



Broadcasting Decision CRTC 2012-574

PDF version

Route reference: 2012-370

Additional references: 2012-370-1 and 2012-370-2

Ottawa, 18 October 2012

BCE Inc., on behalf of Astral Media inc.

Across Canada

Application 2012-0516-2, received 1 May 2012

Application 2012-0573-2, received 8 May 2012

Applications 2012-0701-9, 2012-0735-8 and 2012-0736-6, received 31 May 2012

Public hearing in Montréal, Quebec

10 September 2012

Astral broadcasting undertakings – Change of effective control

*The Commission **denies** the application by BCE Inc. (BCE), on behalf of Astral Media inc. (Astral), for authority to change the effective control of Astral's broadcasting undertakings. The Commission is not convinced that the transaction would provide significant and unequivocal benefits to the Canadian broadcasting system and to Canadians sufficient to outweigh the concerns related to competition, ownership concentration in television and radio, vertical integration and the exercise of market power.*

*In addition, BCE filed applications for authority to effect corporate reorganizations and to convert CKGM Montréal from an English- to a French-language radio station. The applicant indicated that the related applications were all contingent on approval of the proposed change of effective control of Astral's broadcasting undertakings. In light of the Commission's decision to deny the change of effective control, the Commission also **denies** the related applications.*

The applications

1. On 1 May 2012, BCE Inc. (BCE) filed applications on behalf of Astral Media inc. (Astral), requesting authority to change the effective control of Astral and its licensed broadcasting undertakings to BCE, pursuant to section 11(4) of the *Radio Regulations, 1986* (the Radio Regulations), section 14(4) of the *Television Broadcasting Regulations, 1987* (the Television Regulations), section 6(4) of the *Pay Television Regulations, 1990* (the Pay Television Regulations), and section 10(4) of the *Specialty Services Regulations, 1990* (the Specialty Services Regulations). The transaction would be carried out by the acquisition of all outstanding shares of Astral by BCE and BCE Subco, a wholly owned subsidiary to be incorporated. In

connection with the proposed transaction, BCE filed related applications for authority to effect corporate reorganizations and to convert CKGM Montréal from an English- to a French-language radio broadcasting undertaking. The applicant indicated that these applications were contingent on approval of the proposed transaction.

2. The proposed transaction would take place pursuant to the Arrangement Agreement (the Arrangement) entered into by BCE and Astral on 16 March 2012. The Arrangement was approved by Astral's shareholders on 24 May 2012 and by the Quebec Superior Court on 25 May 2012.
3. BCE is a major Canadian broadcaster that is involved in both programming and distribution. BCE currently operates two English-language conventional television networks, CTV and CTV Two, as well as 29 discretionary television services and 33 radio stations. BCE also operates a national direct-to-home (DTH) broadcasting distribution undertaking (BDU) which is the third largest BDU in Canada, by number of subscribers. As well, BCE is the second largest wireless services provider and the largest provider of Internet access. These services play and will continue to play an important role in delivering content to Canadians.
4. Astral is Canada's largest radio broadcaster, with 84 stations in eight provinces. It is also a major provider of premium content and specialty television in Canada, with significant ownership interests in 20 popular English- and French-language discretionary services. Astral also operates two conventional English-language television stations, both of which are affiliates of the Canadian Broadcasting Corporation.

Public process

5. Section 11(4) of the Radio Regulations, section 14(4) of the Television Regulations, section 6(4) of the Pay Television Regulations, and section 10(4) of the Specialty Services Regulations require a licensee to obtain prior approval of the Commission in respect of any act, agreement or transaction that directly or indirectly would result in a change by whatever means of the effective control of its undertaking. Such prior approval is also required where persons wish to acquire or increase their holdings in broadcasting licensees above certain thresholds, even if those licensees form part of a larger unlicensed commercial enterprise.
6. In many instances, such applications for approval are subject to a public process which in turn informs the Commission in its decision making. It is the Commission's practice to scrutinize applications for acquisition of assets or for changes of effective control of licensees in a manner comparable to its examination of applications for new broadcasting licences. The Commission's approach to processing applications for changes of effective control was restated in Broadcasting Information Bulletin 2008-8-1. Consistent with the approach outlined in that information bulletin, the Commission published the relevant applications for public comment in Broadcasting Notices of Consultation 2012-370, 2012-370-1 and 2012-370-2, issued on 10 July 2012, 16 July 2012 and 14 September 2012, respectively.

