM's annual CCD contribution level from 5% of gross revenues from its satellite subscription radio undertakings reported in its annual returns for the previous broadcast year to 4% of those revenues. In assessing the CCD contribution level to be applied at that time, the Commission took into account the licensee's corresponding commitment to increasing the level of Canadian programming required on its original Canadian-produced channels from 50% to 70%, which was an enhancement to its offering at the time as it related to the use of Canadian resources. It also noted the licensee's commitment to adhere to a condition of licence requiring an increase in the services' broadcast of music by Canadian emerging artists, from 25% to 40%, on Canadian music channels.

70. In regard to the present request, SiriusXM has not offered any corresponding increase in the number of Canadian channels or any other programming enhancements that would mitigate the reduced spending on CCD initiatives.
71. Further, a review of SiriusXM's overall financial performance from 2005 to 2018 shows that the current licence term has been its most profitable and that the revenues of the licensee's services continue to grow. Although SiriusXM raised issues regarding competition in order to justify the requested licence amendments, it did not cite a financial need for the amendments. Further, the Commission finds that the licensee's financial situation does not raise any concerns in this regard. As such, there is not a financial need on the part of SiriusXM for the requested amendments.
72. In regard to SiriusXM's claim that the percentage of its revenues that it, as a satellite subscription radio undertaking, contributes to CCD annually is significantly more than what terrestrial radio stations contribute, the Commission notes that the CCD contribution regimes for both types of services are different in order to take into account the differences between the two types of service. The two CCD contribution regimes cannot be directly compared in this regard.
73. SiriusXM's higher CCD contribution levels are also meant to balance its lower levels of Canadian content across the entirety of its channels. In this regard, terrestrial radio stations provide a local service with limited reach, while Sirius Canada and XM Canada are licensed to operate nationally and can be heard across North America. Canadian content requirements for terrestrial radio stations, which, as set out in the *Radio Regulations, 1986* (the Regulations), start at 35% of all programming broadcast, are higher than the 10% requirement for SiriusXM, which, in addition, does not have any obligations relating to the broadcast of local programming.
74. In addition, terrestrial radio stations generally rely on advertising revenue, whereas approximately 99% of SiriusXM's revenues are derived from subscribership, with national advertising accounting for less than 1% of total revenues. These distinct service and business models have led to distinct regulatory requirements for the two types of service and are reflective of their contributions to the Canadian broadcasting system. Further, as noted above, SiriusXM's higher CCD contribution levels are largely a function of its higher revenues compared to any other individual licensee.
75. The Commission acknowledges that services operating under the DMEO are not required to make any CCD contributions, and notes SiriusXM's concern that this creates an unfair competitive imbalance between its services and unregulated services. However, in the Commission's view, the competitive balance between traditional broadcasting services and online services represents a broader policy issue with potential implications for the entire broadcasting system and is, therefore, beyond the scope of this licence renewal proceeding. Nevertheless, SiriusXM currently offers an option to stream its service via the Internet, instead of or in addition to using its receiver. Further, plans that include Internet streaming service offer additional content not available to those who subscribe to satellite radio alone.

As such, the Commission considers that SiriusXM is better positioned than other operators to compete with unlicensed services.

76. Finally, in regard to applications for licence amendments, Broadcasting Information Bulletin 2014-608 sets out that the Commission will consider any instances of non-compliance in light of factors such as the quantity, recurrence and seriousness of the non-compliance, as well as the relationship between the proposed amendment and the instance of non-compliance. In cases where a licensee is found to be in non-compliance with a regulatory requirement that it is proposing to amend, the Commission could deny the licensee's application for the amendment. As noted above, the Commission has found that the licensee was in non-compliance with its condition of licence relating to CCD contributions for the 2013-2014 through 2016-2017 broadcast years.
77. In light of all of the above, the Commission finds that it would not be appropriate to approve SiriusXM's requested amendments to its condition of licence relating to CCD contributions, and therefore **denies** the request. By maintaining the current condition of licence, the Commission is ensuring that the licensee's required CCD contributions continue to be directed to the promotion and development of Canadian artists at a level that is commensurate with its services' overall contribution to the Canadian broadcasting system.
78. In regard to SiriusXM's proposed "materiality threshold," the Commission emphasizes the importance of any licensee's full compliance with regulatory requirements. In addition, adopting such a proposal would not significantly contribute to eliminating any administrative burden given that the entire amount of the licensee's CCD contributions would have to be evaluated in order to determine whether the 2% threshold has been met. Accordingly, the Commission does not consider it appropriate to accept the "materiality threshold" proposed by the licensee.
79. In consideration of the interveners who commented on the licensee's proposed changes to its CCD expenditure percentages, the Commission has taken into account the interests and needs of OLMCs. In this regard, certain of its services' current conditions of licence serve to advance the vitality and development of these communities. For example, as noted above, the licensee is subject to a condition of licence (specifically, 13.(d)), whereby "[a]t least 45% of the licensee's discretionary contribution shall be allocated to initiatives for the development of Canadian French-language content, and no less than 45% shall be allocated to initiatives for the development of Canadian English-language content." Further, SiriusXM is subject to conditions of licence (specifically, conditions 2.(a) through (c) set out in the appendix to Broadcasting Decision 2012-629) that ensure its services are made available, through national distribution, to OLMCs.
80. In the Commission's view, maintaining SiriusXM's historical percentages of required CCD funding to FACTOR and MUSICACTION, which reflect the relative size of each organization, is more appropriate than requiring an equal distribution of funding between these mandatory initiatives. In this regard, the Commission considers, among

other things, that a predominantly English-language satellite subscription radio undertaking should not be disproportionately responsible for the funding of French-language artists. It further considers that although a greater percentage of spending is directed towards English-language funds, there is still a significant amount of money being allocated to French-language funds.

81. In the event it were to deny the licensee's request for amendments to the services' condition of licence relating to CCD contributions, the Commission questioned SiriusXM on various options relating to spending on discretionary initiatives, including eliminating either a portion of or all spending on discretionary initiatives, or specifying where such spending could or could not be made.
82. In reply, SiriusXM stated that under a denial scenario, its current ability to pursue discretionary CCD initiatives should remain in place. It stated that maintaining its current discretionary spending would allow it to support Canadian artists as it has done in the past, while allowing it to continue exploring creative and innovative ways to best support artists in a changing landscape. The licensee added that any reductions to or the elimination of discretionary allocations would limit its ability to direct funds to underserved Canadian artists. In regard to restricting or prohibiting certain recipients of discretionary CCD funding, SiriusXM stated that it would need to re-evaluate a number of its initiatives, which could have a detrimental impact on Canadian artists, especially new and emerging spoken word artists that it strives to develop with its initiatives and programming and who are in the greatest need of valuable exposure.
83. As set out in Broadcasting Information Bulletin 2014-608, at the time of licence renewal for a service, one of the measures that the Commission may apply in the case of non-compliance by a licensee is to remove the licensee's ability to make CCD contributions to discretionary initiatives. In such cases, the Commission may require instead that all CCD contributions be made to mandatory initiatives such as FACTOR, MUSICACTION or the CRFC.
84. As noted above, SiriusXM incurred shortfalls in regard to its required CCD contributions to discretionary initiatives over four consecutive broadcast years, which accounted for an annual average of 4.9% of the total required contributions for discretionary initiatives for those broadcast years. In the Commission's view, reducing the percentage of CCD contributions to be allocated to discretionary initiatives from 65% to 60% of all CCD spending, which would approximate the shortfall incurred by the licensee, would be an appropriate measure for addressing non-compliance. It would also strike a balance between the benefits that maintaining a significant level of discretionary CCD payments would bring, while recognizing that SiriusXM's non-compliance stems from its repeated failure to meet its discretionary CCD requirements.
85. However, this reduction in the minimum required spending on discretionary initiatives would require a corresponding change to the percentage of spending to be made to mandatory CCD initiatives (i.e., FACTOR, MUSICACTION and the CRFC).

