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Broadcasting Notice of Consultation CRTC 2013-106

Astral Broadcasting Undertakings – Change of Effective Control

Re-Proposed Merger of Bell Canada Enterprises & 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 provide our comments on the re-proposed merger of Bell Canada Enterprises (BCE) and Astral Media.

2. As a starting point, we note that the current proposal has been modified greatly from its predecessor in an attempt to alleviate concerns set out in Broadcasting Decision CRTC 2012-574, as well as to reflect obligations imposed in *Commissioner of Competition v. BCE Inc.*, CT-2013-002.[1] We have carefully reviewed these changes, and in spite of the improvements they offer over previous proposals, we remain of the view that this merger is *not* in the public interest, and its impact on the broadcasting system as a whole will be detrimental.

3. While the modified merged entity will have less market power than would have been the case with Bell and Astral's previous merger proposal, BCE is already concentrated to such a significant degree and across so many ancillary markets, that additional growth of *any* degree remains problematic. The merger with Astral will permit BCE to leverage these multiple channels to gain even *more* market share after the transaction ends, exacerbating the problem. Moreover, it is not only the growth of BCE that is problematic in the context of this merger, but the *disappearance* of Astral. Keeping this in mind, it is not clear that the changes to the current proposal lead to lower *overall* market concentration when compared to its predecessor. It is already clear that core elements of the divested properties will go to another highly concentrated and integrated firm, Shaw.[2]

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[1] Broadcasting Decision CRTC 2012-574, Astral broadcasting undertakings – change of effective control, October 18, 2012, <http://www.crtc.gc.ca/eng/archive/2012/2012-574.htm>, *Commissioner of Competition v. BCE Inc.*, CT-2013-002, March 4, 2013, <http://www.ct-tc.gc.ca/CMFiles/CT-2013-002_Consent%20Agreement_2_45_3-4-2013_2073.pdf>.
[2] Competition Bureau, "Competition Bureau Review of the Proposed Acquisition of Astral by Bell – Backgrounder", March 4, 2013, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03544.html>; Corus Entertainment Inc., "Corus Entertainment Expands Interests in French-language Specialty Television Market through Major Deals with Bell and Shaw Media", Press Release, Canada NewsWire, March 4, 2013, <http://www.newswire.ca/en/story/1123705/corus-entertainment-expands-interests-in-french-language-

4. The remaining divested properties, even if not acquired by one of Canada's other integrated conglomerates, will not permit for an independent Canadian broadcaster of any meaningful size to exist. As such, the modified proposal does not change the fact that this merger will signal the effective end of non-integrated broadcasting distribution in Canada. This, in turn, will lead to a host of market problems that will require heavy regulatory intervention to correct. Specifically threatened, in our view, will be the development of innovative online and mobile platforms that are content-dependent. In its application, Bell and Astral highlight the potential for this merger to improve cross-platform content delivery.[3] However, it is clear that what is envisioned here is content delivery cross-*Bell*-platforms. The concern, however, is that this merger will prevent a thriving, innovative online content delivery market by preventing *others* from cross-platform innovation. As the FTC noted with respect to a comparable merger in the United States:

> This transaction would effectuate 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. The harms that could result are substantial. For example, Comcast-NBCU…have the incentive and ability to hinder the development of rival online video offerings and inhibit potential competition from emerging online video distributors that could challenge Comcast's cable television business.[4]

While our neighbours to the south had the fortune of witnessing the development of online video services such as Hulu *before* a wave of mergers ended the independence of entities such as NBC/Universal, Canada may not be as lucky.

5. In our view, the choices before the Commission in this matter are clear: refuse this merger, or embrace a regulatory world where competition and existing regulatory frameworks can no longer be relied upon to fix a range of problems and where ongoing innovation in

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specialty-television-market-through-major-deals-with-bell-and-shaw-media>; Shaw Media, "Shaw Media Optimizes Specialty Channel Portfolio", Press Release, MarketWire, March 4, 2013, <http://www.marketwire.com/press-release/shaw-media-optimizes-specialty-channel-portfolio-tsx-sjr.b-1763978.htm>.

[3] Astral Media Inc. & BCE Inc., Supplementary Brief, Broadcasting Notice of Consultation CRTC 2013-106, *Astral Broadcasting Undertakings – Change of Effective Control*, January 31, 2013, ABRIDGED.

[4] Federal Communications Commission, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, January 20, 2011, FCC 11-4, <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf>.

program delivery, customer choice and fair pricing will only come at the price of a significantly more intrusive regulatory presence.

6. Our submission below will focus primarily on highlighting competitive problems that are already hampering Canada's communications landscape, each demonstrative of the use of concentrated and/or vertical market power in order to gain a competitive advantage. The Bell/Astral merger will create an untenable level of integrated concentration and exacerbate these problems already evident in the current media and communications delivery market, elevating the threat they pose to unbearable levels.

I. General Regulatory Concerns: Uniformly Integrated, Converged Communications Behemoths

7. 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.

(a) Vertically Integrated

8. 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.[5]

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 the strong market incentives that are typically relied upon to govern the price and nature of wholesale agreements.

9. 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.[6] Distribution and connectivity revenues tend to significantly outweigh content revenues.[7] The prospect of bundling further and dramatically increases the value of distribution customers over and above the value of added distribution through competing distributors.[8] This means that, contrary to some types of non-horizontal mergers,[9] converging communications entities will face strong incentives to divert revenues towards distribution or telecommunications offerings and away from content-based inputs.

