

Broadcasting Notice of Consultation CRTC 2013-106

Item 1 - Application by Astral Media Inc. (Application 2013-0244-7) for authority to change the effective control of its broadcasting undertakings to BCE Inc. (BCE)

Intervention of the Public Interest Advocacy Centre (PIAC), Consumers' Association of Canada (CAC), Council of Senior Citizens' Organizations of British Columbia (COSCO), National Pensioners and Senior Citizens Federation (NPSCF), and Option consommateurs (OC)

(“PIAC/CAC/COSCO/NPSCF/OC”)

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EXECUTIVE SUMMARY

- E1. The Public Interest Advocacy Centre (PIAC), Consumers' Association of Canada (CAC), Council of Senior Citizens' Organizations of British Columbia (COSCO), National Pensioners and Senior Citizens Federation (NPSCF) and Option consommateurs (OC), together "PIAC/CAC/COSCO/NPSCF/OC", are pleased to provide the CRTC with comments opposing the application by Astral Media Inc. (Astral) requesting authority to transfer ownership and control of its broadcasting undertakings to Bell Canada Enterprises Inc. (Bell). We include in support of this intervention a research brief written by Dr. Dwayne Winseck, Professor at the School of Journalism and Communication, Carleton University.
- E2. PIAC/CAC/COSCO/NPSCF/OC continue to believe that the primary consumer interest in broadcasting is in ensuring that consumers benefit from access to a diverse and wide variety of programming in a broadcasting system that offers choice and flexibility in an affordable manner. Despite the proposed safeguards and divestitures of the new application by Astral to transfer authority to Bell, we oppose the proposed transaction on the basis that increased vertical integration and media concentration is not in the public interest, and this particular transaction will not benefit Canadians as citizens and consumers.
- E3. **Diversity of Voices quantitative analysis:** With respect to TV viewing shares, we disagree with Astral's characterization of the proposed transaction's impact on the diversity of voices in French- and English-language television. It is precisely because of Bell's already significant position in the broadcasting system and the level of concentration in the broadcasting industry that any further increase in viewing share raises policy concerns and must be fully examined by the Commission, even if its increase is limited to a few percentage points. With respect to TV revenue market shares, a closer look at the French-language pay and specialty television market, for instance, shows that the combination of Bell and Astral after divestitures would result in Bell controlling 54.1% of revenues in this market, more than three times the revenues generated by the next largest competitor. Bell's pre-merger revenue shares in English-language conventional and specialty and pay television are already significant compared to many of its competitors in English-language television.
- E4. We remain concerned that the proposed transaction would result in the combination of the largest and fourth largest broadcaster in radio. As a result of the proposed transaction, Bell would control 23.5% of all English-language radio revenues and 27.3% of all French-language radio revenues. We ask the Commission to refer to Dr. Winseck's more detailed analysis of the radio market in Appendix 1.

- E5. Finally, the available data to analyze the combined Bell-Astral viewing share and revenue share poses several challenges, including the location of accurate viewing share data for individual TV services and the identification of an accurate source for revenues. Given that the broadcasting industry is increasingly concentrated in the hands of a few private players, the Commission must consistently collect and publish reliable data about viewing and revenue shares in a manner that is publicly accessible for rigorous analysis.
- E6. **Other policy considerations:** HHI and CR4 scores provided by Dr. Winseck demonstrate a highly concentrated tight oligopoly in all broadcast product and geographic markets. In comparison to the other countries studied by the International Media Concentration Research Project, Canada has stunningly high levels of cross-media ownership and vertical integration ratios. The Bell-Astral proposed transaction would further increase Canada's cross-media ownership and vertical integration ratio. Several critics of vertical integration in the media market have criticized claims that more conglomeration and consolidation will lead to synergies that benefit media markets.
- E7. The loss of Astral in the marketplace means that Québec will be served by two large vertically integrated media conglomerates. The loss of a competitor cannot be said to "deliver more competition" or "unleash greater competitive intensity." PIAC/CAC/COSCO/NPSCF/OC are concerned that allowing a Bell-Astral combination will also spur further industry consolidation by creating an incentive for other vertically integrated companies to "match" Bell-Astral's size. The removal of Astral leaves a variety of small independent broadcasters who will be at a distinct disadvantage against the large vertically integrated players who form a highly concentrated, tight oligopoly.
- E8. Finally, with respect to the Consent Agreement between Bell and the Competition Bureau, the Bureau does not have the expertise or flexibility to consider social and cultural policy concerns and competition law may not be the most appropriate tool to ensure a diversity of voices in the media market. Therefore, the Consent Agreement should not satisfy the Commission in its application of the Diversity of Voices policy and public interest test.
- E9. **Hollow intangible "benefits" to consumers:** PIAC/CAC/COSCO/NPSCF/OC continue to be skeptical of the benefits of vertical integration for Canadian consumers that are promised by media conglomerates and strong vertically integrated players. Further vertical integration in this transaction primarily benefits Bell's shareholders, not competition or consumers. While vertical integration and media concentration may result in greater internal efficiencies for Bell, these efficiencies will not be passed on as benefits for the entire broadcasting system.
- E10. Meanwhile, consumers are paying increased prices for inflated packages that do not meet their needs or expectations. PIAC's 2012 consumer survey demonstrates that Canadians continue to be dissatisfied with the level of flexibility and choice offered for television service packages. Of note in PIAC's survey are the distinct results between English Canada and Quebec (where more pick-and-pay options are available).

Respondents in English Canada are generally 10 to 25 percentage points more dissatisfied with their level of choice than Quebec respondents.

- E11. Notably, Bell-Astral propose a new “TV Everywhere” service which should be heavily scrutinized by the Commission. First, it is not clear whether Bell will require significant additional fees from its competitor BDUs for this new service, which would increase costs for subscribers. Moreover, given that Bell would be the only firm offering such a service to all BDUs, it would have a monopoly in its offering and could withhold any Bell online content from its competitor BDUs.
- E12. **Tangible benefits package:** PIAC/CAC/COSCO/NPSCF/OC would support Astral’s proposed \$2M to be allocated as a tangible benefit to the Broadcasting Participation Fund (BPF). However, we oppose the funds set aside for the “consumer education” component of the benefits package, which would likely be channeled to create descriptive products (rather than truly addressing consumer concerns about choice and affordability) and could create conflicts of interest for consumer groups. Therefore, PIAC/CAC/COSCO/NPSCF/OC submit that the Consumer Education component would be best rolled into the BPF and specifically earmarked to fund consumer research (outside of active CRTC broadcasting hearings) that defines what consumers need to achieve real empowerment in the broadcasting retail market.
- E13. **Proposed safeguards insufficient:** While PIAC/CAC/COSCO/NPSCF/OC prefer the Commission’s proposal to impose a series of conditions of licence (COLs) incorporating *each provision* of the VI Code of Conduct to Bell’s general reference to the Code, we note that the Code has been criticized as an inadequate tool to address the anti-competitive behaviour that Bell has exhibited in past negotiations for its services. Moreover, we wonder how the Commission would enforce the breach of a COL that refers to a *voluntary* set of guidelines. Dispute resolution processes also do not correct imbalances or anti-competitive behaviour in the market unless an aggrieved player (often a smaller, non-integrated player) has the ability, time and resources to prove non-compliance at the hands of the advantaged party (a large, vertically integrated player).
- E14. Astral’s outright rejection of a functional separation remedy overlooks significant developments in this area, particularly in Europe, which could very well inform conditions imposed by the Commission, or become a future remedy in the case of market failure or Bell’s abuse of its dominant position. We also propose that wholesale rate regulation may be necessary in discretionary markets, given Bell’s concentrated and significant market power in both the French-language and English-language markets. The Commission must ensure vigorous competition in local retail markets. We urge the Commission to issue a Notice of Consultation to determine the obligations that should be imposed on BDUs, especially VI BDUs, to ensure choice and flexibility of television services for consumers. Insufficient progress has been made in this area and the time has come for examine regulatory solutions.

1. INTRODUCTION

1. The Public Interest Advocacy Centre (PIAC), Consumers' Association of Canada (CAC), Council of Senior Citizens' Organizations of British Columbia (COSCO), National Pensioners and Senior Citizens Federation (NPSCF) and Option consommateurs (OC), together "PIAC/CAC/COSCO/NPSCF/OC", are in receipt of Application 2013-0244-7 by Astral Media Inc. (Astral) requesting authority to transfer ownership and control of its broadcasting undertakings to Bell Canada Enterprises Inc. (Bell).
2. PIAC is a non-profit Ottawa-based organization that represents the concerns of ordinary and vulnerable consumers in important public services delivered by the private sector.¹ PIAC has previously been involved in Commission broadcasting proceedings where the consumer interest has been engaged and issues of access and affordability of broadcasting services are raised. CAC is an independent, non-profit, volunteer-based charitable organization with a mandate to inform and educate consumers on marketplace issues, to advocate for consumers with government and industry, and work with government and industry to solve marketplace problems.² COSCO is the largest federation of senior citizens' organizations in the province of British Columbia and is the umbrella organization of 79 seniors' organizations and a significant number of individual associate members.³ NPSCF is a democratic, non partisan, non sectarian organization with the mission to stimulate public interest in the welfare of aging Canadians, composed of 350 seniors chapters and clubs across Canada with a collective membership of 1,000,000 Canadian seniors and retired workers.⁴ OC is a not-for-profit association whose mission is to promote and defend the basic rights of consumers and ensure that they are recognized and respected.⁵
3. In Broadcasting Notice of Consultation CRTC 2013-106 (6 March 2013), the Commission states its intention to discuss the concentration of ownership and potential market dominance of the post-divestiture Bell-Astral entity in television markets, the proposed safeguards addressing vertical integration and anti-competitive behavior, the application of the Diversity of Voices policy to the proposed transaction, consistency of the proposed transaction with the Common Ownership Policy for radio and other issues pertaining to radio, the value of the transaction, and the proposed benefits package.
4. PIAC/CAC/COSCO/NPSCF/OC are pleased to provide the Commission with comments outlining our concerns with Astral's application. Despite the proposed safeguards and divestitures of the new application by Astral to transfer authority to Bell, we oppose the proposed transaction on the basis that increased vertical integration and media concentration is not in the public interest, and this particular transaction will not benefit Canadians as citizens and consumers.

¹ See Public Interest Advocacy Centre, online: <http://www.piac.ca>.

² See Consumers' Association of Canada, online: <http://www.consumer.ca/index.php4>.

³ See Council of Senior Citizens' Organizations of BC, online: <http://coscobc.ca/>.

⁴ See National Pensioners and Senior Citizens Federation, online: <http://www.npscf.org/>.

⁵ See Option consommateurs, online: <http://www.option-consommateurs.org/>.

2. SUMMARY OF PROPOSED BELL-ASTRAL TRANSACTION

5. As we noted in our intervention in the last application, Astral is one of the few remaining independent media companies in Canada and is the most valuable and strongest media company of the remaining non-vertically integrated independent broadcasters. The Commission has recognized Bell as a significant player in the Canadian broadcasting system⁶ and Bell describes itself as “Canada’s largest communications company” and “Canada’s premier media company” in its financial reports.
6. Astral’s application requests authority to transfer ownership and control of its broadcasting undertakings to Bell. In its application, Astral states that the proposed transaction will create and promote compelling new content that will result in a strengthened Canadian broadcasting system. Astral also states that the combined Bell-Astral will be Canada’s leading broadcaster and the proposed transaction will benefit and help Canadians connect to their communities, their fellow citizens, and each other through audio and video platforms on multiple channels. Finally, Astral states that the proposed transaction “is designed to deliver real benefits to Canadian consumers themselves and to promote their interests in the ways they see fit”, and commits to helping Canadians protect their interests through substantial commitments to consumer education and initiatives.
7. Astral conditions the proposed transaction on television and radio divestitures. It further submits that the Diversity of Voices targets raise no issue for the proposed transaction in respect of French-language television and that the potential impact of this transaction on the diversity of voices in English-language television is extremely limited. It proposes two additional safeguards: the addition of a condition of licence for all Bell and Astral programming undertakings to adhere to the Vertical Integration Code of Conduct and an expansion on the prohibition on tied selling in the Vertical Integration Code of Conduct regarding carriage of multiple services.⁷

3. THE PUBLIC INTEREST IN REVIEWING THE PROPOSED TRANSACTION

8. In Decision 2012-574, the Commission stated that its decision on whether a proposed transaction is in the public interest “takes into account a wide set of factors as reflected in the Act, including the nature of programming and service to the communities involved, as well as regional, social, cultural, economic and financial considerations”.⁸ The Commission identified the relevant Canadian broadcasting policy provisions in reviewing the last Bell-Astral application.⁹ PIAC/CAC/COSCO/NPSCF/OC submit that these broadcasting policy provisions remain relevant in reviewing the current proposed transaction.

⁶ Decision 2012-574 at para. 62.

⁷ Supplementary Brief at paras. 119 and 120.

⁸ Decision 2012-574 at para. 17.

⁹ Decision 2012-574 at paras. 12 and 13. The Commission stated that relevant broadcasting policy provisions for the previous Bell-Astral proposal included: ss. 3(1)(b), 3(1)(c), 3(1)(d)(i), 3(1)(d)(ii), 3(1)(i), 3(1)(t)(ii), and 3(1)(t)(iii).

