

September 21, 2012

VIA ACCESS KEY

Mr. John Traversy
CRTC
1 Promenade du Portage
Les Terrasses de la Chaudière
Central Building
Gatineau, QC
K1A 0N2

Dear Mr. Traversy:

Subject: Broadcasting Notice of Consultation CRTC 2012-370, Application by BCE Inc. on behalf of Astral Media Inc. for authority to acquire effective control of Astral's broadcasting undertakings, Final Written Comments

1. The Canadian Cable Systems Alliance ("CCSA") represents small and independent distributors across Canada. CCSA speaks on regulatory matters for over 100 companies operating in all Canadian jurisdictions except New Brunswick and Prince Edward Island.
2. CCSA continues strongly to oppose the acquisition by BCE Inc. ("Bell") of the specialty, pay and pay-per-view services currently owned by Astral Media Inc.

Bell's Recent Behaviour

3. CCSA was interested in Rogers' description, at the public hearing, of its recent experience in negotiation with Bell Media, as follows:

On the linear platform, Bell has demanded massive increases in wholesale fees and revenue guarantees as a quid pro quo for packaging flexibility. The terms are so unreasonable that in almost all cases we have refused to accept them. In contrast, all of our other programming

suppliers, both Canadian and foreign, have given us some degree of packaging flexibility.¹

4. That experience reflects CCSA's, exactly. The point of appearances by CCSA members, CCAP and Nor-Del, at the public hearing was to demonstrate that what Bell calls a "flexible" rate card is, in practice, anything but flexible. Rather, those so called "flexible" packaging terms are "so unreasonable" that CCSA members are being forced to remove services from discretionary digital packages to the basic service.
5. Our experience has been like Rogers', as well, in that CCSA has never before seen carriage terms like this in the industry.
6. Rogers' testimony continues:

MR. PURDY: They want us to guarantee the old linear while they go out and start brand-new businesses with new partners on the multiplatform side.²

7. Again, that statement is consistent with CCSA's experience. Never before has CCSA been confronted with the proposition that it must completely guarantee a programmer's linear television revenue base as a condition of carriage.
8. CCSA agrees with Rogers' inference that Bell is seeking to have competing BDUs guarantee its linear programming revenues until it can grow revenues from non-linear platforms to a degree that loss of revenues from the linear side is no longer a significant risk.
9. In fact, Bell's development of its mobile and on-line products focuses squarely on Bell's direct ownership of the customer relationship.
10. That is, competing BDUs are effectively being required to finance their own disintermediation. Even as they lose customers to Bell's BDU, mobile and on-line

¹ TRANSCRIPTION OF PROCEEDINGS BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION to consider the broadcasting applications listed in Broadcasting Notice of Consultation CRTC 2012-370 and 2012-370-1, Volume 3, 12 September 2012 [hereinafter *Transcript Volume 3*] at paragraph 4595.

² *Ibid.* at paragraph 4634.

services because of the packaging/rate constraints that Bell, as a program supplier, has placed on them, they must continue to guarantee Bell's linear programming revenues.

11. That approach, whereby Bell uses its dominance in the supply of content to create conditions that drive retail distribution customers to one or more of its own platforms, is profoundly customer-unfriendly. That is because it drives competitors' wholesale prices up while constraining their freedom to package services in response to customer demand.

12. As PIAC said at the hearing:

Bell boasts that its acquisition of Astral will result in "efficiencies", "synergies" and "benefits for consumers". Bell wants to focus on its claims that there will be competitive benefits for Quebec consumers.

Speaking as consumer groups that represent consumers across Canada, we disagree. This deal is broader than competition and choice in Quebec. This deal is about Bell -- a leading distributor of television services, Internet access services and wireless services -- adding to its already vast and valuable array of broadcasting content, so that Bell can push its content on Bell subscribers and its competitors' subscribers. If Bell's plan works, its competitors' customers would switch their bundle of communications services to Bell. These strategies are designed to maximize Bell's revenues and profits.³

13. The short-term interest of Canadian consumers is of little importance in the context of that strategy. Indeed, As CCSA pointed out at the hearing, Bell's own satellite BDU has collapsed its former theme packaging in a manner that requires customers to select services from a very few, large, relatively expensive packages that look very much like the old analog trapped cable tiers.

14. Most recently, in its reply comments at the public hearing, Bell responded to CCSA's submissions as follows:

CCSA members are important customers for Bell Media and we will continue to work hard to be good partners to them. We particularly hope our new multi-platform On Demand service will benefit these

³ *ibid.* at paragraphs 5888-89.

smaller BDU's who also need a consumer-friendly response to the threat posed by NetFlix and other foreign OTT providers.

