Broadcasting Notice of Consultation CRTC 2021-281

Application by Rogers Communications Inc., on behalf of Shaw Communications Inc., for Authority to Acquire Effective Control of Shaw Communications Inc.

Final Comments of TELUS Communications Inc.

13 December 2021

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1.0 Introduction

1. At the outset of the hearing in this proceeding, the Chair stated that "…it is the responsibility of the Applicant to demonstrate that a transaction is in the public interest. In this case, Rogers bears the burden of proof."[1]

2. To satisfy its burden of proof, Rogers was required to demonstrate that:

   - approval of the proposed transaction is in the public interest;
   - the tangible and intangible benefits of the transaction are commensurate with the size and nature of the transaction; and
   - the application represents the best possible proposal in the circumstances.[2]

3. The Commission considers this analysis to be particularly important when dealing with a large transaction that has the potential to reshape the Canadian broadcasting system.[3] This is *a fortiori* such a transaction. It will give Rogers unprecedented scale and market power in the broadcasting and broadband sectors. This will allow Rogers to foreclose competition in ways that will dictate the future direction of the broadcasting sector, including by 1) abusing its vertically integrated status to sharply raise costs for its competitors or deny them content altogether by migrating it to online platforms, 2) gaining exclusive access to foreign streaming services, and 3) becoming an unavoidable gatekeeper for Canadian programming services.

4. More broadly, if it is approved this transaction will also drive the need for further consolidation in the broadcasting sector, by TELUS and others, in an attempt to seek competitive parity through comparable scale. It will become the blueprint for future consolidation in the sector.

5. Nevertheless, Rogers has steadfastly refused to acknowledge, let alone address, any of the concerns raised by the transaction. Incredibly, Rogers has even refused to acknowledge that the proposed transaction would result in <u>any consolidation</u> within the broadcasting system.[4]

6. Consistent with that wilfully myopic approach, Rogers proposed no meaningful safeguards in its application. It has only belatedly and begrudgingly offered or accepted a few minor safeguards that are inadequate to address the concerns raised by the transaction. Rogers' refusal to meaningfully engage in the regulatory process is far from sufficient to satisfy the applicant's onus, which includes an onus to propose adequate safeguards to address the concerns raised by its application.[5]

7. Rogers has also failed to offer any meaningful benefits for the broadcasting system. The tangible benefits are insubstantial compared to the overall value of the transaction, and any

[1] Broadcasting Notice of Consultation CRTC 2021-281, Transcript at para. 14 ["Transcript"].
[2] Broadcasting Notice of Consultation CRTC 2021-281, *Notice of Hearing*, 12 August 2021 ["BNOC 2021-281"].
[3] Broadcasting Decision CRTC 2012-574, *BCE Inc., on behalf of Astral Media inc.*, 18 October 2012, at para. 9.
[4] Transcript, at paras. 1226-1231.
[5] *Supra* note 3, at para. 66.

purported intangible benefits are largely unrelated to the broadcasting system and incapable of outweighing the harms created by the transaction. Those that can be considered relevant to the broadcasting system largely consist of investments that are already being made, or that will be made irrespective of the merger.

8. When conducting its analysis of a proposed ownership transaction, the Commission must be satisfied that the transaction would provide significant and unequivocal benefits to the Canadian broadcasting system and to Canadians sufficient to outweigh the concerns raised by the transaction.[6] What Rogers has offered falls far short of that threshold, and surely cannot represent the best possible proposal in the circumstances.

9. It is therefore abundantly clear that Rogers has failed to discharge its burden to demonstrate that the proposed transaction is in the public interest. <u>Accordingly, its application must be denied</u>.