9. The public interest lies in maintaining (and where possible, enhancing) a healthy diversity of voices and ensuring strong competition between players. In our view, the nature of the proposed transaction suggests that Bell-Astral must make substantial contributions and commitments to the Canadian broadcasting system to prove that the proposed transaction is in the public interest. The high burden of proof is that the transaction must be proved to provide “significant and unequivocal benefits to the Canadian broadcasting system and to Canadians” to outweigh concerns related to competition, ownership concentration in television and radio, vertical integration and the exercise of market power.¹⁰ This high standard is necessary to serve the public interest, and the prevention of concentration in the overall media market and submarkets is a reasonably cautious standard.¹¹
10. In defining the public interest, the needs and expectations of Canadians are key considerations. Canadians interact with the broadcasting system as citizens with an interest in quality, balanced, diverse Canadian content in Canadian radio and television services that connects them to their local, regional, national and international communities.¹² Canadians primarily exert their interests as broadcasting consumers in the market for television services where the consumer pays for access to television services and makes choices within the range of subscription tier or add-on offerings provided by a broadcasting distribution undertaking (BDU). These BDU subscription services are often marketed and sold to households on a bundled basis with promotions and discounts for subscription to multiple communications services (such as wireline phone, internet access service and wireless phone) by a single provider. Consumers thus are an important component in the Canadian broadcasting system as they are the audience that broadcasters seek to access and serve, but also represent a source of lucrative revenues for broadcasting distributors.
11. PIAC/CAC/COSCO/NPSCF/OC continue to believe that the primary consumer interest in broadcasting is in ensuring that consumers benefit from access to a diverse and wide variety of programming in a broadcasting system that offers choice and flexibility in an affordable manner. As we stated in the public hearing for Bell’s application to acquire Astral in Notice of Consultation CRTC 2012-370, consumers are best served when there is a broad plurality of voices in the private element of the broadcasting system. Consumers are also best served when competition effectively disciplines the market by delivering pricing efficiency and choice for consumers.
12. The trend of increasing vertical integration and media concentration in Canada over the last decade has seen the massive growth of a few major players in the telecommunications and broadcasting sectors. These players have downplayed any

¹⁰ Decision 2012-574 at para. 16.

¹¹ See for example: Mark Cooper, *Media Ownership and Democracy in the Digital Information Age: Promoting Diversity with First Amendment Principles and Market Structure Analysis* (Stanford: Center for Internet and Society, Stanford Law School, 2003) [Cooper, 2003] at pp. 178 to 181 . Dr. Cooper, who is the Director of Research at the Consumer Federation of America, advocates for a high threshold or standard for competition in defining limits on media ownership to serve the public interest, and encourages the Federal Communications Commission to promote the public interest by limiting media ownership mergers.

¹² Marc Raboy, *Missed Opportunities: The Story of Canada’s Broadcasting Policy* (Montreal: McGill-Queen’s University Press, 1990). Raboy discusses the public interest in broadcasting policy at p. 355: “If there is ‘a’ public interest, it is in seeking to achieve a context for the just and equitable coexistence of difference, distinct, and often conflicting publics. The role of the state may be to mediate but not to impose and the only way the state can possibly play a neutral role is if there are effective (democratic) and meaningful (determining) public controls.”

concerns about vertical integration by arguing that their growth and consolidation would bring competitive benefits to the Canadian market and by extension, to Canadian consumers. Similar to the last proposed transaction by Bell-Astral, PIAC/CAC/COSCO/NPSCF/OC submit that the current application reduces the diversity of voices in the private element of the Canadian broadcasting system, and threatens competition in a manner that will likely result in higher prices and reduced choice and flexibility for Canadian consumers (both Bell's subscribers and its competitors' subscribers).

13. We note that the Commission's public interest analysis of Bell's first proposal to acquire Astral identified the following issues: (1) the potential impact of the transaction on the Canadian broadcasting system; and (2) the proposed benefits of the transaction for the Canadian broadcasting system. PIAC/CAC/COSCO/NPSCF/OC suggest that the same issues exist for this proposed transaction and address both issues below.

4. THE PROPOSED TRANSACTION STILL THREATENS A HEALTHY DIVERSITY OF VOICES IN THE CANADIAN BROADCASTING SYSTEM

14. Before assessing the intangible commitments and tangible benefits that Bell-Astral offer as part of its proposed transaction, we first examine the impact of the proposed transaction on the diversity of voices and the entire Canadian broadcasting system.
15. The Commission in its decision denying the initial Bell application to acquire Astral recognized that Bell already holds a "significant position in the Canadian broadcasting system"¹³ and that "a transaction of this magnitude goes beyond an operational decision on a change of ownership; indeed, its impacts would shape the structure of the industry over the coming years."¹⁴ These statements hold true in the context of the current proposed transaction. In fact, while the Applicants present the proposed divestments as an effort to keep Bell's size under or within the Diversity of Voices thresholds, the Commission should not overlook the fact that some valuable divestitures have been arranged to be sold to Corus, another large vertically integrated entity that holds a significant position in the Canadian broadcasting system.
16. Astral in this proposal is very careful to tread within the lines of the thresholds of Diversity of Voices policy. However, we note that the Diversity of Voices thresholds are merely intended to guide analysis of horizontal media consolidation when reviewing applications for changes in effective control – the thresholds are not determinative.¹⁵ Furthermore, the proposed transaction still raises sufficient policy concerns about the impact of the transaction on the Canadian broadcasting system to warrant close scrutiny.

¹³ Decision 2012-574 at para. 62.

¹⁴ Decision 2012-574 at para. 50.

¹⁵ Decision 2012-574 at para. 52.

4.1. Diversity of Voices – quantitative targets

4.1.1. Control of the television market

VIEWING SHARE

17. Astral submits that the total audience viewing share of the proposed Bell-Astral after divestitures would be 23.0% in French-language television, 35.7% in English-language television and 33.7% of the national viewing audience. Astral suggests that its proposed Bell-Astral 23.0% viewing share in French-language television raises no issue because it is below Quebecor's viewing share (30.5%) and even below Astral's pre-merger viewing share (24.8%).¹⁶ Astral suggests that its proposed Bell-Astral 35.7% viewing share suggests an extremely limited potential impact on the diversity of voices with respect to English-language television, noting that the divestitures limit the proposed transaction's viewing share impact to two percentage points, leaving Bell-Astral "only" three points above Shaw-Corus.¹⁷
18. We disagree with Astral's characterization of the proposed transaction's impact on the diversity of voices in French- and English-language television. It is precisely because of Bell's already significant position in the broadcasting system and the level of concentration in the broadcasting industry that any further increase in viewing share raises policy concerns and must be fully examined by the Commission, even if its increase is limited to a few percentage points (e.g. in English-language television) or whether its post-merger size remains below the 35% threshold of the Diversity of Voices policy (e.g. in French-language television).
19. We further note that Astral's Diversity of Voices viewing share charts on p. 29 of its Supplementary Brief do not reflect Bell's arrangement to sell Astral's ownership interest in the TELETOON, Télétoon (French), TELETOON Retro, Télétoon Rétro (French), Cartoon Network, Historia and Séries+ to Corus in Shaw-Corus' Diversity of Voices viewing shares.

REVENUES

20. The Commission in Decision 2012-574 noted that it should rely on multiple indicators of market power, competition and ownership concentration in evaluating a proposed transaction, rather than limiting its analysis to the television market share thresholds set out in the Diversity of Voices policy. Therefore, the Commission would consider the combined entity's control of revenues.
21. PIAC/CAC/COSCO/NPSCF/OC have filed in Appendix 1 evidence of Dr. Dwayne Winseck which analyzes the revenue shares over time of industry players in the English-language, French-language and national markets for pay and specialty services, conventional television services, and total television services. Dr. Winseck considers the combined market share (based on a percentage of revenues) of the proposed Bell-Astral in these markets. His data demonstrates that the proposed transaction raises significant

¹⁶ Supplementary Brief at paras. 105-106.

¹⁷ Supplementary Brief at paras. 107-108.

concerns about the level of concentration in the pay and specialty services and total television in both the English-language and French-language markets.¹⁸

22. Similar to its submissions regarding viewing share, Astral suggests that its revenue share should not draw close scrutiny because it remains comparable to other players and represents a small increment to Bell's existing market share. Again, we disagree with this characterization. It is because of Bell's pre-existing market power that even a small increase to Bell's market power in this transaction could substantially impact competition and the diversity of voices in the Canadian broadcasting system. This warrants Commission scrutiny.
23. Astral submits that "in the French-language television market, the post-merger, post-divestiture Bell-Astral 22.9 percent revenue share is comparable to Quebecor's (at 21.1 percent), and well behind SRC's 41.8 percent share, given the size of the latter's government funding envelope."¹⁹ A closer look at the French-language pay and specialty television market shows that the combination of Bell and Astral after divestitures would result in Bell controlling 54.1% of revenues in this market. This represents more than three times the revenues generated by the next largest competitor in the French-language pay and specialty television market (Québecor with 17.7% of revenues).²⁰
24. Astral submits that in the English-language market, "Bell-Astral's 33.2 percent post-divestiture revenue share is only 3.3 points higher than stand-alone Bell's. Other large players have sizeable revenue shares too, including the combined Shaw-Corus share, at 28 percent, and Rogers' 12.5 percent share of English-language television revenues."²¹ Bell's pre-merger revenue shares in English-language conventional and specialty and pay television are already significant compared to many of its competitors in English-language television, with the exception of Shaw and Corus if they are treated as a single ownership group.²² While the resulting increase in Bell-Astral's revenue share is smaller in the proposed transaction than in its initial application, this should not satisfy the Commission that the proposed transaction is in the public interest. We ask the Commission to refer to Dr. Winseck's more detailed analysis of revenue market share in Appendix 1.

4.1.2. Control of the radio market

25. Astral proposes to transfer 21 French-language and 56 English-language radio stations to Bell and submits that their integration with Bell's radio stations is consistent with the Commission's Common Ownership Policy.
26. We remain concerned that the proposed transaction would result in the combination of the largest and fourth largest broadcaster in radio. As a result of the proposed transaction, Bell would control 23.5% of all English-language radio revenues and 27.3%

¹⁸ See: Appendix 1.

¹⁹ Supplementary Brief at para. 111.

²⁰ See: Appendix 1: Evidence of Dr. Dwayne Winseck at Figure 9.

²¹ Supplementary Brief at para. 111.

²² We note diverging Commission precedents in its treatment of Shaw and Corus as a single ownership group. For example, in Decision 2010-572, the Commission combined the viewing shares of Shaw and Corus in its determination that the transfer of control of Canwest to Shaw would not meet the thresholds of the Diversity of Voices policy (para. 70). However, in Decision 2012-574, the Commission noted the viewing shares of Shaw and Corus separately in its calculation of the combined viewing shares of Bell and Astral.

of all French-language radio revenues. Bell would control 23.8% of all national radio revenues, more than the combined market share of Rogers and Corus.

4.1.3. Concerns with the availability and accuracy of data to calculate viewing and revenue shares

27. PIAC/CAC/COSCO/NPSCF/OC are concerned that the available data to analyze the combined Bell-Astral viewing share and revenue share poses several challenges. First, both viewing share and revenues are only complete and reported for 2010-2011, meaning that the data is not reflective of the applicant's and purchaser's performances in the most recent year.
28. Second, the Commission only publishes viewing share data at an aggregate level by ownership group in its annual Communications Monitoring Report.²³ The aggregation of data prevents non-private parties from analyzing the breakdown of viewing share on an individual or broadcasting market level. Thus, PIAC/CAC/COSCO/NPSCF/OC are not able to scrutinize Astral's submissions on its post-divestiture viewing shares.
29. Third, Dr. Winseck in Appendix 1 identifies a number of sources for revenues.²⁴ For example, the Commission collects revenue data for each television service on an annual basis and publishes this information in Financial Summaries for individual pay, pay-per-view, video-on-demand and specialty services. However, media companies also publish Annual Reports, which report revenues that have been verified by an audit process. Where the Commission's revenue data does not align with revenues verified by an independent auditor as reported in a company's Annual Report, the inconsistency could result in a notable difference when calculating a company's market share. These inconsistencies also weaken the ability of the Commission and the public to analyze trends over time.
30. Given that the broadcasting industry is increasingly concentrated in the hands of a few private players, the Commission must consistently collect and publish reliable data about viewing and revenue shares in a manner that is publicly accessible for rigorous analysis. Without sufficient and accurate data about the market, the Commission may not have a full understanding of the nuances of industry structure and growth, and may be limited in its ability to measure the impact of vertical integration and media concentration on the diversity of voices. The public and interveners are also left at a disadvantage in their ability to comment on key public policy issues, such as media concentration.

4.2. Other policy considerations that require further scrutiny

4.2.1. The Canadian broadcasting system is already heavily concentrated

31. The Commission in Decision 2012-574 suggested that in addition to the television market share thresholds set out in the Diversity of Voices policy, it should rely on indicators ownership concentration in evaluating a proposed transaction. For instance, the Commission should consider metrics such as the concentration ratio or the HHI score of firms competing in each market.

²³ See, for instance: CRTC, *Communications Monitoring Report* (2012) at Table 4.3.9.

²⁴ See Appendix 1: Evidence of Dr. Dwayne Winseck.

32. The following chart by Dr. Mark Cooper describes media markets based on general economic literature and the United States Department of Justice *Merger Guidelines*. In order to assess the potential for exercise of market power resulting from a merger, the Department of Justice analyzes the level of concentration as measured by the Herfindahl-Hirschman Index (HHI). A second method frequently used by economists to quantify market concentration is the market share of the four largest firms (four firm concentration ratio or CR4).²⁵ Dr. Cooper uses the following categories to describe media markets:

- Monopoly – 1 dominant firm
- Duopoly – 2, relatively equal-sized, firms that dominate the market
- Tight oligopoly – 3 to 5 large firms
- Moderately concentrated – 6 to 9 firms
- Unconcentrated – 10 or more firms
- Atomistic competition – 50 firms

²⁵ Cooper, 2003 at p. 115-116: “Under its *Merger Guidelines*, the DOJ considers a market with an HHI of 1000 or less to be unconcentrated. Such a market would have the equivalent of ten equal-sized competitors. In such a market, the four firm concentration ratio would be 40 percent. Any market with a concentration above this level is deemed to be a source of concern. The DOJ considers an HHI of 1800 as the point at which a market is highly concentrated. This level falls between five and six equal-sized competitors. The four firm concentration ratio would be 67 percent. William Shepherd describes these thresholds in terms of four firm concentration ratios as follows: Tight Oligopoly: The leading four firms combined have 60-100 percent of the market; collusion among them is relatively easy. Loose Oligopoly: The leading four firms combined have 40 percent or less of the market; collusion among them to fix prices is virtually impossible.”

