PUBLIC

CT-2002-002

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 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 COMMUNICATION INC. AND SHAW COMMUNICATIONS INC.

Respondents

- and -

THE ATTORNEY GENERAL OF ALBERTA and VIDEOTRON LTD.

Interveners

RESPONDING MOTION RECORD OF ROGERS COMMUNICATIONS INC.
(Telus Communications Inc.'s Motion to Quash Subpoenas)

October 19, 2022

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INDEX

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AFFIDAVIT OF ASHLEY MCKNIGHT
(affirmed October 19, 2022)

I, **Ashley McKnight**, of the City of Oshawa, in the Regional Municipality of Durham, AFFIRM:

1. I am a law clerk with the law firm of Lax O'Sullivan Lisus Gottlieb LLP, lawyers for the Respondent, Rogers Communications Inc. ("**Rogers**"), and as such, have knowledge of the matters contained in this Affidavit.

2. On May 8, 2022, the Commissioner of Competition (the "**Commissioner**") served the Respondents with his Notice of Application pursuant to section 92 of the *Competition Act*. A copy of the Commissioner's Section 92 Notice of Application is attached as **Exhibit "A"**.

3. On August 18, 2022, Rogers served the Commissioner with its Fresh as Amended Response to the Commissioner's section 92 application, a copy of which is attached as **Exhibit "B"**.

4. On September 2, 2022, the Commissioner served the Respondents with his Fresh as Amended Reply, a copy of which is attached as **Exhibit "C"**.

5. On September 6, 2022, Rogers served the Commissioner with its Demand for Particulars with respect to the Commissioner's Fresh as Amended Reply, a copy of which is attached as **Exhibit "D"**.

6. On September 12, 2022, the Commissioner served his Response to Rogers' Demand for Particulars. A copy of the Commissioner's Response is attached as **Exhibit "E**".

7. I understand that all documents in this proceeding are subject to the Confidentiality Order dated May 19, 2022, which was amended on September 12, 2022. I further understand that pursuant to the Confidentiality Order, information may be designated as “Level A”, “Level B” or “Public”. A copy of the Amended Confidentiality Order is attached as **Exhibit “F”**.

8. Attached as **Exhibit “G”** is a copy of the Order of Chief Justice Paul Crampton, dated August 26, 2022.

9. On September 23, 2022, the Commissioner served the Respondents with his section 92 application materials, which included witness statements from Charlie Casey, the Vice President Consumer, Controller at TELUS Corporation (“**Telus**”) and Nazim Benhadid, Telus’ Senior Vice President, Network Build & Operate.

10. A copy of Mr. Casey’s witness statement is attached as **Exhibit “H”** to this Affidavit. A copy of Mr. Benhadid’s witness statement is attached as **Exhibit “I”**.

11. I understand that Telus made submissions to the Canadian Radio-television and Telecommunications Commission (“**CRTC**”) during the CRTC’s review of the Rogers and Shaw proposed transaction in 2021.

12. Telus’ submissions are publicly available on the CRTC website, and include:

(a) Comments dated September 13, 2021 (a copy of which is attached as **Exhibit “J”**);

(b) Opening submissions at the CRTC Hearing dated November 23, 2021 (a copy of which is attached as **Exhibit "K"**);

(c) Final Submission dated December 13, 2021 (a copy of which is attached as **Exhibit "L"**).

13. On July 15, 2022, the Commissioner served the Respondents his Affidavit of Documents ("**AOD**") for his section 92 application. He served a Supplementary AOD on September 21, 2022.

14. I understand that the Commissioner's AOD and Supplementary AOD included documents the Bureau received from Telus pursuant to the Section 11 Order.

15. On October 3, 2022, Rogers served a subpoena pursuant to section 7 of the *Competition Tribunal Rules* addressed to Mr. Casey and Mr. Benhadid of Telus, through Telus' counsel at Osler. On October 14, 2021, Rogers served an updated subpoena of that date ("**Telus Subpoena**"), and notified Telus' counsel that it was withdrawing its previous subpoena. A copy of the covering email from Mr. Naqi and the October 14 subpoena are attached as **Exhibit "M"**.

16. I understand that the Telus Subpoena requests documents which were prepared on or after May 7, 2022, and would not be included in any documents the Bureau received from Telus pursuant to the Section 11 Order. I further understand that the requested documents are not in the Commissioner's AOD or Supplementary AOD.

AFFIRMED before me at the City Toronto, in the Province of Ontario, on October 19, 2022.

Commissioner for Taking Affidavits
(or as may be)

RONKE AKINYEMI

(Signature of deponent)

ASHLEY MCKNIGHT

This is Exhibit “A” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.

Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

CT-2022-

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B E T W E E N :

COMMISSIONER OF COMPETITION

Applicant

- and -

ROGERS COMMUNICATIONS INC. AND SHAW COMMUNICATIONS INC.

Respondents

NOTICE OF APPLICATION

TAKE NOTICE THAT the Commissioner of Competition (the "**Commissioner**") will make an application to the Competition Tribunal (the "**Tribunal**"), on a day and place to be determined by the Tribunal, pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "**Act**") for:

a. an order directing the Respondents not to proceed with the Proposed Transaction;

b. in the alternative, an order requiring the Respondents not to proceed with that part of the Proposed Transaction necessary to ensure that it does not prevent or lessen and is not likely to prevent or lessen competition substantially;

c. an order directing the Respondent, Rogers Communications Inc., to divest such additional assets as are required to eliminate the substantial lessening or prevention of competition;

d. an order directing the Respondents to pay the Commissioner's costs; and

e. such further and other relief as the Commissioner may request and this Tribunal may consider appropriate.

AND TAKE NOTICE that if you do not file a response with the Registrar of the Tribunal within 45 days of the date upon which this Application is served upon you, the Tribunal may, upon application by the Commissioner and without further notice, make such order or orders as it may consider just, including the Orders sought in this Application.

AND TAKE FURTHER NOTICE that the Applicant will rely on the Statement of Grounds and Material Facts below in support of this Application.

AND TAKE FURTHER NOTICE that a concise statement of the economic theory of the case is attached hereto as Schedule "A".

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The Applicant proposes that the hearing of this matter be held in Ottawa, Ontario and heard in English and French.

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. OVERVIEW

1. Rogers' proposed acquisition of Shaw seeks to eliminate Shaw as a competitive force, and as a growing significant fourth competitor. The proposed transaction would substantially prevent or lessen competition by eliminating Shaw, a maverick competitor with a proven track record of disrupting wireless services markets and leveraging its wireline business to compete more vigorously.

2. Shaw was poised to continue as an unmatched disruptive force at a key time in wireless market evolution in Canada when the proposed acquisition was announced. Shaw was on the verge of launching 5G wireless services and making other investments to expand wireless services in Canada; these plans were largely shelved with the announcement of the proposed acquisition in March, 2021.

3. Mobile wireless services, or wireless services, are those services provided over a radio network permitting both voice and data communication (including text messaging, internet and mobile application services) without being tethered to a fixed location. "Wireless Services" are wireless services provided to customers other than business customers as described in Section V.A below.

4. Wireless Services play a critical role in supporting economic and social development in Canada. In 2020, Wireless Services reached 99.7% of Canadians and there were 38.7 million Canadian subscriptions for Wireless Services. Wireless Services allow Canadians to maintain and to grow personal and professional connections, to stay informed about the latest news and information, to purchase and to sell products, and to access essential services. They are a gateway to mobile applications, whether for entertainment or for professional purposes. Canadians increasingly depend on Wireless Services for everything from virtual doctors appointments, to proof of vaccination, to financial management, to ride-hailing.

5. Vigorous competition is essential for Canadians to have access to affordable, high quality Wireless Services and for stimulating innovation and diversity in the products and services available by using those services in the growing digital economy.

6. Three national incumbents, Rogers Communications Inc. ("Rogers"), Bell Mobility Inc. ("Bell"), and TELUS Communications Inc. ("TELUS") (collectively, the "National Carriers") dominate Wireless Services markets in Canada, possessing, until only recently, over 90% of the revenues for such services in the country.

7. Persistent intervention by regulatory authorities since 2008 to stimulate competition through measures such as licencing new spectrum acquisitions have finally yielded benefits to Canadians as a result of entry and expansion by the Respondent Shaw Communications Inc. ("Shaw").

8. Shaw, an historic wireline cable operator, entered the Wireless Services market by acquisition of a wireless entrant in 2016. Leveraging its wireline infrastructure to decrease costs and accelerate deployment of services, Shaw has since made substantial network investments, seen significant wireless subscriber growth, and played the role of competitive disrupter. In the geographic markets in which it operates – Ontario, B.C. and Alberta -- Shaw has driven down prices, made wireless data more accessible, and offered innovative services to consumers.

9. Rogers and Shaw are each other's closest competitors. Competition between them is intense, with each gaining and losing more customers to one another than to other wireless carriers. Shaw has brought to the markets where it competes an increased competitive intensity, to the benefit of Canadian consumers, who have historically paid some of the highest prices for Wireless Services in the developed world paired with one of the lowest rates of wireless data consumption.

10. Rogers and Shaw have [redacted] with parties interested in acquiring Shaw's Freedom Mobile wireless business and have claimed that such divestiture would eliminate any substantial lessening or prevention of competition resulting from the proposed transaction. However, the divestiture proposed is not an effective

remedy for the competitive harm the Proposed Transaction has caused and will likely continue to cause.

II. THE PARTIES

11. The Commissioner is appointed under section 7 of the Act and is responsible for the administration and enforcement of the Act.

12. Rogers is a publicly traded Canadian communications and media company headquartered in Toronto, Ontario that provides Wireless Services, cable wireline services and media products to Canadian consumers and businesses.

    a. **Wireless:** Rogers offers mobile Wireless Services nationally. Rogers operates under the brands Rogers, Fido, Chatr and Cityfone. Rogers is the largest Wireless Services provider in Canada, with approximately 11.3 million subscribers and $8.8 billion in annual revenue in 2021.

    b. **Wireline**. Rogers offers wireline services, including Internet access, television distribution, telephony and smart home monitoring services for consumers and businesses in Southern and Eastern Ontario, New Brunswick and Newfoundland.

    c. **Media**. Rogers offers a portfolio of media properties, including sports media and entertainment, TV broadcasting (including conventional, specialty channels, pay-per-view television and video-on-demand services), radio broadcasting, multi-platform shopping and digital media.

13. Shaw is a publicly traded Canadian communications company headquartered in Calgary, Alberta that provides wireline and Wireless Services, as well as television distribution.

    a. **Wireless**. Shaw offers Wireless Services under the Freedom Mobile and Shaw Mobile brands. In 2016 Shaw entered the Canadian wireless market with the purchase of Wind Mobile, soon after rebranded as Freedom Mobile. Freedom Mobile serves customers in Ontario, Alberta and British Columbia. Leveraging

its wireline assets, Shaw has grown to become the fourth largest Wireless Services provider in Canada, with approximately 2.1 million subscribers and $1.3 billion in revenue in 2021. In 2020, Shaw launched a second wireless brand, Shaw Mobile, which serves customers in Alberta and British Columbia. Shaw Mobile wireless services have been offered at very competitive rates when bundled with Shaw's internet services.

b. **Wireline**. Shaw's wireline segment serves residential customers and businesses primarily in Western Canada and Northern Ontario. Shaw's wireline services include internet access, television distribution, telephony and smart home monitoring services for consumers and businesses. Shaw also offers direct-to-home satellite television services to consumers across Canada through Shaw Direct, as well as licensed video-on-demand and pay-per-view services.

III. THE PROPOSED TRANSACTION

14. On March 13, 2021, Rogers agreed to purchase all of the issued and outstanding shares of Shaw for approximately $26 billion, inclusive of debt, under an "Arrangement Agreement" made as of that date (the "Proposed Transaction").

IV. INDUSTRY BACKGROUND AND STRUCTURE

A. Historical Background: Consolidation, Concentration and Regulatory Efforts to Stimulate Competition

15. During the late 1990s and early 2000s, several mergers and acquisitions involving both wireline and wireless carriers led to substantial consolidation in the wireline and wireless industries in Canada. During this period, TELUS was formed out of the privatization of Alberta Government Telephones and subsequent acquisitions, including BC TEL, Quebec Telephone and Clearnet. In the same period, Atlantic Canada's four incumbent telephone companies merged and were acquired by what is now BCE Inc., the parent company of Bell Canada, Bell MTS and NorthwesTel. In 2004, Rogers, acquired Microcell Telecommunications Inc, owner of the Fido

brand of Wireless Services. Following this period of consolidation, the Canadian telecom regulators have taken repeated measures to intervene in the wireless market to promote competition and new entry.

16. Those measures have begun to spur greater competition to the benefit of Canadians through growing regional carriers, like Shaw. Shaw has been able to leverage a foundation of existing wireline infrastructure coupled with favourable wireless market policies and regulations to compete more effectively with the National Carriers. The proposed merger threatens to undo more than a decade of competitive progress to the detriment of Canadians.

17. The telecom regulators are the Department of Industry, Science and Economic Development ("ISED", formerly Industry Canada) and the Canadian Radio-television and Telecommunications Commission (the "CRTC"). These organizations share certain authority over mobile wireless service regulation in Canada.

18. In 2007, Industry Canada noted that Canada was one of the most expensive countries for Wireless Services and had one of the lowest subscriber penetration rates of Wireless Services globally. In 2008, it conducted a spectrum auction with the objective of stimulating greater competition in the wireless industry. At the time, the three National Carriers accounted for in excess of 90% of wireless subscribers and revenue in Canada. During this auction, several firms purchased spectrum reserved for new entrants. The entrants included Wind Mobile, Public Mobile, Mobilicity, and Videotron (a subsidiary of Quebecor Media Inc., a diversified media and telecommunications company).

19. The wireless businesses carried on by Wind Mobile, Public Mobile and Mobilicity were each subsequently acquired by incumbent cable and local telephone carriers. TELUS purchased Public Mobile in 2013. Rogers purchased Mobilicity in 2015. As noted above, Shaw purchased Wind in 2016.

20. In 2017, Bell purchased the regional incumbent telecom provider in Manitoba, Manitoba Telecom Services ("MTS").

21. ISED determined that it was necessary to include measures that prevent greater spectrum concentration in the hands of Bell, Rogers and Telus in all major spectrum auctions since 2007, including the most recent 3500 MHz spectrum auction in 2021.

22. The CRTC has also implemented regulatory policies in an effort to increase competition. For example, in 2013, it established a mandatory code of conduct (the "Wireless Code") for all providers of Wireless Services in Canada, governing such matters as the length of wireless contracts.

23. In addition, in 2015 the CRTC imposed wholesale roaming regulations, after finding the National Carriers possessed market power, to facilitate entry and expansion. The National Carriers possess a considerable competitive advantage over regional competitors, having taken decades to construct their existing nationwide wireless networks and having access to installed wireline infrastructure and networks. The regulations are intended to allow other mobile wireless carriers the ability to compete by offering nationwide mobile wireless coverage through roaming. Specifically, in 2015, the CRTC required Bell, Rogers, and TELUS to offer wholesale roaming.

24. In 2021, the CRTC found that the National Carriers together exercise market power in the provision of Wireless Services in all provinces except Saskatchewan, where SaskTel exercised market power. It also found that Bell exercises market power in the provision of Wireless Services in the Northwest Territories, Nunavut, and Yukon. The CRTC implemented a Mobile Virtual Network Operator ("MVNO") policy which seeks to facilitate the expansion of facilities-based carriers (carriers that operate their own network) such as Shaw. The National Carriers and Sasktel will be obligated to temporarily provide access to their networks to other wireless carriers for resale if the latter possess spectrum and intend to build out their own network in that geographic area within the next seven years. The stated purpose of the MVNO policy is to accelerate the sustainable competitive discipline that regional competitors like Shaw have brought to the market by assisting them in overcoming the barriers they face to expanding their networks to new areas.

25. In its 2021 decision, the CRTC found signs that competition was intensifying through regional competition, which was led by Shaw among other regional carriers. This progress was hard earned over a period of 10 years, involving investments of more than $3.5 billion.

26. Since 2016, Shaw has more than doubled its subscriber base. To achieve this growth, Shaw has made significant long-term investments to transform the Freedom network from a 3G network into a competitive LTE-Advanced network and 5G-capable network. It has also used wireline infrastructure as a springboard to launch Shaw Mobile and spur competitiveness through innovations such as Wi-Fi hotspots, affording internet access at no extra charge to its wireless subscribers.

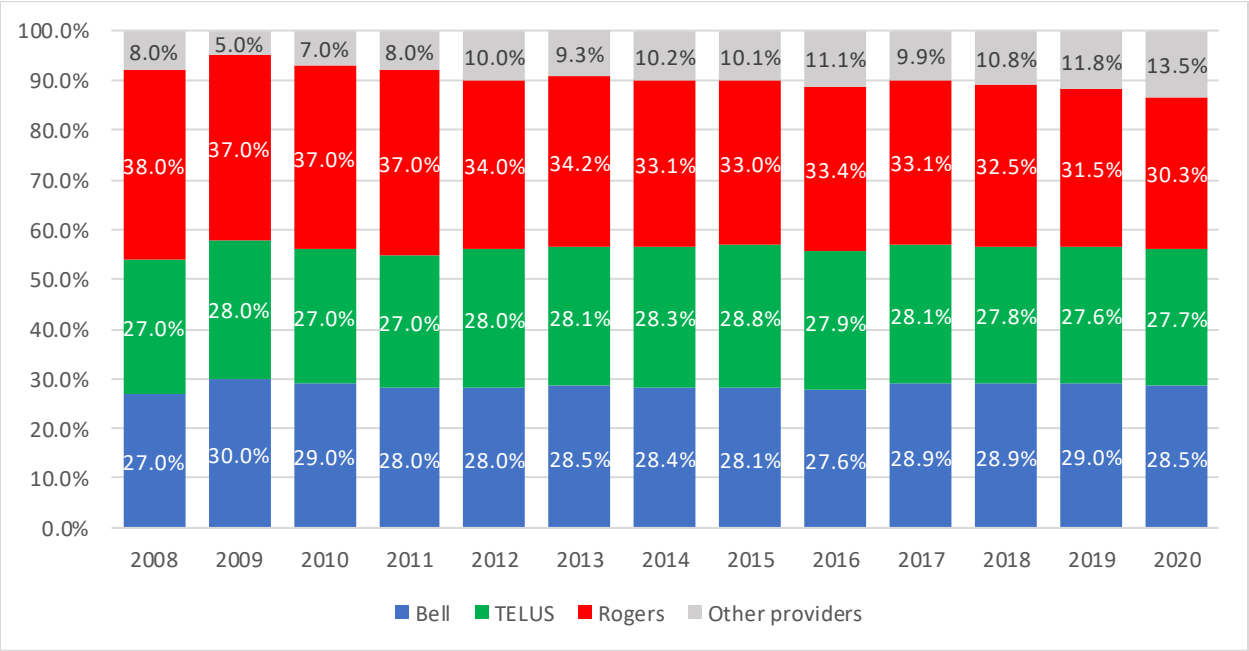
27. Shaw stated its intention during the CRTC hearing to use the MVNO policy to facilitate its expansion. A proceeding to determine the tariffs in relation to the MVNO policy is ongoing (in which the National Carriers have proposed several measures to limit the policy's impact on competition.)

28. The Proposed Transaction threatens to reverse the competitive benefits Shaw has delivered for consumers, and seeks to halt their demonstrated progress, to the detriment of 64% of the Canadian population.

B. The Wireless Services Market is Highly Concentrated

29. Despite the efforts of ISED and the CRTC to promote competition in the supply of Wireless Services, the National Carriers still together account for approximately 87% of all Canadian mobile wireless subscribers. This level of nationwide concentration has been roughly steady in recent years, as shown in Figure 1, which shows market shares by subscribers from 2008-2020.

Figure 1 – National Mobile Wireless Market Shares by Subscribers, 2008-2020



30. The National Carriers have a roughly equal Canada-wide market share. Each has particular regional strengths. These regional strengths affect how they interact with one another across Canada.

31. There are six facilities based regional Wireless Services carriers that remain:

    a. Shaw, with the Freedom Mobile and Shaw Mobile brands, provides wireless services alone and bundled with wireline services in Alberta, Ontario, and British Columbia;

    b. Videotron, an incumbent cable company, supplies Wireless Services alone and bundled with wireline services to customers, primarily in Quebec;

    c. SaskTel, the incumbent telephone company in Saskatchewan, provides wireline and Wireless Services throughout Saskatchewan;

    d. Eastlink, an incumbent cable company in parts of the Maritimes, Northern Ontario, Alberta and other communities, provides Wireless Services alone and

bundled with wireline services in parts of the Maritimes as well as Sudbury and Timmins, Ontario and Grande Prairie, Alberta;

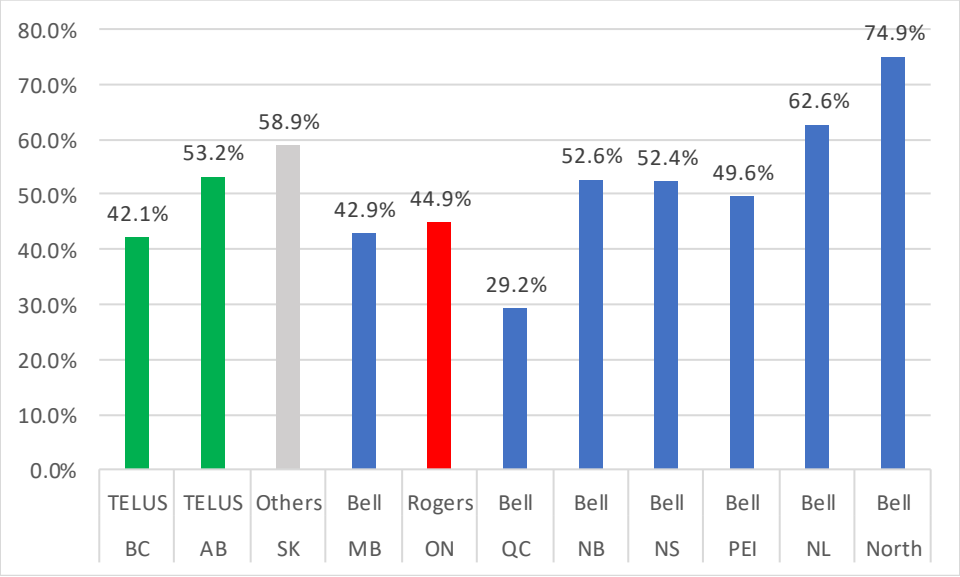
e. Tbaytel, formerly Thunder Bay Telephone Company, supplies wireline and Wireless Services in Thunder Bay, Ontario;

f. Xplore Mobile, operates in parts of Manitoba; and

g. Iristel, operating in the northern territories including Nunavut, Northwest Territories, and the Yukon.

32. Figure 2 shows the market share by subscribers of the largest carrier in each Canadian province for 2020. It indicates that Bell is particularly strong in the North, Manitoba and the Atlantic provinces, whereas TELUS is strong in the western provinces of Alberta and British Columbia, and Rogers is strong in Ontario. In Saskatchewan, on the other hand, SaskTel, a regional wireless carrier and the wireline incumbent in that province, has the largest market share.

Figure 2 – Market Share of the Largest Carrier by Province, 2020



33. The market share patterns in each Province and the North correlate to the historical origins of each of the National Carriers, and have been consistent over many years

with the exception of the growth of Shaw in Alberta, British Columbia and Ontario; the growth of Videotron in Quebec; and the acquisition of MTS by Bell.

34. In certain cities such as greater Toronto ("GTA") and greater Vancouver ("GVA"), the combined market share of a merged Rogers-Shaw would exceed [redacted] (see Figure 3).

