

BCE Acquisition of Astral Media

Broadcasting Notice of Consultation CRTC 2012-370, Item 1

Comments of Rogers Communications Inc.

I. EXECUTIVE SUMMARY AND INTRODUCTION

1. Rogers Communications Inc. (Rogers) is pleased to provide comments on the above-referenced application by BCE Inc. (BCE or Bell) to acquire ownership and control of Astral Media Inc. (Astral). Rogers opposes the application unless the Commission requires BCE, as a condition of approval, to divest of the English-language television services operated by Astral. We request to appear at the hearing beginning September 10, 2012.
2. The proposed transaction raises significant concerns relating to dominance in the English-language television market. If the application is approved, BCE's market power, already the strongest in Canada, would be enhanced significantly. This would negatively impact the diversity of programming available to Canadians. It would also enable BCE and its affiliates to further undermine the competitive marketplace for Canadian programming services and broadcasting distribution undertakings (BDUs), thereby harming Canadian consumers.
3. The Commission has established a variety of policies to protect competition and consumers and to ensure that the Canadian broadcasting system continues to provide Canadians with a diversity of voices and programming choices. In particular, in Broadcasting Public Notice CRTC 2008-4, *Diversity of Voices* (BPN 2008-4), the Commission outlined its revised approach to ownership consolidation and other issues relating to diversity of voices in Canada.
4. As part of its revised policy framework, the Commission stated that, as a general rule, it would not approve applications for a change in effective control that would result in the control, by one person, of so dominant a position in the delivery of television services to Canadians that it would impact on the diversity of programming available to television audiences. The Commission also indicated that it will "carefully examine transactions that would result in the control by one person of between 35% and 45% of the total television audience share" in a given linguistic market. The proposed acquisition of Astral by BCE would result in BCE holding a total television audience share of more than 35% in the English-language television market.
5. Rogers submits that the proposed acquisition of Astral by BCE would provide BCE with a dominant position in the delivery of television services to Canadians in the English-language television market, which would negatively impact the

diversity of programming available to television audiences and would cause material harm to the competitive market and to Canadian consumers.

6. Vertical integration within Canada's broadcasting industry has fundamentally changed the power balance that previously existed and has enabled BCE to dominate the television services market in this country. Not only is BCE our biggest competitor in the broadcasting distribution and wireless markets, but now it is also, by far, Rogers' biggest supplier of programming. The more programming services (particularly pay and specialty services) that BCE can accumulate, the more powerful it will become and the easier it will be for BCE to impose unfair and harmful programming access terms on third party distributors, like Rogers. This will, in turn, unjustly enrich BCE's affiliated programming services and provide unfair advantages to its affiliated distribution business.
7. In comparison with the US, the acquisition by BCE of Astral would allow BCE to command a much higher viewership share in pay and specialty services than any other vertically integrated ownership group in the US. Post acquisition, BCE's share of discretionary viewing hours in English language markets would be approximately 41% of total discretionary viewing hours.¹ In comparison, Comcast, the largest vertically integrated distributor in the US, has a 14.4% share of discretionary viewing hours.² Comcast's minority interest (16%) in A&E Television Networks is not included given its pending sale.³ Even if it was included, the resulting audience share would be less than 25%, which is still well below what a combined BCE and Astral viewing share to discretionary services would be.
8. In light of the above, Rogers submits that any approval of this transaction must be accompanied by a number of meaningful conditions precedent that would protect consumers, maintain competitiveness in the market, enhance diversity in the Canadian broadcasting system and further the objectives of the *Broadcasting Act*. Specifically, we propose three conditions precedent.
9. First, in order to protect diversity, competition and Canadian consumers, Rogers believes that the Commission should deny BCE's application to acquire Astral's English-language pay and specialty services in order to protect diversity, competition and Canadian consumers. BCE should be required, as a condition of approval, to divest of these television undertakings. It is our view that no other

¹ Calculated based on the data reported in *Communications Monitoring Report 2011. Table 4.3.9 – Viewing share of Canadian services by ownership group in the English and French-language markets* (2009/2010 data for Canadian English-language market).

² Audience share of Comcast-affiliated cable networks calculated using the list of cable network ratings for July 2012 from the TV Newser Website at: http://www.mediabistro.com/tvnewser/cable-network-ranker-july-2012_b139908. Calculation excludes Comcast's minority interest in A&E Networks, given its impending sale of this interest. The current listing of Comcast-affiliated cable networks can be found at Appendix B, Table 2 of the FCC's Revision of the Commission's Program Access Rules, 27 FCC Rcd 3413 (March 20, 2012).

³ *3 billion Comcast sale of A&E to Disney, Hearst OK'd by feds* (<http://movies.yahoo.com/news/3-billion-comcast-sale-e-disney-hearst-okd-191905467.html>).

regulatory mechanism would be as effective in ensuring that BCE does not abuse its market power.