TABLE V-1: Describing Market Structures

DEPARTMENT OF JUSTICE MERGER GUIDELINES	TYPE OF MARKET	EQUIVALENTS IN TERMS OF EQUAL SIZED FIRMS	TYPICAL HHI IN MEDIA MARKETS	4-FIRM SHARE
↑	MONOPOLY	1 ^a	5300+	~100
	DUOPOLY	2 ^b	3000 - 5000	~100
HIGHLY CONCENTRATED	TIGHT OLIGOPOLY	5	2000	80
			1800 OR MORE	
		6	1667	67
MODERATELY CONCENTRATED				
UNCONCENTRATED	LOOSE OLIGOPOLY	10	1000	40 ^c
↓	ATOMISTIC COMPETITION	50	200	8 ^c

a = Antitrust practice finds monopoly firms with market share in the 65% to 75% range. Thus, HHIs in “monopoly markets can be as low as 4200.

b = Duopolies need not be a perfect 50/50 split. Duopolies with a 60/40 split would have a higher HHI.

c = Value falls as the number of firms increases.

Sources: U.S. Department of Justice, *Horizontal Merger Guidelines*, revised April 8, 1997, for a discussion of the HHI thresholds; William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), for a discussion of four firm concentration ratios.

33. In adopting the Diversity of Voices thresholds, the Commission considered the Competition Bureau’s thresholds for measuring competition in relation to banking mergers. The Bureau’s suggested bank merger thresholds consider the four-firm concentration level noting that “[i]f the four-firm concentration level is below 65%, then coordination among firms in the market is likely to be too difficult to raise competition concerns.”²⁶ In our view, the public interest in diversity of voices for media may prompt the Commission to consider a more cautious, lower concentration threshold.

34. Dr. Winseck’s evidence in Appendix 1 examines the HHI and CR4 in each of the television and radio markets over time. This analysis is useful because it allows the Commission to examine larger picture trends in broadcasting markets. The HHI and CR4 scores demonstrate a highly concentrated tight oligopoly in all broadcast product and geographic markets, with heightened concentration concerns in all French-language television markets and in the English-language conventional television markets where the HHI and CR4 are extremely high.

²⁶ Competition Bureau, “The Merger Enforcement Guidelines as Applied to a Bank Merger” (January 2003), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01253.html>.

Table 1: Four-Firm Concentration Ratio in Broadcasting Market

Market	2011		Post-Bell-Astral	
	CR4	HHI	CR4	HHI
English Pay & Specialty Television CR4: Shaw/Corus, Bell, Rogers, (CBC)	74.7 (84.0)	1607.2 (2171.2)	81.7 (84.7)	1915.1 (2527.7)
English Conventional TV CR4: CBC, Bell, Shaw/Corus, (Rogers)	94.9 (95.4)	2534.1 (2566.1)	95.1 (96.7)	2544.3 (2611.4)
English Total TV CR4: Bell, Shaw/Corus, CBC, (Rogers)	77.3 (87.6)	1757.7 (2157.4)	80.5 (91.5)	1979.0 (2380.8)
Note: The CR4 and HHI scores in parentheses denote scores where Shaw and Corus are counted as a single ownership entity.				
French Pay & Specialty Television CR4: Bell, Quebecor, CBC, Corus	91.8	2697.6	92.3	3489.9
French Conventional TV CR3: CBC, Quebecor, Remstar	95.9	4510.8	95.9	4510.8
French Total TV CR4: CBC, Quebecor, Bell, Remstar	89.9	2668.9	91.1	2788.2
English Radio CR4: Bell, Rogers, CBC, Corus	54.8	925.4	63.8	1158.5
French Radio CR3: CBC, Bell, Cogeco	(CR3) 85.6	2542.9	(CR3) 83.5	2426.5

35. Each of these markets is highly concentration in the hands of vertically integrated players, with the exception of the CBC. Further, the four vertically integrated firms (Bell, Rogers, Shaw/Corus, and Québecor) produce very high concentration ratios in various media and distribution (broadcasting and telecommunications) markets. This is demonstrated in the following chart:

TABLE 2: Concentration Ratio of Vertically Integrated Firms in the Canadian Broadcasting and Telecommunications Market

Market		# VI players	VI Players	2011 CR(VI)	Post Bell-Astral CR(VI)
Conventional TV	English	3	Bell Rogers Shaw/Corus	66.2	66.4
	French	1	Québecor	28.1	28.1
Pay & Specialty TV	English	3	Bell Rogers Shaw/Corus	74.7	81.7
	French	3	Bell Québecor Shaw/Corus	69.6	80.6
Total TV	English	3	Bell Rogers Shaw/Corus	72.4	76.3
	French	3	Bell Québecor Shaw/Corus	33.3	48.5
Radio	English	3	Bell Québecor Shaw/Corus	37.6	50.8
	French	1	Bell	0.0	27.3
Broadcasting Distribution Undertakings	English	3	Bell Rogers Shaw	71.0	
	French	2	Bell Québecor	74.5	
	National	4		83.2	
Internet Service Providers	English	3	Bell Rogers Shaw	50.6	
	French	2	Bell Québecor	66.4	
	National	4		57.1	
Wireless Service Providers	English	2	Bell Rogers	64.2	
	French	3	Bell Québecor Rogers	66.5	
	National	3	Bell Québecor Rogers	64.7	
Wireline Service Providers	English	3	Bell Rogers Shaw	48.9	
	French	2	Bell Québecor	78.0	
	National	4		59.3	

4.2.2. The trend of vertical integration has not flourished elsewhere in the world

36. In comparison to the other countries studied by the International Media Concentration Research Project, Canada has stunningly high levels of cross-media ownership and vertical integration ratios. The Bell-Astral proposed transaction would further increase Canada's cross-media ownership and vertical integration ratio.²⁷
37. As we noted in our intervention in Broadcasting Notice of Consultation CRTC 2012-370, vertical integration in media ownership is not a trend in media markets around the world. Where vertical integration mergers have occurred, these have proven to be the exception to the rule.
38. Moreover, several critics of vertical integration in the media market have criticized claims that more conglomeration and consolidation will lead to synergies that benefit media markets. For example, Dr. Cooper observed that concentrated ownership was a risky business for media companies:

When the Commission voted to relax its cross-ownership rules in 2003, it gave substantial weight to the argument that unless media owners were permitted to engage in consolidation and conglomeration in pursuit of scale economies, local media outlets would be seriously weakened or unable to survive. But over the past three years, the premise that consolidation and conglomeration are necessary to the economic well-being of media companies has been challenged by reality. Data derived from recent sales of media properties, as well as evidence from other sources, including trade and academic literature as well as the popular press, show that newspaper and television properties are selling at healthy multiples of cash flow and experiencing profit margins comparable to other media businesses. Large conglomerates and chains which have emphasized centralization, the realization of synergies and staff cuts are struggling, but smaller chains and stand-alone properties with a focus on quality news and locally produced content have been thriving. Consequently, although traditional media outlets face economic challenges today as their audiences and advertisers migrate to the Internet, more conglomeration and consolidation will not solve the problem. Therefore, the Commission should not rely on the spurious claim that more concentration in ownership is the key to local media survival as justification for relaxing media ownership rules. The actual data simply do not support that conclusion.²⁸ [footnotes omitted]

39. Similarly, Stéphanie Peltier questioned the economic rationality of media mergers such as the AOL-Time Warner and Vivendi-Universal mergers. She notes that mergers and acquisitions have become the preferred strategic tool of firms in the media industry, but states that the hopes placed in synergies have generally disappointed. In a sample of 11 media firms, Peltier found that a firm's size and simultaneous presence in the many businesses of the media industries do not improve economic performance, nor does the possession of complementary assets.²⁹ Academics have suggested that vertical

²⁷ See: Attachment 1: Evidence of Dr. Dwayne Winseck.

²⁸ Mark N. Cooper, ed., *The Case Against Media Consolidation: Evidence on Concentration, Localism and Diversity* (Stanford: Donald McGannon Center for Communications Research, 2006) [Cooper, 2006] at p. 12.

²⁹ Stéphanie Peltier, "Mergers and Acquisitions in the Media Industries: Were Failures Really Unforeseeable?" (2004) 17:4 *Journal of Media Economics* at p. 261.

integration in media markets has turned out to be a failed business strategy and synergies have not been achieved.³⁰

4.2.3. Competition in Québec would not be invigorated by removing an independent competitor to create a larger player to compete with Québecor

40. Astral submits that "[t]ogether, Astral and Bell will deliver more competition and provide more choice by investing even more heavily in content reflective of Québec viewers and supporting more significantly Québec's extremely talented artists. This will unleash even greater competitive intensity, to the clear benefit of viewers and listeners, of all creators and others who work within the system, and of all those who use Québec media as an advertising vehicle."³¹ Astral further submits that "[t]he combination of Bell and Astral will create a new competitive balance with Québecor."³²
41. However, a closer look at the French-language media market reveals that the loss of Astral means that Québec will be served by two large vertically integrated media conglomerates. The loss of Astral means the loss of a competitor in the marketplace, which cannot be said to "deliver more competition" or "unleash greater competitive intensity."
42. We thus question Astral's claim of a "new competitive balance" with Québecor. We agree with the following statement by Astral: "competition in a market cannot be measured simply by counting the number of competitors: the state of competition also depends substantially on the strength of competition and relative degree of parity between players."³³ A closer comparison of Québecor and Bell's assets show that if the proposed transaction is approved, they will not be of comparable size in the various media markets. Québecor's television assets are largely in French-language conventional television while Bell will acquire Astral's significant share in French-language pay and specialty television services, a market in which Québecor has few assets. Bell will have the added advantage of being a large national player with considerable market share in English-language television and distribution services (both broadcasting and telecommunications).

³⁰ See for example Dal Yong Jin, "Deconvergence and Deconsolidation in Global Media Industries: The Rise and Fall of (Some) Media Conglomerates," in Dwayne Winseck and Dal Yong Jin, eds., *The Political Economies of Media: The Transformation of the Global Media Industries*, (New York: Bloomsbury Academic, 2011) at p. 167. Jin observes: "Since the early twenty-first century, however, a countertrend has emerged as several mega-media and telecommunications companies, including Disney, Time Warner, and Viacom have turned to deconvergence as a new business model. Many communications giants have adopted a strategy of focusing on a few core business areas and have split-off and/or spun-off other aspects of their operations. Thus, where mergers and acquisitions (M&As) among media and communication companies were the norm during the high tide of neoliberal reforms in the 1990s, during the past decade spin-offs, split-offs, and deconsolidation have become significant trends in the communication market. This change is occurring mainly because media convergence has met with several serious problems, including plummeting stock prices, feeble content, and the fact that new forms of mediation means that synergies are not as easily achieved as the "visionaries of convergence" once thought" (p. 167). Notably, Jin states: "It is worth repeating that the deconvergence trend is a response to the limited success of the mega-mergers that characterized the late-1990s before these firms quickly became lumbering dinosaurs that could not survive as their economic models and stock market valuations crumbled. Forced by this turn of events, they have tried to morph into small or mid-sized companies. This rather abrupt change in course reflects the stern discipline of disgruntled investors and the drying up of capital markets. First and foremost, it is the logic and demand of capital, rather than *any* concern with restoring competition and a diversity of voices at the center of the public sphere." (p. 178) (emphasis in original text)

³¹ Supplementary Brief at para. 28.

³² Supplementary Brief at para. 32.

³³ Supplementary Brief at para. 32.

4.2.4. The proposed transaction removes the last major independent, non-integrated broadcaster from the Canadian broadcasting system

43. PIAC/CAC/COSCO/NPSCF/OC are concerned that allowing a Bell-Astral combination will spur further industry consolidation by creating an incentive for other vertically integrated companies to purchase remaining broadcasters to “match” Bell-Astral’s size. This would result in additional media concentration and further negatively impact independent participants in the market.
44. We note that Bell has already announced that some of its television divestitures have been sold to Corus, another large vertically integrated player. Given that vertical integration can create or reinforce barriers to entry into the industry, it is unlikely that the remaining divestitures will create new independent players.
45. Dr. Mark Cooper has observed that horizontal concentration and vertical integration have structural impacts in the market, noting that one concern about vertical mergers is that the industry undergoes a rush to integration and consolidation: “being a small independent firm at any stage renders the company extremely vulnerable to a variety of attacks.”³⁴ Moreover, Dr. Cooper notes that following vertical integration, “dynamic processes in the industry will clearly shift toward cooperation and coordination rather than competition” with mutual forbearance and reciprocity occurring as spheres of influence are recognized and honoured between and among a small number of interrelated entities in the industry.³⁵
46. Dr. Cooper suggests that vertical integration can create or reinforce barriers to entry into the industry by integrating across stages of production to force potential competitors to enter at both stages, making competition much less likely.³⁶ Vertical integration can also foreclose input markets to competitors. In other words, media concentration and vertical integration are not likely to invigorate competition.
47. The current application, like the last application by Bell, proposes to decrease the diversity and number of voices in the private element of the broadcasting system, and would result in the absorption of the largest and strongest remaining independent non-integrated broadcaster by a strong vertically integrated entity. Independent broadcasters can play an important role in driving innovation in Canadian broadcasting. Further, the removal of Astral leaves a variety of small independent broadcasters who will be at a distinct disadvantage against the large vertically integrated players who form a highly concentrated, tight oligopoly. The Commission in Decision 2012-574 noted that it is mindful that “a healthy communications system also requires entities of various sizes that are able to compete and innovate in a fair environment.”³⁷
48. Astral submits that “[i]ndependent players will continue to account for a very substantial portion of the French-language television ecosystem following the proposed

³⁴ Cooper, 2009 at pp. 374 and 358.