10. Finally, vertical integration can lead to other, more subtle competitive harms as well. A substantial degree of upstream concentration can permit an entity to not only impact on

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[5] European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, October 10, 2008, EC 2008/C 265/07, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF>, para. 33.
[6] 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.
[7] 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>.
[8] 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.
[9] OECD, "Economic Evidence in Merger Analysis", July 12, 2012, DAF/COMP(2011)23, <http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf>, Section 3.4.

downstream 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.[10] 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.[11] Vertical integration enhances the ability for a company to impose this type of favoured business model by providing the integrated entity with the means of disciplining downstream entities by leveraging lucrative inputs.[12] This, in turn, can have serious repercussions for market innovation and consumer choice as well as for pricing, as downstream entities are unable to develop competing innovative business models.

(b) Behemoth

11. 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 vertical integration-based input foreclosure concerns related to pricing, on the one hand, 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 or distribution channels would provide a conglomerate with the opportunity to harm competition even without actual dominance in either market.[13]

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[10] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, para. 11.9.

[11] 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>.

[12] European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, October 10, 2008, EC 2008/C 265/07, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF>, paras. 79-83.

[13] 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,

12. 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,[14] or, in services with high entry costs, even prevent new competitors from entering the field by offering some bundled products at predatory prices.[15] This, again, leads to fewer user choices, less innovation in services and reduced diversity in voices.

(c) Market Uniformity

13. Market concentration in general raises the additional risk of market coordination. The Competition Bureau defines coordinated behaviour as such:

> Coordination involves interaction by a group of firms (including the merged firm) that is profitable for each firm because of each firm's accommodating reactions to the conduct of the others. Coordinated behaviour may relate to price, service levels, allocation of customers or territories, or any other dimension of competition.[16]

Similarly situated firms operating under similar incentives are able to recognize mutual benefits, monitor other firms for any deviation from adopted favourable conditions, and response to any such deviations if they arise.[17]

14. Coordinated activity need not be explicit, but can be tacit as well. An example from the telecommunications context of what might be termed 'coordinated behaviour' is the development of

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2008, 2008/C 265/07, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF>, para. 99.

[14] 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.

[15] 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 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.

[16] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, para. 6.24.

[17] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, para. 6.26.

three year contractual lock-in periods for wireless service contracts. A three year lock-in term benefits service providers far more than a two year term, as it insulates providers from the need to compete with new entrants, without any added cost to the incumbent wireless provider. In Canada, uniquely amongst OECD countries, the three incumbent providers were able to coordinate sufficiently to engrain three years as the predominant lock-in period for wireless service contracts.[18]

15. Non-horizontal concentration increases the risk of market coordination. Merged entities are able to leverage inputs to foreclose (or threaten to foreclose) downstream competitors from *effectively* counteracting preferred behaviour.[19] More to the immediate point, non-horizontal mergers can increase the risk of coordination where they increase uniformity in the types of market players involved either by creating a smaller number of vertically integarated entities with similar incentive structures or by eliminating a 'vigorous and effective competitor', as the letter are antithetical to any form of coordination:

> Vertical mergers may also increase the degree of symmetry between firms active in the market(s). This may increase the likelihood of coordination by making it easier to reach a common understanding on the terms of coordination. Likewise, vertical integration may increase the level of market transparency, making it easier to coordinate among the remaining market players.
>
> Further, a merger may involve the elimination of a maverick in a market. A maverick is a supplier that for its own reasons is unwilling to accept the co-ordinated outcome and thus maintains aggressive competition. The vertical integration of the maverick may alter its incentives to such an extent that co-ordination will no longer be prevented.[20]

The Bell/Astral merger raises increasing concerns over coordinated behaviour by eliminating the last substantial non-vertically integrated entity, leading to greater market concentration and uniformity.

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[18] See: CIPPIC/OpenMedia.ca, Final Reply Comments, Telecom Notice of Consultation CRTC 2012-557, Proceeding to Establish a Mandatory Code for Mobile Wireless Services, March 15, 2013, <http://www.cippic.ca/uploads/2012-557_FinalReply.pdf>, pp. 2-9; and CIPPIC/OpenMedia.ca, Additional Comments, Telecom Notice of Consultation CRTC 2012-557, Proceeding to Establish a Mandatory Code for Mobile Wireless Services, March 1, 2013, <http://cippic.ca/uploads/2012-557_FinalComments.pdf>, paras 17-23.

[19] European Commission, *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. 83.

[20] European Commission, *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>, paras. 84-85.

(d) Converged Communications Context

16. Finally, the Canadian communications context allows for market concentration along an unprecedented number of complimentary dimensions and markets. Several Canadian communications entities in particular have now surpassed the coveted 'quadruple play' (broadband Internet access, television, home phone and mobile phone/Internet) and are now enjoying quintuple (quadruple plus programming/content such as Bell/CTV or Rogers/Maple Leafs) and even sextuple (quintuple plus frontline retail control such as Bell/The Source) plays. In addition, many are able to exert significant control over *additional* related products, such as the ability of wireless service providers to influence the conditions under which mobile handsets are presented to the market (even though they do not actually own or produce these handsets).[21]

17. Concentration thresholds for unilateral concentration, even in the context of non-horizontal mergers, are typically measured with two- or maybe even three-dimensional concentration in mind. Vertical integration harms, for example 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:

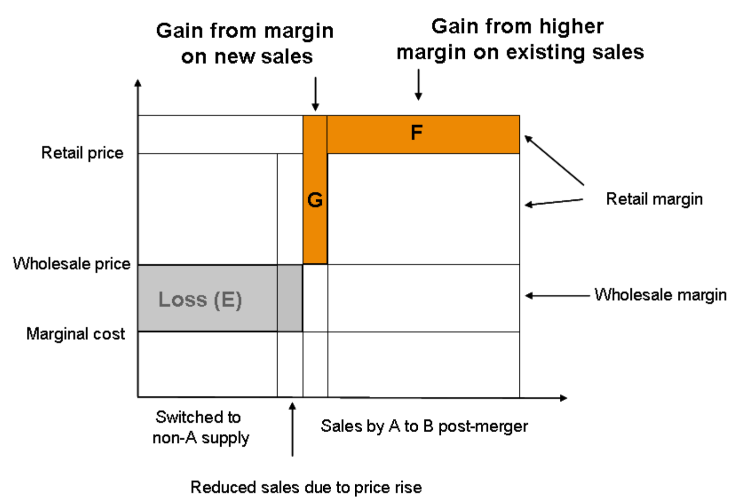

IMAGE SOURCE: OECD, "Economic Evidence in Merger Analysis", July 12, 2012, DAF/COMP(2011)23

[21] See, for example, CIPPIC/OpenMedia.ca, Additional Comments, Telecom Notice of Consultation CRTC 2012-557, Proceeding to Establish a Mandatory Code for Mobile Wireless Services, March 1, 2013, <http://cippic.ca/uploads/2012-557_FinalComments.pdf>, para. 28.

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.[22]

18. Concentration thresholds used as signifiers of concern in non-horizontal contexts typically presume incentives for two dimensional tradeoffs: the costs/benefits of either input foreclosure or bundling/tied selling between distributor/upstream input dimensions.[23] Concentration thresholds for the assessment of non-horizontal mergers typically assume this two-dimensional landscape. For example, the European Commission's threshold for non-horizontal mergers is 30% or an HHI of at least 2,000 is based on this two-market dynamic.[24] Similarly, the Competition Bureau recognizes that unilateral anti-competitive concerns become salient at concentration levels of 35% in a non-integrated context.

19. In order to properly assess the risk of unilateral anti-competitive action, concentration thresholds need to account for Canada's heavily integrated communications market, where quadruple plays have become status quo and incentives for a much more multi-faceted range of tradeoffs are operative. Merged entities such as Bell are able 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.

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[22] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, para. 11.2
[23] OECD, "Bundled and Loyalty Discounts and Rebates", DAF/COMP(2008)29, <http://www.oecd.org/competition/abuseofdominanceandmonopolisation/41772877.pdf>.
[24] European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, October 10, 2008, EC 2008/C 265/07, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF>, para. 25.

20. Further, it is critical to note that risks of coordinated behaviours arise at far *lower* thresholds. The European Commission, for example, recognizes that mergers may be problematic even if they do not attain 30% concentration where:

> (a) a merger involves a company that is likely to expand significantly in the near future, e.g. because of a recent innovation;
>
> (b) there are significant cross-shareholdings or cross-directorships among the market participants;
>
> (c) one of the merging firms is a firm with a high likelihood of disrupting coordinated conduct;
>
> (d) indications of past or ongoing coordination, or facilitating practices, are present.

Similarly, the Competition Bureau notes that coordinated behaviour can be dismissed if "the post-merger market share accounted for by the four largest firms in the market…would be less than 65 percent."[25]

II. Canada's Broadcasting System Post Bell/Astral: The Straw that Breaks the Regulatory Framework

21. It is important to analyze the proposed Bell/Astral merger within its proper factual and regulatory context. Only by doing so can its full impact be assessed. CIPPIC/OpenMedia.ca submit that a merged Bell/Astral, even post-divestiture, will remain overly concentrated, will retain too many 'key inputs' that it will be able to leverage across its numerous integrated holdings, and will increase the likelihood of coordinate behaviour to levels that are unacceptable under the CRTC's myriad policy objectives and are not addressed by current regulatory safeguards.

(a) Bell/Astral: Still more concentrated than it seems

22. In its Supplementary Brief to this proposal, Bell/Astral note that their significant divestiture commitments further to the Competition Bureau's obligations will leave it with acceptable

[25] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, para. 5.9.

viewership shares: 35.7% for English television and 23% for French television, and a revenue share of 33.2% in English and 22.9% in French.[26] Of these, only the 35.7% for English television borders on the Commission's 35% threshold under its Diversity of Voices framework.[27]

23. CIPPIC/OpenMedia.ca respectfully submit, however, that these thresholds are not helpful for assessing the impact of potential unilateral anti-competitive activity on diversity of voices in the context of a vertically integrated, The thresholds themselves are taken from the Competition Bureau's concentration guidelines for banking services, where integration and conglomeration is not an issue. With this in mind, a borderline 35.7% viewership shares concentration level is, in CIPPIC's eyes, problematic, as is the near-threshold 33.2% post-divestiture revenue share. Even the 23% post-divestiture television viewing share that Bell will have in French language markets is troubling, as it provides Bell with a strong position in one of the few remaining markets where it currently has no major presence (current French viewing shares are at 8.3%).

24. Bell's strong market power in wireless, wireline and home phone, its strong and growing presence in television distribution and its already strong presence in programming and content cannot be ignored. On the basis of this alone, CIPPIC/OpenMedia.ca submit that there remains a significant risk that a post-merger, post-divestiture Bell will have detrimental unilateral impact on diversity of voices in Canada while raising a range of other public interest concerns. However, it must be noted that these concentration ratios are only the *starting* point. Given Bell's increasing cross-market concentration, it is highly likely that its concentration levels will *continue* to grow once the merger is approved, as it will be able to leverage advantages in a number of related markets to gain a bigger foothold.