10. Second, should the Commission not order such divestiture, Rogers believes it would be necessary to require Bell, as a condition of approval, to make all linear and non-linear program rights that it holds available on commercially reasonable terms to any third party distributor as part of any negotiation of affiliation agreements. It is our view that Bell is already dominant in the television marketplace and that this condition precedent is required to ensure competing BDUs can access these multiplatform rights. In addition, any third party distributor already distributing a given service would be permitted to exploit the non-linear rights to that service held by Bell, notwithstanding the absence of a commercial agreement.
11. Third, consistent with the Commission's longstanding benefits policy,⁴ BCE's proposed benefits package should simply be denied. It is obvious that BCE has proposed a benefits package that is non-compliant in numerous respects. Contrary to Public Notice CRTC 1989-109, BCE is attempting to use the public hearing process to negotiate its benefits package. If BCE wants to proceed with this application, it should be required, as a condition precedent, to file a revised benefits package that is compliant with the Commission's benefits policy for television and radio. Specifically, any such revised benefits package should address the following:
 - (a) The proposal to devote \$40 million to "Supporting Canada's Digital Future", which would provide Northwestel with money to build-out its wireline and wireless infrastructure in rural areas, should be excluded because the Commission has already directed Northwestel to carry out such a modernization project in Telecom Regulatory Policy CRTC 2011-771 (TRP 2011-771). The proposed expenditure would be anti-competitive, self-serving and would not be incremental. As well, it would be unprecedented and clearly inconsistent with both the letter and spirit of the benefits policy to apply broadcasting benefits payments to telecommunications infrastructure investments.
 - (b) The proposal to devote \$3.5 million to support a mental health awareness campaign should be excluded. BCE's proposal to use funds to support a charitable campaign is not a broadcasting-related initiative.
 - (c) The percentage of BCE's proposed benefits package that is devoted to on-screen initiatives should be increased so that more than 85% of the value of the benefits package will be used to support the production of programming. BCE is proposing to devote less than 69% of its benefits package to on-screen initiatives, which, if allowed, would represent the

⁴ The CRTC's benefits policy for television and radio is contained in a series of policy statements, including Public Notice CRTC 1989-109, Public Notice CRTC 1993-68, Public Notice CRTC 1999-97 and Broadcasting Public Notice CRTC 2006-158.

lowest percentage accepted by the Commission in a transaction of this size and magnitude.

- (d) The proposal to spend the benefits money over a ten year timeframe, rather than the standard seven year term, should be rejected. The Commission has never, to our knowledge, permitted a purchaser to extend the time period for paying out benefits to ten years.

II. DIVERSITY OF VOICES

(i) The Commission's Test for Market Dominance in Television Markets

12. BCE's proposed acquisition of Astral would clearly result in control by one person (i.e. BCE) of between 35% and 45% of the English-language total television audience share, as that term was used in BPN 2008-4. As such, and consistent with the policy set out in BPN 2008-4, the Commission has an obligation to conduct a full review of the proposed transaction to determine whether it would result in BCE exercising a dominant position in the delivery of television services to Canadians that would impact on the diversity of programming available to television audiences.
13. The Commission indicated in BPN 2008-4 that it would generally deny applications that would result in one person controlling more than 45% of the total television audience share. In addition, the Commission stated that "barring other policy concerns" it would be prepared to approve applications that would result in control by one person of less than 35% of the total television audience share. However, with respect to those transactions that would result in the control by one person of a total television audience share of between 35% and 45%, the Commission stated:

the Commission will carefully examine transactions that would result in the control by one person of between 35% and 45% of the total television audience share - including audiences to both discretionary and OTA services.⁵
14. The acquisition of Astral would increase BCE's control of the total television audience share in the English-language television market – including audiences to both discretionary and OTA services – to more than 41%.⁶
15. In its application, however, BCE has suggested that the transaction would not result in it controlling more than 35% of the total television audience share for the

⁵ The Commission indicated in BPN 2008-4 that audiences are measured, separately, on a national basis for both English- and French-language markets using BBM/Neilsen data.

⁶ According to the CRTC's *Communications Monitoring Report 2011, Table 4.3.9*, a combined BCE/Astral would hold a total television audience share of 41.4% (2009/2010).

English-language television market. It sets the number at 33.5% and suggests that this means that the transaction should present no concern to the Commission.

16. BCE's interpretation of the 35% threshold for total television audience share is wrong. It has misinterpreted the Commission's Diversity of Voices policy for the common ownership of discretionary (pay and specialty) television services and over-the-air television stations by including in its calculation non-Canadian television services.
17. In BPN 2008-4, the Commission examined the total television audience share for the English-language television market and indicated that for the 2006/2007 broadcast year CTV's share, at that time, was 37.4%.⁷ In calculating that percentage, the Commission clearly did not include non-Canadian television services in its calculation. In addition, in establishing the 35% threshold for total television audience share, the Commission stated that this would include "audiences to both discretionary and OTA services."⁸ The Commission specifically defined "discretionary services" in that Public Notice as being pay and specialty services.⁹
18. Moreover, the Commission's calculation of the total television audience shares of each broadcasting ownership group in the *Communications Monitoring Report 2011* excludes non-Canadian television shares.¹⁰
19. We would also note that, under the *Broadcasting Act* and its various regulations, the Commission only regulates Canadian broadcasting undertakings, and it only approves transactions involving licensed Canadian services. It makes sense, therefore, that any rule relating to common ownership would apply solely to those programming services that are Canadian owned and controlled. In this respect, the Commission has consistently been concerned about the number of Canadian voices and Canadian choices that are available in the Canadian broadcasting system. As such, rules and guidelines relating to diversity of ownership have been applied by the Commission only to Canadian services.
20. Finally, it should be pointed out that BCE acknowledged that the Astral transaction would, if non-Canadian television services were excluded, provide the company with control of well over 35% of the total television audience share in the English-language television market.
21. In view of the above, there should be little doubt that the proposed acquisition of Astral would push BCE's share of the total television viewing audience in the English-language market into the "danger zone" of above 35%. As such and in

⁷ BPN 2008-4, at paragraph 80.

