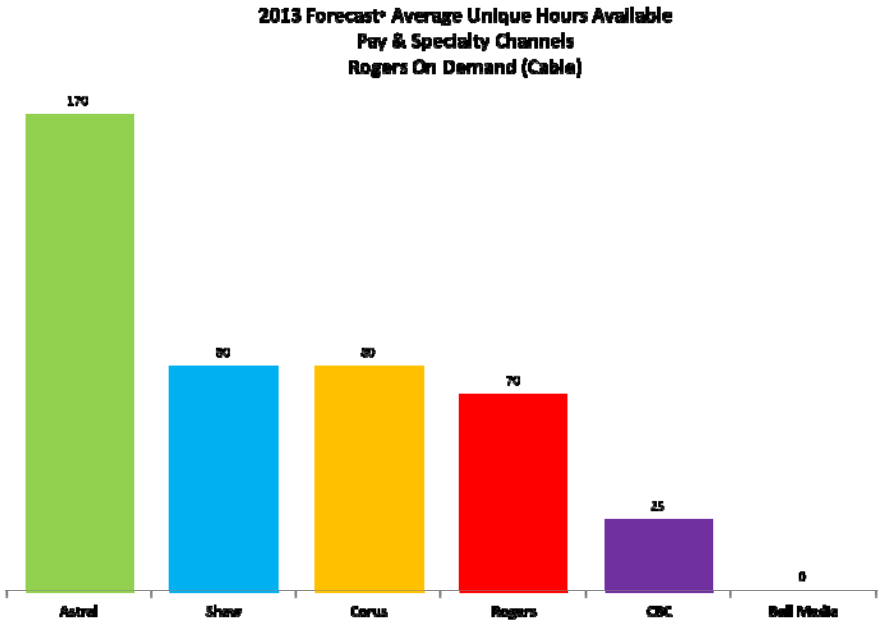
FINAL COMMENTS

ROGERS COMMUNICATIONS INC.

BROADCASTING NOTICE OF CONSULTATION CRTC 2012-370-2



Current (2012) Availability of On Demand Programming from Pay & Specialty Channels on Rogers' Platforms

	VOD (CABLE)	BROADBAND	MOBILE
astral	✓	✓	✓
SHAW MEDIA	✓	✓	✓
CORUS ENTERTAINMENT	✓	✓	✓
ROGERS MEDIA	✓	✓	✓
CBC	✓	✓	✓
Bell Media	⊗*	⊗	⊗

* Very limited volume of VOD content from one channel – forecast to end September 2012

"We're not here saying that Bell are evil or that Bell are cruel, we're saying that Bell are rational business people. The money that they make from their distribution businesses is much more impressive than the money that they make from their media businesses. If they can sacrifice a bit of profit in the media business by not selling to everyone and sell more cable subscriptions and sell more wireless subscriptions and sell more internet subscriptions, they make more money.

So, you're absolutely right that they are trying not to leave money on the table, but the result is that they're not behaving like a content provider would behave. A content provider like Astral wants to get every last scrap of money out of their content business. A vertically integrated distributor wants to maximize the overall corporate profits which often means enhancing their distribution business and not selling content to their competitors.

And that's where the conduct becomes anti-competitive and not the kind of profit maximization that's good for the system; it becomes bad for the system and bad for consumers." [i]

I. INTRODUCTION

1. Rogers Communications Inc. (Rogers) is pleased to file final comments with respect to the new proposals and information submitted at the oral public hearing into Bell's application to acquire Astral Media Limited (Astral).

2. Despite its claims to the contrary, it is clear that Bell's behaviour over the past 18 months has been markedly anti-competitive. Bell has repeatedly used CTV's content as a tool to enable Bell TV and Bell Mobile to obtain an advantage over competing distributors. Bell has tried to force its competitors to pay substantially more for Bell Media's content than they had paid in the past and it has limited their ability to address growing customer demands for more choice and greater access to content on multiple platforms.