86. In Broadcasting Decision 2012-629, when it last renewed the broadcasting licence for Sirius Canada and XM Canada, the Commission proposed that SiriusXM be required to allocate its required CCD contributions using the same percentages that were required of terrestrial radio services. SiriusXM opposed this proposal, noting that the amounts to be paid to each mandatory initiative would be out-of-scale when compared to the contributions of more than 600 commercial stations to those organizations. In light of SiriusXM's concern, the Commission adopted the current funding allocation formula of 20% to FACTOR, 10% to MUSICACTION and 5% to the CRFC.
87. In the Commission's view, redistributing the surplus 5% should follow the same approach. Accordingly, whereas the licensee will be allowed to allocate 60% of its CCD spending to discretionary initiatives, it will also be required to allocate 22% of its CCD spending to FACTOR, 12% to MUSICACTION, and 6% to the CRFC. A **condition of licence** to that effect is set out in the appendix to this decision. These new allocation percentages will provide an increase in yearly funding to these mandatory initiatives that accounts for the relative size of each organization. Further, the increase in the percentage of funding to be allocated to MUSICACTION will address certain concerns raised by ADISQ and ANIM in their interventions.

#### **Support for Indigenous production through Canadian content development contributions**

88. In regard to SiriusXM's proposed amendments to its services' condition of licence relating to CCD contributions, ADISQ questioned the licensee's plans to finance Indigenous production by giving money to the CMF for allocation to the Indigenous Program. It noted that CMF guidelines require projects eligible for funding to include a television component, and that CCD contributions only serve to fund audio (i.e., musical and spoken-word) content for broadcasting. Given that SiriusXM's CCD contributions should fund only audio content, ADISQ proposed that the contributions be directed equally to FACTOR and MUSICACTION, with 2.5% of the amount to each of those initiatives being allocated to Indigenous production, as noted above. In its reply, SiriusXM stated that should the Commission deny the proposed allocation to the CMF's Indigenous Program, it would not object to allocating a percentage of its CCD contribution to another eligible initiative identified by the Commission that supports the creation of Canadian Indigenous programs.
89. The CMF's website stipulates that projects funded through this program must include content to be developed and produced for distribution on at least two platforms, one of which must be television. Given that the proposed initiative emphasized the creation of visual content, it would not have met the objectives of the CCD policy relating to the creation and promotion of audio content for broadcast (paragraphs 98 and 107 of the Commercial Radio Policy), and as such would not have qualified as an eligible CCD initiative.
90. Nevertheless, the Commission recognizes the importance of ensuring that the Canadian broadcasting system contributes to the promotion and protection of Indigenous cultures. In the Commission's view, any contribution from a national

service to an organization that supports Indigenous musicians or spoken word artists should be national as well. However, at the present time, no such organizations operate on a national scale. Accordingly, in the absence of such a national organization, the Commission expects the licensee to allocate a portion of its discretionary CCD contributions to directly support Indigenous Canadian musicians and spoken word artists through eligible CCD initiatives. Any such contributions should be clearly identified in the licensee's proof of CCD expenditures submitted as part of its annual return.

91. The Commission reminds the licensee and all broadcasters, both Indigenous and non-Indigenous, of their role in ensuring that the programming broadcast on their respective stations reflects Indigenous cultural diversity; working in collaboration and sharing programming content; giving a voice to Indigenous people by allowing them to broadcast information on issues that concern them; and shaping the destiny of Indigenous communities. Further, all broadcasters, both Indigenous and non-Indigenous, must ensure that reporting on Indigenous issues is fair, accurate and non-discriminatory.

#### **Canadian content development contributions directed to promotion**

92. The Commercial Radio Policy sets out that all CCD initiatives must involve direct expenditures, and must be allocated to the support, promotion, training and development of Canadian musical and spoken word talent, including journalists. Although promotion is an important component for the allocation of CCD contributions, any expenditures must be directed to projects that go well above and beyond promotional activities and regular programming costs.<sup>10</sup>
93. For certain initiatives, the licensee has shown a tendency to devote a greater portion of its expenditures to promoting events and artists than it does to paying the artists themselves. Two initiatives of particular concern for the next licence term are Les Concerts SiriusXM and Top Comic.
94. Les Concerts SiriusXM, along with the former Studio SiriusXM Interviews, were created to expand the profile of French-language artists to television, Internet and social media audiences across the country using third parties. Whereas SiriusXM has spent over \$1 million per year on these initiatives, the single largest allocation of its total French-language CCD funding, the licensee's contributions have been directed mainly to the promotion and marketing of video interviews and concert clips, with very little going directly to the artists involved. In regard to Les Concerts SiriusXM in particular, since 2017, most of the spending on this initiative has gone towards audio and video production and promotion, with very little going directly to Canadian artists. Although this initiative broadly aligns with the CCD guidelines, the Commission has concerns regarding the oversight of the advertising purchased, the return provided to the artists, and the ultimate cost of the initiative.

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<sup>10</sup> In this regard, see the Commission's webpage [Canadian Content Development Contributions and Eligible Initiatives](#).

95. Top Comic is a talent-contest type event where comedians compete to be chosen to perform at the SiriusXM Top Comic Finale during the Just for Laughs Festival in Montréal. During the current licence term, SiriusXM has directed millions of dollars of CCD funding to this initiative. In questions to SiriusXM regarding Top Comic, concerns were expressed that the licensee has been using CCD funding predominantly for promotion and marketing rather than for payments made directly to artists. In addition, SiriusXM receives rights to broadcast, in perpetuity, all submitted entries as well as performances during the talent contest. This content has been aired a significant number of times during the current licence term and is used towards meeting other regulatory requirements, such as that relating to the broadcast of original Canadian content. Although SiriusXM claims to be helping artists gain exposure to an international platform, millions of potential fans and the opportunity to earn royalties, these artists are often not paid for their performances from CCD funding, or are paid very little.

***SiriusXM's position***

96. SiriusXM submitted that while it might derive some indirect benefits through the promotion of artists, the recordings were conducted for the benefit of Canadian artists by exposing them to its services' North American platform. It argued that these types of expenditures would not be part of the normal costs of doing business and that they surpass ordinary programming expenses. The licensee added that these initiatives resulted in public performances and content that otherwise would not have taken place or have been created. In SiriusXM's view, expenditures in this regard are not self-serving.

97. In regard to Les Concerts SiriusXM, the licensee stated that the promotional cost of the program is higher than funding required for other areas, such as artist fees, due to the immense amount of value artists receive through media campaigns.

