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CT-2022-002

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the proposed acquisition by Rogers Communications Inc. of Shaw Communications Inc.; and

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND

SHAW COMMUNICATIONS INC.

Respondents

AMENDED RESPONSE OF ROGERS COMMUNICATIONS INC.

I. OVERVIEW

1. Rogers opposes the Commissioner's Application under s. 92 of the *Competition Act* for an order blocking its acquisition of Shaw, in whole or in part. Rogers denies that the Commissioner is entitled to any of the relief sought and denies the allegations set out in the Commissioner's Notice of Application.
2. Rogers' acquisition of Shaw will not lessen or prevent competition in any market. To the contrary, the transaction will increase competition and generate

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substantial efficiencies for the Canadian economy. It will allow Rogers to be a stronger and more effective competitor and provide a national wireline network. It will also allow Rogers to make significant improvements to its national wireless network, benefitting the more than 13 million Canadians who currently subscribe to Rogers and Shaw.

3. The Commissioner accepts that the significant majority of this transaction – the combination of Shaw’s wireline with Rogers’ wireline and media businesses – will have no anti-competitive effect in those industries. Shaw and Rogers do not currently compete with one another in these areas and their wireline networks do not overlap.
4. Shaw generates more than three quarters of its revenue from its wireline business. Combining it with Rogers will generate substantial benefits for Canadians and the Canadian economy, including:
 - a. allowing Rogers to extend its *Connected for Success* program to the areas served by Shaw, providing seniors and low-income Canadians with access to high speed, low cost internet;
 - b. bringing increased competition to government and business wireline customers requiring national networks, who currently only have one option; and
 - c. allowing Rogers to invest \$1 billion to significantly enhance connectivity to rural, remote, and Indigenous communities across Western Canada.

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5. Notwithstanding these significant benefits and the absence of any effect on competition in the wireline industry, the Commissioner seeks to block the entirety of the transaction solely on the basis of alleged effects on competition for wireless services in British Columbia, Alberta, and Ontario.
6. The Commissioner, who bears the burden of quantifying the competitive effects of the transaction, has failed to properly assess those effects, which are in fact minimal to none. The Commissioner has also failed to assess, properly or at all, the significant efficiencies the transaction will bring to the Canadian economy. The Commissioner cannot establish that the transaction will result in a substantial lessening of competition in wireless services, and any alleged impact on competition is far outweighed by the transaction's efficiencies.
7. Although Rogers and Shaw dispute there is any substantial lessening or prevention of competition in wireless services, or that any competitive effects are not outweighed by the efficiencies the transaction will generate, they have proposed the full divestiture of Freedom Mobile. Freedom accounts for the vast majority of Shaw's wireless subscribers and wireless revenues.
8. Consistent with this proposal, Rogers, Shaw and Quebecor Inc.—the parent company of Videotron—have entered into an agreement for the divestiture of Freedom including, among other things, Freedom's entire wireless business and wireline subscribers. The proposed divestiture of Freedom to Quebecor, including the ancillary agreements, would occur immediately prior to Rogers' acquisition of Shaw.

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9. The Commissioner has rejected this proposal as well. The Commissioner insists that no aspect of the transaction can proceed, regardless of what divestiture Rogers and Shaw propose and regardless of the benefits to Canadians and the Canadian economy that will be lost as a result. The Commissioner's position is unreasonable, contrary to both the economic and fact evidence presented to the Bureau, and not supportable at law.
10. Contrary to the Commissioner's allegations, the transaction as a whole does not give rise to a substantial lessening or prevention of competition in wireless services, and any alleged competitive effects are far outweighed by the significant efficiencies the transaction will generate.
11. To the extent the transaction would generate any alleged competitive effects, those would be fully eliminated by the proposed divestiture of Freedom. The company would continue as a fourth competitor in the same markets and with the same assets as before the transaction but with the benefit of lower marginal costs as well as efficiencies created from integrating with Videotron.
12. The Commissioner's assertion that Freedom's ability to compete "vigorously" is dependent on leveraging Shaw's wireline assets is wrong. It is not grounded in technical or commercial reality and ignores that Shaw operates Freedom as a stand-alone business, there is little relationship between Freedom and Shaw's wireline business, and that relationship is conducted on an arms-length basis
13. The significant majority of Freedom's wireless business is located in Ontario, where Shaw has only a limited wireline presence and provides no backhaul

