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Broadcasting Notice of Consultation CRTC 2012-370

Proposed Merger of Bell Canada Enterprises and Astral Media Inc.

Intervention of the Samuelson-Glushko Canadian Internet Policy & Public Interest clinic (CIPPIC) & OpenMedia.ca

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Introduction

1. The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) and the Open Media Engagement Network (OpenMedia.ca) are grateful for this opportunity to express our concerns over the proposed merger of Bell Canada Enterprises (BCE) and Astral.

2. CIPPIC and OpenMedia.ca are extremely concerned over the increasing degree of concentration in Canada's telecom and broadcasting sectors. If approved, the Bell/Astral merger will signal the end independent, non-vertically integrated media in Canada and will exacerbate a number of concerning trends already evident in the current media and communications delivery market.

3. CIPPIC and OpenMedia.ca are aware of and generally supportive of a submission to this proceeding made by the Public Interest Advocacy Centre (PIAC). Below, we highlight a few specific dimensions of the Bell/Astral merger that in our view raise particular high-level concerns for diversity of voices in Canadian media, competition and, ultimately, user choice, with a high emphasis on competition.

4. Our specific focus in this complimentary submission is on some of the potential competitive impacts that may result from a combination of increased vertical integration and concentration in a communications context. As the proposed merger effectively signals the death of non-integrated media in Canada, it threatens to wreak havocs that should either be avoided altogether, or will require a significantly more intrusive regulatory framework that requires difficult regulatory tradeoffs. In light of this, CIPPIC/OpenMedia.ca suggest that the CRTC block this merger. In case the Commission does not do so, we conclude with some brief comments on Bell's proposed benefits package.

I. BCE: An Integrated, Converging Communications Behemoths

5. The Bell/Astral proposed merger raises a number of general concerns that are common to communications markets. These relate to increased vertical integration, increased concentration and the ability to leverage these advantages in a rapidly converging environment. Many of these concerns have been addressed, to a certain extent, through various CRTC policy frameworks. Nonetheless, it is helpful to highlight in brief what concerns these issues raise and how they may interact with each other before turning to specific concerns raised by the Bell/Astral merger and the ways in which the existing regulatory frameworks fall short of addressing these.

Vertically Integrated

6. Increased vertical integration is deeply problematic because of the manner in which it skews market incentives. In addition to traditional concerns over monopolistic pricing, vertically integrated contexts can have far more subtle impacts:

> Input foreclosure may occur in various forms. The merged entity may decide not to deal with its actual or potential competitors in the vertically related market. Alternatively, the merged firm may decide to restrict supplies and/or to raise the price it charges when supplying competitors and/or to otherwise make the conditions of supply less favourable than they would have been absent the merger.[1]

Since a lost distributer for specific content is translated into a competitive advantage for the content provider's own distribution system, vertically integrated entities simply lack strong market incentives that are typically relied upon to govern the price and nature of wholesale agreements.

7. Vertical integration can lead to other, more subtle harms as well. A substantial degree of upstream concentration can permit an entity to not only impact on downstream

[1] EC, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, October 10, 2008, 2008/C 265/07, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF>, para. 33.

pricing, but also to leverage content inputs in order to discourage or punish any deviation from business models or practices established by the vertically integrated distributer.[2] For example, an upstream provider with a favoured business model can attempt to lock downstream distributors into this model so as to prevent competition and innovation on the means of delivery.[3] This, in turn, can have serious repercussions for consumer choice as well as for pricing, as downstream entities are unable to develop competing innovative business models.

8. Vertical integration raises specific concerns where the merged entity has the ability to foreclose inputs; the *incentive* to do so (which will not always be present, as sometimes content revenues lost from foreclosure will outweigh any potential for gained distribution revenues); and the likely effect of foreclosure.[4] Distribution and connectivity revenues tend to significantly outweigh content revenues.[5] The prospect of bundling further and dramatically increases the value of distribution customers over and above the value of added distribution through competing distributors.[6] This means that, contrary to some types of non-horizontal mergers,[7] converging

[2] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, para. 11.9.
[3] See, for example, Telecom Regulatory Policy CRTC 2011-703, Billing Practices for wholesale residential high-speed access services, November 15, 2011, <http://www.crtc.gc.ca/eng/archive/2011/2011-703.htm>, para. 15 and Broadcasting Decision CRTC 2012-208, Request for dispute resolution by the Canadian Independent Distributors Group relating to the distribution of specialty television services controlled by Bell Media Inc., April 5, 2012, <http://www.crtc.gc.ca/eng/archive/2012/2012-208.htm>.
[4] OECD, "Economic Evidence in Merger Analysis", July 12, 2012, DAF/COMP(2011)23, <http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf>, Sections 3.3-3.4.
[5] CRTC, "Communications Monitoring Report", July 2011, <http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2011/cmr2011.pdf>. See also: A. Odlyzko, "Content is not King", (2001) 6(2) *FirstMonday*, <http://www.dtc.umn.edu/~odlyzko/doc/history.communications2.pdf>.
[6] CRTC, "Communications Monitoring Report", July 2011, <http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2011/cmr2011.pdf>, Table 5.1.12, gives an indication of the prevalence of bundling in Canadian communications markets: in 2010, 48% of local telephone services were bundled with at least one additional service.
[7] OECD, "Economic Evidence in Merger Analysis", July 12, 2012, DAF/COMP(2011)23, <http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf>, Section 3.4.

communications entities will face strong incentives to divert revenues towards distribution or telecommunications offerings and away from content-based inputs.

