Broadcasting Notice of Consultation CRTC 2012-370

Application of Bell Canada Enterprises Inc. on behalf of Astral Media Inc. (Application 2012-0516-2)

Comments of the Public Interest Advocacy Centre, Consumers' Association of Canada, Canada Without Poverty, Council of Senior Citizens' Organizations of British Columbia

("PIAC/CAC/CWP/COSCO")

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EXECUTIVE SUMMARY

ES1. The Public Interest Advocacy Centre (PIAC), Consumers' Association of Canada (CAC), Canada Without Poverty (CWP), and Council of Senior Citizens' Organization of British Columbia (COSCO), together "PIAC/CAC/CWP/COSCO", are pleased to provide the Commission with comments <u>opposing</u> the proposed transaction and outlining our concerns with Bell's application for the Commission's authority to acquire control of Astral Media Inc.

ES2. Consumers value a diversity of voices in the private element of the broadcasting system. A broad plurality of voices ensures that consumers can access a wide variety of programming and points of view. Moreover, maintaining and broadening the diversity of voices in the Canadian broadcasting system strengthens the principle of consumer choice.

ES3. PIAC/CAC/CWP/COSCO have several concerns with the impact of the proposed transaction on the diversity of voices in the Canadian broadcasting system. First, the proposed transaction is not consistent with the *Diversity of Voices* policy, as the combined television viewing share of Bell/Astral is 44.89% in the English-language market, alarmingly close to the 45% threshold the Commission has set to deny proposed transactions. The combined television viewing share of Bell/Astral in the French-language market is 35.04%, presenting a transaction that the Commission should carefully examine. The Commission must also closely examine other metrics such as revenue share to understand the full impact of this transaction on the diversity of voices.

ES4. Second, the proposed transaction will generate very high levels of media concentration in conventional television and allow 88% of revenues of pay and specialty television services to rest in the hands of four large vertically integrated entities. This high level of concentration among the vertically integrated entities is a great risk to a healthy diversity of voices in broadcasting. Canada already has the highest level of cross-media ownership consolidation and vertical integration out of 32 countries examined by the International Media Concentration Research Project. Given that concentration within and across network media industries is extremely high, the Commission must closely scrutinize and deny an application that proposes further concentration, especially in the hands of the largest vertically integrated company, Bell.

ES5. Third, Bell argues that it must get larger in order to compete with foreign unregulated media players, such as OTT providers. PIAC/CAC/CWP/COSCO urge the Commission to question this argument, given that Canadians use OTT services as a complement to regulated broadcasting services. Moreover, Bell and other vertically integrated entities have a significant competitive advantage over OTT services

through their operation of internet access services and use of data caps on retail subscribers.

ES6. Fourth, PIAC/CAC/CWP/COSCO do not believe that the proposed transaction will benefit consumers. While there is ample evidence to show that vertical integration has benefited Bell's shareholders, there is little evidence that consumers have equally enjoyed a similar level of benefits. Our primary concern is the trend of rising prices for subscriptions to television services. These prices have increased at a significantly higher rate than the Consumer Price Index as well as all other communications services. The cost of "basic service" for television has increased while broadcasting distribution undertakings have simultaneously crammed more services into the lowest retail tiers. Consumers are also offered less flexibility in packaging and fewer choices to pick and pay only for the services they want to watch. Increasing prices paired with less flexibility and choice suggest that market forces are not working to deliver affordable prices for consumers. The Commission must intervene to deliver on its stated expectations of affordability, increased choice and flexibility.

ES7. Fifth, PIAC/CAC/CWP/COSCO are concerned that increased vertical integration will give the "big four" players the ability to use their tremendous market power in an anti-competitive way. Specifically, increased vertical integration undermines competition and threatens the ability of non-vertically integrated broadcasting distribution undertakings to compete and offer innovative pricing and packaging to cater to consumer desires for increased choice and flexibility.

ES8. Finally, PIAC/CAC/CWP/COSCO find that Bell's proposed tangible benefits package for this transaction is flawed. We take particular issue with the proposal to direct $40M to BCE Inc.'s subsidiary Northwestel in order to modernize broadband infrastructure in the North. The proposal fails to meet the Commission's test set out for tangible benefits on all three grounds – it is not incremental to broadcasting, it had already previously been required by the Commission in the price cap review of Northwestel and thus would have been done in absence of the Bell/Astral transaction, and it does not flow to third parties but rather back to a BCE Inc. subsidiary. It is also unclear that the Commission has the jurisdiction to use its powers under the *Broadcasting Act* to accomplish what is primarily a telecommunications objective. While PIAC/CAC/CWP/COSCO are strong advocates for broadband in the North, this plan appears to be a defensive move against broadband and wireless competition in the North and only benefits Northerners if they subscribe to Northwestel's services. We also note that Bell has not filed affordability studies for these services.

ES9. For all these reasons, PIAC/CAC/CWP/COSCO <u>oppose</u> this proposed transaction and urge the Commission to deny approval of this transaction. We also call on the Commission to issue a Notice of Consultation to determine which obligations should be imposed on broadcasting distribution undertakings, particularly vertically integrated BDUs, to ensure choice and flexibility for consumers. Insufficient progress in this area has been made and the time has come to examine regulatory solutions.

INTRODUCTION

1. The Public Interest Advocacy Centre (PIAC), Consumers' Association of Canada (CAC), Canada Without Poverty (CWP), and Council of Senior Citizens' Organization of British Columbia (COSCO), together "PIAC/CAC/CWP/COSCO", are in receipt of application 2012-0516-2 by Bell Canada Enterprises Inc. (Bell) requesting the Commission's authority to acquire control of Astral Media Inc. (Astral).

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] CWP is a federally incorporated, non-partisan, not-for-profit and charitable organization dedicated to the elimination of poverty in Canada.[3] 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.[4]

3. Broadcasting Notice of Consultation CRTC 2012-370 (10 July 2012) indicates that given that that Bell is a significant Canadian communications company with subsidiaries in broadcasting and telecommunications combined with a leading Canadian broadcasting company, the Commission may discuss the potential impact of the proposed transaction on the market and examine various ownership related issues. The Commission stated that it may also discuss the proposed transaction's adherence to the *Diversity of Voices* regulatory policy, common ownership policy and the tangible benefits package proposed by Bell.

4. PIAC/CAC/CWP/COSCO are pleased to provide the Commission with comments outlining our concerns with Bell's application. We are concerned that this proposed transaction is not consistent with the *Diversity of Voices* policy, allows for very high levels of media concentration in the hands of four vertically integrated companies, and we do not believe that the proposed transaction will benefit consumers.

SUMMARY OF THE BELL-ASTRAL TRANSACTION

5. Astral is one of the few remaining independent media companies in Canada, and the most valuable and strongest media company of the remaining non-vertically integrated

[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 Canada Without Poverty, online: http://www.cwp-csp.ca.
[4] See Council of Senior Citizens' Organizations of BC, online: http://coscobc.ca/.

independent broadcasters. Astral is Canada's largest radio broadcaster by a number of stations, operating in French-language radio (21 radio stations in Quebec), and English-language radio (62 radio stations in seven provinces). Astral is also a major player in pay and specialty television services as the fifth largest television operator in Canada with 23 television services. More specifically, Astral operates pay and specialty services in French-language television (two pay services and five specialty services) and English-language television (five pay services, one specialty service, one pay-per-view service). Astral also owns two conventional over-the-air television services. In addition to its licensed media properties, Astral is a major player in traditional and digital advertising.

6. Bell describes itself as "Canada's largest communications company" and "Canada's premier media company" in its financial reports. In addition to its place as the incumbent local exchange carrier for telephone and DSL internet services in most of Canada east of Manitoba and in the northern territories, Bell's subsidiary Bell Mobility is one of the big three players in national wireless services in Canada. Bell Media owns several media properties, including 28 conventional stations including CTV Television Network and 30 specialty services. Bell Media also owns 35 radio stations across Canada. In addition to its ownership in media properties, Bell operates broadcasting distribution services through IPTV (Bell Fibe TV) and direct-to-home satellite (Bell Satellite TV). Bell has seen a growth in the number of subscribers in the last three years and in 2011, Bell reported 2,028,000 subscribers to its DTH and IPTV distribution services, representing a 3% growth from 2010.[5]

7. Bell's application proposes to bring Bell and Astral together to create "a leading national media player in both languages and on multiple digital platforms." This transaction, if approved, would establish Bell's prominence in French-language media through the ownership of Astral's French-language radio stations and specialty services to challenge Quebecor Media. The addition of Astral's English-language pay and specialty services to Bell would result in Bell owning nearly twice the viewing share percentage of its next-largest competitor, Shaw Media.

8. This transaction, if approved, places Bell in a dominant position for communications and media in Canada and strengthens its market power as the largest vertically integrated player in Canada in the highly concentrated Canadian media market.

THE CONSUMER INTEREST IN BROADCASTING

9. PIAC/CAC/CWP/COSCO submit that the primary consumer interest in broadcasting is ensuring that consumers benefit from access to a wide variety of programming in the broadcasting system that offers choice in an affordable manner. These values are reflected in several objectives of the *Broadcasting Act* (the Act), such as:

[5] CRTC, 2011 Communications Monitoring Report, Table 4.4.2.

- s. 3(1)(d)(i): the Canadian broadcasting system should serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
- s. 3(1)(d)(ii): the Canadian broadcasting system should encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view;
- s. 3(1)(d)(iii): the Canadian broadcasting system should through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children … ;
- s. 3(1)(*i*)(i): the programming provided by the Canadian broadcasting system should be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes;
- s. 3(1)(s)(i): private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them, be responsive to the evolving demands of the public;
- s. 3(1)(t)(ii): distribution undertakings should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost;
- s. 3(1)(t)(iii): distribution undertakings should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of these programming services.

Many objectives focus on supporting programming tailored to communities that might not otherwise be served. Arguably, underlying the objectives of serving specific communities and fostering diversity is the notion that Canadian consumers should be provided with choice in what they watch.[6] Other objectives focus on the affordability and reasonable terms and packages for the retail offerings of programming services for Canadian consumers. The Commission is required to balance these consumer-oriented objectives with the many other objectives of the Act.

10. Consumers value a diversity of voices in the private element of the broadcasting system. A broad plurality of voices ensures that consumers can access a wide variety of programming and points of view. Moreover, maintaining and broadening the diversity of voices in the Canadian broadcasting system strengthens the principle of consumer choice.

11. The Commission has established a competitive licensing framework for many services based on the premise that competition is in the public interest. PIAC/CAC/CWP/COSCO submit that competition is in the public interest only if it delivers pricing safeguards, new

[6] Michael Koch, “Competition and Choice in Broadcasting and Telecommunications Services”, presented to the LSUC 16th Biennial National Conference, New Developments in Communications Law and Policy (26-27 April 2012) at p. 11-5.

services and choice for consumers.[7] PIAC/CAC/CWP have long been vocal opponents of unfettered competition on telecommunications matters before the Commission. Since broadcasting opened up to participation from the telecommunications companies, licensees have argued for increased deregulation in broadcasting. PIAC/CAC/CWP/COSCO believe that the greatest threat to the health of the broadcasting system do not come from unnecessary regulation, but from a concentration of market players with scant competition and inadequate regulatory controls to shape a fairer customer relationship.

12. PIAC has consistently advocated for affordable basic television services, most recently arguing for "skinny" basic service in the vertical integration proceeding. The Commission has also heard directly from Canadian consumers who have expressed concerns about paying more for programming they currently receive and the affordability of television services and packages.[8]

13. Consumers exert their interests in the broadcasting marketplace through their subscription to broadcasting services.[9] Where the Commission has eliminated basic service and packaging regulations, consumers rely only on effective competition in the marketplace to offer true flexibility in the packaging of services so that they can exercise choice.

14. The trend of increasing vertical integration and media concentration 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 concerns about vertical integration by arguing that allowing their growth and consolidation would bring competitive benefits to the Canadian market and by extension, to Canadian consumers.