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[26] Astral Media Inc. & BCE Inc., Supplementary Brief, Broadcasting Notice of Consultation CRTC 2013-106, *Astral Broadcasting Undertakings – Change of Effective Control*, January 31, 2013, ABRIDGED, paras. 105-112.
[27] 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.

25. Concerns are significantly higher when the potential for coordinated behaviour is considered. From this perspective, even the divested properties by Astral are problematic as, at this point, are likely to be purchased by either another vertically integrated conglomerate, leading to additional concentration problems. In addition, as noted by the Competition Bureau's Merger Guidelines, the loss of a fourth significant market participant is a signifier of potential concern.[28]

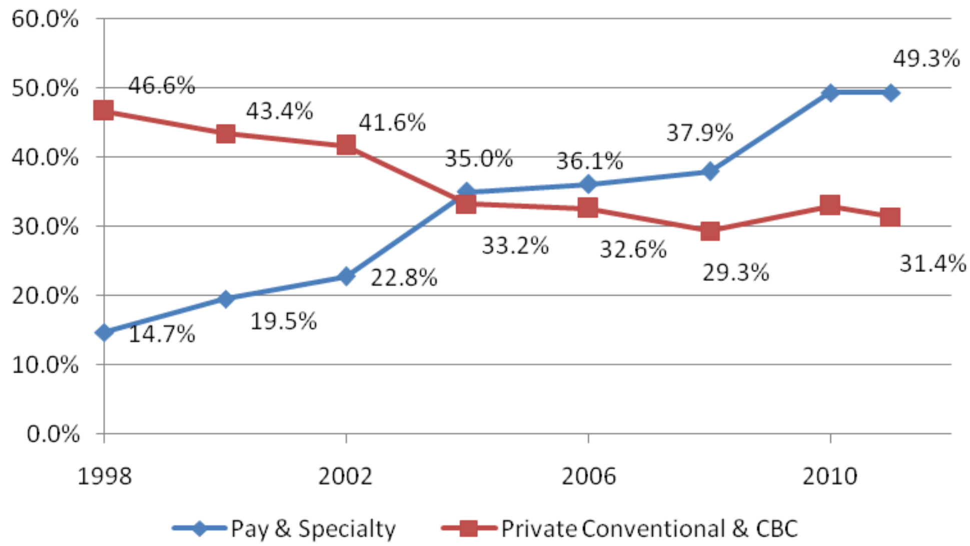
26. In the context of coordinated behaviour, the loss of Astral Media – as the last substantial independent media entity – cannot be ignored. At best, these divested properties will be purchased by an entity lacking sufficient market/viewership presence in programming to act as an effective check on market coordination. This will leave a market almost wholly characterized by a small number of heavily concentrated and heavily integrated entities. There will be no effective market-based check left on the incentives that accompany vertical integration. The chance of coordinated behaviour increases exponentially, as it will be almost uniformly constituted of businesses operating under similar incentives. As *all* significant market players will be vertically integrated, *all* will be subject to the unique incentives that accompany vertical integration.

(b) Lucrative Inputs: Specialty Channels

27. Exacerbating this increased concentration and potential for coordinated behaviour is the greater control a post-merger Bell will have over lucrative inputs. Specialty channels are rapidly outpacing conventional television in terms of viewing share:

[28] Competition Bureau, "Merger Enforcement Guidelines", June 27, 2011, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03384.html>, para. 5.9.

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, 2012[29]

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. This, in turn, means that such inputs can be leveraged to impose pricing, service or business models on downstream competitors.

28. Bell itself recognizes 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. <u>Subscriber fee revenues grew a healthy 22% year-over-year driven by higher specialty sports programming rates which we put through with broadcast distributors</u>. Subsequent to the end of the quarter, we concluded new agreements now with all the remaining BDUs for our specialty channel rate increases,

[29] 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 2012, September 5, 2012, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr4.htm#t433>, Table 4.3.3.

> and that's going to support Bell Media's revenue growth trajectory in the second half of the year.
>
> 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 <u>strong NHL hockey playoff ratings, the federal election, and CTV's coverage of the royal wedding</u>…so overall Bell Media continues to perform very, very well.[30]

29. 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,[31] or very rigid penetration thresholds that, in practice, force downstream distributors to package inputs in specific ways.[32] The Competition Bureau explained regarding its decision to approve, under strict divestiture conditions, this merger:

> Certain of Bell and Astral's programming services are high-demand, often referred to in the industry as "must haves". Therefore, if a distributor was unable to access these services on commercially reasonable terms, the distributor would likely lose a significant number of its customers. The Bureau concluded that the addition of all of Astral's programming services to Bell's existing portfolio, as contemplated by the proposed transaction, would have increased Bell's market power and thereby its ability to: (i) negotiate higher fees from distributors for the right to resell its programming; and (ii) impose contractual terms on distributors that limit choice and flexibility in their offerings

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30 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, my emphasis.

31 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>.

32 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.

> to consumers. Ultimately, some or all of the impact on distributors would have been passed on to consumers, including through higher subscription prices and less choice.
> The Bureau also found that Bell, as a vertically integrated entity operating as a distributor in its own right, has the economic incentive to leverage its programming in a way that disadvantages rival distributors to the benefit of its own distribution service. Bell may accomplish this in a number of ways, including raising rivals' costs, limiting rivals' consumer offerings, and stifling innovation.[33]

An integrated conglomerate can also leverage such valuable inputs to push related products/distribution channels.