7. The Commission received more than 9,700 interventions, supporting, commenting on and opposing the transaction. These interventions were from broadcasters, distributors, independent producers and creative groups, citizen and consumer advocacy groups as well as from individuals from all parts of Canada.
8. The Commission held an oral public hearing from 10-14 September in Montréal to hear the applications. The applicant and more than 50 interveners appeared. At the public hearing, BCE amended certain aspects of its application relating to its proposed tangible and intangible benefits. The Commission provided interveners the opportunity to file final written comments on these amendments following the hearing. The Commission also granted BCE a final reply, which was filed on 28 September 2012. The Commission hereby accepts the amendments, as well as all submissions relating to those amendments. The complete public record for these applications, including the transcript of the oral phase of the hearing, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings." In its analysis, the Commission has considered the entire record of this proceeding.

Regulatory framework

9. The review of ownership transactions is an essential element of the Commission's regulatory and supervisory mandate under the *Broadcasting Act* (the Act). Since the Commission does not solicit competitive applications for changes in effective control of broadcasting undertakings, the onus is on the applicant to demonstrate that approval is in the public interest, that the benefits of the transaction are commensurate with the size and nature of the transaction, and that the application represents the best possible proposal in the circumstances.¹ This analysis is of particular importance when dealing with a large transaction that has the potential to reshape the Canadian broadcasting system.
10. In addition, the Commission must be assured that approval of a proposed ownership transaction will not impede the ability or willingness of the licensee to meet its obligations under the Act. These obligations include those that arise from conditions of licence, regulations, or directions made by the Governor in Council pursuant to the Act.
11. The Commission also takes into account its guidelines, in the form of regulatory policies, information bulletins or other non-mandatory measures, when exercising its discretionary authority to approve a proposed ownership transaction.² Guidelines

¹ These principles have been addressed by the Commission on numerous occasions, including in Decision 77-456, in a working paper entitled *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, 25 July 1978, as well as in Public Notice 1992-42 and Broadcasting Decision 2003-205.

² The Commission is authorized and encouraged to issue such guidelines by the common law, the Act, and the *Telecommunications Act*. See in particular: *Capital Cities Comm. v. C.R.T.C.*, [1978] 2 S.C.R. 141 at paragraphs 170-171; see also *Ainsley Financial Corp. v. Ontario (Securities Commission)*, (1994), 21 O.R. (3d) 104; the Act, section 6, and *Telecommunications Act*, section 58.

serve, among other things, to inform applicants about the criteria the Commission will consider in its decision-making process and consequently to ensure a level of consistency and transparency.

12. The Commission must, however, consider each application on its merits, based on the circumstances specific to the application. The Commission may not use such instruments to limit the discretion granted to it by Parliament.³ While not binding, the Commission has nonetheless considered relevant regulatory policies, including Broadcasting Public Notice 2008-4, which sets out the Commission's policy on diversity of voices (the DoV policy), Broadcasting Regulatory Policy 2011-601, which sets out the Commission's regulatory framework relating to vertical integration (the VI framework), as well as the code of conduct set out in Broadcasting Regulatory Policy 2011-601-1 (the VI Code of Conduct).⁴

The public interest

13. Pursuant to section 5(1) of the Act, the Commission's mandate is to regulate and supervise all aspects of the Canadian broadcasting system in the public interest. The public interest is reflected in the numerous objectives of the Act and of Canadian broadcasting policy set out in section 3(1).⁵ When reviewing this ownership transaction, relevant Canadian broadcasting policy provisions include the following:

- the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty; [section 3(1)(b)]
- English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements; [section 3(1)(c)]
- the Canadian broadcasting system should
 - serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada, [section 3(1)(d)(i)], and

³ See in particular: *Dawkins v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 639; and *Maple Lodge Farms Ltd. v. Government of Canada*, [1981] 1 F.C. 500, affirmed [1982] 2 S.C.R. 2.

⁴ Other relevant policies include the tangible benefits policy, originally published in Public Notice 1989-109 and most recently articulated in Public Notice 1999-97 and Broadcasting Regulatory Policy 2010-499, as well as the commercial radio policy set out in Broadcasting Public Notice 2006-158.

⁵ See in particular: *Genex Communications Inc. v. Canada (Attorney General)*, (2005) D.L.R. (4th) 45, 2005 FCA 283 at para. 31.

- encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view; [section 3(1)(d)(ii)]
 - the programming provided by the Canadian broadcasting system should (i) be varied and comprehensive...(ii) be drawn from local, regional, national and international sources...(iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and (v) include a significant contribution from the Canadian independent production sector. [section 3(1)(i)]
14. In addition, since this transaction raised concerns regarding access to programming services offered by distribution undertakings, the Commission considered sections 3(1)(t)(ii) and 3(1)(t)(iii) of the Act. These provisions provide that distribution undertakings:
- should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost [section 3(1)(t)(ii)], and
 - should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services. [section 3(1)(t)(iii)]
15. In the course of implementing the broadcasting policy, the Commission must have regard to the regulatory policy set out in section 5(2) of the Act. The regulatory policy provides, among other things, that the Canadian broadcasting system must be regulated and supervised in a flexible manner that facilitates the provision of broadcasting to Canadians and is sensitive to the administrative burden that may be imposed on persons carrying on broadcasting undertakings.
16. In ownership applications involving television and radio undertakings, applicants must demonstrate that the transaction would yield significant and unequivocal benefits for the Canadian broadcasting system. This objective is articulated in the Commission's tangible benefits policy, which established that contributions proposed as tangible benefits should represent a certain percentage of the value of the transaction as a substitute for a competitive licensing process.
17. The Commission's decision on whether a proposed transaction is in the public interest takes into account a wide set of factors as reflected in the Act, including the nature of programming and service to the communities involved, as well as regional, social, cultural, economic and financial considerations. The Commission therefore considers that an appropriate tangible benefits package is only part of the applicant's obligation

to demonstrate that the transaction is in the public interest. In rendering a decision, the Commission must be persuaded that, on balance, the proposed transaction benefits the Canadian broadcasting system.

18. The Commission has assessed the proposed transaction in light of the regulatory framework set out above and has identified the following issues:
 - potential impacts on the Canadian broadcasting system; and
 - proposed benefits of the transaction for the Canadian broadcasting system.

Positions of parties

Potential impacts on the Canadian broadcasting system

BCE

19. BCE submitted that, in general, the proposed transaction would invigorate competition in French-language radio and television and position English-language broadcasting to compete against threats from non-Canadian services. Moreover, BCE stated that the proposed transaction is consistent with all Commission policies relevant to ownership transactions, including the DoV policy, the VI framework and the VI Code of Conduct.
20. BCE reviewed its post-transaction share of television viewing, pursuant to the DoV policy relating to the common ownership of discretionary television services, set out at paragraph 87. This policy provides that, in general, the Commission would process expeditiously applications that result in one person's control of less than 35% of the "total television audience share," would carefully examine transactions that would result in the control by one person of between 35% and 45% of the total television audience share, but would not approve applications that would result in one person's control of more than 45% of that share.
21. BCE submitted that while the Commission was clear that audiences are measured separately, on a national basis, for both English- and French-language markets, the DoV policy did not include the specific methodology that should be used to calculate "total television audience share." BCE argued that this share must include viewing to non-Canadian services, submitting that the "voices" reaching Canadians include non-Canadian services, that these services are distributed by BDUs pursuant to Commission authorization and that inclusion of these services is consistent with Competition Bureau guidelines regarding market definition. Similarly, BCE argued that services equally owned by two parties (joint ventures) should be excluded from any calculation of viewing share.
22. BCE submitted that, when viewing to non-Canadian services is included, the BCE/Astral post-transaction viewing share would be 33.5% in the English-language market and 24.4% in the French-language market. BCE further submitted that even excluding non-Canadian services, the proposed transaction raises no issues.

23. In addition, BCE argued that the proposed transaction is fully compliant with the analytical framework set out at paragraph 89 of the DoV policy. Specifically, BCE noted that there will be no effect on discretionary services offering news and public affairs programming, that the VI framework protects access to programming services by BDUs, and that both Astral and Bell Media have signed comprehensive terms of trade with the Canadian Media Production Association. In addition, Astral has a similar agreement in place with the Association des Producteurs de films et de télévision du Québec.
24. With regard to radio, BCE proposed to divest 10 stations and to convert CKGM Montréal from an English- to a French-language station in order to comply with the common ownership policy for radio (COP), which was affirmed in the DoV policy and clarified in Broadcasting Information Bulletin 2010-341. BCE argued that the COP is a sufficient safeguard to ensure a diversity of voices in the private element, given that radio is primarily a local business.
25. In the Quebec market, BCE argued that it would bring greater programming diversity, choice and innovation to consumers through increased competition with Quebecor Media Inc. (Quebecor). Within that province, Quebecor is the largest cable provider, controls nearly 30% of television viewing, and is the largest vertically integrated media enterprise, with significant interests in Internet access, home telephone and mobile services.
26. With respect to concerns around the combination of BCE's distribution arm with the programming assets of Bell Media and those of Astral, BCE submitted that the VI framework is more than sufficient to address any issues. According to BCE, it has and will continue to respect the rules set out in the VI framework, which in its view will constrain any potential market power. BCE also submitted that it does not make logical or commercial sense to withhold content from other BDUs, as to do so would jeopardize its revenues and its ability to acquire rights to premium content. Notwithstanding these assertions, BCE stated that it was prepared to accept a condition of licence requiring compliance with the VI Code of Conduct, in order to satisfy any remaining concerns.