15. The accelerating trend toward increased vertical integration in the converged telecommunications and broadcasting industries has been driven by Bell as the purchaser. In the last two years, Bell has announced three successive transactions to acquire additional television content and programming services within the Canadian broadcasting system, starting with the acquisition of CTV on September 10, 2010, the acquisition of Maple Leaf Sports Entertainment Ltd. (MLSE) with Rogers on December 19, 2011, and now the acquisition of Astral Media Inc. on March 16, 2012, the subject of this application.

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[7] This view is shared by Liora Salter & Felix Nii Lantei Odartey-Wellington, *CRTC & Broadcasting Regulation in Canada*, (Thomson Canada Limited, Toronto: 2008) at p. 638.

[8] See for example, individual consumer comments the Commission received in the proceeding Broadcasting Notice of Consultation CRTC 2009-614, summarized in “The implications and advisability of implementing a compensation regime for the value of local television signals”, CRTC report prepared pursuant to s. 15 of the *Broadcasting Act* (23 March 2010).

[9] Liora Salter and Felix Nii Lantei Odartey-Wellington, *CRTC & Broadcasting Regulation in Canada* (Thomson Canada Limited, Toronto: 2008) at p. 646.

16. PIAC/CAC/CWP/COSCO recognize that the scope of this application is limited to the transfer of effective control of Astral's licenses to Bell. However, PIAC/CAC/CWP/COSCO believe that the Commission must scrutinize this particular application in the larger context of Bell's previous transactions and the trends of increased and accelerating vertical integration and media concentration in the converged Canadian communications sector. Further, the Commission must consider the impact of this transaction on competition in the broadcasting distribution services market and the ability of competition to offer competitive prices and true flexibility in the packaging of these services for Canadian consumers.

17. PIAC/CAC/CWP/COSCO are concerned that if the proposed transaction is approved, the Commission will effectively allow an unprecedented level of vertical integration and media concentration, which would have negative repercussions on the Canadian media market. Namely, this proposed transaction reduces the diversity of voices in the private broadcasting element of the Canadian broadcasting system, threatens competition and will likely result in higher prices for Canadian consumers (both Bell's subscribers and its competitors' subscribers).

THE PROPOSED TRANSACTION THREATENS A HEALTHY DIVERSITY OF VOICES

18. The Commission has established quantitative and qualitative targets relating to media ownership and concentration in the regulatory policy on *Diversity of Voices*.[10] Canadian consumers expect a diversity of voices in the broadcasting system comprising a healthy community element, strong public broadcasters and a plurality of voices in the private element.[11]

19. PIAC/CAC/CWP/COSCO are concerned that Commission approval of the acquisition of Astral by Bell would reduce the diversity of voices in Canadian media. In particular, PIAC/CAC/CWP/COSCO believe that a combined Bell/Astral will negatively impact the plurality of voices in the private element by allowing the strongest remaining independent broadcaster to be absorbed by the largest vertically-integrated entity.

Diversity of Voices - Quantitative Targets

Control of the television market

20. In the *Diversity of Voices* decision, the Commission established the general rule that it would not approve applications for change in effective control, by one person, of a dominant position in the delivery of television services to Canadians that would impact

[10] Broadcasting Public Notice CRTC 2008-4, *Regulatory Policy : Diversity of Voices* (15 January 2008).
[11] Broadcasting Public Notice CRTC 2008-4, *Regulatory Policy : Diversity of Voices* (15 January 2008) at para. 11.

on the diversity of programming available to television audiences.[12] The Commission established the quantitative thresholds at which it would be concerned with diversity of voices:

- as a general rule, the Commission will not approve transactions that would result in the control by one person of more than 45% of total television audience share - including audiences to both discretionary and OTA services;
- the Commission will carefully examine transactions that would result in control by one person of between 35% and 45% of the total television audience share - including audiences to both discretionary and OTA services;
- barring other policy concerns, the Commission will process expeditiously transactions that would result in the control by one person of less than 35% of the total television audience share – including audiences to both discretionary and OTA services.

21. Bell submits that the total television audience share of a combined Bell and Astral would be 33.5% in the English-language market and 24.4% in the French-language market. Bell notes that the Commission did not specify a methodology to calculate total television audience share in its *Diversity of Voices* regulatory policy. Bell has calculated its "total television audience share" for all television services viewed by Canadians, which includes non-Canadian services.[13]

22. In PIAC/CAC/CWP/COSCO's view, there are issues with the methodology that Bell uses to calculate the "total television audience share" for the purposes of the *Diversity of Voices* regulatory policy on common ownership. First, "total television audience share" should be calculated based on Canadian services only. Second, Bell appears to exclude some proposed acquisitions from its calculations.

23. The 2011 CRTC Monitoring Report calculates the television audience share of Canadian services by ownership group in the English-language and French-language markets. Using the 2011 Communications Monitoring Report data, the combined television audience share of Canadian services of Bell/Astral would be 41.4% in the English-language market and 26.8% in the French-language market.[14] By comparison, the next largest competitor in the English-language market was Shaw with 21.1% of viewing share of Canadian services. In other words, Bell would own nearly twice the viewing share percentage of its next largest competitor in the English-language market. The largest competitor in the French-language market is Quebecor with 29.6% of viewing share of Canadian services.

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[12] Broadcasting Public Notice CRTC 2008-4, *Regulatory Policy : Diversity of Voices* (15 January 2008) at para. 87.
[13] Bell Application 2012-0516-2 (1 May 2012), Appendix 1, Supplemental Brief at paras. 37-38.
[14] See CRTC, 2011 Communications Monitoring Report, Table 4.3.9. Bell's viewing share in 2009-2010 was 35.5% in the English-language market; Astral's viewing share in 2009-2010 was 5.9% in the English-language market. Bell's viewing share in 2009-2010 was 8.9% in the French-language market; Astral's viewing share in 2009-2010 was 17.9% in the French-language market.

24. Notably, Astral's television audience share in Table 4.3.9 of the 2011 Communications Monitoring Report does not include the viewing share for Astral-owned Historia, Series+, Teletoon English, Teletoon French, Teletoon Retro English, Teletoon Retro French or HBO Canada into its calculations for Bell or Astral. Furthermore, PIAC/CAC/CWP/COSCO note that this table would not have included any viewing share attributable to the MLSE specialty services that were proposed to be transferred jointly to Bell and Rogers earlier this year. Inclusion of the television audience share of these Astral-owned services would increase Bell/Astral's combined television audience share of Canadian English-language market services beyond 41.4% to 44.89%, which is very close to the 45% threshold the Commission has set to deny proposed transactions.[15] This inclusion would boost Bell/Astral's combined television audience share of Canadian French-language market services beyond 29.6% to 35.04%, presenting a transaction that the Commission should carefully examine.[16] Note that these numbers do not include the television audience share for MLSE specialty services as they were not owned by BCE or Rogers in 2009-2010.

25. PIAC/CAC/CWP/COSCO also suggest that the use of television audience share as the sole metric to measure media concentration does not give the Commission the full picture of the impact of a proposed transaction on diversity of voices, as supported by the evidence of Dr. Dwayne Winseck with a more substantial critique of the utility of audience ratings as a proxy for market share in Appendix A. The Commission should use other quantitative measures in its examination of whether a combined Bell/Astral could exercise any market dominance or reduce the diversity of voices in broadcasting, such as the percentage of revenues.

26. PIAC/CAC/CWP/COSCO note that in order to formulate its quantitative target for *Diversity of Voices*, the Commission adapted the thresholds developed by the Competition Bureau to measure competition in relation to banking services. The Bureau's thresholds for bank's core services examines post-merger combined market share (in either personal or business transaction accounts).[17] PIAC/CAC/CWP/COSCO

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[15] The 44.89% calculation is based on adding the combined 2009-2010 Canadian English-language market viewing share of Bell/Astral (41.4%) with the combined 2009-2010 Canadian English-language market viewing share for the services listed in footnote 15 of Table 4.3.9 excluding Mystery (3.49%). If the footnote 15 services should only be counted in a manner that considers that they are equally shared between Astral and Shaw or Corus, then the total viewing share for Canadian services in the English-language for Bell/Astral would be 43.15%.

[16] The 35.04% calculation is based on adding the combined 2009-2010 Canadian French-language market viewing share of Bell/Astral (26.8%) with the combined 2009-2010 Canadian French-language market viewing share for the services listed in footnote 15 of Table 4.3.9 excluding Mystery (8.24%). If the footnote 15 services should only be counted in a manner that considers that they are equally shared between Astral and Shaw or Corus, then the total viewing share for Canadian services in the French-language for Bell/Astral would be 30.92%.

[17] While the test was enumerated in the *Diversity of Voices* regulatory policy, a 1998 document from the Competition Bureau shows that transaction account data was chosen because it was the core of the

submit that market share could be calculated on the basis of revenues. Based on the 2011 Communications Monitoring Report data on 2010 commercial television revenues by broadcaster, a combined Bell/Astral would own 40% of commercial television revenues, more than double the next largest competitor, Shaw, who reported earning 17% of commercial television revenues.[18]

27. Dr. Dwayne Winseck's Evidence paints a particularly troubling picture when revenues are considered. Bell/Astral's combined revenue share would capture 42.2% of the pay and specialty television services market. Moreover, the top four vertically integrated entities would control 88.4% of revenues for pay and specialty television.[19] Similarly, Bell/Astral's combined revenue share captures 34.97% of revenues in the total television universe (conventional, pay and specialty services combined). Again, the top four vertically integrated entities dominate the market with 76.27% of revenues in the total television universe.[20]

28. Notably, the Competition Bureau's suggested thresholds more nuanced than a simple calculation of market share. The Competition Bureau's 2003 document detailing how its Merger Enforcement Guidelines would apply to a bank merger suggest that the Bureau would not be concerned where:
    - the post-merger market share of the merged entity would be less than 35% in the market; or
    - the post-merger market share accounted for by the four largest firms in the market would be less than 65% and the post-merger market share of the merged entity would be less than 10%.[21]

    Applying the second consideration to the proposed Bell/Astral transaction, the post-market share accounted for by the four largest firms (Bell/Astral, Shaw, Rogers, Quebecor) in conventional television, pay and specialty television, and all television

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banking relationship for personal and business customers. (See for example, online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01601.html).

[18] CRTC, 2011 Communications Monitoring Report, Figure 4.1.3.

[19] See Appendix A, Evidence of Dr. Dwayne Winseck at Table 2. Dr. Winseck also notes the HHI score suggests a highly concentrated market for pay and specialty services.

[20] See Appendix A, Evidence of Dr. Dwayne Winseck at Table 3. He also notes a high HHI score.

[21] 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 under "Calculation of Market Shares and Concentration Levels" at para. 2. Paragraph 3 provides further guidance:

> "If the sum of the merging firms' pre-merger market shares is below 35%, there are likely to be sufficient products and suppliers to which consumers can turn in response to any attempt by the merged entity to exercise market power. <u>If 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.</u> If there is other information to suggest that competition is likely to be lessened or prevented substantially even though these thresholds are not surpassed, the Bureau will consider this information in its assessment. These <u>thresholds simply serve to identify mergers that are unlikely to have anti-competitive consequences from mergers that require more detailed analyses</u>, before any conclusions regarding likely competitive impact can be reached. In all cases, an assessment of market shares and concentration is only the starting point of the Bureau's analysis." [emphasis added]

assets exceeds 65%. Therefore, there are significant competition concerns with this transaction because of the level of concentration accounted for by the four largest firms in these broadcasting markets.