³⁵ Cooper, 2009 at p. 374.

³⁶ Cooper, 2009 at p. 374: “Vertical mergers may enhance barriers to entry into the primary industry if entrants must operate at both stages in order to be competitive with existing firms and if entry at both stages is substantially more difficult than entry at one stage.”

³⁷ Decision 2012-574 at para. 63.

transaction.”³⁸ In making this claim, it relies on the fact that 41.6% of the French-language television market is attributable to Radio-Canada. However, an examination of remaining private independent broadcasters shows that independent broadcasters are dwarfed by its vertically integrated counterparts. In French-language television, remaining private independent broadcasters account for only 7.8% of the total revenue share.

49. Similarly, the merger of Bell-Astral removes a strong independent player from English-language television. The remaining private independent broadcasters in the English-language television market account for only 2.4% of the total revenue share.

4.2.5. Competition Bureau’s analysis and Consent Agreement to Bell-Astral insufficient to address diversity of voices concerns

50. We note that the Competition Bureau reached an agreement with Bell that “preserves competition” in the supply of English and French pay and specialty television programming services in Canada.³⁹ The Bureau in its release noted that without the Consent Agreement, “Bell’s acquisition of Astral’s pay and specialty television channels would likely have led to increased prices, less innovation and reduced choice for television programming.”⁴⁰ However, the Bureau’s Consent Agreement with Bell should not satisfy the Commission in its application of the Diversity of Voices policy and public interest test.

51. In our view, the Competition Bureau analysis falls short. The Bureau’s analysis applies the general merger review provisions of the *Competition Act*, which focus on defining the point at which scrutiny is required – that is, whether a merger “substantially lessens or prevents competition.”⁴¹ The Bureau does not have the expertise or flexibility to consider social and cultural policy concerns that are of utmost importance in the broadcasting industry – that is encouraging maximum diversity in media to promote democratic and vibrant communities. The Federal Communications Commission in the United States has similarly argued that “the merger guidelines of the Justice Department and the Federal Trade Commission might be too low as their purpose lay in defining the point at which antitrust scrutiny is required, and not in encouraging a wide array of voices and viewpoints.”⁴² Thus, competition law may not be the most appropriate tool to ensure a diversity of voices in the media market or to deal with social policy concerns raised by media concentration in particular. Indeed, the Commission’s test of whether a transaction is “in the public interest” prescribes a higher threshold test than the merger review under the *Competition Act*.

³⁸ Supplementary Brief at para. 32.

³⁹ Competition Bureau, “Significant Divestitures in Bell-Astral Merger to Preserve Competition” (4 March 2013), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03543.html>.

⁴⁰ Competition Bureau, “Significant Divestitures in Bell-Astral Merger to Preserve Competition” (4 March 2013), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03543.html>.

⁴¹ *Competition Act* at s. 92(1).

⁴² Cooper, 2003 at p. 179.

5. ASSESSING THE PROPOSED INTANGIBLE BENEFITS PROMISED TO CONSUMERS

52. As mentioned above, Canadians primarily exert their interests as broadcasting consumers in the market for television services where the consumer pays for access to television services and makes choices within the range of subscription tier or add-on offerings provided by a broadcasting distribution undertaking (BDU).
53. PIAC/CAC/COSCO/NPSCF/OC continue to be skeptical of the benefits of vertical integration for Canadian consumers that are promised by media conglomerates and strong vertically integrated players.

5.1. Further vertical integration primarily benefits Bell’s shareholders, not competition or consumers

54. In our intervention to Broadcasting Notice of Consultation CRTC 2012-370, we questioned Bell’s assertions in its application and in previous submissions to the Commission that vertical integration is beneficial for consumers.⁴³ We continue to believe that any efficiencies gained from vertical integration appear to have benefitted Bell and Bell’s shareholders to a greater extent than the company’s subscribers. Bell continues to report high yield for shareholders:

Table 3: Bell Canada Enterprises Inc. annual dividends declared and yield

Bell Canada Enterprises Inc. Annual Revenue			
Year	Annual Revenue (\$)	Total Dividends Declared on Common Shares (\$)	Common Dividend Yield (%)
2000	16,668,000,000	849,000,000	2.4%
2001	18,796,000,000	969,000,000	3.3%
2002	19,186,000,000	1,031,000,000	3.8%
2003	19,056,000,000	1,105,000,000	3.9%
2004	17,009,000,000	1,110,000,000	4.1%
2005	17,551,000,000	1,222,000,000	4.6%
2006	17,554,000,000	1,132,000,000	4.6%
2007	17,707,000,000	1,172,000,000	3.6%
2008	17,661,000,000	588,000,000	2.9%
2009	17,735,000,000	1,218,000,000	5.4%
2010	18,069,000,000	1,352,000,000	5.4%*
2011	19,497,000,000	1,579,000,000	5.5%*
2012	19,975,000,000	1,720,000,000	5.4%*

Sources: BCE Inc. Annual Reports, 2000-2012; BCE Investor Fact Sheets, Q1-Q4 2010

*This number is listed as the “Dividend Yield” in the BCE Inc. Annual and Quarterly Reports. It is unclear whether this represents the common dividend yield.

55. Recent quarterly reports to shareholders demonstrate Bell’s strategy to grow its market share in the broadcasting distribution market. Notably, the growth of its Fibe TV service is hinged on bundling with its internet access service and strong “triple play” bundling with

⁴³ See PIAC/CAC/CWP/COSCO intervention in Broadcasting Notice of Consultation CRTC 2012-370 filed 9 August 2013.

wireline phone.⁴⁴ Bell's 2012 Annual Report also reports an expectation of TV revenue growth in 2013 with higher ARPU (average revenue per user) "due to customers coming off introductory pricing promotions, product enhancements, higher value premium package programming and price increases."⁴⁵ Bell's Annual Report states:

Stronger forecasted TV and Internet subscriber growth, higher penetration of three-product households and stabilizing business markets performance is expected to drive improved year-over-year wireline revenue performance in 2013. We also expect an improving wireline EBITDA trajectory in 2013, driven by increasing scale of Fibe TV, the subsiding year-over-year financial impact of a shortened discount period on residential bundle acquisition offers, fewer residential net customer losses as our IPTV footprint further expands, the positive impact of price increases on our residential services, abating repricing pressures in our business and wholesale markets, as well as further cost savings.⁴⁶ [emphasis added]

56. This demonstrates that Bell views itself as already having significant market power in the distribution and communications market, as it can effectively raise its prices without losing its customers to competitors. In January 2013, Bell increased retail prices for Bell TV (by \$2.14 to \$3.45 per month), Bell Internet (by \$2.00 to \$5.00 per month), and Bell Home Phone (by \$2.03 per month, with \$2.00 to \$3.00 per month increases to long distance plans).⁴⁷ In January 2013, "triple-play" households could see an increase in at least \$6.17 per month with no corresponding benefit or improvement to their services. Bell recently announced on its website that Bell Home Phone subscribers would face another rate increase effective June 1, 2013.⁴⁸
57. While vertical integration and media concentration may result in greater internal efficiencies for Bell, these efficiencies will not be passed on as benefits for the entire broadcasting system. Rather, consumers will end up paying more because Bell can exercise its market power in the distribution market to charge consumers more for service and its distributor competitors more for content. This suggests that the market price is not being determined in the most efficient way or to be as close to marginal cost as possible, which is the consumer benefit that should be derived in a fiercely competitive marketplace. We urge the Commission to question how any efficiency gains will be passed on to Canadian consumers and to the Canadian broadcasting system and to ensure that all commitments are measurable and publicly reported so that these claims can be evaluated.

⁴⁴ Jim Barthold, "IPTV expansion key to Bell Canada's future", FierceIPTV (8 February 2013), online: "Bell Canada now has an 8 percent penetration rate of homes passed and '85 percent of our TV subs are coming from cable operators on new growth [and] 15 [percent are] migrating from our satellite business," George Cope, BCE's president-CEO, said during an earnings conference call Thursday. Cope said 84 percent of Fibe TV customers buy into a triple play voice, video, data offering and 100 percent "take Internet and that's fundamental to what we need to do going forward to grow our Internet market share."

⁴⁵ BCE 2012 Annual Report at p. 31.

⁴⁶ BCE 2012 Annual Report at p. 32.

⁴⁷ See Appendix 3 for full list of Bell price increases effective January 2013.

⁴⁸ Bell, "Price updates – Bell Canada", online: http://www.bell.ca/Residential_services/Price_updates (accessed April 4, 2013). The monthly rate increase ranges from \$0.25 per month to \$2.00 per month.

5.2. The combination of deregulated basic television prices and vertical integration has not resulted in increased competition to provide increased choice or flexibility or lower prices for consumers

5.2.1. The broadcasting distribution market is heavily concentrated with vertically integrated players

58. The Commission has in the past aligned the public interest in the distribution of broadcasting services with deregulation on the basis that competition would best serve Canadian consumers. In 1997, the Commission deregulated basic service rates, leaving the establishment of affordable rates to BDU competition in the market.⁴⁹

59. However, competitors in the BDU market are not in a fair marketplace where all players are of relatively equal size. The BDU market is heavily concentrated in the hands of vertically integrated media companies. The four vertically integrated players (Bell, Rogers, Québecor, and Shaw) together control 83.2% of the cable and satellite distribution markets.⁵⁰ The Commission has previously stated that it expected that vertically integrated entities would make significant strides to offer consumers more choice in the near future with respect to their BDU offerings.⁵¹ The Commission required VI entities to show in April 2012 how they provided consumers with more choice and flexibility in the services that they offered, by, for instance, providing them with the ability to pay only for the services they wanted to watch (a “pick-and-pay” model). These filings did not show significant strides to provide consumer choice and flexibility. No further strides towards greater consumer choice and flexibility appear to have been made since this reporting deadline a year ago. We submit that increased choice and flexibility are highly unlikely to manifest in the offerings of vertically integrated entities without direct regulatory action by the Commission.

60. Further, the bundling of television services with other communications services on the basis of fixed-term contracts likely dampens the intensity of competition between BDUs.

5.2.2. Consumers are paying increased prices for inflated packages that do not meet their needs or expectations

61. Canada has a high penetration of BDU subscriptions, with 89% of Canadians in 2011 subscribing to television services.⁵² The BDU industry continues to report significant profits, with annual BDU programming revenues per subscriber per month increasing steadily.⁵³

⁴⁹ See for example Broadcasting Public Notice CRTC 2008-100, *Regulatory policy: Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* (30 October 2008) at para. 39.

⁵⁰ See Appendix 1: Evidence of Dr. Winseck.

⁵¹ Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration* (21 September 2011) at para. 22.

⁵² CRTC, “Navigating Convergence II: Charting Canadian Communications Change and Regulatory Implications” (August 2011) at p. 53.

⁵³ PricewaterhouseCoopers projected that BDU subscriptions and revenues would continue to grow between 2011 and 2015, albeit at a slower pace than in previous years, given the maturity and penetration. See CRTC, “Navigating Convergence II: Charting Canadian Communications Change and Regulatory Implications” (August 2011) at p. 54.

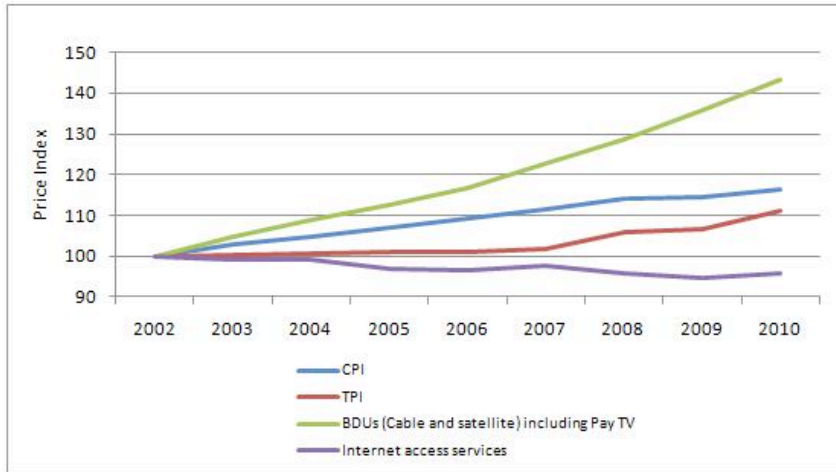
Table 4: Annual average BDU programming revenues per subscriber per month

Year	BDU programming revenues per subscriber per month	% increase from previous year
2006	\$46.56	5.3%
2007	\$49.79	7.0%
2008	\$53.36	7.2%
2009	\$56.18	5.3%
2010	\$59.73	6.3%
2011	\$61.86	3.6%

Source: CRTC, 2012 Communications Monitoring Report, Table 4.4.1.

62. As PIAC has noted in previous interventions before the Commission, there has been no consistent collection of historical retail price data for television services since the elimination of retail rate regulation for television services. Moreover, BDU prices increases have been fast outpacing the consumer price index (CPI) and price increases for other communications services such as telephone and internet access since 2002 (reproduced from the Commission’s “Navigating Convergence” report).

Figure 32 Price indices – telephone price index (TPI), BDU (cable and satellite), including pay television, Internet access, and CPI¹⁶³



Source: Statistics Canada

63. The average monthly rate for basic service has doubled since 1997. These price increases are not reflective of the discipline of competition that was expected with the cable forbearance process. Furthermore, basic service continues to be inflated with more services than consumers truly need as part of "basic" television service.

