Broadcasting Notice of Consultation CRTC 2021-281,

Notice of Hearing to consider an application by Rogers Communications Inc. on behalf of Shaw Communication Inc. to acquire all of the issued and outstanding shares of Shaw and to operate various licensed broadcasting distribution undertakings, the national direct-to-home satellite distribution undertaking Shaw Direct, the national satellite relay distribution undertaking Shaw Broadcast Services and the direct-to-home programming service Shaw Pay-Per-View currently owned by Shaw

Final Submission

of

BCE Inc.

13 December 2021

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1.0 INTRODUCTION

1. We are providing this Final Submission in response to BNC 2021-281, including the oral testimony provided at the public hearing held during the week of 22 November 2021 and the undertakings provided by Rogers. The record of this proceeding clearly shows that this transaction as currently constituted should not be approved.

2. Granting approval to Rogers to acquire Shaw would be highly detrimental to the Canadian broadcasting system. In this regard, and despite having the burden to prove otherwise, Rogers has not demonstrated that this transaction is in the public interest. It has not proposed any divestitures or safeguards whatsoever in recognition of the fact that it will control 47% of the English-language broadcasting distribution market in Canada as well as the Internet access platforms that will control the delivery of linear and over-the-top (OTT) programming for the foreseeable future. Such a level of dominance is unprecedented in a market of this size and will give Rogers the power to "make or break" Canadian programming services, resulting in one provider being able to dictate what content is available to Canadians, on what distribution platforms the content is available, regardless of where they live or which broadcasting distribution undertaking (BDU) they subscribe to. It will also allow Rogers to create a go-to unregulated distribution platform for foreign content providers in Canada.

3. Rogers' strategy to address this problem is to deny the significant impact of the transaction by hiding behind a clear misinterpretation of the Diversity of Voices (DoV) Policy regarding horizontal mergers between BDUs in a manner that ignores the key principles underlying the policy.

4. This submission focuses on the real issue at hand: the detrimental impact this merger will have on programming undertakings and by extension, the entire production industry and Canadian content available to consumers. In particular, we address the following issues, which we firmly believe are key to why this transaction should not be approved:

- Rogers' purposeful misinterpretation of the DoV Policy;
- The appropriate test and analytical framework to assess the market power that a combined Rogers-Shaw would be able to exercise;
- The ability of Rogers to exercise exclusives or preferential treatment; and
- The inadequacies of existing safeguards to address the potential detrimental impact and market power of this proposed merger.

2.0 THE MARKET POWER OF A COMBINED ROGERS-SHAW CLEARLY FAILS THE COMMISSION'S REGULATORY TESTS

5. In Phase III of the public hearing, Commissioner Desmond posed the following questioning to Rogers:

> I just wanted to give you the opportunity to respond with respect to the Astral case. …

> And I think you framed the case as being one of exclusivity but yesterday we heard Bell frame it as being a situation of the relationship between the programmer and the BDU and how much leverage there is for one party.
>
> So I'm just curious if you could respond to the comments of Bell in particular where they say this case is more about the bargaining power and the leverage of any one party. And why would the Commission not consider that as something -- as a guide going forward?[1]

6. In response, Rogers accused Bell of fabricating the relevant test under the DoV Policy and then simply pointed to the existing safeguards as a reason to approve the transaction.[2] They assert that the Commission's ownership concerns are correlated to the exclusive rights held by programming services, and do not apply to horizontal BDU mergers such as Rogers-Shaw.

7. Rogers is wrong. The merger review standards set out in the DoV Policy apply to concentration of ownership, not programming exclusivity. Moreover, while programming services may hold exclusive rights, they are also required, by regulation, to offer their services to all BDUs.

8. In initiating the DoV proceeding, the Commission's objective was to examine the existing ownership frameworks, and to consider, in the context of an increasing number of ownership transactions (both horizontal and vertical) whether to introduce new ownership policies. In its Notice, the Commission outlined a relevant distinction between common ownership and concentration of ownership:

> While issues of common ownership are generally market-specific, issues of concentration of ownership tend to be on a larger scale. Concerns respecting concentration of ownership most often occur during ownership transactions, when the potential market dominance of the acquiring entity can be measured in terms of revenues and overall audience share. **In other words, "common ownership" issues tend to focus on the impact on a particular market; "concentration of ownership" issues tend to focus on the impact on the system as a whole**.[3] [Emphasis added]

9. This distinction has been obfuscated by Rogers as they have repeatedly framed their proposed merger with Shaw as a common ownership issue, arguing that they are simply stepping into the shoes of Shaw, and that, as a result, there is no impact on a particular local market. However, as we and other interveners have argued, the issue is properly framed as one of concentration of ownership, given the impact that this transaction would have on the broadcasting system as a whole.