Behemoth

9. The Bell/Astral merger raises broader concentration concerns in that it feeds into an already heavily concentrated entity that is not only vertically integrated, but also increasingly conglomerated. This conflates input foreclosure concerns related to pricing through vertical integration with conglomerate non-horizontal concerns. Conglomerates raise anti-competitive concerns where they have the capacity to leverage control over two complementary products in order to impact the ability of others to compete against one of those products. Strong concentration in two such related products would provide a conglomerate with the opportunity to harm competition even without actual dominance in either market.[8]

10. Concentrated market power in related products allows conglomerates to leverage techniques such as tied selling and bundling in order to increase demand for related products, impose business models on smaller competitors,[9] or, in services with high entry costs, even prevent new competitors from entering the field by offering some bundled products at predatory prices.[10] This, in turn, leads to fewer user choices, less innovation in services and reduced diversity in voices.

[8] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, para. 11.2; EC, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, October 10, 2008, 2008/C 265/07, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF>, para. 99.
[9] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, paras. 11.8-11.9, 6.33.
[10] Predatory pricing within a bundle is difficult to measure in that it is difficult to estimate how much each product/service within the bundle is being discounted. Some argue that bundling can have exclusionary effects even where component products/services are above cost, in that it allows for pricing that is below what an equally efficient (but non-conglomerated) competitor can offer. Others have suggested treating all types of bundling as tied selling, since customers face a choice between purchasing products/services

Canadian Communications Context

11. The communications context raises particular challenges for analysis of competition in a vertical merger. Non-horizontal concentration thresholds have typically developed in two-dimensional contexts. Vertical integration harms are analyzed in terms of tradeoff gains in pricing that may result from partial or total input foreclosure of a downstream competitor against added sales of the upstream product that would result from dealing with that competitor:

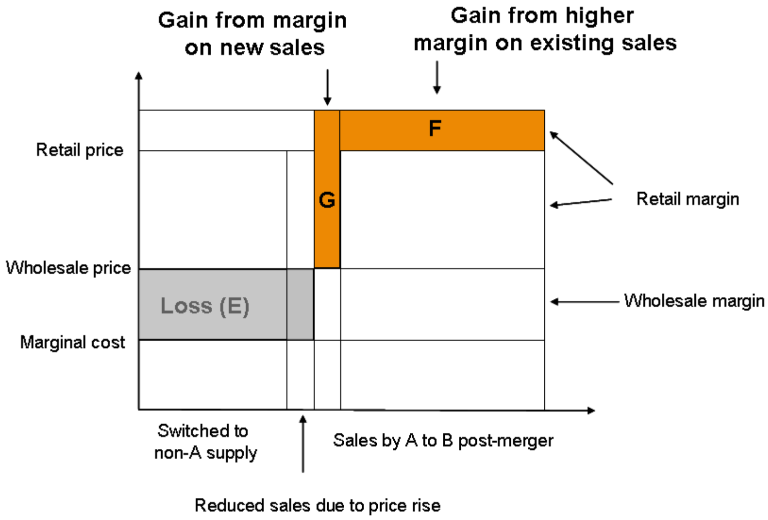


IMAGE SOURCE: OECD, "Economic Evidence in Merger Analysis", July 12, 2012, DAF/COMP(2011)23

Non-horizontal conglomerates are examined in terms of the capacity of the conglomerate to leverage some concentration in two complementary markets in order to impact on the ability of others to compete against one of those markets. This provides the potential to harm competition even without actual dominance in either market.[11]

independently or doing so at a discount: OECD, "Bundled and Loyalty Discounts and Rebates", DAF/COMP(2008)29, <http://www.oecd.org/competition/abuseofdominanceandmonopolisation/41772877.pdf>, pp. 25-26.

[11] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, para. 11.2

12. Concentration thresholds used as signifiers of concern in non-horizontal contexts typically presume incentives for two dimensional tradeoffs: either along a distributor/upstream input dimension or along bundling/tied selling dimension.[12] The concentration thresholds adopted by the Commission in its diversity of voices framework, for example, are based on just such assumptions.[13]

13. Canada's heavily integrated communications market, where quadruple plays are rapidly becoming status quo, puts in place incentives for a much more multi-faceted range of tradeoffs. This allows merged entities such as Bell to leverage vertical inputs *and* to conglomerate markets along *multiple* distribution and product dimensions. It is not clear that, in this highly integrated context, existing concentration thresholds remain adequate to ensuring merged communications entities are not able to detrimentally impact on competition, diversity of voices and user choice at even lower concentrations than are traditionally salient.

14. Indeed, there is cause to believe that if the Bell/Astral merger is not blocked, the Commission's regulatory framework will no longer be adequate to the task of ensuring its Broadcasting objectives.