3. As noted by the Chairman on the first day of the hearing, it is Bell's burden to demonstrate that its application to acquire Astral is in the public interest and is the best possible proposal in the circumstances. Bell has failed to do that. In fact, the evidence presented in this proceeding demonstrates that allowing Bell to own Astral's English-language television assets would be contrary to the public interest.

4. It is Bell's size and scope that are the problems. Bell holds a unique position in the Canadian broadcasting system. It is the only Canadian company that can use its broadcasting assets to gain an unfair advantage over competing distributors. No other company operating in Canada's English-language television market today – not Shaw, not Rogers, not Quebecor – has the same scale or mix of broadcasting and distribution assets as Bell. No other Canadian company dominates the English-language television market like Bell.

5. Bell Media is already too big. It should not be allowed to get bigger by acquiring Astral, which holds the broadcast rights to some of the most popular content – movies, HBO series and children's programming – outside of the sports genre. Bell's anti-competitive behaviour will certainly escalate and become even more harmful if it is allowed to acquire Astral's English-language television services. In

some instances, consumers will have to pay more for Astral's content as Bell demands higher wholesale fees and limits packaging flexibility, while in others they simply will not be able to access that content unless they subscribe to Bell TV and Bell Mobility.

6. Rogers submits that, in order to protect consumers by maintaining a competitive distribution market in Canada, the Commission should, as a condition of approval, require Bell to divest of Astral's English-language television services. This will ensure that Bell will not be able to use Astral's content to gain an unfair competitive advantage. This is not an extraordinary or unprecedented remedy. The Commission has, in the past, required divestiture when faced with an application to transfer ownership or control of a broadcasting company that raised competition concerns. The Commission ordered CTV to divest of Sportsnet in Decision CRTC 2000-86, as a condition of approval of CTV's application to acquire TSN, and it similarly required CTV to divest of the Citytv stations in Broadcasting Decision CRTC 2007-165, as a condition of approval of CTV's application to acquire CHUM Limited.

II. ROGERS' EVIDENCE IS UNCONTESTED

7. Rogers and other interveners presented evidence demonstrating that Bell's acquisition of Astral's English-language television services would be contrary to the public interest. In its oral reply, Bell chose to ignore key aspects of the evidence of anti-competitive behaviour amassed against it during this proceeding. Most notably, Bell did not address the substance of Rogers' concerns that were reflected in the two Charts we included as part of our oral remarks. Those two Charts illustrated specific evidence of Bell's anti-competitive behaviour and that evidence was not refuted. Bell's failure to challenge the evidence in the Charts produces two undeniable and uncontested propositions about the vertically-integrated company.

8. The first is that Bell is the only major Canadian broadcaster that has refused to provide pay and/or specialty content for our video-on-demand (VOD), broadband and mobile video services on commercially reasonable terms. As the Charts demonstrate, every other major Canadian broadcaster, including Shaw, Corus, Astral and the CBC, have partnered with Rogers to enable consumers to access pay and specialty content on multiple platforms. Nothing that Bell said refutes this.

9. The second proposition is that if Bell is allowed to own Astral's English-language pay and specialty television services, it will use Astral's content to gain an even greater unfair advantage over its competitors. At that point, a Bell-controlled Astral will cease to be our valuable programming partner. It will instead become our rival.

10. Since its acquisition of CTV, Bell has demonstrated that it is willing and able to use its power in the Canadian programs rights market to advantage Bell TV and Bell Mobile and to undermine competing distributors. With the exception of Shaw, every distributor that participated in this proceeding confirmed this.

11. The increased leverage that Bell would obtain in the content market following its acquisition of Astral would motivate it to continue to disadvantage competitors by denying them access to marquee content, increasing their costs and preventing

them from offering content to consumers in new and innovative ways. This will also make it even harder for Bell's competitors to respond to new competition from over-the-top (OTT) services, like Google TV, Apple TV and Amazon precisely because we will not be able to access CTV and Astral content in a timely manner or on commercially reasonable terms for our various platforms.