Figure 3 – Shares of Wireless Services Providers by Region, as of June 30, 2020

35. Shaw has been a growing competitive force, winning a significant share of subscribers. Since Shaw acquired Wind in 2016, it has increased its wireless subscribers by 101% compared to a 9% increase over the same period for the National Carriers.

C. Canadians Have Experienced High Prices, Low Data Usage

36. In 2021, the CRTC found that Wireless Services prices were higher in Canada than in other comparable jurisdictions, that factors such as network costs or network quality do not explain the price differentials and that it is likely that insufficient competition in Canada contributes to higher prices in comparison to other countries.

37. Wireless Services data usage in Canada has similarly been found to be among the lowest on a per subscriber basis in the world. This pent-up demand for access to wireless data, a function of the high data prices and overage charges offered by the National Carriers, was addressed by Shaw's innovative service offerings described below, which made available liberalized data terms and stimulated such competitive benefits as the introduction of unlimited data plans in Canada.

D. Barriers to Entry are High

38. Barriers to entry faced by a prospective Wireless Services provider are high. These barriers include, among other things, access to radio spectrum, negotiating access to the networks of established carriers, significant sunk costs such as investments in infrastructure, economies of scale and scope, and client acquisition costs and delays.

39. First, a new entrant must acquire sufficient (and appropriate) radio spectrum over which it can transmit its wireless signals. Because spectrum is limited, the government allocates only certain bands for mobile wireless services, and it limits spectrum licenses to specific geographic areas. Spectrum auctions only occur periodically. Any new entrant seeking to provide Wireless Services must either obtain a spectrum license from the government (i.e. through auction) or purchase a license from an existing spectrum holder after obtaining approval from ISED. These steps involve delay and significant uncertainty.

40. In addition to obtaining spectrum, a carrier also needs to build a network in the service area within which it has a license, a process which takes considerable time and involves significant risk. The essential network investments include building wireless towers equipped with radio transmitters and antennae and connecting those towers to mobile wireless switches using fiber or microwave.

41. Because no carrier has a network that provides truly ubiquitous coverage in Canada, carriers also enter into wholesale roaming arrangements (which are mandated by the CRTC) with other carriers so that their customers can continue to use their phones even when travelling outside the range of the facilities owned by their carrier. Other essential contractual arrangements include those affording access to international networks.

42. Other steps which delay or limit entry are the need to purchase computer systems and to construct databases to handle customer information, telephone portability issues, billing, and other back-office functions, and to hire and to train support, sales

and marketing personnel. An entrant must also develop a system of retail distributors to sell its services and handsets as well as invest in advertising and other marketing activities to develop a brand accepted and trusted by consumers.

43. As a result of the costs, time delays and difficulties of entering the markets for Wireless Services, barriers to entry are high.

44. To serve business customers, additional barriers exist such as multi-line billing capabilities, reporting requirements, analytics, and competitive international roaming agreements.

45. To replace the competition that would be lost from the elimination of Shaw as a strong regional competitor in the markets in which it operates, a new entrant would need to have a portfolio of spectrum similar to that possessed by Shaw, the significant investments and other elements noted above as well as an established brand. Such entry is unlikely to occur in a sufficiently timely fashion to restrain the exercise of increased market power Rogers would enjoy from the Proposed Transaction.

46. All significant suppliers of Wireless Services (in terms of market share) who remain in operation in Canada are also suppliers of wireline services such as internet, television and home phone. In their wireline operating areas, providers typically offer service plans that bundle Wireless Services with wireline services. Barriers to expansion are lower for carriers which operate a pre-existing wireline network in that geographic area as a result of:

    a. brand recognition and the ability to cross-sell wireless products to pre-existing wireline customers;

    b. reduced churn rates associated with bundled accounts; and

    c. reduced fixed and operating costs.

47. While the National Carriers have in some limited circumstances provided wholesale services to enable certain other companies to provide Wireless Services as MVNOs

under operating constraints they specify, a competitively effective wholesale market has not developed in Canada. Where MVNOs provide services, their ability to compete is significantly constrained by the incentive of the National Carriers not to undercut their own profitability.

48. To the extent they operate, MNVOs are confined to niche markets and attract few customers. Regulatory rules governing MVNOs are under revision and there is considerable uncertainty surrounding them.

49. Significant MVNO entry is not likely in a time period or on a scale that is likely to constrain the likely increase in market power attributable to the Proposed Transaction. While the National Carriers are building out their 5G networks, an MVNO entrant would be starting from scratch, and would remain beholden to National Carriers for network access for years, face significant cost disadvantages, and be unable to compete effectively for bundled subscribers.

V. THE PROPOSED TRANSACTION IS LIKELY TO SUBSTANTIALLY PREVENT OR LESSEN COMPETITION IN WIRELESS AND BUSINESS SERVICES IN B.C., ALBERTA AND ONTARIO

A. The Relevant Markets

a. Product Market

50. The relevant product markets for assessing the effects of the Proposed Transaction are the provision of Wireless Services:

    a. to consumers other than business customers (referred to as Wireless Services, as defined above); and

    b. to business customers ("Business Services").

51. There are no close substitutes for Wireless Services or Business Services.

52. Business Services customers are a distinct set of business and government customers who purchase multiple mobile lines and devices. These customers have

distinct needs and seek distinct features and terms and conditions such as data allocations that are pooled amongst a large number of mobile phone lines, affordable international roaming, and multi-line reporting and billing.

b. Geographic Market

53. The relevant geographic markets for assessing the effects of the Proposed Transaction on Wireless Services are each of the provinces of B.C., Alberta and Ontario.

54. Because most customers use Wireless Services at and near their workplaces and homes, and in areas where they travel frequently, customers typically purchase services from providers that offer and market services where they live, work, and travel on a regular basis. Furthermore, a Wireless Services provider can only sell to customers living within its network coverage area, because CRTC regulations prohibit customers from permanently roaming on another service provider's network. Practically speaking, these factors mean that an individual consumer's wireless options are limited to those offered by companies which operate a network in the geographic area where that consumer lives.

55. Rogers and Shaw both offer Wireless Services throughout Alberta, British Columbia and Ontario. Bell and Telus also operate a Wireless Services network in those provinces. Videotron operates a network in the Ottawa-Gatineau area.

56. While wireless carriers offer province-wide prices on their websites, they also offer promotions for Wireless Services alone or bundled with Wireline Services which can be targeted at a group of provinces, a single province, a city, or even to specific outlets in certain shopping malls. As a result, competitive activity can vary in areas as narrow as a city or local area.

57. Wireless Services markets however can be assessed provincially because the competitive dynamics are generally similar across a province.

58. The relevant geographic markets for assessing the effects of the Proposed Transaction on Business Services are also each of the provinces of B.C., Alberta and Ontario. There are certain regional competitors and other differences in the competitive conditions in different provinces. The same permanent roaming restrictions that apply to Wireless Services apply to Business Services, resulting in the same list of competitors namely, the National Carriers in all regions except Ottawa-Gatineau, where Videotron is also a competitor.

B. Prevention or Lessening of Competition

a. Prevention or Lessening of Competition: Eliminating a Direct, Disruptive and Growing Competitor

59. Shaw has been a persistent disruptive force in Wireless Services and a vigorous and effective competitor. Shaw – a self described "disruptor" – has attracted customers through aggressive price competition, bigger data allowances than those available from the National Carriers, and service innovations such as the elimination of data overage fees. It has employed bundling by offering its existing Shaw wireline customer base Wireless Services at low prices. Shaw was poised to continue this pattern of disruption with plans to enter new areas, fill coverage gaps on major roadways, launch 5G, and expand into Business Services.

60. Prior to Shaw's acquisition of Wind Mobile, Wind experienced a difficult time expanding its customer base after its entry in 2008.

61. Shaw acquired Wind in 2016 and began investing heavily to improve network quality and product offerings, culminating in obtaining access to the iPhone in advance of its launch of "Big Gig" plans in 2017. These plans consisted of a large block of data for a reasonable price, with no data overage fees. Since then, Shaw has placed continued competitive pressure on the National Carriers.

62. With its Big Gig promotion in 2017, Shaw's Freedom Mobile brand increased its market share substantially.

63. Shaw has been a force of innovation and dynamic competition. It has been responsible for numerous "firsts" in the relevant Wireless Services markets, such as being the first carrier to eliminate overage fees, the first carrier to offer devices for free on term contracts, the first carrier to offer Wi-Fi offloading (access to numerous locations for free Wi-Fi by its customers), and the first and only carrier to offer $0 phone plans with internet bundles.

64. Shaw's wireline assets have enhanced its ability to build and maintain a strong customer base through cross selling and bundling opportunities and the ability to leverage its established brand. Its wireline assets have also reduced the cost and time associated with building and operating its wireless network.

65. The National Carriers have responded to Shaw's new plan offerings and low pricing in numerous ways, including by offering enhanced plans and promotions and targeting customers lost from Shaw's competitive behaviour.

66. Rogers has felt the competitive pressure exerted by Shaw. For example, Rogers launched unlimited data plans in response to competitive pressure from Shaw. Such plans offered customers Wireless Services for a fixed monthly fee while eliminating overage charges for data consumption.

67. The Proposed Transaction will eliminate head-to-head competition between Rogers and Shaw. Before the merger, significant substitution took place between Rogers and Shaw, with customers frequently leaving one company to obtain better deals with the other. This direct competition is shown in porting (switching between carrier) data that discloses the comparatively higher level of switching between Rogers and Shaw compared to levels of switching between other firms. The two firms have frequently targeted their marketing activities at one another.

68. The Proposed Transaction will also reduce product differentiation. Shaw, through its Freedom brand, has provided a low-priced option in the market. Shaw Mobile has likewise provided an innovative and attractively priced bundle of services to consumers in Alberta and British Columbia. The merged entity will lack the

incentives possessed by Shaw to offer each of these brands as distinctive competitive offerings because they cannibalize Rogers' high-margin sales.

69. The removal of Shaw as a competitor will result in the loss of the competitive pressure it has placed on the market, resulting in a likely substantial lessening of both price and non-price competition.

70. Since the Proposed Transaction was announced, competition between Rogers and Shaw has already been lessened. Shaw has reduced marketing and promotional activity and reduced the investment necessary to continue to compete aggressively. The result has been a loss of customers in favour of Rogers. This reduction in competition will only increase if the Proposed Transaction is permitted.

b. Future Wireless Services Competition will be Prevented by the Proposed Transaction

71. Prior to the merger announcement, Shaw showed no signs of slowing competitively. Relying on its strategy to "disrupt the market", its significantly improved LTE network, and acquisition of 600 MHz spectrum in 2019, Shaw was poised to make a 5G network announcement and had projected to grow its market share within the next several years.

72. Shaw's presence as a facilities-based competitor in the 5G market would provide a spur to adoption and expansion of use of this new technology.

73. Shaw also had expansion and network improvements planned. This expansion would have led to increased competition with the National Carriers, both within and outside Shaw's current geographic markets.

c. Remaining Competition Will not Constrain Post-Merger Market Power

74. The other National Carriers, Bell and Telus, will not effectively constrain Rogers' increased post-merger market power.

75. While the other National Carriers operate in Ontario, B.C. and Alberta, they have not historically played the vigorous and disruptive competitive role that Shaw has played in those markets. This is because, for example, when the other National Carriers are deciding whether to undertake promotional activity, they must weigh the benefit of gaining a new customer against the risk that their promotion will also reduce the prices they can charge their pre-existing base of customers or that retaliation by other National Carriers will result in switching and loss of customers.

76. Before Shaw's "Big Gig" promotion forced the National Carriers to compete to retain their customers, prices were increasing year-over-year. They have since decreased in terms of price per unit of data purchased.

77. Shaw has different competitive incentives from those of the National Carriers. Given Shaw's smaller market share, the relative risk to Shaw of its competitive initiatives reducing the prices of its existing base of customers is lower than the upside from market share gains from the larger portion of the market possessed by rivals. If Shaw is eliminated as a competitive force, neither Bell, Telus nor Rogers are therefore likely to replace its competitive impact and presence.

78. These dynamics mean that the stable, high priced competitive environment that was in place prior to Shaw's Big Gig initiative in 2017 is likely to return if the merger is permitted.

d. Increased Likelihood of Coordinated Behaviour

79. Coordination refers to non-competitive behaviour by a group of firms, such as parallel or follow-the-leader conduct, that is profitable for each firm due to the accommodating reactions of the other firms in the group. Markets for Wireless Services in Canada are highly susceptible to coordination.

80. The relevant markets for Wireless Services are highly concentrated. The four-firm concentration ratio in every region of Canada except Ottawa is virtually 100%, and even in Ottawa it is very high at [redacted] Three-firm concentration ratios are also very

high, with the National Carriers accounting for approximately 87% of the total number of subscribers nationally.

81. The National Carriers are roughly symmetric in their national market shares. Each is relatively stronger in some provinces and weaker in others. These shares have generally been stable for years.

82. The supply of Wireless Services involves a large number of small-sized transactions. The wireless carriers, particularly the National Carriers, generally offer similar, though not identical, products, plans and bundles. Trends in cost and demand are relatively stable and well known among these players at this point in the industry's evolution.

83. Pricing is transparent to wireless carriers and especially the National Carriers who actively monitor their competitors' plans, prices and promotions.

84. National Carriers can and do signal their future pricing intentions by such tactics as using promotional pricing with pre-specified end dates, or by publicly announcing their future pricing. They sometimes interpret price movements as signals about competitor intentions and react with their own price signals meant to communicate their intention to accede to a price increase, or to punish a competitor for lowering its price.

85. National Carriers each recognize that they mutually benefit when they enjoy a period without vigorous competition. They often refer to the need to maintain "price discipline" and to avoid "irrational pricing". As a result, there is a history of parallel or coordinated behaviour in this industry.

86. The threat of retaliation from competitors is a significant factor in pricing decisions by the National Carriers. Wireless Services are a significant source of revenue for the National Carriers, who compete with each other across many product and geographic markets. Multi-market exposure among the National Carriers is significant, and encompasses a number of geographies and business lines at the retail level. This multi-market exposure leads them to weigh the risk of a national

competitor retaliating in not only the same areas in which a promotion is offered, but also in other areas where they operate.

87. As referred to above in respect of remaining competition, the risk that lowering prices or enhancing offers will re-price their existing customer base or result in a loss of customers due to their switching to competitors also contributes to the likelihood of coordination by the National Carriers. It discourages both the likelihood and scale of competitive initiatives and responses.

88. The following additional factors mean that there would be a substantial increase in the likelihood of successful coordination post-merger:

    a. consumers of Wireless Services lack buyer-side market power;

    b. there are high barriers to entry and expansion;

    c. there will be a substantial increase in concentration that would result from this merger;

    d. there will be an increase in cost symmetry among the National Carriers;

    e. underlying service costs of competitors are generally well known to these players;

    f. the number of competitors in Shaw's service area will reduce from four to three, facilitating coordination; and

    g. the Proposed Transaction will eliminate a maverick competitor.

89. With the respect the last factor above, Shaw has a relatively smaller customer base and therefore different incentives than the National Carriers. Before the parties announced their proposed merger, Shaw positioned itself as a disruptor of coordination, driving down prices and fostering service enhancements such as higher plan limits. The Proposed Transaction is likely to lead to enhanced

anticompetitive coordination by removing this highly disruptive player from the market.

90. In summary, given the foregoing factors, the Proposed Transaction is likely to prevent or lessen competition substantially in the relevant markets by increasing the likelihood of coordinated behaviour post-merger.

C. Prevention of Competition in Business Services

91. Prior to the announcement of the Proposed Transaction, Shaw had planned to enter the Business Services market. The Proposed Transaction has prevented, or is likely to prevent, Shaw from entering, expanding and becoming a vigorous and effective competitor in that market.

92. Shaw was a poised or emerging competitor in that market. [redacted] By marketing to that base using such approaches as cross-selling and bundling of wireline and wireless services, Shaw would have likely played a disruptive competitive role in this market.

93. The Proposed Transaction prevents or is likely to prevent competition substantially by eliminating Shaw as a competitive threat and participant in the Business Services markets in Ontario, B.C. and Alberta.

D. The Parties' Proposed Divestiture(s) Fail to Remedy the Substantial Lessening or Prevention of Competition Resulting from the Proposed Transaction

94. In order to address competition concerns in the market for Wireless Services, Rogers and Shaw have proposed certain divestitures. These exclude certain assets and interests, including assets Shaw has used to provide Wireless Services and/or wireless subscribers.

95. The proposed divestitures will not eliminate the substantial lessening or prevention of competition resulting from the Proposed Transaction ("SLPC"). Among other things, with the creation by divestiture of this new entity ("New Freedom"):

    a. the proposed new owners are likely to provide less effective financial, managerial, technical or other support for the Wireless Services business;

    b. the proposed divestitures do not provide the assets necessary to effectively replicate the competitive presence of Freedom Mobile and Shaw Mobile in order to eliminate the SLPC; and

    c. the other Wireless Services providers, including Rogers, are not likely to compete with the same vigour as they would have but for the Proposed Transaction, given the pre-merger presence of Freedom and Shaw Mobile in the market.

96. Separating Freedom Mobile from Shaw will reduce New Freedom's competitiveness. Among other things:

    a. the reduction in scale of Freedom Mobile's operations will limit its ability to invest in and expand its network, and result in slower deployment of 5G;

    b. the separation of Freedom Mobile from the Shaw network infrastructure on which it relies will reduce its ability, for example, to offer bundled services by cross-subsidizing and cross-marketing between its product lines with promotions and discounts;

    c. the separation of Freedom from Shaw's integrated network severs its ability to offer customers access to more than 450,000 "Go Wi-Fi" hotspots. Losing these hotspots would result in inferior network coverage by Freedom Mobile as well as increased costs to provide the same level of service. Their loss would also increase costs and hurdles to effect future 5G deployment; and

    d. removing New Freedom's products from Shaw's retail locations and distribution would weaken New Freedom's retail network.

97. New Freedom is unlikely to have adequate access to the devices, network equipment and spectrum it needs to successfully operate and expand its wireless business.

98. New Freedom will face substantially greater hurdles to expand its network and deploy a 5G network than would have been the case for Shaw but for the Proposed Transaction. [redacted] Since the announcement of the Proposed Transaction, Shaw's investment in its network has declined and it did not acquire 5G-critical 3500 MHz spectrum, placing New Freedom in a more disadvantageous position for future expansion.

99. These challenges are heightened by New Freedom's loss of access to Shaw's network, which provides support for small cells and connectivity for the radio access network. As a result, New Freedom will require the infusion of substantially greater investment in order to successfully deploy a 5G network compared to that required by Shaw in the absence of the merger.

100. The divestitures proposed by Rogers and Shaw [redacted]

101. New Freedom will be unable to replace competition from Shaw Mobile in Alberta and British Columbia. The majority of Shaw Mobile customers are currently bundled customers, who tend to have a lower churn rate and a higher expected lifetime value than customers who only subscribe to a single service.

102. New Freedom would no longer have the same level of access to Shaw's wireline assets in Alberta and British Columbia, and would therefore be unable to provide bundled services, or to provide such bundles as competitively. This will limit New Freedom's ability to offer discounted bundled wireless plans and attract new

customers. Furthermore, it is unlikely that New Freedom will be able effectively to maintain the bundled offers to divested customers and therefore retain them. This will likely lead to higher customer churn and lower customer lifetime value for New Freedom, undermining its ability to invest in its network in the future.

103. Following the Proposed Transaction, Wireless Services providers, including Rogers, are unlikely to compete with substantially similar vigour as they would have but for the Proposed Transaction. Shaw, with its regional base as an established wireline service provider in Western Canada with an integrated Wireless Services business, was a maverick competitor with the ability and incentive to grow its business and gain market share. It had an incentive to offer aggressive wireless discounts to its existing base of internet subscribers with a lower wireless re-price risk in those markets. Post-transaction, Rogers would not share that incentive given its relatively high share of the Wireless Services market and greater risk of re-pricing its existing base of subscribers.

104. The divestitures proposed by Rogers and Shaw fail to substantially replicate this disruptive incentive and therefore the benefit of Shaw's competition brought to consumers in the relevant markets.

VI. RELIEF SOUGHT

105. The Commissioner therefore seeks the relief set out above.

DATED AT OTTAWA, ONTARIO, this 8th day of May, 2022.

Matthew Boswell
Commissioner of Competition
Competition Bureau
Place du Portage, Phase I
50 Victoria Street
Gatineau, QC K1A OC9

Schedule "A"

CONCISE STATEMENT OF ECONOMIC THEORY

WIRELESS SERVICES

1. The Respondents each provide Wireless Services in British Columbia, Alberta, and Ontario. Prior to the announcement of the Proposed Transaction, Shaw had planned to enter the Business Services market, which Rogers currently serves.

2. Wireless Services and Business Services are the relevant product markets.

3. The relevant Wireless Services and Business Services geographic markets are no broader than each of British Columbia, Alberta, and Ontario. Narrower areas may constitute relevant geographic markets for Wireless Services and Business Services and some competitive activity is local; however, the competitive dynamics are generally similar within a province. Competition can be analyzed at a provincial level in general.

4. Rogers, Bell, and TELUS provide wireless services across Canada and collectively account for almost 90% of national industry revenues. The National Carriers have historically dominated the provision of wireless services in most parts of Canada, each with roughly a one third share of national revenues. While the National Carriers have traditionally had similar shares of national revenues, each has had historic 'home markets' with greater shares. For example, Rogers is particularly prevalent in Toronto.

5. In some parts of Canada, the incumbent telephone company is also an incumbent provider of Wireless Services. Examples include SaskTel in Saskatchewan and Tbaytel in North Western Ontario. These carriers have a high share in their service area but do not account for a large share of national revenues.

6. Beginning in 2008, regulatory authorities have set aside spectrum for bidders with less than a 10% share of national wireless subscribers. The CRTC has also implemented policy measures to protect consumers and promote competition. Even

with such policy action, effective entry has been challenging and the National Carriers have maintained their high shares. Only recently has their share of national revenues dipped below 90%.

7. Shaw entered the wireless market in 2016 by acquiring a carrier that entered in 2008 and, following substantial investments, began to increase its share of new subscriber additions. Today, Shaw serves over 2 million subscribers and Rogers and Shaw are each other's closest competitor as measured by the number of subscribers won and lost from each carrier. But for the Proposed Transaction, Shaw would likely continue growing in competitive significance. Shaw's likely competitive growth includes expanding and upgrading its network, including to 5G.

8. A merger may harm competition in two ways: through unilateral effects and/or through coordinated effects.

9. Shaw and Rogers are significant head-to-head competitors of Wireless Services and, but for the Proposed Transaction, would be significant head-to-head competitors of Business Services. Each company unilaterally constrains the ability of the other to raise prices and otherwise exercise market power. Following the Proposed Transaction, that constraint would be lost, and Rogers would exercise increased market power, including charging customers higher prices for Wireless Services and Business Services in British Columbia, Alberta, and Ontario. Rogers may also adversely change the terms of its provision of Wireless Services and Business Services, such as by reducing data allowances in mobile plans. This exercise of market power (and reference to price changes herein) may include other adverse changes to the quality or service offerings for the product.

10. Rogers has [redacted] following closure of the Proposed Transaction. If it does so, Rogers would find it profitable to unilaterally increase its prices following the Proposed Transaction. This is because some of the sales that it would have lost had Shaw Mobile and Freedom Mobile still been available options would instead be retained by Rogers. This sales retention makes increasing prices profitable following the

Proposed Transaction when it would not have been profitable prior to the Proposed Transaction. In addition, the loss of brand choice is itself a significant anticompetitive effect.