Bell/Astral: Special Problems

15. In non-horizontal merger contexts, activities that are typically beneficial (such as internal efficiencies, bundling, etc.) become problematic because of their impact on competition and, by transference, on user choice, diversity of voices and innovation in distribution. The proposed Bell/Astral merger will permit Bell to leverage a number of these non-horizontal advantages in ways that may seriously impact competition.

[12] OECD, "Bundled and Loyalty Discounts and Rebates", DAF/COMP(2008)29, <http://www.oecd.org/competition/abuseofdominanceandmonopolisation/41772877.pdf>.
[13] Broadcasting Public Notice CRTC 2008-4, Regulatory Policy: Diversity of voices, January 15, 2008, <http://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htm>, para. 82.

16. There are a number of holes in the current regulatory framework that a more concentrated Bell/Astral integrated conglomerate will be able to use in ways that will decrease competition. These include traditional instances of partial or total input foreclosure, as well as of bundling or tied selling which. In addition, Bell's position as a vertically integrated conglomerate can impact on downstream competition in much more subtle ways. For example, Bell can leverage immediate access to its own inputs in ways that give it an advantage over competing distributors who may only be able to access such content inputs after a delay or, often, after lengthy regulatory battles.[14] Or Bell can leverage its position to impose restrictions on downstream *packaging* discipline which, in turn, can prevent non-converged distributors from competing on the *means* of delivery, or through subtle pricing mechanisms.[15]

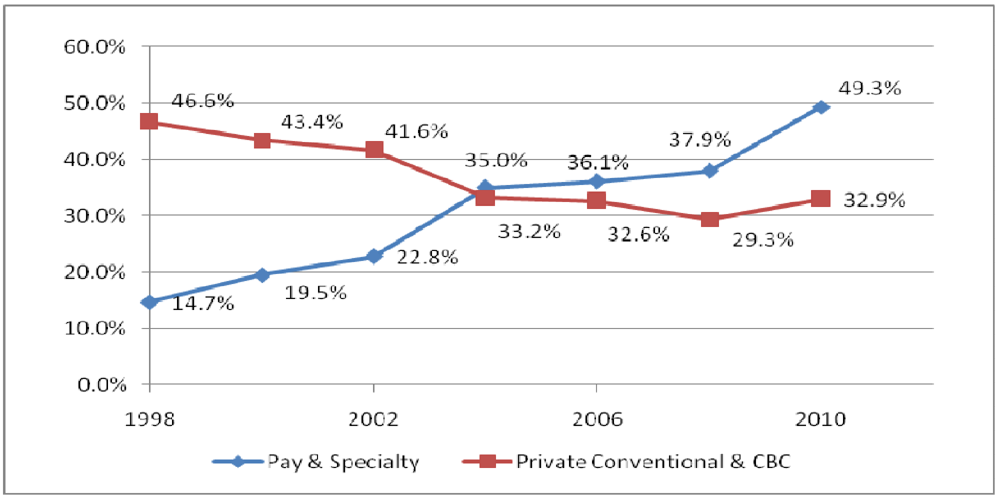
17. Much of this varied activity may not be as readily objectionable in a less concentrated market but, in the concentrated environment following a Bell/Astral merger, the *accumulative* impact of these various activities may detrimentally and substantially impact on the ability of various distribution and content entities to compete. Some examples of potential problem areas include:

18. **Specialty Channels.** Specialty channels are rapidly outpacing conventional television in terms of viewing share:

[14] For example, Bell will develop its *own* VOD business model for specialty services before providing VOD capacity for non-Bell distributors (para. 107). See also Testimony of M. Bibic and K. Crull, Transcript of Proceeding, Volume 1, March 22, 2012, Broadcasting and Telecom Information Bulletin CRTC 2009-38, CRTC Ref. No.: 8622-C193-201201110, <http://www.crtc.gc.ca/eng/transcripts/2012/tb0322.html>, lines 158-162, 527-533 and 1172. For yet another example, see Telecom Regulatory Policy CRTC 2010-632, Wholesale high-speed access services proceeding, August 30, 2010, <http://www.crtc.gc.ca/eng/archive/2010/2010-632.htm> and CRTC, Follow-up to Regulatory Policy CRTC 2010-632, Wholesale high-speed access services proceeding (cost studies – ILEC), CRTC Reference Number: 88638-C12-201016882, <http://www.crtc.gc.ca/PartVII/eng/2010/8638/c12_201016882.htm>.

[15] For a general example, see: Telecom Regulatory Policy CRTC 2011-703, Billing Practices for wholesale residential high-speed access services, November 15, 2011, <http://www.crtc.gc.ca/eng/archive/2011/2011-703.htm>, para. 15.

Viewing Share of Private Conventional/CBC vs. Specialty/Pay Services
(Quebec Francophone market excluded)



DATA SOURCE: CRTC, Navigating Convergence, February 2010; CRTC, Communications Monitoring Report, 2011[16]

What this means, in the broader context, is that specialty and pay services are increasingly attractive to viewers and, hence, that access to such inputs is becoming increasingly critical to media-based or media-adjacent services.

