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CT- 2022-002

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

CT-2022-002

OTTAWA, ONT.

192

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*.

B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

**Rogers Communications Inc. and
Shaw Communications Inc.**

Respondents

**AMENDED REPLY to the Response of Shaw Communications Inc.
of the Commissioner of Competition**

I. OVERVIEW

1. The Applicant repeats and relies upon the Reply to the Response of Rogers Communications herein in respect of the Response of Shaw Communications Inc. ("Response"), including the Overview in paragraphs 1-4 thereof.

II. POINTS IN REPLY

2. The Applicant repeats and relies upon the facts in his Notice of Application, Statement of Grounds and Material Facts and Concise Statement of Economic

Theory (collectively, the “Application”), and except as hereinafter expressly admitted, denies the allegations in the Response. Unless otherwise indicated, defined terms in this Reply have the meaning ascribed to them in the Application.

3. The Applicant admits the facts contained in the following paragraphs of the Response: paragraphs ~~14~~ 17 to ~~20~~ 23, ~~24~~ 27 to ~~27~~ 30, ~~32~~ 35, ~~43~~ 46, ~~45~~ 48 to ~~47~~ 50, ~~54~~ 56 to ~~53~~ 58, ~~55~~ 60, and paragraph ~~54~~ 59 except the first sentence.

A. Shaw’s Reasons for Selling are Immaterial

4. Shaw makes certain assertions about why it chose to sell to Rogers,¹ Canada’s largest wireless company. That decision was based on private interests, not the public interests reflected in the Act, and the reasons are not determinative or material to the issues raised in this application.

B. Market Definition

5. Shaw adopts Rogers’ Response in respect of market definition. The Applicant repeats paragraph 7 of its Reply to the Response of Rogers Communications Inc. in this respect.

C. Shaw Mobile’s Competitive Impact was Significant and Growing

6. Shaw downplays the competitive significance of its past impact on the Wireless Services market generally,² and of Shaw Mobile’s impact in particular.³ To the contrary, the launch of Shaw Mobile exceeded Shaw’s expectations and positioned it for sustainable growth. Shaw Mobile outperformed Freedom Mobile in its first year and led Shaw’s postpaid wireless subscriber growth, despite only being offered in Alberta and British Columbia, less populous markets than Ontario. The launch of Shaw Mobile was profitable, having the intended effect of increasing overall profitability and reducing wireline customer churn.

¹ Paragraphs ~~36-42~~ 39-45 of the Response.

² Paragraphs ~~64-67~~ 69-72 of the Response.

³ Paragraphs ~~33-34~~ 36-37 and ~~86-89~~ 93-96 of the Response.

7. Contrary to the Respondent's claims, while Ontario has historically represented the largest share of Shaw's wireless subscribers due to the relative size of the province and Shaw's acquisition of WIND subscribers (which were primarily in Ontario), Shaw Mobile was changing Shaw's growth trajectory. Shaw Mobile was projected to be the leading driver of growth in wireless on a going-forward basis. Shaw expected Shaw Mobile to continue growing rapidly, but-for its acquisition by Rogers.
8. Shaw's claim that Shaw Mobile had no downward pricing pressure on Wireless Services prices is therefore false and is contrary to the Respondents' own internal assessment of competition before the announcement of their Proposed Transaction.
9. Shaw planned to make 5G investments, enter new markets and expand into wireless Business Services. Shaw has a proven track record of investing in and expanding its business and Shaw would have continued but for the Proposed Merger. Shaw assessed these projects and determined that they were profitable strategies. Shaw's decisions to cease these investments and to compete less vigorously are due to the Proposed Transaction.
10. Shaw asserts that "Shaw's wireless business has yet to become free cash flow positive".⁴ The Applicant puts Shaw to the strict proof thereof, but in any case, it is not unusual in this industry for a relatively recent and expanding entrant like Shaw to take a lengthy period to recover the large capital investments needed to be competitive. Furthermore, wireless and wireline aspects of these businesses cannot be considered in isolation, given that these operations are significantly interconnected.