15. To CCSA, those are empty words with no basis in history. Rather, based on our recent negotiation and dispute resolution with Bell Media, from CCSA's point of view, a "good partnership" appears to be synonymous with "being crushed".
16. As to multi-platform services, all CCSA knows is that we cannot purchase multi-platform rights from Bell today and we have no idea if or when that might ever happen or at what cost. We note Bell's assertion, in its reply comments that, for the 2011-12 season, it "provided to Rogers, Shaw and Bell all of CTV's over-the-air content for set-top box VOD".⁴ Those content rights have been made available neither to CCSA's members nor, so far as we know, to other independent distributors.
17. CCSA notes, further, the following exchange during CCSA's appearance at the hearing, after Nor-Del Cablevision's statement that the new Bell Media contract has forced Nor-Del to move TSN from digital theme packs to its basic service:

COMMISSIONER MENZIES: Just to follow up, it doesn't seem to make sense that driving up the cost of basic cable is a good way to compete against OTT operations?

MR. BAXTER: Yes, exactly.⁵

18. Based on the facts we know today, Bell has little interest in helping competing independent BDUs meet the challenge of foreign OTT competition. Bell's last-minute announcement, at the hearing, of a new, multi-platform on-demand service was a complete surprise to CCSA. Certainly, no such product has been discussed with or even mentioned to us.
19. Rather, Bell continues to deny CCSA members access to any multi-platform rights for its services and, as Commissioner Menzies noted, is driving up the cost of our

⁴ TRANSCRIPTION OF PROCEEDINGS BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION to consider the broadcasting applications listed in Broadcasting Notice of Consultation CRTC 2012-370 and 2012-370-1, Volume 5, 14 September 2012 [hereinafter *Transcript Volume 5*] at paragraph 9459.

⁵ *Ibid.* at paragraphs 8631-32.

members' basic service. Bell's rigidity in its packaging requirements has, in fact, created fertile ground for services like Netflix.

20. CCSA has no basis for believing that Bell would offer the promised new multi-platform VOD offering in a way that would benefit our members or their customers. To CCSA, the more likely scenario is that Bell will continue to restrict packaging of its services by competing BDUs and roll out, for itself, a flexible service.

Constraining the Power

21. At the public hearing, Commissioner Denton asked CCSA, "So, given the situation you have described, then how is that power to be constrained, if it is to be constrained?"⁶ Commissioner Denton invited CCSA to comment further on this point in its final, written submission.
22. Bell is already the dominant owner of Canadian television content. Approval of the proposed transfer of control would make Bell far more dominant than it already is in this respect. Bell is also an experienced, sophisticated player in the regulatory, government relations and public relations spheres.
23. As CCSA said, at the hearing, the Vertical Integration Policy framework may well eventually become the right sort of tool to use to constrain such power. However, the real solution lies with effective enforcement of such a framework. Effective enforcement requires the adjudicator – be it the Commission or an expert third party – to be fully conversant not only with the terms of affiliation agreements but, also, with prevailing norms as to what is and is not standard, acceptable practice with respect to such agreements.
24. Those conditions do not exist today nor is it likely that the Commission could get such conditions in place in time if it were to approve the proposed acquisition by year's end.
25. For its own part, CCSA was the first party to rely on the new VI Policy framework. CCSA's original August 30, 2011 filing of its application for CRTC-assisted dispute resolution in relation to the Bell Media negotiation was motivated largely by CCSA's

⁶ *Ibid.* at paragraph 8580.

need to prevent Bell Media from delivering on its threat to shut off access to Bell Media services that CCSA members already carried.

26. While Bell Media did not withdraw those services during the currency of the dispute, it did refuse to process any CCSA member launches of new Bell services such as TSN2, RDS2 and the HD versions of services such as Bravo, Discovery and Space. Some of those services were withheld for close to a year.
27. It is very difficult to reconcile that behaviour with Mr. Cope's comment, at the hearing, that, "There are 13 million households in Canada and Bell TV serves 2.2 million or 17 percent of them. It makes absolutely no commercial sense for us to withhold content from the other 83 percent of the marketplace or 10.8 million households. It just doesn't work if we do that."
28. The fact is that denial of access to content does "work". It is, in the first instance, an exceedingly powerful lever in negotiation, as CCSA members have recently experienced. More generally, as Dr. Ware explained during Cogeco's oral appearance,⁷ Bell, as an integrated entity stands to gain far more revenues from "switching" BDU customers than it stands to lose in wholesale programming revenues it presently earns from competing distributors.
29. However, the real point is that, since the VI Policy came into being, Bell has been able to sidestep that voluntary code. With respect to CCSA, Bell has, among other things:
 - benefited from "head starts" with respect to new HD services it has introduced;
 - insisted on packaging and penetration levels that are inconsistent with the value of its services;
 - required CCSA members to carry certain services as a condition of access to distribution of other Bell Media services.
30. As Bell itself said in its Reply Comments in this proceeding, "The manner in which the [Vertical Integration] framework's principles are to be applied, how they inter-relate, and real-life implementation issues associated with these, are only now being worked out."