11 [redacted] then Rogers would find it profitable to unilaterally increase their prices on each of their brands following the Proposed Transaction because some of the sales lost by each brand in response to a price increase would be diverted to its other brands. This sales recapture by its additional own brands makes increasing prices profitable following the Proposed Transaction when it would not have been profitable prior to the Proposed Transaction.

12. This incentive is significant because of the high diversion between Rogers and Shaw and because of the high incremental margins each firm earns. The Respondents have the unilateral incentive and ability to raise prices by a material amount, and this is likely to lead to a material overall industry price increase.

13. In addition, greater coordination is more likely if the merger is permitted. Coordination refers to the strategic behaviour (such as in regard to pricing) of a group of firms that is profitable for each firm because of each firm's accommodating reactions to the conduct of the others. Absent the merger, the National Carriers are better positioned to take advantage of mutually beneficial terms of coordination, monitor and detect deviations from coordinated behaviour, and effectively punish deviations, without the disruption of a competitor like Shaw. In particular:

    a. The National Carriers recognize mutually beneficial terms of coordination due to their symmetries. Each National Carrier has a roughly equal share of national revenues. However, each also has certain areas they consider to be their home markets, in which they possess a substantial share of subscribers. While the National Carriers could benefit from initiating increased competition outside these markets, they risk retaliation in their home markets if they were to do so. This renders them less likely to seek out competition outside their home markets;

b. The National Carriers are able to monitor and detect deviations from coordinated behaviour. The supply of Wireless Services and Business Services involves a large number of small transactions and the National Carriers can monitor customer wins and losses daily. The National Carriers monitor both “above the line” (publicly visible), and “below the line” (not broadly publicised) pricing. Moreover, industry trends are well known to the National Carriers, allowing them to distinguish between changes in product offerings due to changes in demand or supply conditions compared to changes in product offerings due to changes in competition.

c. The National Carriers are able to effectively punish deviations and signal a return to coordination. They may signal their future pricing intentions by using promotional pricing with prespecified end dates and making public announcements of their future pricing. National Carriers can react to such initiatives by communicating their intent to match a price change or by punishing a deviation from coordination. National Carriers fear retaliation if they compete too vigorously and win too many subscribers at the expense of another National Carrier.

14. The Proposed Transaction would eliminate a maverick competitor and permit a return to enhanced coordination.

15. Shaw is a disruptive entrant into an otherwise comfortable oligopoly. In addition to changing the unilateral incentives of firms to raise prices, the Proposed Transaction also threatens to change the nature of competition between the remaining suppliers in favour of greater coordination. As a capable entrant, Shaw is more strongly incented to gain subscribers than the National Carriers, even at the potential cost of diminishing margins for the whole market.

16. Shaw has made large investments which allow it to offer sufficiently attractive products to disrupt coordination among the National Carriers. But for the Proposed Transaction, it would continue to make such investments. The National Carriers have been, and but for the Proposed Transaction would continue to be, forced to

respond to Shaw's disruptive entry by introducing better offerings themselves, lest they lose too many subscribers to Shaw.

17. Enhanced coordination can have a significant impact on market outcomes. If the industry were to coordinate or coordinate more effectively following the Proposed Transaction, market prices would increase even more than predicted under an assumption of unilateral competition.

18. Shaw's competitive impact goes beyond lowering prices. Shaw has greatly improved data availability to consumers of Wireless Services. Shaw has also played an important role in introducing innovative service offerings, especially those that leverage its wireline assets, such as Wi-Fi hotspots. [redacted] Shaw was well positioned to play a disruptive role in Business Services as well, [redacted] and other competitive tactics to gain market share.

19. Entry, expansion, or repositioning by competitors is unlikely to occur in a timely and sufficient manner to prevent the maintained and enhanced market power created by the Proposed Transaction. A new carrier would face many challenges entering the territory served by Shaw, the most obvious is access to sufficient spectrum to operate a network. Even if spectrum set asides continue there is not a timely path for a new entrant to acquire sufficient spectrum at auction. Additionally, existing spectrum holders are unlikely to sell an adequate mix of spectrum to an entrant.

20. The remaining National Carriers will not effectively constrain Rogers' increased post-merger market power. On the contrary, they will benefit from it. The National Carriers' incentives to compete vigorously are also diminished by the high margins they earn on their large installed base of customers. Vigorous competition risks cannibalizing those sales, which would be costly because each such sale is lucrative and there are many of them.

21. Therefore, the Proposed Transaction will likely lead to a substantial lessening and prevention of competition in Wireless Services and a substantial prevention of competition in Business Services.

22. The divestitures Rogers and Shaw propose fail to eliminate the substantial lessening and prevention of competition resulting from the Proposed Transaction.

This is Exhibit “B” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.

Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

CT-2022-002

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

FRESH AS 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. Rogers asks the Tribunal to permit the Transaction, coupled with the Divestiture (as those terms are defined below), to proceed.

2. The Commissioner accepts that the significant majority of the Transaction—the combination of Shaw's wireline business 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.

3. 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.

4. 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.

5. While the Respondents do not agree with the Commissioner's position, Rogers, Shaw and Quebecor Inc.—the parent company of Videotron—have entered into an agreement for the divestiture of Freedom Mobile to Videotron. Freedom accounts for the vast majority of Shaw's wireless subscribers and wireless revenues. This Divestiture includes, among other things, Freedom's entire wireless business and wireline subscribers. The proposed Divestiture, including the ancillary agreements, would occur immediately prior to Rogers' acquisition of Shaw.

6. The Commissioner has rejected this proposal. 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.

7. The Commissioner cannot establish that the Transaction coupled with the Divestiture will result in a substantial lessening of competition in wireless services, and any alleged impact on competition is far outweighed by the efficiencies likely to be generated by the Transaction and the Divestiture.

8. Contrary to the Commissioner's allegations, the Transaction coupled with the Divestiture will not give rise to any, let alone a substantial, lessening of competition. Among other things, the Transaction:

- Will allow Rogers to be a stronger and more effective competitor and provide a national wireline network;

- Will 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;

- Will allow Freedom to continue as a fourth competitor in the same markets and with the same infrastructure as before the transaction, but with the benefit of lower marginal costs as well as efficiencies and other advantages created from integrating with Videotron; and

- Will allow Videotron to create a strong fourth national wireless services provider.

9. With the divestiture of Freedom to Videotron, the Transaction is pro-competitive and will result in significant benefits to wireless customers in B.C., Alberta, and Ontario, as well as significant efficiencies to the Canadian economy on the whole. The Commissioner has failed to assess, properly or at all, the efficiencies the Transaction and Divestiture will bring to the Canadian economy, which substantially outweigh the competitive effects alleged by the Commissioner.

10. 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 arms-length commercial terms.

11. The significant majority of Freedom's wireless business is located in Ontario, where Shaw has only a limited wireline presence and provides no backhaul services to Freedom. Where Freedom does use Shaw's backhaul services, in British Columbia and Alberta, Shaw charges Freedom market rates for that access.

12. A divested Freedom owned by Videotron would have the same or greater economic incentive to compete as it had when owned by Shaw.

13. There is no basis for any of the relief the Commissioner seeks. Rogers asks that this Application be dismissed in its entirety, or in the alternative that the Tribunal issue an order allowing the Transaction, subject to the Divestiture of Freedom. In either scenario, Rogers seeks its costs of this Application.

II. THE PARTIES AND THE TRANSACTION

Rogers

14. 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.

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

Shaw

16. 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.

17. 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.

18. 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.

19. 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

20. 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.

21. 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*.

22. 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.

The Divestiture

23. Having previously entered into a term sheet on June 17, 2022, Rogers, Shaw and Quebecor—Videotron's parent company—entered into a definitive Share Purchase Agreement on August 12, 2022 (the "**Divestiture Agreement**") for the divestiture of Freedom (the "**Divestiture**"). This agreement provides for:

a. Transfer to Videotron of Freedom's entire wireless business and wireline subscribers;

b. Provision by Rogers and Shaw of transitional services that will ensure a seamless transfer of ownership to Videotron without operational or service disruption; and

c. 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.

24. Shaw and Videotron submitted filings in respect of the Divestiture 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.

25. The 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]

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]

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

III. INDUSTRY BACKGROUND AND STRUCTURE

27. 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.

28. 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.

29. 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.

30. 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.

IV. GROUNDS ON WHICH THE APPLICATION IS OPPOSED

A. The Relevant Markets

31. 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

32. The Commissioner's analysis of the competitive effects of the Transaction coupled with the Divestiture 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, coupled with the Divestiture, would not do so once completed.

33. The Commissioner's analysis is flawed because, among other things:

a. The Commissioner's analysis of the competitive effects of the Transaction coupled with the Divestiture is backwards looking and fails to take into account the continued role that regulation, including price regulation, will play in the market;

b. 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;

c. 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 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;

d. 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

e. 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

34. The Commissioner's assertion that the Transaction would substantially lessen or prevent competition even with the Divestiture 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 and that are available to Freedom under the Divestiture Agreement.

35. The Commissioner's assertion that Freedom's success is dependent on Shaw's wireline assets 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:

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]

[redacted]

[redacted]

36. The Commissioner's assertions that Freedom would not be an effective standalone competitor following the Divestiture 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 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 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 will realize marginal cost savings arising from the integration of Freedom and Videotron; and

c. New Freedom will be able to purchase additional spectrum in the upcoming 3800 MHz auction in 2023.

37. 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]

    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.

38. Contrary to the Commissioner's assertions, Rogers and other carriers are likely to compete more intensely, not less, after the Transaction and Divestiture are completed. 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 than Freedom is or was under Shaw's ownership to compete in wireless services against each of Rogers, Bell and Telus, in part due to its ownership of 3.5 GHz spectrum.

39. 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]

40. 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.

41. 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.

42. The Divestiture will also 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

43. The Commissioner has given no consideration at all to the significant productive and dynamic efficiencies the Transaction and Divestiture will generate for the Canadian economy. These efficiencies will significantly outweigh any alleged anti-competitive effects and would be lost if the Transaction were blocked, as the Commissioner asks.

44. The Transaction, coupled with the Divestiture, will result in the following efficiencies:

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

45. 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

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

June 3, 2022

Amended August 8, 2022

Fresh as Amended August 18, 2022

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Shaw Communications Inc.

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 to Videotron (the "Divestiture").

Economic Analysis of Competitive Effects of Transaction Coupled with the Divestiture

3. The Commissioner bears the burden of quantifying the alleged anti-competitive effects of the Transaction coupled with the Divestiture in wireless services. An economic analysis of the competitive effects of the Transaction and the Divestiture 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 relevant parties; (iii) the incentives and abilities that Rogers would have following completion of the Proposed Divestiture, and (iv) the continuing impact of government regulation of the market. An economic analysis that takes such factors into account confirms

that the Transaction coupled with the Divestiture would lead to significant gains in welfare and increased competition.

4. To the extent that the Transaction coupled with the Divestiture 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 Videotron; 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 productive efficiencies that will outweigh any remaining alleged anti-competitive effects (which the Respondents deny) in any market for wireless services.

This is Exhibit “C” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.

Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

CT-2022-002

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 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

- and -

ATTORNEY GENERAL OF ALBERTA AND VIDEOTRON LTD.

Intervenors

FRESH AS AMENDED REPLY to the Response of Rogers Communications Inc. of the Commissioner of Competition

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I. OVERVIEW

1. The within application seeks to block Canada's largest wireless company from acquiring its closest competitor because the Proposed Transaction is anti-

competitive. It will harm millions of Canadian consumers in Ontario, Alberta and British Columbia through higher prices, lower quality services, and lost innovation. The Fresh as Amended Response of Rogers Communications Inc. (the "Response") ignores and seeks to obfuscate the substantial harm their Proposed Transaction and the Divestiture will visit upon the Canadian economy. Rogers' assertion that the Proposed Transaction and the Divestiture are competitively neutral (or that they will increase competition) is incorrect.

2. The proposed divestiture of Freedom Mobile to Videotron (the "Divestiture") is not an effective remedy. It fails to eliminate the substantial lessening and prevention of competition the Proposed Transaction will cause. Such a divestiture will not replace the significant and growing competition Shaw Mobile was delivering and would continue to deliver in Alberta and British Columbia, and it would make Freedom Mobile a substantially weaker competitor than it would have been but for the Proposed Transaction. The substantial growth in Freedom's competitive significance under Shaw's ownership amply demonstrate the significant benefits Freedom received from Shaw. In any case, the completion of the proposed divestiture to Videotron is subject to the ISED Minister's approval. The respondents bear the onus of proving that such divestiture is likely to be completed.

3. While Rogers claims there will be many benefits related to the Proposed Transaction and the Divestiture, the cognizable efficiencies Rogers can demonstrate are insufficient to outweigh and offset the anti-competitive effects.

4. While Rogers' Response asks the Tribunal to permit "the Transaction coupled with the Divestiture", Rogers fails to discharge its burden to demonstrate that the proposed remedy will be effective.

5. The Tribunal should prohibit this anti-competitive merger.

II. POINTS IN REPLY

6. 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 Fresh as Amended Reply have the meaning ascribed to them in the Application.

7. The Applicant admits the facts contained in the following: paragraphs 14, 16, 17, 18, the first sentence of paragraph 20; paragraph 22; the second sentence of paragraph 27; and paragraph 29 of the Response.

A. Market Definition

8. Rogers does not deny the market definition put forward by the Applicant, but suggests that Business Services is not a separate market.[1] To the contrary, Business Services involve unique demand, marketing, pricing and other characteristics which justify its consideration as a market separate from Wireless Services.

B. Shaw Mobile's Competitive Impact was Significant and Growing

9. Contrary to the Respondent's claims,[2] Shaw Mobile's impact on competition was significant and growing before the announcement of the Proposed Transaction.

10. Shaw Mobile gained a significant number of customers in a short period – much of which was at Rogers' expense, accounting for half of Rogers' losses in Alberta and British Columbia post-launch. This prompted competitive responses from Rogers, Bell and Telus to offset subscriber losses to Shaw Mobile. The competitive responses of the National Carriers included aggressive retention and win-back offers targeted at Shaw Mobile and Freedom Mobile customers in Alberta, British Columbia and Ontario.

[1] Paragraph 31 a. of the Response.

[2] Subparagraphs 33(c) and (d) of the Response.

C. The Respondent's Position on the Importance of Wireline Assets are Contradictory and Self-Serving

11. The Respondent erroneously downplays the competitive significance of wireline assets and scale to competition for Wireless Services in Alberta and British Columbia[3] despite its awareness of the material facts set out in the Commissioner's Application.

12. The Respondent's position on the significance of wireline assets to wireless competition is not only wrong as it pertains to Alberta and British Columbia, but it is also at odds with Rogers' assertion that Shaw's wireline assets would enhance Rogers' ability to compete, including against the other National Carriers. Rogers' position that with the Proposed Transaction Rogers "will be better placed to compete in wireless services against Bell and Telus"[4] contradicts Rogers' claim that Freedom Mobile can be severed from Shaw's wireline business without suffering a substantial competitive disadvantage. This is simply not the case. Severing Freedom Mobile from Shaw's wireline business will substantially compromise its ability to compete and provide much-needed competitive discipline to the National Carriers. Shaw is a disruptive entrant that is still growing its wireless business while Rogers is an incumbent that is already the largest wireless carrier in Canada with significant spectrum holdings, established brands, and a nationwide wireless network, retail distribution footprint and already claims to have Canada's largest and most reliable 5G network. The Proposed Transaction plus a Freedom Mobile divestiture would eliminate Shaw Mobile and significantly weaken Freedom Mobile such that the net effect would be a substantial lessening and prevention of competition.

13. As a national carrier with substantial existing market share, and in light of other market characteristics described in the Application,[5] Rogers' incentives to compete in Wireless Services are significantly different from those of Shaw. The Proposed Transaction would give rise to a greater likelihood of coordinated behaviour among

[3] Paragraphs 10-13, 34-37 of the Response.

[4] Paragraph 38 of the Response.

[5] Notice of Application herein, at paragraphs 74-90.

the incumbent facilities-based carriers, not increased competition as Rogers has suggested

D. Shaw Planned to Continue to Grow its Business Before the Announcement of the Proposed Transaction

14. Counter to the Respondent's claims,[6] Shaw planned to make 5G investments, enter new areas 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's decisions to cease these investments and to compete less vigorously are a result of the Proposed Transaction.

E. MVNO Entry is Unlikely to be Timely or Sufficient to Replace Competition from Shaw

15. The CRTC's MVNO Policy will not cure the substantial lessening and prevention of Competition the Proposed Transaction creates.[7] Rogers does not deny that MVNO entry is not likely in a period or on a scale that would constrain the likely increase in market power attributable to the Proposed Transaction.

16. Rather, the CRTC's MVNO Policy sought to protect and enhance the pre-merger competition brought about by regional carriers like Shaw who would have been the main beneficiary of the CRTC's policy. The diminishment of Shaw's Wireless business due to the Proposed Transaction and Divestiture will thus substantially reduce the effectiveness of the CRTC MVNO policy and further compound the anti-competitive effects of the Proposed Transaction.

F. There Would be No Increase in Competition

17. While Rogers pleads that the Proposed Transaction and the Divestiture would increase competition,[8] as noted above, that is not the case, given factors which include Rogers' different market position and incentives from Shaw and the difficulties and reduced competitiveness which Vidoetron will face without wireline

[6] Subparagraphs (d) and (e) of the Response.

[7] See paragraphs 28-30 of the Response.

[8] Paragraphs 38-40 of the Response.

assets and other benefits derived by Shaw from its wireline business. These factors make it likely that there will be increased post-merger coordination and reduced competition in Wireless Services. Contrary to Rogers' assertions, prior to the proposed transaction being announced, Shaw was poised to expand, by steps including extending its network in Ontario and the west, participating in the acquisition of new spectrum and offering 5G services.

G. Claimed Efficiencies Do Not Save this Anticompetitive Merger

18. Rogers attempts to justify its anticompetitive merger with Shaw by asserting that it, and the divestiture of Freedom to Videotron, will achieve productive and dynamic efficiencies. The Respondents bear the burden of establishing the likelihood and the extent of each efficiency gain that they claim, and that such gains, if realized, would provide cognizable benefits to the Canadian economy and that they are likely to be greater than, and offset, the anticompetitive effects of the Proposed Transaction.

19. The efficiencies claims made cannot save this anti-competitive merger, as they:

    a. are speculative, unproven and unlikely to be achieved in whole or in part or are grossly exaggerated;

    b. are based on unrealistic assumptions and flawed methodologies;

    c. are not brought about by the Proposed Transaction or Divestiture or would likely have been achieved irrespective of the Proposed Transaction; and

    d. fail to account or to properly account for the cost to achieve the claimed efficiencies.

20. Additionally, the efficiencies Rogers claims[9] are not cognizable under the Act as:

[9] Paragraphs 43-44 of the Response.

a. Rogers, in seeking to achieve these efficiencies in the manner it proposes, will reduce product choice, lower output, and degrade the quality of Wireless Services in Ontario, Alberta and British Columbia;

b. they are not all true resource savings for the Canadian economy; and

c. they will not all accrue to the Canadian economy but outside of Canada.

21. Further, the Respondents require the approval of the ISED Minister under the *Radiocommunication Act*, R.S.C., 1985, c. R-2 to complete the Proposed Transaction and the proposed divestiture to Videotron. To the extent that the Respondents may be required to modify or agree to modify aspects of the Proposed Transaction and to divest wireless spectrum given the requirements of the *Radiocommunication Act*, any claimed efficiencies that the Respondents cannot realize as a result thereof are not cognizable under the *Competition Act*. Those claimed efficiencies are lost on account of the operation of the *Radiocommunication Act*, not any order under the *Competition Act*.

22. Any cognizable efficiencies that may be obtained through the Proposed Transaction and/or Divestiture that would be lost if the order sought by the Commissioner were made will not be greater than or offset the anticompetitive effects of the Proposed Transaction.

23. Neither the Proposed Transaction nor the Divestiture will contribute to the efficiency and adaptability of the Canadian economy but would require consumers of Wireless Services in Ontario, Alberta and British Columbia to pay materially higher prices, have fewer choices and experience a deterioration in the quality of Wireless Services. These effects will result in a corresponding loss of allocative efficiency, or deadweight loss, to the Canadian economy that outweighs any cognizable efficiencies that may arise from the Proposed Transaction and/or Divestiture.

24. Furthermore, the increase in prices or qualitative effects will result in a transfer of wealth from low- and moderate-income groups in society to the Respondents, whose shareholders include ultra-rich members of the family ownership groups of

these companies. Increased profits will also be paid to non-Canadian investors. These effects are socially adverse and otherwise must be given weight against any efficiencies that may arise. As a result, the cognizable efficiencies of the Proposed Transaction and/or Divestiture, if any, are not greater than or would offset its anti-competitive effects.

Dated: June 16, 2022

Amended August 15, 2022

Fresh as Amended September 2, 2022

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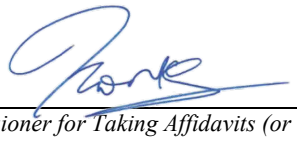
This is Exhibit “D” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.



Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

CT-2022-002

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

DEMAND FOR PARTICULARS

With respect to paragraph 17 of the Commissioner's Fresh as Amended Reply, the Respondent, Rogers Communications Inc., seeks particulars of:

1. What difficulties, if any, the Commissioner alleges Videotron will face?

2. The manner in which the Commissioner alleges Videotron's competitiveness will be reduced?

3. What "other benefits" the Commissioner alleges Shaw's wireless business derives from its wireline business?

September 6, 2022

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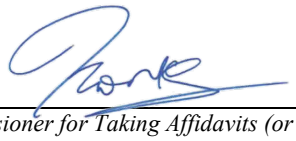
Counsel for the Respondent
Shaw Communications Inc.

This is Exhibit “E” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.



Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

CT-2022-002

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 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

- and -

ATTORNEY GENERAL OF ALBERTA AND VIDEOTRON LTD.

Intervenors

Response to Demand for Particulars

Rogers seek particulars of the underlined language in the following paragraph of the Fresh as Amended Reply. These matters are already specified in the applicant's pleadings. The following response is provided without prejudice to the applicant's position that no further particulars were or are needed. What follows is subject to

amendment or supplement on receipt of the complete information currently sought in the on-going discoveries of Shaw, Rogers and Videotron.

> 17. While Rogers pleads that the Proposed Transaction and the Divestiture would increase competition, as noted above, that is not the case, given factors which include Rogers' different market position and incentives from Shaw and the difficulties and reduced competitiveness which Videotron will face without wireline assets and other benefits derived by Shaw from its wireline business. These factors make it likely that there will be increased post-merger coordination and reduced competition in Wireless Services. …

1. **Request:** "What difficulties, if any, the Commissioner alleges Videotron will face?"