⁴ Paragraph ~~29~~ 32 of the Response.

D. Wireline Assets are Important to the Competitiveness of Shaw Wireless Services

11. Shaw characterizes Freedom Mobile as an easily severable entity from Shaw's wireline assets and downplays the importance of those assets in its Wireless Services business.⁵
12. Shaw Mobile in particular, but also Freedom Mobile, were serving increasing broader segments of the markets and bringing competition not just to the National Carriers flanker brands but other market segments.
13. The Application is not premised on any misconception about the business of Shaw. Contrary to Shaw's allegation, the Application is firmly grounded in Shaw's own internal competitive assessment before its business judgment was affected by the private financial incentives a merger provides to Shaw's shareholders.
14. Contrary to the parties' claims, New Freedom if divested to Videotron would be a less effective competitor due to factors which include:
 - a. additional capital requirements of a standalone wireless entity in B.C. and Alberta;
 - b. incremental costs to develop 5G network;
 - c. incremental capital or operating costs to build out or purchase from third parties backhaul previously provided by Shaw wireline business;
 - d. inability to bundle or cross-sell competitively and the challenge of competing against incumbents who can cross-sell multiple telecommunication products;

⁵ Paragraphs ~~9~~ 12, ~~30~~ 33, ~~69-75~~ 74-80 and ~~81-85~~ 87-91 of the Response.

- e. dependence on Rogers and competitive vulnerability as a result of the numerous contractual arrangements included in the proposed divestiture to Videotron; and
 - f. loss of access, in whole or part, to “Go Wi-Fi” hotspots, resulting in increased costs and inferior coverage.
15. The remedy issue before the Tribunal is not merely whether the Freedom Mobile assets can be separated from Shaw, but whether a divestiture eliminates the substantial lessening and prevention of competition. A Freedom Mobile-only divestiture, as proposed by the Respondents, fails to satisfy the requirements of the *Competition Act*.
16. In fact, there is significant integration of Freedom Mobile within Shaw’s organizational structure and, importantly, Freedom Mobile benefits from its parent’s related businesses and operations, including Shaw’s network infrastructure, Wi-Fi Hotspots and backhaul. Shaw planned to further integrate its wireless and wireline businesses going forward to leverage the synergies between the businesses.

E. Wi-Fi Hotspots are an Important Aspect of Shaw Wireless Competitiveness

17. Contrary to Shaw’s assertions,⁶ its Wi-Fi hotspots improve network coverage, avoid network costs and reduce network traffic. Wireless customers use and assign significant value to these hotspots and they have been a central feature of Shaw’s marketing materials and strategy. Shaw planned to expand its Wi-Fi hotspot network and viewed Wi-Fi and small cell deployment as complementary.

F. Shaw Business Services

18. Shaw’s denial of its intentions to enter the Business Services market⁷ is inconsistent with the facts; in any case, it does not address the fact that Shaw is a capable and well-positioned poised entrant for that market. In contrast, Videotron is an unproven

⁶ Paragraphs ~~76-80~~ 81-85 of the Response.

⁷ Paragraphs ~~90-92~~ 98-100 of the Response.

entrant, lacking the competitive advantages available to an existing wireline operator such as Shaw and the other incumbents which already offer these services.

G. Freedom Mobile's Competitive Decline Since the Merger Was Announced

19. Shaw's suggestion that Freedom's decline since the merger announcement is a product of the circumstances surrounding the pandemic and that its marketing efforts have continued unabated⁸ are belied by porting data which show that customers have moved to other carriers from Freedom in that period, not simply dropped or reduced service. The Proposed Transaction resulted in Shaw's putting on hold competitive initiatives including its planned 5G launch. Shaw was unable to bid on critical 3500 MHz spectrum and the company's capital spending was made subject to limitations under the Arrangement Agreement. These and other factors attributable to the Proposed Transaction to date have already resulted in prevention or lessening of competition.

Dated: June 16, 2022.

Amended August 15, 2022

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⁸ Paragraphs 93-100 102-109 of the Response.

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