10. Subsequently, in its DoV Policy, the Commission stated:

> With respect to market dominance, the Commission recognizes that, while this concern is largely an economic issue relating to questions of competition, issues of dominance also have social and cultural dimensions. **The gate keeping powers that can result from market dominance may affect the diversity of programming within the Canadian broadcasting system. What is carried, what is commissioned, what is broadcast - these are all issues that intersect with the question of market dominance**.[4] [Emphasis added]

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1 BNC 2021-281, Transcript, lines 5497 to 5499.
2 BNC 2021-281, Transcript, line 5500.
3 Broadcasting Notice of Public Hearing CRTC 2007-5, *Diversity of Voices Proceeding*, paragraph 27.
4 Broadcasting Public Notice CRTC 2008-4, Regulatory policy*, Diversity of voices*, (BPN 2008-4), paragraphs 37 and 38.

11. Thus, in order to assess Rogers' proposed merger with Shaw, it is necessary to examine the ownership policy applicable to BDU transactions as well as the analytical framework outlined by the Commission. In this regard, the DoV Policy very clearly outlines the importance that BDU ownership plays in the carriage and packaging of programming services:

> BDUs play an important role in ensuring a diversity of voices in the broadcasting system by acquiring and packaging programming services in ways that meet the needs of consumers and serve the objectives of the Act.[5]

12. Specifically, at paragraph 105, the Commission set out ownership policies for BDUs:

> The Commission, as a general rule, will not approve applications for a change in the effective control of broadcasting distribution undertakings (BDUs) in a market that would result in one person being in a position to effectively control the delivery of programming services in that market. The Commission is not prepared to allow one person to control all BDUs in any given market.[6]

13. Rogers has focused on the last sentence of paragraph 105 to state that the DoV Policy only prohibits BDU mergers in the same retail market. In essence, since there is no overlap of BDU systems with those of Shaw (except for Shaw Direct), Rogers would simply be "stepping into Shaw's shoes". As such, Rogers claims its proposed merger with Shaw is compliant with the DoV Policy.

14. This is a deliberate misreading of the BDU ownership policies in the DoV Policy as well as the entire theory underlying it. The last sentence of paragraph 105 is merely a description of **one** type of BDU transaction that the Commission will (rightly) not allow. Moreover, it was a specific response to concerns about common ownership of BDUs in a local market. More importantly, it is the sentence before it that relates directly to the Rogers-Shaw transaction. As a matter of policy, the Commission will not allow BDU mergers that "effectively control the delivery of programming services". And that is a specific response by the Commission to concerns about concentration of ownership.

15. In fact, in the very next paragraph after 105, the Commission addresses the distinction between these separate common ownership and concentration of ownership tests by further elaborating by the different factors the Commission must consider in its analysis of any BDU transaction:

> In analyzing any such transaction, the Commission will be primarily concerned with preserving the diversity of programming voices in a market. It will give due consideration to factors such as:
>
> - the regulatory framework for BDUs;
> - **the market share of other BDU services**;
> - the impact of unregulated distribution services;
> - **the extent to which a transaction could change the respective negotiating power of the BDU(s) and programming service providers;**
> - the impact on community channels or community programming undertakings;
> - the size of the market; and

[5] BPN 2008-4, paragraph 98.
[6] BPN 2008-4, paragraph 105.

- the majority language of the market.[7] [Emphasis added]

16. The point could be no clearer. The Commission has committed to analyzing BDU mergers on the basis of their impact on market power. The record of this proceeding clearly shows that, with its potential market share of 47%, Rogers would control the delivery of programming services in every English-language market. It is not that Rogers would control the delivery of programming services in any local market.