19. Bell points to its these specialty/pay inputs as integral to the success of its media business, particularly in light of lower industry-wide advertising revenues:

> Moving to Bell Media, overall I'd say a very good set of results that were the best in the Canadian media industry this quarter, both financially and in terms of TV audience ratings and viewership levels. Subscriber fee revenues grew a healthy 22 % year-over-year driven by higher specialty sports programming rates which we put through with broadcast distributors. Subsequent to the end of the quarter, we concluded new agreements now with all the remaining BDUs for our specialty channel rate increases, and that's going to support Bell Media's revenue growth trajectory in the second half of the year.

[16] CRTC, "Navigating Convergence: Charting Canadian Communications Change and Regulatory Implications", CRTC Convergence Policy, Policy Development and Research, February 2010, <http://www.crtc.gc.ca/eng/publications/reports/rp1002.htm>, Figure 1; CRTC, "Communications Monitoring Report", July 2011, <http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2011/cmr2011.pdf>, Table 4.3.3.

> Consistent with results reported by other Canadian media operators in the quarter, we saw advertising revenues down 7.8 % year-over-year. Advertising demand, particularly in conventional TV, remains soft across most industry sectors. Additionally, advertising revenue in the second quarter of last year benefited from strong NHL hockey playoff ratings, the federal election, and CTV's coverage of the royal wedding…so overall Bell Media continues to perform very, very well.[17]

20. Integrated conglomerates can leverage control of these valuable inputs in a number of ways, as access to such inputs is core to the success of any media service, on any distribution platform. Particularly concerning in this context are attempts to impose strict packaging conditions onto distributers that prevent deviations in Bell's pre-ordained packaging decisions by attempting to attach, for example, vetoes over packaging changes,[18] or very rigid penetration thresholds that, in practice, force downstream distributors to package inputs in specific ways.[19]

An integrated conglomerate can also leverage such valuable inputs to push related products/distribution channels. Likely in anticipation of the success of this merger, Bell is already, for example, offering its lucrative, soon-to-be acquired from Astral Movie Network for the first 2 months of any new Fibe TV subscription at no cost.[20] Overall, the proposed Bell/Astral merger will provide BCE with control over 54 specialty and pay television services,[21] or 40 percent of the pay and specialty

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[17] Siim Vanaselja, BCE Q2 2012 Results Conference Call, Transcript, August 8, 2012, <http://www.bce.ca/assets/investors/Q2-2012/Q2_2012_Transcript.pdf>, p. 6.

[18] While it appears that Bell withdrew its veto over packaging conditions in favour of variable costing based on penetration rates, this was only accomplished subject to regulatory intervention: Broadcasting Decision CRTC 2012-393, <http://www.crtc.gc.ca/eng/archive/2012/2012-393.htm> and Broadcasting Decision CRTC 2012-208, <http://www.crtc.gc.ca/eng/archive/2012/2012-208.htm>.

[19] Penetration ratios are very susceptible in their impact to pricing, and pricing remains confidential, so it is difficult to assess the extent to which this is an issue in BD CRTC 2012-393. One stark example can be pointed to with respect to penetration ratios for stations such as TSN, a popular, Bell owned sports network. TSN carries a high price and, now, a significantly high penetration obligation so as to require competing distributors to include it within their basic service package. This has the detrimental impact of driving up significantly a competing distributor's basic cable entry price: Transcript of Proceeding, Volume 1, March 22, 2012, Broadcasting and Telecom Information Bulletin CRTC 2009-38, CRTC Ref. No.: 8622-C193-201201110, <http://www.crtc.gc.ca/eng/transcripts/2012/tb0322.html>, lines 47, 709.

[20] <http://fibetv.bell.ca/en/features/tmn/>, accessed August 8, 2012.

[21] D. Friend & L. LaSalle, "Bell Invests in 'TV everywhere'", March 17, 2012, Winnipeg Free Press, <http://www.winnipegfreepress.com/business/bell-invests-in-tv-everywhere-143035445.html>.

television market.[22] They will have the ability to leverage this incredible concentration in the most lucrative media inputs (in terms of both revenues and view share) across their entire integrated conglomeration of services and distribution channels.

21. **Fibe TV.** Bell is leveraging its Fibe TV product in a number of ways aimed at driving the competitiveness and value of its other services and particularly its Internet access services:

> Turning to wireline data, Fibe TV – very pleased with the 38,000 net adds. Ninety per cent of our Fibe TV customers are now taking three products. Quebec City is ahead of plan from where we thought it would be with the launch of fibre and the IPTV footprint now at 2.4 million homes passed, and at the end of the year we said we anticipate being at about 3.3 million homes passed.
>
> …
>
> Frankly we're right on where we wanted to be on IPTV at this point in the year. The footprints are where we wanted to be, the economics are where we wanted it to be and now it's just about trying to accelerate because everything that we do on IPTV seems to pull some really good numbers on NAS and Internet.[23]

Driving the triple play referred to here is a form of mixed bundling that seems to have proven quite effective to date, with 90% of Bell's 2.4 million Fibe TV customers also subscribing to Internet and NAS.[24]

22. The role Fibe TV is playing in driving the Internet access component of the triple play referred to above is particularly troubling. In this context, it is no longer a question of mixed (optional) bundling, but one of tied selling as Bell Internet access is a necessary