Interveners

27. Consumer groups, including Union des Consommateurs and Option Consommateur, and individual Canadians submitted that the proposed transaction does in fact pose disadvantages or risks. These interveners noted that there is little evidence that the trend of the past decade toward greater consolidation and vertical integration has provided product quality or innovation benefits to Canadian consumers of television services. In their opinion, any efficiency gained from vertical integration has not flowed back to consumers either through price reductions for subscribers or through increased choice and improved service.
28. These interveners argued that further consolidation in the hands of BCE would result in:

- a decreased number of voices in the private element if the strongest remaining independent broadcaster is absorbed by the largest vertically integrated entity;
 - fewer options for consumers to access original Canadian content since the same content may be spread across a greater number of broadcasting services all owned by one large vertically integrated entity;
 - fewer buyers and options for financial support for independently produced Canadian content (especially English-language television Canadian content); and
 - incentive for other vertically integrated companies to further consolidate or purchase remaining broadcasters, resulting in additional media concentration, which could lead to a reduction in independent participants in a given market and pose a direct threat to freedom of the press.
29. The consumer groups also suggested that the use of television audience share as the sole indicator of diversity of voices does not give the Commission the full picture of the impact of this acquisition and proposed that other metrics, including combined revenue share, should also be used.
30. Among creative groups, including the Union des artistes, the Société des auteurs de radio, télévision et cinéma, the Alliance québécoise des techniciens de l'image et du son, the Directors Guild of Canada, the Actors Fund of Canada and the Writers Guild of Canada, certain interveners were satisfied that the proposed transaction adheres to the DoV policy and the COP. Others questioned whether the disappearance of one of the few remaining independent broadcast groups along with an increase in the size and power of Canada's largest vertically integrated broadcasting group, provides a net benefit to Canadian audiences and to the creation of Canadian programming. Representatives of the production industry were generally in support of the transaction, conditional on appropriate valuation of the transaction and changes to the proposed tangible benefits.
31. Non-integrated broadcasters and distributors, including Cogeco Cable Inc. (Cogeco), Bragg Communications Inc., operating as Eastlink (Eastlink), and the Independent Broadcast Group, acknowledged that the Commission's VI framework, including the VI Code of Conduct, is fundamentally important to the continued existence of diversity in the broadcasting system and, in particular, to the health of independent media companies that do not own distribution facilities. However, interveners noted that the regulatory safeguards established in the VI framework are only now being implemented and their effectiveness in protecting a diversity of voices is not yet established. Intervenors also noted that BDUs are important and valuable business partners and that this relationship may make independent broadcasters more reluctant to launch formal disputes against BDUs if faced with anti-competitive behaviour.
32. Some other interveners, including Cogeco, Eastlink, MTS Inc. and Allstream Inc., operating as MTS Allstream, Rogers Communications Inc. (Rogers), and 2251723 Ontario Inc., operating as VMedia, submitted that BCE already abuses its market

power as an integrated broadcaster and distributor when dealing with independent distributors and that incentives for anti-competitive behaviour have not been effectively constrained by the VI framework. In this regard, interveners filed evidence and provided arguments during the public proceeding of BCE's alleged anti-competitive behaviour with respect to program rights negotiation and product launches.

33. With respect to BCE's plan to divest 10 radio stations should the transaction be approved in order to comply with the COP, parties expressed the general view that they have not had the opportunity to see and question the details of BCE's plan.
34. Intervenors were divided on BCE's contention that the acquisition of Astral's French-language television services would increase competition in a market currently dominated by Quebecor. In addition, some intervenors submitted that this transaction must be considered as a whole, including its impact on competition in all markets, taking into consideration BCE's substantial position in programming on all screens across Canada.

Proposed benefits of the transaction for the Canadian broadcasting system

BCE

35. BCE argued that the transaction would serve Canadian consumers, viewers, listeners and content creators and is therefore in the public interest.
36. BCE initially proposed a benefits package of approximately \$200 million, representing 6% of the value of the radio undertakings and 10% of the value of the television undertakings being acquired, excluding the joint ventures. Pursuant to the Arrangement, the total purchase price is \$3.38 billion. Using a PricewaterhouseCoopers (PwC) valuation, the applicant assigned a value of \$2.406 billion to the licensed broadcasting assets.
37. The proposed television benefits would be directed toward various initiatives supporting different genres of Canadian programming, including feature film, programs for children and youth, music, and other programs of national interest. BCE also proposed to spend \$40 million to extend broadband Internet access to communities in the North, through its subsidiary Northwestel.
38. At the public hearing, BCE revised the amount of its total tangible benefits package to \$241.3 million, including \$180.5 million in television benefits. It also proposed a number of additional projects, directed in particular to independently produced French-language content, programming to celebrate Canada's 150th anniversary, and the launch of a new national Category C French-language news service. BCE further proposed a radio tangible benefits package of \$60.8 million, to be allocated consistent with the policy set out in Broadcasting Regulatory Policy 2010-499.
39. BCE also submitted that the proposed transaction would provide significant intangible benefits to the Canadian broadcasting system. It argued that these benefits