98. In regard to Top Comic, SiriusXM argued that while it does air the recordings created from the initiative, all promotional activities were conducted for the benefit of Canadian artists and to increase exposure for artists to new and existing fans and to SiriusXM's North American platform. It noted that promotion was targeted to the general public (not exclusively to SiriusXM subscribers) with interests that align with the artists to increase discoverability. The licensee added that the expenses directed to recordings of Canadian comedian auditions and the finale were above and beyond its ordinary programming expenses and that they would not otherwise have been recorded and broadcast. SiriusXM disagreed with the statement that a minimal amount of compensation is provided to the winners of the Top Comic initiative compared to the total CCD expenditure amounts claimed. It noted that the participants receive a significant amount of direct value through the program and that each expenditure was directed to support and provide exposure to the comedians directly.

99. Finally, SiriusXM submitted that there is nothing in the Commercial Radio Policy that prohibits a licensee from hiring third parties to promote events that highlight achievements and the music of Canadian artists.

### ***Commission's analysis and decisions***

100. In regard to the above initiatives, the Commission has concerns regarding the disparity between what is spent on promotion and marketing and what is directly paid to artists. Although there is value in these innovative initiatives, the Commission questions whether the CCD funding being directed to them are benefiting Canadian artists to the maximum extent possible.
101. In regard to funding directed towards the promotion of events, the Commission also has concerns relating to the proof of eligibility provided by the licensee for various CCD initiatives. As noted above, a lack of detail and supporting documentation regarding expenditures claimed for advertising companies was a recurring issue for SiriusXM in regard to several initiatives that the Commission audited. Documentation provided by the licensee with its annual returns tends to be minimal for these types of expenditures, even though they account for a large percentage of expenditures on many of its CCD initiatives. Consequently, there are often multiple requests for information, and in many cases, SiriusXM has been unable to provide copies of all media purchased with CCD funding. Given that there is such a widespread number of marketing and promotional materials that are created by SiriusXM (such as website banners and ads, social media posts, television and radio ads, video and audio clips and print media), it is difficult to ensure the eligibility of each specific advertisement.
102. The Commission also has concerns regarding the level of control that SiriusXM has over the content and media purchased for certain advertisements, and the effect of such control, given that in many cases, it is directly paying media companies for the advertisements. In regard to the CCMA Awards, for example, rather than providing the money directly to the event, which would then pay for any promotion and advertising, SiriusXM retained control over what was promoted and how it was promoted. Despite the licensee's claim that it had no control over the advertising, the Commission is not persuaded given that SiriusXM directly paid for the advertising.
103. Finally, promotional content created through funds paid directly by SiriusXM to advertising companies appears in some cases to directly promote SiriusXM and its brand in a much more explicit manner when compared to content not directly paid for by the licensee. As an example, the SiriusXM logo has featured prominently at the beginning and at the end of the videos created and aired as part of the Les Concerts SiriusXM initiative. As well, when the licensee directly pays for promotion and advertising, it creates an increased regulatory burden during the audit process, requiring the Commission to devote extra resources to verify the licensee's compliance with regulatory requirements. In contrast, when SiriusXM provides CCD funding directly to an event, leaving the event in control of the purchasing of any media or promotional materials (rather than SiriusXM hiring a third party and directly paying that party to create advertising), SiriusXM tends to be featured less prominently, with the artists being the feature of the promotional content.

104. SiriusXM was questioned on the possibility of limiting the amount of discretionary CCD funding that could be spent on promotion and marketing, and requiring that a minimum amount be devoted to artist performance fees. In reply, the licensee stated that given the importance of the promotional aspect for artists, such requirements would cause SiriusXM to re-evaluate all initiatives and organizations. It noted that this would have a significant impact on artists, specifically emerging artists who most need valuable exposure.
105. SiriusXM was also questioned on the possibility of prohibiting it from directing discretionary CCD funding to the hiring of third-party contractors or to purchasing advertising campaigns as part of its support of independent events such as the CCMA's or the Juno Awards. To be claimed as eligible CCD contributions, these funds would have to be paid directly to the independent artistic groups. In its reply, SiriusXM submitted that imposing unique restrictions prohibiting it from directing discretionary CCD funding to third-party activities would reduce the effectiveness of its discretionary expenditures. It added that such restrictions would also limit the potential for artists to earn royalties for the broadcast of their music on SiriusXM's platform and for performance fees paid by SiriusXM.
106. While promotion does benefit artists, and while the Commercial Radio Policy does not prohibit spending on promotion, the Commission has concerns regarding the manner in which SiriusXM has directed its CCD funds towards promotion and advertising. In the Commission's view, the extent to which SiriusXM has focused on this component has been detrimental to its support of Canadian artists. Given the minimal amount of CCD funding going directly to artists, the issues relating to the level of control that SiriusXM likely exercises over the advertising and promotion provided by third-party companies, the provision of proof of eligibility, and the fact that SiriusXM has used videos produced with CCD funding to showcase its own brand, the Commission finds that SiriusXM's practices in this regard do not align with the objective of the CCD framework, resulting in non-compliance on its part and many outstanding questions regarding its CCD spending.
107. In light of the above, for the new licence term for Sirius Canada and XM Canada, the Commission finds that in regard to events that correspond to discretionary initiatives and that are run directly by SiriusXM, including Les Concerts SiriusXM and Top Comic, it would be appropriate to cap CCD expenditures on promotion at 30% of the total budget for the event. Although this represents a decrease for many SiriusXM initiatives that have tended to spend upwards of 75% of the total budget on promotion, it will still allow for expenditures on the promotion of Canadian artists and events. Further, for events that correspond to discretionary initiatives and that are run directly by SiriusXM, the Commission finds that it would be appropriate to require that a minimum of 20% of the total CCD funding allocated to the event be paid directly to artists in the form of performance fees. This threshold represents a significant increase for many of SiriusXM's initiatives that have tended to spend very little on artist performance fees. In regard to third-party events, any expenditures claimed towards their promotion must be done by the third-party event itself for the expenditure to be considered an eligible CCD expenditure. A **condition of licence** in

regard to the above is set out in the appendix to this decision. Finally, the Commission expects SiriusXM to ensure that any marketing or promotional materials minimize the licensee's branding and logos. The Commission reminds SiriusXM, and all licensees, that Commission staff are available to discuss issues relating to the eligibility of initiatives for CCD funding.