   Response: The words are taken out of context. The "difficulties and reduced competitiveness that Videotron will face without wireline assets and other benefits derived by Shaw from its wireline business" include the following:

   a. the barriers to entry faced by Videotron in the relevant markets identified at paras. 38-49 of the Notice of Application;

   b. the decline of Freedom since the merger was announced, as specified at para. 70 of the Notice of Application;

   c. the impacts of the divestiture on Freedom identified at para. 95 of the Notice of Application;

   d. the impacts of the separation of Freedom from Shaw on Freedom as proposed to be divested to Videotron, as identified at para. 96 of the Notice of Application;

   e. Videotron's challenges associated with access to devices, network equipment and spectrum as specified at para. 97 of the Notice of Application;

f. Videotron's greater hurdles related to expansion and deployment of elements of a network, including a 5G network, as specified at paras. 98 and 99 of the Notice of Application;

g. Videotron's reliance and dependence on Rogers created by various agreements with Rogers, some of which are still being concluded, as referenced at para. 100 of the Notice of Application;

h. Videotron's inability to replace competition from Shaw Mobile, including in competition through bundled products and pricing, as specified in paras. 101 and 102 of the Notice of Application;

i. Videotron's reduced access to wireline assets as specified in para. 102 of the Notice of Application and further specified at para. 12 of the Fresh as Amended Rogers Reply ("Rogers Reply");

j. the different competitive circumstances of Videotron, which affect the likelihood or ability to replicate or to approximate Shaw's competitive vigour, tactics and incentives as specified in paras. 103 and 104 of the Notice of Application and further specified at paras. 12 and 13 of the Rogers Reply;

k. the loss to Videotron of the benefits of Freedom's integration with Shaw including those specified at para. 16 of the Fresh as Amended Shaw Reply ("Shaw Reply"); and

l. the matters which reduce the competitive effectiveness of a divested Freedom specified in para. 14 of the Shaw Reply:

    i. additional capital requirements of a standalone wireless entity in B.C. and Alberta;

    ii. incremental costs to develop 5G network;

iii. incremental capital or operating costs to build out or purchase from third parties backhaul previously provided by Shaw wireline business;

iv. inability to bundle or cross-sell competitively and the challenge of competing against incumbents who can cross-sell multiple telecommunication products;

v. dependence on Rogers and competitive vulnerability as a result of the numerous contractual arrangements included in the proposed divestiture to Videotron; and

vi. loss of access, in whole or part, to "Go Wi-Fi" hotspots, resulting in increased costs and inferior coverage.

2. **Request**: "The manner in which the Commissioner alleges Videotron's competitiveness will be reduced?"

   Response: See above.

3. **Request:** "What 'other benefits' the Commissioner alleges Shaw's wireless business derives from its wireline business?"

   Response: See above.

Dated: September 12, 2022.

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Competition Bureau Legal Services
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50 Victoria Street, 22nd Floor
Gatineau, QC
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Attention: John S. Tyhurst
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AND TO: **Davies Ward Phillips & Vineberg LLP**
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Attention: Kent E. Thomson
Derek D. Ricci
Steven G. Frankel
Chanakya Sethi
Counsel to Shaw Communications Inc.

This is Exhibit “F” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.

Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

Competition Tribunal Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 14
File No.: CT-2022-02
Registry Document No.: 215

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34 as amended.

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc. and Shaw Communications Inc.
(respondents)

and

Attorney General of Alberta and Videotron Ltd.
(interveners)

Decided on the basis of the written record
Before: Mr. Justice Andrew D. Little (Chairperson)
Date of order: September 12, 2022

AMENDED CONFIDENTIALITY ORDER

FURTHER TO an application filed by the Commissioner on May 9, 2022 against the Respondents pursuant to section 92 of the *Competition Act*, RSC 1985, c C-34, as amended;

AND FURTHER TO the draft confidentiality order filed on consent by the Parties and the Intervener Videotron Ltd. on August 19, 2022; a Direction from the Tribunal on August 23, 2022; a letter dated September 8, 2022, from counsel for the Attorney General of Alberta with respect to access to confidential information; and discussions at a Case Management Conference on September 9, 2022;

AND CONSIDERING that the Tribunal considers thjs Order to be a relevant confidentiality order for the purposes of Rule 51(d) of the *Competition Tribunal Rules*, without prejudice to the ability of the Attorney General of Alberta and each of the Parties and Videotron Ltd. to seek additional amendments to it;

THE TRIBUNAL ORDERS THAT:

[1] For the purpose of this Order:

(a) "**Act**" means the *Competition Act*, RSC 1985, c C-34, as amended;

(b) "**Affiliate**" has the same meaning as in subsection 2(2) of the Act;

(c) "**Commissioner**" means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;

(d) "**Designated Representatives**" means up to two in house counsel and up to six additional individuals designated by each of the Respondents and the Intervener who will be permitted access to Records designated as Level B Protected Documents in accordance with the terms of this Order, which designations shall be made by written notice to the Tribunal with a copy sent concomitantly to the Commissioner. The Commissioner may make a motion to the Tribunal objecting to such designations;

(e) "**Independent Expert**" means an expert retained by a Party or the Intervener with respect to the Proceedings who (i) is not a current employee of a Respondent or the Intervener; (ii) has not been an employee of a Respondent or the Intervener within two years prior to the date of this Order, (iii) is not a current employee of a competitor of a Respondent or the Intervener; (iv) has not been an employee of a competitor of a Respondent or the Intervener within two years prior to the date of this Order; and (v) has executed the Confidentiality Undertaking in the form attached as Schedule A hereto;

(f) "**Intervener**" means Videotron;

(g) "**Parties**" means the Commissioner and Respondents collectively, and "**Party**" means any one of them;

(h) "**Person**" means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;

(i) "**Proceedings**" means the applications filed by the Commissioner against the Respondents (File Number CT-2022-002) for orders pursuant to sections 92 and 104 of the Act;

(j) "**Protected Record**" means any Record (including the information such Record contains) that is produced in the Proceedings, including Records listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to undertakings, Records produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits and submissions that:

i. the Party or Intervener producing the Record claims is confidential pursuant to Section 2 of this Order; or

ii. the Tribunal has determined is confidential;

(k) "**Record**" has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;

(l) "**Record Review Vendor**" means a professional service provider retained by a Party or the Intervener with respect to the Proceedings to facilitate the review of Records, both digital and paper, by legal professionals and who has executed the Confidentiality Undertaking in the form attached as Schedule A hereto;

(m) "**Respondent**" means Rogers and Shaw collectively, and "**Respondent**" means either of them;

(n) "**Rogers**" means Rogers Communications Inc., its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the foregoing entities, and their respective directors, officers, employees, agents, representatives, successors and assigns of each;

(o) "**Shaw**" means Shaw Communications Inc., the Shaw Family Living Trust, and, as applicable, their respective directors, officers, employees, agents, representatives, trustees, beneficiaries, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the foregoing entities, and their respective

directors, officers, employees, agents, representatives, successors and assigns;

(p) "**Third Party**" means any Person other than the Commissioner, Respondents, or the Intervener;

(q) "**Tribunal**" means the Competition Tribunal established pursuant to subsection 3(1) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), as amended; and

(r) **"Videotron"** means Videotron Ltd., its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the foregoing entities, and their respective directors, officers, employees, agents, representatives, successors and assigns of each.

[2] Disclosure of Records containing any of the following types of information could cause specific and direct harm, to the extent they or the information therein are not already publicly available or otherwise available to the recipient, and such Records may be designated as Protected Records:

(a) information relating to prices, auctions, spectrum acquisition, network planning, capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives produced by a Respondent, the Intervener, or a Third Party;

(b) confidential contractual arrangements between a Respondent or the Intervener and their customers, agents, and/or suppliers or between a Third Party and its customers, agents, and/or suppliers;

(c) financial data or reports, or financial information relating to a Respondent, the Intervener, or their customers, suppliers or a Third Party;

(d) business plans, marketing plans, strategic plans, budgets, forecasts and other similar information of a Respondent, the Intervener, or a Third Party;

(e) internal market studies and analyses of a Respondent, the Intervener, or a Third Party;

(f) internal investigative and related Records belonging to the Commissioner; and

(g) other Records containing competitively sensitive and/or proprietary information of a Respondent, the Intervener, or a Third Party.

[3] Without prejudice to any position or argument a Respondent or the Intervener may take or make in the Proceedings and in any related appeals, including (without limiting the generality of the foregoing) with respect to any claim of privilege by the Commissioner, the Commissioner may designate as Level A Protected (as defined below), any information that could identify a

Third Party who is reasonably concerned about the public disclosure of its identity.

[4] If information from a Protected Record is incorporated into any other Record, that Record shall be a Protected Record. Any Protected Record shall cease to be a Protected Record if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); (b) with respect to any Protected Record originating from the Intervener, if the Parties and the Intervener agree in writing that the Record shall cease to be a Protected Record and, with respect to all other records, if the Parties agree in writing that the Record shall cease to be a Protected Record; or (c) the Tribunal determines that the Record shall cease to be a Protected Record.

[5] Protected Records will be identified in the following manner for the purpose of the Proceedings:

(a) a Party or the Intervener claiming that a Record is a Protected Record shall, at the time of production of a Protected Record, mark it with the name of the Party or the name of the Intervener producing the Record and with "Confidential – Level A" or "Confidential – Level B" on the face of each Record and/or on each page that is claimed as confidential;

(b) subject to Section 4 of this Order, all Records designated as Protected Records shall be treated as a Protected Record, save for determination otherwise by the Tribunal or re-designation pursuant to Section 9 below;

(c) the inadvertent failure to designate a Record or portion thereof as a Protected Record at the time it is disclosed does not constitute waiver of the right to so designate after disclosure has been made;

(d) if a Record originates with or from more than one Party and/or the Intervener and is designated by at least one Party or the Intervener as a Protected Record, the highest level of confidentiality shall universally attach to that Record, subject to the resolution of any challenge to that claim of confidentiality;

(e) at any point in the Proceedings, a Party or the Intervener may challenge a claim of confidentiality or level of confidentiality made by another Party or the Intervener. The Parties shall use their best efforts to agree as to whether the Records (or portions thereof) are to be treated as Protected Records; and

(f) if agreement cannot be reached, the Parties or the Intervener may apply to the Tribunal to determine whether the Record or a portion thereof is a Protected Record or what level of confidentiality should apply to a Protected Record.

[6] Subject to a further order of the Tribunal, the consent of the Party or Parties or Intervener that produced and claimed confidentiality over the Protected Record, or as required by law,

Protected Records marked "Confidential – Level A" (**"Level A Protected"**) may be disclosed only to:

(a) the Commissioner, counsel to the Commissioner, and the Commissioner's staff;

(b) outside counsel to the Respondents and outside counsel's staff who are directly involved in the Proceedings;

(c) outside counsel to the Intervener and outside counsel's staff who are directly involved in the Proceedings;

(d) Independent Experts and their staff who are directly involved in the Proceedings; and

(e) Record Review Vendors.

[7] (a) Subject to a further order of the Tribunal, the consent of the Party or Parties or Intervener that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked "Confidential – Level B" (**"Level B Protected"**) may be disclosed only to:

(i) the individuals described in Section 6 above; and

(ii) Designated Representatives of the Respondents or the Intervener who have executed the Confidentiality Undertaking in the form attached as Schedule A.

(b) Notwithstanding paragraph 7(a)(ii) and the definition of the term "Designated Representatives" found in paragraph 1, as it relates to a Protected Record produced by either Rogers or Shaw and designated at Level "B", the said Protected Record may only be shared with in-house counsel at each of Rogers and Shaw who have executed the Confidentiality Undertaking in the form attached as Schedule A and shall not be disclosed to any other Designated Representative of the Respondents.

(c) Notwithstanding paragraph 7(a)(ii) and the definition of the term "Designated Representatives" found in paragraph 1, Protected Records produced by Videotron and marked as Level "B" shall be treated by the Respondents as Level "A" and not shared with any Designated Representative of the Respondents, and Protected Records produced by the Respondents and marked as Level "B" shall be treated by Videotron as Level "A" and not shared with any Designated Representative of Videotron.

(d) The terms of this Order, and in particular the terms of this paragraph 7, are without prejudice to and shall not limit: (i) any Party's or the Intervener's ability to challenge the designation of any Protected Record; (ii) the burden on any Party or the Intervener to support any confidentiality designations they have made; or (iii) any Party's or the Intervener's ability to seek to vary the terms of this Order, and in particular the terms of this paragraph 7.

[8] Notwithstanding any provision of this Order, the Commissioner may disclose any Records designated as Level A Protected or Level B Protected that he has so designated, and that have not been produced in the Proceedings by a Respondent or the Intervener or otherwise originated from a Respondent or the Intervener, to any Person for the purpose of preparing for the hearing of the Proceedings, subject to the limits prescribed by section 29 of the Act.

[9] A Party or the Intervener may at any time and with prior reasonable notice to the other Party or the Intervener re-designate any of its own Records designated as Level A Protected as Level B Protected or public Records, and/or may re-designate any of its own Records designated as Level B Protected as public Records. Where another Party or the Intervener disputes the re-designation, the Tribunal shall determine the proper designation. Records re-designated as public shall cease to be Protected Records and shall form part of the public record if introduced into evidence at the hearing of the Proceedings, unless the Parties or the Intervener agree otherwise or the Tribunal so orders. If a Party or the Intervener changes the designation of a Record to confidential, a prior disclosure of it shall not constitute a breach of this Order.

[10] If a Party or the Intervener is required by law to disclose a Protected Record, or if a Party or the Intervener receives written notice from a Person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law to disclose a Protected Record, that Party or the Intervener shall give prompt written notice to the Party or the Intervener that claimed confidentiality over the Protected Record so that a protective order or other appropriate remedy may be sought.

[11] Outside counsel to the Respondents and their staff, outside counsel to the Intervener and their staff, counsel to the Commissioner, the Commissioner and his staff, and Independent Experts and their staff, may make copies of any Protected Record as they require in connection with the Proceedings.

[12] Nothing in this Order prevents a Party or the Intervener from having full access to or, in the case of a Respondent or the Intervener only, using or disclosing Protected Records that originated from that Respondent or the Intervener.

[13] For greater certainty, in accordance with section 62 of the *Competition Tribunal Rules*, all Persons who obtain access to Records and information through documentary, written and oral discovery through the Proceedings are subject to an implied undertaking to keep the Records and information confidential and to use the Records and information solely for the purposes of the Proceedings (including any application or proceedings to enforce any order made by the Tribunal in connection with the Proceedings) and any related appeals.

[14] At the hearing of the Proceedings:

(a) Protected Records tendered as evidence at the hearing of the Proceedings shall be identified and clearly marked as such, in accordance with Paragraph 5(a), above;

(b) Following submissions from the Parties or the Intervener, the Tribunal may determine whether the Record should be treated as a Protected Record;

(c) Protected Records shall not form part of the public record unless the Party or Parties or the Intervener claiming confidentiality waive the claim, or the Tribunal determines that the Record is not a Protected Record;

(d) Records over which no privilege or confidentiality claim has been asserted shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record in the Proceedings if introduced into evidence or otherwise placed on the record. Public Records shall be marked "Public" on the face of the Record; and

(e) Nothing in this Order shall abrogate or derogate any legal onus, burden or requirement applicable to a sealing order or abrogate or derogate in any way from the rights of the Parties or the Intervener to assert confidentiality claims during the course of the hearing.

[15] The Parties and the Intervener shall provide the Tribunal with redacted versions of Protected Records at the time any such Records are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked "Public" on the face of the Record and shall form part of the public record in the Proceedings. Each Protected Record shall identify the portions of the Record which have been redacted from the "Public" version, by highlighting such portions in the Protected Record.

[16] The termination of the Proceedings shall not relieve any Person to whom Protected Records were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Records in accordance with the provisions of this Order and any Confidentiality Undertaking, subject to any further order of the Tribunal.

[17] Upon completion or final disposition of the Proceedings and any related appeals, all Protected Records and any copies of Protected Records, with the exception of Protected Records in the possession of the Commissioner and his staff, shall be destroyed or returned to the Party or the Intervener that produced them unless the Party or the Intervener that produced the Protected Records states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Respondents, outside counsel to the Intervener, and counsel to the Commissioner may keep copies of Protected Records in their files and that any copies of Protected Records as may exist in the Parties' or the Intervener's automatic electronic backup and archival systems may be kept provided that deletion is not reasonably practical and the copies are retained in confidence and not used for any purpose other than backup and archival purposes.

[18] The Parties and the Intervener shall bear their own costs associated with the request for and issuance of this Order.

[19] Nothing in this Order prevents or affects the ability of a Party or the Intervener from applying to the Tribunal for further orders or directions with respect to the use or disclosure of Records or information produced by another Party or the Intervener.

[20] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including, without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction of the Tribunal and may be

varied by order of the Tribunal.

[21] The amendments to the Tribunal's Order dated May 19, 2022, contained in this Order are made effective on August 19, 2022.

DATED at Toronto, this 12th day of September 2022.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

SCHEDULE "A"

Confidentiality Undertaking

IN CONSIDERATION of being provided with Protected Records,
I _____, of the City of _____, in the Province/State of _____, hereby undertake and agree to maintain the confidentiality of any Protected Documents that I obtain and, in particular, that:

1. I will not copy, disseminate, transfer or otherwise share or disclose any Protected Record to any other person, except, as applicable, (a) my staff who are directly involved in this matter; (b) outside counsel for the Party on whose behalf I have been retained, outside counsel's staff who are directly involved in the Proceedings and, in the case of the Commissioner, the Commissioner's staff directly involved in the Proceedings; and (c) Persons permitted by order of the Competition Tribunal.

2. I will not use any Protected Record for any purpose other than in connection with the Proceedings and any related appeals.

3. Upon completion of the Proceedings and any related appeals, I agree that all Protected Records, and any copies of same, in my possession shall be dealt with in accordance with instructions from counsel for the Party or the Intervener I am retained by or as prescribed by the order of the Tribunal.

4. I have read the Confidentiality Order granted by the Tribunal on _____, a copy of which is attached to this Undertaking, and agree to be bound by same. I acknowledge that capitalized terms in this Undertaking have the same meaning as defined in the Confidentiality Order. I further acknowledge that any breach of this Undertaking by me will be considered to be a breach of the Confidentiality Order.

5. I acknowledge and agree that the completion of the Proceedings and any related appeals shall not relieve me of the obligation to maintain the confidentiality of Protected Records in accordance with the provisions of this Undertaking. I further acknowledge and agree that either Party or the Intervener shall be entitled to injunctive relief to prevent or enjoin breaches of this Undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.

6. In the event that I am required by law to disclose any Protected Record, I will provide counsel for the Parties to the Proceedings and the Intervener with prompt written notice so that the Party or the Intervener that claimed confidentiality over the Protected Record may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Records that is legally required and I will exercise my best efforts

to obtain reliable assurances that confidential treatment will be accorded to it.

7. I will promptly, upon the request of the Party or the Intervener who provided Protected Records to me, advise where they are kept. At the conclusion of my involvement in the Proceedings and any related appeals, I will, upon the request and direction of the Party or the Intervener who provided Protected Records to me, destroy, return or otherwise dispose of all Protected Records received or made by me having been duly authorized and directed to do so.

8. I hereby attorn to the jurisdiction of the Tribunal to resolve any disputes arising under this Undertaking.

DATED this ___day of _____, 2022.

SIGNED, SEALED & DELIVERED in the presence of:

_____	_____
Name of witness	Name of signatory

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

John S. Tyhurst
Derek Leschinsky
Katherine Rydel
Ryan Caron
Kevin Hong

For the respondents:

Rogers Communications Inc.

Jonathan Lisus
Crawford Smith
Matthew Law
Bradley Vermeersch

Shaw Communications Inc.

Kent E. Thomson
Derek D. Ricci
Steven G. Frankel
Chanakya Sethi

For the Interveners:

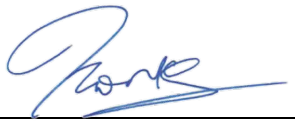
Attorney General of Alberta

Kyle Dickson-Smith
Opeyemi Bello
Andrea Berrios

Videotron Ltd.

John F. Rook Q.C.
Emrys Davis
Alysha Pannu

This is Exhibit “G” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.



Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

Competition Tribunal Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 13
File No.: CT-2022-002
Registry Document No.: 188

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the Competition Act, RSC 1985, c C-34 as amended;

BETWEEN:

Commissioner of Competition
(applicant)

and

Rogers Communications Inc.
Shaw Communications Inc.
(respondents)

and

Attorney General of Alberta
Vidéotron Ltd.
(intervenors)

Date of hearing: August 26, 2022
Before: Mr. Chief Justice Paul S. Crampton (Presiding Member)
Date of Order: August 26, 2022

ORDER REGARDING REFUSALS MOTION ARISING FROM DISCOVERY

UPON reviewing the *Outline of Argument of the Commissioner of Competition on Refusals Motion Arising from Discovery of Dean Prevost*;

AND UPON hearing the oral submissions this afternoon on behalf of the Commissioner and the respondent Rogers Communications Inc.;

THE TRIBUNAL ORDERS as follows:

[1] Questions related to network outages are relevant pursuant to the pleadings in this proceeding.

[2] There is no order as to costs.

DATED at Ottawa, this 26th day of August, 2022.

SIGNED on behalf of the Tribunal by the Presiding Member.

(s) Paul S. Crampton

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

John S. Tyhurst
Derek Leschinsky
Katherine Rydel
Ryan Caron
Kevin Hong

For the respondents:

Rogers Communications Inc.

Julie Rosenthal
David Rosner
Michael Koch
Jonathan Lisus
Crawford Smith
Matthew Law
Brad Vermeersch

Shaw Communications Inc.

Kent E. Thomson
Derek D. Ricci
Steven G. Frankel
John Bodrug

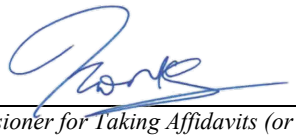
For the intervenors:

Attorney General of Alberta

Kyle Dickson-Smith
Opeyemi Bello
Andrea Berrios

Videotron Ltd.
John F. Rook
Emrys Davis
Alysha Pannu

This is Exhibit “H” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.



Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

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. or an affiliate thereof of Shaw Communications Inc.;

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:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC.

SHAW COMMUNICATIONS INC.

Respondents

WITNESS STATEMENT OF CHARLIE CASEY

I, Charlie Casey, of the City of Richmond Hill, in the Province of Ontario state as follows:

1. I am Vice President Consumer, Controller at TELUS Corporation ("TELUS"). I have worked at TELUS for 23 years, and my current responsibilities are financial planning

and reporting for our consumer segment. In this capacity, I support all financial and subscriber key performance indicators for our consumer business.

2. I make this statement in connection with the application under section 92 of the *Competition Act* made by the Commissioner of Competition (the "Commissioner") against Rogers Communications Inc. ("Rogers") and Shaw Communications Inc. ("Shaw"), relating to their merger (the "Proposed Transaction").

OPERATIONS OF TELUS

3. TELUS is a communications company that provides wireless and wireline services to individual subscribers, governments, and businesses across Canada. TELUS' mobile wireless business includes TELUS' 3G, 4G LTE, and 5G network through which it offers subscribers voice, data transmission and messaging services across Canada and worldwide delivered on subscribers' mobile devices, as well as TELUS' smartphone, tablet, and mobile devices offered to subscribers across the country. TELUS also offers a number of other services, including Internet access, TV, and virtual health care.

COMLINK DATA

4. As of October 2020, TELUS commenced subscribing to Comniscient Technologies Inc. ("Comlink") for porting data and analytics for the Canadian wireless industry. TELUS believes Comlink is a reliable source of porting data and analytics for the Canadian wireless industry.

5. TELUS provides its porting data to Comlink. For context, a port occurs when a subscriber switches from one wireless carrier (e.g., Shaw) or a landline carrier to another wireless carrier (e.g., TELUS) and keeps their phone number. The term "net ports" refers to the number of ports into a carrier minus the number of ports out from the carrier during the same defined time period. For purposes of this statement, unless I specifically indicate otherwise, references to Shaw relate to Shaw's wireless business which operates under the Shaw Mobile and Freedom Mobile brands.

Comlink uses the term “Freedom” to cover both Shaw Mobile and Freedom Mobile, and does not provide a breakdown as between the two Shaw brands.

6. TELUS utilizes the porting data and analytics provided by Comlink (via an electronic portal which TELUS can access at any time) in its regular course of business, together with other information, to better inform its competitive response. Most importantly, the Comlink data and analytics provides TELUS with directional insights on:

   a) TELUS’ wireless performance relative to our principal wireless competitors (Bell, Rogers, Shaw, Videotron, SaskTel, and Eastlink) by, for example, identifying which competitors are gaining or losing subscribers on a daily, weekly, monthly or quarterly basis nationally and by province; and

   b) the competitive impact of promotional and advertising activities undertaken by TELUS and/or our wireless competitors (as listed above) in terms of which competitors lost subscribers and which competitors gained subscribers during the period where such activities were undertaken.