29. Finally, Bell suggests that the Astral acquisition will have “a very limited impact on BCE’s existing competitive position” for English-language television.[22] PIAC/CAC/CWP/COSCO disagree with Bell’s assertion and urge the Commission to resist Bell’s efforts to frame this transaction as a small incremental acquisition. It is because Bell has considerable pre-existing market power that any impact on competition resulting from this transaction, even if small, will be substantial and thus warrants Commission scrutiny.[23]

Diversity of Voices - Qualitative Factors

30. The Commission in the *Diversity of Voices* regulatory policy stated that it will be primarily concerned with preserving the diversity of programming voices in the market. The Commission enumerated six factors it would give consideration to:
    - the regulatory framework for OTA and discretionary services;
    - the impact of the transaction on the ownership and control of discretionary services offering news and public affairs programming;
    - the effectiveness of any safeguards to ensure fair access by programming services to BDUs in cases where a BDU controls such services;
    - the existence of effective terms of trade agreements between licensees and independent producers;
    - the availability and popularity of new media platforms as a source of television programming for Canadians; and
    - the views, if any, expressed by the Competition Bureau.[24]

The “big four” vertically integrated players control a substantial proportion of the media market

31. The “big four” vertically integrated players are Bell, Rogers, Quebecor and Shaw. Together, before the Bell/Rogers/MLSE and Bell/Astral proposed transaction, they control revenues for:
    - 86% of cable and satellite distribution;
    - 70% of wireless revenues;
    - 63% of the wired telephone market;
    - 54% of internet service provider revenues;
    - 42% of radio;

[22] Bell Application 2012-0516-2, Bell Reply 4 to Commission request for information, (31 May 2012), answer to Q14c.
[23] PIAC/CAC/CWP/COSCO note that the Competition Bureau Merger Enforcement Guidelines state that where merging firms have considerable pre-existing market power, smaller impacts on competition resulting from the proposed transaction, will meet the test of being substantial. See Competition Bureau, Merger Enforcement Guidelines (October 2011) at para. 2.14.
[24] Broadcasting Public Notice CRTC 2008-4, *Regulatory Policy : Diversity of Voices* (15 January 2008) at para. 89.

- 40% of the television universe (conventional, pay and specialty television services);
- 19% of newspaper and magazine markets;
- 61% of total revenues from all of the above media sectors combined.[25]

32. If the Bell/Astral transaction is approved, these "big 4" VI players will control revenues for:
    - 65.5% of conventional television;
    - 88.4% of pay and specialty television services;
    - 76.27% of the television universe (conventional, pay and specialty television services);
    - 50.7% of radio.[26]

33. Furthermore, a combined Bell/Astral alone would control revenues in:
    - 42.2% of the pay and specialty television market;
    - 35.1% of the television universe (conventional, pay and specialty services);
    - 27.7% of radio, which would catapult Bell from its ranking as fifth to top earner for radio revenues.

34. PIAC/CAC/CWP/COSCO are concerned by the sheer level of control wielded by the four vertically integrated entities together and Bell/Astral alone in the converged market. Such concentration vested in the hands of a few powerful vertically integrated entities suggests that competition and market forces alone may not be sufficient to work to the welfare of Canadian consumers, despite the Commission's move to relax the regulatory framework for BDUs and reliance on competition.

Bell's acquisition of Astral's radio stations reduces the diversity of voices in news and public affairs programming in French-language radio

35. Bell submits that the Astral television broadcast assets do not include any discretionary services that offer news and public affairs programming in the English-language television sector. Furthermore, Bell states that the addition of Astral's French-language services to Bell Media will not affect the diversity of news programming in the French-language television market because neither Bell Media nor Astral has any OTA television stations operating in the French-language and none of the pay or specialty services operated by Astral in the French-language offers news or public affairs programming.[27]

36. However, Bell is conveniently silent regarding the fact that it would be acquiring radio stations from Astral that offer news and public affairs programming. Astral's radio

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[25] See evidence of Dr. Dwayne Winseck, Appendix A. Note that Shaw does not control any wireless revenues, meaning that 70% of wireless revenues are controlled by three firms.
[26] See evidence of Dr. Dwayne Winseck, Appendix A. Note that Quebecor does not control any radio revenues.
[27] Bell Application 2012-0516-2 (1 May 2012), Appendix 1, Supplemental Brief at paras 56 and 57.

newsrooms would thus be absorbed by Bell's radio newsrooms, which could negatively impact the diversity of news and information programming for radio.

37. Dr. Winseck in his evidence highlights the concern that while the Bell/Astral transaction does not trigger any quantitative concerns for radio stations, the transaction would increase concentration in the radio sector which is one of the most diverse media sectors in Canada.[28]

Bell does not need to be protected from competition with "unregulated foreign media players"

38. One of the qualitative factors to be contemplated by the Commission in the *Diversity of Voices* analysis is the availability and popularity of new media platforms as a source of television programming for Canadians. Bell in its application suggests that the approval of the proposed transaction will allow Canadian market participants to better compete with integrated global players in the long term. Bell states: "Canadian services face increasing competition from 'unregulated foreign media players' in the English-language TV market and thus vertical integration is needed to better compete with integrated global players."[29]

39. The "unregulated foreign media players" Bell refers to are OTT providers such as Netflix, Apple and Google. The share of these OTT providers in almost every media market in which the likes of Bell, Shaw, Rogers and Quebecor are significant is marginal. OTT providers are not a clear substitute for Canadian BDU services or Canadian broadcasting services.

40. Indeed, Netflix defines itself as a complement to regulated broadcasting services rather than as a competitor. These services will likely remain complementary, especially without premium live content, such as the valuable sports programming that Bell and Rogers own.

41. The most recent CRTC report on convergence noted that "[t]he impact of foreign OTT providers who have recently entered Canada has yet to be determined. While it is clear that Canadians are adopting these services, the extent to which Canadians are substituting them for the broadcasting and OTT services of traditional Canadian players is not yet known" [footnotes omitted].[30]

42. While it may be true that subscription TV services face emerging competition from OTT services, Bell's estimation of the threat of OTT services as justification for its own

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[28] See Appendix A, Evidence of Dr. Dwayne Winseck.
[29] Bell Application 2012-0516-2, Bell Reply 4 to Commission request for information, (31 May 2012) at Q14b. See also Bell Application 2012-0516-2 (1 May 2012), Appendix 1, Supplemental Brief at paras. 8, 25, 66-69.
[30] CRTC, "Navigating Convergence II: Charting Canadian Communications Change and Regulatory Implications" (August 2011) at p. 42.

continued growth in order to compete with these services is overstated. PricewaterhouseCoopers forecasted that BDUs will continue to appeal to households who want wide options or whose preferred programming and channels are not available on OTT services.[31]

43. In fact, the Commission reported in its fact-finding exercise on the over-the-top programming services that there was no evidence to demonstrate that the presence of and greater consumption of OTT content have created a negative impact on the ability of the system to achieve the policy objectives of the *Broadcasting Act* or that there are structural impediments to a competitive response by licensed undertakings to the activities of OTT providers.[32] The Commission issued a follow-up letter dated 16 April 2012 indicating that over-the-top programming services have not had an impact sufficient to warrant another fact-finding exercise.[33]

44. In fact, Bell and other vertically integrated entities have a significant competitive advantage against OTT services through their operation of internet access services. As internet access providers, these companies have set data caps limiting the amount of data a subscriber can download each month. These retail packages restrict the ability of OTT services to compete directly with BDU television services, assuming they offer the same content. The United States Justice Department is conducting a wide-ranging antitrust investigation into whether cable companies are acting improperly to quash nascent competition from online video.[34]

45. Canadian consumers who are fully substituting OTT services for BDU subscriptions are likely seeking economical alternatives and interested in only the smaller set of channels available, reinforcing PIAC/CAC/CWP/COSCO’s position (to be detailed later in this intervention) that consumers want a “skinny” affordable basic service for television services, on top of which they can exercise choice to subscribe to only the services they want to enjoy.

46. The Commission should question Bell’s suggestion that it needs to get bigger to compete with foreign players. This is an argument that PIAC/CAC/CWP/COSCO have seen incumbents argue in the telecommunications sector.[35] Notably, Canada has the

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[31] CRTC, “Navigating Convergence II: Charting Canadian Communications Change and Regulatory Implications” (August 2011) at p. 55.
[32] CRTC, "Results of the fact-finding exercise on the over-the-top programming services" (October 2011). See Broadcasting and Telecom Notice of Consultation CRTC 2011-344, *Fact-finding exercise on the over-the-top programming services in the Canadian broadcasting system* (25 May 2011).
[33] Commission letter to the distribution list of Broadcasting and Telecom Notice of Consultation CRTC 2011-344, (16 April 2012).
[34] Wall Street Journal, "U.S. Probes Cable for Online-Video Limits", (13 June 2012).
[35] See for example, “A Canadian Success Story at Risk” by Stentor (1995). In this report, Stentor stated that “the survival of a domestic telecommunications industry in Canada depends on progressive government and regulatory policy”, arguing that Canada’s major telephone companies compete for customers against large multinational companies in a worldwide market. Stentor argued for “a forward-looking regulatory and policy environment that brings confidence to shareholders and potential investors”,

eighth largest media market in the world and there is no evidence that large vertically integrated incumbents such as Bell are in need of special protection.[36]

The Competition Bureau has not yet cleared the proposed transaction and may be investigating other instances of anti-competitive behaviour by Bell Media

47. Finally, Bell states that it has made a full submission to the Competition Bureau that the transaction is not likely to prevent or lessen competition substantially in the market and thus there is no reason for the CRTC to exercise its jurisdiction to address competition policy concerns.[37]

48. In a "no-action" letter clearing the Bell/Rogers transaction acquiring MLSE, the Bureau noted that it had "heard a number of serious concerns from market participants about the effect that incremental increasing concentration and vertical integration in the broadcasting industry is said to be having on consumers, as well as on non-vertically integrated broadcasting distribution and programming undertakings."[38]

49. The Bureau has not yet cleared the proposed acquisition of Astral, and as of 7 August 2012, the Bureau was still reviewing the transaction.[39] The Commissioner of Competition stated that the Bureau is "aware that a number of serious concerns have been expressed by market participants related to the effect that increased concentration and vertical integration in the broadcasting industry are said to be having on consumers and other television programming providers" and confirmed that the Bureau is actively reviewing these concerns.

50. The Bureau also appears to be investigating Bell Media for possible anti-competitive behaviour in contravention of the *Competition Act*. In a 19 July 2012 application filed with the Federal Court, the Commissioner of Competition stated that "[a]s the owner of significant and high-demand television content, Bell itself has the ability to restrict the manner in which competing BDUs access and distribute Bell-owned content." The Commissioner expressed concern that "Bell is imposing, or seeking to impose, unlawful

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claiming that the weight of federal regulation from an era when competition did not exist limited the telephone companies' abilities to respond to global pressures and domestic competition. Stentor suggested that rate increases were needed to cover their costs so that they could compete with large global players.

[36] See Appendix A, Evidence of Dr. Dwayne Winseck.

[37] Bell Application 2012-0516-2 (1 May 2012), Appendix 1, Supplemental Brief at para. 70.

[38] Competition Bureau, "Competition Bureau Statement on Bell and Rogers' Acquisition of Maple Leaf Sports & Entertainment" (2 May 2012), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03464.html.

[39] See Competition Bureau, "Statement from the Commissioner of Competition Regarding Concerns in the Proposed Acquisition of Astral by BCE Inc." (7 August 2012), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03488.html.

restrictions on computing BDUs' ability to access and distribute Bell-owned content, contrary to Part VIII of the Act."[40]

51. The Bureau's lengthy and ongoing examination of the proposed transaction, paired with its investigation of Bell Media for anti-competitive behaviour suggest there are significant competition policy concerns that the Commission needs to consider and address in its parallel approval process.

THE TREND TO INCREASED VERTICAL INTEGRATION THREATENS CONSUMERS' ACCESS AND AFFORDABILITY FOR BROADCASTING SERVICES

52. As stated above, PIAC/CAC/CWP/COSCO believe that the proposed acquisition of Astral by Bell must be scrutinized in the larger context of Bell's previous transactions and the trends of increased vertical integration and media concentration in the Canadian broadcasting and telecommunications sectors. Namely, increasing and accelerating vertical integration compounds the impact of any threat to the diversity of voices in Canadian broadcasting.