– notably the creation of a strong private-sector counterweight to Quebecor and the emergence of a large Canadian communications company that can compete with “global players” – would not emerge absent the transaction. BCE further submitted that these benefits would be sufficiently important to the system in their own right to warrant approval of the transaction. In addition, at the public hearing, BCE proposed to offer a national, multi-platform on-demand service to all Canadians through the BDU of their choice, which would compete with Netflix and other unlicensed non-Canadian services. It stated that the Astral content would be crucial to the launch of this service.

40. BCE submitted that the proposed transaction would provide the scale necessary to compete with foreign content companies like Netflix, Apple, Google and Amazon. The transaction, BCE argued, would allow for investments in Canadian content and technology and would provide Astral the financial stability required to distribute its services’ programming on multiple platforms. In discussing the acquisition of Astral’s radio stations, BCE argued that this scale would improve the ability of the stations to gather and broadcast news in their communities.
41. Finally, BCE submitted that the benefits of this transaction would be unaccompanied by the corresponding disadvantages sometimes attached to media consolidation, arguing that its focus on broadcasting and its dedication to producing and showcasing Canadian content is in the best interests of consumers, viewers, creators and the system itself.

Interveners

42. With respect to BCE’s new multi-platform on-demand service, interveners noted that Astral’s President and Chief Executive Officer indicated that such a service would be core to Astral’s business and was already under development within the company, suggesting that Astral would have proceeded with that type of service regardless of the proposed transaction. Interveners submitted that while many broadcasters and distributors offer such value added services at no additional cost today, BCE may require significant additional fees from BDUs for this new service. These costs, in their view, would have to be passed on to subscribers. Failure to accept BCE’s terms would mean that BCE would offer this online service to its own customers, while those BDUs that refused to accept those terms would be unable to offer any of BCE’s content to their customers online.
43. Some interveners expressed concern with the lack of evidence presented by BCE to support the suggestion that Astral can no longer acquire program rights from U.S. studios. They argued that merely providing a single example of Netflix acquiring pay television rights for Canada does not demonstrate that Astral lacks the scale to compete against over-the-top (OTT) services in the genre-protected Canadian pay television market. In their view, Astral does not have to become part of a vertically integrated company in order to continue to acquire top-rated U.S. studio content for its pay television services.

44. Other interveners, including consumer groups, referred to the most recent CRTC report on convergence to support their view that the extent to which Canadians are substituting OTT services for those offered by traditional Canadian broadcasters is not yet known. In addition, the viewing share of foreign OTT providers is marginal compared to that of BCE, Shaw Communications Inc., Rogers and Quebecor in almost every media market.
45. In general, interveners agreed that the tangible benefits policy is an appropriate mechanism to ensure that benefits flow to the broadcasting system. They submitted that benefits must be incremental and must flow to third parties. Multiple interveners submitted that the percentage of benefits flowing to on-screen production must be maximized and that benefits should never be self-serving.
46. As for BCE's proposal to fund a portion of Northwestel's modernization plan, interveners submitted that this proposal is contrary to the tangible benefits policy and that the plan must be fulfilled regardless of the outcome of the BCE/Astral transaction. Further, interveners argued that the proposal would fund telecommunications services that would not necessarily be used to access broadcasting content. Therefore, certain interveners considered the proposal to be a diversion of funds from the broadcasting system. Intervenors argued that the tangible benefits policy was implemented to offset the effects of consolidation of the broadcasting industry, whereas this proposal benefits BCE, a private company, which would otherwise use its own resources to fund required upgrades and service improvements. Intervenors also noted that Northwestel is already subsidized by approximately \$20 million per year. Finally, they argued that approval of this initiative would provide a financial benefit and competitive advantage to an individual company at the expense of others.
47. Intervenors were of the view that the Commission should deny BCE's proposal to use tangible benefits to fund a new national French-language television news service. They submitted that it contradicts Public Notice 1993-68 where the Commission stated that it would "not generally accept as a benefit any proposed initiative that is dependent upon approval of a separate application."
48. Certain intervenors submitted that large broadcasters have closed several conventional television stations in the past three years, reducing Canadian programming expenditures, employment opportunities and local reflection. Furthermore, none of the \$241.3 million in tangible benefits would be directed toward existing or new local programming for any of the local television and radio stations in the application.
49. Finally, intervenors argued that BCE has failed to propose new local programming to any of the 74 communities served by Astral's radio stations, after focusing mainly on television in its application as well as during its appearance at the public hearing. In the intervenors' view, while BCE offered an undefined commitment to provide radio listeners a strong local presence, it also indicated that it would maintain the status quo and rely on BCE stations for additional news, rather than creating new opportunities for local radio and television.