Table 5: Average basic service monthly rates, 1996-1999

Distributor type	1996	1997	1998	1999
Class 1	\$18.02	\$18.70	\$18.51	\$19.02

Source: CRTC, Broadcasting Policy Monitoring Report 2000

Table 6: Basic Service Monthly Rates, 2013

BDU	Basic Service Price
Bell (DTH)	\$37.77-\$46.77
Bell Fibe	\$46.57*
Cogeco	\$32.31
Rogers	\$38.86
Shaw Cable	\$34.90
Shaw Direct	\$51.50
Telus Optik TV (IPTV)	\$34.00

Source: PIAC market scan

* Estimated based on Year 2012 unbundled rates and Year 2013 published Bell rate increases.

Table 7: Digital Television Packages Offered By Canadian BDUs – Comparison of 2009, 2012 and 2013

BDU	Year 2009		Year 2012		Year 2013	
BELL (DTH)	Tier 1	\$35	Tier 1	\$44.80	Tier 1	\$46.77
	Tier 2	\$59	Tier 2	\$74.80	Tier 2	\$74.77
	Tier 3	\$80	Tier 3	\$109.80	Tier 3	\$112.77
	Tier 4	\$95				
	Tier 5	\$69				
	Tier 6	\$90				
	Tier 7	\$105				
COGECO	Tier 1	\$31.98	Tier 1	\$32.47	Tier 1	\$32.31
	Tier 2	\$51.99	Tier 2	\$51.76	Tier 2	\$51.50
	Tier 3	\$62.99	Tier 3	\$57.85	Tier 3	\$57.56
	Tier 4	\$72.99	Tier 4	\$69.01	Tier 4	\$68.67
			Tier 5	\$80.18	Tier 5	\$79.78
ROGERS	Tier 1	\$29.99	Tier 1	\$38.04	Tier 1	\$38.86
	Tier 2	\$46.48	Tier 2	\$57.84	Tier 2	\$60.59
	Tier 3	\$46.48	Tier 3	\$72.04	Tier 3	\$73.71
	Tier 4	\$46.48	Tier 4	\$82.14	Tier 4	\$83.76
	Tier 5	\$51.48				
	Tier 6	\$56.48				
SHAW CABLE	Tier 1	\$33.95	Tier 1	\$34.90	Tier 1	\$34.90
	Tier 2	\$58.95	Tier 2	\$69.90	Tier 2	\$69.90
	Tier 3	\$74.95	Tier 3	\$149.90	Tier 3	\$84.90
SHAW DIRECT	Tier 1	\$37.99	Tier 1	\$44.65	Tier 1	\$51.50
	Tier 2	\$48.99	Tier 2	\$56.83	Tier 2	\$63.62
	Tier 3	\$51.99	Tier 3	\$62.82	Tier 3	\$66.65
	Tier 4	\$60.99	Tier 4	\$69.01	Tier 4	\$75.74
	Tier 5	\$67.99	Tier 5	\$76.11	Tier 5	\$82.81
	Tier 6	\$73.99	Tier 6	\$82.20	Tier 6	\$88.87
	Tier 7	\$82.99	Tier 7	\$91.34	Tier 7	\$97.96

VIDÉOTRON	Tier 1	\$17.98	Tier 1	\$23.32	Tier 1	\$25.23
	Tier 2	\$25.99	Tier 2	\$35.50	Tier 2	\$37.35
	Tier 3	\$31.99	Tier 3	\$48.70	Tier 3	\$50.48
	Tier 4	\$37.99	Tier 4	\$53.77	Tier 4	\$55.53
	Tier 5	\$44.99	Tier 5	\$63.92	Tier 5	\$65.63
	Tier 6	\$74.99	Tier 6	\$84.22	Tier 6	\$85.83

Sources:

2009 Responses to Commission letter issued for Broadcasting Notice of Consultation CRTC 2009-614

2012 Reports on Programming Choice and Flexibility – Follow Up to Broadcasting Regulatory Policy CRTC 2011-601

PIAC market scan

*Television programming packages may differ by BDU and by year. This table depicts changes in price options and does not compare value of packages offered.

64. The deregulation of cable prices in the United States has produced the same trend of increased cable rates (including the increase of basic service rates) at the hands of an increasingly concentrated cable industry:

The deregulation of cable prices and the strong trend of concentration in the industry, indicating the failure of head-to-head competition to develop, resulted in a dramatic and continuous increase in cable prices. ... Since 1996, cable rates have increased by over forty percent, more than two-and-one-half times the rate of inflation. Basic service rates have increased even more rapidly. Advertising and advanced service revenues have been growing even faster, and total revenue is up almost 60 percent. On a per subscriber basis, monthly revenues are up over 50 percent. In the longer term, the ability to raise prices at several times the rate of inflation is evident. With the exception of the short period of regulation in 1992-1996, cable prices have been largely unregulated. Whenever they are deregulated, they increase at about 2.5 times the rate of overall inflation. Not only have prices increased, but the industry has also restructured its revenue stream to maximize the leverage afforded by its market power. It has engaged in bundling, price discrimination, and other anti-consumer behavior (including activities such as efforts to impose negative check-offs and tie-in sales), driving consumers to buy bigger and bigger packages of programs at higher prices. While basic packages were being expanded and bundled to force consumers to pay higher prices, rates for pay services were flat.⁵⁴ [footnotes omitted]

65. In our last intervention to the Commission on Bell's application to acquire Astral, we noted that Bell's retail package offerings for Bell Fibe TV in Ontario reduced the number of tiers available for consumers to choose its services. Consumers can only choose between three tiers: "Good" (147 services for \$46.57/mo), "Better" (235 services for \$77.27/mo), or "Best" (320 services for \$111.92/mo). Bell eliminated consumers' ability to pick and pay for selected channels à la carte on top of its most basic "Good" package, which in our view represents a significant move away from the Commission's expressed hope that consumers would have the ability to only pay for the services the consumer wants to watch.

⁵⁴ Cooper, 2003 at pp. 143-144.

66. It is especially important to monitor the way that Bell packages its offerings at the retail level because it can be expected that Bell will leverage the content it owns to ensure that its competitors in the distribution market cannot offer their retail customers more choice or flexibility at a competitive price. Non-vertically integrated BDUs remarked on their significant challenges in the present system in negotiating commercially reasonable terms with respect to packaging and rates for carriage of Bell's premium discretionary services.⁵⁵

5.2.3. Consumers currently do not have the flexibility or choice they expect in the distribution market

67. Consumers expect maximum flexibility and choice in the services that they receive through their BDUs. PIAC's 2012 consumer survey (filed in Appendix 5) demonstrates that Canadians continue to be dissatisfied with the level of flexibility and choice offered for television service packages.⁵⁶ Of note in PIAC's survey are the distinct results between English Canada and Quebec. Respondents in English Canada are generally 10 to 25 percentage points more dissatisfied with their level of choice than Quebec respondents.⁵⁷

68. This is perhaps not surprising given that the vertically integrated entities offer entry tiers for television services at a high cost to subscribers. We attach Appendix 4, which compiles a market scan of BDU basic service offerings in six metropolitan markets in Canada. Our findings suggest that the market has not evolved to consistently offer flexible packaging through à la carte offerings, as most consumers expect in a "pick and pay" model.

69. Consumer expectations of increased flexibility and choice in their television services are also reflected in the public's questions to the CanadiansDeserveMore.ca website. We note that many questions from the public focused on whether the present proposed transaction would increase flexibility in packaging:

- Steve (Ottawa, Ontario): So Bell, will you become more flexible in your television programming choices in Ontario like you already are in Quebec?
- Louise A (Hull, Quebec): When will be able to select the channels we want to watch without having to select them as part of packages?
- Louise O'Donnell (Toronto, Ontario): Your ad says I'll be able to provide even greater packaging flexibility to your TV provider. What do you mean by that?
- Brian Morris (Brantford, Ontario): Will there be more diversity in the plans offered to the customer?

⁵⁵ See for example PIAC's intervention to Broadcasting Notice of Consultation 2012-370 at paras. 78 to 87.

⁵⁶ PIAC survey 2012, filed as Appendix 5. 39% were dissatisfied with the choice of pre-set packages offered by their television service provider; 35% were dissatisfied with the choice of additional pre-set "theme packs" of television channels; 43% were dissatisfied with their ability to pick and pay for a set number of television channels on top of their pre-set package; and 47% were dissatisfied with their ability to pick and pay for individual television channels on top of their pre-set package.

⁵⁷ For example, 85% of respondents in English Canada found the cost of television a little too high or much too high, compared to 73% of respondents in Quebec. In English Canada, 45% of respondents were somewhat dissatisfied or very dissatisfied with the choice of pre-set packages offered by their provider, compared to 19% in Quebec. In English Canada, 53% of respondents were somewhat dissatisfied or very dissatisfied with their ability to pick and pay individual television channels on top of a pre-set package, compared to 29% in Quebec.

- Brian Morris (Brantford, Ontario): Will there be more diversity in the channel choices?
 - K rae (Toronto, Ontario): When will we get the a-la-carte services?
 - Anonymous: I don't watch French-language programming. Will I be paying for channels I will never watch?
 - KAD (Toronto, Ontario): Will the transaction benefit to the consumers with lower subscription rates?
 - Ron Westkett (Oshawa, Ontario): When will bundling stop? When will I be able to choose to pay for what I want?
 - Steven (Regina, Saskatchewan): With content providers having the ability to dictate channel lineups to service providers, will Bell/Astral continue to force linkage of channels and restrict mobile access, as they currently do?
70. Clearly, the vertically integrated players in the market are not meeting consumer expectations for flexibility and choice.
71. Bell and Astral provided vague answers to questions from the public on the CanadiansDeserveMore.ca site about consumer demand for increased choice and flexibility.⁵⁸ Bell's answer was always a derivative of the following statement: "As broadcasters, Astral and Bell Media provide our television stations to all of the cable, satellite and IPTV providers in Canada in accordance with clear rules put in place by the CRTC. In doing so, we are committed to providing them with flexibility they need to design TV packages that respond to your needs. We expect your TV provider to pass that flexibility on to you."
72. Bell's answers ignore the fact that their own retail offerings in English Canada do not currently provide maximum packaging flexibility to the consumer. In fact, Bell states: "Bell TV's current Good, Better, and Best packages provide a balance between price and the number of TV services offered, that most subscribers desire." It is clear that Bell has a remarkably different view of consumer choice than consumers do. Moreover, the fact that Bell's retail offerings do not offer extensive packaging flexibility to consumers when the Commission has strongly stated that it expects VI entities to increase consumer choice and flexibility shows that Bell will not voluntarily increase choice and flexibility in the packaging of television services for their own customers without Commission intervention.

5.3. Bell and Astral's public promises to consumers and commitments in the proposed application

73. Bell and Astral have made a number of promises to the public and to consumers on its website: CanadiansDeserveMore.ca. Notably, Bell and Astral promise "more choice and competition." They promise "more choice" by providing more choices for radio content, local news coverage, news programming services, sports radio and Canadian OTT services.⁵⁹ They also promise "more competition" for the Quebec broadcasting sector, Canadian TV broadcasters and Canadian radio broadcasters.

⁵⁸ We have compiled the questions and answers from CanadiansDeserveMore.ca that discuss consumer choice and flexibility in Appendix 6.

⁵⁹ Interestingly, Susan Crawford in *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age* (2013) Yale University Press at p. 88 states: "Comcast hired economist Gregory Rosston to assess the consumer benefits of the NBC Universal deal: "the actual form of the consumer benefit will not necessarily be a reduction in

74. In its supplementary brief, Astral lists specific commitments the combined Bell-Astral will be able to make as a result of the proposed transaction at para. 145.

5.3.1. Bell-Astral's commitment to share local news with local television services and radio stations does not enhance source diversity

75. Bell and Astral claim they will enhance the diversity of news coverage by adding Bell's content to Astral's Burli system, by offering radio-specific English- and French-language news feeds to independent small market broadcasters in communities not served by the combined Bell-Astral on a cost recovery basis, and by offering to share content with Association des radios communautaires du Canada (ARCC) members stations in official language minority communities not served by a Bell-Astral station at no cost. We are concerned that these commitments ignore the importance of source diversity and the role of independent broadcasters in contributing to source diversity. Repurposing content across media platforms does not help achieve the policy objectives behind ensuring a diversity of voices, not simply a diversity of content. A multiplicity of sources will better serve the interests of diversity and localism better by creating competition between sources and providing Canadians with a better range of programming from which to choose. Independent sources are critical within this diversity as they stimulate greater innovation and creativity and more local content. Independent programmers can also be expected to produce more vigorous journalism.⁶⁰

76. Moreover, Bell commits to keep all of Astral's and Bell's local television stations open through the end of their licence terms while maintaining their current levels of local programming.⁶¹ This commitment ensures that Bell's local stations will be open until 2016 and Astral's stations will be open until 2017. With respect, these are short-term commitments for a media concentration transaction that will impact the future of the industry for many years to come. The Commission should seek bolder and stronger commitments from larger players in the broadcasting system.

5.3.2. Bell-Astral's commitment to a multi-platform OTT service raises concerns for competition and for consumers

77. In its supplementary brief, Astral continues to portray Netflix and other OTT providers as threats to the Canadian broadcasting system. Bell-Astral propose TV Everywhere, which it describes as:

... based on a broader content aggregation model providing multi-platform access to a wide range of content available on many linear television services - the very best in Canadian and international movies, along with great news, entertainment and sports content from Bell. The proposed TV Everywhere service will provide a standardized platform for delivering content to multiple devices, giving consumers a more useable, single-point-of-access interface that competes more effectively with foreign competitors like Netflix, Apple, and Google. This made-in-Canada TV Everywhere service in French and in English will be available everywhere the combined entity has the necessary

Comcast's prices relative to current prices or prices that might otherwise be charged, but consumer benefit could also come from increased investment by Comcast in programming and distribution leading to higher quality and more consumer choice." In other words, prices wouldn't necessarily go down, but consumers might get more stuff."