#### **Use of Canadian content development contributions to fulfil other regulatory requirements**

108. Sirius Canada and XM Canada's condition of licence 1.(b), set out in the appendix to Broadcasting Decision 2012-629, specifies that not less than 10% of the total number of unique channels distributed by the licensee on Sirius Canada and XM Canada shall consist of original Canadian-produced channels. Further, the services' condition of licence 4 stipulates that in regard to each of the undertakings, the licensee shall devote at least 85% of the total spoken word programming broadcast in a week on all Canadian-produced channels, considered together, to Canadian spoken word programming. It appears that the licensee has been using recordings produced through CCD funding, at least in part, to fulfill the above-noted requirements.
109. When questioned on the above, SiriusXM stated that it has not used CCD funding to obtain content to meet regulatory requirements as it does not allocate any value to Canadian programming that airs on its Canadian channels. The licensee added that it is not aware of any provision in the *Broadcasting Act*, the Regulations, its conditions of licence or any Commission policy or guideline that prohibits the manner in which recordings of Canadian content associated with CCD initiatives are used.
110. SiriusXM argued that any ancillary benefits received through CCD initiatives were appropriate and consistent with the principles, purpose and requirements of the Commercial Radio Policy since all of its CCD initiatives were designed to maximize benefits to the artists involved and to focus on the development and exposure of new and emerging Canadian artists. According to the licensee, the mere fact that it has broadcast content produced through CCD funding does not and cannot be reasonably construed to imply that the expenditure was self-serving, and that the real question is whether the expenditure benefited the artist and increased the supply of programming that was available for broadcast.
111. SiriusXM confirmed that the licence agreement for Top Comic includes a clause stating that SiriusXM receives an unlimited, perpetual, international licence to all material submitted by comics as part of the audition process as well as material recorded at live auditions, the finale performance, and performance clips. The agreement also sets out that the recordings can then be used by SiriusXM to promote its services and be played on SiriusXM channels an unlimited number of times in perpetuity. The licensee stated that it does not claim any exclusive rights in the recordings and does not control the distribution of content. Further, it submitted that the legal protections from its licence agreement are not self-serving as they are required to facilitate the potential broadcast of the content of new Canadian artists on its North American platform. SiriusXM added that since the contest is multi-platform

and featured internationally, a broad licence is required, which reduces the risk that it will inadvertently exceed the scope of its licence.

112. SiriusXM argued that imposing a condition of licence that would limit the broadcast of content generated through events to which it directs CCD funding would harm Canadian artists and limit their potential exposure across North America, limit their potential to earn royalties from their broadcast on SiriusXM's platform, and limit performance fees paid by SiriusXM for the artists' performances at public venues or events.
113. The Commission notes that there are rules surrounding self-serving initiatives that are relevant. According to the guidance provided on the Commission's [Canadian Content Development Contributions and Eligible Initiatives](#) webpage, all expenditures must be directed to projects that go well above and beyond regular programming costs. The Commission is concerned that the practice of using content to meet both CCD contribution requirements and Canadian content requirements has no limitation and could lead to the exploitation of dual purpose content where a significant amount of CCD funds are used for self-serving purposes, in particular, towards regular programming costs.
114. The Commission notes that the airing of recordings made with CCD funds for the Gestion Juste Pour Rire inc. initiative was modified starting in the 2016-2017 broadcast year, when SiriusXM received only two programs from the initiative, both of which featured Canadian comics and were aired only a total of five times. In comparison with previous years where SiriusXM received content that was aired numerous times equaling hundreds of hours of content, the approach taken in the 2016-2017 broadcast year in regard to the airing of recordings made with CCD funds is more in line with the CCD Policy.
115. In regard to the licence agreement, regardless of whether SiriusXM requires this type of legal protection in order to broadcast this content, SiriusXM is ultimately still receiving licensing rights to the content that is produced with CCD funding. Gaining the licence rights for this spoken word content to meet additional licence requirements for Canadian produced channels is not the intention of the CCD framework. CCD funding must be allocated to the support, promotion, training and development of Canadian musical and spoken word talent, and not be used to obtain hours of content at a low price.
116. In light of the above, the Commission finds that SiriusXM has been using content produced through CCD funding to fulfil other regulatory requirements. Although SiriusXM may still use CCD funding to record programs and may also use content created with CCD funding on its platform, in order to meet the requirements set out in conditions of licence 1.(b) and 4, as well as the requirement set out in the services' condition of licence 3 relating to the broadcast of Canadian musical selections, the recordings should not be used for any extended length of time. The approach taken in regard to the Gestion Juste Pour Rire inc. during the 2016-2017 broadcast year provides the licensee guidance in this regard.

### **Providing artists with recordings of content produced through Canadian content development funding**

117. In regard to many of the initiatives that are funded through its discretionary CCD contributions, SiriusXM submitted that the value for artists stems from them having copies of the recordings for their own future use for promotion. According to the licensee, it does not claim any exclusive rights to content created from CCD contributions, and recorded material is available to artists at any time. However, in some cases, it is not clear that the artists directly receive any recordings.
118. In response to a request for information in regard to the above, SiriusXM stated that it intends to benefit Canadian artists by providing them not only with professionally recorded audio content to use in any manner they wish, but with the ability to be exposed to its North American platform. It added that the greatest contribution of support that it can provide to new and emerging Canadian artists is to provide those artists with as many opportunities as possible through the broadcast of their content on its North American satellite radio platform. The licensee further stated that the guidelines made available by the Commission set out that:
- CCD contributions are financial contributions made by broadcasters to initiatives that aid in the development and promotion of Canadian musical and spoken word content for broadcast;
  - the support, promotion, training and development of Canadian musical and spoken-word talent contribute to increasing the supply of and demand for high-quality Canadian music in a variety of genres, as well as the supply of Canadian spoken word material for broadcast; and
  - the policy is intended to be flexible so that licensees can contribute to a wide variety of initiatives and to ensure that contributions have the most positive impact on Canadian musical and spoken word artists.
119. The Commission recognizes that recordings produced by SiriusXM through CCD funding and broadcast on SiriusXM's channels are valuable for Canadian artists. As such, it is of the view that the licensee should continue creating these recordings for artists. However, the Commission is concerned that artists do not receive the recordings unless they request them, something that artists might not be aware they can do. Although there is evidence that the recordings are used by SiriusXM on its channels, there is rarely evidence that the artists in question have received copies of their recordings.
120. The ability for artists to promote themselves through professionally-edited recordings of their performances is often a justification put forth by SiriusXM for the eligibility of such recordings for CCD funding. Accordingly, the Commission finds that rather than ensuring that recordings of artists' performances are simply made available to those artists, the licensee is required to provide confirmation that an artist has received any and all audio and video recordings, both the raw recording as well as any edited versions of the programming. A signed document or an email from the

artist confirming receipt of the recording will generally be considered sufficient proof of receipt. A **condition of licence** to that effect is set out in the appendix to this decision.

#### **Canadian content development expenditures made to third-party entities**

121. SiriusXM has ongoing commercial relationships with many organizations that provide content for its original Canadian-produced channels. These include national sports leagues such as the National Hockey League (NHL) and the Canadian Football League (CFL), whose games SiriusXM broadcasts on some of its Canadian channels. SiriusXM enters into contractual relationships with these same third-parties to develop, organize and sponsor CCD initiatives.
122. The Commission has concerns regarding the lack of clear, sufficient and detailed documentation substantiating the value of expenditures directed to these CCD initiatives where SiriusXM has an ongoing commercial relationship with the third-party. The documentation generally provided by SiriusXM to support the significant CCD contributions to these parties does not provide much detail as to how the money was spent.
123. In regard to the above, SiriusXM stated that its ongoing commercial relationships with third-party entities are governed by long-term licence agreements and are not ameliorated by the use of CCD funding. None of the intervening parties commented on this issue.
124. In light of the above-noted concerns, the Commission finds that for any third parties with which SiriusXM has an existing commercial relationship, the licensee must provide additional documentation to support the eligibility of any CCD expenditures made to such parties. This documentation must include, at a minimum, all invoices paid by and contracts entered into by a third party to organize and operate the CCD initiative, and copies of all contracts between SiriusXM and the third party. A **condition of licence** to that effect is set out in the appendix to this decision.