[22] D. Winseck, "Bell-Astral Deal Should be Stopped in its Tracks", March 16, 2012, Globe and Mail, <http://www.theglobeandmail.com/technology/digital-culture/bell-astral-deal-should-be-stopped-in-its-tracks/article536024/>.
[23] George Cope, BCE Q2 2012 Results Conference Call, August 8, 2012, <http://www.bce.ca/assets/investors/Q2-2012/Q2_2012_Transcript.pdf>, pp. 4 and 11.
[24] *Ibid*.

business (but not technical) precondition to Fibe TV access.[25] The success of this tied selling strategy is quite telling:

> On the Internet side, really quite frankly softer than we wanted to be, and really mixed results. What we're seeing is where we have IPTV footprint, we're seeing quite positive net adds on the Internet side; and where we don't have IPTV footprint is where we are seeing the impact, particularly where there would be DSL and the churn can be quite high there. We anticipate with the expansion of the IPTV footprint from 2.4 million to 3.3 that that will address the internet issue that we have, which will obviously pull through additional revenue, and further expansion of the IPTV footprint in 2013, which we'll talk about on our call, later this year.
>
> On the other side of the Internet, where it is particularly aggressive is in southern Ontario where our cable competitor continues to offer 50% off for 12 months of service, and we think that's having some impact as well. *But by and large, given the numbers we're seeing where we have IPTV, we know what the solution is and we're just going to drive that through IPTV footprint*.
>
> …what's most important is when they migrate [from DSL to a Fibe package], we get both, right, because they move to a higher Internet speed which, quite frankly, in the competitive marketplace we're in, particularly in southern Ontario, can be pretty close to some of the pricing we're seeing on non-Fibe Internet. But where we're seeing obviously the lift is we're picking up a $60 TV sub and getting the triple play, obviously, will help us with churn overall. And so that's really how we're seeing that.[26]

Bell clearly seems to be engaging in a tied selling strategy that leverages its Fibe TV product in order to compensate for stiff competition on Internet access services. However, many of its competitors in the Internet access business will not be able to leverage similar tied selling strategies as they lack the TV distribution capacity.

23. This business model has the ancillary effect of elevating the importance of Bell's TV distribution service, providing strong incentives to leverage its media content inputs

[25] Bell Canada, "FibeTV – Overview", <http://fibetv.bell.ca/en/features/overview/>, (accessed August 9, 2012):

> When you sign up for Fibe TV, you'll also be asked to sign up for a separate Fibe Internet package. So, on top of the best TV, you'll also get faster Internet.

[26] George Cope, BCE Q2 2012 Results Conference Call, August 8, 2012, <http://www.bce.ca/assets/investors/Q2-2012/Q2_2012_Transcript.pdf>, pp. 4 and 11; my emphasis.

to enhance the competitiveness of its TV distribution (and even at cost to the value of its content distribution revenues).[27]

24. **TV Nowhere?** A related concern that exacerbates the potential for misuse of valuable upstream inputs is the growing importance and relevance of new media as a medium of content distribution.[28] This is likely to exacerbate wholesale market problems arising from vertical integration and conglomeration. It provides another avenue for an integrated entity to leverage inputs in order to drive customers towards its own offerings or to exert control over the makeup and price points of downstream markets.

25. There are a number of ways this might manifest in spite of current regulatory protections. The Commission's vertical integration framework prohibits exclusive online distribution of some media content.[29] However, it does not require content creators to offer content that has been expressly designed for the online environment, nor does it require vertically integrated entities to make available new media distribution rights that that the vertically integrated entity is not deploying itself.

26. This latter point is particularly problematic if high value inputs are concentrated in one place. It gives the concentrated entity – a merged Bell – the ability to determine the shape, nature and timing of digital strategies in Canada. Under the current

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[27] As noted at footnote 4 above, such incentives are strong indicators of potential competitive harms from vertically merged entities.
[28] CRTC, "Navigating Convergence: Charting Canadian Communications Change and Regulatory Implications", CRTC Convergence Policy, Policy Development and Research, February 2010, <http://www.crtc.gc.ca/eng/publications/reports/rp1002.htm>, paras. 76-78.
[29] Broadcasting Regulatory Policy CRTC 2011-601, Regulatory framework relating to vertical integration, September 21, 2011, <http://www.crtc.gc.ca/eng/archive/2011/2011-601.htm>, paras. 21-22.

framework, Bell is able to develop its own comprehensive digital strategy while foreclosing access to others of its digital rights until such time as it goes to market.[30]

27. The basic control over *timing* this framework implies gives Bell a significant advantage over competitors. It can take develop and launch its own comprehensive digital strategy before competitors even know what types of rights they might be able to rely upon in attempting to develop their own competing strategies. This means competitors are foreclosed from even *planning* a digital strategy until Bell is ready to launch their own.