⁶⁰ Cooper, 2009 at p. 331.

⁶¹ Supplementary Brief at para. 58.

rights – mobile, Internet, VOD, in-house and public Wi-Fi and live streaming – and distributed through the cable, satellite or IPTV provider of the consumer's choice, not on a direct-to-consumer basis.⁶²

78. PIAC/CAC/COSCO/NPSCF/OC are not convinced that this proposed benefit is significantly different from Bell's vague "new multi-platform on-demand service" proposed at the Oral Hearing in September 2012. As such, our concerns remain the same as expressed in our Final Written Reply filed on September 21, 2012.⁶³ Bell-Astral present this new multi-platform service as a benefit for consumers, but the Commission must examine the broader market effects of the introduction of this service to determine whether the service would truly serve the public interest and consumers in the long run.
79. It is not clear whether Bell will require significant additional fees from its competitor BDUs for this new service, which would result in increased costs passed on to subscribers. Moreover, given that Bell would be the only firm offering such a service to all BDUs, it would have a monopoly in its offering and failure to accept Bell's terms would mean that Bell would offer the online service to its own customers while BDUs that refused to accept Bell's terms would be unable to offer any of Bell's content to customers online.⁶⁴
80. Moreover, it appears that Bell-Astral's promise of "TV Everywhere" closely mirrors the "TV Everywhere" promised by Comcast in its bid to acquire NBC Universal in the United States. Susan Crawford describes the TV Everywhere proposal as "key to a walled-garden future" and explores the competitive impact of such a service on competitors and consumers.⁶⁵

... the TV Everywhere structure is effectively a joint venture among all the major cable distributors and most of the media conglomerates around the country. ... Comcast and Time Warner have clustered their operations so that they control the "whole of the market" in which they are the providers of bundled wired distribution services (video plus data). TV Everywhere allows them to move their local physical market power online because customers must subscribe to their pay-TV service to access TV Everywhere.

...

This time around, the interests of the concentrated media conglomerates and the cable distributors are clearly aligned: they are all threatened by online video and interested in keeping the tens of billions of dollars in payments flowing among them. ... All those fees will flow only if distribution of high-priced content can be carefully controlled and charged for by way of a guaranteed distribution channel – the downstream control that Bewkes says is essential for any vertical integration scheme to work. ... The NBC Universal deal made Comcast into a media programming powerhouse, and thus allowed it to place formidable content assets inside the TV Everywhere umbrella to kick-start efforts to fight the rise of competing online video.⁶⁶

⁶² Supplementary Brief at para. 90.

⁶³ PIAC/CAC/CWP/COSCO Final Reply in Broadcasting Notice of Consultation 2012-370 filed 21 September 2012 at paras. 17 to 22.

⁶⁴ The Commission recognized this argument in Decision 2012-574 at para. 42.

⁶⁵ Crawford at p. 103.

⁶⁶ Crawford at p. 113.

...

Most pay-TV subscribers will believe that their cable provider's online aggregation of content is free, whereas they will perceive that they have to pay extra for, say Netflix. This will presumably make those subscribers unwilling (or at least less willing) to pay a substantial fee for any competing online aggregation of content, like Netflix. At the same time, programmers will be able to ask for an increase in their licensing fees to cover the online portion of their agreement with the cable distributors. And the cable distributors can push subscribers toward bundles of pay-TV and internet access by pricing Internet-only subscriptions at a higher rate than that of the bundle. A win-win for the megalopolis.

TV Everywhere became a major asset for the cable distributors in 2010. The ability to put all cable programming behind an "authentication wall" (you had to already be a pay-TV subscriber) would help keep the status quo in place – tens of billions of dollars in fees paid to programmers, hundreds of billions of dollars in pay-TV subscription fees paid to distributors. Broadcast network shows, which account for only a tiny portion of the media conglomerates' overall revenue, might be allowed to float online free of high-priced bundled pay-TV subscriptions, but the lucrative cable channels would be available online only via TV Everywhere, where the conglomerates' traditional revenue streams were secure. Cable distributors were also anxious to retain their revenues from Video on Demand (VOD) packages that give subscribers instant access to movies at home for extra payments; if Netflix or another aggregator had enough content, it could offer a compelling alternative to VOD.

Any independent online video aggregator like Netflix would have a tough time in this environment: if the choice is between an upstart and a behemoth, who is likely to win?⁶⁷

...

Here's the kicker: if Comcast sells Xfinity (its TV Everywhere-model service) in other cable distributors' territories, what is the result? The major players have divided up the country. Let's say that Comcast decides to market TV Everywhere in Time Warner territory. Then it will be using Time Warner's infrastructure. If that happens, Comcast can easily undersell Time Warner's own TV Everywhere package because, again, Comcast pays the least for this content. It will have the best and cheapest video package in America. So Comcast wins either way. Inside its own territory, it can turn all the dials – access to content, access to a guaranteed connection – to block any online video package seeking to compete with its own products. Outside its territory, it can underprice the other operators' packages.⁶⁸

6. TANGIBLE BENEFITS

81. PIAC/CAC/COSCO/NPSCF/OC are content with the valuation of the transaction for the purpose of the calculation of tangible benefits. We also believe that the tangible benefits proposed by the Applicant are generally appropriate in that they will support the Canadian broadcasting system as a whole and are of appropriate amounts.

⁶⁷ Crawford at pp. 117-118.

⁶⁸ Crawford at p. 122.

82. PIAC/CAC/COSCO/NPSCF/OC, given our mandates however, wish to comment on matters related to the social benefits proposed in relation to consumers as part of the Canadian broadcasting system.

83. We therefore deal first with the Canadian Broadcasting Participation Fund (BPF),⁶⁹ the contribution to which is appropriate and of an appropriate amount.

84. However, we take issue with the “Consumer Education” benefit under the Social Benefits portion of the tangible benefits package given our position on the likely result of the proposed Bell-Astral transaction.

6.1. Valuation

85. PIAC/CAC/COSCO/NPSCF/OC are generally content with the valuation of the total tangible benefits package as calculated by the Applicant. While we noted the Commission’s question to the Applicants regarding potential inclusion of divested radio assets, we saw no principled basis upon which to question the Applicants’ exclusion of these assets, unless the Commission were to question the entire trust structure of the Applicants’ divestiture strategy – which would appear to be a departure from past practice.⁷⁰

6.2. Contribution to the Canadian Broadcasting Participation Fund (BPF)

86. PIAC/CAC/COSCO/NPSCF in the first Bell-Astral transaction argued that the tangible benefits package should include 1% of the value of the transaction for the Canadian Broadcasting Participation Fund (BPF). This fund, as noted in the present application, allows public interest groups such as PIAC/CAC/COSCO/NPSCF/OC to finally represent the public interest in broadcasting hearings. This type of intervention greatly enhanced the Commission’s understanding of the consumer interest in the first Bell-Astral transaction and is thus of high value to the health of the Canadian broadcasting system, which at the end of the day, seeks to serve Canadians as citizens and consumers under the policy goals in the *Broadcasting Act*.

87. PIAC/CAC/COSCO/NPSCF/OC are pleased to note that the Applicant has proposed \$2M or approximately 1.15% of the value of the transaction to be allocated as a tangible benefit to the BPF. PIAC/CAC/COSCO/NPSCF/OC fully support this proposed benefit as well as the proposed amount. As we said in our oral comments at the first Bell-Astral transaction: when it rains, you should fill the rain barrel.

6.3. Proposed “consumer education” benefit must empower consumers

88. It is PIAC/CAC/COSCO/NPSCF/OC’s view that the present pay and specialty television market, and especially the post-Bell-Astral pay and specialty television market will

⁶⁹ While we are not advocates for people with disabilities, we are concerned that the Applicants have ignored a parallel fund, the Broadcasting Accessibility Fund (BAF), when designing their tangible benefits package. Both the BAF and the BPF were born at the same hearing and both are continuing funds relying upon tangible benefits to ensure their continued existence. The BAF serves a crucial purpose in promoting access to the broadcasting system for people with disabilities. There is no principled reason for the Applicants to choose to support only the BPF and not the BAF.

⁷⁰ See Broadcasting Decision 2000-222.

provide little consumer choice and flexibility in obtaining broadcasting services at a reasonable price. Thus the prospect of “educating” consumers about how the system functions now and in a post-Bell-Astral universe could amount to simply a description of (and possibly a justification for) why consumers are unable to attain the choice of programming services they desire at a reasonable price.

89. Therefore, we would suggest that in order for this “Consumer Education” component to be truly valuable to consumers in a post Bell-Astral broadcasting system, the Commission should require that it have considerable advocacy aspects.
90. The Applicant’s “Consumer Education” tangible benefits proposal is presently undeveloped and, without direction, could create more problems for consumers than benefits. Should the Commission consider that this proposal as a potentially positive benefit for the broadcasting system as a whole, we would caution the Commission to ensure that the benefit does not enchain broadcasting consumers but rather seeks to empower them.
91. PIAC/CAC/COSCO/NPSCF/OC have two main concerns with the “Consumer Education” proposal.
92. First, we are concerned that any funds so set aside will be channeled to descriptive “products” (deliverables such as brochures, websites, YouTube videos) that do not assist broadcasting consumers to obtain better or more affordable broadcasting service. Consumers actually obtaining better service, more choice and lower prices are the appropriate goals for any consumer-oriented “education”.
93. Consumer education in broadcasting is a new endeavour. It will first have to have its scope and purpose defined. PIAC/CAC/COSCO/NPSCF/OC submit that this definition and scoping must be based on initial input from consumer groups, and that focused consumer research should then be undertaken with the goal of empowering consumers in the marketplace, not merely informing them of how that marketplace functions.
94. Astral claims that its tangible benefits proposal upholds the Commission’s stated 3 pillars: create, connect and - particularly in relation to this consumer education proposal - “protect”. Yet it is clear that consumers want real choice and competition in broadcasting offerings in the market – and not simply information about the way the broadcasting system functions. Indeed, on the Applicant’s CanadiansDeserveMore.ca website, public comments asking for such offerings and choice outnumber any questions relating to how broadcasting is delivered or licensed.
95. Second, PIAC/CAC/COSCO/NPSCF/OC are concerned that the Applicant’s consumer education proposition is ill-defined and possibly difficult for consumer groups to administer, with a large potential for conflicts of interest.
96. If such funds are distributed directly to consumer groups to manage education programs, without more independent management, there is a strong chance of entrenching conflicts of interest in these groups who, by their mandates, should be ensuring the best value for consumers and not looking to applications such as the present one as a chance to increase or maintain “consumer education” budgets.

97. At present, the best place to locate any tangible benefits directed to “consumer education,” therefore, would be in an independent fund that supported research into broadcasting matters from a consumer perspective. That fund already exists: the Broadcasting Participation Fund. The BPF has some flexibility to fund consumer research – but arguably only where that research supports an intervention in a CRTC broadcasting hearing (for example to commission a poll relied upon as evidence in the hearing). The BPF presently has no consumer education component.
98. Therefore the tangible benefits proposed for “consumer education” could be added as a separate division of the BPF. These funds could be managed and independently awarded by the BPF to meritorious consumer research in broadcasting on matters that were not presently before the Commission and to consumer “education” that actually increases consumer ability to participate in the broadcasting services market in an efficient and “profitable” way. An example of this empowering educational tool, for example, could be a consumer “broadcasting costs calculator” that compares BDU offerings in the consumer’s market and empowers the consumer to select the best solution for his or her needs in an impartial and systematic way. Likewise, an access component could be designed to ensure, for example, that Canadians know better how to obtain particular channels or services without having to accept them only in a larger bundle of services (in other words, a mechanism to enhance consumer choice in broadcasting services by lowering consumer search costs).
99. PIAC/CAC/COSCO/NPSCF/OC are very concerned that as it is currently vaguely outlined, the “consumer education” tangible benefits amounts offered in this Application are simply an attempt to co-opt consumer groups into supporting the present and future broadcasting licence transfer applications.
100. Thus we submit that the Consumer Education component would be best rolled into the BPF (to avoid tainting consumer group independence) but should be specifically earmarked to fund research outside of active CRTC broadcasting hearings – in other words, to support consumer research that defines what consumers need in terms of information and advocacy tools to achieve real empowerment in the broadcasting retail market.

7. PROPOSED SAFEGUARDS BY ASTRAL INSUFFICIENT TO ADDRESS IMPACTS OF THE TRANSACTION ON THE CANADIAN BROADCASTING SYSTEM

101. The Commission in Decision 2012-574 found that: “[t]he significance and breadth of the broadcasting assets of a combined BCE/Astral are such that safeguards to properly supervise this level of market power would be extensive and unduly burdensome. The Commission does not consider that such a level of interference would be consistent with the regulatory policy set out in section 5(2) of the Act.”⁷¹
102. Astral in its application proposes a few safeguards to address the impacts of the transaction on competition and the Canadian broadcasting system. The Commission also

⁷¹ Decision 2012-574 at para. 66.

proposes safeguards in letters to Astral, which Astral rejects. In our view, the safeguards proposed by Astral are insufficient to address the impacts of the transaction on the Canadian broadcasting system and to properly safeguard healthy and fair competition that will benefit consumers, particularly given the increase in Bell's already significant market power. Moreover, appropriate safeguards must be meaningful and enforceable in a timely and public manner. If the Commission is not prepared or able to supervise and monitor exercise of market power and market conduct by the tight oligopoly of vertically integrated entities, it should not approve the proposed transaction.