2.0 Rogers has failed to meaningfully engage with the regulatory framework

10. The Commission's decision on whether a proposed transaction is in the public interest must take into account a wide set of factors under the Act. The public interest is reflected in the numerous objectives of the Act and the Canadian broadcasting policy set out in section 3(1) of the *Broadcasting Act* ("Act").[7]

11. The principles articulated in the Diversity of Voices Policy ("DoV Policy") inform the Commission's determination of whether a transaction is in the public interest. In analyzing transactions involving changes of ownership, the Commission is primarily concerned with preserving the diversity of programming voices in a market, and will give due consideration to a broad array of factors.[8] The DoV Policy also explicitly recognizes that <u>preserving the diversity of programming voices in a market requires the Commission to focus on ensuring effective competition for BDU services</u>.[9]

12. Throughout this proceeding, Rogers has repeatedly tried to avoid addressing the public interest issues raised by its application by mischaracterizing the analytical framework under the DoV Policy.[10] In particular, it has focused very narrowly on the lack of overlap between Rogers and Shaw in Western BDU markets to argue that the proposed transaction will not reduce competition and is consistent with the DoV Policy.

13. Rogers has used this approach to try to narrow the scope of issues under consideration and brush aside all of the obvious concerns relating to competition and diversity that flow from the transaction – whether they were raised by intervenors or by the Commission itself at the

[6] *Id.* at para. 68.
[7] *Id.* at paras. 13 and 17.
[8] CRTC 2008-4, at para. 106. See also BNOC 2021-281, where the Commission cites this framework.
[9] *Id.* at para. 103.
[10] See, for example, 2021-0228-4, Rogers' Application, 13 April 2021, "Appendix 1 – Supplementary Brief", at paras. 23-29 ["Rogers Application"]; see also Transcript at para. 1227.

hearing. For example, Rogers argued that this transaction, which combines two of the largest vertically integrated entities in the Canadian broadcasting sector, would not result in any further consolidation in the broadcasting system. Its basis for that conclusion was that "[w]e do not compete with Shaw today in any market. Therefore, there is no consolidation."[11]

14. However, that position is clearly untenable. First, it is inaccurate since Rogers does currently compete with Shaw in Eastern markets. If approved, the merger would immediately remove a competitor (Shaw Direct) in Eastern Canada. Second, and more importantly, it completely ignores the unprecedented scale that Rogers will gain if the transaction is approved, and all of the anti-competitive effects that scale will create. These anti-competitive effects are obviously relevant to the question of whether the transaction is in the public interest.

15. Similarly, when the Commission asked Rogers to comment on the substantial imbalance in leverage and negotiating power between Rogers and other BDUs and programming services that would result from this merger, Rogers tried to avoid addressing the issue by stating: "That is not the test under the Diversity of Voices. Bell has fabricated that. That is not the test."[12]

16. However, what Rogers calls "the test" under the DoV Policy is not a test at all. It is a policy articulated by the Commission, namely, that it "will not approve applications…that would result in one person being in a position to effectively control the delivery of programming services in [a given BDU] market."[13] This is merely a "bright line rule" for denial of an application, and cannot be used to derogate from an applicant's burden to demonstrate that a transaction is in the public interest.

17. As a result of this approach, Rogers has failed to meaningfully address the impact of the proposed transaction on the public interest, including the impacts on competition and the diversity of programming voices in the market. As the applicant bearing the onus to demonstrate that the transaction is in the public interest, it was incumbent on Rogers to engage in good faith with the regulatory framework set out by the Commission. Instead it chose to adopt a narrow lens that would allow it to avoid any serious attempt to grapple with the anti-competitive effects of the merger.

18. This is a critical deficiency in Rogers' application. Rogers cannot meet its burden of proof when it has effectively chosen to disregard that burden.

3.0 The proposed transaction is not in the public interest

19. The Commission has recognized that a transaction of sufficient magnitude can adversely affect competition and diversity in the Canadian broadcasting system, and threaten the Commission's ability to achieve the policy objectives (which reflect the public interest) set

[11] Transcript, at para. 1227.
[12] Transcript, at paras. 5497-5500.
[13] *Supra* note 8 at para. 105.

out in the Act.[14] That principle is clearly applicable to the proposed transaction, which is one of the most significant ever examined by the Commission.