30. In an attempt to address this concern, the Competition Bureau's imposed conditions of merger will see Bell divest itself of substantial amounts of Astral's specialty/pay holdings. This will lead to a less significant increase in Bell's post-divestiture specialty/pay holdings. However, given Bell's *existing* significant presence in specialty/pay and the nature of the remaining specialty/pay services it will gain, the merger will nonetheless increase Bell's capacity to leverage these lucrative inputs.

31. While the specialty and pay services market itself is varied, it is characterized by a small number of services that command significant amounts of revenues – the 'must have' services. In 2011, 17 specialty/pay services comprised 49% of all pay/specialty revenues.[34] The 6 highest revenue generating properties produce 26% of all pay/specialty revenues.[35] Bell currently controls 3 of these highly lucrative channels (TSN, RDS and Discovery). Under the previous merger proposal, a post-divestiture merged Bell/Astral would have controlled 7 of the top 17 and 4 of the top 6 revenue-generating pay/specialty properties. While the Competition Bureau's imposed divestiture reduces this number, a merged Bell will still control 5 of the top 17 and 4 of the top 6 revenue generators. This is by no means insignificant.

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[33] Competition Bureau, "Competition Bureau Review of the Proposed Acquisition of Astral by Bell – Backgrounder", March 4, 2013, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03544.html>.
[34] The top 17 revenue generating properties produce $1,831,320 out of a total of $3,732,149 annual pay/specialty revenues: CRTC, Communications Monitoring Report 2012, September 5, 2012, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr4.htm>, Tables 4.3.9 and 4.3.13.
[35] The top 6 revenue generating pay/specialty properties produce $986,36 out of a total of $3,732,149: CRTC, Communications Monitoring Report 2012, September 5, 2012, <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2012/cmr4.htm>, Tables 4.3.9 and 4.3.13.

32. To put this in context, it is useful to examine the makeup and ownership of these top 6 highest revenue-generating pay/specialty channels (accounting for 26% of all pay/specialty revenues). For comparison purposes, the international subscriber and annual revenues of Netflix are included:

Table 1: Putting Lucrative Content in Context

Name of Property (post-merger control)	# of Subscribers (thousands)	Annual Revenues (thousands)	% Total Pay/Specialty Revenues
The Sports Network (Bell)	9,004	$289,400	7.8%
Réseau des Sports (Bell)	3,446	$129,966	3.5%
The Movie Network (Bell)	1,226	$138,748	3.7%
Discovery Channel (Bell)	8,114	$99,913	2.7%
Movie Central (Corus/Shaw)	984	$110,499	3.0%
Sportsnet (Rogers)	8,957	$217,810	5.8%
Netflix	1,858 [36] (all non-U.S.)	$111,838[37] (all non-U.S.)	N/A

SOURCE: CRTC, Communications Monitoring Report 2012;
Netflix, Annual Report, SEC Filing, 2012

It is not so much the direct revenue of these respective pay/specialty channels that is problematic in this context, as these remain dwarfed by their respective owners' cross-platform distribution revenues. But the high revenues these generate is indicative of their

[36] Netflix, Inc., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2011, <http://files.shareholder.com/downloads/NFLX/2405500021x0x561754/3715da18-1753-4c34-8ba7-18dd28e50673/NFLX_10K.pdf>, p. 72.

[37] Netflix, Inc., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2011, <http://files.shareholder.com/downloads/NFLX/2405500021x0x561754/3715da18-1753-4c34-8ba7-18dd28e50673/NFLX_10K.pdf>, p. 72.

lucrative nature, and the appeal they hold for the general public, who is willing to pay significant amounts to access the content they carry.

33. This will be the content that a vertically integrated entity will be able to most effectively leverage to draw customers towards its mobile, wireline or broadcasting distribution mediums. Conversely, the absence of this content will be what prevents innovative services like Netflix and Hulu from gaining a foothold. More subtle concerns, some examples of which are provided in the sections below, include the leveraging of cross-platform content for lower cost offerings designed to draw customers to expensive distribution offerings, ongoing ability to delay competitors from coming to market, bundling of several services to increase overall revenues extracted from each customer, and choosing content based on what will be most effective across *all* properties.

34. Before exploring these and some other potential and existing harms, it is helpful to point out, cursorily, gaps existing in the existing regulatory framework that will permit many of these problems to proliferate.

(c) Holes and Inadequacies in the Current Regulatory Frameworks

35. Current legal frameworks in place to ensure that the public interest is preserved in the new broadcasting world will be inadequate. Indicative gaps in these frameworks that are already proving problematic include:

- The Commission's Diversity of Voices framework for assessing plurality of ownership is broken because it fails to account for non-horizontal pressures;
- The Commission's Vertical Integration framework fails to provide adequate protection for non-linear rights and to safeguard against head-start scenarios;
- The Commission's net neutrality framework has no proactive application absent express blocking of content, and its application to price-based competitive advantages has not been clarified; and
- There is no framework for protection against the competitive advantages gained by bundling that amounts to excessive preferencing.

In addition, CIPPIC/OpenMedia.ca note that there appears to be heavy reliance on arbitration as a means of resolving many of these potential/ongoing problems. We do not have high faith in the ongoing ability of this mechanism to provide such a solution.