12. Our uncontested evidence points to only one conclusion. Bell's ownership of Astral's English-language television services would undermine competition and harm consumers, and for those reasons approval of this application would be contrary to the public interest.

III. BELL FAILED TO MEET ITS BURDEN

13. Bell has not demonstrated that its ownership of Astral is in the public interest. The public interest has always been a key consideration with respect to transfer of ownership or control applications dating back to the 1970s when the Commission first expressed the view that applicants would have to demonstrate:

> …that such a transfer will not affect the ability of the licensee to maintain existing broadcasting services; that it will benefit the subscribers and the communities served and that it is in the public interest.[ii]

14. That public interest test was reiterated and explained in Public Notice CRTC 1989-109, Elements assessed by the Commission in considering applications for the transfer of ownership or control of broadcasting undertakings, where the Commission stated that "the onus is on the applicant to demonstrate to the Commission that the application filed is the best possible proposal under the circumstances." The Commission also emphasized that "concentration of ownership" and "cross-media ownership" were key considerations in its deliberations as to how the public interest could best be served.

15. Bell has failed to satisfy that burden of proof. It has not demonstrated how its application to acquire Astral and become an even bigger content owner would serve the public interest. In fact, rhetorical flourishes aside, it has made almost no attempt to do so.

16. Outside of its tangible benefits proposals, only two public interest arguments were made by Bell at the hearing to support its application. The first was its claim that, in the face of OTT threats, Bell needs to establish a competitive Canadian offering to Netflix. The second was its claim that Astral needs Bell's economies of scale to compete with Netflix. Neither of these arguments is particularly persuasive. We have, nevertheless, addressed both of them below.

(a) Bell's alternative to Netflix

17. As part of its opening statement and again in its oral reply, Bell proposed to launch what it called a "made-in-Canada" response to Netflix. While Bell's surprise announcement was short on details, which suggests it was cobbled together just before Bell attended the hearing on September 10, it is clear that it would be nothing like Netflix. Based on the limited description that was provided by Bell, the so-called

"Canadian alternative to Netflix" would not provide all Canadians with online access to movies and other content at a low price, as Netflix currently does. Instead, it would appear to be an online service that might be sold to Bell's customers through Bell TV and would also be offered to third party BDUs.

18. While most broadcasters make such value add services available today at no additional charge (bundled into the linear rate), Bell might require a significant additional fee from BDUs for this new service, which would have to be passed on to subscribers. The failure to participate would mean that Bell would offer this online service to its customers, while those BDUs that refused to accept Bell's unreasonable terms would be unable to offer any of Bell's content to their customers online.

19. Bell's proposed service is not something that is new to the Canadian broadcasting system. A number of Canadian cable distributors have been offering an authenticated on-line service for quite some time.[iii] In fact, Rogers announced at the New Media Hearing in March 2009 – more than three and a half years ago – that we were launching an authenticated broadband service and we did so in May 2010. Our broadband service, which was originally known as Rogers On-Demand Online (or RODO) is now called Rogers Anyplace TV.

20. Despite considerable effort on our part, however, we have not been able to secure content from Bell's specialty services for Rogers Anyplace TV. We provided evidence on this matter during our appearance at the Montreal hearing. Our Charts showed that Bell has not made its specialty content available to us for our broadband offering. That evidence went unchallenged. Moreover, because the Charts aimed to demonstrate that Bell alone among major broadcasters has <u>not</u> made its specialty content available on VOD, broadband and mobile, we did not highlight in those Charts that Bell has also *never* provided access to content from Bell's conventional television networks, CTV and CTV 2 for distribution on our broadband platform.