20. The intractable problem at the heart of this transaction is the unprecedented scale that it will bestow upon Rogers, and the market power and dominance that scale will create. Rogers will have a distribution network that covers 47% of English-language subscribers, and its network will pass 80% of homes in English Canada, giving it significant incentive and ability to leverage its scale to grow its broadcasting and broadband market control even further. The scale that Rogers will gain from this transaction will allow it to effectively control the terms and conditions on which programming will be available to Canadian consumers, or even <u>whether</u> programming is available to Canadians, and enable it to act in a number of ways that will undermine the health of the Canadian broadcasting system and the public interest.

3.1 <u>Rogers will have increased incentive and ability to deny rivals access to programming</u>

21. Rogers is a vertically integrated entity that controls some of the most popular "must have" sports programming in Canada. It therefore has the incentive to use programming exclusivity to drive subscriptions to its distribution business instead of seeking the broadest possible distribution for its programming services. Scale will make it more profitable for Rogers to forego distribution of its content by rival BDUs, since its own distribution platforms alone will reach nearly half of English language subscribers, with the potential to grow to 80%. Gaining subscribers to its BDU service will also allow Rogers to potentially sell higher margin Internet and mobility subscriptions to those customers. Rogers will therefore have sharply increased incentives to foreclose access to the content its controls.

22. The existing regulatory framework provides a pathway for Rogers to deny its rivals access to content, by migrating programming to online platforms where exclusivity is permitted if it is tied to a BDU subscription. Even for linear services, Rogers will be able to deny rival BDUs access to new features and functionalities, for which there is no guarantee of access under the existing framework.[15] Rogers will also be able to effectively delay or deny rival BDUs' access to content by demanding unreasonable rates or terms of carriage, which will impair their ability to offer an attractive service to their customers.

23. As outlined later in this submission, existing competitive safeguards are insufficient to prevent these anti-competitive behaviours, or the resulting harm to competition and to consumers.

3.2 <u>Rogers' scale will lead to *de facto* exclusivity for foreign streaming services</u>

24. Scale will also allow Rogers to secure exclusivity from foreign streaming services for its own BDU customers. Rogers argues that the Digital Media Exemption Order ("DMEO") prohibits exclusive or preferential arrangements with non-Canadian online services,[16] but that is

[14] *Supra* note 3, para. 63.
[15] Broadcasting Decision CRTC 2021-341, *Complaint by the CCSA against Bell Media alleging undue preference and disadvantage*. 15 October 2021.
[16] Rogers Response to CRTC Undertakings, RFI Answer 8.

incorrect. Section 5 of the DMEO only prohibits offering television programming on an exclusive or preferential basis in a manner that is dependent on subscription to a specific mobile or Internet access service. The DMEO does not prohibit offering television programming on an exclusive or preferential basis in a manner that is dependent on subscription to a specific BDU service.

25. At the hearing, Rogers sought to cast doubt on the notion that they would be able to acquire exclusive access to foreign content. In response to statements made by TELUS regarding the impact of the merger on its negotiations with Disney, Rogers said that its arrangement with Disney does not provide it with exclusive BDU distribution rights. However, that statement misses the mark. TELUS did not suggest that Disney had provided Rogers with contractual exclusivity tied to its BDU service. On the contrary, TELUS stated that Disney was prepared to enter into a distribution arrangement with TELUS, subject to a significant revenue guarantee. From TELUS' perspective, that amounted to *de facto* exclusivity since no other BDU has the scale that Rogers expects to gain from this merger, which is what allowed Rogers to set that precedent. TELUS' perspective was based on its perception of the timing of events surrounding its negotiations with Disney and the public statements made by Rogers, and not on any knowledge of the terms of Rogers' agreement with Disney.

26. Thus, while the DMEO does not prohibit Rogers from securing exclusivity for its BDU service directly through contractual means, in practice, the far more significant risk posed by the merger is that Rogers' scale will lead to *de facto* exclusivity because it will be able to agree to distribution terms that other BDUs cannot hope to match. Rogers' commitment not to enter into exclusive arrangements following the close of the transaction[17] is therefore inadequate to address this concern.

27. Further, because Rogers will be able to offer access to nearly half of English language subscribers in Canada, many foreign streaming services will be able to forego the significant costs associated with selling directly to Canadian consumers, or integrating their application with multiple BDU systems, and rely exclusively on distribution through Rogers. This will be an attractive option for foreign streamers as they seek to launch in multiple countries around the world as quickly as possible. Thus, a foreign streaming service may well decide to forego launching a direct-to-consumer product in Canada after securing distribution through Rogers, and the result will be that all Canadians that are not subscribed to Rogers' BDU service will not have access to that content.