⁸ *Ibid*, at paragraph 87.

⁹ *Ibid*, see heading above paragraph 69, which identifies "discretionary services" as being pay and specialty services.

¹⁰ See Table 4.3.9 in *Communications Monitoring Report 2011*.

accordance with BPN 2008-4, this triggers a full review of the transaction by the Commission to ensure that it would not result in the control, by one person, of a dominant position in the delivery of television services to Canadians that would impact on the diversity of programming available to television audiences.

(ii) Concerns relating to Television Market Dominance are Greater in a Vertically-Integrated Environment

(a) BCE's market dominance

22. The prospect of one person (in this case BCE) controlling more than 40% of the total television audience share in the English-language television market raises serious concerns at this stage in the evolution of the Canadian broadcasting system. The enhanced level of vertical integration that exists today has created an environment where a decision allowing BCE to acquire Astral's English-language services will reduce diversity, undermine competition and harm Canadian consumers (by increasing their subscriber fees and limiting their access to programming).
23. The 35% threshold established in BPN 2008-4 was created at a time when there was very little vertical integration in the Canadian broadcasting system, particularly in the English-language television market. The Commission's primary concern at that time was horizontal integration within the television broadcasting industry as CTV (at 37%) and Canwest (at 26%) had reached audience share levels that began to raise concerns of market dominance.
24. Even in that environment, where the level of vertical integration was limited, the Commission recognized that a pure-play broadcaster that held a market share exceeding 35% could have significant market power and might have the ability to abuse that power by imposing unfair terms on independent producers and by reducing the diversity of programming available to Canadian viewers.¹¹
25. An entity, such as BCE, that is proposing to exceed the 35% threshold today is a far greater concern because it is both vertically and horizontally integrated. The problems the Commission recognized in relation to horizontal integration in 2008 have been compounded by the rapid growth of vertical integration in the Canadian broadcasting system.
26. If BCE is permitted to acquire Astral in its entirety, BCE would increase its share of the English-language market total television viewing audience to 41.4%.¹² That is almost twice the audience share that is held by Shaw Media (at 21.1%), and it dwarfs the viewing shares of other major broadcasters, such as Corus

¹¹ BPN 2008-4, at paragraph 77 and paragraph 85.

¹² *Communications Monitoring Report 2011*, at Table 4.3.9.

Entertainment (at 10.8%), Rogers Media (at 8.9%) and the CBC (at 8.5%).¹³ The market dominance thresholds established in BPN 2008-4 demonstrated the level of concern that the Commission had in 2008 when only two pure-play broadcasters, CTVglobemedia and Canwest Global, held significant market shares. With the acquisition of Astral, the vertically and horizontally integrated BCE will be able to exercise a dangerous and unprecedented dominance over the English-language television market.

27. Approving the proposed acquisition of Astral will provide the company with an even greater ability to dictate the terms under which Rogers and other BDUs and wireless service providers offer BCE-affiliated services and programming. It will enable BCE to impose unreasonable and anti-competitive terms on those distributors, which will increase costs for consumers and limit their ability to access programming. Those consumers that subscribe to one of BCE's competitors will be forced to pay more for content and, in some instances, will simply be unable to access the content on all platforms unless they switch to BCE's affiliated BDU or wireless service. Clearly, as BCE's broadcasting assets grow larger, it will acquire an enhanced ability to prefer its own BCE-affiliated services and disadvantage third party BDUs, wireless distributors and broadcasters with whom its affiliated distributors and programming services compete.
28. More specifically, and speaking from experience, Rogers submits that allowing a vertically and horizontally integrated entity like BCE to acquire the English-language programming services of Astral will enable it to further abuse its market power in at least four ways.

(b) BCE's behaviour places competitors in a "Catch 22" situation

29. First, it will enhance BCE's current ability to dominate the programming services market, which creates a "Catch 22" situation for third party BDUs and wireless distributors. BCE's massive ownership interests in both content and distribution already provide the company with the ability and the incentive to demand from third party distributors unreasonable fees and other terms for granting access to its content and services. By demanding unreasonable terms for access to BCE's programming (on multiple platforms) and its programming services, BCE reaps a significant unfair competitive advantage regardless of whether or not a third party distributor accepts those terms.
30. It has been our experience that BCE has consistently tried to over-charge for its program rights and programming services, requiring a distributor to accept minimum guarantees and/or penetration-based rate cards. These penetration-based rate cards, which are offered under the pretext of providing a BDU with enhanced packaging flexibility, carry extremely stiff penalties if penetration levels decline.