⁷ Transcript, Volume 3 at paragraphs 5456-71.

31. CCSA agrees. The VI Policy, especially in its present form as “a voluntary code that people voluntarily don’t follow”,⁸ is not a proven, effective tool for “constraining the power”.
32. In that context – a context in which Bell is already dominant and the Commission lacks any effective tools for constraining any abuse of that dominance – it would seem reckless to approve a transaction that would significantly increase that dominance and thereby increase risk to Canadian television viewers. As recent experience with Bell Media indicates, attempts to rein in that dominance after the transaction has been approved are unlikely to succeed.
33. The real power that the Commission holds is the power to deny the application for transfer of control. At least until such time as it is comfortable that it has all of the necessary tools in hand and can ensure compliance with stringent safeguards, the Commission should not approve the proposed transaction.

Risk to the Market

34. During CCSA’s appearance at the hearing, the Chairman posed this question:

I well understand that when the option of denying this application, in whole or in part, is there and in a sense our concern should not be the impact on financial markets. But we do have the responsibility to make sure that we have a good broadcasting system.

Aren't you concerned that if -- that what you are proposing wouldn't create a bit of chaos in the broadcasting system?⁹

35. CCSA whole-heartedly agrees that the fundamental test for the Commission is whether the proposed transaction will support a “good broadcasting system”. For the reasons that we have set out in our written comments and at the oral hearing, CCSA believes that the proposed transaction would undermine Canada’s broadcasting system to the detriment, in particular of Canadian consumers and rural consumers.

⁸ *Transcript Volume 5* at paragraph 8528.

⁹ *Ibid.* at paragraphs 8505-06.

36. CCSA – and, indeed, many others – have submitted that approval of this transaction would, among other things:

- impair the affordability of television services for Canadian consumers;
- impair Canadians’ ability to choose and pay for only the programming they want;
- pose a serious risk to the continued delivery of locally-based broadcasting, telephone and High-Speed Internet services to the many rural Canadians that live in high-cost areas that Bell is not interested in serving;
- accentuate the “technological divide” between urban and rural markets.

37. Against those risks one must place Bell’s assertion that the Commission has “set out an analytical framework and roadmap; a set of rules with which we fully comply”.¹⁰ Bell’s submissions are anchored, principally, in two such sets of rules; the Commission’s Diversity of Voices policy and its Tangible Benefits policy.

38. Putting aside the many arguments that have been made about whether the present application satisfies either of those policies, CCSA submits that the question to be answered is larger than that. As the Chairman said, the question to be answered is whether the proposed transaction is good for the broadcasting system.

39. That question must be answered by reference to the all of the policy objectives and regulatory principles set out at ss. 3 and 5 of the *Broadcasting Act*. The Commission has a legislated duty to consider those objectives and principles.

40. Moreover, as the Chair noted at the oral hearing,¹¹ by virtue of s. 6 of the *Act*, the Commission is not constrained by its own prior policy statements, such as the Diversity of Voices and Tangible Benefits policies, from conducting this review with reference to those broader objectives and principles.

¹⁰ *Ibid.* at paragraph 9426.

¹¹ TRANSCRIPTION OF PROCEEDINGS BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION to consider the broadcasting applications listed in Broadcasting Notice of Consultation CRTC 2012-370 and 2012-370-1, Volume 1, 10 September 2012 at paragraphs 204-05.

41. CCSA submits that the impacts that it has described in these comments and in its earlier comments in this proceeding raise serious doubts about whether this transaction will benefit the broadcasting system and the Canadians it serves.
42. Certainly, it would be wrong for Bell to assume that, simply by announcing a transaction of this magnitude, it has somehow created a presumption of the Commission's approval. It would be wrong for Bell to rely on an argument that denial of its application will create some form of chaos in the financial markets.
43. Such arguments do not determine the questions that the Commission must answer. Such arguments are attempts to undermine the Commission's very real and very important jurisdiction and duty in this matter.

Conclusion

44. CCSA has given serious thought to actions the Commission might take to constrain the potential for Bell's abuse of its growing market dominance.
45. The Vertical Integration Policy has the potential to be a powerful tool but it can only be effective if it is made mandatory and rigorously enforced. It is not yet proven.
46. Bell is already dominant. Astral is healthy. There is no urgent need for this transaction to be approved. The Commission must ensure it has effective tools in place to regulate the industry before it approves any more transactions with VI companies.
47. The Commission's most effective tool for constraint of Bell's growing dominance is denial of this application. CCSA strongly urges the Commission to make that choice, for the benefit of the broadcasting system and Canadian consumers.

Sincerely,



Christopher J. Edwards
Vice-President, Regulatory Affairs

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