7. The types of business decisions impacted by the insight provided by the Comlink data and reports include, for example:

   a) During Black Friday 2021, TELUS used the porting data to understand how TELUS was performing relative to competitors after promotions were launched, and whether or not TELUS would match the promotions of its competitors.

   b) Post-Black Friday 2021, TELUS undertook a detailed post-mortem analysis using porting data to understand how TELUS performed during the Black Friday promotion period and more specifically what type of promotions worked and what did not work (i.e., did not drive the desired performance). This analysis informed TELUS’ December 2021 Boxing Week promotional strategy.

   c) The data regularly informs TELUS’ determination to undertake competitor-targeted campaigns and promotional activity to increase share and win back

subscribers and it informs TELUS' actions during the time period of such campaigns. For example, in Q3 and Q4 2020 TELUS launched Operation Freedom which included: (a) win back offers targeting subscribers who ported out from TELUS to Shaw; and (b) promotions to win share against Shaw by offering Shaw subscribers incentives to port-in (i.e., switch) to TELUS.

CHANGES IN SHAW'S COMPETITIVE INTENSITY SINCE ROGERS ANNOUNCED ITS PROPOSED ACQUISITION OF SHAW

8. I believe that Shaw's competitive intensity in Alberta, British Columbia and in Ontario has decreased materially since the announcement of the Proposed Transaction on March 15, 2021. My belief is based on a number of data points and observations, including the following:

   a) The Comlink data: Attached to my witness statement as Exhibit A are true copies of three Comlink reports which show the net ports for Shaw on a monthly basis for the period commencing January 1, 2021 (prior to the announcement of the Proposed Transaction) and ending August 31, 2022, on a national basis, on a combined Alberta and British Columbia basis; and on an Ontario only basis. [redacted] More specifically,

      i. The national report shows that Shaw gained [redacted] net ports in April 2021 and lost [redacted] net ports in December 2021. This is an approximate 235% decrease in the number of net ports. This trend has continued throughout 2022. Shaw commenced 2022 by losing [redacted] net ports and in August lost [redacted] net ports.

      ii. The combined Alberta and British Columbia report shows that Shaw gained [redacted] net ports in April 2021 and lost [redacted] net ports in December 2021. This is an approximate 103% decrease in net ports. Shaw has experienced a drastic decline in net ports in 2022. It commenced the year by gaining [redacted]

net ports and then the decline commenced and in August it lost [redacted] net ports.

iii. [redacted] since the Proposed Transaction was announced. Shaw lost [redacted] net ports in April 2021 and lost [redacted] net ports in December 2021. This is an approximate 374% decrease in net ports. This trend has continued throughout 2022. Shaw lost [redacted] net ports in January 2022 and in August it lost [redacted] net ports.

iv. A common element of each of these reports, each of which covers a time period after the announcement of the Proposed Transaction, is Shaw's substantial loss of net ports in the Black Friday-Cyber Monday period (late November) and the Boxing Week period (late December) which suggests that Shaw was not competing vigorously for subscribers during these heavy price promotional periods.

b) TELUS' review of Shaw's Third Quarter Results for the three-month periods ending May 31, 2021, and May 31, 2022 shows, among other matters, that in Q3 2021, immediately after the Merger was announced, Shaw reported 46,604 postpaid net adds. In Q3 2022, approximately a year after the Merger was announced, Shaw reported 19,392 postpaid net adds, less than 50% of the net adds in the quarter immediately following the announcement of the Merger. This activity occurred despite the fact that the number of wireless subscribers in each of British Columbia, Alberta, and Ontario (being the provinces in which Shaw competes) increased in Q3 2022 relative to Q3 2021.

c) TELUS' own internal porting data shows that in the three quarters between April 1, 2020 and December 31, 2020 Shaw won [redacted] net ports from TELUS and in the three quarters in 2021 following the announcement of the Proposed Transaction, being April 1 2021 to December 31, 2021, Shaw only won [redacted] net ports from TELUS, a decrease of over 90%. From January 1, 2022 to August 31,

2022, the decline continued: Shaw lost [redacted] net ports to TELUS, representing a [redacted] decrease in net ports won from TELUS year-over-year.

9. The data also show that Shaw has reduced its promotional activity during heavy price promotional periods since the Proposed Transaction was announced. These periods include the Back-to-School period (mid-August to mid-September), the Black Friday-Cyber Monday period (late November) and the Boxing Week period (late December). In the third and fourth quarters of 2020, TELUS lost [redacted] net ports to Shaw. In the third and fourth quarters of 2021 (following the announcement of the Proposed Transaction) not only did TELUS not lose any net ports to Shaw, TELUS won [redacted] net ports from Shaw. I further observed Shaw's continued decreased competitive intensity in its 2022 Back-To-School promotions where TELUS won [redacted] net ports from Shaw in August 2022.

DATA SUPPLIED PURSUANT TO SECTION 11 ORDER

10. In response to an order the Federal Court issued under section 11 of the Competition Act, R.S.C. 1985, c. C-34 on August 1, 2021 (the "Order"), TELUS supplied data, records and information to Laura Sonley at the Competition Bureau relating to its wireless business and such production was completed November 29, 2021 ("Records").

11. The Records were reviewed by Andrea Wood, Chief Legal and Governance Officer of TELUS, who certified that the information so supplied is, to the best of her knowledge and belief, correct and complete in all material respects. Following this certification TELUS provided clarifications to the Bureau about certain data aspects of the Records. Andrea Wood, Chief Legal and Governance Officer of TELUS, has certified that these such clarifications are to the best of her knowledge and belief, correct and complete in all material respects.

12. Included with the Records TELUS produced to the Competition Bureau, and pursuant to the Order, TELUS provided the Competition Bureau with internal company data and access to Comlink's porting data and analytics.

13. Attached to my witness statement as Appendix 1 is a list of certain data sets included in the Records TELUS produced to the Competition Bureau pursuant to the Specifications 11, 17 and 19 of the Order (the “Data”). I attest that the Data was collected and maintained by TELUS in the usual and ordinary course of business.

Charlie Casey

September 20, 2022

Exhibit A to Witness Statement of Charlie Casey

Monthly Freedom Net Ports – National

Chart Parameters:

Measurement: Net Ports (Net Additions)

Time Period: January 2021 to August 2022

Time Interval: Monthly

Carrier: Freedom/Shaw Mobile

Region: National

Chart Parameters:

Measurement: Net Ports (Net Additions)

Time Period: January 2021 to August 2022

Time Interval: Monthly

Carrier: Freedom/Shaw Mobile

Region: Ontario

Chart Parameters:

Measurement: Net Ports (Net Additions)

Time Period: January 2021 to August 2022

Time Interval: Monthly

Carrier: Freedom/Shaw Mobile

Region: Alberta & British Columbia

Appendix 1 - Data

Specification 11

- “Specification 11- Response (Final- September 10, 2021).XLSX”

Specification 17

- NON_MB_SUMMARY_201701.xlsx- NON_MB_SUMMARY_201712.xlsx (replacement files received on 10/7/2021)
- NON_MB_SUMMARY_201801.xlsx-NON_MB_SUMMARY_202107.xlsx (original files received on 9/29/2021)

Specification 19

- Specification 19- Response (Final) edited.XLSX
- Spec_19_Plans_part2.xlsx

This is Exhibit “I” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.

Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

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. or an affiliate thereof of Shaw Communications Inc.;

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:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC.

SHAW COMMUNICATIONS INC.

Respondents

WITNESS STATEMENT OF NAZIM BENHADID

I, Nazim Benhadid, of the City of Montreal, in the Province of Quebec state as follows:

1. I am the Senior Vice President, Network Build & Operate of TELUS Corporation ("TELUS"). I have worked at TELUS for over 22 years, with experience across multiple services, including voice, wireless, and core infrastructure. In my present

capacity, I am responsible for all key areas of wireless and wireline network build and maintenance.

2. I make this statement in connection with the application under section 92 of the *Competition Act* made by the Commissioner of Competition (the "Commissioner") against Rogers Communications Inc. ("Rogers") and Shaw Communications Inc. ("Shaw"), relating to their merger (the "Proposed Transaction").

OPERATIONS OF TELUS

3. TELUS is a communications company that provides wireless and wireline services to individual subscribers, governments, and businesses across Canada. TELUS' mobile wireless business includes TELUS' 3G, 4G LTE, and 5G network through which it offers subscribers voice, data transmission and messaging services across Canada and worldwide delivered on subscribers' mobile devices, as well as TELUS' smartphone, tablet, and mobile devices offered to subscribers across the country. TELUS also offers a number of other services, including Internet access, TV, and virtual health care.

WIRELINE NETWORK OWNERSHIP IS CRITICAL TO WIRELESS NETWORK PERFORMANCE AND RELIABILITY

4. TELUS' wireline and wireless networks are highly integrated. In general, the only truly wireless portion of the wireless network is the link between our customers' wireless phones and the cell sites where our antennas are located. The rest of the network can be thought of in two components. The "core" networks are the high-speed backbone through which almost all data passes as it is transported across our network. Backhaul, in turn, is the portion of the network that links our cell sites to our cores. All of TELUS' core networks and almost all of TELUS' backhaul facilities are comprised of terrestrial fibre to optimize the performance and reliability of long-distance and large-scale wireless data transfers. As a result, the quality, performance, and reliability of our wireless network is heavily dependent upon the quality, performance, and reliability of our wireline network.

5. A network is only as fast as its slowest link. This is why TELUS' wireline fibre infrastructure is an integral part of the wireless network performance and reliability. Without a fibre network, TELUS would have to either duplicate fibre infrastructure at additional cost or lease it from other carriers. Leasing fibre backhaul facilities reduces TELUS' ability to control their performance (including speed, latency, jitter, capacity and upgrades to equipment), routings, and timely maintenance of critical facilities. Owning facilities (as opposed to leasing them) allows TELUS to build redundancies and other reliability features into the architecture of the network and to respond more quickly to incidents and outages through consistent and timely traffic monitoring. For example:

   a) **Containing disruptions from outages:** Operators that own their own facilities are able, in their sole discretion, to determine the number of cell sites that share a connection to the core networks, in accordance with their own risk tolerances. By controlling the number of cell sites that share a connection, and how such a connection is shared, an operator is able to contain the impact of outages or network failures. The greater the number of cell sites that share a connection, the greater the effects will be in the event there is an outage affecting that connection. Accordingly, the experience that an operator that leases fibre backhaul is able to provide its downstream customers in terms of reliability may be substantially different, and in any event will be largely out of its control, instead resting in the hands of the operator from whom they lease the facilities.

   b) **Reducing risk of outages:** TELUS ensures that certain key cell sites have two independent connections to the cores and have back-up generators, to ensure optimum performance and reliability. We are thus able to protect against a substantial outage by building two connections that are physically separate from each other, so that if one connection goes down, the other can still carry the traffic. Other wireline carriers upon whom operators that lease fibre will be dependent may not have a similar network design.

c) **Adapting to sudden spikes in demand:** When TELUS anticipates increased network traffic in an area where it owns the facilities (for example, the Calgary Stampede) and there is insufficient backhaul capacity for that traffic, TELUS can readily upgrade capacity within [redacted]. In comparison, where TELUS leases backhaul, we must request an upgrade from the provider and such an upgrade can take up to one week or longer to implement. Where such events can be forecasted at the time the wholesale contract is entered into, it may be possible for the lessee to negotiate established timeframes for responding to such requests. However, in TELUS' experience this is not done, and in any event, many such events – such as natural disasters, sporting events or protests – cannot be forecast accurately.

d) **Rectifying performance anomalies quicker:** Where TELUS owns its own network, it can address performance anomalies in voice and/or data quality substantially more quickly by having end to end visibility into all the elements traversed by that traffic than could be addressed by a lessee who would need to persuade its wholesale provider to investigate and resolve the performance issues.

6. Therefore, in order to maintain and enhance its ability to compete for wireless and wireline subscribers, TELUS prioritizes investments to convert its legacy copper infrastructure to fibre, thereby improving not only TELUS' wireline network, but equally improving the quality of TELUS' wireless network.

THE IMPORTANCE OF NETWORK OWNERSHIP IS DEMONSTRATED BY TELUS' SUBSTANTIAL NETWORK INVESTMENTS

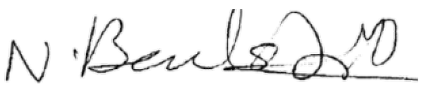
7. In my experience, competition between network operators leads to substantial network investments to improve the speed, reliability and performance of wireless (and wireline) services that would not otherwise be made. This is an important reason why TELUS decided to build the vast majority of its own fibre backhaul to serve our wireless operations outside of our traditional wireline serving area, for example, in Montreal.

8. Competition on the basis of network speed, reliability and performance requires massive capital investments. For example, from 2013 to date, TELUS has built fibre to 2.9 million households and businesses in British Columbia, Alberta and Quebec, and has invested approximately $6.3 billion in the build. Leveraging the fibre for improved wireless services was an essential component of the business case for TELUS fibre to the home build. The copper-to-fibre migrations are being undertaken at substantial cost not only because of the inherent benefits to TELUS' wireline network, but also because they lead to significantly improved experiences for wireless services. This, in turn, increases TELUS' ability to more effectively compete for downstream wireless customers.

INTENSE COMPETITION FOR CUSTOMERS BASED ON NETWORK RELIABILITY AND PERFORMANCE

9. TELUS constantly competes for customers with Rogers, Bell, Shaw, and others on the basis of network reliability and capability. TELUS and other providers regularly make comparative marketing and advertising claims about the reliability and performance of their respective networks.

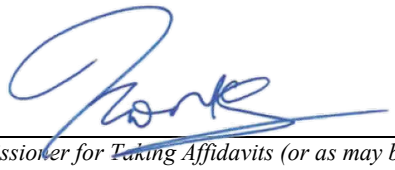
10. TELUS regularly relies upon industry reports such as those produced by Opensignal and Ookla to understand and assess its network performance and reliability relative to its wireless competitors and support performance-based marketing and advertising claims for its wireless network and capabilities. Opensignal is an independent global standard for analyzing consumer mobile experience. Ookla's Speedtest Awards are elite designations based on consumer-initiated tests and background scans from Speedtest applications and represent real world network performance and the internet speeds and coverage provided to customers.



Nazim Benhadid

September 20, 2022

This is Exhibit “J” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.



Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

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.

Comments of TELUS Communications Inc.

13 September 2021

Table of Contents

1.0 Introduction

1. TELUS welcomes the opportunity to comment on this application by Rogers Communications Inc. ("Rogers") to acquire the licensed broadcasting undertakings owned by Shaw Communications Inc. ("Shaw"), as set out in Broadcasting Notice of Consultation CRTC 2021-281 ("Notice of Consultation"). TELUS requests to appear at the hearing scheduled to commence November 22, 2021 to expand upon the views outlined in this intervention.

2. TELUS opposes this application. Rogers has failed to demonstrate (1) that approval is in the public interest, (2) that the benefits of the transaction are commensurate with the size and nature of the transaction, and (3) that the application represents the best possible proposal under the circumstances.

3. The proposed merger would combine two of the largest vertically integrated entities in the Canadian broadcasting sector to create the largest vertically integrated media and communications company in Canada. This would greatly exacerbate the anti-competitive effects of Canada's already extremely concentrated broadcasting sector.

4. **Merger would have profound negative effect on competition for BDUs and programming services** - The cumulative effect of vertical integration should be central to the CRTC's review of this merger. If approved, the proposed transaction will result in just one broadcasting distribution undertaking ("BDU") controlling 35.5% of national BDU subscribers, and up to 47% of the English-language BDU subscribers. Permitting Rogers to control such a large proportion of BDU subscribers, in combination with its existing control of must-have programming, will have a negative effect on competition for Canadian BDUs and programming services. **Rogers will effectively become a gatekeeper for programming** due to its increased incentive to withhold affiliated content from rival BDUs, and its ability to "make or break" unaffiliated programming services by denying them carriage on Rogers' distribution platforms.

5. **Merger gives Rogers power to exclude BDUs from online content –** The proliferation of unregulated online programming options, and their increasing viability as substitutes for traditional programming will also provide Rogers with increased ability to foreclose rival BDUs' access to content by shifting popular programming, such as NHL games, to online platforms, or to deny rival BDUs access to new features or functionality by offering them exclusively online. Rogers' increased scale could similarly allow it to negotiate exclusive carriage of foreign online services, such as Netflix, Amazon Prime Video or Disney Plus, through its BDU platform. **The existing regulatory framework provides no safeguards to protect against these anti-competitive outcomes.**

6. **Merger gives Rogers ability to impose steep increases to signal transport costs –** Rogers' increased scale also creates concerns in the area of signal transport services, since the proposed transaction includes the acquisition of Shaw Broadcast Services ("SBS") – one of two satellite relay distribution undertakings ("SRDUs") in Canada. Rogers will be able to raise the cost of signal transport for smaller BDUs, because it will be less reliant on them to ensure its own

programming services reach a meaningful proportion of Canadian subscribers. **Smaller BDUs that rely on those signal transport services will have no choice but to accept increased costs, and pass those costs on to their customers.**

7. **Merger would reduce funding for Global news and reduce the diversity of voices –** The proposed merger will also diminish the diversity of voices in local news programming as Rogers will deprive the Global television network of nearly $13 million in annual funding for local news production that it currently receives from Shaw, impacting its ability to create news programming that attracts strong viewership in Alberta and British Columbia. **The merger will harm diversity of voices and reduce the quality and quantity of critical local news programming available today.**

8. **Accordingly, the Commission should deny Rogers' application.** Denial is the only response proportionate to the concerns raised by the transaction, and is most compatible with protecting the public interest. The transaction provides no benefit to the broadcasting system that can outweigh the harmful impacts of the merger, and would:

    - increase existing levels of vertical integration, when Canada already has one of the most highly vertically integrated broadcasting sectors in the world;
    - reduce the ability of consumers to access content on the platform they choose, with the service provider of their choice, by increasing Rogers' incentive and opportunity to shift content to online platforms where it can be offered exclusively to its subscribers;
    - increase regulatory uncertainty, as well as the CRTC's administrative burden to monitor and enforce behavioural remedies, as vertically integrated entities ("VIs") are actively challenging the CRTC's jurisdiction to impose and enforce competitive safeguards; and
    - decrease competition, plurality of ownership, and the diversity of voices in the broadcasting system.

9. If the CRTC takes the view that the public interest concerns can be addressed through conditions, stringent conditions should be applied to ensure that Rogers will not foreclose access to programming or otherwise use its increased scale to impair competition from independent distributors and programming services, or restrict the diversity of voices. TELUS proposes that such conditions should include:

    - ensuring timely access to all programming controlled by Rogers, including all features and functionality, on all platforms, on commercially reasonable rates and terms of carriage;
    - requiring that the Shaw family divest its controlling interest in Corus Media;
    - 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; and
    - requiring that Rogers continue funding local news programming production by Global TV at levels commensurate with the funding previously provided by Shaw.

2.0 Increased vertical integration will harm competition

10. If this transaction is approved, Rogers will gain an unprecedented share of BDU subscribers. That scale will provide it with heightened incentives and opportunities for anti-competitive conduct, with serious ramifications for both independent BDUs and programming services.

11. While Rogers asserts that it will "merely step into Shaw's shoes" without adversely affecting existing BDU competition,[1] this is not a straightforward horizontal merger. Rogers is a vertically integrated entity, and so any acquisition it makes in the broadcasting industry results in an increase in vertical integration and creates anti-competition concerns.

12. As stated in the Notice of Consultation, the proposed transaction would result in Rogers holding a total of 3.624 million distribution subscribers, representing 35.5% of all Canadian television subscribers. However, that figure is based on national BDU subscribers. When looking at English-language subscribers, where the majority of Rogers' BDU competition takes place, Rogers' share of BDU subscribers would be up to 47%,[2] *i.e.*, nearly half of BDU subscribers.

13. One of the factors the CRTC considers when determining whether to approve an application for a change in effective control is the extent to which the transaction could change the respective negotiating power of the BDUs and programming service providers and the size of the market.[3] In the context of this transaction, this important factor leads to the conclusion that competition will be greatly undermined.

2.1 Rogers will be able to forego distribution by other BDUs

14. If the transaction is approved, the resulting scale of Rogers' BDU network could make it feasible, and profitable, for it to forego broader distribution on competing BDU platforms. This will provide Rogers with significant leverage in any negotiations with other BDUs, allowing it to demand exorbitant rates as it can afford to forego distribution by most of its BDU competitors altogether.

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1 2021-0228-4, Rogers' Application, 13 April 2021, "Appendix 1 – Supplementary Brief", paras. 24-27 [Rogers' Application].

2 For this comparison, TELUS has removed from the national BDU market the 2,443,000 Quebec subscribers as reported at Figure 12 "Subscribers by Region (Cable & IPTV) & National Satellite Subscribers" in the CRTC's 2020 Broadcasting Financial Summaries. Highlights from the number of national BDU subscribers as determinable through Broadcasting Notice of Consultation CRTC 2021-281, Notice of Hearing, 12 August 2021.

3 Appendix to Broadcasting Public Notice CRTC 2008-4, *Regulatory Policy – Diversity of Voices*, 15 January 2008, and at Broadcasting Notice of Consultation CRTC 2021-281, *Notice of Hearing*, 12 August 2021.

15. As the Commission recognized in its Vertical Integration Framework[4] it is distribution, rather than content, that drives the revenues of a vertically integrated entity and creates the incentives for foreclosure of rival BDUs' access to programming:

> …The potential increase in the market share of the distribution services that form part of the VI entity would provide an incentive for a VI entity to deny competing distribution systems access to popular programming.[5]

16. This dynamic is even more pronounced for entities that control "must have" programming, such as Sportsnet, as such programming services are more likely to draw subscribers away from a competitor that has been denied access to that programming. As noted below, TELUS' own experience with Rogers demonstrates that its existing market power is sufficient to lead to such outcomes.

2.1.1.1 Rogers will have increased incentive to deny access to must-have programming

17. In recent years Rogers has sought to deny TELUS access to the programming it controls, by:

- Attempting to foreclose TELUS' access to Sportsnet in 2017 by purporting to terminate its affiliation agreement with TELUS for its Sportsnet and Sportsnet One services in order to avoid Final Offer Arbitration.[6]
- Defying the "head-start" rule by refusing to provide TELUS access to its 4K programming unless TELUS agreed to pay exorbitant rates.[7]
- Restricting access to VOD programming by challenging the notion that negotiations for the distribution of content for video-on-demand services can be subject to dispute resolution.[8]
- Providing exclusive access to GamePlus, which provides access to unique camera angles during NHL hockey games and other NHL-related content, to Rogers' own wireless or cable subscribers.[9]

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4 Broadcasting Regulatory Policy CRTC 2011-601, *Regulatory framework relating to vertical integration*, 21 September 2011, paras. 20-22.

5 *Id*. para. 19.

6 See letter from Susan Wheeler, Rogers to CRTC, dated 21 April 2017, available online at <https://crtc.gc.ca/public/otf/2017/T66_201703091/2873425.pdf>

7 CRTC, "Broadcasting Commission Letter Addressed to Susan Wheeler and Ann Mainville-Neeson (Rogers Media Inc. and TELUS Communications Inc.)", 5 April 2017, online: <https://crtc.gc.ca/eng/archive/2017/lb170405a htm>. In March 2017, the Commission directed Rogers to provide its 4K content to TELUS immediately, despite the absence of a commercial agreement.