28. At a more fundamental level, deference to Bell's (or any other concentrated, integrated communications conglomerate's) business strategy is problematic to the extent that it implies Bell's market strategy will be the guiding force that defines any future derivative online strategies. If, for example, Bell decides to provide a specific subset of channels on mobile (for more details on problems specific to BCE Mobile TV, see below), there is no competitive or other force that can push it to make its other services available through that platform. If Bell decides to limit its multi-screen strategy to one or two screens (Mobile/iPad) but not another (Smart TV application),[31] then it appears as though competitors will be foreclosed from

[30] For Bell's view of its right to go to market as and when it chooses, see: M. Bibic, Transcript of Proceeding, Volume 1, March 22, 2012, Broadcasting and Telecom Information Bulletin CRTC 2009-38, CRTC Ref. No.: 8622-C193-201201110, <http://www.crtc.gc.ca/eng/transcripts/2012/tb0322.html>, lines 1191-1193; and Bell Canada, "Report on Consumer Choice and Flexibility", April 1, 2012, DM#1702897, ABRIDGED, at para. 107: "While we have experimented with providing some content from our specialty services for VOD distribution, we are currently in the process of developing a business model that includes a more robust and consistent VOD offering from our specialty services. Once that is determined, and the technical challenges are met, we intend to approach the BDUs and provide viewers with another way to access our content."

[31] S. Kovach, "The 10 Apps Every Smart TV Should Have", December 16, 2010, Business Insider, <http://www.businessinsider.com/the-apps-every-smart-tv-should-have-2010-12>

competing through these distribution mediums/channels. If Bell does not wish to deploy a Hulu-like web portal, Canada does not get one.[32]

29. The Bell/Astral merger exacerbates this problem in two very significant ways. First, this issue is, of course, primarily one of concentration. However, traditional media concentration ratios are not well calibrated to address such problems. Bell/Astral will add to Bell's growing stock of very *key* inputs such as sports networks, movie channels and other high viewership inputs without which an online distribution service might not be feasible.[33]

30. There is cause to believe these incentives are operative. Bell's existing 'multi-screen strategy' is a mechanism for enhancing accessibility to content, but primarily a mechanism to increase revenues along its distribution channels.[34] Indeed, Fibe TV subscribers are provided, free of charge, with the ability to access premium television content online through Bell's TV Online service, a Hulu-like streaming service that Bell makes available exclusively to its own customers.[35] As Bell officials point out: "It's clear that Bell isn't a telecom company anymore, we're in the screens business

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[32] For reference, see: Federal Communications Commission, *Applications of Comcast Corporation, General Electric Companyy and NBC Universal, Inc.*, January 20, 2011, FCC 11-4, <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf>, paras. 86-90; and *U.S.A. et. al. v. Comcast Corp et. al.*, Proposed Final Judgment, (D.C. Cir), Case:11-cv-00106, <http://www.justice.gov/atr/cases/f266100/266160.pdf>, Section IV.2: "Defendants shall provide to any requesting [Online Video Distributor] all Video Programming subject to Defendants' management or control and all Video Programming, including Video Programming owned by another Person, over which Defendants possess the power or authority to negotiate content licenses."
[33] See D. Friend & L. LaSalle, "Bell Invests in 'TV everywhere'", March 17, 2012, Winnipeg Free Press, <http://www.winnipegfreepress.com/business/bell-invests-in-tv-everywhere-143035445.html>. For a list of some key specialty television services already controlled by Bell, see Broadcasting Decision CRTC 2012-393, July 20, 2012, < http://www.crtc.gc.ca/eng/archive/2012/2012-393.htm>, Appendix A. Astral media will add additional key inputs such as the Movie Network, Disney, and others to this list: Broadcasting Notice of Consultation CRTC 2012-370, Proposed merger of BCE and Astral, July 10, 2012, <http://crtc.gc.ca/eng/archive/2012/2012-370.htm>.
[34] D. Friend & L. LaSalle, "Bell Invests in 'TV everywhere'", March 17, 2012, Winnipeg Free Press, <http://www.winnipegfreepress.com/business/bell-invests-in-tv-everywhere-143035445.html>.
[35] <http://tvonline.bell.ca/tvonline/servlet/CommandServlet?lang=en&command=watchonline&EXT=BTVO_tvhmpg_TXT_BTVO_Mass_060112_rg>

now."[36] In the context of this strategy, 'TV Everywhere' might well mean, in essence, 'TV Everywhere Bell owns a screen'.[37]

31. Further, the Bell/Astral merger marks the end of independent, non-converged, non-conglomerated media in Canada. There will simply be no major media producer left operating independent of the specific incentives that confine the operations of vertically integrated entities. That means that the Commission will even be deprived of a frame of reference to evaluate the competitiveness of future activities. Put another way, if there was a major independent media producer left, it might decide to compete through its own Hulu-like offering whereas vertically integrated/conglomerate incentives may push Canada's other four major media market players to develop their own distribution channels instead. Such a frame of reference from independent peers could at least provide clues that something may be awry.[38] The Bell/Astral merger will rob Canadian regulators of such a frame of reference.

32. In sum, the Bell/Astral merger will mean that the transition to new media in Canada will be effectively defined by vertically integrated, conglomerated entities operating under strong incentives to favour their own particular distribution channels, and very limited competitive pressures to explore alternative avenues. There will not even be a comparison point by which to gauge the activities of converged entities and their competitive or anti-competitive impact.