#### **Condition of licence relating to Canadian content development ambassadors**

125. The Commission first approved applications to operate Sirius Canada and XM Canada in Broadcasting Decisions 2005-246 and 2005-247, respectively. At that time, the Commission authorized the licensees to allocate CTD funds to CTD coordinators who would manage the services' contributions, coordinate events and promote initiatives. In Broadcasting Decision 2012-629, in light of the complexity and level of SiriusXM's CCD contributions, the Commission determined that maintaining this program was justified. However, it also determined that not more than 5% of the services' discretionary CCD contributions should be devoted to these CCD "ambassadors," and imposed a condition of licence to that effect. Among other things, the Commission considered that this level of funding would encourage

efficient use of CCD funding and ensure that a maximum level of such funding would be directed to eligible initiatives.<sup>11</sup>

126. However, SiriusXM has claimed amounts under that condition of licence for a portion of salary expenses of a variety of employees, including those with job titles such as designer, director of music programming, director of talk programming, senior director of marketing, senior producer, specialist of sponsorship and events, programmer and specialist of social media. As such, the Commission is concerned that the types and amount of expenditures being claimed under this condition of licence are not reflective of its original intent, specifically, to assist the licensee in managing its extensive CCD spending.
127. Moreover, for the 2016-2017 broadcast year, only 50.1% of the total expenditure claimed for the CCD ambassadors related to employees that the licensee had listed as having spent the majority of their time on CCD activities. The remaining 49.9% of expenditures was claimed for employees who had spent less than 35% (in some cases, only 5%) of their time managing CCD activities.
128. SiriusXM stated that to manage CCD expenditures efficiently, effectively and in accordance with its condition of licence, it relies on internal staff with considerable experience in all areas of marketing, event management and programming of the music/spoken word industry. The licensee added that by using and leveraging the expertise of internal staff, it maximizes the benefit of the funds given that every time it contracts a third party to administer an event, the costs increase and less benefit is received by the artist. Finally, SiriusXM stated that its involvement in all aspects of the music industry ensures that it receives feedback and input from across the industry regarding support of new initiatives, new programs and new artists.
129. As noted above, the Commission's intention in authorizing the CCD ambassador program was to assist SiriusXM in the management of CCD-related funding and to ensure that such funding would be spent in a manner consistent with its condition of licence. Accordingly, the Commission determines that only salaries for employees whose sole focus is the eligibility of CCD expenditures should be claimed as CCD expenditures under this condition of licence, rather than such expenditures covering all corporate costs relating to CCD. In addition, the Commission determines that for an employee to be considered as having the eligibility of CCD expenditures as their sole focus, that employee must spend no less than 95% of their time on CCD activities. An amended **condition of licence** to that effect is set out in the appendix to this decision.
130. The Commission notes that no other broadcasters currently have a condition of licence that is similar to SiriusXM's condition of licence relating to CCD ambassadors. The Commission therefore reminds the licensee of the extraordinary

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<sup>11</sup> The Commission also noted that the annual payments to be made to FACTOR, MUSICACTION and the CRFC required minimal effort and that the percentage of contributions to be devoted to the ambassadors program should therefore be based solely on the discretionary portion (i.e., 65%) of CCD contributions.

nature of this condition of licence and that the purpose of the expenditures made in regard to CCD ambassadors is to ensure that CCD contributions are spent in an efficient manner and in full compliance with all Commission regulations and policies.

**Performance indicators relating to Canadian content development expenditures**

131. The Commission uses a number of approaches to help ensure the achievement of the cultural, social and economic objectives set out in the *Broadcasting Act*, including the establishment of various contribution and expenditure regimes. A guiding principle relating to the CCD contribution framework is that commercial radio station and audio service licensees that benefit from the broadcasting system must also support the development of new content through programming and funding commitments. Consistent with the Treasury Board of Canada's reporting mandate, the Commission publishes its annual Communications Monitoring Report to provide Canadians and the communications industry with data relevant to the adoption of regulated and unregulated technologies. This report provides data on CCD and tangible benefits contributions by the radio sector in dollar amounts and through a breakdown of types of initiatives.
132. The stated goals of the CCD framework include supporting the careers of emerging Canadian artists and increasing the supply of Canadian music in a variety of genres. SiriusXM's CCD contributions represent a significant portion of all commercial radio station and audio service licensee contributions to CCD. Although the licensee submitted that its CCD contributions have benefited Canadian artists, it has not provided measurable evidence of the positive impact that its contributions to discretionary CCD initiatives have had on those artists. The Commission acknowledges the interventions filed by Canadian artists and their related associations in support of SiriusXM's licence renewal application. However, without reporting by the licensee on the achievement of the policy outcomes through such contributions, it is difficult to assess the effectiveness of its discretionary CCD contributions and to determine the extent of the impact that the significant amount of funds contributed through its CCD contributions has had on the careers of Canadian artists.
133. SiriusXM was questioned on the possibility of requiring the use of metrics or performance indicators to show the achievement of discretionary CCD spending. In reply, the licensee claimed that it would be impossible to use a metric to prove that contributions towards exposure are achieving isolated results, while simultaneously claiming that the impact of promotion for artists is immense. The licensee reiterated that promotional costs for programs are higher than other areas of funding, such as artist fees, due to the immense amount of value the artists receive through media campaigns. SiriusXM nevertheless indicated that, as long as it is permitted to redact confidential information, it would not object to a condition of licence requiring it to submit an annual report providing information on CCD contributions, abridged versions of which would be made public.
134. In regard to the above, SiriusXM did not provide any evidence or data in support of its claims regarding the value that artists receive through promotion. In the

Commission's view, Canadian content creators and audiences would benefit when the Commission ensures that CCD contributions deliver measurable results for the broadcasting system, particularly when a single licensee is responsible for a significant level of support.

135. Moreover, it is the Commission's view that the public interest would be better served by requiring SiriusXM to produce an annual report on the results of discretionary spending. Such a requirement would be similar to the annual reporting requirements imposed on BCE Inc. (BCE) in Broadcasting Decision 2013-310, in which the Commission approved an application by Astral Media inc. (Astral) and its licensed broadcasting subsidiaries for authority to change the effective control of Astral's broadcasting undertakings to BCE. In that decision, the Commission directed BCE to submit annual reports on tangible benefits and for its emerging artist airplay commitments.
136. In light of the above, the Commission **directs** SiriusXM to submit to the Commission, by no later than **6 March 2020**, its view on the feasibility of and on other issues relating to providing the Commission with an annual report on its discretionary CCD spending that would include the following performance indicators and that would be made publicly available:
- the number of music and spoken word artists supported;
  - the percentage of discretionary funds distributed by music genre/spoken word;
  - the percentage of total discretionary funds allocated to performance fees paid to artists;
  - the number of audience attendees at events;
  - the number of shows/tours developed for music and spoken word artists;
  - the number of new music and spoken word recordings supported;
  - the percentage of discretionary funds spent on marketing/promotion expenditures;
  - the number of English-language music and spoken word artists supported;
  - the number of French-language music and spoken word artists supported; and
  - the number of Indigenous music and spoken word artists supported.
137. The Commission may direct SiriusXM to provide the Commission with an annual report on its discretionary spending following its review of the licensee's submissions in this regard.