7.1. The Vertical Integration Framework and Code of Conduct is inadequate to safeguard consumer choice, flexibility and affordability

7.1.1. A condition of licence to adhere to the Vertical Integration Code of Conduct is not a sufficient “additional” safeguard

103. Bell and Astral suggest that adding a condition of licence (COL) that requires Bell-Astral to adhere to the Vertical Integration Code of Conduct is an “additional safeguard.”⁷²
104. PIAC/CAC/COSCO/NPSCF/OC much prefer the Commission's proposal to impose a series of COLs incorporating each provision of the VI Code of Conduct to Bell's proposed COL referencing the VI Code of Conduct. In our view, incorporating each provision as a required COL is a more appropriate safeguard against the exercise of Bell's significant market power than reference to the VI Code of Conduct, which as drafted reads as a set of guidelines for the industry.
105. This is further demonstrated in Bell and Astral's objection to the Commission's proposed COL wording in its answer to Question 23 in Reply 1, where they note that the Commission meant the Code of Conduct to serve as a guideline for the industry. Therefore, Bell wants the guidelines to remain voluntary and it is unclear how referencing a set of voluntary guidelines as a COL will serve as an additional safeguard against Bell's incentive and ability to act in an anti-competitive manner.
106. In Bell and Astral's view, embedding the VI Code as a COL is an additional safeguard because there are more serious consequences for breaching a COL.⁷³ However, one would wonder how the Commission would exercise these levers in the event that it believes Bell has breached the COL if the COL references a set of industry guidelines rather than strong industry requirements. The fact that the VI Code of Conduct serves as an industry guideline underlines the Code's weakness and inability to effectively address current imbalances in the market between vertically integrated and non-integrated competitors. The Code will be an even weaker tool in a more concentrated environment with increased market power in the hands of vertically integrated players.

⁷² Supplementary Brief at para. 19, also echoed in Reply 1 in response to Q23 and Reply 2 in response to Q2.

⁷³ Astral's reply to Q2 of Reply 2, wherein it references legal consequences that flow from failure to comply with a condition of licence under ss. 24 and 33 of the *Broadcasting Act*.

7.1.2. The Vertical Integration Code of Conduct and Vertical Integration Framework is inadequate to address existing imbalances in market power

107. Despite our preference for the Commission's proposed series of COLs, we still question whether these COLs would sufficiently guard against Bell's incentive and ability to act in an anti-competitive manner. We note that several non-vertically integrated competitors and less integrated competitors such as Rogers have raised a number of concerns about the adequacy of the current VI framework and Code of Conduct in addressing Bell's anti-competitive behaviour.⁷⁴
108. In fact, conduct brought to light in the last hearing on this transaction suggests that Bell does attempt to undermine effective competition at the retail level by: (1) demanding high prices from its distributor competitors for access to Bell's content on different platforms; (2) imposing restrictive conditions on the flexibility of its distributor competitors to package Bell's content; (3) undermining distributor competitor ability to offer more flexible and affordable choices to consumers; and (4) structuring arrangements for access to Bell's content in such a way that its competitor distributors cannot match Bell TV's offerings.
109. The VI Code of Conduct has been criticized as an inadequate tool to address anti-competitive behaviour Bell exhibits in negotiations for Bell's English-language specialty services (particularly with respect to Bell's terms and conditions regarding minimum penetration rates, packaging flexibility, and commercially reasonable rates).⁷⁵ As we noted in our intervention in the first application by Bell, vertically integrated entities not only have the ability to increase wholesale rates for television services, but also have the incentive to negotiate terms that guarantee carriage of their discretionary services on their competitors' basic service packages in order to preserve and enhance their own revenues.⁷⁶ In this way, Bell is able to heavily influence, if not control, the offerings of its distributor competitors, which could seriously harm competition and the operation of market forces – this is at odds with the Commission's objective to increase consumer choice and flexibility in television services.⁷⁷ Further, this type of behaviour impedes the ability of distributors to achieve policy objectives subparas. 3(1)(t)(ii) and (iii) under the *Broadcasting Act*: to provide efficient delivery of programming at affordable rates and to provide reasonable terms of the carriage, packaging and retailing of programming services.
110. Competitors have also criticized the VI Code of Conduct as being inadequate to ensure timely access to non-linear rights at commercially reasonable rates, given that

⁷⁴ See in particular presentation of Rogers at the Oral Hearing in Broadcasting Notice of Consultation 2012-370, interventions and presentations of independent BDUs such as TELUS, Cogeco, MTS, CCSA, VMedia.

⁷⁵ CIDG Application for Dispute Resolution (17 January 2012).

⁷⁶ Based on our review of the public record of the Bell/CIDG dispute resolution, we Bell has exercised its substantial market power and advantage in negotiations with non-vertically integrated commercial players to impose increases to wholesale rates for the television services it owns and demand terms that restrict its competitors' flexibility to package Bell's specialty services to retail customers.

⁷⁷ For example, Rogers argued in the Oral Hearing at para. 4597 that Bell attempted to undermine Rogers' London trial to offer a skinnier basic service with pick and pay flexibility by trying to restrict the trial period and prohibit Rogers from offering TSN or TSN2 on a strictly discretionary basis.

any delay in negotiations effectively results in a preferential or exclusive period for Bell's own distributors.⁷⁸

111. Bell's willingness to provide access to non-linear rights should be very closely scrutinized by the Commission given Bell-Astral's intangible commitment as part of the proposed transaction to provide the TV Everywhere service. Since Bell will be the only provider of this service and intends to make the service available through the cable, satellite and IPTV distributor of the consumer's choosing, the Commission must ensure that appropriate safeguards are in place to ensure that negotiations with competitor distributors for access to the TV Everywhere service will be fair. For example, how will Bell establish that the rate for access to this service is based on fair market value given that there is no other frame of reference for an equivalent service in Canada? How can Canadians be assured that the TV Everywhere service is priced at the most efficient rate possible if Bell alone controls the supply of the service? What mechanisms will be in place to ensure that Bell does not launch the service on a preferential basis while stalling negotiations with its competitors?

7.1.3. The Vertical Integration Dispute Resolution process is not an effective safeguard

112. Bell and Astral argue that "the availability of Commission dispute resolution acts as an additional, effective safeguard to ensure that vertically-integrated entities do not seek unreasonable terms pertaining to the carriage of their programming services by other BDUs."⁷⁹ We note that several competitors have raised concerns about the effectiveness of the Commission's enforcement of the VI framework and the adequacy of the dispute resolution process given the unequal share of risk between parties.⁸⁰ These concerns existed prior to Bell's proposed acquisition of Astral.

113. In our view, any further increase in Bell's already significant market power requires a review of the VI framework and Code of Conduct in all of the above areas, including the Commission's ability to facilitate dispute resolution in a timely manner which recognizes the imbalance of risk and resources in a dispute resolution process. We question whether dispute resolution in markets that are highly concentrated by a tight vertically-integrated oligopoly will be effective, given that there will be no frame of reference against which to examine assertions regarding "fair market value" and "commercial reasonableness." The dispute resolution processes do not correct imbalances or anti-competitive behaviours in the market unless an aggrieved player (likely a smaller, non-integrated player) has the ability, time and resources to prove non-compliance at the hands of the advantaged party (likely a large, vertically integrated player).⁸¹

⁷⁸ Rogers submitted that Bell is a laggard in making non-linear rights available. Many parties suggested that they received unreasonable offers to access the non-linear rights. We note that the in NBC Universal's application to assign and transfer of control of broadcasting licenses to Comcast, the Federal Communications Commission concluded that Comcast-NBCU would have the incentive to withhold or discriminate in providing online rights to video programming (Decision FCC-11-4A1-1 at para. 44). The FCC also concluded that Comcast-NBCU would have the incentive to withhold or discriminate in providing online rights to video programming in order to prevent Comcast's multichannel video programming distribution (MVPD) rivals from competing aggressively with it. In response, the FCC created a set of safeguards to address these concerns including that Comcast-NBCU must provide online video programming to other MVPDs at fair market value and on non-discriminatory terms (Condition IV.A.1).

⁷⁹ Supplementary Brief at para. 115.

⁸⁰ TELUS in its intervention in Broadcasting Notice of Consultation 2012-370.

⁸¹ See, for example, the Independent Broadcasters Group intervention in Broadcasting Notice of Consultation 2012-370 at para. 13: "Independent broadcasters are reluctant to launch formal disputes against BDUs. First, BDUs are

114. We submit that the broad participation of the currently proposed Bell-Astral remains very similar to the initial Bell-Astral proposal in popular genres and services, in must-carry discretionary services (especially in the French-language market), access to popular conventional programming and national distribution networks. Thus, a combined Bell-Astral would still have the incentive and ability to unduly exert market power to the disadvantage of its competitors. Moreover, Bell's market power would be so significant that the VI framework would be insufficient to effectively address disputes and facilitate program availability and distribution.⁸²

7.2. Current behavioural conditions on tied selling are inadequate to safeguard consumer choice, flexibility and affordability

115. Bell and Astral also state that they are "prepared to commit to expand the prohibition on tied selling contained in the VI Code of Conduct regarding carriage of multiple services, and are amenable to taking steps to ensure that affiliation agreements do not prevent the launch or distribution of new programming services."⁸³ PIAC/CAC/COSCO/NPSCF/OC are concerned that the tied selling prohibition does not preclude programming undertakings from seeking unreasonable terms and conditions in regards to their service. In other words, it must be explicitly clear that a standalone offer must be reasonable. Astral's insistence on the wording that the condition "does not prevent or limit the right or ability of a licensee to offer broadcasting distribution undertakings multiservice or other discounts, promotions, rebates or similar programs" is similar to wording of the behavioural restrictions contained in Bell's Consent Agreement with the Competition Bureau.⁸⁴ In our view, this does not adequately safeguard against Bell's incentive and ability to offer a stand-alone service at a very high price or unreasonable minimum penetration level, making this offer effectively undesirable or untenable.

7.3. Astral's inadequate consideration of possible structural and functional separation

116. Astral's response to the Commission's questions on functional separation as a potential safeguard do not answer the questions but rather challenge the premise that

important and valued business partners for independent broadcasters. It does not contribute to the strength of that business partnership to rely on dispute resolution. Pre-determined rules, known in advance by both parties, are preferable. Second, independent broadcasters are often placed in a vulnerable position if a dispute is launched. Third, the dispute resolution process itself requires resources and time that place a greater strain on smaller independent services than is the case for the large, vertically integrated BDUs. Last, notwithstanding the Commission's policy to publish its decisions following from dispute resolution, these decisions have not, so far at least, been sufficiently numerous or provided sufficient information to provide concrete guidance to industry participants."

⁸² Decision 2012-574 at para. 65.

⁸³ Supplementary Brief at para. 120.

⁸⁴ The Competition Bureau Consent Agreement at para. 26 requires Bell not to, directly or indirectly: "a) refuse to make available or condition the availability of any of its Programming Services to any Distribution Undertaking on whether that Distribution Undertaking or any other Distribution Undertaking agrees to carry any other separately licensed Programming Service; b) condition any carriage terms for any of its Programming Services to any Distribution Undertaking on whether that Distribution Undertaking or any other Distribution Undertaking agrees to carry any other separately licensed Programming Service; provided, however, that nothing in the Agreement shall prevent or limit Respondent's right or ability to offer Distribution Undertakings multiservice or other discounts, promotions, rebates or similar programs."

separation is a current or appropriate regulatory tool. Astral's answer avoids discussing significant developments in this area, particularly in Europe. These developments, even if not applicable to the present applications, could very well inform the reporting requirements or other conditions imposed by the Commission and could over the longer term become a future remedy in case of market failure or Bell's abuse of its dominant position vis-a-vis its downstream competitors.

7.3.1. The Commission's question

117. The Commission asked Bell-Astral:

Vertical Integration Analysis

Q20. Functional separation

a) Would a condition of approval requiring BCE to implement a form of "functional separation" as between its BDU and programming services operations be a viable mechanism to address the concerns expressed by the Commission in Broadcasting Decision CRTC 2012-574 (see paragraphs 64 and 65 in particular) about the ability and incentive of a combined BCE/Astral to exert market power in a potential anti-competitive manner? Please expand.

b) If functional separation constitutes, in your view, an appropriate mechanism, please describe what specific measures would best address these concerns regarding a potential anti-competitive behaviour. For instance, such measures could include the creation of distinct business units or legal entities for BCE's BDU and programming services operations and prohibitions on communications between the groups.

118. Bell's answer consisted of reasons why functional separation of any type would be inappropriate. The main reason was that given the divestitures in this version of the deal, there would be no significant market power in Bell-Astral's hands, and thus the Commission's concerns expressed in the above paragraphs from its first decision could be safely ignored. Presumably Bell is relying upon the Competition Bureau's Consent Order in this regard, although the 'proof' that Bell-Astral will not exercise significant market power in any relevant market are not specifically mentioned.

119. Bell's secondary argument amounts to a statement that the remedy of functional separation has not been tried by the CRTC – with one exception for Shaw – and that the Commission has instead pursued alternative regulatory safeguards. There then follows a long list at the bottom of page 29 of all the measures. However, Bell sums up these measures with a false conclusion:

The purpose of these safeguards has been to provide that, to the extent that a vertically-integrated entity has a business incentive to give an undue preference to its own distribution facilities, the vertically-integrated entity does not have the opportunity to act on that incentive.⁸⁵ [Emphasis added.]