[36] J. Horn, "Bell's multi-screen Olympic Campaign", July 18, 2012, *Strategy*, <http://strategyonline.ca/2012/07/18/bell-medias-multi-screen-olympic-campaign/>, quoting Rick Seifeddine, SVP Brand, Bell Media.
[37] D. Friend & L. LaSalle, "Bell Invests in 'TV everywhere'", March 17, 2012, Winnipeg Free Press, <http://www.winnipegfreepress.com/business/bell-invests-in-tv-everywhere-143035445.html>; D. Winseck, "Bell-Astral Deal Should be Stopped in its Tracks", March 16, 2012, Globe and Mail, <http://www.theglobeandmail.com/technology/digital-culture/bell-astral-deal-should-be-stopped-in-its-tracks/article536024/>.
[38] FCC, *Applications of Comcast Corporation, General Electric Companyy and NBC Universal, Inc.*, January 20, 2011, FCC 11-4, <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf>, para. 88.

33. **BCE Mobile TV.** Bell's developing use of its existing Media content stores in the mobile context provide an interesting case study as they are illustrative of how one entity can leverage a combination of bundling, tied selling, and integration in order to provide a service in a manner that will be highly insulated from competitive pressures.

34. To begin with, it is interesting to see what Bell views as its most compelling 'levers' for growing Mobile TV adoption:

> The model in Canada that we think will really haunt us – it's not in your data bucket, so therefore you don't have to worry about data charges. You know, at $5 for 10 hours, it's intuitive to people that from a mobile application, 10 hours should be enough. From a parent who may have someone younger subscribing to TV service, that they know the cost can't go beyond $5, we think that will drive adoption. And then we get these levers, these events, and the Olympics of course—as I mentioned, we're seeing 90,000 streams a day now on mobile TV.[39]

Of note is that both of these 'levers' rely on non-horizontal advantages that non-integrated non-conglomerate competitors will have difficulty matching. Specifically, Bell highlights CTV's (of Bell Media) coverage of the Olympics and the unique data plan it is offering (which leverages Bell's mobile distribution channel) as key to the ongoing success of Mobile TV.

35. The unique data arrangement Bell refers to involves selling Bell Mobile TV access to Bell Mobility users at an hourly rate as opposed to a data usage rate.[40] As Bell correctly points out, usage based online rates are anathema to users and can deter adoption of online services such as video streaming.[41] Being able to offer such

[39] George Cope, BCE Q2 2012 Results Conference Call, August 8, 2012, <http://www.bce.ca/assets/investors/Q2-2012/Q2_2012_Transcript.pdf>, p. 4.
[40] The initial cost to Bell Mobility users is $5.00/month, and this provides 10 hours of viewing, regardless of how much data is consumed. Use of any other video application will be charged to users by the MB: <http://www.bell.ca/mobility/products/mobile_tv>, accessed August 8, 2012.
[41] CIPPIC/OpenMedia.ca, Initial Comments, Telecom Notice of Consultation CRTC 2011-77, march 28, 2011, <http://www.cippic.ca/sites/default/files/20110327-CIPPIC-CRTC_2011-77-COMMENTS.pdf>, and

services at a flat hourly rate, as Bell does with Bell Media, provides Bell with an exceptional advantage over any competing distributor or platform that seeks to stream content on mobile and tablet devices. Netflix is not, for example, able to offer Bell Mobility customers (or any of its customers) such a deal. It could be argued that Bell Mobility is offering itself an undue preference or, alternatively, discriminating against competing online video distribution mediums on its mobile platform.[42] However, it is by not clear that the Commission desires to engage in the type of micro managing of residential billing arrangements that such a finding would require.

36. The second 'lever' that Bell points to as integral to building its Mobile TV penetration is its control of key inputs such as the Olympics, the royal wedding, and other highly valued inputs. The Commission's Vertical Integration and New Media exclusion orders prevent Bell from offering media content *exclusively* on its mobile channel.[43] Consistent with this, Bell has made its Bell Mobile TV service available to other distributors for purchase.[44]

37. However, as noted above, there remain a number of ways that an integrated conglomerate such as Bell can leverage its content holdings to increase its competitive advantage. For example, its Mobile TV offering to competing distributors appears to replicate its own Mobile TV packaging, meaning that competing distributors are not able to pick and choose what channels to offer and under what conditions, as of yet.

CIPPIC/OpenMedia.ca, Reply Comments, Telecom Notice of Consultation CRTC 2011-7, April 29, 2011, <http://www.cippic.ca/sites/default/files/20110429-CIPPIC-CRTC_2011-77-REPLY.pdf>.

[42] See Telecom Regulatory Policy CRTC 2009-639, <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>, and Telecom Decision CRTC 2010-445, <http://www.crtc.gc.ca/eng/archive/2010/2010-445.htm>.

[43] Broadcasting Regulatory Policy CRTC 2011-601, Regulatory framework relating to vertical integration, September 21, 2011, <http://www.crtc.gc.ca/eng/archive/2011/2011-601.htm>, paras. 21-22.

[44] George Cope, BCE Q2 2012 Results Conference Call, August 8, 2012, <http://www.bce.ca/assets/investors/Q2-2012/Q2_2012_Transcript.pdf>: "We also from the Bell Media side are selling our content to Videotron who is also moving mobile TV product and we're wide open for business from the Bell Media perspective, looking for other carriers who want to access that content I think that can be a great business for Bell Media."