36. We note that distributors and small independent producers alike do not have the power to provide an effective backdrop for mandatory arbitration. Other entities will be highly dependent on accessing Bell's program holdings, and given the subtle ways in which Bell's market power can be leveraged, will be hesitant to anger the conglomerate. And, as noted by Blue Ant in its initial comments to the last merger attempt, existing frameworks do not offer clear rights or a sufficiently robust enforcement framework:

> The concerns we highlight here relate to the general structure of the industry as highlighted by this transaction and are not about the Bell-Astral transaction per se (which we support), nor about Bell in particular (who has generally been a good partner). Specifically, it has been Blue Ant's experience since the Vertical Integration Decision that, generally speaking, the Code of Conduct does not provide a sufficiently robust framework to address these issues, since it simply describes actions that should be taken, without creating any enforceable obligations or clear direction, thereby leaving amply room for the exercise of a large BDU's bargaining power.
>
> It is unrealistic to expect that the exercise of this power to unduly disadvantage a company like Blue Ant can be resolved by means of the current dispute resolution service, which often pits a small independent broadcasting company against a large and well-financed corporation. For example, it is extremely challenging for Blue Ant to afford the time and cost associated with using the current dispute resolution service: we are simply not on the same footing as a large vertically integrated BDU and we risk starting a fight that we can't afford to lose. The advantages of large, vertically integrated companies are already numerous. Not only do they have more resources to "wait out" negotiations but they also have access to less expensive capital, greater flexibility in meeting requirements for Canadian Programme Expenditures (CPE), a broader range of assets for diversifying risk and the ability to control the supply of programming. Moreover, these companies act as the gatekeepers to our audience, Canadian consumers, diminishing our influence. In Blue Ant's view, significant media concentration means that now is the time for the CRTC to take action to redress the balance in the broadcasting system between the large, vertically integrated companies and small, independent undertakings.

37. TELUS, one of the few incumbent telecommunications providers that does *not* have access to content, noted similar issues with the arbitration process:

> Without an equal sharing of risk, a dispute resolution mechanism such as final offer arbitration does not lead to closing the gap between the parties and therefore does not result in the most commercially reasonable rate…This unequal sharing of risk was evident in the final arbitration between Bell and TELUS where no material concession was made by Bell throughout the negotiation or dispute resolution process…In its final offer, Bell for all intents and purposes never moved to middle ground and if anything its final offer included worse terms than some of its proposals in negotiations. Bell did not move to middle ground in final offer arbitration because it had nothing to lose. The worst that could have happened to Bell as a result of that arbitration is that it would receive slightly less than its original ask from a distributor who covers less than 5% of the subscriber market. A loss in final offer arbitration for Bell would have had little or no effect on the profitability of its content services since the bulk of wholesale revenue ofr its content services is generated from other vertically integrated distributors.[38]

TELUS' and Blue Ant's experience, coming from opposite ends of the non-integrated broadcasting spectrum (content and delivery), demonstrate how vertical integration concentration can even undermine resolution processes.

38. With the disappearance of Astral, these issues will become ever *more* problematic, as no frame of reference will even exist for what a commercially 'normal' solution might look like. The following section will explore how these and other gaps are being or are likely to be exploited, to increasing degrees if this merger is approved.

III. Specific Problems

39. As noted above, non-horizontal merger contexts, activities that are typically beneficial (such as internal efficiencies, bundling, etc.) become problematic because of their adverse impact on competition and, by transference, on user choice, diversity of voices, innovation in distribution and other communications policy objectives. Put another way, these typically beneficial activities become problematic because they are *insulated* from true competitive pressures due to a combination of anti-competitive incentives, coordination and cross-channel market power. The post Bell/Astral merger market will be ill equipped to deal with these challenges.

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[38] A. Mainville-Neeson, Final Comments of TELUS Communications Company, Broadcasting Notice of Consultation CRTC 2012-370, Astral Media Inc. – Change of Effective Ownership, September 21, 2012, para. 14.

40. There are, moreover, a number of holes in the current regulatory framework that a more concentrated Bell/Astral integrated conglomerate will be able to leverage in order decrease competition in a manner that will undermine several policy objectives that the Commission is entrusted with protecting. 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.[39] 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.[40]

41. 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 existing and potential problems are explored below, beginning with broadcasting-specific problems, followed by broader communications industry wide problems.

(a) Broadcasting-Specific Concerns

Preferencing Content that Best Fits Cross-Channel Promotion

[39] 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>.

[40] 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.

42. Bell is clearly emphasizing the cross-platform/multi-window appeal it will be able to leverage in order to maximize Astral's holdings as a *benefit*:

> The combined Bell-Astral will match OTT players' ability to move blockbuster programming through multiple windows, but will be able to put those windows to work supporting Canadian programs. A scripted Canadian drama would premier on The Movie Network, appear in a coveted prime time slot on CTV, and subsequently live on in reruns on Bravo.[41]

However, there is cause for concern that this cross-platform/window approach will lead towards the selection of content and programming primarily on the basis of its suitability across these several program groups and multiple platforms.

43. As noted by the Writers' Guild of Canada in their initial comments to Bell/Astral's previous merger proposal:

> Consolidation…also means that programmers are not just picking a show that will work for a particular service but one whose cost can be amortized by airing it across the group on a number of services. We can already see the amortization of programming across a group. For example, you can watch "The Listener" on CTV, CTV2 and Bravo. The Bell purchase of Astral is particularly troublesome for two reasons. The first is that TMN has made a name in commissioning, with Movie Central, edgy, adult dramas such as "Call Me Fitz" and "Durham County" that cannot be broadcast on mass market networks such as CTV and Global because of their subject matter, use of language and/or nudity. If TMN must now commission programs that can also be aired on Bravo, CTV and CTV2, those programs will be much more mass market and less niche-oriented. They are likely to be a lot of police procedurals. Canadian screenwriters are very concerned about the potential loss of Canada's only outlet for challenging adult drama.[42]

The Documentary Organization of Canada echoes such concerns with respect to the ongoing viability of documentaries:

> Consolidation has led to commissioned programming that is suitable to each group's entire stable of broadcast holdings, rather than specific mandates of the individual channels. And it is DOC's view that consolidation is the main reason for the marked

[41] Astral Media Inc. & BCE Inc., Supplementary Brief, Broadcasting Notice of Consultation CRTC 2013-106, *Astral Broadcasting Undertakings – Change of Effective Control*, January 31, 2013, ABRIDGED, para. 38.
[42] Writers Guild of Canada, Initial Comments, Broadcasting Notice of Consultation CRTC 2012-370, Astral Media Inc, Change of Effective Ownership, August 9, 2012, para. 20.