¹³ *Ibid.*

31. If a third party BDU or wireless distributor accedes to BCE's demands, then it will pay unreasonably high fees to BCE for access to its content and services. This will mean that third party distributors will be less competitive in a marketplace that includes BCE's affiliated BDUs and wireless distributors, and that the competitor's customers will be forced to pay a higher cost to continue to receive the BCE-affiliated content and services than those of BCE's affiliated BDUs.
32. The practice of guaranteeing Bell's revenues places BCE's competitors at an even greater disadvantage in the marketplace because of the manner in which BCE's affiliates make programming available on ancillary platforms. While BCE demands minimum revenue guarantees for its linear services (essentially requiring BDUs to make them whole should they experience lower penetration as a result of lower subscriber and advertising revenues), it makes this programming available for free on-line.
33. One egregious example of this practice is contained in the way BCE markets the programming of MTV, a Category A specialty service operated by Bell Media. While BCE demands minimum revenues for the carriage of MTV on the linear platform, almost every single program offered by MTV is available absolutely free of charge on MTV's associated on-line website which is advertising-supported. BCE's strategy appears to be to require its competitors to guarantee the linear revenues for MTV, while offering the content for free on-line to generate additional advertising revenues for its affiliated programming service. This, in turn, devalues the MTV programming service to those BDUs that compete with BCE and that are required by regulation to distribute the service.
34. In the event that a third party BDU or wireless service provider takes the bold step of refusing to accept the unreasonable minimum revenue demands made by BCE for its affiliated services, BCE will still gain a significant competitive advantage. The competing distributor will be unable to access the BCE-owned content and services, which will make its distribution service and ancillary platforms much less attractive to consumers. Rogers has experienced this first-hand. Today, Rogers has comprehensive on-line content agreements in place with every major broadcast group in Canada, except for one. BCE has, to date, simply refused to make its content available to us on reasonable terms. That refusal may well have curtailed subscriber interest in our new service offerings.
35. Limiting access to its premium content advantages BCE's BDU and wireless affiliates. It provides them with the additional promotional advantage of being able to tell potential subscribers that the only way they can continue to receive premium services (like TSN) and premium quality multiplatform rights (like NFL and Olympic content) is to subscribe to a BCE-affiliated wireless or BDU service. Bell's recent Olympic Ad "Elevator" is an excellent example of this. It underscores the point that only Bell wireless customers can access Olympic coverage on their mobile devices. We have provided a link to the ad¹⁴ as well

¹⁴ <http://www.youtube.com/watch?v=k61aBEZ5PZ8>

as a written transcript of its dialogue at Appendix A. This is also a message that BCE has made loud and clear to its shareholders. This is evidenced in BCE's explanation of the increase in its wireless division's average revenue per user (ARPU) as reported in its Q2 2012 quarterly results:

The ARPU lift was partly due to higher data usage, particularly from Bell's mobile television service, which the company has been touting since it acquired CTV and which it expects to drive mobile growth. Though Bell Media is streaming the London Games to all online users, BCE has reserved live mobile coverage exclusively for its mobile TV service. With interest in the Games peaking, Mr. Cope said the subscription-based service would surpass 500,000 customers by the closing ceremonies.¹⁵

36. The exclusive multiplatform rights that BCE has obtained for the Olympics and its refusal to make those on-line and wireless rights available to competing on-line and wireless distributors is a prime example of how BCE can use its dominant position in the marketplace to undermine competition and harm consumers.
37. If its proposed acquisition of Astral is approved, BCE will obtain a number of additional "must have" or premium programming services, like The Movie Network (TMN) and Family Channel. In order for competing BDUs to continue to attract subscribers and maintain their customer bases, they will have to be able to access TMN and Family Channel (as well as BCE's array of other premium services) on commercially reasonable terms. Based on our experience negotiating with BCE to date, it is clear that as BCE accumulates an ever greater number of these premium services, the terms under which it will demand carriage will become even more unreasonable.
38. As this brief overview of BCE's market power demonstrates, BCE's competitors are caught in a "Catch 22" situation that prevails today, and that will only get worse if BCE is permitted to continue to grow its programming empire. Unfortunately, it is not just BCE's competitors that will be harmed by the company's actions. Canadian consumers are ultimately the ones who will pay the price. They are already being harmed either by paying excessively high fees for subscribing to BCE's content and services when they access them through a third party distributor or by losing access to that programming because BCE has refused to provide it to a third party distributor on commercially reasonable terms. That harm will become even more pronounced if BCE is permitted to acquire Astral.

(c) BCE dominates the program rights market in Canada

39. A second example of the manner in which BCE already abuses its market power is found in the program rights market. BCE's vast ownership interests enable the company and its affiliates to dominate the programming rights market in Canada.

¹⁵ Firing on cylinders, BCE hikes dividend as profit spikes 31% (<http://business.financialpost.com/2012/08/08/bce-hikes-dividend-as-profit-spikes-31/>)

This creates several problems for competing distributors and programming services, and is also harmful to Canadian consumers.

40. BCE's significant buying power enables it to bid for almost every major program available and to use that power to drive up the price of acquiring program rights as a means to limit the ability of competing broadcasters to obtain those rights. Through its effort to bid-up the price of content and in some cases to even lock-up the rights to programs that its affiliated services do not air, BCE is effectively able to prevent competing broadcasters from accessing that content on reasonable terms. BCE and CTV have engaged in this activity with significant success in the past. CTV did this for several years over the past decade. Its scale/buying leverage was a key factor that contributed to the financial instability experienced at Canwest Global and the ultimate decision to place that company into receivership.
41. Bulk buying involves acquiring multiplatform rights to all of the major programs offered by a U.S. studio. The combination of BCE and Astral will result in even greater bulk buying across platforms and across genres. The combined entity could attempt to enter into agreements with all major studios and lock up all rights to key programs, thereby forcing competitors to out-bid BCE for these bulk rights. If Rogers is required to compete with an even larger buying group made up of a combined BCE and Astral, we will have to engage in bulk buying, which will significantly increase our expenditures on American programs.
42. In this environment, it will be nearly impossible for a Canadian broadcaster to acquire one-off series from a U.S. studio. For Rogers, this will mean that rights to a series like *Shameless*, which currently runs on Astral's TMN during the pay window, but has been acquired by Rogers for conventional and specialty TV broadcast, will no longer be available to us. A combined BCE/Astral will use its increased buying power to out-bid Rogers for those rights and, with pay, specialty and conventional television viewing options, will have every incentive to buy rights to all of the viewing windows for the series.
43. In addition and as noted above, BCE has also benefitted from acquiring exclusive multiplatform rights to marquee programming (such as NFL and Olympic content), which prevents competing distributors from accessing the content and offering it to their customers. In a vertically-integrated environment, BCE's ability to prefer its affiliated distributors and ensure that they are the sole source of premium content in Canada will continue to unfairly undermine competition.
44. The substantial power that BCE holds in the program rights market and its ability to acquire and control access to premium content also stifles innovation within the Canadian broadcasting system. Today, in order to access the content necessary to launch new service offerings and meet the evolving needs of consumers, a distributor must first obtain the consent of BCE. Rogers has experienced this first hand. We have endured significant delays in the launch of our cutting-edge services, like Rogers AnyPlace TV (RAP-TV) and Rogers On