**Support for official language minority communities through Canadian content development contributions**

138. To demonstrate support and to advance the vitality and development of OLMCs, and to ensure that Sirius Canada and XM Canada are also made available, through national distribution, to those communities, consistent with section 41(1) of the *Official Languages Act*, the Commission imposed the following conditions of licence on the services, which are set out in the appendix to Broadcasting Decision 2012-629.
- 2.(a) In no case may a subscriber receive a package of channels with fewer than four French-language original Canadian-produced channels.
  - (b) Effective 17 May 2013, in no case may a subscriber receive a package of channels with fewer than three French-language and three English-language Canadian music channels.
  - (c) No less than 25% of the original Canadian-produced channels distributed by each undertaking shall consist of French-language original Canadian-produced channels.
  - 13.(d) At least 45% of the licensee's discretionary [CCD] contribution shall be allocated to initiatives for the development of Canadian French-language content, and no less than 45% shall be allocated to initiatives for the development of Canadian English-language content.
139. To further address the needs and realities of OLMCs over the next licence term, and in recognition of the Commission's obligations under section 41(1) of the *Official Languages Act*, the Commission encourages SiriusXM to support OLMCs through its discretionary CCD funding.

**Proposed amendment to condition of licence relating to the broadcast of Canadian musical selections**

140. In Broadcasting Decision 2012-629, the Commission set out the following condition of licence for Sirius Canada and XM Canada relating to the broadcast of Canadian musical selections:
- 6. Between 6 a.m. and midnight each week, the licensee shall devote at least 25% of the musical selections broadcast on each Canadian music channel to new Canadian musical selections and at least 40% of the musical selections broadcast to Canadian selections by emerging English- and French-language Canadian artists, as defined in paragraphs 5 and 9 of *Definition of emerging Canadian artists on commercial radio*, Broadcasting Regulatory Policy CRTC 2011-316, 12 May 2011, as amended from time to time.

For the purposes of this condition of licence, a "new Canadian musical selection" is a Canadian selection, as defined in section 2.2(2) of the *Radio Regulations, 1986*, that has been released in the 6 months prior to the date that

the musical selection is broadcast. The eastern time zone will be used for purposes of determining compliance with this condition of licence.

141. SiriusXM proposed to replace that condition of licence with the following:

6. a) Between 6 a.m. and midnight each week, the licensee shall devote at least 25% of the musical selections broadcast on each Canadian music channel to new Canadian musical selections and at least 40% of the musical selections broadcast to Canadian selections by emerging English- and French-language Canadian artists.
- b) For the purposes of this condition of licence, a “new Canadian musical selection” is a Canadian selection that has been released in the 18 months prior to the date that the musical selection is broadcast.
- c) For the purposes of this condition of licence, an “emerging English Canadian artist” is an artist who has not yet achieved “Gold” record sales according to SoundScan or has not reached a position on the Nielsen Canada Top 200 Billboard Album Chart or a position in the Top 20 on the Nielsen Emerging Chart. The artist would retain the status of emerging English Canadian artist until a period of 48 months have passed from the date in which the artist has achieved the position on the charts noted herein.
- d) For the purposes of this condition of licence “an emerging French Canadian artist” is an artist who has never previously achieved “Gold” record sales according to SoundScan. An artist would retain the status of emerging French Canadian artist for a period of 48 months from the date in which the artist reaches a Top 200 position on the SoundScan chart, and after the artist has two Top 10 positions on the ADISQ digital sales chart.
- e) For the purposes of paragraphs (c) and (d) of this condition of licence, an “artist” includes duos, trios or groups of artists operating under a defined identity. If a member of a duo, trio, or group begins with a new defined identity, the solo artist or duo, trio or group shall be considered an “emerging artist” according to the above criteria.

142. In support of its request, the licensee indicated that the definitions of “emerging English- and French-language Canadian artists” and “new Canadian musical selection” should be the same as those used in the wider Canadian music and radio industries. It submitted that the proposed condition of licence would enhance the ability of new and emerging Canadian artists to be played on the satellite radio platform for the amount of time required to align with industry practices regarding promotional campaigns.

143. Both CIMA and ADISQ supported SiriusXM’s request, but with modifications to the wording of the proposed condition of licence.

144. The current definitions of “emerging English-language Canadian artist,” “emerging French-language Canadian artist” and “Canadian musical selection” are a result of a public proceeding involving various industry players, following which the Commission commissioned studies to assess the implications of the proposed new definitions. Any changes to the definitions would have a direct effect on other players in the Canadian music and radio industries, and all radio broadcasters, related organizations and artists should have the opportunity to participate in a broader public proceeding. As such, this licence renewal proceeding is not the proper venue in which to consider the licensee’s request. In this regard, in its reply to interventions, SiriusXM stated that it would be willing to postpone consideration of its requested amendment until after the completion of a review of the issue of emerging artists that would be applicable to all licensees.
145. In light of the above, the Commission **denies** the request by SiriusXM to amend its condition of licence relating to the broadcast of Canadian musical selections.

#### **Length of the licence term**

146. The Commission’s approach to non-compliance by radio stations is set out in Broadcasting Information Bulletin 2014-608.<sup>12</sup> Under this approach, each instance of non-compliance is evaluated in its context and in light of factors such as the quantity, recurrence and seriousness of the non-compliance. The circumstances leading to the non-compliance in question, the arguments provided by the licensee and the actions taken to rectify the situation are also considered.
147. ADISQ submitted that should SiriusXM be found in non-compliance, the broadcasting licence for its services should be renewed for a short-term period of five years rather than a full seven-year term. In its reply, SiriusXM indicated that a short-term renewal would further exacerbate the regulatory imbalance between its services and its competitors’ services that are exempt under the DMEQ, due to the impact on its ability to enter into or renew agreements with third-party content providers, who could then be motivated to sign agreements with its unregulated competitors instead.
148. For each of the broadcast years in question, the issues underlying the non-compliance relate to issues such as a lack of supporting documentation, excessive promotional activities, the self-serving nature of the initiative, and specific ineligible expenditures within eligible initiatives in regard to the licensee’s CCD contribution obligations. Although SiriusXM makes significant contributions to CCD and rectified shortfalls for the 2013-2014 and 2014-2015 broadcast years, the instances of non-compliance for all of the broadcast years were both serious in nature and repetitive. Consequently, the Commission finds that it would be appropriate to grant SiriusXM a short-term licence renewal for Sirius Canada and XM Canada, which will allow for an earlier review of the licensee’s compliance with regulatory requirements.

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<sup>12</sup> In the past, the Commission has also used this approach when reviewing non-compliance by SiriusXM’s satellite subscription radio services.

## Conclusion

149. In light of all of the above, the Commission **renews** the broadcasting licence for the national satellite subscription radio services Sirius Canada and XM Canada from 1 January 2020 to 31 August 2024. The terms and **conditions of licence** for the services are set out in the appendix to this decision.

## Employment equity

150. Because this licensee is subject to the *Employment Equity Act* and files reports concerning employment equity with the Department of Employment and Social Development, its employment equity practices are not examined by the Commission.

