January 17, 2023

Copyright Board of Canada
800-56 Sparks Street
Ottawa, ON K1A 0C9

Filed via: email to registry-greffe@cb-cda.gc.ca

Re: Proposed Tariff Title: RE:SOUND TARIFF 1.A – COMMERCIAL RADIO (2024-2028)

NOTICE OF GROUNDS FOR OBJECTION

The following Notice of Grounds for Objection (the "Notice") is filed on behalf of the Canadian Association of Broadcasters (CAB) in respect of Proposed *RE:SOUND TARIFF 1.A – COMMERCIAL RADIO (2024-2028)* which was filed with the Copyright Board on 2022-11-11 pursuant to subsection 67(1) of the *Copyright Act*. This Notice is filed in accordance with PN 2022-007.

1. **Any grounds for why the Board should not approve the proposed tariff despite any alteration of royalties or levies or fixation of terms and conditions**

The CAB has been paying Re:Sound Tariff 1.A consistently since it was first determined by the Copyright Board. This tariff was last subject to thorough examination in 2013[1] along with SOCAN Tariff 1.A and the reproduction right tariffs applicable to commercial radio. In the time since, each of the other tariffs considered and determined at that time have continued at status quo rates and terms, largely because the commercial radio industry has remained stable and nothing material has happened that would justify changing the commercial radio tariffs. Despite this, Re:Sound continues to seek not only rate increases, but also fundamental structural changes to its Tariff 1.A. This is completely unjustified and unreasonable. With the exception of adding simulcasting to Tariff 1.A, subject to the CAB's comments on that below, Re:Sound Tariff 1.A should be certified in a form that is substantially similar to the existing tariff.

2. **Any grounds for objecting to any royalty or levy rates in the proposed tariff**

Re:Sound is seeking to increase its rates on the basis that its repertoire is now equivalent to 100% of SOCAN's, but it has offered no evidence to establish that it represents 100% of SOCAN's repertoire. The adjustment of 100% is not justified or valid. A full repertoire study including a robust audit right for the CAB would be required to determine a valid repertoire adjustment for Re:Sound.

Re:Sound is again seeking to collect an additional royalty on the basis of section 72.1 of the *Copyright Act*. Re:Sound states that because it cannot collect a royalty directly from stores and other public places

[1] *Statement of Royalties to be collected by SOCAN, Re:Sound, CSI, connect/SOPROQ and Artisti in respect of commercial radio stations*, Reasons, 2016-04-21, https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366778/index.do.

that play the radio in the background, that it is entitled to collect one from the radio stations. Re:Sound has lost this argument before the Copyright Board in the past, and nothing has changed since that decision to indicate that it is somehow entitled to collect it now. The Copyright Board very clearly articulated why Re:Sound is not entitled to a second payment from radio broadcasters under this provision in the 2016 decision in commercial radio:

> [256] The commercial radio tariff permits radio stations to carry out a specific form of performance to the public, namely the "communications to the public by telecommunication by commercial radio stations for private or domestic use." However, the royalty rate for this tariff is based on all revenues, including those revenues that could be notionally attributed to listeners in business establishments. Thus, Collectives already receive royalties based on advertising revenues related to the listening of performances of radio broadcasts in all contexts—including those envisaged in subsection 69(2) of the Act.[2]

The Board went on to explore how it would calculate such a royalty were it to find that Re:Sound was entitled to collect it (which it did not), and it clearly explained that any amount attributable to subsection 69(2) (as it then was) would be deducted from the primary amount payable by the radio broadcaster. Re:Sound has conveniently ignored this decision from the Board and is again seeking to double dip on its royalty payments to the prejudice of commercial radio broadcasters. This argument was thoroughly examined with evidence and expert testimony in 2013 and was rejected. It should be rejected here too.

The CAB agrees with Re:Sound that simulcasting should be part of Tariff 1.A, as it is for SOCAN and CMRRA. In those cases, and as the Board noted in the initial Re:Sound 8 tariff decision,[3] the reason to include simulcasting in Tariff 1.A is that it is an activity that mirrors the primary use, so the tariff for it should mirror the tariff for the primary use. Despite this guidance from the Copyright Board, Re:Sound proposes to include different rates for simulcasting than for the primary use, and this defeats the purpose of alignment. Re:Sound points to 2022 Sound Exchange rates for non-subscription commercial webcasters in the United States as a justification for its proposed simulcasting rates in Canada. It does not provide any details relating to these rates, how they were determined or to whom they apply, nor does it provide any explanation of how or why similar rates in the United States are in any way a reasonable or relevant proxy for the Canadian marketplace. These rates should be rejected and simulcasting revenues should be subject to the same rates applicable to the primary use.