> decline of the documentary genre on our screens. If the transaction of Astral by BCE is allowed to go through, this scenario will now allow for the purchase of rights across linguistic markets as well! So where a documentary producer could once have negotiated three separate licences say with TMN, CTV and Canal D, the same producer will now face one licence for all channels regardless of linguistic markets. Furthermore, research indicates that with consolidation, licences are NOT increasing.[43]

This becomes even more problematic when group-wide amortization becomes *cross-platform incentive*. That is, when programming is chosen on the basis of its ability to pull customers into mobile offerings such as Bell Mobile TV (see below).

Packaging/Penetration Rates

44. There is great concern that Bell will continue to leverage its increasing market power across several distribution channels in order to impose carriage of its growing repertoire of lucrative channels into packages. The price of basic entry-level cable has risen dramatically for most providers in recent years, in part because increasingly concentrated and integrated companies obligate their competitors to carry expensive television offerings such as The Sports Network with extremely high penetration rates.[44]

Bundling

45. Bell's *existing* use of bundling is *already* problematic. Here, the high cost of basic service packages are used to push customers towards committing to *multiple* Bell services if they wish to receive reasonable rates. Bell's *entry* rate for Fibe TV, for example, is advertised at $37.95/month, but only in a TV, Internet and Home Phone bundle (absent which the monthly rate increases by 20%.[45]

(b) Cross Platform Problems

Multi-platforms, One Provider to Rule them All

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[43] Documentary Organization of Canada, Initial Comments ,
[44] See Cogeco, Initial Comments, Broadcasting Notice of Consultation CRTC 2012-370, Astral Media Inc, Change of Effective Ownership, August 9, 2012, para. 126.
[45] FibeTV, "Choose a Package – Good", accessed April 5, 2013, <http://fibetv.bell.ca/en/programming/>.

46. Much has been said on the record of this proceeding with respect to the importance of multiple platform access. However, the creative and technical innovation that has underpinned the immense success that is the Internet emerged largely from a 'no gate keepers' or 'innovation without permission' context. Bell's vision of multi-platform appears to reverse this basic tenet of online innovation. Its multi-platform strategy is a multi-BELL-platform strategy:

> Our digital focus for 2013 is very much about TV Everywhere. The explosion of viewing on tablets and smartphones has been well documented. With TV Everywhere, now cable and telco distributors will be able to offer their consumers the very best content in Canada to satisfy this demand. It's important to note that this strategy supports the current television ecosystem, providing distributors with tremendous value enhancements to improve up-sell and reduce churn on their BDU products. Our offering is comprehensive. In fact, it's the most comprehensive TV Everywhere anywhere in North America. We provide live streaming, catch-up current season content, and prior season library content to any device over any network.
>
> We'll monetize this at Bell Media through three avenues. First, through advertising revenue and eventually through dynamically targeted—dynamically inserted targeted advertising; second, we'll monetize through penetration support for our specialty services; and third, from additional fees that we will charge to the distributors for these rights.[46]

This highlights quite clearly the role Bell envisions for the transition to multi-platform viewing. It is a value-enhancement to other, more primary services that is designed to reduce churn.

47. Contrasting Bell's perception of so-called 'over the top' service offerings to that of Astral is instructive in this regard. Bell

> We think that this TV Everywhere strategy, complemented by other broadcaster initiatives like HBO GO, provide an excellent response to OTT competition…There's no question that the industry dynamic has changed with OTT. Competition from huge global technology providers, that you see here, is already having an impact on our content availability and cost. These players have introduced fantastic user interfaces, ease of

[46] K. Crull, BCE, Investor Conference 2013, Q4 '12 Results & 2013 Guidance, February 7, 2013, <http://www.bce.ca/assets/investors/Q4-2012/BCEQ4ResultsAnnualTRANSCRIPT.pdf>, p. 29.

> access, and they're growing the viewing market by facilitating new consumption habits like binge viewing.
>
> The great news is that the vast majority of this viewing has so far been complementary to the existing system. But, we know we must respond, and we are. As I said at the opening, it's the content that matters, no matter what screen, so we will continue building on our strengths of producing and procuring the content that Canadians want, and we will introduce an authenticated TV Everywhere service, which leverages the customer base of our distribution partners and the promotional power of our CTV megaphone, and we'll make sure that the content available is more comprehensive than any OTT provider can offer, thanks in part to our Astral acquisition.[47]

The innovative and fantastic user interfaces and ease of access that OTT has brought as a standalone platform is viewed as an impending threat, to be replaced with a closed, Bell-only service that is tied to linear subscriptions.

48. Meanwhile, pre-merger Astral has become a leader in providing online content delivery that is *not* tied to any *particular* broadcasting distributer such as Bell or Shaw. Examples include HBO Go and Virgin Radio Networks, both of which offer on-demand access to Astral content. The latter (Virgin Radio) is not tied to any subscription whatsoever, marks the first time a Canadian broadcaster provided such a service.[48] While HBO Go remains tied to a subscription with a particular distributer, it is a web-based portal operated by Astral and can be accessed by those with an HBO Canada subscription from *any* Canadian provider.