17. Finally, the DoV Policy specifies market thresholds under which the Commission will approve ownership transactions. In this regard, the Commission will not approve transactions that would result in the control by one person of more than 45% of the total audience share and will closely scrutinize any transaction over 35%.[8]

18. Of note, the 47% market share that a combined Rogers-Shaw would have in English Canada far eclipses the 42.7% English-language audience market share and the 33.1% French-language audience market share that the Commission determined was too great for BCE and Astral.[9] Moreover, in the Commission's determination of BCE's second application to acquire Astral, wherein the combined BCE-Astral English-language television audience share decreased from 42.7% to 35.8% with the divestitures that we proposed, the actual increase in Bell Media's share of this market was only 1.8%, clearly far below the 20% increase that Rogers would have.[10]

19. The same conclusion must be reached here. We recognize that these market thresholds specifically apply to television viewing in the context of a programming undertaking merger rather than BDU market share in the context of a BDU merger. However, as we and others made clear at the oral hearing, this Application is the flipside of the BCE-Astral transaction as both mergers impact the negotiation of the value of content between BDUs and programming undertakings. They are one in the same market.

20. In response to this fact, Rogers argued that:

> Bell's claim that the merger of Rogers and Shaw raises the same concerns as the first Bell-Astral application in 2012 is patently false. Bell and Astral both operated television services in the most popular genres and held exclusive rights to many of the most-watched programs and programming services in Canada. It was that exclusivity that compelled the Commission to issue its denial.

21. However, a simple read of the Commission's decision demonstrates that the Astral acquisition raised concerns about market power and concentration of ownership. More specifically, Astral was not about exclusivity, but rather about the extent of horizontal integration proposed by that transaction. As stated by the Commission:

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7 BPN 2008-4, paragraph 106.
8 BPN 2008-4, paragraph 87.
9 Broadcasting Decision CRTC 2012-574, *Astral broadcasting undertakings – Change of effective control,* (BD 2012-574) paragraph 53.
10 Broadcasting Decision CRTC 2013-310, *Astral broadcasting undertakings – Change of effective control*, paragraphs 45 and 46.

> However, in the Commission's view, the proposed transaction warrants close scrutiny due to concentration of ownership and market dominance in television and radio in both English- and French-language markets.
> …
> The Commission…considers that a transaction of this magnitude would adversely affect competition and diversity in the Canadian broadcasting system and thereby threaten its ability to achieve the policy objectives set out in the Act.
> …
> While BCE submitted that it would be in its own best interest to make content available as widely as possible, **the Commission shares the concerns of many interveners about the ability of a distributor with the content properties of a combined BCE/Astral to exert market power in an anti-competitive manner. These concerns are based on the business incentive of a vertically integrated entity to give an undue preference to its own distribution facilities by** restricting access to its programming services or **offering them at above market rates to its competitors**.[11]

22. The above statements make it clear that at the heart of the 2012 Astral application was the potential impact on the relative market power vis-à-vis BDUs and an expanded Bell Media, and in particular, the ability of Bell Media to use its bargaining leverage to not only unduly impact BDUs but also wireless service providers. At the time, this was even acknowledged by Rogers:

> Approving the proposed acquisition of Astral will provide the company with an even greater ability to dictate the terms under which Rogers and other BDUs and wireless service providers offer BCE-affiliated services and programming. It will enable BCE to impose unreasonable and anti-competitive terms on those distributors, which will increase costs for consumers and limit their ability to access programming. Those consumers that subscribe to one of BCE's competitors will be forced to pay more for content and, in some instances, will simply be unable to access the content on all platforms unless they switch to BCE's affiliated BDU or wireless service. Clearly, as BCE's broadcasting assets grow larger, it will acquire an enhanced ability to prefer its own BCE-affiliated services and disadvantage third party BDUs, wireless distributors and broadcasters with whom its affiliated distributors and programming services compete.[12]

23. Nowhere in the discussion above is the focus on exclusivity, but rather the focus is on the market power and the negotiating leverage that a company with 42% market share would have – in the same market (but the flip side) that is at issue in this transaction.

24. Thus, the same metric of 45% market share (resulting in transactions not being approved) must be applied to the Rogers-Shaw transaction as parallels can and should be drawn given that both markets are part of the same industry and given the gatekeeper role that Rogers would have over nearly 50% of the English-language BDU market. It is this market share that is the most relevant for the Commission to consider given that the carriage of programming services is negotiated on a national market basis, and not a local-by-local market basis.