Vertical Integration Benefits Shareholders, not Consumers

53. PIAC/CAC/CWP/COSCO are very concerned by the accelerating trend of increased vertical integration and media concentration in Canadian broadcasting services. Vertically integrated media conglomerates have argued that vertical integration would lead to benefits, such as cost savings and increased efficiencies.[41] The Commission has expressed the view that the benefits of vertical integration would enable Canadians to have access to programming that fulfills the objectives set out in the *Broadcasting Act*.[42] Indeed, Bell itself suggested in the VI proceeding that consumers would benefit from vertical integration:

> We find that there is a strong presumption, both on theoretical and empirical grounds, that <u>vertical integration is beneficial for consumers</u>. … The organization of transactions within a firm means that vertical integration is ubiquitous and this gives considerable further support to the presumption that it is efficiency enhancing. … The efficiency advantages we highlight associated with vertical integration in

[40] The Wire Report, "Competition Bureau investigating Bell Media carriage agreements: court documents" (1 August 2012). See *Commissioner of Competition v. Bragg Communications et al.*, Notice of Application, Court File No. T-1409-12 (19 July 2012) at paras. 1-2.

[41] Cost savings and efficiencies could be gained from reduction of input costs or elimination over functional overlaps. Some analysts have suggested that a combined Bell/Astral could have synergy opportunities based on the amount of duplication and integration between the two companies. See the Globe & Mail, "Bell-Astral deal likely to spur job cuts", (21 March 2012) citing UBS analyst Phillip Huang.

[42] Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration* (21 September 2011), ("VI Policy") at para. 7.

> broadcasting arise from lower costs, improvements in product quality, and introduction of new products.[43] [emphasis added]

54. However, PIAC/CAC/CWP/COSCO note that there is little if any evidence that the trend of the past decade toward greater concentration and vertical integration has delivered product quality or innovation benefits to Canadian consumers of broadcasting services. Moreover, PIAC/CAC/CWP/COSCO are concerned that vertical integration has not improved affordability of the rates charged to Canadian consumers for television services.

55. Any efficiencies that have been gained from vertical integration have not flowed back to Canadian consumers, either directly through price reductions for subscribers of vertically integrated distributors or indirectly through increased competition in the Canadian market. Bell has demonstrated consistently healthy revenues and profits, despite the economic recession. Any efficiencies gained from vertical integration appear to have benefited Bell and Bell's shareholders to a greater extent than its subscribers. Over the past decade, Bell has reported high yield for shareholders.[44]

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[43] See Bell Canada intervention in Broadcasting Notice of Consultation CRTC 2010-783, *Regulatory framework relating to vertical integration*, (filed 27 April 2011) at para. 23 citing expert evidence commissioned for the hearing by Jeffrey Church, *The Competitive Effects of Vertical Integration: Content and New Distribution Platforms in Canada*, (April 2011) at para. 6.

[44] The following statement by Thomas C. O'Neill, Chair of the BCE Inc. Board in "Letter to Shareholders" in *BCE Inc. 2011 Annual Report* (2012), online: http://www.bce.ca/assets/Uploads/Documents/archivesAnnualReport/BCE/2011/BCEAR2011EN.pdf at p. 5 exemplifies management's commitment to directing benefits to shareholders, not necessarily to customers:

> We delivered on our commitment to provide ongoing returns to you, solidifying our track record as a leading Canadian dividend growth company:
>
> • In 2011, BCE announced 2 increases in the annual dividend payable to common shareholders – consistent with our target payout ratio of 65% to 75% of Adjusted EPS – for a total of 7 dividend increases in the last three years. This represents 49% dividend growth since the fourth quarter of 2008; in the same period, BCE's total return to shareholders reached 141%.

Table 1: Bell Canada Enterprises Inc. annual dividends declared and yield

Bell Canada Enterprises Inc. Annual Revenue		
Year	**Total Dividends Declared on Common Shares ($)**	**Common Dividend Yield (%)**
2000	849,000,000	2.4%
2001	969,000,000	3.3%
2002	1,031,000,000	3.8%
2003	1,105,000,000	3.9%
2004	1,110,000,000	4.1%
2005	1,222,000,000	4.6%
2006	1,132,000,000	4.6%
2007	1,172,000,000	3.6%
2008	588,000,000	2.9%
2009	1,218,000,000	5.4%
2010	1,352,000,000	5.4%*
2011	1,579,000,000	5.5%*

Sources: BCE Inc. Annual Reports, 2000-2011; 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.

56. PIAC/CAC/CWP/COSCO recommend that any evidence associated with efficiencies or synergies gained from the Bell/Astral transaction should be questioned. Unless there is a requirement to do so, these gains will not be passed on to Canadian consumers or to the broadcasting system. The Commission should not confuse potential efficiencies with increased or effective competition that will benefit consumers. Better results for shareholders of private broadcasters and BDUs may not bring a better broadcasting system.

Consumers continue to pay increasing BDU prices

57. Canada has a high penetration of BDU subscriptions, with 89% of Canadians in 2011 subscribing to television services.[45] The BDU industry continues to report significant profits with annual BDU programming revenues per subscriber per month continue to increase steadily.[46]

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[45] CRTC, "Navigating Convergence II: Charting Canadian Communications Change and Regulatory Implications" (August 2011) at p. 53.

[46] 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 2: Annual average BDU programming revenues per subscriber per month

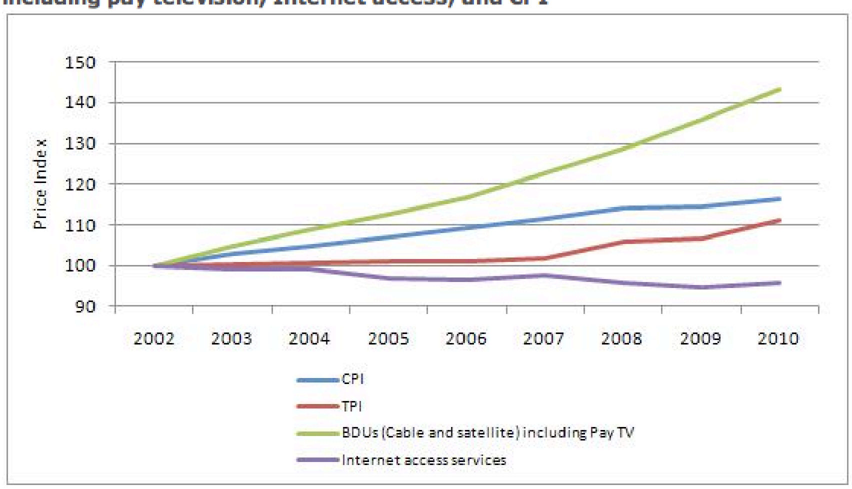
Year	BDU programming revenues per subscriber per month*	% increase from previous year
2010	$59.73/mo	6.3%
2009	$56.18/mo	5.3%
2008	$53.36/mo	7.2%
2007	$49.79/mo	7.0%
2006	$46.56/mo	5.3%

Source: CRTC, 2011 Communications Monitoring Report, Table 4.4.1.

* calculated by averaging total BDU revenues by total number of subscribers per month

58. Competition theory suggests that retail prices should decrease over time with efficiency gains, innovation and new technology. Since the elimination of retail rate regulation for television services, there has been no consistent collection of historical retail price data for television services. Nonetheless, since 2002, BDU pricing has been on an upward trajectory in comparison with the overall consumer price index (CPI), increasing at a significantly higher rate than other communications services, such as telephone and internet access services (see Figure 32 of the Commission's "Navigation Convergence II" report, reproduced below).[47]

Figure 32 Price indices – telephone price index (TPI), BDU (cable and satellite), including pay television, Internet access, and CPI[163]



Source: Statistics Canada

[47] CRTC, "Navigating Convergence II: Charting Canadian Communications Change and Regulatory Implications" (2011) at p. 64-65, see Figure 32 reproduced here. Figure 32 notes:

> The TPI reflects the price changes experienced by a household for a basket of telephone services. The basket of telephone services reflects a weighted-average of consumer expenditures on basic local service, other local services (such as options and features), and long distance, installation and repair services. However, the TPI does not include wireless or Internet service expenditures. The BDU price index reflects the price changes experienced by a household for a basket of cable television services. The basket includes both "basic" and "extended" cable services. Basic cable service is the minimum service to which all customers must subscribe. Extended service is the most popular package of additional channels. The index does not account for bundling discounts.

59. PIAC/CAC/CWP/COSCO's initial compilation of retail prices filed with the Commission (see Table 3 below) also suggests that retail prices for packaging tiers continue to increase for television services.

Table 3: Digital television package tiers offered by Canadian BDUs - 2009 and 2012

BDU	Year 2009		Year 2012	
BELL (DTH)	Tier 1	$35	Tier 1	$44.80
	Tier 2	$59	Tier 2	$74.80
	Tier 3	$80	Tier 3	$109.80
	Tier 4	$95		
	Tier 5	$69		
	Tier 6	$90		
	Tier 7	$105		
COGECO	Tier 1	$31.98	Tier 1	$32.47
	Tier 2	$51.99	Tier 2	$51.76
	Tier 3	$62.99	Tier 3	$57.85
	Tier 4	$72.99	Tier 4	$69.01
			Tier 5	$80.18
ROGERS	Tier 1	$29.99	Tier 1	$38.04
	Tier 2	$46.48	Tier 2	$57.84
	Tier 3	$46.48	Tier 3	$72.04
	Tier 4	$46.48	Tier 4	$82.14
	Tier 5	$51.48		
	Tier 6	$56.48		
SHAW CABLE	Tier 1	$33.95	Tier 1	$34.90
	Tier 2	$58.95	Tier 2	$69.90
	Tier 3	$74.95	Tier 3	$149.90
SHAW DIRECT	Tier 1	$37.99	Tier 1	$44.65
	Tier 2	$48.99	Tier 2	$56.83
	Tier 3	$51.99	Tier 3	$62.82
	Tier 4	$60.99	Tier 4	$69.01
	Tier 5	$67.99	Tier 5	$76.11
	Tier 6	$73.99	Tier 6	$82.20
	Tier 7	$82.99	Tier 7	$91.34
VIDÉOTRON	Tier 1	$17.98	Tier 1	$23.32
	Tier 2	$25.99	Tier 2	$26.35
	Tier 3	$31.99	Tier 3	$35.50
	Tier 4	$37.99	Tier 4	$48.70
	Tier 5	$44.99	Tier 5	$48.70
	Tier 6	$74.99	Tier 6	$53.77
			Tier 7	$63.92
			Tier 8	$84.22

Sources:
2009 Responses to Commission letter issued in 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

Note: 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.

60. In PIAC/CAC/CWP/COSCO's view, where prices set by the market limit access by failing to deliver affordable or desirable service, the implications reverberate beyond the realm

of taste and choice. Moreover, the Commission has not conducted any affordability studies for broadcasting services in the last decade. The Commission must be attuned to the significance of fostering a digital divide and the disproportionate impact of BDU rate increases on groups of Canadians with lower or fixed incomes.

Consumers expect flexibility in packaging of BDU services but they aren't getting it

61. Many consumers believe that the rates for cable television services are unreasonably high and are not satisfied with their ability to pick and pay for cable television services that they want.[48] In past proceedings, the Commission has heard from many Canadian consumers expressing the view that there is a lack of choice in programming packages and indicating that BDU packages do not offer the pick-and-pay flexibility that they want.[49]

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[48] See survey jointly sponsored by PIAC, Bell Canada, and TELUS for the Telecommunications Policy Review Panel (2005). 44% of consumers found cable television services available at "unreasonably high prices". Only 10% of consumers stated that cable television services are available at "good prices", compared to 37% of consumers who found cable television service available at "acceptable prices". Notably, cable service provider scores were significantly lower than their telecom counterparts. 50% of consumers said that they were satisfied with their ability to pick and pay for cable television services they want, compared to 41% of consumers who were dissatisfied.