21. Our inability to access Bell's specialty content for distribution on Rogers Anyplace TV has severely hampered our ability to provide our customers with a full, multi-screen experience. And we are concerned that if Bell launches its own authenticated broadband service (as it proposes to do), it will use that Bell-branded offering to limit consumer choice by further undermining our ability to meet our customers' needs.

22. Clearly, Bell's first proposal fails to meet the burden that it bears to demonstrate that its acquisition of Astral is in the public interest.

(b) Astral needs Bell's economies of scale to compete

23. As for the argument that Astral needs Bell's economies of scale to compete in the Canadian marketplace, that seems far-fetched. Astral already has the scale and size it needs to acquire content and respond to any changes taking place in the Canadian pay television market. Astral is operating in a genre-protected pay television environment where it is allowed to purchase exclusive rights to

programming for its movie services. It has huge buying power and it has sufficient scale to acquire content from the U.S. studios.

24. No credible evidence was presented by Bell to support the suggestion that Astral can no longer acquire rights from the U.S. studios. Astral's Ian Greenberg only pointed to one example involving Paramount where Astral was allegedly out-bid by Netflix for Canadian pay television rights. No details were given regarding the nature of the content Netflix acquired. Nor did Astral provide any evidence that it has been unable to acquire pay television rights from any other U.S. studios. In fact, Mr. Greenberg's evidence was recently contradicted by the CEO of Corus Entertainment Inc., licensee of Movie Central:

> Netflix is far from mature but I think it's finding its place now - and what we're starting to see is a more orderly market as it relates to windows and access to content and again, the concern about whether this was going to result in significant increases in content and programming costs, I think we've pretty much got that one addressed.[iv]

25. Merely providing a single example of Netflix acquiring pay television rights for Canada does not demonstrate that Astral lacks the scale to compete against OTT services in the genre-protected Canadian pay television market. Astral does not have to become part of a vertically-integrated company in order to continue to acquire top-rated U.S. studio content for its pay television services.

26. Again, Bell has failed to demonstrate that the public interest would be served by the Commission's approval of this transaction.

IV. BELL'S UNSUBSTANTIATED CLAIMS AND FABRICATIONS

27. Bell characterized the arguments and evidence presented by Rogers and other interveners during the hearing as "unsubstantiated allegations" and "outright fabrications". Instead of addressing each aspect of the considerable evidence of anti-competitive behaviour presented by Rogers and other interveners, Bell chose to respond to only a few arguments that were made and, in doing so, presented the Commission with an inaccurate picture of the relationship that it has developed with Rogers and other competing distributors.

28. We respond to each of Bell's claims below.

(i) Bell's $3 million mobile offer

29. For the first time in this proceeding, Bell claimed during its in-chief appearance before the Commission on September 10 that it offered its content to all competing mobile distributors for $3 million:

> Bell Mobility today pays $8 million -- and that number is growing -- on an annualized basis to Bell Media. We have offered these services, all of our content, to our other wireless companies for $3 million a year…[v]

30. During Rogers' appearance at the hearing, we refuted Bell's claim. We noted that more than a year ago Bell had indeed offered some specialty mobile content to Rogers at a minimum figure far in excess of the amount quoted by Bell. At that time, Rogers did not have a single mobile video subscriber and viewed the offer as unreasonable. That proposal was later amended by an expanded offer which amounted to several times the quoted $3 million price tag. It was not until August of this year, during a telephone conversation, that a Bell employee stated that Bell might be willing to make its mobile content available to us at $3 million, a price which understated the actual cost because it did not include the "connection management fees" or the per subscriber fee that would drive up the cost as volumes increased. To date, Bell has not provided Rogers with a formal written offer.

31. In its oral reply, Bell attempted to justify its refusal to negotiate a commercially reasonable deal for mobile content by arguing that Rogers did not launch a mobile video offering until May of this year. Rogers' delay in launching a mobile video offering comparable to Bell's was directly related to our inability to achieve a critical mass of content, notably including content controlled by Bell.