8 Rogers Media, Corus Entertainment and Bell Media filed joint comments in response to Broadcasting Notice of Consultation CRTC 2017-280, *Call for Comments on measures to provide for dispute resolution between video-on-demand operators and discretionary services*, 4 August 2017, which included a legal opinion challenging the CRTC's jurisdiction over the licensing of video-on-demand programming rights.

9 Broadcasting Decision CRTC 2015-89, *Complaint by Bell Canada against Rogers Media Inc., formerly Rogers Broadcasting Limited, alleging violations of the Digital Media Exemption Order*, 16 March 2015.

18. Indeed, at the time of TELUS' 2017 dispute with Rogers over access to the Sportsnet service, Rogers stated that it had "…concluded that it would be better to forgo the revenues we would derive from Telus in order to ensure that we can protect the integrity of our business model."[10]

19. Thus, Rogers has already confirmed for the Commission that it values the economic benefits of distribution exclusivity over the economic benefits of broad distribution, notwithstanding the negative impact on competing BDUs and their subscribers who would lose access to the Sportsnet service. The proposed transaction will only serve to amplify this anti-competitive calculus on Rogers' part, and in TELUS' case, will also amplify the harmful effects as Rogers becomes a direct competitor in the western marketplace. In particular, Rogers will have added incentive, and will reap greater potential benefits, for depriving TELUS of "must have" programming that it can use to draw away TELUS' subscribers.

2.1.2 Increased wholesale costs will lead to increased prices for consumers

20. If the transaction is approved, the resulting imbalance in negotiating power between Rogers and smaller BDUs will create a dynamic where independent BDUs or programming services are under increased pressure to accept unreasonable and/or restrictive terms to avoid losing "must have" programming services. The Competition Bureau describes "must have programming" as referring to "…a service whose absence from a BDU's lineup would cause sufficient subscriber losses to rivals such that all BDUs consider the service necessary to remain competitive. The most often cited examples are mainstream sports programming services that offer a wide variety of live sports."[11]

21. This will inevitably lead to increased wholesale costs for programming, and especially for must-have programming like the NHL programming controlled by Sportsnet. Wholesale rates for Sportsnet have consistently increased year over year, despite the fact that the collective pool of subscribers to traditional BDUs has declined, as did the take-up rate among subscribers for the Sportsnet service. According to data published by the CRTC, the average wholesale rate per subscriber from the period 2016 to 2020 has increased from $2.91 monthly in 2016, to $4.25 in 2020,[12] despite Sportsnet's subscribership decreasing from 73% of Canadian subscribers in 2016, to 64% in 2019. Nevertheless, Rogers Media was able to maintain double-

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[10] *Supra* note 6.

[11] Competition Bureau Canada, *Submission by the Commissioner of competition before the Canadian Radio-television and Telecommunications Commission-broadcasting Notice of Consultation CRTC 2015-97-Call for comments on a Wholesale Code,* 4 May 2015, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03918 html#sec2>.

[12] Calculated using distribution revenues and subscriber information available in CRTC, *Individual discretionary and on-demand services: statistical and financial summaries – 2016 - 2020*, Rogers Sportsnet, p. 140, online: <https://publications.gc.ca/collections/collection_2021/crtc/BC9-30-2020-eng.pdf>.

digit profit margins[13] through substantial increases to wholesale rates despite the declining subscribership to the service.

22. These statistics illustrate just how unbalanced negotiations already are today between vertically integrated programming services and independent BDUs, and negotiations will only become more unbalanced as a result of the transaction. For example, Rogers will be able to undermine negotiations through the use of volume-based rate cards ("VBRCs"), which set out a percentage discount or sliding scale rate based on the number of potential subscribers that a BDU delivers to a programming service.

23. The potential impact of VBRCs can be understood by considering the relative sizes of BDUs if the transaction is permitted to proceed. Post-transaction, Rogers' and Bell's BDUs will represent nearly two thirds (~63.5%) of national BDU subscribers, and their subscriber numbers will reset the standard for volume discounts provided through VBRCs. With such a large size differential between the largest and smaller BDUs, VBRCs will ensure that smaller BDUs pay substantially higher rates per subscriber for the same programming since volume-based discounts will be effectively out of reach for all but the largest BDUs.

24. The Commission can also expect wholesale programming costs to continue to rise due to the use of penetration-based rate cards ("PBRCs"), which is a major contributing factor to rising wholesale rates today. PBRCs set out varying wholesale rates based on a programming service's share of a BDU's subscriber base, with rates increasing as penetration decreases.

25. The Competition Bureau has recognized that PBRCs make it more expensive for BDUs to offer increased consumer choice, as choice lowers penetration rates, resulting in higher wholesale costs which inevitably push retail prices higher.[14] The Competition Bureau also recognizes that vertical integration motivates entities to raise rivals' costs and limit their ability to introduce customer choice and flexibility, and that the latter incentive is stronger for a vertically integrated BDU that operates "must have" programming services, like sports.[15]

26. In recent years, as more programming undertakings have begun offering direct-to-consumer ("DTC") products, PBRCs have become increasingly punitive for traditional BDUs. While DTC offerings compete with BDUs and draw away subscribers, PBRCs simultaneously raise the BDU's wholesale costs to make up the loss of those subscribers for which the programming undertaking is responsible.

27. Thus, if this transaction is approved, the CRTC can expect wholesale costs for programming services to rise at an even greater pace than they do today as the imbalance in negotiating power between vertically integrated entities and independent BDUs becomes more

[13] In 2019, Rogers Sportsnet reported a PBIT Margin of 22.1%. In 2020, Sportsnet reported a PBIT margin of 11.6%, with the decline being attributable to a considerable dip in national ad sales, presumably as a result of the COVID-19 pandemic when new sports programming was not being produced for most of that broadcasting year.

[14] *Supra* note 11, para. 10.

[15] *Id*. para. 11.

pronounced. The result will be higher prices for consumers, which will perpetuate the cycle of consumer cord-shaving and cord-cutting, especially as over-the-top streaming services become increasingly viable substitutes for the traditional television system.

Mitigate by ensuring access to all content, on all platforms, on reasonable terms

28. The Commission should deny the application. This is the only course of action that is proportionate to the concerns raised by the transaction, and that is most compatible with protecting the public interest. Existing levels of vertical integration have already proven sufficient for VIs to attempt to withhold programming from rival BDUs, which reduces the ability of consumers to access content on the platform of their choice.

29. Further, ongoing attempts by VIs to challenge the CRTC's jurisdiction to impose and enforce competitive safeguards will both increase regulatory uncertainty and add to the CRTC's administrative burden associated with monitoring and enforcing behavioural remedies.

30. However, if the Commission takes the view that the public interest concerns can be addressed through conditions, significant additional safeguards will be required to mitigate the negative impacts of the proposed transaction.

31. TELUS' proposed safeguards include expanded conditions of licence that provide for access to content on all platforms and on a timely basis, including programming offered pursuant to the digital media exemption order, ancillary programming, and multi-platform rights, with advance notice of the impending launch of any new service accompanied by a reasonable commercial offer for carriage.

32. TELUS has also proposed measures to help determine and ensure the commercial reasonableness of rates, by expanding the list of examples of what constitutes commercially unreasonable conduct, such as: requiring restrictions on customer-enabled viewing experiences (*e.g.* multi-view, social media apps); terms preventing distributors from providing a differentiated offer; and requiring penetration-based rates in respect of programming that is offered directly to consumers, or volume-based rates that affect the ability of a competitor to carry the programming.

33. To ensure terms of carriage are based on fair market value, TELUS proposes additional criteria for determining fair market value, such as the consideration of viewership to a programming service as the most important criteria in determining wholesale rates, and the availability of, and rate charged for, any competitive direct-to-consumer offerings by the programming service.

34. The CRTC might also wish to require Rogers to file for its approval standard, industry-wide rate cards for its programming services, to effectively set the basis for what is an acceptable wholesale rate. This would help independent distributors by providing greater certainty when

entering renewal negotiations with Rogers in the future, and would help the CRTC to return timely determinations in the event of a dispute.

35. To assist the Commission in its consideration of these issues, TELUS has drafted proposed additional conditions of licence for Rogers Media that attempt to address these concerns, as attached as Appendix A to this submission. These proposed conditions are intended to be applied in addition to existing competitive safeguards that apply to Rogers.

36. Specifically, Rogers' current conditions of licence on its programming undertakings include specific competitive safeguards that are broader than those included in the Wholesale Code. One such safeguard requires that Rogers Media, where it has not renewed an affiliation agreement within 120 days of its expiry, refer the matter to the CRTC for dispute resolution where the other party has confirmed its intention to renew the agreement.[16] Although these safeguards are currently applied on a suspensive basis, given attempts by VIs to withhold programming from competitors, as discussed later in this intervention, TELUS proposes that they should apply as fully enforceable conditions of licence.

2.2 Rogers will be able to foreclose on unaffiliated programming services

37. The impact of the merger on programming services will also be substantial, as the increased share of subscribers for Rogers' distribution platforms will allow it to foreclose unaffiliated programming services' access to a large proportion of subscribers. Rogers will effectively be able to "make or break" channels – particularly independent programming services – by denying them access to Rogers' distribution platform and thus to nearly half of all English-language subscribers.

38. The Commission has a long-standing policy of supporting independent programming services to meet the objectives of Act, and has expressed concerns that in an increasingly consolidated system "VI entities might prioritize the distribution of related services and of services related to other VI entities over the distribution of independent programming services, thus limiting the programming to which Canadians have access."[17]

39. Most recently, in the Let's Talk TV policy, the CRTC recognized that "…independent services are an important source of diversity in the system as they often offer niche program targeted at narrower audiences." As a result, in order to ensure the diversity of voices through the protection of independent services, the CRTC increased the ratio of unrelated programming services that vertically integrated BDUs must carry, so as to require a 1:1 ratio between affiliated and unaffiliated services.[18]

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[16] Broadcasting Decision CRTC 2017-151, *Rogers Media Inc. – Licence renewals for English-language television stations, services and network*, 15 May 2017, Appendix 3, condition of licence para. 32.
[17] *Supra* note 4, para. 43.
[18] Broadcasting Policy CRTC 2015-96*, Let's Talk TV, A World of Choice - A roadmap to maximize choice for TV viewers and to foster a healthy, dynamic TV market,* 19 March 2015, para. 118.

40. However, as explained below, the proposed transaction will undermine these policies by reducing distribution opportunities for unaffiliated services.

2.2.1 The Shaw family will have financial incentives to use Corus to benefit Rogers

41. Although Rogers is not acquiring Corus as part of this transaction, the continuing control of the Shaw family over Corus is a relevant consideration to the Commission's analysis of this transaction.

42. The CRTC currently considers Shaw to be a vertically integrated entity by virtue of the effective control exercised by the Shaw family over Corus.[19] However, Rogers has stated that following the completion of the transaction, the Corus programming services should be considered independent programming services because Corus' current affiliation with Shaw's BDUs would terminate.[20] Rogers also stated that "…[Rogers] will have no incentive to confer an undue preference on the Corus licensees. Similarly, the Corus licensees will have no incentive to confer an undue preference on Rogers."[21]

43. However, these assurances ignore the financial incentives that the Shaw family will have to favour Rogers over other BDUs following the transaction. In particular, the consideration received by the Shaw family in this transaction includes a very substantial equity stake in Rogers, consisting of over 23.6 million Class B shares, making the Shaw family one of the largest shareholders in Rogers.[22] The Shaw family would also be receiving at least two seats on Rogers' Board of Directors.

44. Under the circumstances, Corus cannot be considered to be truly independent from Rogers. Given the terms of the proposed transaction, Rogers can be expected to receive advantageous rates or terms of carriage from Corus' programming services as this will financially benefit the Shaw family.

45. Further, if Corus is considered to be an independent programming undertaking, Rogers' carriage of Corus' programming services will allow it to fulfil its unaffiliated service carriage obligations, resulting in decreased incentives to carry other independent programming services.

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19 Broadcasting Decision CRTC 2016-110, *Various television services and stations - Corporate reorganization (transfer of shares)*, 23 March 2016.
20 Rogers' Application, "Response to CRTC Deficiency Questions", 29 July 2021, p. 8.
21 *Id.* p. 13.
22 Rogers News Release, "Rogers and Shaw to come together in $26 billion transaction, creating new jobs and investment in Western Canada and accelerating Canada's 5G rollout", (15 March 2021), online: <https://about rogers.com/news-ideas/rogers-and-shaw-to-come-together-in-26-billion-transaction-creating-new-jobs-and-investment-in-western-canada-and-accelerating-canadas-5g-rollout/>.

Mitigate by requiring divestiture of Corus Media services and/or conditions of licence

46. The Commission should deny the application. This is the only course of action that is proportionate to the concerns raised by the transaction, and that is most compatible with protecting the public interest given that independent programming services will necessarily have reduced access to Rogers' distribution platforms once Corus is considered independent (whether or not it truly is). This will decrease competition, plurality of ownership, and the diversity of voices in the broadcasting system.

47. Further, the Shaw family's incentive to use its control over Corus to favour Rogers' over other distributors will undermine competition in the distribution sector. This will result in higher prices for consumers.

48. However, if the Commission takes the view that the public interest concerns can be addressed through conditions, it should at least require the Shaw family to divest its controlling interest in Corus as a condition of approval of this transaction. This would ensure true independence for the Corus services.

49. If the Commission does not require such divestment, then the measures TELUS proposed be imposed on Rogers' programming services should be imposed on those of Corus as well, to ensure independent distributors are not disadvantaged relative to Rogers' distribution services.

3.0 Online distribution provides Rogers with opportunities for content foreclosure

50. TELUS urges the Commission to carefully consider Rogers' ability to use unregulated online streaming services as a means of bypassing important competitive safeguards such as the requirement to provide BDUs with access to the programming that it controls.

51. Over the past decade it has become clear that television programming is gradually migrating to digital media platforms. The last time the Commission examined the Digital Media Exemption Order ("DMEO"), over-the-top ("OTT") services were a nascent form of distribution, but they have increasingly become viable substitutes for traditional television subscriptions as today 79% of Anglophone Canadians watch content online.[23]

52. Nevertheless, these programming options remain effectively unregulated and are not subject to the competitive safeguards the Commission relies upon to restrict potential anti-competitive behaviour. This ongoing shift in the broadcasting landscape will allow Rogers to shift the programming it controls to online platforms where it can offer that programming exclusively to its subscribers. Rogers will similarly be able to offer new features or functionality

[23] Media Technology Monitor, "*Adoption Report: Anglophone Market*", (2020).

associated with programming on an exclusive basis by offering them only through online platforms.[24]

3.1 Migration of programming to OTT services will allow Rogers to foreclose on rival BDUs

53. The migration of programming to online platforms poses new challenges to the Commission's longstanding policy of requiring that programming services be made available to all BDUs, and to the achievement of the policy objectives of the Act. One source of concern is the regulatory gap that allows services operating pursuant to the DMEO to offer programming exclusively to a particular BDU's subscribers.

54. When the Commission last reviewed the DMEO nearly a decade ago, it created a distinction between "programming designed primarily for conventional television, specialty, pay, or VOD services" ("television programming") and programming designed for mobile and retail Internet platforms. Online services were permitted to offer television programming on an exclusive basis provided that exclusivity was not based on a consumer's specific mobile or retail Internet access service.[25] However, the Commission did not prohibit undertakings from offering exclusive television programming based on a consumer's specific BDU service.

55. Within a few years of the last DMEO proceeding, television programming was routinely being offered on both traditional linear and OTT platforms, leading the Commission to conclude that "access to programming for distribution on a multiplatform basis on reasonable terms is an increasingly essential strategy for gaining and keeping customers".[26] The Commission thus introduced a provision into the Wholesale Code requiring vertically integrated programming services to offer multiplatform rights to unrelated BDUs along with their linear rights, on reasonable terms and on a timely basis.[27]

56. However, the DMEO continues to allow exclusivity for television programming as described above, and today it offers vertically integrated companies a pathway to avoid important regulatory safeguards that would prevent them from denying their competitors access to popular programming to benefit their own distribution arms.

57. For example, Rogers holds the program rights for NHL content that is extremely popular in Canada, and primarily aired on its specialty channel Sportsnet and on its over-the-air channel CityTV. In the future Rogers could choose to air hockey games exclusively via an OTT service, and offer its BDU customers that OTT service through its BDU platform while denying competing BDUs the opportunity to offer their customers the same service. The only

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[24] Rogers is already taking advantage of these opportunities through the Apple TV App, which provides new features to search for games and receive on-screen notifications. BDUs like TELUS, on the other hand, are prohibited from similar overlay features like notifications that are not user-initiated.

[25] Broadcasting Order CRTC 2012-409, *Amendments to the* Exemption order for new media broadcasting undertakings *(now known as the* Exemption order for digital media broadcasting undertakings*),* 26 July 2012, para. 19.

[26] Broadcasting Regulatory Policy CRTC 2015-438, *The Wholesale Code*, para. 115.

[27] *Id*. Appendix, s. 12.

countervailing market force would be the loss of potential distribution for its programming services that an exclusive offering to its BDU subscribers would entail.

58. However, if the transaction is approved, Rogers' distribution business will represent almost half of all English BDU subscribers in Canada, meaning Rogers may have no need of wider distribution through other BDUs to achieve profitability for its programming services. This will also greatly increase its incentive to deny its rivals access to that programming, as the increased distribution revenues it would gain will more easily outweigh any unrealized revenues from the loss of viewers associated with denying programming to competing distributors.

3.1.1 Rogers' scale will allow it to foreclose access to foreign OTT programming as well

59. The incentives described above are not limited to Rogers' own programming, but could also extend to foreign OTT services that have become important to traditional BDUs as a means of retaining subscribers and fighting cord-cutting trends.

60. With its dramatically increased scale, Rogers would have the ability to credibly negotiate for exclusive carriage of foreign online services through its BDU platform, as it would be able to offer a foreign OTT service access to over a third of all Canadian BDU subscribers and nearly half of English-language BDU subscribers. This would allow Rogers to weaken the service offered by rival BDUs, without foregoing any distribution for its programming services. This is an especially pertinent concern given the trend of foreign broadcasters moving towards direct to consumer offerings.

61. The Commission should also be skeptical of Rogers' attempts to characterize increased scale as a "benefit" of the transaction. Rogers argues that its proposed acquisition of Shaw will allow it to "achieve the scale necessary to compete more effectively against…foreign streaming giants, which have been a significant contributor to Canadians' cord-cutting and cord-shaving since at least 2012."[28] However, there is no evidence to support that dubious claim, and in fact past experience leads to the opposite conclusion.

62. For example, in 2014, when Rogers and Shaw jointly created an OTT streaming service named "Shomi", they chose to initially restrict access to the service to only their own internet and television subscribers,[29] which indicates that the service was never meant to compete with foreign OTT services but rather was intended to bolster Rogers' and Shaw's own BDU and internet service offerings.

63. The Shomi example illustrates that Rogers is more likely to attempt to use OTT services to advantage its BDU service offering, and it will be easier for it to do so by seeking exclusive

[28] Rogers' Application, *supra* note 1, para. 28.
[29] Darrell Etherington, "Rogers and Shaw Team Up to Launch a Netflix Competitor for Canada Called 'Shomi'", Tech Crunch (26 August 2014), online: <https://techcrunch.com/2014/08/26/rogers-and-shaw-team-up-to-launch-a-netflix-competitor-for-canada-called-shomi/>.

distribution of foreign OTT services than by competing with them. Rogers' incentive to do so is supported by market research published by Mindshare, a global media and marketing agency, which reveals that more than half of Canadians have subscriptions to Netflix, followed by Amazon Prime Video and Disney+.[30]

3.1.2 Similar U.S. transactions indicate that exclusive online distribution is a real risk

64. A review of similar recent mergers in the U.S. broadcasting sector illustrates not only the harmful consequences of further vertical integration discussed above, but also the ways in which the migration of programming to exclusive OTT distribution has the potential to harm competition between BDUs.

65. In 2011, the FCC approved a transaction in which Comcast Corporation ("Comcast"), the largest cable operator and Internet distributor in the U.S., acquired a majority stake in NBC Universal Inc. ("NBCU") to form a vertically integrated combined entity ("Comcast-NBCU").[31] At the time, the FCC expressed concerns about the substantial harms that could result from the unprecedented vertical integration that would result from the merger, especially with regard to "…an unprecedented aggregation of video programming content with control over the means by which video programming is distributed to American viewers offline and, increasingly, online as well" and its concerns the transaction presents to its "statutory mandate to promote diversity and localism in broadcast television and video programming distribution."[32]

66. To mitigate those substantial harms, the FCC relied on a combination of voluntary commitments from Comcast-NBCU and conditions for approval,[33] including, ensuring reasonable access for rival distributors to programming controlled by Comcast-NBCU, protecting the development of online competition, and ensuring access to Comcast-NBCU's distribution systems for non-affiliated programming services.

67. However, the merger conditions imposed by the FCC proved to be insufficient. As early as 2012, Comcast-NBCU was found to have violated multiple merger conditions, including discriminating against unaffiliated programming in 2011,[34] breaching its requirement to promote reasonably priced stand-alone broadband for consumers in 2012, which resulted in

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30 "Stuff We Watch – Understanding Canadian Video Consumption Habits", Mindshare (30 September 2020), p. 3, online: <https://content mindshareapps.com/media/sites/88/2020/09/Mindshare-Stuff-We-Watch_Q2.pdf>.

31 *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4381 (2011) ["Comcast-NBCU Merger Order"].

32 *Id*. para. 3.

33 *Id*. para. 4.

34 See *Bloomberg L.P. v. Comcast Cable Communications*, MB Docket No. 11-104, Memorandum Opinion and Order, 27 FCC Rcd 4891 (MB 2012).

Comcast-NBCU agreeing to pay an $800,000 (USD) fine,[35] and engaging in bullying and delay tactics in coming to an agreement to make its "must see" programming available to online video distributor Project Concord, [36] which did not survive the dispute.

68. Notwithstanding the enforcement actions taken by the FCC in 2012, numerous additional complaints were filed in the following years based on violations of the merger conditions, leading a member of the United States Senate, Senator Richard Blumenthal of Connecticut, to write to the DOJ in 2017 to express concerns over the expiry of the conditions in September 2018 and urging the DOJ to consider whether the merger should be allowed to stand without the merger conditions.[37]

69. Such concerns proved to be well-founded. Once its merger conditions expired in September 2018, Comcast quickly took steps to more aggressively leverage its considerable control over content rights to benefit its distribution business. Only four months after the expiry of its merger conditions, Comcast announced that it would launch a streaming service in early 2020 that would be available at no cost to Comcast's pay TV subscribers in the U.S., under the brand name "Peacock".[38]

70. When Peacock launched in April 2020, it was available exclusively to Comcast Cable subscribers, who received a subscription to the Premium tier of the service for no additional charge.[39] On July 15, 2020, when Peacock became available nationally to all U.S. consumers via direct subscription, the only subscribers that could access the service through their cable TV provider were customers of Comcast or of Cox Communications, a cable TV distributor that does not compete in the same geographic areas as Comcast.

71. The Peacock streaming service has exclusive rights to some of NBCU's most popular programming,[40] and provides subscribers with access to popular programming before it airs on

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35 See Press Release, FCC, "FCC Resolves Investigation of Comcast-NBCU Broadband-Related Merger Conditions; Ensures Consumer Access to Reasonably Priced Broadband Internet Service" (27 June 2012), online: <https://transition.fcc.gov/eb/News_Releases/DOC-314879A1.html>.

36 See Consumer Rep., *Comcast: A History of Broken Promises* (1 March 2014), online: <https://advocacy.consumerreports.org/research/comcast-a-history-of-broken-promises>.