[49] See for example comments received by the Commission in Broadcasting Notice of Consultation CRTC 2009-614, summarized in "The implications and advisability of implementing a compensation regime for the value of local television signals", CRTC report prepared pursuant to s. 15 of the *Broadcasting Act* (23 March 2010):

> "Other participants said they had no choice but to accept a new fee. In their view, there is no real choice available to them because there is no viable alternative to the services that cable and satellite subscriptions provide, both in terms of access to local programming and to a variety of other content. They expressed frustration about their inability to exercise choice when paying for program packages, especially if asked to pay more for what they currently receive." (pp. 12-13) [emphasis added]
>
> "However, consumers expressed much more interest in being given the opportunity to select and pay for only certain programming services that are currently part of basic, along with other services outside the basic service." (p. 19) [emphasis added]
>
> "The majority of consumers indicated that the current packages offered by BDUs often include a number of services that do not interest them. Since many services are only offered exclusively as part of packages, subscribers submitted that they are compelled to pay for services they do not want in order to receive the services they do. Consumers want to be able to select and pay for only those services they wish to receive." (p. 19) [emphasis added]

Notably, the Morin minority report argued that consumers wanted the ability to choose a skinny basic service:

> "And what exactly did consumers complain about at the hearings? Was anyone listening when they talked about the lack of choices, the excessive cost of basic services, the packages to which they had to subscribe to receive THE discretionary service in which they were interested? What are consumers constantly complaining about to the Commission? The same thing. It was true yesterday and it is still true today. Over half the 7,000 complaints received last year by the Commission involved subscriber billing by cable and satellite services." (Minority Report, p. viii) [emphasis added]
>
> "And to close this aspect of the report, I would like to point out that what I heard during the hearings – and in this I disagree with the Commission's perception – was consumers that want, not a new agency to complain to, but rather more choice and more options, with a skinny basic service to boot. In this sense, a skinny basic service by the BDUs would have met their expectations better than the creation of another Complaints Commissioner similar to the one that now exists for the telephone industry. Let's not put the cart before the horse. The real problem is the cost of accessing the basic service and not the body that will handle consumers' complaints." (Minority Report, p. x) [emphasis added]

62. As PIAC has noted in previous proceedings, the price increases for basic service reflect a cramming of additional services into basic service, considerably distorting the concept. If affordability and connection to BDU networks are broadcasting priorities, these numbers are a cause for concern, particularly as they appear during a time during which the Commission expects more competition. The high levels of concentration and lack of competition among major BDUs subvert the concept of basic service. PIAC/CAC/CWP/COSCO attach Appendix C 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.

63. In the VI Policy, the Commission stated it “expects VI entities to make significant strides to offer consumers more choice in the near future with respect to their BDU offerings.”[50] The Commission also directed VI entities to report by 1 April 2012 on how they provided consumers with more choice and flexibility in the services they can subscribe to while at the same time providing them with the ability to only pay for the services they want to watch, such as a pick and pay model.

64. Bell changed its retail packaging offerings for Bell Fibe TV in Ontario in February 2012. Bell reduced the number of tiers available for consumers to choose its services, allowing consumers only the choice between a “Good” package (147 services for $44.43), a “Better” package (235 services for $73.99) or a “Best” package (320 services for $108.47).[51] Most notably, Bell appears to have eliminated consumers’ ability to pick and pay for selected channels à la carte, which would represent a significant move away from the Commission’s expressed hope that consumers would have the ability to “only pay for the services [consumers] want to watch”. Not only does this retail packaging change increase the price of Bell’s basic television services, but the PIAC/CAC/CWP/COSCO submit that this change reduced consumers’ ability to choose that requires them to pay more for the services that they want to watch by eliminating à la carte offerings.

65. Bell is on the record in strong opposition of the consumer choice model, stating at the expedited hearing against the Canadian Independent Distributors Group that it is "dreadfully fearful of a penetration decline that would wipe out revenues that are necessary to support the obligations of these [specialty] services” and that “[c]hoice and flexibility shouldn't come at the expense of the regulated system for 30 or so services

[50] Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration* (21 September 2011) at para. 32.
[51] These prices are non-promotional, non-bundled prices. PIAC/CAC/CWP/COSCO attach Bell’s promotional materials explaining Fibe TV packaging options in Ontario in Appendix B, along with a historical account of Bell’s retail pricing and packaging for television services.

which are at the very heart of the specialty system".[52] In other words, Bell does not support increased consumer choice and flexibility if it means lower revenues for its specialty services.

66. PIAC/CAC/CWP/COSCO believe that Bell has not made and has no intention of making significant strides to offer consumers more choice for BDU offerings, despite the Commission's stated expectations in the regulatory policy on *Vertical Integration*.

67. Notably, the Commission's "Navigating Convergence II" report suggested that the rollout of IPTV services provided by the telephone companies would introduce "more competition that may put downward pressure on BDU pricing."[53] Bell's most recent packaging options and pricing for its IPTV services does not confirm this prediction.

Competition is not sufficient to ensure that BDU prices are affordable

68. In previous proceedings considering whether there is a need for regulated basic service and skinny basic service, the Commission found that re-regulation of basic service rates and regulated limits on the size and structure of basic service would be contrary to its approach of relying on market forces wherever possible: "[t]he Commission considers that BDU competition will be sufficient to ensure that rates are affordable."[54]

69. A study by the National Regulatory Research Institute summarizes the necessity of looking further than the mere existence of competition as follows:

> Having a competitive industry means far more than simply removing the barriers that impede the entrance of firms into the market. Indeed, it means far more than having a few competitors. Unless there is a substantial number of competitors with significant market shares, unless there is no single firm or group of a few firms with an overwhelming percentage of the market, large firms in the market will continue to exercise market power: the ability to raise the price. Indeed, many telecommunications markets that were open to competition as much as two decades ago continue to show clear evidence of market power: price increases in the face of declining costs, price leadership and high prices and profits.[55]

70. Consumers expect greater choice, flexibility and competitive pricing. The Commission has previously stated the objective of "ensuring that consumers continue to benefit from

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[52] Transcript of proceedings, Expedited procedure for resolving a competitive issue – Broadcasting application (22 March 2011), see Mr. Crull at line 302 and Mr. Bibic at line 309.
[53] CRTC, "Navigating Convergence II: Charting Canadian Communications Change and Regulatory Implications" (August 2011) at p. 65.
[54] Broadcasting Public Notice CRTC 2008-100, *Regulatory policy: Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* (30 October 2008) at para. 39.
[55] National Regulatory Research Institute, *Determining When Competition is "Workable"*, handbook for State Commissions making assessments required by the *Telecommunications Act 1996*, July 1996.

a wide choice of programming in a broadcasting system where programming and distribution have become increasingly integrated" and required the vertically integrated media companies to report on how they are providing consumer with more choice and flexibility.[56]

71. Instead, vertically integrated BDUs argue that there is greater "value" for consumers in television offerings and an increased number of television services offered. Consumers only truly benefit from this "value" if they can exercise real choice by paying only for services that they want. It is in this spirit that consumer advocates have pushed for affordable basic service for television that comprises only the services that Canadians must have access to. Consumers themselves have also expressed a desire for a regulated basic television service.[57] Consumer "choice", therefore, is best exercised on top of an affordable minimum basic service by adding only the services they want to enjoy, such as "à la carte" offerings or theme packs. If this granular level of consumer choice is not respected, there is a risk that consumers will pay too much for television services or will buy services that do not meet their needs.[58] The United States Federal Communications Commission estimated that the average cable customer would save 13% with an à la carte model.[59] Canadian consumers have consistently expressed concern that there is too little choice and competition for television services.[60]

72. Since the deregulation of basic service rates in 1997, basic service subscription rates are established through negotiation between parties. VI media companies, however, have the incentive to package the broadcasting services they own in a manner that guarantees wide distribution and maximum revenues. Thus, VI companies have the

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[56] Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration* (21 September 2011).

[57] See survey jointly sponsored by PIAC, Bell Canada, and TELUS for the Telecommunications Policy Review Panel (2005) in which 51% of consumers stated that cable television services should be considered basic and be subject to price limits set by the government. See also evidence filed by CBC/Radio-Canada for Broadcasting Notice of Public Hearing CRTC 2007-10 in Appendix D. CBC/Radio-Canada commissioned a survey by TNS Canadian Facts demonstrating that almost 90% of Canadians currently subscribing to a BDU service support the availability of a small basic package and 72% expressed an interest in subscribing.

[58] Consumers Union, the non-profit publisher of *Consumer Reports* in the United States suggested that the cable market dominance in the United States cost consumers an estimated $4.5 billion to $6 billion per year *more* than if there was real competition. See testimony of Gene Kimmelman on behalf of Consumers Union and Consumer Federation of America before the Senate Committee on Commerce, Science and Transportation on Escalating Cable Rates: Causes and Solutions (25 March 2004).

[59] Federal Communications Commission, *Further Report On the Packaging and Sale of Video Programming Services To the Public* (2006), online: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf at p. 9.

[60] See survey jointly sponsored by PIAC, Bell Canada, and TELUS for the Telecommunications Policy Review Panel (2005) in which only 36% of consumers felt they have an adequate choice of competitors from which they can buy cable television services. 58% of consumers felt that they did not have enough choice for cable television services. More recently, see TELUS, Appendix to submissions to Broadcasting Notice of Consultation CRTC 2010-783, "Research Results Omnibus Survey" conducted by Harris Decima in April 2011, in which 24% of consumers strongly agreed and 37% of consumers agreed with the statement that "[t]here is too little choice and competition as it is, when it comes to TV services".

incentive to package content so that consumers must purchase content they do not want in order to access the content they want. VI companies not only dominate the BDU market and set market rates for television services, but they also negotiate the rates and terms for broadcasting services with their competitors. They thus have the ability to restrict their competitors' ability to compete with VI BDU retail offerings by increasing their competitors' input costs or restricting their ability to offer competitive retail packaging that differs from VI BDUs.

73. Furthermore, PIAC/CAC/CWP/COSCO's cursory scan of BDU basic service rates and packages suggests that basic service rates continue to increase, and that the average monthly rate for basic service has doubled since 1997. Furthermore, basic service continues to be inflated with more services than consumers truly need as part of "basic".

Table 4: 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 5: Basic service monthly rates, 2007

Cable Distributor	Basic package price
Rogers	$34.97 to $42.96
Shaw	$29.50
Mountain Cablevision	$47.95
Cogeco	$25.50
Videotron	$25.28

Source: PIAC market scan for Broadcasting Notice of Public Hearing CRTC 2007-10

Table 6: Basic service monthly rates, 2012

BDU	Basic Service Price
Bell (DTH)	$35.86 to $44.80
Bell Fibe TV	$44.43
Cogeco	$32.47
Rogers	$38.04
Shaw Cable	$34.90
Shaw Direct	$44.65
Telus Optik TV (IPTV)	$31.00

Source: PIAC market scan
See also Appendix C for PIAC's market scan comparing basic service package prices and number of included services, and level of choice for add-ons allowed at the basic service level for six local markets.

74. The increases do not appear to be reflective of the discipline of competition that was expected with the cable forbearance process. The price increases for basic service also reflect the practice of cramming additional services into basic service, considerably distorting the concept. This is hardly in line with the Commission's stated expectations that BDU competition would ensure affordability, choice and flexibility for consumers of television services.

75. There are few international comparative price studies for basic television service. Ofcom's 2011 International Communications Market Report compared TV pricing for basic pay TV, which Ofcom defined as the minimum price to purchase a pay-TV package that includes channels not available over free-to-air TV.[61] Ofcom found that the monthly cost for basic pay-TV in the UK was £14 in 2010 and 2011, compared to £11 and £12 in France in 2010 and 2011, £17 and £19 in Germany in 2010 and 2011 and £22 in the United States in 2010 and 2011.

76. The Commission must closely scrutinize the efforts of Bell as a large vertically integrated entity to provide consumers with true choice and flexibility that they expect for television service packages. The Commission must also closely scrutinize the ability and incentives of Bell, as a dominant provider of popular and valuable content, to increase wholesale and retail prices of its services to the detriment of its competitors and consumers.

77. Allowing greater media concentration and vertical integration has not resulted in benefits for Canadian consumers in terms of lower retail prices for regulated broadcasting services, or dynamic competition in retail offerings that provide consumers with lower prices, more choice, or greater flexibility to subscribe only to the services that they want. Thus, PIAC/CAC/CWP/COSCO oppose any further media concentration and vertical integration.

Increased vertical integration undermines competition and threatens independent distributors

78. Bell's continued growth as a leading vertically integrated entity in Canada lessens competition in the broadcasting services sector. BDU competitors must negotiate with Bell in order to access content. The acquisition of Astral gives Bell increased ownership of valuable broadcasting content, which should concern the Commission given the disproportionate market power of vertically integrated Bell in comparison to smaller, non-vertically integrated distributors.