Demand (ROD), because we could not obtain access to content owned by BCE on terms that were reasonable.

45. Competition has been substantially lessened as a result of BCE's content acquisition practices, and it will continue to be undermined if BCE is allowed to grow by acquiring Astral. Canadian consumers will also continue to suffer harm, because they will be forced to pay higher prices for content and services or lose access to premium content if BCE refuses to make it available to third party distributors on reasonable terms.

(d) BCE's market power stifles innovation

46. A final anti-competitive practice that BCE uses to gain an unfair advantage over its competitors relates to its refusal to provide timely access to its content. Bell Media has withheld multiplatform rights for its programming when its distribution affiliate is not yet prepared to launch services on these platforms. As a result, this stifles innovation by other parties in the system by dictating the roll-out of multiplatform solutions according to BCE's timetable. In Broadcasting Regulatory Policy CRTC 2011-601 (BRP 2011-601), the Commission did not establish a rule requiring vertically integrated companies, like Bell Media, to link the negotiation of multiplatform rights to that of linear rights. The absence of such a requirement effectively provides BCE with the opportunity to control the evolution of ancillary platforms in Canada.

(e) The vertical integration policy is not enough

47. BCE dominates the television services market in this country. Not only is BCE our biggest competitor in the broadcasting distribution and wireless markets, but now it is also, by far, Rogers' biggest supplier of programming. The more programming services (particularly pay and specialty services) that BCE can accumulate, the more powerful it will become.
48. The vertical integration framework announced in BRP CRTC 2011-601, which included certain regulatory amendments, the Code of Conduct and an expansion of the Commission's dispute resolution mechanisms is a welcome and useful regulatory initiative. However, in one short year, time has already passed it by. It is no longer a sufficient regulatory mechanism in this new vertically integrated environment, particularly if Bell Media is allowed to get bigger.
49. An after-the-fact complaints-driven mechanism to resolve disputes is an imperfect, expensive and time-consuming tool.
50. It is Rogers' submission that rather than trying to manage BCE's market dominance in the television services market, the best policy is to reduce that dominance. It is in the pay and specialty market that BCE wields the greatest level of market dominance. If its application to acquire Astral is approved, BCE will control approximately 40% of commercial television revenues and more than

40 pay and specialty services.¹⁶ Of the 46 pay television and specialty services Bell will own and control, 27 of them will be Category A services which, as “must carries”, wield significant leverage in affiliation negotiations.

51. In its response to a Commission deficiency question relating to market dominance, BCE made a thinly-veiled threat that it might shut-down the CTV Two stations in order to reduce its market share below the 35% threshold outlined in the Diversity of Voices policy in BPN 2008-4.¹⁷ BCE’s response and its willingness to shut down the CTV Two stations miss the point, no doubt purposely. The CTV Two stations are already must carry services. As over-the-air (OTA) television stations, they are distributed as of right and do not negotiate terms like wholesale fees, packaging and penetration guarantees.
52. It is the ownership of specialty and pay television services that gives BCE its enormous and dominant market power. Even without Astral, BCE already has the clout to make exorbitant and commercially unreasonable demands of third party BDUs for access to its pay and specialty services.
53. Allowing it to acquire Astral will position BCE to engage in even more anti-competitive behaviour. Before BCE acquired CTV in 2011, CTV had no incentive to behave in that way. As a pure-play broadcaster, CTV could not reap benefits by making outrageous demands for access to its programming or by failing to reach agreement with the BDUs that distribute its services. To remain financially sound, CTV needed BDUs to deliver its services as much BDUs needed CTV’s services in order to attract subscribers. That all changed when BCE acquired CTV.
54. The same will be true of Astral if BCE acquires it. Over the past decade, Astral has been an outstanding programming partner for Rogers and for other BDUs. When we launched our video on demand service, ROD, in 2002, Astral was one of the very first programming service operators to take advantage of this new platform. Astral’s The Movie Network (TMN) was, in fact, Rogers’ first subscription video on demand (SVOD) offering and continues to be one of our most popular SVOD offerings today. By contrast, the amount of programming we receive today from Bell Media’s programming services is extremely limited. At most, we obtain from Bell Media just a few hours of outdated “sampler” content per specialty channel per week to provide to our customers on an on-demand basis.
55. We had a similar experience with respect to our Internet offering RAP-TV (formerly known as RODO). When we introduced the on-line RAP-TV service in 2010, Astral was one of the very first programming partners to provide a wealth of content that we could use to attract customers to this new service offering. The response we received from Bell Media and CTV to this new offering was

¹⁶ CRTC deficiency 14(c) dated May 25, 2012.