32. That delay enabled Bell to be first to the market with its mobile service. That is the kind of anti-competitive advantage that Bell has demonstrated a propensity to create and exploit since it acquired CTV, and it is the kind of behaviour that the current vertical integration safeguards are not able to adequately address, because they do not prevent Bell from gaining a head start.

33. During its reply, Bell also attempted to turn the table on Rogers by arguing that Bell Mobility has not been able to secure mobile rights for Sportsnet. For the record, Rogers Media did present a comprehensive offer of mobile content rights to Bell Mobility on September 4, 2012. Our formal offer was the product of months of discussions with Bell about the reasonable value attributable to Rogers Media's content, in the context of the unreasonable value being demanded by Bell.

(ii) CTV's 2400 hours of content

34. In its oral reply, Bell provided new information to the Commission with respect to the amount of CTV content that it provides to Rogers. Bell indicated that it had given Rogers close to 2400 hours of CTV programming for distribution on our VOD platform. What BCE did not point out, however, is that the content it provides is solely conventional television programming. Bell's decision to respond to our evidence by only referencing the content it makes available to us from CTV and CTV 2 is telling.

35. As we emphasized at the hearing and as evidenced in the two Charts we provided, Bell has refused to provide us with any of its specialty content for distribution on our VOD and broadband platforms, and as noted above, access to content for the mobile platform was only offered on terms that were not commercially reasonable.[vi] The Chart we provided to the Commission as part of our oral remarks, highlighting the absence of specialty content from Bell for our non-linear platforms, is accurate.

(iii) The MLSE transaction does not raise vertical integration concerns

36. In its oral reply, Bell also introduced new information relating to the application by Rogers and Bell to acquire joint control of Maple Leaf Sports & Entertainment (MLSE) and its three Category B services. Bell argued that the reply to interventions, which was filed in that proceeding jointly by Rogers and BCE, stated that existing vertical integration safeguards were sufficient to address any concerns relating to anti-competitive behaviour in the context of the MLSE application. Rogers continues to believe that.

37. The application that was approved by the Commission in Broadcasting Decision CRTC 2012-443 involved the acquisition of three highly niche Category B specialty services. According to the Commission's *2012 Communications Monitoring Report*, the combined viewing audience for those three services is negligible. These are not services that BDUs must have to compete and, in fact, many BDUs have chosen not to offer them. Moreover, these three Category B services do not hold the rights to premium sports content that could be used to undermine competition in the linear, VOD, broadband and mobile video markets.

38. The acquisition of MLSE was not motivated by a desire on our part to own its three Category B services. Rather, we wanted to buy the sports teams as a means to gain some degree of cost certainty with respect to the acquisition of sports programming rights. This point was acknowledged by the Commission in Broadcasting Decision CRTC 2012-443, when it dismissed concerns that were raised regarding the ownership of the unlicensed sports assets (the Maple Leafs NHL team, the Raptors NBA team, etc.) and ancillary broadcast rights.[vii]

39. With respect to the vertical integration safeguards, this is what Rogers and BCE said in the MLSE proceeding in reply to interveners:

> In light of the vertical integration framework, there is no reason to believe that approval of this application will enable RCI or BCE to gain some sort of unfair advantage over independent distributors.[viii]

40. We stand by that statement. The vertical integration safeguards established by the Commission in Broadcasting Regulatory Policy CRTC 2011-601 are sufficient to protect independent distributors from anti-competitive behaviour in relation to the three MLSE services. The fact that Rogers and Bell now control MLSE's three Category B services has very little impact on the competitive distribution market. The three MLSE services do not have the must-see content that large numbers of Canadian consumers are interested in accessing on multiple platforms.

41. The comments we made in the MLSE proceeding are simply not applicable to Bell's stable of CTV properties or their proposed acquisition of Astral's premium English-language pay and specialty services. The vertical integration safeguards are not sufficient to protect consumers and competitors from a company like Bell that controls CTV, TSN, and many other popular specialty services and, with the acquisition of Astral, will control the most popular pay television services as well.