38. In addition, the 'delay' factor referred to in the context of other non-linear/online rights could be an issue in this context.[45] Bell appears to have already launched its 'multi-screen' campaign in earnest, while many competitors continue to remain locked out of non-linear rights.[46] Meanwhile, its current 'two-lever' strategy appears to have been phenomenally successful, improving its Bell Mobile TV user base from about 300,000 subscribers in March 2012 to an estimated 500,000 in August 2012.[47]

39. Bell also employs Mobile TV in order to drive customers to its other related products/distribution channels as part of its heavily advertised multi-screen strategy.[48] First, to drive sales of its Mobility service plans. Bell's Mobile TV application is currently available on a number of application markets, including Android's and Apple's. It can be downloaded and installed on any Android or Apple phone/tablet, but attempts to view BCE Mobile TV content on non-Bell phones receive the following message:

> **Bell Mobile TV**
>
> Mobile TV is only available to Bell customers on a cellular network in Canada. For more information on becoming a Bell customer visit a Bell store, bell.ca or call 1 888 4 MOBILE.

The Commission's vertical integration framework does not appear, so far, to obligate Bell to allow subscribers of competing wireless services to purchase access to its

[45] See *supra* footnote 30.
[46] Testimony of A. Mainville-Neeson, Transcript of Proceeding, Volume 1, March 22, 2012, Broadcasting and Telecom Information Bulletin CRTC 2009-38, CRTC Ref. No.: 8622-C193-201201110, <http://www.crtc.gc.ca/eng/transcripts/2012/tb0322.html>, Lines 1201-1203.
[47] George Cope, BCE Q2 2012 Results Conference Call, August 8, 2012, <http://www.bce.ca/assets/investors/Q2-2012/Q2_2012_Transcript.pdf>, p. 4 and D. Friend & L. LaSalle, "Bell Invests in 'TV everywhere'", March 17, 2012, Winnipeg Free Press, <http://www.winnipegfreepress.com/business/bell-invests-in-tv-everywhere-143035445.html>.
[48] J. Horn, "Bell's multi-screen Olympic Campaign", July 18, 2012, *Strategy*, <http://strategyonline.ca/2012/07/18/bell-medias-multi-screen-olympic-campaign/>.

Mobile TV application. Competing wireless distributors will need to negotiate directly with Bell before their customers are able access Mobile TV.

40. Bell has the option of increasing distribution of Mobile TV by offering it for purchase directly on existing Mobile phone marketplaces as these marketplaces transcend wireless service providers. However, it chooses to forgo this distribution advantage in favour of an enhancement to its Bell Mobility distribution channel.

41. These instances indicate highly sophisticated leveraging of Bell's multiple related product lines and distribution channels in ways that put non-converged/integrated competitors at a disadvantage even in *non*-concentrated markets. The Bell/Astral merger will add inputs with even higher market concentration into the equation and thereby greatly exacerbate the competitive impact these practices are having. The potential harm that can result to an already overly concentrated Canadian communications market, to online innovation, to diversity of voices and, ultimately, to user choice might be devastating.

II. Benefits Package

42. In light of these egregious concerns, CIPPIC and OpenMedia.ca urge the Commission to reject the proposed merger of Bell and Astral. However, if the Commission chooses to approve the merger, CIPPIC/OpenMedia.ca urge the Commission to, at the least, reject a component of Bell's proposed benefits package.

43. Included in this proposed benefits package is a 'modernization plan' for Northwestel Inc., a wholly owned Bell subsidiary, that forms part of Northwestel's Commission-mandated obligations to upgrade its Internet accessibility to rural areas.[49]

[49] Broadcasting Notice of Consultation CRTC 2012-370, <http://crtc.gc.ca/eng/archive/2012/2012-370.htm>.

44. CIPPIC/OpenMedia.ca agree that improvements to online infrastructure can prove to be a tangible benefit to meeting *Broadcasting Act* objectives. They can, for example, be an important and key driver of the move to online content and will help provide incentives that will help Canadian content gain a competitive edge in the digital environment.[50]

45. However, in CIPPIC/OpenMedia.ca's view, there is no tangible benefit to Canadian broadcasting if these funds are employed in order to meet a regulatory obligation that must already be met. As the regulatory obligation exists independently of the tangible benefits investment, and Canadians will benefit from it whether the Bell/Astral merger is successful or not, this proposed investment cannot be classified as a tangible benefit.

46. CIPPIC/OpenMedia.ca urge the Commission to reject this component of Bell's proposed tangible benefits package and, instead, to allocate the funds to the Community Access Program (CAP). CAP provides a vital mechanism for increasing Internet accessibility and, subject to recent budget cuts, the program is at serious risk of ending its twelve year tenure.[51]

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[50] See, for example, T. Israel, "The New Media: Maximizing Canada's Online Presence", CRTC Stakeholder Consultations on New Media & Broadcasting, November 16, 2011, <http://www.cippic.ca/sites/default/files/CIPPIC-newmedia.ppt>.

[51] CBC News, "Ottawa Cuts CAP Public Web Access Funding", April 6, 2012, <http://www.cbc.ca/news/technology/story/2012/04/06/ns-cap-funding-cut.html>; Industry Canada, "CAP Youth Initiative", Last modified July 13, 2012, <http://www.ic.gc.ca/eic/site/cap-pac.nsf/eng/h_00005.html>.