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services to Freedom. Where Freedom does use Shaw's backhaul services, in British Columbia and Alberta, Shaw charges Freedom market rates for that access.

14. A divested Freedom would have the same or greater economic incentive to compete as it had when owned by Shaw. The Commissioner cannot establish that the transaction, coupled with the proposed divestiture, would give rise to any effect on competition at all. And even if some competitive effect could be demonstrated, it would be outweighed by the significant efficiencies the transaction will continue to generate even after the proposed divestiture.
15. There is no basis for any of the relief the Commissioner seeks and Rogers asks that this Application be dismissed in its entirety, with costs payable to Rogers.

II. THE PARTIES AND THE TRANSACTION

Rogers

16. Rogers Communications Inc. ("**Rogers**") is a publicly traded company in the business of providing wireline, wireless, and media products and services. Rogers provides wireline services in Ontario, New Brunswick, and Newfoundland, and wireless services across the country. Its media portfolio includes sports media, TV and radio broadcasting, and digital media.
17. Rogers is Canada's only truly national wireless network operator and has a long history of innovation, including being the first Canadian carrier to launch a 5G

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wireless network, in January 2020. Rogers provides services and content to tens of millions of Canadians from coast to coast.

Shaw

18. Shaw Communications Inc. ("**Shaw**") is a publicly traded company in the business of providing wireline and wireless services, as well as TV distribution. Shaw provides wireless services primarily through its wholly-owned subsidiary, Freedom Mobile ("**Freedom**"), which it purchased in 2016.
19. Shaw's wireline business represents the significant majority of its revenues and serves residential customers and businesses primarily in Western Canada and Northern Ontario. Its consumer offerings include broadband internet, video, and telephone services. Its business services include fibre internet, telephony, video and audio services, and network and trunking services. Shaw also provides third parties with wholesale access to its wireline networks.
20. In July 2020, Shaw also launched a discount wireless service, Shaw Mobile, marketed at its wireline customers, in an effort to protect its wireline business. Shaw Mobile's revenues and subscribers are a small portion of Shaw's overall revenues.
21. Shaw's primary wireless business is Freedom, which has over 1.7 million subscribers and accounts for a significant majority of Shaw's wireless revenues. Freedom provides service in southern Ontario, Alberta, and British Columbia. The significant majority of Freedom's subscribers are in Ontario, outside Shaw's

wireline and wifi footprints. It offers its products and services through a distribution network that includes nearly 800 Freedom Mobile locations across Alberta, British Columbia and Ontario, including corporate and retail partners.

The Transaction

22. On March 13, 2021, Rogers and Shaw entered into an Arrangement Agreement pursuant to which Rogers agreed to purchase all of the issued and outstanding shares of Shaw for approximately \$26 billion, inclusive of debt (the “**Transaction**”). Shaw made the decision to enter into the Transaction after a careful evaluation of the strategic options available to it, including whether to continue to compete on a standalone basis.
23. The Transaction triggered the need for pre-merger notification and review under the *Competition Act* and is also subject to approval from the Canadian Radio-television and Telecommunications Commission (the “**CRTC**”) under the *Broadcasting Act* and from the Minister of Innovation, Science and Industry (the “**Minister**”) under the *Radiocommunication Act*.
24. The Respondents submitted filings to each of the CRTC, Commissioner and the Minister on April 13, 2021. Pursuant to an agreed process, the Respondents’ submissions to the Commissioner included detailed evidence of the efficiencies that would be realized from the Transaction, which was provided in November of 2021 and subsequently. The review periods under the *Competition Act* have expired. The Transaction has received CRTC Approval but remains subject to approval from the Minister.