¹⁷ BCE response to CRTC deficiency questions, dated May 31, 2012, at page 15.

considerably less enthusiastic. Despite the fact that BCE's affiliated services offer a range of programming on-line, the company has refused to provide our on-line service RAP-TV with any programming.

56. Most recently, we launched Rogers Live TV, an application for tablets, such as the Apple Ipad. It allows Rogers customers who subscribe to both Rogers Hi Speed Internet and Rogers Digital TV to stream to their tablets, within their own homes over their own WiFi connections, complete channels from a selection of approximately 20 basic TV channels. Prior to launching the service, Rogers asked Bell Media whether we could include its OTA television services in the offering. Bell Media denied our request, even though the offering is merely an extension of a customer's basic cable service and is analogous to a customer having an extra outlet in their home. As a result and to this day, we do not offer any of the CTV OTA television services as part of our live TV service.
57. Given the unwillingness of BCE's affiliates to provide programming for our new and innovative offerings, it is clear that the proposed acquisition of Astral would put our current program supply arrangements with Astral in jeopardy. It would also effectively prevent Rogers (and other BDUs and distributors) from continuing to obtain access, on commercially reasonable terms, to a wealth of Astral content that has, to date, been a vital part in the roll-out of our new service offerings to Canadians.

(f) Additional safeguard

58. If Rogers, one of Canada's largest communications companies, is already experiencing these kinds of problems and is having difficulty negotiating fair and reasonable access to BCE's content and services, then surely smaller distributors and independent broadcasters will have far less ability to obtain access to that content and those services on reasonable terms and will suffer severe harm at the hands of an even more powerful BCE/Astral.
59. The regulatory amendments relating to the vertical integration framework and the Code of Conduct outlined in BRP 2011-601 are not, in our submission, sufficient to protect the industry from a vertically and horizontally integrated entity like BCE if it is permitted to acquire Astral. At the point where an entity reaches the size of BCE (following the acquisition of Astral), the protections afforded by regulatory measures such as those outlined in BRP 2011-601 be too little too late to protect diversity, competition and consumers.
60. For all of these reasons, the Commission should deny BCE's application to acquire the English-language pay and specialty television assets from Astral. The additional market power that BCE will obtain in the English-language television market as a result of the acquisition of these television assets will reduce the diversity of programming, undermine competition and harm Canadian consumers.

61. We propose, therefore, that the Commission direct BCE, as a condition of approval, to divest of all of the English-language television programming services it is proposing to acquire from Astral.
62. Should the Commission not order such divestiture, Rogers believes it would be necessary to require Bell, as a condition of approval, to make all linear and non-linear program rights it holds available in a timely manner and on commercially reasonable terms to any third party distributor as part of any negotiation of affiliation agreements. In the event that an application for dispute resolution by either party were filed with the Commission, the Commission would make its determination based on this requirement (i.e. any final offer arbitration would be conducted on the basis that all linear and non-linear program rights held by Bell for any given service would form the basis of the final offers).
63. In addition, any third party distributor already distributing a given service would be permitted to exploit the non-linear rights to that service held by Bell, notwithstanding the absence of a commercial agreement. Should the parties be unable to negotiate appropriate terms, either party could apply to the Commission for dispute resolution and ask the Commission to render a decision pursuant to final offer arbitration to be applied retroactively to the date that the third party distributor began exploiting the non-linear rights.
64. Rogers recognizes that these requirements would run counter to the determination made by the Commission in Broadcasting Decision CRTC 2012-208.¹⁸ There, the Commission denied the Canadian Independent Distributor Group's (CIDG) request to include the non-linear rights to programming on the Bell Media services in the affiliation agreement as those rights became available. This decision means that Bell Media will be able to negotiate these rights with CIDG separately from the linear rights. However, if BCE is allowed to acquire all of Astral's English language pay and specialty television assets, the potential for it to abuse its dominant position with regard to non-linear program rights will increase significantly. If this ruling is not modified in the context of the Commission approving such an acquisition, it will remain difficult, if not impossible (as outlined above) for Rogers (and other BDUs) to acquire Bell Media services' content for our online, on demand (and mobile) platforms to the detriment of ourselves and our customers.
65. In addition, there is no policy rationale to require separate negotiations for linear and non-linear rights to programming. To do so, in fact, flies in the face of how those rights are actually being acquired by programmers and offered to the public by distributors. In today's multi-platform environment, the distinction between linear and non-linear programming has largely eroded. Programmers buy linear and non-linear rights as a package, not as part of two separate negotiations. In fact, it would be virtually impossible to buy non-linear rights to a popular program

¹⁸ *Request for dispute resolution by the Canadian Independent Distributors Group relating to the distribution of specialty television services controlled by Bell Media Inc.* April 5, 2012 (<http://crtc.gc.ca/eng/archive/2012/2012-208.htm>).

without having first bought the linear rights to that program. As a result, the linear programming service essentially controls all access to its content on non-linear platforms.

66. The Commission recognized this fundamental change and evolution in broadcasting in its Vertical Integration Policy when it imposed rules that prohibited programmers from withholding non-linear rights for programming “designed for television”. This rule was imposed to ensure that programming was made available to consumers on multiple platforms on fair and reasonable terms.
67. In our view, the best way to ensure multi-platform rights are made available to consumers on fair and reasonable terms is to require that they be negotiated with the linear rights. This is consistent with the way these rights are acquired by programmers and offered to the public by distributors. It will also create a predictable and efficient business framework for the exploitation and monetization of these rights, while ensuring consumers have affordable access to the content of their choice, on the platform of their choice, in a timely manner.