Secretary General

## Related documents

- *Sirius Canada and XM Canada – Administrative renewal*, Broadcasting Decision CRTC 2019-300, 23 August 2019
- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2019-72, 12 March 2019
- *Administrative renewals*, Broadcasting Decision CRTC 2018-305, 22 August 2018
- *Tangible benefits proposal by Sirius XM Canada Inc.*, Broadcasting Decision CRTC 2018-91, 16 March 2018
- *Sirius Canada and XM Canada – Transfer of shares*, Broadcasting Decision CRTC 2017-114, 26 April 2017
- *Update on the Commission’s approach to non-compliance by radio stations*, Broadcasting Information Bulletin CRTC 2014-608, 21 November 2014
- *Astral broadcasting undertakings – Change of effective control*, Broadcasting Decision CRTC 2013-310, 27 June 2013
- *Sirius Canada and XM Canada – Licence renewal*, Broadcasting Decision CRTC 2012-629, 16 November 2012
- *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)*, Broadcasting Order CRTC 2012-409, 26 July 2012
- *Commercial Radio Policy 2006*, Broadcasting Public Notice CRTC 2006-158, 15 December 2006
- *Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-247, 16 June 2005
- *Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-246, 16 June 2005

- *Introduction to Broadcasting Decisions CRTC 2005-246 to 2005-248: Licensing of new satellite and terrestrial subscription radio undertakings, Broadcasting Public Notice CRTC 2005-61, 16 June 2005*

*This decision is to be appended to the licence.*

## **Appendix to Broadcasting Decision CRTC 2019-431**

### **Terms, conditions of licence, expectations and encouragements for the national satellite subscription radio undertakings Sirius Canada and XM Canada**

#### **Terms**

The licence will take effect on 1 January 2020 and expire 31 August 2024.

#### **Conditions of licence**

1. (a) The licensee shall provide national satellite subscription radio undertakings consisting of original Canadian-produced channels and non-Canadian channels. The licensee is authorized to distribute the services of Sirius XM Radio Inc. in accordance with the conditions of licence set out below.
  - (b) No less than 10% of the total number of unique channels distributed by the licensee shall consist of original Canadian-produced channels.
  - (c) The licensee may distribute, to any Canadian subscriber, a maximum of nine non-Canadian-produced channels for each original Canadian-produced channel that it distributes to that subscriber.
  - (d) In no case may a subscriber receive a package of channels in which original Canadian-produced channels constitute less than 10% of the total channels received by that subscriber.
2. (a) In no case may a subscriber receive a package of channels with fewer than four French-language original Canadian-produced channels.
  - (b) In no case may a subscriber receive a package of channels with fewer than three French-language and three English-language Canadian music channels.
  - (c) No less than 25% of the original Canadian-produced channels distributed by each undertaking shall consist of French-language original Canadian-produced channels.
  - (d) The licensee shall distribute an Indigenous channel. An “Indigenous channel” is a channel on which at least 60% of the programming in a week consists of audio programming that is directed towards Indigenous persons and includes original or previously broadcast programming by, about or including Indigenous persons. This channel may consist partly or wholly of programming from other broadcasters. The Indigenous channel will be considered an “original Canadian-produced channel” and that channel shall be exempted from the calculation set out in condition of licence 2(c).

3. In respect of each undertaking, the licensee shall devote at least 85% of the total musical selections broadcast in a week on all Canadian-produced channels, considered together, to Canadian selections as defined in section 2.2(2) of the *Radio Regulations, 1986*.
4. In respect of each undertaking, the licensee shall devote at least 85% of the total spoken word programming broadcast in a week on all Canadian-produced channels, considered together, to Canadian spoken word programming.

For the purposes of this condition of licence, “Canadian spoken word programming” means programming other than musical selections or commercial messages that is produced in Canada and in which a Canadian is the primary performer or speaker.

5. On each French-language channel, the licensee shall devote each week at least 65% of its vocal musical selections from content category 2, as defined in the appendix to *Revised content categories and subcategories for radio*, Broadcasting Regulatory Policy CRTC 2010-819, 5 November 2010, to musical selections in the French language and schedule them in a reasonable manner throughout each day.
6. Between 6 a.m. and midnight each week, the licensee shall devote at least 25% of the musical selections broadcast on each Canadian music channel to new Canadian musical selections and at least 40% of the musical selections broadcast to Canadian selections by emerging English- and French-language Canadian artists, as defined in paragraphs 5 and 9 of *Definition of emerging Canadian artists on commercial radio*, Broadcasting Regulatory Policy CRTC 2011-316, 12 May 2011.

For the purposes of this condition of licence, a “new Canadian musical selection” is a Canadian selection, as defined in section 2.2(2) of the *Radio Regulations, 1986*, that has been released in the 6 months prior to the date that the musical selection is broadcast. The eastern time zone will be used for determining compliance with this condition of licence.

7. Except for an Indigenous channel, the licensee shall not broadcast any original local programming on a Canadian-produced channel.

For the purposes of this condition of licence, “original local programming” means programming produced by the licensee for broadcast on the satellite subscription radio undertaking that targets a particular geographic community and includes but is not limited to commercial messages, news, weather and traffic information.

8. Except for an Indigenous channel, the licensee shall broadcast no more than six minutes of national commercial messages during any clock hour on any Canadian-produced channel.

For the purposes of this condition of licence, a “national commercial message” is a commercial message that is purchased from the licensee at a national rate and receives national distribution on the undertaking.

9. The licensee shall adhere to sections 3, 4, 6, 10.1 (with respect to its terrestrial transmitters) and 11 of the *Radio Regulations, 1986*.
10. The licensee shall adhere to the Canadian Association of Broadcasters' *Equitable Portrayal Code*, as amended from time to time and approved by the Commission. The application of the foregoing condition of licence will be suspended as long as the licensee is a member in good standing of the Canadian Broadcast Standards Council.
11. The licensee shall adhere to the Canadian Association of Broadcasters' *Broadcast Code for Advertising to Children*, as amended from time to time and approved by the Commission.
12. The licensee shall pay \$528,659 relating to the outstanding shortfall for Canadian content development contributions for the 2015-2016 broadcast year by no later than **6 April 2020**, as follows:
  - \$211,464 to FACTOR;
  - \$211,464 to MUSICACTION; and
  - \$105,731 to the Community Radio Fund of Canada.

The licensee shall provide the Commission with proof of these payments by no later than **5 May 2020**.

13. The licensee shall pay \$149,483 relating to the outstanding shortfall for Canadian content development contributions for the 2016-2017 broadcast year by no later than **6 April 2020**, as follows:
  - \$59,793 to FACTOR;
  - \$59,793 to MUSICACTION; and
  - \$29,897 to the Community Radio Fund of Canada.

The licensee shall provide the Commission with proof of these payments by no later than **5 May 2020**.

14. (a) During each broadcast year, the licensee shall contribute at least 4% of gross revenues from its satellite subscription radio undertakings reported in its annual returns for the previous broadcast year to eligible initiatives for the development of Canadian content development (CCD).
- (b) During each broadcast year of the licence term, the licensee shall allocate its contribution under (a) above as follows:
  - at least 22% to FACTOR;

- at least 12% to MUSICACTION;
- at least 6% to the Community Radio Fund of Canada; and
- the remainder to other eligible initiatives (discretionary contribution).