Re:Sound is requesting that royalties should be calculated based on the total combined gross income in a year of all stations owned by the same company. Re:Sound's justification for this request is that it will "ensure that the lower rates applicable to stations with revenues under $1.25M and under $625,000 are not misapplied by large, profitable radio groups." This is a gross misstatement of the Parliamentary intent of the provision in question, which was to provide stable and continuing recognition that radio

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[2] *Supra* note 1.

[3] *Re:Sound No. Tariff 8 – Non-interactive and semi-interactive webcasts, 2009-2012*, Reasons, 2014-05-16, <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366734/index.do> at para 217.

stations be able to benefit from a flat royalty rate of $100 on revenues under $1.25M.[4] This provision has always benefitted small stations, and continues to benefit small stations today. ReSound is attempting to undermine Parliamentary intent through tariff setting because it has failed to convince Parliament to remove this provision in the Act. Re:Sound has made and lost this argument before the Copyright Board before. As with the section 72.1 request, in the 2013 hearing to consider the commercial radio tariffs, the Board had the opportunity to examine extensive economic evidence on this issue and found that the request for group-based royalties was unsupported by the evidence and could not be accepted. The Board noted the following

> [291] As a result, in our opinion, the premise that royalties paid by smaller stations that are part of a group should be increased is not supported by the evidence and cannot be accepted.[5]

This request has been rejected in the past and should be rejected now as well.

3. Any grounds for objecting to any terms or conditions in the proposed tariff

Re:Sound proposes to change the reporting period for music use information to the 14th day after the end of each month, rather than for the reference month 2 months prior. The reference month is a well-enshrined method of calculation for commercial radio broadcasters, and Re:Sound has provided no indication that it has suffered prejudice because of the certified time frame. Changing this time frame is unnecessary and unjustified and would be prejudicial to commercial radio broadcasters. It should not be included in the tariff.

Re:Sound also proposes to delete the "where available" caveat in the music use reporting requirements. The CAB has long held the position that removing those words does not change the fact that some types of information are simply not available to some broadcasters. The CAB has always encouraged radio broadcasters to provide any and all information they have available to them to facilitate distributions by the Collectives. Re:Sound has failed to provide any evidence that stations are deliberately withholding information in their reporting, and has failed to demonstrate any existing prejudice from the inclusion of the "where available" caveat. It is essential that it be maintained to ensure that stations that are providing all the information they have are not found to be offside the tariff. To the extent the music use requirements are subject to the "where available" caveat, the CAB does not contest the modifications and will encourage its members to provide any and all available information to assist Re:Sound in its distributions.

Re:Sound proposes to change the certified tariff to limit the time during which a station may recover overpayments to 12 months. There is no corresponding limit on the time for which Re:Sound may recover royalties. This is unfair. Re:Sound has provided no evidence that it has suffered prejudice from the absence of this type of provision. This time limit is unnecessary and unjustified and should not be

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[4] *House of Commons Debates*, 16 (18 June 1996) at 1120 (Ms. Susan Katz). This testimony shows that Parliament's intent with the introduction of section 68.1 (as it then was) was to include special and transitional measures for radio. The special measure was the $100 threshold on the first $1.25M in revenue. The transitional measure was the gradual phasing in of the Re:Sound tariff. These measures were incorporated into the *Copyright Act* specifically to acknowledge the financial situation of small stations.

[5] *Supra* note 1 at para 291.

included in the tariff. If the Board is to introduce a time limit, it should at least be the same 6-year period offered to the collectives for audit purposes.

Similarly, Re:Sound has proposed what it calls “a financial disincentive” for late reporting. As it notes, the last approved tariff provides for interest payable on late payments which acts as a disincentive for stations to miss their payment due date, and Re:Sound is now proposing “a similar disincentive for late reporting which increases Re:Sound’s costs of administering the tariff.” Again, Re:Sound has provided no explanation of the extent to which late reporting has occurred or the supposed increase to its costs for administering the tariff. This provision should not be included in the tariff.