III. BENEFITS

68. In addition to concerns about BCE’s dominance in the television services market, the benefits package that has been proposed as part of this application is clearly deficient and contrary to the Commission’s longstanding benefits policy.
69. In Public Notice CRTC 1989-109, *Elements Assessed By The Commission In Considering Applications For The Transfer Of Ownership Or Control Of Broadcasting Undertakings*, the Commission clearly stated that an applicant would not be permitted to use the public hearing process to negotiate its proposed tangible benefits:

The public hearing process provides the Commission with the opportunity to seek additional explanation or clarification as to the proposed benefits. Public hearings should not be used by applicants to attempt to negotiate or to present alternative bargaining positions nor are they held for the purpose of adding to the benefit packages contained in applications being considered.

70. In proposing a benefits package that includes a \$40 million (29%) expenditure on an affiliated telecommunications carrier, a \$3.5 million (2.5%) expenditure on a charitable initiative, a mere 68% of the expenditures going to on-screen initiatives and a 10 year time frame in which to spend this money, BCE is “thumbing its nose” at the Commission benefits policy. It is proposing initiatives that are obviously deficient and unacceptable as tangible benefits in an attempt to negotiate alternative bargaining positions with the Commission.

71. This willingness to engage in negotiations over its proposed benefits is something that BCE has frequently done in recent years. With every new application to acquire a broadcasting company, BCE has been putting forth more and more off-side benefits proposals in an attempt to negotiate various exceptions to the Commission's policy.
72. It is time for the Commission to put an end to this unseemly activity, which is contrary to Public Notice CRTC 1989-109. In Rogers' view, the Commission should reiterate its policy statement from 1989 and require a purchaser, such as BCE, to propose benefits consistent with initiatives previously approved by the Commission or, failing which, face the potential consequence of a denial of its transfer of ownership application.
73. There are four aspects of BCE's benefits package, outlined below, that are inconsistent with the Commission's tangible benefits policy. Under that policy, the Commission has consistently stated that it accepts as benefits only those initiatives that are broadcasting-centric, incremental and would not be realized without approval of the proposed transfer.¹⁹
74. In view of this, the Commission should simply reject the benefits package proposed by BCE and require the applicant, if it wishes to proceed with its application to acquire Astral, to re-file a tangible benefits proposal that is consistent with existing CRTC policy.
 - (i) *\$40 Million to Northwestel*
75. A key aspect of BCE's proposed benefits package that contravenes the Commission's longstanding benefits policy is its proposal to devote \$40 million to an initiative called "Supporting Canada's Digital Future". Under this proposal, BCE intends to provide Northwestel, an affiliate of BCE, with \$40 million to extend a range of communications services, including broadband video, to remote communities in Canada's Far North.
76. BCE's proposal to direct \$40 million of the tangible benefits package to Northwestel is clearly inconsistent with the key criteria that the Commission has established for accepting benefits. Those criteria were recently reiterated by the Commission in its decision approving Shaw's acquisition of Canwest as follows:
 - (1) expenditures proposed as tangible benefits be truly incremental;
 - (2) such expenditures be directed to projects and initiatives that would not be undertaken or realized in the absence of the transaction; and

¹⁹ Public Notice CRTC 1993-68, *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*.

(3) as generally required, applicants demonstrate that expenditures proposed as tangible benefits flow predominantly to third parties, such as independent producers.²⁰

77. It is Rogers' submission that BCE's proposal fails to meet any of these criteria. This initiative should not be accepted as a benefit because it is self-serving and fails the Commission's incrementality requirement.
 78. The proposed expenditures would not be truly incremental. The Commission has already imposed in TRP 2011-771 an obligation on Northwestel to establish a plan to modernize the telecommunications carrier's infrastructure. It is clear that BCE is attempting to use money from its benefits package to fund a portion of the Far North modernization project that its affiliate is obligated to implement under the *Telecommunications Act*.
 79. In view of this, it is also apparent that the proposed \$40 million expenditure would be directed at an initiative that would be undertaken by Northwestel even in the absence of BCE's proposal to acquire Astral.
 80. Moreover, under BCE's proposal, the tangible benefits would not flow predominantly to third parties. We understand that BCE argues that investing in Northwestel's infrastructure would provide Canadians living in these rural/remote communities with online access to Canadian programming that would be equivalent to the access already available in urban markets. Even if that were true, it would not change the fact that the proposed benefit money would be self-serving and primarily directed at improving Northwestel's telecommunications infrastructure and, by extension, its market dominance. Moreover, these rural and more remote communities already have access to the full range of programming services that are available in larger urban markets through the two Direct-to-Home (DTH) satellite distributors. As a result, the residents of these communities are not disadvantaged when it comes to accessing television programming. If Northwestel simply lives up to the obligations established by the Commission under TRP 2011-771, these residents will then be in the position to enjoy the same multiplatform experiences as other Canadians.
 81. Finally, the fact that the proposed \$40 million expenditure would be used to support improvements to Northwestel's telecommunications infrastructure and services, rather than broadcasting services, would appear, on its own, to make this ineligible as a tangible benefit.
- (ii) *\$3.5 Million to Mental Health Awareness*
82. A second aspect of BCE's proposed benefits package that is unacceptable is its proposal to devote \$3.5 million to support mental health awareness. While supporting mental health awareness is certainly a laudable initiative, it is not the

²⁰ Broadcasting Decision CRTC 2010-782, at paragraph 30.

type of benefit that has been or should be accepted by the Commission. To be accepted, a benefit must contribute to the development of the Canadian broadcasting system. BCE's proposal is totally unrelated to broadcasting.