III. INDUSTRY BACKGROUND AND STRUCTURE

25. Competition for wireless services in Canada is intense. Carriers compete on price, as well as along other dimensions such as plan features, network quality, and customer service.
26. Wireless services have also been subject to significant regulatory scrutiny and intervention in recent years. In 2021, the CRTC issued Telecom Regulatory Policy CRTC 2021-130, *Review of mobile wireless services* (the “**MVNO Policy**”) which seeks to facilitate the expansion of facilities-based carriers. The MVNO Policy was developed based on input and submissions from a variety of stakeholders including the Competition Bureau.
27. Under the MVNO Policy, carriers such as Bell, Telus, Rogers and Sasktel are required to: (i) provide temporary access to their networks to other wireless carriers for resale in geographies in which those carriers hold spectrum and intend to build out their own network facilities within the next seven years; and (ii) offer low-cost and occasional use wireless plans that meet criteria set out by the CRTC.
28. The MVNO Policy did not impose any requirements related to access to backhaul, which the CRTC has decided in separate proceedings should be forborne from regulation because those markets were found to be competitive. Nor did the MVNO policy suggest that integration with wireline or commercial bundling with wireline is a requirement for success in wireless services.

29. The CRTC expects that the MVNO Policy will lead to near-term entry by firms that are best positioned to disrupt existing competitors in the sale of wireless services.

IV. GROUNDS ON WHICH THE APPLICATION IS OPPOSED

A. The Relevant Markets

30. The Commissioner has wrongly defined the relevant product markets in the provision of wireless services because:
- a. the business consumers identified are mainly small and medium-sized enterprises which typically purchase services through the same channels as non-business consumers. As a result, there is no ability to define a separate market for this category; and
 - b. the Commissioner alleges that the competitive effects of the Transaction arise, in part, from the need to offer bundled wireless and wireline services, yet the relevant product market is not a bundled product.

B. Transaction Will not Substantially Lessen Competition for Wireless Services

31. The Commissioner's analysis of the competitive effects of the Transaction in the wireless market is flawed and incomplete. Contrary to the Commissioner's allegations, the Transaction has not substantially lessened or prevented

competition in wireless services since it was announced in March 2021 and would not do so once completed.

32. The Commissioner's analysis is flawed because, among other things:
- a. The Commissioner fails to consider the impact of entrants and reduced barriers to entry and expansion resulting from the CRTC's MVNO Policy. After an extensive consultation, written submissions, and a hearing, in which the Commissioner actively participated, the CRTC concluded that the MVNO Policy would allow for new wireless market entry in the near term, as well as support long-term sustainable competition in the industry;
 - b. The Commissioner's analysis of the Transaction's competitive effects is backwards looking and fails to take into account the near-term and disruptive impact that MVNOs will have, as well as the continued role that regulation, including price regulation, will play in the market;
 - c. The Commissioner wrongly asserts that Rogers has felt significant competitive pressure from Shaw, when Rogers in fact competes much more closely against Bell and Telus, and any competitive pressure Shaw has exerted in the past was attributable to specific market dynamics at that time;
 - d. The Commissioner has overstated the competitive significance and impact of the Shaw Mobile brand (as distinct from Freedom), in the wireless market. It was launched in British Columbia and Alberta only to protect

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Shaw's wireline business, with generous promotional discounts offered only to a subset of Shaw's highest-paying wireline households, and has no viable path for sustained future growth;

- e. The Commissioner wrongly asserts that, but for the Transaction, Shaw would have made the necessary investments to allow it to be a significant competitive force in 5G. Among other things, and as noted above, when faced with the prospect of making those significant capital investments, Shaw chose instead to sell; and
- f. The Commissioner's assertions that Freedom had planned to expand into business services in a manner that would impact competition are unsupported and incorrect.