120. Of course, Bell has every opportunity to engage in discriminatory downstream behaviour. *Ex ante* regulation is not designed to stop such discriminatory behaviour; it is

⁸⁵ Astral - Reply 1 to request for information - Doc 65 - ABRIDGED - Response to 12FEB2013, at p. 31. See also p. 32: "Nor, in view of the existing regulatory frameworks and the undertakings related to this Application, would BCE-Astral have the opportunity to exercise such market power even if it did have it." [Emphasis added.]

intended to catch such behaviour if it does happen on the assumption that a firm is unlikely to risk *ex ante* application of safeguards, although that may not be the case in practice. Indeed, the assertion that Bell has continued to act in a discriminatory fashion despite all of these safeguards was the focus of the CIDG arbitration and V-Media's initial complaints, as well as Rogers', TELUS' and other distributors' complaints at the September 2012 Bell-Astral hearing: Bell was exerting at every opportunity such discriminatory actions in various ways, and waiting to be confronted with action under the other safeguards. These parties mentioned that such a strategy bought Bell time and a strong negotiating position and they have questioned the actual effectiveness of those safeguards following the Commission's decision on final offer arbitration between Bell and TELUS and between Bell and CIDG, as well as during the September 2012 Bell-Astral hearing.

7.3.2. Degrees of (functional) separation

121. First, Bell in its answer implies that the Commission is considering an out-of-date tool (functional separation) that has no obvious theoretical basis or present application, with the exception of the Commission's Shaw DTH and SRDU orders,⁸⁶ where Shaw's market shares in the appropriate distribution markets were more than the present post-Bell-Astral distribution market shares will be. This is a logically flawed argument: even if the Commission were considering a regulatory tool that had not previously been applied, that is not an argument against that tool's potential utility to the market, and, in any case, the Commission has in the past used that tool.

122. Second, there are several recent examples in other jurisdictions in which incumbents with significant market power have been encouraged by the regulator to "voluntarily" functionally separate their wholesale access divisions from their retail operations. Notably, this happened in the U.K., where BT (2005-7) created an internet access services division called Openreach.⁸⁷ Likewise, in Australia, Telstra entered in 2012 into a "Structural Separation Undertaking" in order to facilitate Australia's aggressive National Broadband Network policy goal.⁸⁸ Further voluntary undertakings were made by incumbents in Sweden, Poland and Italy.⁸⁹

⁸⁶ See *Amalgamation of Cancom and Star Choice*, Decision CRTC 99-169, 9 July 1999, paragraphs 26-32 and Appendix A; *Amendments to conditions of licence relating to structural separation for Cancom and Star Choice*, Broadcasting Decision CRTC 2002-84, 12 April 2002, and *Star Choice – Licence renewal*, Broadcasting Decision CRTC 2004-130, 31 March 2004; *Shaw Direct – Licence amendments*, Broadcasting Decision CRTC 2011-602, 21 September 2011.

⁸⁷ A detailed summary of the BT undertaking is found in *BEREC Guidance on functional separation - Annex I - Functional separation in practice: EU experiences*. Online:

http://berec.europa.eu/files/documents/bor_10_44Rev1b.pdf

⁸⁸ See: http://www.telstrawholesale.com.au/about/structural-separation-undertaking/index.htm#.UVBrB6U_5co which notes in part:

What is the SSU?

On 28 February 2012, the Australian Competition and Consumer Commission (ACCC) accepted Telstra's Structural Separation Undertaking (SSU) and draft Migration Plan. The SSU commenced operation on 6 March 2012, while the Migration Plan took effect from 7 March 2012.

The SSU fulfills two roles:

- **It commits Telstra to structural separation by 1 July 2018** - through the progressive disconnection of fixed voice and broadband services from Telstra's copper and HFC networks, while the NBN is being rolled out; and
- **It sets out the various measures which Telstra will put in place to provide for equivalence and transparency** in the supply of regulated fixed network services to its wholesale

123. Third, there is a well-developed regulatory guidance that has been developed in Europe by the Body of European Regulators for Electronic Communications (BEREC)⁹⁰ in order to guide European national regulatory agencies applying functional separation under the Better Regulation Directive,⁹¹ which specifically addresses structural and functional separation in articles 13a and 13b of the Access Directive.⁹²

124. Fourth, there is significant economics literature on the theory and practice of functional separation.⁹³ It is clear from reviewing this literature that it is not only a current regulatory problem but also that functional separation is being considered for new areas of regulated industries. Notably, the possibility of,⁹⁴ and rational economic advantage of,⁹⁵ non-price discrimination towards wholesale customers in markets with vertically-integrated operators (also having a retail operation in competition with downstream operators) who possess significant market power is very well established.

125. The specific non-price discriminatory tactics of an entity with such significant market power have been identified as "sabotage activities [such] as (1) providing inferior service to competitors, (2) delaying competitors' attempts to implement new and improved services, (3) withholding crucial information from competitors, and (4) structuring services and standards to favour the operations of their own downstream affiliates at the expense of rivals."⁹⁶

126. Bell (Bell Media, Bell Mobility and Bell Canada) has recently been accused of applying all of these tactics in relation to recent broadcasting distribution negotiations,⁹⁷ and in the course of the September 2012 hearing of Bell-Astral.⁹⁸ In particular, these allegations concerned non-price discriminatory demands with regard to thematic or other packaging options; minimum penetration levels; revenue loss guarantees; delays in

customers and the supply of comparable services to its retail customers during the transition to the NBN.

⁸⁹ See also the discussions of Italy and Poland in *BEREC Guidance on functional separation - Annex I, supra*; and Sweden in *BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences, infra*.

⁹⁰ See: *BEREC Guidance on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences* ("BEREC Guidance" [BoR (10) 44 Rev1]). Online: http://berec.europa.eu/files/doc/berec/bor_10_44rev1.pdf

⁹¹ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF>

⁹² See *ibid.*, at pp. L 337/61-62.

⁹³ The best starting point for a discussion of this area remains Cave, Martin E., Six Degrees of Separation Operational Separation as a Remedy in European Telecommunications Regulation. COMMUNICATIONS & STRATEGIES, No. 64, p. 89, 4th Quarter 2006. Available at SSRN: <http://ssrn.com/abstract=994798>

⁹⁴ See Richard Cadman, "Means not ends: Detering discrimination through equivalence and functional separation" *Telecommunications Policy* 34 (2010) 366–374 at 367.

⁹⁵ See Nicholas Economides, "The incentive for non-price discrimination by an input monopolist" *International Journal of Industrial Organization* 16 (1998) 271–284.

⁹⁶ See Cadman, *supra*, citing Mandy, D.M., & Sappington, D.E.M. (2007). "Incentives for sabotage in vertically related industries." *Journal of Regulatory Economics*, 31, 235–260 at 236.

⁹⁷ See CIDG Application for Dispute Resolution (17 January 2012) at para. 6; cited by PIAC/CAC/COSCO in our Intervention on Bell-Astral I at para. 84.

⁹⁸ See, in particular, Rogers presentation, Broadcasting Notice of Consultation 2012-370, Oral Hearing Day 3 Transcript, (September 12, 2012), at paras. 4586 et seq., where Rogers alleges delay tactics by Bell to interfere with its bringing its own services to market; increasing costs to above commercially reasonable rates; refusal to provide access to content; refusals to provide access on non-linear and mobile platforms. Online: <http://www.crtc.gc.ca/eng/transcripts/2012/tb0912.html>

providing access; and refusal to provide access on various platforms. Adding more "content leverage" to Bell if it acquires even the parts of Astral specified in the present applications risks creating opportunities for even more "bad behaviour" than was already alleged against Bell.⁹⁹

127. There is therefore a strong theoretical basis and evidentiary basis for the Commission to conclude that it should at the very least consider whether a remedy such as functional separation is necessary in the context of these applications.
128. A more pertinent answer from Bell would have been to attempt to define the point at which present regulatory safeguards could be judged to be inadequate in controlling, *ex ante*, the actions of Bell after this acquisition, in the event that it is found that significant market power in many distribution markets is an issue. Bell has simply avoided considering this possibility; however, the Commission should be prepared to consider it, if not now, then in the future.
129. The regulatory guidance and directive from the EU makes it clear that functional separation should be considered an exceptional remedy and one that is undertaken after full and complete implementation of other "standard" regulatory safeguards have proven ineffective.¹⁰⁰ In addition, the result of market failure and failure of regulatory safeguards under the Directive must lead to "important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets."¹⁰¹ Further, under the Directive the regulatory agency must first show that "there is little or no prospect of effective and sustainable infrastructure-based competition within a reasonable time-frame" (Article 13a(2)(b)) and that functional separation would be the 'most efficient means to enforce remedies aimed at addressing the competition problems/markets failures identified" (Article 13a(2)(d))."¹⁰² Secondly, the regulator, before embarking on this course, should undertake an impact analysis that considers "the impact on the regulatory authority, the undertaking, the electronic communications sector as a whole, incentives to invest in a sector as a whole, and on other stakeholders, including impacts on competition and on consumers (see Article 13a(2)(c)), " understanding that "impacts on competition and consumers" can include benefits such as reduced "incentive for discriminatory practices by the incumbent" and concomitant reduction of necessary regulatory oversight by the regulator *ex ante*.¹⁰³
130. The very serious and last resort nature of the remedy of functional separation therefore demands a very large amount of market information and a high level of market analysis by the regulator before it can reasonably be imposed (presuming the Commission would adopt similar principles of application). The implication of this is that the Commission should at a minimum, impose market information-gathering requirements upon Bell to allow it to assess any future need for consideration of the

⁹⁹ See comments of Mr. Ken Engelhart at Broadcasting Notice of Consultation 2012-370, Oral Hearing Day 3 Transcript, (September 12, 2012) at para. 4613: "Bell currently controls the number one over-the-air television network in the country, the most popular specialty services in the country, the most popular sports network in the country, and, with this acquisition, the most popular pay television services. When a vertically integrated company has too much content leverage, the temptation to behave badly is just too great."

¹⁰⁰ See BERC Guidance, *supra*, at pp. 8-10.

¹⁰¹ *Ibid.*, at p. 12, citing

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

remedy of functional separation should Bell abuse market power in broadcasting distribution markets or in other markets where vertical integration provides it with significant market power. Ideally, the Commission should make public, to the utmost extent possible, the information provided so that the public, other regulators such as the Competition Bureau, competitors, and public interest groups can assess the potential need for resort to such a remedy as functional separation.

7.4. Wholesale rate regulation for discretionary services may be necessary

131. In the September 2012 Bell-Astral hearing, the Commission's legal staff asked whether Bell would complete the transaction if the Commission were to regulate wholesale rates for discretionary services.¹⁰⁴ Bell said that it would not, arguing that "the regulator can't establish market rates, the market establishes market rates".¹⁰⁵
132. We, however, proposition that wholesale rate regulation may be necessary in discretionary markets, given Bell's concentrated and significant market power in both the French-language and English-language markets. Further, we note that both of these markets are controlled by a highly concentrated, tight oligopoly of vertically integrated entities who are greatly motivated and able to increase wholesale rates for discretionary services. This incentive and ability can easily pervert the "market rate" or "fair market value" paid by non-integrated or less-integrated competitors, which leads to inefficient pricing and inefficient transfers of wealth from competitors and their customers to the vertically-integrated players with the most market power.
133. Economists recognize that pricing plays a crucial role in coordinating economic activity in both integrated and non-integrated companies. Market systems in which property ownership is dispersed among numerous self-interested businesses provide economic coordination most efficiently, noting that entrepreneurs lose incentives when they become a conglomerate's employee. Evans further notes that "prices that relay economically efficient incentives are important - complex and changeable technology leads to contractual disputes and wastes if midstream modifications are priced incorrectly."¹⁰⁶

7.5. Ensuring effective, vigorous and dynamic competition in retail markets

134. If the Commission allows this proposed transaction and the resultant increase in vertical integration and media concentration, it must diminish the vertical effects of vertical integration by ensuring strengthened and vigorous competition in local retail markets. Canadians have been promised that competitive forces will deliver choice, flexibility and affordable services. If the Commission continues to rely on market forces to serve consumers, it must collect service and pricing information about the retail market and analyze the retail market to ensure that the benefits of competition are actually flowing to consumers.

¹⁰⁴ Broadcasting Notice of Consultation 2012-370, Oral Hearing Day 5 Transcript, (September 14, 2012), Mr. McIntyre at para. 9521.

¹⁰⁵ Broadcasting Notice of Consultation 2012-370, Oral Hearing Day 5 Transcript, (September 14, 2012), Mr. Cope at para. 9529.

¹⁰⁶ David S. Evans and Sanford J. Grossman, "Integration" in David S. Evans, ed., *Breaking Up Bell: Essays on Industrial Organization and Regulation*, (1983) Elsevier Science Publications, New York, NY at pp. 95-126.

135. The Commission should at minimum continue to require vertically integrated entities to file information about their efforts to provide consumers with greater flexibility and choice in television services. These filings should be available to the public on the Commission's website and the Commission should seek the public's views on whether these efforts sufficiently meet consumer expectations.

136. We urge the Commission to issue a Notice of Consultation to determine the obligations that should be imposed on BDUs, especially VI BDUs, to ensure choice and flexibility of services for consumers. In our view, insufficient progress has been made in this area and the time has come to examine regulatory solutions.

APPENDICES FILED AS SEPARATE DOCUMENTS:

APPENDIX 1: EVIDENCE OF DR. DWAYNE WINSECK

APPENDIX 2: EVIDENCE OF DR. DWAYNE WINSECK – DATA CHARTS AND FIGURES
SOURCE NOTES

APPENDIX 3: HISTORICAL OVERVIEW OF BELL'S RETAIL TELEVISION SERVICE
PRICING AND PACKAGES

APPENDIX 4: SELECTED METROPOLITAN MARKET COMPARISON OF BASIC TELEVISION
SERVICE MONTHLY RATES, 2012

APPENDIX 5: PIAC 2012 TELEPHONE SURVEY ABOUT CONSUMER CHOICE IN TV
SERVICE

APPENDIX 6: SELECTED QUESTIONS AND ANSWERS FROM
CANADIANSDESERVEMORE.CA

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