25. It is important to understand the significance of this threshold and what it means from a market power perspective. Today, the English-language BDU market functions well because there are three large BDUs (Rogers, Bell and Shaw) with comparable market shares. That ensures an equilibrium in

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11 BD 2012-574, paragraphs 54 and 63-64, emphasis added.
12 Broadcasting Notice of Consultation CRTC 2012-370, *Notice of Hearing*, Rogers Intervention, 9 August 2012, paragraph 28.

the marketplace. A programming service does not need any particular BDU, it can survive with carriage on at least two of the three large BDUs. **No one BDU is a gatekeeper**. The existing market shares of these BDUs provides an equilibrium, which creates a further balance of market power between programming services and BDUs.

26. But if this transaction is approved and Rogers becomes the dominant provider without which no programmer's service can survive, that equilibrium will be destroyed. In effect, Rogers will become the sole determinant as to what services are carried, and therefore, what Canadians get to watch. The equilibrium that protects programmers and the system as a whole will disappear.

27. Rogers simply ignores this fact and meagrely commits to carry 45 independent services and again tries to hide the issue of its market power by claiming this remedy is about preserving its commitments to existing independents given that Corus will no longer be exempted from the linkage requirements. However, this solution is wholly inadequate. It ignores non-independents including Bell Media; it ignores third language services; and, is cleverly designed to preserve the market power threat over independents as well, as Rogers will not commit to carrying all independent programming services. Unless Rogers commits to continued carriage of **all** programming services carried by Rogers and Shaw today, its market share will enable it to use the threat of non-carriage to extract unreasonable and damaging concessions from all Canadian programming services.

28. In their oral reply during Phase III, Rogers was asked whether they use the threat of dropping a service as a negotiating tactic and provided the following response:

> I guess I'll say at the outset that using the threat of dropping channels is not the way or is not our usual practice in terms of negotiating with a partner with whom we're going to renew an agreement. So as we all know, four months prior to renewal, we enter into discussions to renew, and insofar as that takes place and we both intend to renew, then we have negotiations. And I will honestly say that using that threat to drop is not our practice.
> …
> **And I will tell you quite honestly, the only instances where a channel has not made it is where the penetration has fallen to an extremely low threshold, and that would be the only occasion where we have made that determination**.[13] [Emphasis added]

29. Our own experience with Rogers proves that is not the case. #

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[13] BNC 2021-281, Transcript, lines 5490 and 5492 (emphasis added).

30. We have already witnessed the impact of the market power that a combined Rogers-Shaw would have. At the hearing, we saw a number of independent programming services not providing further comments, changing their position and/or dropping out of the process entirely. It appears they made carriage deals with Rogers. Facing the uncertainty of a BDU with that kind of potential market power, these services have essentially grabbed the deal they could get – especially as this hearing represented the last vestige of any negotiating power they would have against Rogers. In so doing, we have heard them explain their actions as hoping not to be worse off following the transaction. That does not sound like an endorsement of this transaction by these services, but rather their response to being exposed, with little option but to make a deal with Rogers now, and survive the next few years. However, as we pointed out at the hearing, the concern that is relevant for the long term is the harmful impact that Rogers' market power would have on the entire broadcasting system.

31. While Rogers would like to interpret our opposition to their Application as ironic since we also attempted to acquire Shaw, it is important to note that we did not lose that bid on the basis of price. As is clear [in Shaw's document], we matched the price offered by Rogers. However, we also foresaw the very real regulatory concerns with the transaction. Unlike Rogers, we were not prepared to solely carry that risk. As stated in Shaw's Notice of Special Meeting of Shareholders:

> Mr. Shaw contacted the Chief Executive Officer of Party A on March 2, 2021 to provide feedback on Party's A proposal, including to advise him that the regulatory issues with Party A's proposal would need to be addressed if Party A was to move forward in the process. Party A's CEO advised Mr. Shaw that Party A was not prepared to amend its proposal to address those issues.[14]

32. To be clear, our regulatory approach recognized that we would not have been able to have a market share of the size that Rogers is now proposing for itself. Divestitures of terrestrial BDU licences would have to be required to lower our market share to levels permitted under the DoV Policy.