83. We would note, in this respect, that the Commission rejected a similar expenditure that was proposed as a benefit by CanWest when it applied to acquire Western International Communications (WIC) in 2000. In that case, the Commission disqualified a \$3.5 million proposed benefit that was to be spent on grants and community organizations including the Boys and Girls Clubs of Canada because there was "no clear link drawn between these expenditures and the Canadian broadcasting system."²¹

(iii) *On-Screen Initiatives*

84. A third concern relating to BCE's benefits package is that BCE is proposing to devote only 68% of the funds being made available to on-screen initiatives. Recently, a trend seems to be developing among applications to acquire control of broadcasting undertakings whereby applicants seek to devote ever smaller percentages of their benefits packages to support programming initiatives. In Broadcasting Decision CRTC 2010-782, the Commission accepted a benefits package from Shaw that included on-screen initiatives representing close to 80% of the overall value of that package. In approving BCE's acquisition of CTV in Broadcasting Decision CRTC 2011-163, that number fell to less than 72%.
85. Rogers believes that this trend should not be continued, and that if this transaction is approved, the Commission should require BCE to increase funding for on-screen initiatives to a minimum of 85% of the overall value of the benefits package. As the Commission noted in question 7 of its May 17, 2012 deficiency letter to BCE, it has been the Commission's general practice to require that the majority (85 to 90%) of television tangible benefits should result in on-screen programming. In our view, the exceptions to this requirement that have recently been granted to Shaw and BCE should not be adopted in respect of the current application. The Commission should instead return to the underlying premise of its benefits policy and ensure that the initiatives proposed will benefit the broadcasting system as a whole by requiring that the vast majority of benefit monies are used to fund the production of television programming.
86. To achieve this, the Commission could simply require BCE to redirect the \$40 million earmarked for Northwestel and the \$3.5 million proposed for mental health awareness to the Canadian Media Fund (CMF). Rogers has no doubt that the CMF would be able to utilize the additional funding.

(iv) *Benefit Expenditure Period*

²¹ Decision CRTC 2000-221, at paragraph 56.

87. A final concern relates to BCE's proposal that it be permitted to spend the benefits money over a 10 year term, rather than the standard 5 or 7 year period that the Commission typically requires in approving these transactions. BCE argues that a 10 year term would be appropriate because the additional time is needed to allow such a large amount of benefits money to be absorbed into the broadcasting system, given the existence of other benefits monies that are currently being spent over the next 5 years.
88. BCE is not the first applicant to try to extend its benefits payment schedule in this manner. In the past, the Commission has rejected proposals to extend the timeframe to 10 years. For example, in Broadcasting Decision CRTC 2007-249, the Commission denied a proposal to deviate from its policy:
- Though the Commission appreciates that the creative process is dynamic and difficult to predict, it notes that tangible benefit packages in the past have been managed successfully within the five- and seven-year periods. The Commission is not convinced that the advantages CanWest claims would result from a ten-year period are sufficient to warrant a deviation from the accepted five- or seven-year norms.²²
89. If BCE is truly concerned about the ability of the broadcasting system to absorb the benefits package it is proposing as part of this application, it should perhaps consider devoting all or a portion of the money to the CMF, which would have no difficulty ensuring that the money is used to support the production of Canadian programming within a seven year timeframe.

IV. CONCLUSION

90. While Rogers has been a supporter of greater consolidation within the Canadian broadcasting system and we continue to believe that significant benefits accrue to Canadian consumers as a result of having larger and financially stable broadcasting companies operating in Canada, we are very concerned that, with the acquisition of Astral, BCE will become too big and too powerful with the ability and incentives to abuse its dominance in the television distribution marketplace. If this transaction is approved, the size of BCE's television ownership interests and its concomitant ability to control the television services market in the Canadian broadcasting system will grow to such a level that the company will have every incentive to continue to act in a manner that reduces program diversity in the system, threatens the competitive marketplace and harms Canadian consumers.

²² Broadcasting Decision CRTC 2007-429, at paragraph 80.

91. In view of this, Rogers opposes the proposed acquisition of the Astral English language pay and specialty television services and requests that the Commission deny that aspect of BCE's application. We propose that the Commission direct BCE, as a condition of approval, to divest of all of the English-language television programming services it is proposing to acquire from Astral.
92. Should the Commission not order such divestiture, Rogers believes it would be necessary to require Bell, as a condition of approval, to make all program rights to all platforms they hold on a per channel basis available to any third party distributor in the negotiation of affiliation agreements. It is our view that Bell is already dominant in the television marketplace and that this condition precedent is required to ensure competing BDUs can access these rights. In addition, any third party distributor already distributing a given service should be permitted to exploit the non-linear rights to that service held by Bell, notwithstanding the absence of a commercial agreement.
93. In addition, Rogers submits that any such approval must also be subject to the condition precedent requiring BCE to re-file a benefits package that complies with the Commission's longstanding benefits policy.
94. Rogers appreciates this opportunity to comment on BCE's application and looks forward to discussing these issues further at the public hearing in Montreal that begins on September 10.