Commission analysis and decisions

50. The issues raised by this application involve many intersecting objectives and policies and speak directly to the health and sustainability of the Canadian broadcasting system. A transaction of this magnitude goes beyond an operational decision on a change in ownership; indeed, its impacts would shape the structure of the industry over the coming years.
51. The proposed transaction would not only remove the last major independent, non-integrated broadcaster from the system, but transfer its undertakings to the largest vertically integrated broadcaster and telecommunications service provider in Canada. With the combination of the largest and third largest participants in discretionary television services (by revenue), one entity would control more than 63% of revenues from French-language discretionary services. This would represent more than five times the revenues generated by the next largest competitor in that market. BCE would also have a stake in five of the top ten English- and French-language discretionary services (by revenues) as well as a significant position in sports, film and other premium programming in both languages. In radio, the transaction would result in the combination of the largest and fourth largest broadcasters. As a result, BCE would control more than a quarter of all commercial radio revenues in Canada, more than the second and third largest radio broadcasters' revenues combined.
52. The Commission notes that a significant amount of discussion centred on the thresholds set out in the DoV policy. These thresholds are intended to help guide Commission analysis of horizontal media consolidation when reviewing applications for changes in effective control – they are not determinative of the outcome of Commission deliberations. For clarity, the Commission considers that “total television share” is based on viewing to Canadian commercial television services, consistent with the Commission’s Communications Monitoring Report (CMR) and past practice. While the Commission recognizes that non-Canadian services form part of the broadcasting environment, its mandate is to support a healthy, diverse Canadian system. Furthermore, tuning to popular U.S. programming is already included in viewing to Canadian services since U.S. programming is broadcast on Canadian services, especially in the English-language market. Given that the DoV policy was intended to guide Commission decisions on transfers of ownership, the Commission does not consider it relevant to include services over whose ownership it does not have direct jurisdiction.
53. Based on the figures in the 2012 CMR, in the English-language market, BCE’s services captured 33.7% of viewing to Canadian services, Astral’s services garnered 6.0% and the joint ventures another 3.0%. The combined BCE/Astral viewing share, including joint ventures, would therefore be 42.7%. In the French-language market, the combined viewing to BCE/Astral services would represent 24.9% of viewing to Canadian services, with viewing to the joint ventures representing an additional 8.2%, for a total viewing share of 33.1%. The Commission considers that, in the case of the joint ventures, even in the absence of clear cut control, it would be unreasonable to separate a 50% ownership position from the significant role in the operation and

management of the services that such a party would possess. Moreover, a 50% owner could benefit from significant participation in decisions relating to the distribution of these services. Therefore, the Commission has included viewing to the joint ventures in its calculation. Accordingly, BCE/Astral's combined viewing share in the French-language market would fall just below the 35% threshold, and the share in the English-language market would require "close examination" pursuant to the DoV policy. The Commission underscores, however, that the DoV policy applies "as a general rule," "barring other policy concerns" and subject to the status of policies adopted pursuant to section 6 of the Act, as indicated above.