C. Divestiture to Videotron Fully Remedies Any Alleged Lessening or Prevention of Competition

33. On June 17, 2022, Rogers, Shaw and Quebecor—Videotron's parent company—entered into a letter agreement and term sheet ("**Divestiture Agreement**") for the divestiture of Freedom (the "Divestiture"). This agreement provides for (i) the transfer to Videotron of Freedom's entire wireless business and wireline subscribers; (ii) transitional services from Rogers and Shaw, which will ensure a seamless transfer of ownership to Videotron without operational or service disruption; and (iii) the provision by Rogers of ongoing ancillary network access services that will lower Freedom's cost base, making it a stronger and more effective competitor than it was before the merger.

34. Shaw and Videotron submitted filings to each of the Commissioner and the Minister on June 24, 2022 and June 27, 2022, respectively. The filings submitted to the Commissioner included detailed evidence about why Videotron is a qualified buyer for Freedom, why the Divestiture resolves the substantial lessening of competition in wireless alleged by the Commissioner, and why the combination of Freedom and Videotron will create significant efficiencies.
35. Key terms of the Divestiture Agreement are:
- a. **Asset Transfer.** The Divestiture Agreement provides for Videotron's purchase of all Freedom Mobile Inc. shares, as well as the transfer of all assets necessary for Videotron to continue operating Freedom's wireless and wireline businesses on a standalone basis. These assets include:
- **Subscribers:** All of Freedom's approximately [REDACTED] mobile subscribers, and its approximately [REDACTED] Freedom Gateway internet subscribers (as of March 2022);
 - **Spectrum:** All of Freedom's spectrum licences;
 - **Network Infrastructure:** Freedom's wireless core-network and related assets, cell sites and network equipment;
 - **Backhaul Assets:** All of Freedom's backhaul microwave systems and contracts for backhaul with third parties at Freedom's cell sites;

- **Roaming Agreements:** All of Freedom’s domestic and international third-party roaming agreements; and
- **Brand and Distribution:** All Freedom-related IP and goodwill, branded stores, and contracts with Freedom dealers/franchisees.

b. **Transition Services:** The Divestiture Agreement requires Rogers and Shaw to provide Freedom with various transition services [REDACTED], so that it can continue under Videotron’s ownership immediately upon completion without any service or operational disruption (“**Transition Services**”). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

c. **Ancillary Network Access Services:** On top of these Transition Services, Rogers also agreed to provide Videotron with certain network access services (“**Access Services**”) that will enable it to operate Freedom on a more cost-effective basis than Shaw could before the proposed divestiture. These Access Services include:

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

36. Subject to regulatory approval, Freedom’s divestiture to Videotron will occur immediately prior to the closing of Rogers’ acquisition of Shaw.

37. The Commissioner’s assertion that the Transaction would substantially lessen or prevent competition even with the divestiture of Freedom to Videotron is wrong. It is premised, in large part, on the claim that Freedom’s competitiveness is dependent on “leveraging” Shaw’s wireline assets. It takes no account of the wireless and wireline assets that Videotron would make available to Freedom.

38. That claim is not grounded in technical or commercial reality and ignores that Freedom was a stand-alone business when Shaw acquired it and has been operated as such ever since. Among other things:

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- a. In southern Ontario, which accounts for the significant majority of Freedom's wireless revenues, Shaw has no wireline network and Freedom makes extensive use of microwave backhaul or pays market rates to access other companies' wireline networks. Similarly, Rogers has a successful wireless business in British Columbia and Alberta, where it has no wireline network and relies on microwave backhaul or pays for access to the wireline networks of others;
- b. In British Columbia and Alberta, Freedom accesses wireline backhaul from Shaw at market rates. It also accesses additional backhaul from third parties in British Columbia and Alberta, again at market rates, as it does in Ontario (where Shaw is not present). Under Videotron's ownership, Freedom will be in the same, if not better position as it is without the Transaction and Divestiture under Shaw's ownership in Alberta and British Columbia; and
- c. Contrary to the Commissioner's assertions, Shaw Go Wifi provides no material benefit to Freedom in offloading network traffic, nor could it, for both technical and practical reasons, provide any material advantage in the deployment of 5G services. [REDACTED]