28. It will be impossible for the Commission to effectively prevent such outcomes. The Commission can (and must, if it approves this application) impose, as a condition of approval, a condition of licence on Rogers requiring that it not enter into exclusive or preferential arrangements with foreign streaming services. However, that condition of licence cannot protect against *de facto* outcomes such as those described above, which would be the result of rational economic choices made by foreign streaming services.

[17] *Id*.

3.3 Rogers will necessarily become a gatekeeper for Canadian programming services

29. The scale Rogers will gain will impoverish the diversity of programming voices in the broadcasting system. Rogers will unavoidably become a gatekeeper for Canadian programming services, as their viability will depend on carriage on Rogers' distribution platforms. Any service that is not carried by Rogers will lose access to half the English language market. Its cost structure will remain the same, but its potential revenues will be halved. This will allow Rogers to "make or break" programming services, and give it tremendous negotiating leverage that will allow it to dictate rates and terms of carriage for services, especially for independent services.

30. Rogers' commitment to carry at least 45 independent programming services for the next three years - which is fewer than the number of services it carries today – is both underwhelming and fails to address the underlying issue. What protection will independent programming services have after the commitment period expires? Will they be forced to accept unreasonable rates and terms or carriage in the meantime, and how will this affect their ability to maintain the quality of their service in the future? Rogers has not only failed to address these relevant questions, at the hearing they suggested that if, in their view, the quality of programming offered by these services were to decline they would cease to carry them after the three year period.[18] This will inevitably threaten the viability of those programming services.

31. The diversity of voices in local news programming will also be diminished. Rogers will deprive the Global television network of nearly $13 million in annual funding for local news production that it currently receives from Shaw, affecting its ability to create news programming that attracts strong viewership in Alberta and British Columbia. When Global news seeks to replace that lost funding from the Independent Local News Fund, this will greatly reduce the funding available for smaller independent local news stations, many of whom serve smaller markets where neither Global news nor City TV have a presence. The quantity and quality of local news that those stations can produce will suffer as a result.

3.4 Rogers' control over signal transport will undermine competition

32. At the hearing Rogers told the Commission that it would behave no differently than Shaw after taking over its satellite relay distribution undertaking ("SRDU"). Yet it refused to agree to conditions that would implement a rate freeze, or require them to adhere to the Wholesale Code or the standstill rule. Rogers' unwillingness to accept conditions that would hold it to commercially reasonable behaviour is a red flag that the Commission should not ignore.

33. Rogers is a different economic actor than Shaw, and this will be particularly true if this merger is permitted. Shaw does not have the scale to withhold access to its 30 affiliated discretionary services (the Corus channels), so it is in its best interest to ensure that its programming services are available to as many Canadians as possible.

[18] Transcript, at paras. 756-761.

34. However, following the merger Rogers will have sufficient scale that it will not need to rely on other BDUs for distribution of its affiliated services, and in fact, it will want to withhold its programming services from rival BDUs. It will therefore have the ability and the incentive to deny or raise rates for signal transport, as this will be an indirect means of weakening its competition in the BDU market.

35. This will be particularly damaging to smaller independent BDUs that serve rural and remote regions, for whom Shaw's signal transport service is an essential input. Rogers will be able to weaken those BDUs to such an extent that it can acquire them at a substantial discount, thereby further entrenching its market power in both broadcasting and broadband markets.

3.5 Consumers will be harmed

36. The Commission has always recognized that the best way to protect Canadian consumers is by fostering healthy competition in the market for BDU services, and that "a healthy communications system requires entities of various sizes that are able to compete and innovate in a fair environment."[19]

37. This transaction will inevitably undermine the welfare of Canadian consumers. By undermining competition in the market for BDU services, Rogers will ensure that consumers have less choice and flexibility, yet pay higher prices. Consumers will pay higher prices because Rogers will have the market power to demand higher prices for its affiliated services, and to demand lower prices from unaffiliated services. Those unaffiliated services will have no protection through the regulatory framework since they are not entitled to dispute resolution if Rogers decides not to carry them. As a result, they will look to other BDUs to recoup that shortfall in revenues. In both cases, those higher prices will be reflected in the cost of the service, or the range of programming, that other BDUs can offer to their customers.