37 See *Letter from Hon. Richard Blumenthal, Senator, United States Senate, to Hon. Makan Delrahim, Assistant Attorney General, Antitrust Division, Department of Justice* (13 December 2017), p. 1, online: <https://www.blumenthal.senate.gov/imo/media/doc/12.13.17%20Letter%20to%20DOJ%20Antitrust%20re%20Comcast-NBCU.pdf>.

38 Dade Hayes, "NBCUniversal Entering the Streaming Wars with 2020 Launch of Bonnie Hammer-Run Service; Mark Lazarus, Jeff Shell Also Get Major Promotions", Deadline (14 January 2019), online: <https://deadline.com/2019/01/nbcuniversal-entering-the-streaming-wars-with-2020-launch-of-bonnie-hammer-run-service-mark-lazarus-jeff-schell-get-major-promotions-1202534914>.

39 Todd Spangler, "NBCU's Peacock Pricing and Launch Dates Announced", Variety (16 January 2020), online:<https://variety.com/2020/tv/news/nbc-peacock-pricing-launch-date-1203469722>.

40 Nellie Andreeva, "'Parks & Recreation' to Join 'The Office' on Peacock NBCU Streaming Service", Deadline (17 September 2019), online: <https://deadline.com/2019/09/parks-recreation-acquired-peacock-join-the-office-nbcu-streaming-service-1202736698>.

television on NBC.[41] Further, during the 2021 Major League Baseball season, a three-game series between the Philadelphia Phillies and the San Francisco Giants was aired exclusively and nationally on the Peacock streaming service.[42] The vertically integrated entity decided to bypass traditional cable distribution of these games by putting them solely on its OTT streaming service.

72. The migration of sports programming from traditional television to online platforms became even more pronounced recently, when for the first time, the afternoon college football home opener game between Notre Dame and Toledo did not air on television, but was exclusively streamed on Peacock Premium, for which membership for the service is $4.99 per month.[43]

73. This demonstrates that merger conditions such as behavioural measures were insufficient to preserve competition while they were applicable. It also demonstrates that television programming will increasingly migrate to, and be offered exclusively on, OTT platforms with access to that content restricted to benefit a VI entity's own distribution arm.

74. TELUS urges the Commission to consider the lessons to be learned from these U.S. experiences as it conducts its review of the proposed transaction. In particular, the Commission should bear in mind the difficulties that U.S. regulators faced in enforcing merger conditions, the anti-competitive impacts of the Comcast-NBCU merger once those merger conditions expired, and ultimately the inadequacy of the merger conditions in preventing harm to competition in the U.S. broadcasting sector.

Mitigate by prohibiting Rogers from offering exclusive distribution of online programming

75. The Commission should deny the application. This is the only course of action that is proportionate to the concerns raised by the transaction, and is most compatible with protecting the public interest given that the CRTC's existing framework to regulate online undertakings does not protect against anti-competitive incentives to limit the ability of consumers to access a wide range of programming from the service provider of their choice.

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41 Greg Evans, "NBC's 'Tonight Show Starring Jimmy Fallon' & 'Late Night With Seth Meyers' Get Early Streamings On Peacock Premium", Deadline (16 January 2020), online: <https://deadline.com/2020/01/peacock-premium-nbc-jimmy-fallon-tonight-seth-meyers-late-night-stream-early-1202832739/>.

42 "Major League Baseball And Peacock Announce Special Coverage Of Phillies/Giants Series This Weekend", NBCUniversal Media Village (14 June 2021), online: <https://www nbcumv.com/mediavillage/interactive/2929fed4187b40648b79a9839e70e91fproduct169208/index.html#/brand/ddfffeac-5bfe-497f-9bfb-d359535d0079/press-releases/497f16bc-70f2-403c-83eb-d465749d8bdb>.

43 Bill Bender, "Who is going to stream Notre Dame home opener on Peacock?", Sporting News (6 September 2021), online: <https://www.sportingnews.com/us/ncaa-football/news/who-is-going-to-stream-notre-dame-home-opener-on-peacock/13mvmeyya98yv1n44f1spor0j4>, and Dan Caesar, "Notre Dame game will be streamed only; Dierforf retiring from Michigan broadcasts", St. Louis Post-Dispatch (9 September 2021), online: <https://www.stltoday.com/sports/columns/notre-dame-game-will-be-streamed-only-dierforf-retiring-from-michigan-broadcasts/article_203f16b3-2863-59ca-a21e-579ec33c3365.html>.

76. This will lead to higher prices for consumers and perpetuate the cycle of consumer cord-shaving and cord-cutting, which will imperil the CRTC's ability to ensure the achievement of the policy objectives of the Act.

77. Nevertheless, if the Commission takes the view that the public interest concerns can be addressed through conditions, TELUS has proposed conditions of licence in Appendix B that would prohibit Rogers' licensed BDUs from obtaining exclusive distribution of any online programming services where such exclusivity is tied to Rogers BDU platform.

4.0 Rogers' increased scale will undermine the signal transport sector

78. In addition to operating as a DTH BDU, Shaw operates one of the two satellite relay distribution undertakings (SRDUs) in Canada. SRDUs play an important role in transporting television signals to BDUs across Canada, who in turn provide these signals to subscribers.

79. Following the proposed transaction, Rogers and Bell will operate the only two SRDUs in Canada. As noted earlier in this intervention, Rogers' increased scale after this transaction will make its programming services far less reliant on distribution through other BDUs to be financially viable. At the same time, Rogers will compete directly with independent BDUs, which will create strong incentives for it to increase the costs of signal transport to those competitors.

4.1 Rogers will have incentives to raise rates for, or withhold, signal transport

80. In response to CRTC deficiency questions relating to how the merger will impact the signal transport sector, Rogers noted that it "…will continue to operate both SBS's SRDU and our own terrestrial relay distribution undertaking (TRDU) in the same manner as they are operated today" and that "…[a]pproval of this transaction will have no material impact on either terrestrial or satellite relay distribution in Canada as Rogers will step into SBS's SRDU shoes and the service will remain the main competitor to Bell's SRDU.[44]

81. What these responses ignore is the impact that Rogers' increased scale will have on its ability, and incentive, to raise its competitors' costs for access to signals that are vital to their operations. The existing conditions of licence imposed on SRDUs require over-the-air signals to be offered to BDUs, but are silent on the rates or terms applicable to such transport.

82. Further, SRDUs are currently not obliged to transport discretionary services at all, yet many BDUs currently rely on these transport services to receive discretionary services. Thus, SRDUs could severely disadvantage their competitors by ceasing to provide signal transport for discretionary services, notwithstanding the anti-competitive effect, without contravening any of the existing regulations or their conditions of licence.

[44] Rogers' Application, *supra* note 20, p. 2.

83. Accordingly, the proposed transaction would very likely undermine the Act's policy objective that requires distribution undertakings to "provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost".[45]

Mitigate by requiring divestment of Shaw Direct

84. The Commission should deny the application. The anti-competitive incentives discussed above are intrinsically related to the massive scale that Rogers would gain from the transaction, and the fact that the two VIs left to control the market for satellite relay distribution – an essential input for smaller, independent BDUs – have greater incentive to deny access to their rivals than they have to ensure the wide distribution of their programming services.

85. If the CRTC chooses not to deny the application, it should at least require the divestment of Shaw Direct, which includes SBS, as a means of mitigating Rogers' ability to further disadvantage its competitors by impairing their ability to receive signals for programming services.

86. While this divestment alone is grossly insufficient to mitigate the negative impacts of this transaction, it has the added benefit of reducing Rogers' BDU subscriber share by the 687,000 subscribers that are served by Shaw Direct.

5.0 The proposed transaction threatens the diversity of voices in local news

87. In 2016, the CRTC provided BDUs with the flexibility to redirect a portion of their allowable contribution to local expression towards the creation of local news.[46] In large metropolitan regions, BDUs were permitted to direct 100% of their allowable community programming contribution to local news, while in smaller markets, the flexibility to redirect contribution funding earmarked for community programming was limited to 50%.

88. Following the introduction of this policy, vertically integrated distributors closed or descaled their community channels in large markets, and redirected these funds to their commercial networks for the creation of local news. According to aggregate annual returns published by the CRTC, Rogers directed approximately $7.2 million to local news broadcasts on its CityTV network, and Shaw directed nearly $13 million to the creation of local news on its Global network in 2020 alone.[47]

89. If the proposed transaction is approved, Rogers has confirmed that it "does not intend to continue to allocate funds to unaffiliated Corus-owned Global television stations".[48] However, as part of its review of the transaction, the Commission has indicated its intention to consider the impact of Rogers' proposal on the funding of locally reflective news, and its delivery to

[45] *Broadcasting Act*, SC 1991, c 11, s 3(1)(t)(ii).
[46] Broadcasting Policy CRTC 2016-224, *Policy framework for local and community television*, 15 June 2016, paras. 90-91.
[47] As reported in Aggregate annual returns for the 2019-2020 Broadcast Year for Rogers and Shaw.
[48] Rogers' Application, *supra* note 20, p. 3.

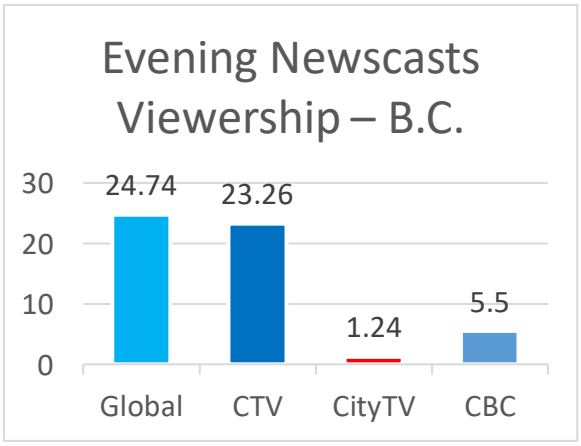
Canadians, in order to better understand its impact on the diversity of voices, including regional voices.

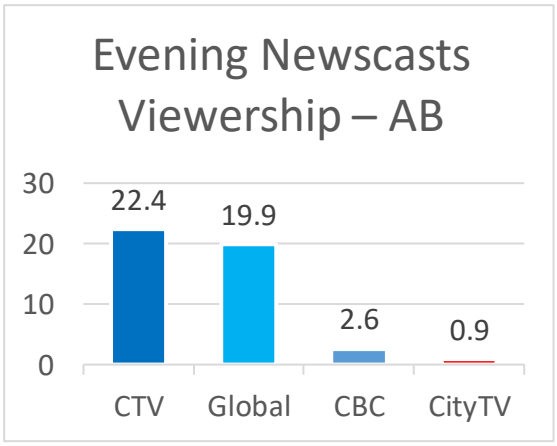
5.1 A redirection of funding will threaten the creation of local news programming

90. The Commission has recognized that local news, information and analysis produced and distributed through the broadcasting system are of central importance to achieving the policy objective under section 3(1)(b) of the Act, which requires that the Canadian broadcasting system provide through its programming a public service essential to maintaining and enhancing Canadians' national identity and cultural sovereignty.[49]

91. This transaction will lower the quality of a trusted editorial news voice, as the loss of approximately $13 million per year in funding will negatively impact Global TV's ability to provision news programming of the same quality, or quantity, that it produces today. A second, but equally considerable risk is that, as a newly independent television network with a sudden loss of funding, the Global TV network could turn to and deplete the financial resources set aside for the production of local news for independent television channels,[50] further reducing smaller independent editorial voices to the detriment of consumers.

92. While local news production from a diversity of editorial voices is of national significance, the impact of Rogers' decision to redirect funding previously earmarked for Global TV will be especially harmful in Canada's western marketplace. According to Numeris viewing measurement data, Global TV news programming is substantially more popular and trusted by Western Canadians than CityTV newscasts,[51] as demonstrated below:





[49] *Supra* note 46, at para. 7.
[50] The Independent Local News Fund is funded though annual contributions of licensed BDUs, based on 0.3% of their previous year's broadcast revenues, and provides independent television stations support for the production of locally reflective news and information by private independent television stations.
[51] Calculated using Numeris Average Minute Audience viewership data across all months in 2020, using 6PM-7PM and 11PM-12AM time slots (Monday through Friday), within their specific regions.

Mitigate by requiring Rogers to maintain news funding to Global TV

93. The Commission should deny the application. Rogers has failed to address the damaging impact that the proposed transaction would have on important CRTC policies such as the protection for public news programming and independent programming services.

94. Further, Rogers has proposed no benefit to the broadcasting system that would help to mitigate, let alone outweigh, the negative impacts of the merger on the diversity of voices in local news programming. In fact, Rogers' proposal with respect to redirecting community funds to CityTV works solely to the benefit of Rogers, and to the detriment of independent local news production.

95. If the CRTC nevertheless decides to approve this transaction, Rogers must be required to continue funding local news production by Global TV, at levels commensurate with the funding previously provided by Shaw. This would preserve editorial voices in local news, and help protect the diversity of voices that the Commission has long held to be essential to achieving the objectives of the Act. TELUS has proposed a condition of licence to ensure the continued funding of local news in Appendix B to this submission.

6.0 Safeguards may be inadequate to protect competition

96. In recent years, vertically integrated entities have created regulatory uncertainty by challenging the CRTC's authority to implement the competitive safeguards through which it has sought to regulate anti-competitive conduct.

97. For example, in 2018, Bell successfully invalidated the CRTC's mandatory order, issued under section 9(1)(h) of the Act, requiring licensees to abide by the Wholesale Code.

98. The following year, Quebecor defied the standstill rule by denying Bell access to its TVA Sports signal just prior to the broadcast of the first NHL playoff game, notwithstanding the fact that the CRTC had confirmed that the parties were engaged in a dispute, and that the standstill rule applied. When the CRTC issued a mandatory order requiring Quebecor to comply with the standstill rule and restore the TVA Sports signal, that mandatory order was promptly appealed to the Federal Court of Appeal, where both parties, *i.e.*, Quebecor and Bell, took the position that the CRTC had no jurisdiction to implement the standstill rule. Although the Federal Court of Appeal ultimately dismissed the appeal earlier this year, it remains open to the parties to appeal the decision to the Supreme Court of Canada.

99. Denial of the application is the best way to protect against further challenges to the CRTC's authority that would undermine the certainty that the regulatory framework is supposed to provide to licensees, and especially to independent licensees that rely on competitive safeguards to ensure fair competition

100. Thus, if the Commission were to approve the proposed transaction and allow the creation of a VI of unprecedented scale, the consequences would include greater uncertainty regarding the resiliency of the regulatory framework for vertical integration.

7.0 Conclusion

101. The Commission should deny Rogers' application. The transaction is not in the public interest, given that it would:

- increase existing levels of vertical integration, when Canada already has one of the most highly vertically integrated broadcasting sectors in the world;
- reduce the ability of consumers to access content on the platform they choose, with the service provider of their choice, by increasing Rogers' incentive and opportunity to shift content to online platforms where it can be offered exclusively to its subscribers;
- increase regulatory uncertainty, as well as the CRTC's administrative burden to monitor and enforce behavioural remedies, as vertically integrated entities ("VIs") are actively challenging the CRTC's jurisdiction to impose and enforce competitive safeguards; and
- decrease competition, plurality of ownership, and the diversity of voices in the broadcasting system.

102. Denial of the application is the only course of action that is proportionate to the concerns raised by the transaction, and that is most compatible with protecting the public interest. Further, denial of the application would not prejudice Shaw's ability to enter into a transaction with a non-vertically integrated entity, provided such a transaction is in the public interest.

103. If the Commission nevertheless decides to approve the proposed transaction, wholly or in part, then it is essential that it include sufficient safeguards to ensure meaningful access to content on all platforms, at commercially reasonable rates and on a timely basis, and on terms which allow for innovation by content distributors. This will best ensure that the Canadian broadcasting sector is able to remain competitive notwithstanding its extreme levels of vertical integration.

104. TELUS has commissioned a legal opinion from Michael Ryan, which is provided as Appendix C, that confirms the CRTC has the necessary powers to adopt the various alternative safeguards proposed by TELUS to regulate potential anti-competitive behaviour by Rogers.

105. TELUS thanks the Commission for the opportunity to comment on this proceeding, and requests to appear at the public hearing to consider this transaction to expand upon the views expressed in this intervention.

* * *End of document* * *

Appendix A

Additional proposed conditions of licence to be applied to all programming undertakings operated by Rogers Media

106. The licensee shall allow carriage of its programming services by all unaffiliated broadcasting distribution undertakings (BDUs), including their affiliated video-on-demand (VOD) undertakings, on terms negotiated between the parties and consistent with the Wholesale Code, or on terms set via the Commission's dispute resolution processes.

107. The licensee shall make available to BDUs, including their affiliated VOD undertakings, the linear rights and the non-linear multiplatform rights for all programming that it controls, on terms negotiated between the parties and consistent with the Wholesale Code or on terms set via the Commission's dispute resolution processes.

    - This shall include all features and functionality for which the undertaking has secured rights, and which it is making available to its subscribers.

108. Where the licensee has acquired exclusive rights to programming, it shall not make that programming available to an affiliated entity unless it also makes the programming available to all BDUs, including their affiliated VOD undertakings, that have communicated an intent to distribute the programming, on any platform, notwithstanding the absence of a commercial agreement.

    - Where programming is provided in the absence of a commercial agreement pursuant to this section, it shall be provided subject to commercially reasonable terms of carriage until a commercial agreement is reached between the parties or until terms are set via the Commission's dispute resolution processes.

109. The licensee is prohibited from requiring a penetration-based rate card (PBRC) from a BDU in respect of programming that the licensee offers directly to consumers in a manner that is competitive with that BDU.

110. In negotiating a wholesale rate for a programming service based on fair market value, the licensee shall not require a wholesale rate that has the effect of requiring a BDU, including its affiliated VOD undertaking, to charge consumers a rate that is substantially higher than the rate licensee charges to consumers in any direct-to-consumer offering, including other platforms or retailers.

111. The licensee is prohibited from requiring a volume-based rate card ("VBRC") where doing so would have an anti-competitive effect on the ability of independent BDUs, including their affiliated VOD undertakings, to carry the licensee's programming.

112. The licensee shall file with the Commission all affiliation agreements to which it is a party with a broadcasting undertaking within five days following the execution of the agreement by the parties.

113. The licensee shall provide rates and terms for each programming service individually on the basis of fair market value, and shall not require a party to negotiate terms of carriage for programming services on an aggregate basis.

- When negotiating a wholesale rate for a programming service based on fair market value, the licensee shall take into consideration the following factors:

    - viewership of the service;
    - historical rates;
    - penetration levels and volume discounts;
    - the packaging of the service;
    - rates paid by unaffiliated broadcasting distribution undertakings for the programming service;
    - rates paid for programming services of similar value to consumers;
    - the availability and retail price of any direct-to-consumer offering;
    - the number of subscribers that subscribe to a package in part or in whole due to the inclusion of the programming service in that package;
    - the retail rate charged for the service on a stand-alone basis; and
    - the retail rate for any packages in which the service is included.

114. If the licensee has not renewed an affiliation agreement that it signed with a licensed or exempted Canadian television programming undertaking or a broadcasting distribution undertaking within 120 days preceding the expiry of the agreement and if the other party has confirmed its intention to renew the agreement, the licensee shall submit the matter to the Commission for dispute resolution pursuant to sections 12 to 15 of the *Broadcasting Distribution Regulations*.

Appendix B

Additional proposed conditions of licence to be applied to all terrestrial broadcasting distribution undertakings operated by Rogers Communications Inc.

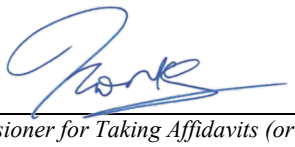
1. As an exception to section 34(2) of the Broadcasting Distribution Regulations, the licensee shall, for each licensed serving area in which the licensee operates in the markets previously served by Shaw Communications Inc., continue to direct:

   a) 100% of its allowable contribution to local expression in metropolitan markets to the production of local news by the Global Television Network; and

   b) up to 50% of its allowable contribution to local expression in non-metropolitan markets to the production of local news by the Global Television Network, as required to maintain funding levels.

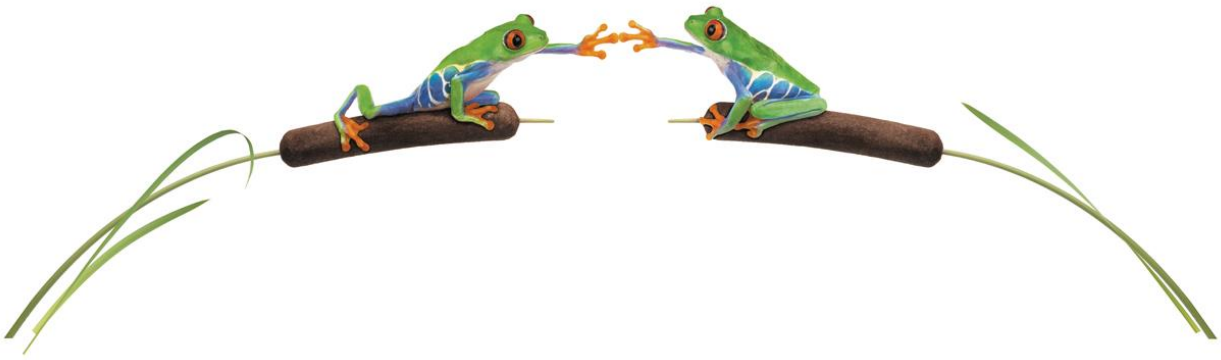
2. The licensee is prohibited from entering into any agreement for exclusive or preferential distribution of any online programming services through its own distribution platforms.

This is Exhibit “K” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.



Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI



Opening Comments by TELUS

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.

November 23, 2021

[Check against delivery]

Introduction

1. Good morning Chairman Scott. Good morning Commissioners. I would like to acknowledge that the land on which we gather is the traditional unceded territory of the Anishnaabeg People.

2. Thank you for the opportunity to appear before you today to expand on our written intervention in this proceeding.

3. My name is Stephen Schmidt and I am the Vice President, Telecom Policy and Chief Regulatory Legal Counsel at TELUS. With me today are, on my left, Zainul Mawji, Executive Vice President Home Solutions, to her left, Lecia Simpson, Director Broadcasting Policy and Regulatory Affairs, and further to her left, Jeff Yurchesyn, Vice President Strategy and Data Insights. To my right is Antoine Malek, Director Broadcasting and Copyright Policy, and to his right is Wayne Lindo, Manager of Content Acquisitions.

4. The merger that you are considering in this proceeding is the most significant one ever proposed in the Canadian broadcasting system, but you would be hard-pressed to find any evidence of it in the application before you. Rogers fails to acknowledge, let alone address, the risks to the broadcasting system that this merger creates, and the harms to competition and to consumers that are certain to follow.

5. Those harms are real, substantial, and non-remediable. This merger will greatly reduce competition and consumer choice, and it will impoverish the diversity of voices in the broadcasting system. The Canadian broadcasting system was built around a principle on non-exclusivity of programming to create healthy competition between BDUs. This merger will change that, as Rogers will be able to use content exclusivity to force consumers to subscribe to their service.

6. As we will explain, this will happen because Rogers will gain the scale to buy exclusive access to foreign content and use that exclusivity to benefit their distribution business, at the expense of their competitors and their customers. The unprecedented scale will also turn Rogers into a gatekeeper for Canadian programming services, because these services will depend on Rogers for their continued survival.

7. Further, Rogers will use its vertically integrated affiliates to give themselves exclusive access to content.

8. Contrary to Rogers' assertions, the Commission's existing competitive safeguards do not prevent these outcomes, and indeed no safeguards will be able to effectively protect against the scale that Rogers will gain.

9. We therefore urge the Commission to <u>deny</u> this application. Rogers has failed to discharge their burden to demonstrate that:

    - approval of the transaction is in the public interest,
    - that the tangible and intangible benefits of the transaction are commensurate with its size and nature, and
    - that the application represents the best possible proposal in the circumstances.