(c) No more than 5% of the discretionary contribution during any broadcast year shall be devoted to expenses and salaries for CCD coordination staff (i.e., the Ambassador/l' Ambassadeur pour la musique canadienne). For the purposes of this condition of licence, only salaries for employees whose sole focus is on CCD activities are eligible to be claimed. An employee must spend at least 95% of their time on CCD activities to be considered as having a sole focus on CCD.

(d) At least 45% of the licensee's discretionary contribution shall be allocated to initiatives for the development of Canadian French-language content, and no less than 45% shall be allocated to initiatives for the development of Canadian English-language content.

(e) To be considered an eligible CCD expense, any promotional spending for initiatives operated by third-parties shall be done by the third-party itself. For initiatives operated by the licensee directly, promotional spending shall be capped at 30% of the total budget for that initiative. Further, a minimum of 20% of the total amount spent on any initiatives operated by the licensee shall be paid directly to Canadian artists in the form of performance fees.

(f) In the annual return that the licensee is required to submit to the Commission by 30 November for the broadcast year ending the previous 31 August, the licensee shall provide the Commission with proof that any artist recordings made with CCD funding have been provided directly to the artist(s). For the purposes of this condition, a signed document or an email from the artist confirming receipt of the recording will generally be considered sufficient proof of receipt.

(g) For any third-parties with which the licensee has an existing commercial relationship, the licensee shall provide additional documentation to support the eligibility of costs claimed as CCD expenditures. This documentation must include, but is not limited to, all invoices paid by and contracts entered into by the third party to organize and operate the CCD initiative and copies of all contracts between the licensee and the third party.

For the purposes of this condition of licence, "eligible initiatives" shall have the meaning set out in section 15(1) of the *Radio Regulations, 1986*.

15. For each Canadian-produced channel, the licensee shall adhere to the provisions of sections 8(1), (2), (3), (4), (5) and (6) of the *Radio Regulations, 1986*.
16. For any non-Canadian-produced channel that may be identified by the Commission from time to time, the licensee shall adhere to the provisions of sections 8(5) and (6) of the *Radio Regulations, 1986*.

17. (1) For any Canadian-produced channel, the licensee shall at the request of the Commission submit for any period specified by the Commission in its request:
- (a) the information required by the most recent Station Self-assessment Report form issued by the Commission; and
  - (b) a list of the musical selections in the order in which they are broadcast by the licensee during that period that includes the title and performer of each musical selection and a legend that identifies:
    - (i) any Canadian musical selection, as defined in section 9(1) of the *Radio Regulations, 1986*;
    - (ii) the release date of any Canadian musical selection, as defined in section 9(1) of the *Radio Regulations, 1986*;
    - (iii) any instrumental selection;
    - (iv) any content category 3 musical selection within the meaning of the appendix to *Revised content categories and subcategories for radio*, Broadcasting Regulatory Policy CRTC 2010-819, 5 November 2010;
    - (v) the language of the musical selection, where the musical selection is not an instrumental selection;
    - (vi) those musical selections it categorizes as being by an emerging Canadian artist for the purposes of condition of licence 6; and
    - (vii) for each musical selection categorized as being by an emerging Canadian artist for purposes of condition of licence 6:
      - for English-language musical selections, if a recording by the artist has appeared in one of the charted positions referenced in paragraph 5 of *Definition of emerging Canadian artists on commercial radio*, Broadcasting Regulatory Policy CRTC 2011-316, 12 May 2011, the title of that recording and the date it first reached the relevant position; and
      - for French-language musical selections, if an album by the artist has reached Gold Record status according to SoundScan or has been marketed commercially, the date this status was first reached or the album was released for marketing and the title of the album.

(2) For any non-Canadian produced channel, the licensee shall at the request of the Commission submit for any period specified by the Commission in its request the following information for each musical selection broadcast:

- (i) the name of the artist;
- (ii) the name of the album from which the musical selection is taken and the number of the track;
- (iii) the year that the musical selection was released; and
- (iv) the version of the track, where multiple versions exist.

18. (a) On or before 30 November of each year, the licensee shall submit to the Commission a statement of accounts, on the annual return of broadcasting licensee form, for the year ending on the previous 31 August.

(b) The licensee shall file a report on the fulfilment of its commitments with respect to Canadian content development with each annual return. The report shall set out the initiatives that the licensee has supported and the amount spent on each initiative, as well as the total amounts devoted to initiatives for the development of French-language and English-language content. The report shall also contain the necessary proof to demonstrate that payment was made in the broadcast year and to substantiate the eligibility of the initiatives to which it has directed its discretionary contribution.

19. At the request of the Commission, the licensee shall provide the Commission with a response to any inquiry regarding the licensee's programming, ownership or any other matter within the Commission's jurisdiction that relates to the licensee's undertaking.

## Definitions

For the purposes of all of the conditions of licence set out above:

An "original Canadian-produced channel" is a channel produced in Canada that consists of programming no less than 70% of which is produced for the channel and broadcast for the first time on that channel. Despite the foregoing, the two channels consisting entirely of the programming of the Canadian Broadcasting Corporation's Radio One and La Première Chaîne shall be considered as being original Canadian-produced channels.

A "Canadian music channel" shall mean an original Canadian-produced channel on which in any week no less than 50% of its airtime is devoted to the broadcast of material from content categories 2 and 3, as defined in the appendix to *Revised content categories and subcategories for radio*, Broadcasting Regulatory Policy 2010-819, 5 November 2010.

The terms "commercial message" and "musical selection" shall have the meanings as those set out in section 2 of the *Radio Regulations, 1986*.

“Day” means the total number of hours devoted to broadcasting for a period beginning at 12 a.m. and ending at midnight the same day.

“Week” means seven consecutive days beginning on Sunday.

### **Expectations**

The Commission expects that each of the “best of” or “Premier” packages offered by the licensee include original Canadian-produced channels that are offered on the standard package of the other undertaking.

The Commission expects the licensee to promote the use of Canadian music on its non-Canadian channels.

The Commission expects the licensee to devote all extra satellite bandwidth that might become available to the distribution of additional Canadian-produced channels.

The Commission expects any marketing or promotional materials produced for the purposes of showcasing Canadian artists or events featuring Canadian artists to minimize Sirius XM Canada Inc. branding and logos in order to be claimed as an eligible Canadian content development contribution.

The Commission expects the licensee to reflect the cultural diversity of Canada in all of its programming.

In the absence of a national fund to support the creation of Indigenous music and spoken word endeavors, the Commission expects the licensee to allocate a portion of its discretionary Canadian content development (CCD) contributions to the direct support of Canadian Indigenous musicians and spoken word artists, via eligible initiatives as defined in section 15(1) of the *Radio Regulations, 1986*. Any such contributions should be clearly identified in the licensee’s proof of CCD expenditures submitted as part of its annual return.

### **Encouragements**

The Commission encourages the licensee to promote those channels that are targeted to specific cultural groups.

To address the needs and realities of official language minority communities (OLMC) in Canada, and in recognition of the Commission’s obligations under section 41(1) of the *Official Languages Act*, the Commission encourages the licensee to allocate a portion of its discretionary Canadian content development contributions to the direct support of OLMCs, via eligible initiatives, as defined in section 15(1) of the *Radio Regulations, 1986*.