38. Consumers will also be harmed because their ability to access programming will be impaired. The *de facto* exclusivity for foreign streaming services that Rogers' scale is likely to create, as well as Rogers' ability to shift its own programming to online platforms to make it exclusive to its subscribers, will cause consumers to lose access to programming unless they are Rogers subscribers.

39. There will also be little competitive pressure on Rogers to force it to innovate or invest in delivering a better consumer experience, whether in terms of pricing, packaging, or customer service. Even today, pre-merger, Rogers has a very poor track record in customer service as measured by CCTS complaints. For example, the recent annual report released by the CCTS shows a 39.3% year over year increase in complaints across all of Rogers' brands. When combined with Shaw's brands, the post-merger entity would represent a total of 35.9% of overall CCTS complaints.

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[19] *Supra* note 3, para 63.

40. These harms to consumer outcomes will only reinforce the existing trend of cord-cutting that is causing Canadian consumers to abandon the regulated system. It will undermine the public interest and further weaken the Canadian broadcasting system.

3.6 Safeguards will not effectively mitigate these harms

41. Notwithstanding the predictable anti-competitive harms outlined above, Rogers refuses to acknowledge these issues and has proposed no meaningful safeguards to address any of the concerns raised by the transaction. Further, it has only begrudgingly accepted a few minor safeguards, such as the application of dispute resolution to the Shaw signal transport business (while refusing to accept more meaningful safeguards such as the Wholesale Code or standstill rule).

42. Rogers has argued that the existing regulatory framework is sufficient on its own to address any potential anti-competitive concerns arising from the transaction. However, the regulatory framework is incapable of adequately addressing the harms outlined above. In some cases, there is no remedy available, and even where a remedy is available, the damage will often be done before it can be obtained.

43. Dispute resolution and final offer arbitration are lengthy processes, and delay works to the advantage of an anti-competitive actor. While a remedy is being sought, it has a *de facto* head start in the marketplace, and its competitors have to live with significant uncertainty regarding their cost for a service while waiting for a regulatory remedy that is not guaranteed. This unequal sharing of risk in dispute resolution and final offer arbitration is a significant problem, and it favours vertically integrated entities ("VIs") that engage in anti-competitive behaviour.

44. The existing framework also does not guarantee access for features and functionalities, which have become important to the value of a service and which customers expect to have as part of their subscription. The existing framework therefore offers incomplete protection.

45. VIs have also been aggressively challenging the Commission's jurisdiction to impose competitive safeguards, or to regulate any aspect of the wholesale relationship, before the Courts. They have achieved some success with those efforts, such as when Bell successfully invalidated the Commission's mandatory order that all licensees comply with the Wholesale Code. If the provisions of the Wholesale Code had not been included as conditions of licence, those safeguards could have vanished overnight.

46. It is therefore clearly inadequate, and self-serving, for Rogers to assert that the Commission should rely on existing competitive safeguards alone. If the transaction is approved, significant and stringent safeguards are required, and conditions of licence to this end (including those proposed by TELUS in the Appendices to its intervention) must be imposed on Rogers as conditions of approval. At minimum, new safeguards must include:

- requiring timely access to all programming controlled by Rogers, including all features and functionality, on all platforms, on commercially reasonable rates and terms of carriage;

- prohibiting penetration-based rate cards for programming that is offered directly to consumers in a competitive manner;
- requiring that the Shaw family divest its controlling interest in Corus Media; and
- requiring the divestment of Shaw Direct, including both Shaw's satellite subscribers and the SRDU business upon which independent distributors and programming services rely on for their business models.

47. However, TELUS reiterates that there is no basis for approval of the transaction. Rogers did not even acknowledge most of these harms in its application, and when they were raised by intervenors or by the Commission, it declined to take any meaningful steps to ameliorate them. It has therefore failed to demonstrate that the transaction is in the public interest.