(iv) Bell's efforts to undermine our London Market Trial

42. Bell also suggested during its oral reply that we falsely claimed that Bell forced Rogers to terminate our "skinny basic" market trial in London, Ontario earlier this year. As part of its evidence, Bell referred to correspondence from Mr. Crull, which indicated that Bell Media would be "willing to support an extension of the trial."

43. We acknowledge that we did receive a letter from Mr. Crull that would have given us Bell's consent to continue with our market trial. However, that consent came with several conditions. Those restrictions and limitations, which would have been imposed on Rogers by Bell, effectively brought the trial to an end.

44. Initially, the market trial was going to be 6 months in length with all discretionary services available in pick-packs of 15, 20 or 30 services. The purpose was to test the natural level of demand for this model. Bell strongly objected. In order for the market trial to go forward with the Bell Media specialty services, Bell required that it be restricted to an unreasonably brief time-frame (initially, 90 days, later extended). It also prohibited Rogers from offering TSN and TSN2 on a truly discretionary basis. As a result, TSN and TSN2 had to be distributed to the vast majority of subscribers to the trial, regardless of their desire to receive the services. This condition in particular totally defeated the purpose of the trial, compromising it to such a degree that we stopped soliciting new customers in January of 2012.

45. Given Bell's restrictions, there was no point to continue the market trial. Bell's insistence on its conditions contaminated the methodology as customers had to receive services they did not want. This, combined with Bell's negative reaction to the trial, ultimately compelled us to terminate the trial prematurely.

(v) Astral's packaging flexibility for French-language services v. Bell's packaging flexibility for its Category A and B services

46. Bell stated in its reply that the rate card for its specialty services mirrors the rate card Rogers agreed to accept from Astral and would provide Rogers with the same packaging flexibility offered by Astral for its French-language services. This statement, while not completely untrue, is misleading.

47. Bell's statement is only accurate with respect to the rate card for its Category B services. That rate card would permit Rogers some packaging flexibility, and would be similar to the rate card we accepted for Astral's French-language services, which are also niche services that enjoy limited penetration. These services are not key drivers for Rogers. Nor are our customers required to purchase them because they are niche digital services that are offered on a discretionary basis.

48. It is not the rate card that Bell is offering for its Category B services, but the rate card it is offering for its Category A services that is the problem. The Category A services are broadly distributed and highly-penetrated on Rogers' systems. The rates and terms proposed by Bell for distribution of these services under a flexible packaging model would result in such a significant increase in our retail prices that flexible packaging would not be a commercially reasonable option for consumers.

49. Bell also asserts that it has offered Rogers a rate card that is the same as the one imposed on Canadian Independent Distributors Group (CIDG) pursuant to the final offer arbitration (FOA) process. Notwithstanding the outcome of the FOA the Commission conducted for Bell and CIDG, Bell's proposal for packaging flexibility is not commercially reasonable. Bell's rate card includes penetration-based rates and better-than-make-whole provisions that no other broadcaster in Canada could reasonably expect or demand. If we accepted Bell's penetration-based rate card, Rogers would be guaranteeing Bell's revenues on the linear platform for the duration of the agreement. That would be the case regardless of how many of our customers actually subscribe to Bell's services.

50. This is the Catch 22 situation that we have referred to in this proceeding. If we give in and sign Bell's penetration-based rate card, Rogers will get additional packaging flexibility, but we will have to set the prices for those packages unreasonably high in order to satisfy the penetration-based rates that we will have to pay to Bell. This will severely hamper our ability to compete with Bell TV and will also impact our ability to compete with OTT providers, which offer low priced options for specific programs. Yet, by refusing to accept Bell's rate card, we have almost no flexibility in how we offer Bell's Category A services on our linear platform. We cannot even offer Bell's services in smaller packages to match Bell TV's offering.