<u>This merger is bad for Canada</u>

10. **There are two primary reasons this merger will be bad for Canadians – the first is the scale that Rogers will gain, and the second is that it will worsen vertical integration issues that are already prevalent in the broadcasting sector.** Even if Rogers was not vertically integrated, the scale they would gain would do tremendous harm to competition in the broadcasting and broadband markets. Rogers would have an unmatched distribution network that covers about 36% of all BDU subscribers, and nearly <u>47% of all English-language subscribers</u>. Their network would pass 80% of all homes in English Canada.

Scale will lead to exclusive foreign content

11. The scale that Rogers will achieve will lessen competition in at least two important ways.

12. First, **Rogers will have the scale to secure exclusivity from foreign streaming services across Canada, at a time when foreign broadcasters are rapidly embracing online distribution in the Canadian market.** Leveraging their relationship with Comcast, Rogers could buy the national rights to a foreign streaming service such as NBC Peacock, which is owned by Comcast, and integrate it into the XFinity platform. They could make it available to their BDU customers, and only their customers.

13. If they do that, no other BDU would be able to offer that content to their customers, and Canadians will also be unable to buy it directly. Buying those national rights would be expensive, but it would make economic sense when you use those rights to serve nearly half of the English-language market, and use exclusivity to grow to 80% of the market.

14. For many foreign streaming services, that will be an attractive offer. It will allow them to avoid or defer the significant costs of selling directly to consumers and of integrating their app with multiple BDU systems.

Scale will turn Rogers into a gatekeeper

15. Second, with the scale Rogers will gain they cannot help but become a gatekeeper for Canadian programming services that operate in the English-language market. **If a programming service cannot secure carriage and reasonable packaging on the Rogers network, it will not be viable.** Rogers will essentially become the *de facto* licensing authority for programming services in the English-language market, and will single-handedly determine the available programming options for all English Canadian consumers, whether they are a Rogers customer or not.

16. This level of market power will also allow Rogers to dictate rates and terms of

carriage for independent programming services, which will inevitably weaken those services. **This is a structural problem to which there is no viable solution.**

17. **The only practical way for competitors to combat the scale that Rogers will gain through this merger will be to seek competitive parity through similar scale.** This merger, if approved, will become the blueprint for further consolidation in the broadcasting industry.

Vertical integration will also lead to exclusive content

18. Vertical integration abuses will make sense for Rogers to pursue after this merger. According to publicly reported data, Rogers earns around $50 million in operating profits from their media business each year, while their wireline distribution business contributes around $2 billion of operating profits each year.

19. These numbers make it abundantly clear how Rogers can maximize their revenues. Where they can, **they will deny competing BDUs and their customers access to their content in order to drive those customers to their own service**. By foreclosing access to their own content, Rogers will increase their overall corporate profitability. The Commission can be sure that Rogers will do this because it is rational, profit-maximizing behaviour.

20. If Rogers cannot deny content to competing BDUs, they will undermine them by unreasonably raising their costs, and by denying or delaying their access to the newest features and functionalities that customers expect. They will do these things with the goal of impairing the ability of those rival BDUs to offer their customers a better value proposition, which will make Rogers' cable television service more attractive in comparison.

The existing safeguards do not prevent vertically integrated companies from having exclusives

21. **Rogers has not proposed any safeguards in their application, but** even if they had, our experience over the last decade leads us to conclude that regulatory

safeguards will not provide sufficient protection from these anti-competitive incentives.

22. **The existing regulatory framework is not sufficiently robust to prevent Rogers from denying other BDUs, and their customers, access to programming**. For example, the Commission has a longstanding principle of programming non-exclusivity, which requires that programming services be offered to all BDUs. The purpose of this policy is to ensure that Canadians have access to content that has been acquired on an exclusive basis, regardless of their television service provider. This also protects consumers by ensuring that BDUs compete on price, packaging, and creating the best customer experience, rather than by offering exclusives.

23. **There is no regulation to implement this important policy. Even the access policy has been actively challenged and undermined by vertically integrated companies**. In 2017, Rogers tried to bypass the principle and deny TELUS access to their Sportsnet service, when it attempted to withdraw from dispute resolution. While that attempt proved unsuccessful, it was part of a trend in which vertically integrated companies have challenged the Commission's access policies.

24. In the past few years, vertically integrated companies have challenged the validity of competitive safeguards that address vertical integration, such as the Wholesale Code and the standstill rule, before the Federal Court of Appeal. **These challenges to the Commission's policies and jurisdiction have become a significant and growing source of uncertainty in today's wholesale market.**

25. **Even where the dispute resolution framework provides for a remedy, the practical reality is that the damage is often done before a remedy can be obtained.** Disputes are often slow to resolve, and if customers are denied the full suite of services they have paid for they are forced to switch providers in the meantime. This is especially true in cases involving access to new features or functionalities, where access is <u>not</u> guaranteed, and a head start in the market can be difficult for a competitor to overcome.

26. In recent years the online distribution market has grown in importance, and this has created additional risks of foreclosure.

The DMEO does not prevent BDU exclusives

27. The vast majority of customers today no longer watch television on only traditional platforms. BDU service offerings have evolved to integrate online content with linear television signals in a seamless experience. However, the regulatory framework has not similarly evolved to prevent exclusivity in the online market.

28. The Digital Media Exemption Order, or "DMEO", does not prohibit exclusivity that is tied to a BDU subscription. It only prohibits exclusivity when it is dependent on subscription to a specific mobile or retail Internet access service. This means that the DMEO does not prohibit Rogers from airing some hockey games on an online service rather than on Sportsnet. They could then make that online service exclusively available to their cable subscribers. If Rogers did this, Canadians that are not Rogers cable customers would lose access to those games.

29. Rogers has already demonstrated their appetite for exclusivity in the online market, when they launched an online service named GamePlus in 2014. GamePlus gives access to different camera angles in hockey games as well as replays, analysis, interviews, news and other programming.

30. Rogers offered GamePlus to their own customers, at no additional charge, but no other BDU in Canada was able to offer GamePlus. Only customers of Rogers cable, Internet, or mobility services could access this content, because Rogers wanted to drive subscriptions to those more profitable lines of business. Since the Commission did not consider the service to be "television programming", GamePlus did not violate the DMEO.

Lack of independence of Corus will also create harms

31. The ongoing control of the Shaw family over Corus is another element of this merger

that will create anti-competitive harms.

32. Rogers states in their application that Corus will become independent as a result of this merger, but that is only true on paper. In reality, the Shaw Family will continue to control Corus through their control of the voting shares, while becoming heavily invested in Rogers and their commercial success. In fact, **the commercial success of Rogers will be more lucrative to the Shaw Family than the commercial success of Corus**, since their investment in Rogers will be several times larger.

33. As an independent entity **Corus will benefit from all of the privileges and protections associated with independent programming services**, such as the right to demand minimum penetration, minimum revenue and minimum subscription levels, while being mandated by the Shaw family to favour Rogers.

Conclusion

34. When the Commission rejected Bell's first attempt to purchase Astral Media, it said it was not convinced that the transaction "would provide significant and unequivocal benefits to the Canadian broadcasting system and to Canadians sufficient to outweigh the concerns related to competition, ownership concentration, vertical integration and the exercise of market power."

35. In this case, the benefits are emphatically not significant, and they are certainly not unequivocal. They are vague, unspecified, not legally binding, and are what any company would do in the normal course of business. They will happen regardless of whether the merger proceeds or not.

36. The primary benefits that Rogers has offered relate to unspecified investments in 5G and enhanced connectivity for rural and Indigenous communities. On 5G, they say they will spend $2.5 billion over the next 5 years, but TELUS has announced investments totalling $27.5 billion over the next 3 years to expand its fibre and 5G networks in Alberta and British Columbia, without the need for merger. More importantly, the investments Rogers is proposing will happen anyway, because they will be driven by the need to compete.

37. Rogers also says they will spend $1 billion to expand into rural and Indigenous communities. But they have not specified where, when, or how they will build. The proposal is a mirage, and will be impossible to enforce. On the other hand, TELUS has made concrete investments in expanding connectivity to rural and Indigenous communities, spending billions since 2014 to expand service to hundreds of rural communities. This includes 129 Indigenous communities, 63 of which were in partnership with Indigenous peoples. Again, all without the need for a merger.

38. Indeed, the policy action most compatible with expanding rural and Indigenous connectivity in Western Canada is the complete rejection of the transaction, by all federal reviewers including the Commission, followed by the repurposing of the Shaw's unused rural spectrum.

39. The concerns created by this merger also extend beyond the anti-competitive outcomes. **The merger will contribute to the hollowing out of Western Canada's business community at a time when it can be ill afforded, especially in Alberta where Shaw is headquartered.** The large amount of debt that Rogers is taking on to pay a 70% premium for Shaw will inevitably lead to job losses in Western Canada. The merger will also reduce the number of actors that control Canada's essential broadband infrastructure, and concentrate an enormous amount of power into the hands of one of the wealthiest families in Canada.

40. All of these issues will challenge the Commission's ability to fulfill its mandate, and its authority to supervise and regulate the broadcasting system. The concerns that animated the Commission in Astral are therefore present even more acutely in this case.

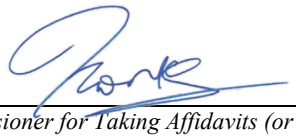
41. These are structural defects of the application that existing regulatory safeguards cannot adequately address. Moreover, the assurances Rogers has given to the Commission are wholly insufficient and incapable of outweighing the harms this merger would cause to the broadcasting system, if approved.

42. Recent events demonstrate that statements made by Rogers to the financial markets, to the public, and indeed to the Commission itself, are not durable, credible, or reliable. The financial markets have reacted by applying a “corporate governance” discount to Rogers, and the Commission should do the same.

43. For all of these reasons, denial of the application is the only response that is proportionate to the concerns that it raises.

44. Thank you. We would be pleased to answer your questions.

This is Exhibit “L” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.



Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

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

Table of Contents

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. Accordingly, its application must be denied.

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 preserving the diversity of programming voices in a market requires the Commission to focus on ensuring effective competition for BDU services.[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 whether 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 Rogers will have increased incentive and ability to deny rivals access to programming

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 Rogers' scale will lead to *de facto* exclusivity for foreign streaming services

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.

[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 significant and unequivocal benefits 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 deny the application.

*** END OF DOCUMENT ***

[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.

This is Exhibit “M” referred to in the Affidavit of Ashley McKnight affirmed October 19, 2022.

Commissioner for Taking Affidavits (or as may be)

RONKE AKINYEMI

From:	Zain Naqi
To:	Henderson, Nicole; Ricci, Derek; Hirsh, Adam
Cc:	Jonathan Lisus; Matthew Law; Brad Vermeersch; Thomson, Kent; Frankel, Steven; Sethi, Chanakya; Tyhurst, John (CB/BC); Leschinsky, Derek (CB/BC); Hofley, Randall; McGrade, Joe; Naudie, Chris; Lally, Michelle; Kuzma, Kaeleigh; Littlejohn, Maureen; Elle.Nekiar@cb-bc.gc.ca; Rydel, Katherine (CB/BC); Crawford Smith
Subject:	RE: Rogers/Shaw ats Commissioner of Competition - Bell and TELUS [LOLG-DMS.FID125335]
Date:	October-14-22 3:45:06 PM
Attachments:	image001.png image002.png 2022 10 14 - Summons to Bell (Final).pdf 2022 10 14 - Summons to Telus (Final).pdf RBCH00008_000001572.PDF

Nicole and Adam,

We echo Derek's note below and also acknowledge your willingness to move forward in a spirit of cooperation.

We attach fresh summonses from our client. Our October 4 summonses are withdrawn. Can you please confirm that you will accept service? Let us know if another call would be helpful to see if we can reach common ground on delivery of the requested documents.

We also have a couple of discrete inquiries, which we believe will be of assistance to the Tribunal:

[redacted]

Please let us know if you'd like to discuss.

Thanks,

Zain Naqi (he/him)
Direct 416 645 3789
Cell 647 980 4134
znaqi@lolg.ca

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From: Henderson, Nicole <nicole.henderson@blakes.com>
Sent: October-14-22 3:25 PM
To: Ricci, Derek <dricci@dwpv.com>; Hirsh, Adam <AHirsh@osler.com>
Cc: Jonathan Lisus <jlisus@lolg.ca>; Matthew Law <mlaw@lolg.ca>; Brad Vermeersch <bvermeersch@lolg.ca>; Thomson, Kent <KentThomson@dwpv.com>; Frankel, Steven <sfrankel@dwpv.com>; Sethi, Chanakya <CSethi@dwpv.com>; Tyhurst, John (CB/BC) <John.Tyhurst@cb-bc.gc.ca>; Leschinsky, Derek (CB/BC) <derek.leschinsky@cb-bc.gc.ca>; Hofley, Randall <randall.hofley@blakes.com>; McGrade, Joe <joe.mcgrade@blakes.com>; Zain Naqi <znaqi@lolg.ca>; Naudie, Chris <CNaudie@osler.com>; Lally, Michelle <MLally@osler.com>; Kuzma, Kaeleigh <KKuzma@osler.com>; Littlejohn, Maureen <MLittlejohn@dwpv.com>; Elle.Nekiar@cb-bc.gc.ca; Rydel, Katherine (CB/BC) <Katherine.Rydel@cb-bc.gc.ca>; Crawford Smith <csmith@lolg.ca>
Subject: RE: Rogers/Shaw ats Commissioner of Competition - Bell and TELUS

Derek,

This is to confirm that we have instructions to accept service of the fresh subpoena issued to Bell.

We are surprised by the tone of your email considering the call we had this afternoon and, frankly, astonished at the suggestion that there was any “misapprehension” about the scope of your client’s initial subpoena. It is entirely disingenuous to suggest that the initial subpoena was “precise” or tailored to the documents your client apparently now seeks—that is made all the more clear by the issuance of this fresh subpoena (which among other things, drops several of the specifications in the earlier document). The companion subpoena issued by your co-respondent, Rogers, was of course even more obviously burdensome and overbroad, and a blatant abuse of process.

Had you truly wanted to “clarify” that—contrary to the express language of the initial subpoena—Shaw was only interested production of a narrower subset of those documents, you could have done so at any time over the past two weeks instead of vaguely inviting us to calls to identify concerns that we had already set out in writing. Instead, by serving the initial subpoena with no prior notice and a demand that Bell produce the documents sought within ten days (which included a holiday weekend), you immediately put our client to the burden of investigating what efforts would be required to comply with the subpoena and preparing motion materials to quash it.

It does not escape us that this is the second time in the last four months that our client has been put to enormous inconvenience and expense to respond on an expedited basis to a tactical maneuver by Rogers and Shaw, only to have the respondents drop their initial demands once Bell’s materials have been served. Regardless of the outcome of the motions to quash, we expect that Bell will be seeking its costs.

We appreciated the desire to cooperate that Kent expressed on the call earlier, and hope that we can move forward in that spirit rather than exchanging self-serving emails. As discussed, we will need to take instructions from our client after reviewing the fresh subpoena, including as to whether we intend to file additional or different evidence on the motion to quash. We will revert on that as soon as we are able, but it will not be before the case conference at 4:00 today.

Regards,
Nicole

Nicole Henderson (she, her, hers)
Partner
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T. +1-416-863-2399

Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000, Toronto ON M5L 1A9 (Map)
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From: Ricci, Derek <dricci@dwpv.com>
Sent: Friday, October 14, 2022 2:03 PM
To: Henderson, Nicole <nicole.henderson@blakes.com>; Hirsh, Adam <AHirsh@osler.com>
Cc: Jonathan Lisus <jlisus@lolg.ca>; Matthew Law <mlaw@lolg.ca>; Brad Vermeersch <bvermeersch@lolg.ca>; Thomson, Kent <KentThomson@dwpv.com>; Frankel, Steven <sfrankel@dwpv.com>; Sethi, Chanakya <CSethi@dwpv.com>; Tyhurst, John (CB/BC) <John.Tyhurst@cb-bc.gc.ca>; Leschinsky, Derek (CB/BC) <derek.leschinsky@cb-bc.gc.ca>; Hofley, Randall <randall.hofley@blakes.com>; McGrade, Joe <joe.mcgrade@blakes.com>; znaqi@lolg.ca; Naudie, Chris <CNaudie@osler.com>; Lally, Michelle <MLally@osler.com>; Kuzma, Kaeleigh <KKuzma@osler.com>; Littlejohn, Maureen <MLittlejohn@dwpv.com>; Elle.Nekiar@cb-bc.gc.ca; Rydel, Katherine (CB/BC) <Katherine.Rydel@cb-bc.gc.ca>; Crawford Smith <csmith@lolg.ca>
Subject: Rogers/Shaw ats Commissioner of Competition - Bell and TELUS

External Email | Courrier électronique externe

Nicole and Adam:

Thank you for the productive call that we just completed.

As discussed, we have received your Motion Materials that were served late yesterday, including the Affidavit affirmed by Mark Graham on October 13, 2022, as well as the Affidavit affirmed by Daniel Stern on October 13, 2022.

It is apparent from these Motion Materials that your clients have been labouring under a misapprehension concerning the documents Shaw seeks production of pursuant to its subpoenas in relation to the hearing that will be conducted by the Competition Tribunal commencing on November 7, 2022.

It is disappointing that we were unable to speak before these Motion Materials were

served. You will no doubt recall that I wrote to you on a number of occasions to invite such a discussion, in an effort to avoid the very confusion that appears to have arisen.

My objective in doing so was to engage in a constructive discussion with you to clarify with precision the documents Shaw seeks production of. I wanted to ensure that Shaw receives documents it requires to proceed properly and fairly with the hearing of this matter without imposing on your client unnecessary or excessive burdens that can easily be avoided.

That said, we have reviewed your clients' Motion Materials carefully with a view to addressing on a timely basis the concerns they have raised.

In that regard, we have obtained fresh subpoenas that specify with precision and limits carefully the scope of documents Shaw seeks production of.

A copy of these fresh subpoenas are attached.

You will see that the enclosed subpoenas are addressed to each of Stephen Howe, Blaik Kirby and Mark Graham (in the case of Bell), and Nazim Benhadid, Charlie Casey and Daniel Stern (in the case of TELUS).

We are confident having regard to the contents of the Affidavits included in your clients' Motion Materials that Messrs. Stern and Graham will have readily available to them all of the documents in question, with the result that there will be no need for Bell or TELUS to search the records of multiple employees to respond properly and immediately to the enclosed subpoenas.

Please advise as soon as possible if you are authorized to accept service of the enclosed subpoenas on behalf of your respective clients. If you are not, we will make the necessary arrangements to have them served.

Shaw's original subpoenas served on Bell and TELUS dated October 5 are formally withdrawn.

Please be advised that in view of the position taken by Bell and TELUS in its Motion Materials served late yesterday that it is immunized from producing to Shaw documents it previously provided to the Competition Bureau, Shaw intends to bring a Cross-Motion against the Commissioner returnable at the same time as the motions of Bell and TELUS, in which Shaw will seek an Order compelling the production by the Commissioner of documents that fall within the scope of the enclosed subpoenas.

We wish to ensure that the demands for production made in the enclosed subpoenas are well understood by your clients and that those demands can easily be complied with if an Order dismissing your clients' Motions is made by the Tribunal.

Although we have made every effort to ensure that the enclosed subpoenas are carefully confined in scope, we would be happy to modify the wording of these subpoenas if doing so is necessary or appropriate to address remaining concerns your clients may have.

Best regards,

Derek

Derek Ricci
T 416.367.7471
dricci@dwpv.com
Bio | vCard

DAVIES
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Toronto, ON M5V 3J7
dwpv.com

Competition Tribunal Tribunal de la concurrence

CT-2022-002

IN THE MATTER of the *Competition Act*, RSC 1985, c C-34, as amended;

AND IN THE MATTER of an application by the Commissioner of Competition pursuant to section 92 of the *Competition Act*.

DANS L'AFFAIRE de la *Loi sur la concurrence*, LRC 1985, ch C-34, et ses modifications;

ET DANS L'AFFAIRE d'une demande par le commissaire de la concurrence en vertu de l'article 92 de la *Loi sur la concurrence*.

B E T W E E N :

Commissioner of Competition
(applicant)
and
Rogers Communications Inc.
Shaw Communications Inc.
(respondents)
and
Attorney General of Alberta
Videotron Ltd.
(intervenors)

E N T R E :

Commissaire de la concurrence
(demandeur)
et
Rogers Communications Inc.
Shaw Communications Inc.
(défendeurs)
et
Procureur général de l'Alberta
Videotron Lté
(intervenants)

SUBPOENA PURSUANT TO SECTION 7 OF THE *COMPETITION TRIBUNAL RULES*

ASSIGNATION DE TÉMOIN EN VERTU DE L'ARTICLE 7 DES *RÈGLES DU TRIBUNAL DE LA CONCURRENCE*

To

Nazim Benhadid
SVP, Network & Build
TELUS Garden
510 West Georgia Street
Vancouver, BC V6B 0M3

Charlie Casey
VP, Consumer, Controller
TELUS Garden
510 West Georgia Street
Vancouver, BC V6B 0M3

Daniel Stern
Director, Regulatory Law and Policy
TELUS Communications Inc.
TELUS Garden
510 West Georgia Street
Vancouver, BC, V6B 0M3

[1] YOU ARE REQUIRED TO ATTEND TO GIVE EVIDENCE at the hearing of this proceeding, on the 7th day of November, 2022, at 10:00 a m., before the Competition Tribunal, 90 Sparks Street, 6th floor, Ottawa, ON, and to remain until your attendance is no longer required.

[2] YOU ARE REQUIRED TO BRING WITH YOU and produce at the hearing the following documents and things:

1. All memoranda or presentations dated on or after May 7, 2022 to Telus Communications Inc.'s ("**Telus**") board of directors or executive leadership team considering the proposed divestiture of Freedom Mobile Inc. to Videotron Inc.

[3] IF YOU FAIL TO ATTEND or remain in attendance as required by this subpoena, you may be in contempt of the Tribunal pursuant to subsection 8(3) of the *Competition Tribunal Act*.

DATED at Ottawa, Ontario, this 14th day of October, 2022.

À

[1] IL VOUS EST ORDONNÉ DE COMPARAÎTRE à l'instruction de la présente instance, le _____ jour du mois de _____ _____, à _____h_____, pour y témoigner devant le Tribunal de la concurrence, 90, rue Sparks, 6ième étage, Ottawa (ON), Canada et d'y demeurer jusqu'à ce que votre présence ne soit plus requise.

[2] IL VOUS EST ORDONNÉ D'APPORTER AVEC VOUS et de produire à l'audience les documents et choses suivants :

[3] LE DÉFAUT DE COMPARAÎTRE ou de demeurer présent tel que l'ordonne la présente assignation peut constituer un outrage au Tribunal en vertu du paragraphe 8(3) de la *Loi sur le Tribunal de la concurrence*.

FAIT à Ottawa (Ontario) ce 14ième jour de octobre, 2022.

Michel Parent
Registrar/Registraire

This subpoena was issued at the request of and inquiries may be directed to:

Crawford G. Smith (LSO# 42131S)
LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750
145 King Street West
Toronto, ON M5H 1J8
Tel: 416.598.8648
Email: csmith@lolg.ca

Should the details set out above be provided in only one official language, a translation to the other official language is available from the counsel or party / intervenor serving this summons.

La présente assignation a été émise à la demande de l'avocat dont le nom apparaît ci-dessous et les demandes de renseignements peuvent lui être adressées

Si les particularités ajoutées ci-haut sont dans une langue officielle seulement, la traduction est disponible auprès de l'avocat ou de la partie / intervenant qui signifie l'assignation.