4.0 Rogers has offered no genuine benefits for the broadcasting system

48. Rogers' burden to prove that the transaction is in the public interest includes a requirement to demonstrate that the tangible and intangible benefits of the transaction are commensurate with the size and nature of the transaction. However, Rogers has offered no genuine benefits to the broadcasting system.

49. The majority of intangible benefits on which Rogers relies are not related to the broadcasting system at all. They include proposals such as entering into R&D partnerships with universities, making unspecified investments in 5G and broadband infrastructure, or even the nomination of Brad Shaw and another member of the Shaw family to the Rogers Board of Directors (which Rogers is required to do under its Arrangement Agreement with Shaw).[20] None of these purported benefits are relevant to the Commission's review of this transaction.

50. Any intangible benefits that are related to the broadcasting system are vague, non-specific, non-binding, and self-serving. For example, promises to accelerate to an all-IP platform, to provide new functionalities or services, or to expand into rural and Indigenous communities,[21] lack any specificity as to when, where, or how those investments would be made. They are as unreliable as they are unenforceable.

51. More significantly, whether they are relevant to the broadcasting system or not, the vast majority of these purported benefits consist of investments <u>that will be made, or are already being made, in the normal course of business regardless of whether the transaction is approved or not.</u>

52. For example, many BDUs have been offering IPTV platforms to Canadians for over a decade without the need for any consolidation. In fact, both Rogers and Shaw partnered with Comcast nearly 5 years ago to offer Comcast's all-IP distribution platform to their customers.

[20] Rogers Application para. 59.
[21] Rogers Application paras. 46-51.

53. Similarly, in respect of 5G, Rogers already claims to operate Canada's largest 5G network,[22] an investment it was perfectly capable of making without acquiring Shaw. Further, public statements by Rogers to the investment community undermine this rationale for the merger by affirming Rogers' commitment to continued network expansion in 5G.[23]

54. Rogers has therefore failed to demonstrate that the tangible and intangible benefits are commensurate with the size and nature of the transaction. The transaction clearly does not provide <u>significant and unequivocal benefits</u> to the Canadian broadcasting system and to Canadians that would be sufficient to outweigh the concerns outlined above regarding competition, scale, vertical integration, and the exercise of market power.

5.0 Conclusion

55. Rogers has manifestly failed to demonstrate that this transaction is in the public interest.

56. For the reasons outlined in these comments, in TELUS' intervention dated September 13, 2021, and during TELUS' appearance at the public hearing, the transaction will undermine competition and the diversity of programming voices in the broadcasting sector, and it will harm consumers. The existing regulatory framework cannot adequately address these harms, and newly imposed safeguards would be an imperfect solution at best.

57. Further, the fact that Rogers is one of the largest vertically integrated companies in the broadcasting sector, and the scale of the resulting entity if it were to acquire Shaw, should preclude its application from qualifying as "the best possible proposal in the circumstances". The best possible proposal would be one that does not acutely magnify concerns relating to vertical integration while creating entirely new and intractable difficulties relating to scale.

58. The best possible proposal also would not force others in the broadcasting and broadband sectors to actively seek consolidation opportunities to maintain competitive parity, while serving as a blueprint for that further consolidation.

59. For all these reasons, TELUS respectfully urges the Commission to <u>deny</u> the application.

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[22] For example, see "Rogers 5G Network Now Reaches Prince George and Port Alberni in British Columbia" (December 16, 2020), available online at: https://about.rogers.com/news-ideas/rogers-5g-network-now-reaches-prince-george-and-port-alberni-in-british-columbia which describes the Rogers network as "Canada's first and largest 5G network" and as offering "10x more coverage than any other carrier".

[23] See, for example, Rogers Communications Inc., "Third Quarter 2021 Results Conference Call Transcript" (October 21, 2021) at 4, available online at: https://1vjoxz2ghhkclty8c1wjich1-wpengine.netdna-ssl.com/wp-content/uploads/2021/10/Rogers-Q321-Call-Transcript.pdf.