49. It is perhaps unsurprising, given these initiatives, that as-yet-un-integrated Astral views online delivery platforms as an *opportunity* to gain increased revenues through advertisement-supported initiatives, not a threat:

> The industry is in a transition phase as it adapts and integrates new digital products made possible by the growth of on-line video, social media, mobile and portable platforms such as smart phones and tablets. However, the fundamentals underlying the Company's core businesses remain positive, positioning it for continued growth. Apart from advertising

[47] K. Crull, BCE, Investor Conference 2013, Q4 '12 Results & 2013 Guidance, February 7, 2013, <http://www.bce.ca/assets/investors/Q4-2012/BCEQ4ResultsAnnualTRANSCRIPT.pdf>, p. 29.
[48] Astral, "Astral Radio Launches On-Demand Digital Music Service Across NRJ and Virgin Radio Networks", Astral Press Room, February 1, 2012, <http://www.astral.com/en/press-room/news/2012/astral-radio-launches-on-demand-digital-musical-service-across-nrj-and-virgin-radio-networks>.

> revenue growth, opportunities for subscriber revenue growth and organic growth exist through the launch of new services and value-added multiplatform products.
>
> With the television sector seeing rapid growth in over-the-top ("OTT") internet-based video-entertainment services, Fiscal 2012 was also marked by an expansion in the Television groups' on-line offers. The on-line window keeps the Company's brands at the forefront of changing consumer consumption habits. Strategically, enriching the multiplatform offers associated with its traditional linear television services has added significant value and has helped sustain revenue growth.[49]

These difference in approaches are hardly surprising, yet it is hoped that a positive multi-platform strategy would encourage innovation and multiple delivery mechanisms and not merely operate to further consolidate market power for a small number of entities.

Fibe TV

50. 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.[50]

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.[51]

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[49] Astral Media Inc., Management's Discussion and Analysis for the periods ended August 31, 2012, <http://www.astral.com/assets/7e61089d1b0c445c87ecd0d0eedc17f4_MDA_Annuel_2012.pdf>, p. 32.
[50] 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.
[51] *Ibid*.

51. 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 business (but not technical) precondition to Fibe TV access.[52] 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.[53]

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.

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[52] 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.

[53] 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.

52. 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 to enhance the competitiveness of its TV distribution (and even at cost to the value of its content distribution revenues).[54]

TV Nowhere?

53. 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.[55] 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.

54. 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.[56] 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.

55. 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 framework, Bell is able to

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[54] As noted at footnote 6 above, such incentives are strong indicators of potential competitive harms from vertically merged entities.
[55] 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.
[56] 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.

develop its own comprehensive digital strategy while foreclosing access to others of its digital rights until such time as it goes to market.[57]

56. 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.

57. 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),[58] then it appears as though competitors will be foreclosed from competing through these distribution mediums/channels. If Bell does not wish to deploy a Hulu-like web portal, Canada does not get one.[59]

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[57] 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."

[58] 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>

[59] For reference, see: Federal Communications Commission, *Applications of Comcast Corporation, General Electric Company 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,

58. 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.[60]

59. 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.[61] 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.[62] As Bell officials point out: "It's clear that Bell isn't a telecom company anymore, we're in the screens business now."[63] In the context of this strategy, 'TV Everywhere' might well mean, in essence, 'TV Everywhere Bell owns a screen'.[64]

60. 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

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<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."

[60] 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>.

[61] 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>.

[62] <http://tvonline.bell.ca/tvonline/servlet/CommandServlet?lang=en&command=watchonline&EXT=BTVO_tvhmpg_TXT_BTVO_Mass_060112_rg>

[63] 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.

[64] 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/>.

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.[65] The Bell/Astral merger will rob Canadian regulators of such a frame of reference.

61. 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.

BCE Mobile TV

62. 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.

63. 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

[65] FCC, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, January 20, 2011, FCC 11-4, <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf>, para. 88.

> 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.[66]

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.

64. 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.[67] As Bell correctly points out, usage based online rates are anathema to users and can deter adoption of online services such as video streaming.[68] Being able to offer such 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.[69] 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.

65. 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

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[66] 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.
[67] 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.
[68] 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 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>.
[69] 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>.

inputs. The Commission's Vertical Integration and New Media exclusion orders prevent Bell from offering media content *exclusively* on its mobile channel.[70] Consistent with this, Bell has made its Bell Mobile TV service available to other distributors for purchase.[71]

66. 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.

67. In addition, the 'delay' factor referred to in the context of other non-linear/online rights could be an issue in this context.[72] Bell appears to have already launched its 'multi-screen' campaign in earnest, while many competitors continue to remain locked out of non-linear rights.[73] 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.[74]

68. 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.[75] First, to drive sales of its Mobility service plans. Bell's Mobile TV application is currently

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[70] 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.
[71] 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."
[72] See *supra* footnote 57.
[73] 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.
[74] 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>.
[75] J. Horn, "Bell's multi-screen Olympic Campaign", July 18, 2012, *Strategy*, <http://strategyonline.ca/2012/07/18/bell-medias-multi-screen-olympic-campaign/>.

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

69. 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.

70. 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.

IV. Benefits Package

71. In light of these concerns, CIPPIC and OpenMedia.ca urge the Commission to once again reject the proposed merger of Bell and Astral. However, if the Commission chooses to approve the merger, CIPPIC/OpenMedia.ca urge the Commission to provide some measure

of tangible support for 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.[76]

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[76] 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>.