33. However, if the Commission decides to allow the level of ownership concentration proposed by Rogers, then it opens the door for more mergers of this size and scale. Without a doubt, approval of the Rogers-Shaw transaction as well as the regulatory arguments that underpinned Rogers' justification for a 47% market share will establish new permissible levels of consolidation for the industry going forward. This concern was also expressed Channel Zero.

> And you've got two of Canada's biggest cable companies coming together to take 50 percent of the market. That may -- I doubt that's the end of it. I mean, there is going to be more acquisitions because scale does help if it's directed in the right way. And all I would say about Bell and Telus is, you know, it would not surprise you, I'm sure, if some merger acquisition -- some merger application or some merger occurred at some point there.[15]

34. In addition, not only will it set the threshold for acceptable market shares, it will also set the terms for what behaviour is permitted in the BDU and OTT programming marketplace.

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[14] https://www.sec.gov/Archives/edgar/data/932872/000119312521129224/d99422dex992.htm at pages 39. For the record, BCE is Party A.

[15] BNC 2021-281, Transcript, lines 4375 and 4376.

2.1 Exclusive or preferential distribution programming content

35. Throughout this merger review process, interveners, including Bell, have expressed concerns about the ability for a BDU with the scale and size of Rogers-Shaw to grant itself exclusive or preferential access to must-have programming content. In response, Rogers asserts that any such action would be contrary to the basic strategy of any programming service (i.e. reaching the largest number subscribers possible). Whether it be an affiliated service such as Sportsnet or an online VOD service like Disney+, Rogers argues that the benefits of the widest distribution possible outweigh the costs of limiting distribution to any one platform.

36. We disagree. Any such strategy is not a principle in and of itself. It is simply a reflection of the market and of the factors involved. If those factors change, especially in such a fundamental way as is being proposed by the merger of Rogers-Shaw, then the market itself will also change.

37. With close to 50% of BDU subscriptions, Rogers would be incentivized to harness that market power by securing exclusive and/or preferential rights to content. Similarly, a programming service could be incentivized to limit its distribution to Rogers-Shaw. For example, Rogers could offer minimum revenue guarantees to foreign streaming services, guarantees that cannot be matched by BDUs with much less market power. In effect, Rogers could pay more, or at least enough to match the costs of services forgoing distribution with other BDUs. As a result, Rogers would act as the gatekeeper, becoming the first and only place with which these services would negotiate access arrangements.

38. Our concerns are not far-fetched, nor are they hypothetical. Videotron has launched two hybrid VOD services: Club Illico and Vrai. In each case, distribution of these services is not maximized. According to Rogers this outcome is not rational. But at 50% market share, Videotron has proven that it is economically rational. Videotron clearly decided to limit these programming undertakings to only its own BDU in order to leverage its significant BDU market power to increase Videotron BDU subscriptions (as well as those for Internet, Mobile and other telecommunications services). While also available on a direct-to-consumer (DTC) basis, those options for Club Illico and Vrai are clearly inferior, essentially designed not to sell and instead maximize the *de facto* exclusivity available from Videotron.

39. During the hearing, a number of interveners, including us, noted that Rogers had recently entered into an agreement with Disney+ for direct access to that application for Rogers Ignite customers. In its reply at the hearing, Rogers downplayed the impact of such an agreement, asserting that any carriage deal with Disney+ is based on innovation (i.e. the Ignite platform), and not market power.

> The power that Rogers had is the power of the platform; it's not market power, and the power of that platform is technology innovation, and that technology innovation is good for Canadian consumers. [16]

40. The initial launch of Netflix by IPTV BDUs was an example of platform power. Only that platform had the technology capacity needed to provide BDU subscribers with access to the Netflix application. Cable BDUs did not.

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16 BNC 2021-281, Transcript, line 5443.

41. Rogers' assertions are false, and are an attempt to mislead the Commission about the commercial rationale for these carriage agreements. There is no technological basis for Disney+ to have entered into an agreement with Rogers. There are no technological impediments to competing IPTV BDUs also accessing the Disney+ application and also making it available to their subscribers. Instead, this is all about market power. It is about a potentially dominant BDU securing exclusive/preferential access to programming content, not only to drive more BDU subscriptions, but also other bundled offers for Internet, Mobile and other telecommunications services.