39. The Commissioner's assertions that Freedom would not be an effective standalone competitor are also misguided. What the Commissioner defines as "New Freedom" is in all material respects the same as old Freedom, except for certain advantages that New Freedom will enjoy as a result of its integration with Videotron:
- a. New Freedom ~~It~~ will have the same spectrum, towers, and other operating assets as it currently does, as well as important 3.5 GHz spectrum that Videotron acquired in the recent auction (which Shaw does not possess);
 - b. New Freedom ~~It~~ will have the same if not greater economic incentives to compete in the market and build out a 5G network. The additional incentives arise from the fact that New Freedom will have access to 3.5 GHz spectrum that Videotron acquired in the recent auction, which is critical for the delivery of high-quality 5G services; and
 - c. New Freedom ~~It~~ will be able to purchase additional spectrum in the upcoming 3800 MHz auction in 2023.
40. The Commissioner's assertions regarding the impact on Freedom of being divested from Shaw are without foundation:
- a. Freedom does not currently provide bundled services to a material number of its customers and it purchases backhaul services at market

rates, which it could continue to do. [REDACTED]

[REDACTED]

[REDACTED]

- b. Freedom does not currently sell its products and services through Shaw's retail network, but has its own network of nearly 800 locations, including corporate and retail partners; and
 - c. Freedom already has access to the services necessary to support its wireless services, both in terms of roaming and access to wireline networks for backhaul, through its contracts with various third parties.
41. Contrary to the Commissioner's assertions, Rogers and other carriers are likely to compete more intensely, not less, after the Transaction is completed, with or without the divestiture of Freedom. Rogers will be better placed to compete in wireless services against Bell and Telus, which have the distinct competitive advantage of sharing a single wireless network and pooling their spectrum, resulting in significantly lower network building and maintenance costs. Videotron will be better placed to compete in wireless services than Freedom under Shaw's ownership against each of Rogers, Bell and Telus, in part due to its ownership of 3.5 GHz spectrum.
42. Rogers will also be better placed than Shaw was to compete against Telus in British Columbia and Alberta for bundled wireline / wireless services, given the relative attractiveness of Rogers' wireless network. [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

43. The additional competitive response that Rogers' presence would elicit from other carriers is already evident in the significant number of additional network investments announced by Bell and Telus immediately after the Transaction was announced and in the subsequent months. The Divestiture is likely to elicit further competitive responses from other carriers.
44. Ultimately, the Divestiture provides Videotron with a unique opportunity for fast, efficient, and effective expansion outside of Quebec. It will ensure Freedom's position as an effective fourth wireless carrier in British Columbia, Alberta, and Ontario by increasing Videotron's incentive and ability to compete against Rogers, Bell, and Telus. It will further provide new opportunities for product differentiation, significantly boost Freedom's 5G capabilities by adding Videotron's valuable mid-band spectrum holdings, and fully address the Commissioner's concerns about any possible coordinated effects. This is particularly so given Videotron's history as a disruptive competitor and its incentive to grow market share.

**V. EFFICIENCIES ARISING FROM THE TRANSACTION AND THE
DIVESTITURE**

45. The Commissioner has given no consideration at all to the significant productive and dynamic efficiencies the Transaction will generate for the Canadian

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economy. These efficiencies will significantly outweigh any alleged competitive effects and would be lost by the relief the Commissioner seeks.