54. The Commission notes that BCE submitted that its viewing shares should pose no concerns, even in the English-language market, particularly given that the transaction involves no news and information services and would have little impact on advertising. However, in the Commission's view, the proposed transaction warrants close scrutiny due to concentration of ownership and market dominance in television and radio in both English- and French-language markets. In addition, given the size and nature of the proposed transaction, the Commission considers that it should rely on multiple indicators of market power, competition and ownership concentration, rather than be limited to the television market share thresholds set out in the DoV policy.
55. In English-language television, a combined BCE/Astral would control an unprecedented amount of total revenues and viewing. In addition, BCE would increase its already significant share of Category A discretionary services which, as must-carry services, would give BCE considerable negotiating power with other distributors. The acquisition of Astral would add popular and successful discretionary television services, resulting in an increased presence by BCE in the most attractive genres – movies, sports and premium content – that drive a significant component of demand for Canadian television services. These genres are consistently popular with Canadian viewers and feature exclusive and/or live programming unavailable elsewhere. Finally, the ability to negotiate for every program rights window with programming suppliers and advertisers, when combined with BCE's size and ability to "bulk buy," could ultimately reduce, rather than increase competition.
56. In French-language television, the addition of Astral's large portfolio to the successful sports services held by BCE would increase the already significant level of concentration in discretionary services. The Commission is cognizant of the current makeup of the French-language television market, which includes Quebecor, a vertically integrated entity with significant market share in both programming and distribution services. BCE submitted that Canadians are best served by competition, but the Commission notes that Astral is currently a significant competitor in the French-language television market. In addition, BCE as a vertically integrated company already possesses a distribution, wireless and wireline infrastructure. The Commission is of the view that BCE did not demonstrate how the proposed transaction, which would result in the vast majority of French-language programming services being held by two large, vertically integrated competitors, would invigorate

competition. Moreover, BCE's proposal did not adequately address the potential negative impact that this transaction could have on independent entities.

57. With respect to radio, the Commission considers the timing and lack of details of BCE's divestiture plan did not afford an opportunity for interveners to comment meaningfully. While the plan respected the letter of the COP, the decision to include certain Bell Media radio stations in the divestiture plan can be viewed as an attempt by BCE to trade underperforming stations for successful ones, which would not provide a benefit to the Canadian broadcasting system or create the conditions for healthy competition. Selling less profitable stations could reinforce BCE's position in these markets, make the entrance of new competitors more difficult and reduce the total tangible benefits paid on Astral's radio stations.
58. As noted above, applicants must clearly demonstrate significant and unequivocal tangible and intangible benefits. BCE submitted that the proposed transaction would, in addition to enhancing competition in the Canadian broadcasting system, provide greater scale enabling enhanced multi-platform delivery of broadcasting services. These intangible benefits would, according to BCE, be accompanied by an unprecedented amount of tangible benefits.
59. The tangible benefits package proposed by BCE would undoubtedly result in significant investment in the Canadian broadcasting system. The Commission notes however that certain initiatives fall outside the guidelines established in Commission policy and general practice. In particular, BCE did not demonstrate that the Northwestel broadband proposal would benefit the broadcasting system. In addition, this proposal, as well as that relating to a new Category C news service, would not primarily benefit third parties. Further, BCE did not demonstrate that the programming commemorating Canada's 150th anniversary celebration would not be undertaken in the absence of benefits funding. The disqualification of these initiatives would reduce the amount of BCE's proposed television tangible benefits to approximately 6% of the value of the television assets. In addition, the benefits package did not satisfy the Commission's general expectation that 85% of benefits should be directed to on-screen initiatives. Finally, the Commission notes that for several radio initiatives, BCE failed to provide adequate explanation of the initiatives and how they would be consistent with Commission policy.
60. As noted above, the applicant's burden to prove that the transaction is in the public interest extends beyond the tangible benefits requirement. While much of the discussion at the public hearing focused on television, the Commission notes that BCE, aside from its proposed tangible benefits, made no firm commitments regarding additional local and spoken word radio programming, or promotion and airplay of emerging Canadian artists. Further, BCE did not provide details on its plan to invest in Astral's radio operations and news. As such, the Commission is not satisfied that BCE discharged its burden to demonstrate how the combination of the Bell Media and Astral radio stations would be beneficial to Canadian radio listeners and the radio sector as a whole.