42. The current market is more balanced. Neither Rogers, Shaw, nor Bell, have sufficient size or scale to affect the normal course strategies for programming services and BDUs. It is much more difficult for these BDUs to secure exclusive offers, and it provides a greater incentive for programming services to work with multiple BDUs to fulfill their distribution objectives and targets.

2.2 Both current and potentially additional safeguards are inadequate

43. In its testimony during the public hearing, Rogers argued that the current set of regulatory safeguards are effective and sufficient to address any concern that might arise as a result of their Application being approved. However, as we noted during our Phase II appearance, this is not the case.

44. With respect to the Wholesale Code, it was not designed to protect programming undertakings from a BDU with a 47% market share. Rather, it was designed to address concerns about vertical integration; to prevent large programming undertakings from forcing terms on small BDUs; and to protect consumers from disputes between programming undertakings and BDUs. To be clear, the Wholesale Code does not and cannot address the market power that a combined Rogers-Shaw would have.

45. In any event, there are three issues with the Wholesale Code and other safeguards. First, the Wholesale Code is subject to each party's interpretation of it. For example, what is a reasonable rate, what is an unreasonable penetration-based or volume-based rate card, what is comparable marketing support and what is the best available package, will vary depending on whether you are a BDU or a programming service. A BDU with almost a 50% market share will set the bar for "reasonableness" at a much different level than one that knows it must compete with other BDUs with comparable market share in order to secure deals with Canadian programming services.

46. Second, and related to this is that safeguards have loopholes, such that parties can interpret and step away from the spirit of the safeguard but still technically be compliant with the letter. In this regard, as we noted above, Rogers has committed to carrying 45 independent services; however, they have not identified those services, thus preserving for themselves the power to threaten every independent service that they are the one to be dropped. Moreover, Rogers did not make any commitments for Bell Media nor third-language services ensuring that they can threaten to drop any such service unless they acquiesce to Rogers' unreasonable demands.

47. Third, with respect to dispute resolution processes, this Commission process always takes time to resolve. Time is something that programming undertakings do not have the luxury of when Rogers is trying to extract concessions in order to maintain carriage. To quote Rogers from its 2012 intervention in BNC 2012-370, "An after-the-fact complaints-driven mechanism to resolve disputes is an imperfect, expensive and time-consuming tool."[17] Moreover, dispute resolution, and the imposition of standstill, have been developed with the specific objective of avoiding disruption of service. Laudable as it may be, it clearly acts in favour of BDUs. Rates and carriage are frozen until the dispute is resolved.

48. It is worth noting that the pre-cursor to the Wholesale Code was the conditions of licence (COLs) that BCE itself proposed in its second application to acquire Astral in order to address the Commission's concerns expressed in BD 2012-574 regarding the market power of BCE-Astral. Of note, these safeguards were only acceptable as they were combined with significant divestitures of programming services that decreased BCE's proposed market share from 42.7% to 35.8%. To clarify, it was only after committing to both divestitures and safeguards that the Commission determined that BCE had addressed the harm to the broadcasting ecosystem that would have resulted had the Commission approved the first application to acquire Astral.

49. None of the current safeguards, nor any new safeguards, address the more fundamental concerns about market power and concentration of ownership that this transaction presents. While we recognize that several interveners have proposed new safeguards, in our view, those safeguards are not practical or realistic. The Commission would have an administrative and enforcement burden that will be impossible to meet; without a doubt, there will be numerous claims of abuse of market power and renewed claims for even more safeguards.

3.0 CONCLUSION

50. Granting approval to Rogers to acquire Shaw will have a transformative impact on the Canadian broadcasting system, one that would be highly detrimental overall. In this regard, Rogers has not proposed any divestitures or safeguards whatsoever in recognition of the fact that it will be the dominant BDU in English Canada, with control over nearly half of the market. As the Commission determined with BCE's 2012 application to acquire Astral, this Application by Rogers should be rejected as they have not demonstrated that its proposal is the best possible in the circumstances. It would, of course, be open to Rogers to return with an amended application that includes significant divestitures and safeguards that would ensure that the current equilibrium between BDUs and programmers is maintained. Consequently, the Commission should conclude that approval is not in the public interest and deny the Application outright.

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[17] BNC 2012-370, Rogers Intervention, 9 August 2012, paragraph 49.