79. 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. The Commission must be vigilant against giving a large VI entity like Bell ownership of even more valuable broadcasting content that it will likely subject to increased rates and anti-competitive terms.

80. Bell has the unilateral ability to increase wholesale prices for television services since the Commission eliminated regulated wholesale fees for genres opened to competition

[61] Ofcom, International Monitoring Report (2011) at p. 91. Ofcom compared the lowest tariff available for the pay-TV component from any of the three largest operators by market share in each country in July 2010 and July 2011, PPP adjusted.

such as sports and news.[62] For example, TSN's regulated rates for carriage on basic service was reportedly $1.07 per subscriber per month and the industry has speculated that with rate deregulation, Bell will increase TSN rates to $4 or $5 per subscriber per month.[63] When Bell increases the wholesale rates for its pay and specialty television services, this will raise the costs of their competitors, which will then be passed on in the form of price increases to their competitors' subscribers. Bell's competitors who are not vertically integrated have no content to leverage in commercial negotiations with Bell to force price discipline in the market, and must pay the prices that Bell demands.

81. It has been reported that the largest portion of Bell's annual content acquisition costs went to Astral.[64] This gives Bell an increased ability to control the major costs of its competitors, and increases the disadvantage of independent distributors who own no content to leverage in commercial negotiations with Bell over access rates and terms.

82. Vertically integrated entities generally, and specifically Bell, 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. In other words, Bell and other VI entities have the opportunity to control its distributor competitors in the market by placing restraints on packaging and rates, harming competition and the operation of market forces.

83. Commercial terms that require Bell's competitors to guarantee carriage of Bell's premium discretionary services on basic packages will drive up the retail price of television services and restrict their competitors' ability to compete with Bell on pricing or choice offerings. The following comment made by an independent distributor is troubling:

> Category C services no longer have access rights. Yet both Bell and Rogers insist on high minimum penetration guarantees as prerequisites for carriage of RDS, TSN or Sportsnet. In fact, in negotiations with CIDG, Bell insisted that BDUs were not allowed to repackage RDS and TSN at end of their expired contracts. If a BDU had these services on Basic, as many did, this results in extremely substantial increases in wholesale fees paid to Bell. Indeed, <u>the magnitude of the increases, will likely force BDUs to increase the price of their Basic service and customers will have no</u>

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[62] Broadcasting Public Notice CRTC 2008-100, *Regulatory policy: Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* (30 October 2008). During the CRTC dispute resolution between CIDG and Bell, CIDG suggested that Bell did not provide any specific economic or financial rationale for its proposed wholesale rate increases or any justification of their impact on customers in the retail television distribution market in Canada, despite substantial margins and profit earnings of specialty programming services. See Canadian Independent Distributors Group (CIDG) Application for Dispute Resolution, letter to the Commission (17 January 2012), at paras. 7-8.
[63] Wire Report, "Deregulation of sports could impact consumers, small distributors: Cable" (24 August 2011).
[64] The Wire Report, "Bell/Astral deal reasonably priced", (23 March 2012).

> choice but to continue receiving, and paying for, RDS and TSN, whether they watch them or not.[65] [emphasis added]

84. The public record of the expedited hearing for the CRTC dispute resolution between the Canadian Independent Distributors Group (CIDG) and Bell Media respecting affiliation agreement terms for Bell Media's specialty television services, suggests that Bell was unwilling to negotiate a greater level of consumer choice and flexibility without guaranteed compensation for all revenue losses, such as subscriber revenue and advertising revenue.

> "… [T]he language proposed by Bell would:
> …
> b) impose for each of the Bell Services stringent minimum penetration requirements upon CIDG members compared to actual penetration levels which, if not met at any time during the term of the affiliation agreement, would trigger a renegotiation of the agreement terms, and ultimately a termination of the agreement, thus leaving CIDG members and their customers to bear entirely the risk of any material penetration decline, including a penetration decline resulting from any of the Bell Services becoming less desirable in the market;
> c) impose very high minimum penetration guarantees specifically for TSN and RDS which would result in forcing CIDG members to include these services in the basic service package or in the highest penetrated package for the whole duration of the affiliation agreement, thus forcing their subscribers to subscribe to these services and pay substantially increased fees for them even if they do not wish to subscribe to them, and it should be noted that the very high minimum penetration requirement sought by Bell is well above the existing penetration requirement achieved by the current packaging of the service in some systems;
> …
> e) preclude CIDG members, for the whole duration of the affiliation agreement, from offering to their customers more theme or other packaging options, or varying the composition of existing packages, as demanded by the market … "[66] [emphasis added]
>
> "While the parties were unable to come to agreement on certain matters, several issues remain, including, but not limited to:
> …
> - the appropriate pricing and packaging principles to be associated with the penetration-based rate cards for Bell Media's Analog Category A and Category C specialty services. In this regard, to date proposals from CIDG would give CIDG's members a significant amount of packaging flexibility, but without appropriately compensating Bell Media for the loss in revenue that would occur as a result;"[67] [emphasis added]

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[65] MTS Intervention in Broadcasting Notice of Consultation CRTC 2012-295, *Notice of applications received, Applications 2012-0081-5 and 2012-0083-1* regarding Maple Leaf Sports and Entertainment specialty services, (18 June 2012) at para 8.
[66] CIDG Application for Dispute Resolution (17 January 2012) at para. 6.
[67] Bell Media Application for Final Offer Arbitration (9 May 2012) at para. 6.

85. PIAC/CAC/CWP/COSCO are very concerned by this trend and submit that these commercial negotiations for access to content hardly represent the type of competition the Commission was envisioning to ensure affordability for basic service for television services.[68] Further, PIAC/CAC/CWP/COSCO submit that Bell's efforts contravene the Commission's stated expectations that consumers be provided with more choice and flexibility in the services they can subscribe to and be given the ability to only pay for the services they want, such as a pick and pay model.[69]

86. It is interesting that Bell has publicly portrayed the results of the Commission's decision on final offer arbitration as a victory for Bell, championing the consumer values of maximum value, choice and flexibility.[70] However, it is impossible for the public to evaluate Bell's assertions that it promotes maximum choice, flexibility and value for consumers, as the details of the agreement are submitted in confidence to the Commission as part of the final offer arbitration process. PIAC/CAC/CWP/COSCO can only surmise that Bell's offer to the independent distributors did not promote maximum choice, flexibility or value based on the observation that Bell's most recent retail BDU offerings in Ontario appear to be restrictive and expensive for Canadian consumers.

87. PIAC/CAC/CWP/COSCO are also concerned by the unfair advantage of VI entities such as Bell to offer bundling discounts and undercut competitor prices with promotional pricing in the converged marketplace to pressure consumers to switch to Bell or to disincentivize Bell's own customers from switching to competitor services. Bell's ability to offer content exclusively on internet and wireless platforms is another advantage it has over non-vertically integrated competitors.

Safeguards of the Vertical Integration Framework Are Not Sufficient to Protect Consumer Choice

88. PIAC/CAC/CWP/COSCO continue to be concerned that the safeguards of the vertical integration framework are insufficient to protect consumer choice. The safeguards target types of conduct that the Commission views as anti-competitive, but rely on lengthy *ex ante* disputes that work to the advantage of the commercial entity with the most resources, that is, the VI entity. Further, these disputes are brokered behind closed doors without public participation, even though key public policy issues are at stake.

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[68] The Commission in the *Diversity of Voices* regulatory policy stated that "effective competition in distribution of broadcasting services is the most efficient way to serve consumers" at para. 99. See also Broadcasting Public Notice CRTC 2008-100, *Regulatory policy: Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* (30 October 2008) at para. 39.

[69] Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration* (21 September 2011).

[70] See for example the Financial Post, "Prodded by regulators, Bell unbundles its TV networks" (21 July 2012), specifically: "Bell Media, the country's largest channel owner, said it will allow television distributors like Cogeco Cable Inc. and Telus Corp. to unbundle its channels and offer them individually following a regulatory ruling."

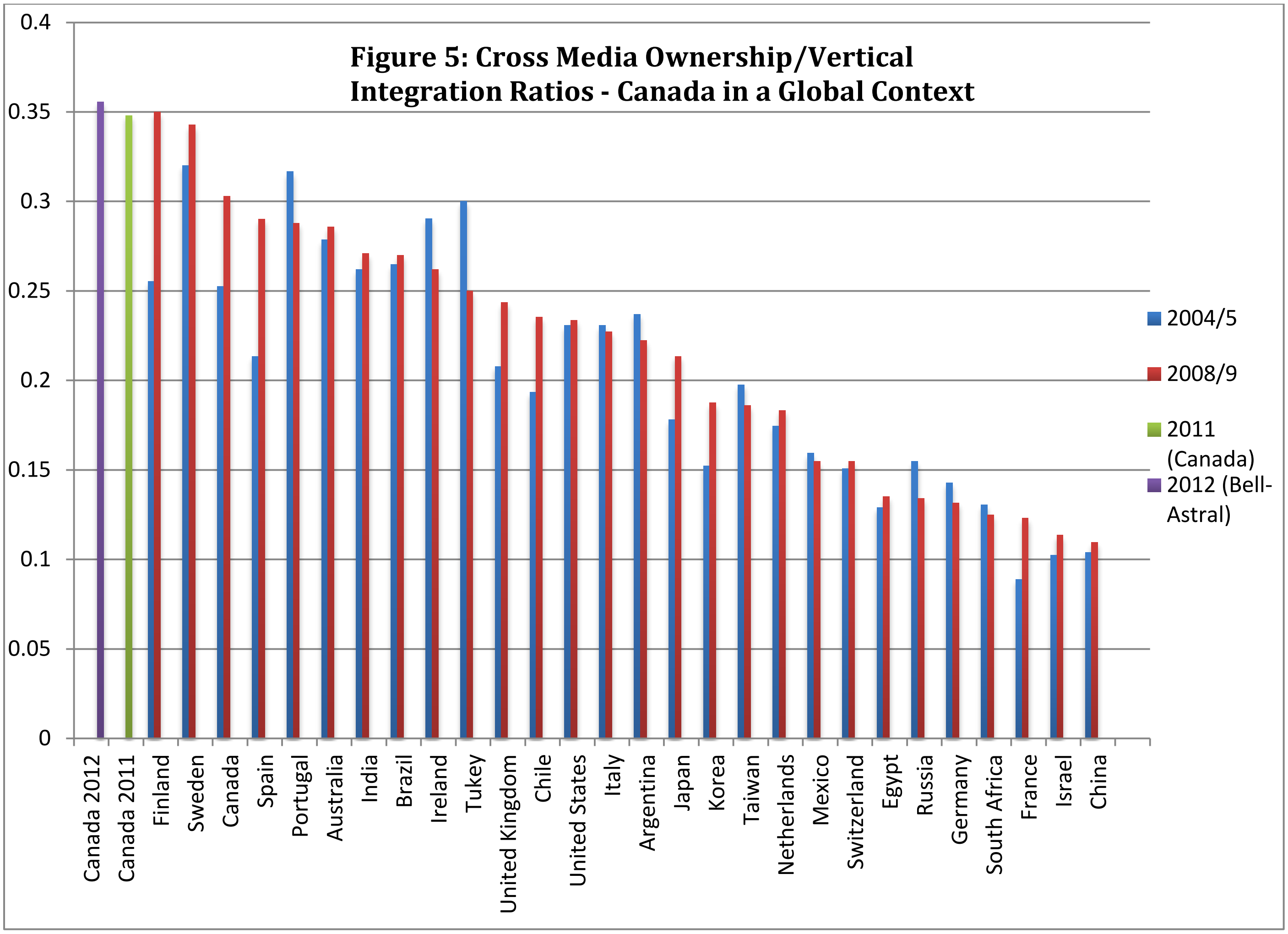
89. Moreover, the safeguards continue to allow exclusive arrangements for certain distribution platforms, which not only give the VI entities a significant competitive advantage, but also restrict the ability of Canadian consumers to watch desirable programming on all distribution platforms.