51. This is a key reason why we are concerned about the adequacy of the vertical integration safeguards and the FOA process. The marketplace will become inefficient if the Commission is asked to substitute its commercial judgment for the parties in dispute. Moreover, if the terms of carriage imposed upon CIDG in its dispute with Bell did in fact resemble the penetration-based rate card proposed to Rogers by Bell, it is clear that the FOA process is not always going to result in commercially reasonable terms of carriage. The vertical integration rules and the FOA process are not an adequate substitute for a properly functioning marketplace.

(vi) Rogers Live TV

52. Finally, Bell also discussed, as part of its reply, Rogers Live TV, which we launched earlier this year. As we noted at the hearing, this new service simply allows our cable customers to stream live TV channels that they have acquired as part of their basic cable package to their tablets (e.g. iPads) when they are inside their homes. The pushback we received from Bell on this subject, combined with their objections related to the London trial and the impasse in our negotiations around packaging flexibility contributed to our decision to simply not add CTV to the service, even though we have the right to do so. No other broadcaster reacted in the same fashion as Bell.

53. Bell's opposition to Rogers Live TV and its refusal to consent to the inclusion of CTV as part of this new offering forced us to exclude CTV from it for fear of any retribution or impact on other facets of our commercial relationship with Bell. There is no doubt that Bell's actions have diminished the value of Rogers Live TV to our customers.

54. While Bell argues that we would have to negotiate with it to obtain a specific right to live stream Bell Media's services in this manner, we believe the real reason that Bell

was so opposed to our launch of Rogers Live TV was because we were the first BDU in Canada to bring that type of service to market. Bell does not want competing distributors to be first to market with new and innovative offerings. And if we are first to market, Bell will do everything in its power to limit the amount of programming that is available to us. Bell's goal is to diminish the value of our new services in the eyes of our customers.

V. CONCLUSION

55. In closing, it is Rogers' submission that Bell should not be allowed to achieve even more power in the English-language television market by acquiring Astral's English-language pay and speciality services. Bell's well-documented pattern of anti-competitive behaviour will only escalate and become even more prevalent if it is able to add Astral's stable of premium television services to its arsenal.

56. Bell has failed to satisfy the onus it has to prove that its ownership of Astral's English-language television services would serve the public interest. In fact, the record of this proceeding demonstrates that the opposite is true. Bell has not provided any credible evidence that approval of this application would benefit Canadian consumers or further the interests of the Canadian broadcasting system.

57. If Bell acquires Astral's English-language television services, the Commission has every reason to believe that, based on Bell's current behaviour, it will limit its competitors' access to Astral's pay and specialty content to the same degree that it has with respect to CTV. The vertical integration safeguards and any other conditions or measures that might be imposed on Bell in this proceeding will not be sufficient to protect consumers and competitors from an even larger Bell. There are no regulatory safeguards that the Commission could establish that would be an adequate substitute for a properly functioning marketplace.

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[i] CRTC Hearing Transcript (Kenneth G. Engelhart), September 12, 2012, at paragraphs 4826 to 4828.
[ii] Decision CRTC 77-456, July 28, 1977.
[iii] The term "authenticated on-line service" means that a customer would have to first subscribe to the linear channel that is the source of the content in order to access the programming on-line.
[iv] The Netflix factor? No biggie, says Corus CEO Cassaday, September 20, 2012 (http://www.cartt.ca/news/14312/Radio-Television/The-Netflix-factor-No-biggie-says-Corus-CEO-Cassaday.html)
[v] CRTC Hearing Transcript, September 10, at paragraph 578.
[vi] As we noted previously, the lone exception to this is a few hours of out-dated content that we have historically received from MTV.
[vii] Broadcasting Decision CRTC 2012-443, at paragraph 69.
[viii] Rogers/Bell Reply to Interventions, at paragraph 7.

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