46. ~~These~~ With respect to the Transaction, these efficiencies will include:
- a. The significant cost savings that would come from combining the Respondents' wireless networks (excluding set-aside spectrum) and wireline networks;
 - b. The significant quality improvements that would come from combining the Respondents' wireless networks (excluding set-aside spectrum) and wireline networks; and
 - c. The significant reduction of redundant real estate and network equipment.
47. Many of these efficiencies would remain cognizable even in the event of a divestiture of Freedom. The efficiencies that will be realized in the event of the divestiture of Freedom to Videotron are as follows:
- a. The significant cost savings that would come from combining the Respondents' wireline networks and operations;
 - b. Quality improvements that would arise from combining the Respondents' wireline networks;
 - c. Quality improvements that would arise from combining Videotron's and Freedom's wireless networks; and

- d. Productive efficiencies arising from the divestiture of Freedom to Videotron, as follows:
- i. Avoided costs relating to network infrastructure and related assets in British Columbia, Alberta, and/or Ontario;
 - ii. Avoided costs related to retail operations in British Columbia, Alberta, and/or Ontario; and
 - iii. Labour-related savings.

VI. RELIEF SOUGHT

48. Rogers respectfully requests that this Application be dismissed in its entirety. In the alternative, Rogers requests an order allowing the Transaction, subject to the divestiture of Freedom. In either scenario, Rogers seeks its costs of this Application.

VII. CONCISE STATEMENT OF ECONOMIC THEORY

49. Rogers' Statement of Economic Theory is attached as Schedule A.

June 3, 2022

Amended August 8, 2022

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SCHEDULE A - CONCISE STATEMENT OF ECONOMIC THEORY

1. Rogers and Shaw offer a range of telecommunications services. The Commissioner's application asserts that the proposed merger of Rogers and Shaw would substantially lessen competition in wireless services and has sought to block the Transaction in its entirety as well as other alternative relief.
2. The Respondents' economic theory addresses both: (i) the Commissioner's assessment of the competitive effects of the Transaction in wireless services; and (ii) the Commissioner's assessment of the competitive effects that would remain in wireless services after the divestiture of the Freedom wireless business (the "Proposed Divestiture").

Economic Analysis of Competitive Effects of Transaction

3. The Commissioner bears the burden of quantifying the alleged anti-competitive effects of the Transaction in wireless services. An economic analysis of the competitive effects of the Transaction upon wireless services must be forward-looking and reflect, among other things: (i) proper inputs such as, for example, the economic margins of various market participants and share of subscribers; (ii) the significant marginal cost savings that are likely to be realized by the merged entity; and (iii) the competitive discipline of poised entrants under the MVNO Policy. An economic analysis that takes such factors into account confirms that the Transaction would lead to significant gains in welfare and increased competition.

4. To the extent that the Transaction results in any anti-competitive effects in any market for wireless services (which is denied), any such effects would be significantly outweighed by the productive efficiencies that are cognizable under section 96 of the *Competition Act* and the quality improvements that are cognizable as dynamic efficiencies under section 96 of the *Competition Act* (or as enhancements to output under section 92 of the *Competition Act*), all of which would be lost in the event of an order blocking the Transaction as sought by the Commissioner.

Economic Analysis of Competitive Effects With Proposed Divestiture

5. The Proposed Divestiture would be effective in eliminating any alleged substantial prevention or lessening of competition in wireless services. The Proposed Divestiture represents a standalone business that will be a viable and effective competitor. An economic analysis of the competitive effects of the Transaction after the Proposed Divestiture must take into account the factors identified above as well as: (i) the limited competitive impact on wireless services of Shaw Mobile; (ii) the incentives, marginal cost savings, and competitive impact of a divestiture purchaser; and (iii) the incentives and abilities that Rogers would have following completion of the Proposed Divestiture. Such economic analysis confirms that any alleged substantial prevention or lessening of competition in any market for wireless services in Canada would be eliminated if the Proposed Divestiture is effected.
6. Further, the Proposed Divestiture will continue to allow the merged entity and Videotron/Freedom to realize, among other things, significant cognizable

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productive efficiencies that will outweigh any remaining alleged anti-competitive effects (which the Respondents deny) in any market for wireless services.