The Trend of Vertical Integration Has Not Flourished Elsewhere in the World

90. Other jurisdictions have taken action to limit cross-media ownership and vertical integration. The Standing Senate Committee on Transport and Communications noted Canada as an anomaly in its June 2006 *Final Report on the Canadian News Media, Volume 1*. The Committee stated: "[t]he Canadian situation with respect to media mergers or media concentration is atypical among large democracies."[71]

91. The levels of cross-media ownership and vertical integration ratios in Canada have reached stunningly high levels compared to the global context. As demonstrated in Figure 5 below, Canada has the second highest level of vertical integration and cross-media concentration amongst the thirty countries studied by the International Media Concentration Research Project. If the proposed Bell/Astral transaction is allowed, Canada will reach the highest level of vertical integration and cross-media concentration among these countries.[72]

[71] Standing Senate Committee on Transport and Communications, *Final Report on the Canadian News Media, Volume 1* (2006) at p. 24.
[72] See Appendix A, Evidence of Dr. Dwayne Winseck at pp. 23-24.



92. Furthermore, Dr. Winseck's evidence suggests that vertical integration is not a trend that has caught on elsewhere in the world. Where vertical integration mergers have happened, they have proved to be the exception to the rule.[73]

93. The time has come for the Commission to seriously examine the existing thresholds established in its cross-media ownership and common ownership policies. With the proposed transaction, the Commission must determine how much media concentration and vertical integration is too much for Canada.

[73] See Appendix A, Evidence of Dr. Dwayne Winseck at pp. 20-23.

BELL'S PROPOSED TANGIBLE BENEFITS PACKAGE IS FLAWED

94. PIAC/CAC/CWP/COSCO believe that there are various aspects of the tangible benefits package proposed by Bell that are not appropriate and should not be accepted by the Commission or at the least, not without considerable changes.

95. We start first by examining the proposed valuation of the tangible benefits package. We then examine certain elements therein and whether their proposition is appropriate, then move to proposed alternatives, including contribution to the Canadian Broadcasting Participation Fund (BPF), which was not proposed by Bell.

Valuation

96. PIAC/CAC/CWP/COSCO are not in a position to minutely critique the corporate enterprise valuation elements such as debt, tax-loss carryforwards and lease transfers, however, we urge the Commission to carefully scrutinize each of these elements so that the transaction and any tangible benefits package represents the true value of the deal. PIAC/CAC/CWP/COSCO do, however, take issue with the exclusion of certain assets from the Bell valuation.

Exclusion of Série +, Historia, Teletoon (all versions) from calculation of the valuation

97. Bell has not included the Série+, Historia, Teletoon English, Télétoon Français, Teletoon Retro English and Télétoon Rétro Français stations in its valuation, arguing that the 50% stake acquired in these individual elements does not make them "regulated assets". The Commission, however, has made quite clear in the recent BCE-CTVgm acquisition that when such minority or effective partnership level undertakings are part of a larger acquisition with majority control being acquired, that the minority or effective partnership level undertakings are to be considered as part of the valuation of deal for the purposes of calculating the tangible benefits package:

> As regards the minority interest in NHL Network and Viewers Choice Canada, it is the Commission's practice in transactions involving multiple assets to include minority interests in broadcasting undertakings in the transaction value.[74]

98. PIAC/CAC/CWP/COSCO submit that the circumstances of the present transaction are even more compelling for including these assets in the valuation, as they are key, they are part of a much larger suite than in BCE-CTVgm and they represent missing elements in a larger suite of broadcasting properties that would provide BCE Inc. with an excessively dominant position in the Canadian broadcasting market. As such, BCE Inc. must make contributions to the broadcasting system as a whole commensurate with this increase in control. Therefore, these key elements (Série +, Historia, Teletoon (all versions)) must be included in the valuation of the transaction for the purposes of the calculation of the tangible benefits package.

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[74] Broadcasting Decision CRTC 2011-163, *Change in effective control of CTVglobemedia Inc.'s licensed broadcasting subsidiaries*, (7 March 2011) at para. 12.

Uncharted Waters - $40M for “Extend[ing] Broadband Infrastructure” in the North

99. BCE Inc. has sailed into uncharted waters with their $40M proposal to “extend broadband infrastructure to remote communities within the next three years.” However, for many, many reasons, “here be dragons.”

100. PIAC/CAC/CWP/COSCO almost do not know where to start in opposing this plan. However, we shall outline our concerns and then treat each in detail. They are:
    - the plan fails the tangible benefits test on all three criteria;
    - the plan requires the Commission to map a new jurisdictional course that allows it to freely transfer funds under its broadcasting jurisdiction to causes under its telecommunications jurisdiction;
    - the plan interferes with the Northwestel Modernization Plan (NWTMP), risks killing nascent broadband and wireless competition in the north, and is procedurally unfair to parties to the NWTMP proceeding;
    - the plan provides IPTV and mobile broadcasting services only if the customer subscribes to Northwestel (BCE Inc./Astral) services (which at present packaging levels may be unaffordable to many northerners).

Three Strikes You’re Out: Plan Fails The Tangible Benefits Test

101. The plan fails the established tangible benefits test on all three criteria.

102. The rationale recognizes that although operating in a competitive environment in a free market society, broadcasters are using a public resource and therefore their arrangements must protect the public interest and promote public benefits:

> In Public Notice 1989-109, the Commission established that the goal of the benefits policy was to allow the market to govern the transfer of broadcasting licences as part of ownership transactions while recognizing that licensees benefit from the use of public property. The purpose of the policy is to ensure that the applicant has filed the best overall proposal under the circumstances to compensate for the absence of a public call for applications. The Commission determined that the benefits to the broadcasting system should be commensurate with the size and nature of the transaction.[75]

103. The tangible benefits test for television was most recently restated in the Bell-CTVglobemedia decision:

> In addition to representing 10% of the value of the transaction, television tangible benefit expenditures should be incremental, should be directed to projects and initiatives that would not normally be undertaken or realized in the absence of the

[75] Broadcasting Decision CRTC 2011-163, *Change in effective control of CTVglobemedia Inc.’s licensed broadcasting subsidiaries*, (7 March 2011) at para. 18.

transaction and should generally flow to third parties, such as independent producers.[76]

104. We assume this is the test for the purpose of this application.

Strike One: Not Incremental to Broadcasting Expenditures

105. First, the benefits promised should be incremental, that is, “above and beyond the base level of expenditures” (Broadcasting Decision CRTC 2008-69 at para. 142). The “base level of expenditures” generally means those expenditures necessary to carry out the conditions of a broadcasting licence. Incrementality in the context of the test therefore implies additional broadcasting expenditures – such as extra hours of programming produced and broadcast in addition to priority programming.[77] The BCE Inc. proposal requires the Commission to equate telecommunications expenditures with those of broadcasting undertakings, indeed, to accept that building broadband internet connections is incremental to broadcasting content. We submit, for the reasons given in the “jurisdiction” section above, that it is not incremental to broadcasting, by definition.

Strike Two: Northern Network Improvement Initiative to be Undertaken in the Absence of the Transaction

106. BCE Inc.’s bold proposal facially appears to be one that would “not be undertaken or realized in the absence of the transaction” – the second part of the tangible benefits test. However, the Commission should not confuse the excuse of this transaction to float a new and untested cross-jurisdictional exploration of regulating telecommunications by broadcasting orders with the obvious, and previously Commission-required obligation, for Northwestel to simply upgrade its telecommunications infrastructure. In Northwestel Review,[78] the Commission clearly required Northwestel to upgrade its infrastructure to support telephony and internet access.[79] The Commission went so far as to announce its intention to require Northwestel to file a Modernization Plan to this effect,[80] and has signaled it will conduct a public proceeding on the matter later this year. Therefore PIAC/CAC/CWP/COSCO submit that the second criteria is far from met: there is a regulatory requirement that the telecommunications infrastructure in the north be upgraded by Northwestel (subject only to details to be formalized in the NWTMP proceeding) and this element of the tangible benefits proposal effectively seeks to do something that has already been ordered by the Commission to be done and that will be done, in the absence of the Bell/Astral transaction.

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[76] Broadcasting Decision CRTC 2011-163, *Change in effective control of CTVglobemedia Inc.’s licensed broadcasting subsidiaries*, (7 March 2011) at para. 27. See also Broadcasting Decision CRTC 2010-782, *Change in the effective control of Canwest Global Communications Corp.’s licensed broadcasting subsidiaries*, (22 October 2010) at para. 30.

[77] See, for example, Broadcasting Decision CRTC 2010-782, *Change in the effective control of Canwest Global Communications Corp.’s licensed broadcasting subsidiaries*, (22 October 2010) at para. 37.

[78] Telecom Regulatory Policy CRTC 2011-771, *Northwestel Inc. – Review of regulatory framework*, (14 December 2011) ("Northwestel Review").

[79] Northwestel Review, at paras. 29-30 and 37-42. Note that the Commission's reference to "forborne services" in para. 41 includes internet and wireless.

[80] Northwestel Review, at paras. 39 and 42.

Strike Three: Tangible Benefits Flow Predominantly to Applicant Not Third Parties

107. The third element of the tangible benefits test requires that "applicants demonstrate that expenditures proposed as tangible benefits flow predominantly to third parties, such as independent producers." BCE Inc.'s proposed direction of $40M for network upgrades in Northwestel territory is simply a transfer to an entity within BCE Inc. and is not directed to third parties. BCE Inc. attempts to gloss over this fundamental, glaring problem by alleging that this portion of the benefits package would " would increase the proportion of Canadians that have access to high quality video content distributed through the Internet." However, that access requires the Canadians that live in Northwestel's territory to subscribe to, and pay for, Northwestel's access service. BCE Inc. is simply subsidizing its Northwestel subsidiary.

108. This proposal is different from the Shaw-Canwest Global provision of satellite receivers and antennas directly to consumers (free) for continued (free) access for to OTA stations affected by the transition to digital broadcasting. For BCE Inc.'s Northwestel proposal to even be somewhat comparable to the Shaw-Canwest Global receivers and antennas situation, Northwestel would have to offer free internet access, which we do not understand this proposal as implying.

109. We note parenthetically that the Northwestel aspect of the tangible benefits package represents, by BCE Inc.'s estimation, 28.7% of the television tangible benefits package,[81] which means that the Commission's policy that 85-90% of television tangible benefits be directed to on-screen initiatives is not being respected by BCE Inc. in this proposal. PIAC/CAC/CWP/BC do not accept BCE Inc.'s explanation that this is not Commission policy when the Commission has stated in its question to BCE Inc. that it is. However, even accepting that BCE Inc. may ask the Commission to deviate from its policy, we do not see how the initiative would "provide real value to the Canadian broadcasting system."[82] It provides no such general benefit to the entire Canadian broadcasting system. Instead, it provides a real boost to Northwestel's internet access service (a telecommunications service) that can provide OTT "broadcasting" (unregulated) services, true, but no other regulated broadcasting services besides BCE Inc.'s own IPTV service.

Telecommunications and Broadcasting Jurisdiction – Parliament Created Two Acts, Parliament Intended Two Regimes

110. BCE Inc. makes a valiant effort to obfuscate what, legally and jurisdictionally, it is asking the Commission to do under this plan. By noting the fact that consumers now watch and desire to have broadcasting content delivered to any screen (including mobile devices) BCE Inc. makes the leap to conclude that the two legal regimes – broadcasting and telecommunications, with two Acts (themselves with two potentially sets of conflicting policy objectives and two regulatory structures built over many years) – are now one.

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[81] Bell Application 2012-0516-2, Bell Reply 4 to Commission request for information, (31 May 2012).
[82] Bell Application 2012-0516-2, Bell Reply 4 to Commission request for information, (31 May 2012).

This then would allow money from a tangible benefits package to be applied to upgrade aging and inadequate telecommunications infrastructure, "extending the range of communications services, including broadband video, to remote communities in Canada's Far North."[83]

111. BCE Inc., in the above quote, purposely obscures these fundamental differences and two frameworks by using the word "communications" – an undefined (under both the *Broadcasting Act* and *Telecommunications Act*) and amorphous term, to describe what is planned. However, on reading the rest of the plan, there is no doubt that BCE Inc. is planning to upgrade telecommunications infrastructure. These are not broadcasting towers, these are wireless switches that provide Northwestel subscribers with local telephony and internet access services. On that internet connection will ride BCE Inc.'s IPTV services (which may soon include Astral properties) as well as any OTT broadcasting, but of course no other competing IPTV services from other IPTV providers such as TELUS. By proposing this novel arrangement, BCE Inc. avoids the issue of properly funding telecommunications infrastructure upgrades in Northwestel territory out of Northwestel operating revenues, as requested by the Commission in (the NWTel decision) but more fundamentally, assumes a fusion of the *Broadcasting Act* and *Telecommunications Act* without an act of Parliament. This is a jurisdictional minefield for the Commission.

112. BCE Inc. cites two broadcasting decisions of the Commission that it contends supports this bold step as well as a seemingly informal policy pronouncement of the Industry Minister. Dealing first with Shaw-Canwest Global (Broadcasting Decision CRTC 2010-782), BCE Inc. cites para. 43 of that decision for the proposition that the Commission approved tangible benefits relating to "satellite receivers and antennas" for consumers affected by the switch to digital broadcasting and the loss of analog signals. This they proffer as evidence the Commission approved technology upgrades as part of a tangible benefits package, particularly if these upgrades improved access to broadcasting by consumers. Of course, BCE's subsequent reference to "extending the range of communications services" cannot hide the fact that these "receivers and antennas" were traditional broadcasting hardware and the fact that the signals received were from "digital transmitters". Customers clearly could not use these antennas or receivers as two-way "communications" devices – two-way communications being a hallmark of "telecommunications" – only as one-way receivers of broadcast content.

113. BCE Inc.'s second example is the Bell- CTVglobemedia decision (Broadcasting Decision CRTC 2011-163), where the Commission allowed some of the tangible benefits package to go towards upgrading satellite TV infrastructure to use better compression technology. Once again, BCE Inc. suggests that the increase in capacity on a broadcasting technology (DTH satellite service) means that any increase in capacity on a

[83] Bell Application 2012-0516-2 (1 May 2012), Appendix 1, Supplemental Brief at para. 115.

telecommunications service should be treated similarly. PIAC/CAC/CWP/COSCO disagree.

114. Telecommunications is two-way communications that, while it can host one-way traffic that appears “broadcast-like” has the capacity for extensive customer interaction via the “up-channel” or, in other words, the simple control of the “application layer” by the end-user. BCE Inc. acknowledges this control by mentioning on two occasions the end-user devices that its proposed plan will enable: smartphones and tablets. These devices are clearly telecommunications devices, although, as noted, any telecommunications service or device can be used to passively watch content streamed in a “broadcast”-type manner. However, these devices also permit interaction on many levels with the content and are of a qualitative difference from TV monitors, even ones equipped with set-top control boxes.

115. The Minister’s statement was not an official policy pronouncement in a formal document but given in a speech to a conference; however, even if it represents government policy on this matter, a reading of the text indicates he clearly was referring to Internet access, not access to Canadian broadcasting content.[84]

116. While convergence is a trend that presents both opportunities and challenges to the industry, the current legal reality is that the Commission is responsible for the administration of two separate Acts, each of which has its own regime and own set of objectives. Certainly, convergence is a topic that garners much policy discussion and debate surrounding the need for legislative reform. The question remains as to whether the Commission has jurisdiction to use its powers under the *Broadcasting Act* to accomplish what is primarily a telecommunications objective.

A Modest Proposal: Interference with Northwestel Modernization Plan; Killing Competition; Procedural Unfairness

117. BCE Inc.'s Northwestel proposal interferes with the Commission's clear requirement for Northwestel to propose a Modernization Plan that addresses all aspects of telecommunications in Northwestel's service area.[85] BCE Inc.'s proposal in the tangible benefits package to "extend broadband infrastructure" in the north is a thinly-veiled subsidy to its Northwestel subsidiary. This subsidy is anti-competitive; there are competitors in nearly all Northwestel's service areas, so this proposal will give a massive headstart to Northwestel and presents a risk to nascent competition.

118. Finally, the procedural unfairness of the proposed method of the Commission approving the Northwestel aspect of the tangible benefits package in this proceeding and only then considering its place in the imminent Northwestel Modernization Plan (NWTMP) proceeding cannot be underestimated. It will be difficult, if not impossible for any party at

[84] Minister cited in Bell Application 2012-0516-2 (1 May 2012), Appendix 1, Supplemental Brief at para. 116.
[85] Northwestel Review, at paras. 29-30 and 37-42.

the Northwestel Modernization Plan proceeding to suggest that Northwestel be able to afford to modernize its network from recent price-cap gains if the Commission's has already approved $40M from the Astral acquisition to this purpose. Likewise, the Commission is being asked to blindly "approve the allocation amount to this project but leave the details to that proceeding" (at Application, para. 125). BCE Inc. has a short memory: the Commission has, since 1989, made clear that it will not "accept as a benefit any proposed initiative that is dependent upon approval of an application yet to be considered by the Commission."[86] The justification for this policy is obvious - any application should be complete and final on its own; there should be no subsequent substantive changes that would prejudice those who participated in the application and the Commission should not fetter its discretion in later proceedings with contingencies from previous application hearings.

Benefits of Northern Broadband

119. PIAC/CAC/CWP/COSCO are proponents of the goal to achieve broadband for the North. All Northerners must have access to technological infrastructure that enables full participation in the digital society and digital economy.

120. As expressed earlier, this was the expectation of the Commission when it required Northwestel to file a Modernization Plan. While BCE Inc.'s Northwestel proposal may have the incidental effect of providing upgrades to Northwestel telecommunications infrastructure that could facilitate some over-the-top broadcasting services, simultaneously the plan provides IPTV and mobile broadcasting services <u>only if the customer subscribes to Northwestel (BCE Inc./Astral) services</u> (which at present packaging levels may be unaffordable to many northerners). As such, while the plan appears geared primarily to be a defensive move against nascent broadband and wireless competition in the North and crucially, appears to be a Hobson's choice, where the supposed benefits of IPTV and wirelessly delivered broadcast services are made available to northerners, but only if they subscribe to Northwestel's IPTV and mobile broadcast services. If those services are priced as they are in Bell Canada territory in the south, they will be expensive and possibly beyond the means of many northerners. PIAC/CAC/CWP/BC note that BCE Inc. has filed no studies of affordability for these supposed benefits to northerners.[87]

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[86] Public Notice CRTC 1989-109, *Elements Assessed by the Commission in Considering Applications for the Transfer of Ownership or Control of Broadcasting Undertakings*, (28 September 1989). BCE Inc. answered (Q12) in their Reply Letter to the Commission of May 24, 2012 that it would propose two distinct aspects to the Modernization Plan, one paid for with Astral money and one not. This is of course no answer to the contention that the present tangible benefits package would then of course be contingent on the subsequent Northwestel Modernization Plan proceeding.

[87] PIAC/CAC/CWP/COSCO also note that Bell has not provided assurances that any BDU services provided in the north would be delivered in a manner consistent with policy objective s. 3(1)(t)(ii) of the *Broadcasting Act*, which states that distribution undertakings should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost.

121. Should the Commission determine that it wishes to accomplish the objective of achieving broadband for the North with part of the Bell/Astral tangible benefits package, the funds should be placed in a fund administered by the Commission or an independent third party to accomplish this goal in a competitive manner. This would require thoughtful consideration of the structure and rules of such a Fund, and PIAC/CAC/CWP/COSCO is willing to offer further submissions before the Commission at the oral hearing if requested.

Funding Mental Health Initiatives: Self-Serving to Serve Others

122. BCE Inc. in answer to Commission questions about the $3.5M portion of the tangible benefits plan proposed for raising awareness of Bell's "Let's Talk Day", a mental health awareness program, stated that this portion of the tangible benefits package was "the very epitome of the significant and unequivocal benefits to which the benefits policy was directed."

123. We beg to differ. BCE Inc. seeks to fund a campaign to raise awareness of its own charitable undertaking. In doing so, it helps itself to $3.5M (over 7 years) to pay itself for advertising space on its own media properties. This monetary contribution is part of BCE Inc.'s corporate social responsibility and should not be taken out of the tangible benefits package, as it is not an "unequivocal benefit" to the Canadian broadcasting system.

124. Further, apportioning part of the tangible benefits package for this purpose does not meet the three-part test for tangible benefits: it is not incremental; it is not clear that these efforts would not be undertaken in the absence of the transaction; and the funds do not flow to third parties such as independent producers or an independent charity.

125. PIAC/CAC/CWP/COSCO of course support the mission of Bell's "Let's Talk Day". However, we oppose using the tangible benefits package, particularly at this quantum and for what is effectively advertising not service delivery, for this purpose.

Broadcasting Participation Fund / Broadcasting Accessibility Fund

126. One element notably missing from BCE Inc.'s tangible benefits package was any contribution to the recently approved Broadcasting Participation Fund or the Broadcasting Accessibility Fund. Both of these funds are designed to help promote participation in and access to the broadcasting system, including the regulatory process. The Commission specifically stated in relation to both funds that the funds should be funded from tangible benefits packages going forward.[88] As both funds are meant to be continuing funds, the prospect of eventual shortcomings in funding are real and therefore tangible benefits packages present a very real opportunity to ensure the future of these funds without undue hardship on the broadcasting industry.

[88] See Broadcasting Regulatory Policy CRTC 2012-430, *Broadcasting Accessibility Fund* (7 August 2012) at para. 16: "The Commission is satisfied that the structure of the BAF as proposed by BCE would allow for future sources of funding as described in Broadcasting Decision 2011-163, including transfers of ownership for which the BAF may be specified as an eligible initiative for tangible benefits."

127. In the Bell-CTVglobemedia decision which led to the creation of both funds, the Commission required $3M to be set aside for the Broadcasting Participation Fund. The total revised tangible benefits plan in that transaction was set at $239.3 million. Therefore, just under 1.25% of the tangible benefits package was dedicated to broadcasting participation. PIAC/CAC/CWP/BC submit that although the Commission may have intended some of the Bell-CTVglobemedia decision package to go to the start-up costs of the BPF, that it is nonetheless reasonable to require BCE Inc. to contribute 1% of the eventual tangible benefits package in this transaction to the Broadcasting Participation Fund.

CONCLUSION

128. PIAC/CAC/CWP/COSCO **oppose** this transaction and urge the Commission to deny approval of this transaction. The Commission must scrutinize this transaction and its impact on the level of media concentration and vertical integration in Canada.

129. PIAC/CAC/CWP/COSCO have serious concerns with the proposed transaction, such as the reduction of diversity of voices and resultant increase in media concentration. Furthermore, the proposed transaction if approved would allow Bell to achieve an unprecedented level of vertical integration. PIAC/CAC/CWP/COSCO believe that this transaction is inconsistent with the *Diversity of Voices* policy and the quantitative targets this transaction achieves reaches a level that the Commission should deny. The

130. PIAC/CAC/CWP/COSCO urge the Commission to consider the impact of this transaction on affordability of BDU services for Canadian consumers, choice and flexibility for broadcasting services, and access to a diversity of voices. Vertical integration in the Canadian media and communications sectors have not delivered on promises of lower prices or a more competitive broadcasting environment for Canadians. PIAC/CAC/CWP/COSCO recommend that, at a minimum, the Commission scrutinize how this transaction will provide greater choice and flexibility to Canadian consumers. We urge the Commission to issue a Notice of Consultation to determine what obligations should be imposed on BDUs, especially VI BDUs, to ensure choice and flexibility for consumers. In our view, insufficient progress has been made in choice and flexibility of services for consumers and the time has come to examine regulatory solutions.[89]

131. Finally, PIAC/CAC/CWP/COSCO submit that if approved, significant modifications are needed to Bell's proposed tangible benefits package.

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[89] Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration* (21 September 2011) at para. 33.

APPENDIX A: Evidence of Dr. Dwayne Winseck

See attached document.

APPENDIX B: Historical Overview of Bell Retail TV Service Pricing and Packages

See attached document.

APPENDIX C: Selected Metropolitan Market Comparison of Basic Television Service Monthly Rates, 2012

See attached document.