61. With respect to intangible benefits to the television broadcasting system, while BCE's proposal for a new multi-platform on-demand service generated significant discussion, BCE did not adequately demonstrate that the acquisition of Astral is a necessary prerequisite to the creation of such a service. Several BDUs already offer similar "TV anywhere" services to their subscribers, and programming from Astral's services is available on diverse platforms. In addition, BCE explained that this type of service is "required to remain competitive," raising questions about the initiative's dependence on approval of this transaction.
62. BCE also argued that the scale it would possess following the proposed transaction is necessary to compete with international unlicensed services. While the Commission is generally supportive of consolidation and scale, BCE already holds a significant position in the Canadian broadcasting system. Further, BCE did not demonstrate that it needs to be bigger to compete with foreign services. The Commission does not consider that there is compelling evidence on the record to demonstrate that foreign, unlicensed competitors are having a significant impact on negotiations for program rights by Canadian broadcasters. In addition, the Commission noted in its report *Navigating Convergence II*, published August 2011, that based on available data, Internet platforms continue to be complementary to the traditional broadcasting system. Finally, Canadian broadcasters benefit from significant protections under the current regulatory regime, including simultaneous substitution, genre protection and public funding and support for program development.
63. The Commission considers that convergence, integration and scale may lead to a point at which the size of an entity on a national level becomes so large that it hinders effective and healthy competition among Canadian broadcasters. The Commission, as discussed below, considers that a transaction of this magnitude would adversely affect competition and diversity in the Canadian broadcasting system and thereby threaten its ability to achieve the policy objectives set out in the Act. The Commission is mindful that a healthy communications system also requires entities of various sizes that are able to compete and innovate in a fair environment.
64. While BCE submitted that it would be in its own best interest to make content available as widely as possible, the Commission shares the concerns of many interveners about the ability of a distributor with the content properties of a combined BCE/Astral to exert market power in an anti-competitive manner. These concerns are based on the business incentive of a vertically integrated entity to give an undue preference to its own distribution facilities by restricting access to its programming services or offering them at above market rates to its competitors. The market power of a combined BCE/Astral could threaten the availability of diverse programming for Canadians and endanger the ability of distribution undertakings to deliver programming at affordable rates and on reasonable terms on multiple platforms.
65. While BCE agreed to accept the VI Code of Conduct as a condition of licence, it did not propose or clearly accept any other possible remedy to address these concerns, including functional separation or divestiture. The Commission considers that the broad participation of a combined BCE/Astral in popular genres and services, in

must-carry discretionary services, its access to popular conventional programming and national distribution networks would give it the incentive and the ability to unduly exert market power to the disadvantage of its competitors. In this context, the Commission considers that, in the event of an approval, BCE's level of market power would be so significant that the VI framework would be insufficient to effectively address disputes and facilitate program availability and distribution.

66. While certain interveners proposed safeguards to address these concerns in the event of an approval, the significance and breadth of the broadcasting assets of a combined BCE/Astral are such that safeguards to properly supervise this level of market power would be extensive and unduly burdensome. The Commission does not consider that such a level of interference would be consistent with the regulatory policy set out in section 5(2) of the Act. The Commission further considers that the onus was on BCE to propose adequate safeguards to address these concerns. In this case, BCE failed to do so.

Conclusion

67. The Commission has reviewed BCE's proposal, as well as the comments received in response to Broadcasting Notices of Consultation 2012-370, 2012-370-1 and 2012-370-2. As noted above, the Commission must evaluate applications for a change in effective control against the objectives set out in the Act, as well as its own policies and regulations. The Commission considers that the concerns related to competition, ownership concentration in television and radio, vertical integration and the exercise of market power are very substantial and fatal to the application.
68. The Commission finds that BCE has not discharged its burden and demonstrated that, on balance, this transaction is in the public interest. The benefits proposed would advantage BCE and its services, but the Commission is not persuaded that the transaction would provide significant and unequivocal benefits to the Canadian broadcasting system and to Canadians sufficient to outweigh the concerns described above.
69. Accordingly, the Commission **denies** the application by BCE Inc., on behalf of Astral Media inc., to change the effective control of Astral and its licensed broadcasting undertakings so that it is exercised by BCE (application 2012-0516-2). In light of its decision, the Commission has not made determinations on other aspects of BCE's application, including the value of the transaction.
70. The Commission notes the objections of numerous interveners with respect to the application by Bell Media Inc. and 7550413 Canada Inc., partners in a general partnership carrying on business as Bell Media Canada Radio Partnership, to convert CKGM Montréal from an English-language to a French-language commercial radio programming undertaking (application 2012-0573-2). These objections related to, among other things, the integrity of the Commission's licensing process and the loss of an English-language broadcasting service to an official language minority community. At the public hearing, BCE indicated that in the event the proposed

transaction was denied, it would continue to operate CKGM Montréal as an English-language station. As a result, the Commission **denies** this application. Therefore, the licensee will continue to operate CKGM Montréal under the terms and conditions in effect under its current licence.

71. Similarly, the Commission **denies** the following related applications, which BCE indicated were contingent on approval of the proposed change of control of Astral:

- applications by BCE Inc., on behalf of certain of its licensed broadcasting subsidiaries, to effect a multi-step corporate reorganization involving the transfer of the assets of 33 Bell Media radio stations to seven partnerships or corporations, requiring the issuance of new broadcasting licences (applications 2012-0701-9 and 2012-0736-6); and
- application by BCE Inc., on behalf of Astral Media inc. and certain of its licensed broadcasting subsidiaries, to effect a corporate reorganization involving the transfer of the assets of certain broadcasting undertakings to companies to be incorporated, requiring the issuance of new broadcasting licences (application 2012-0735-8).

Other matters

72. The Commission notes that the applicant made amendments to its application after its publication, which were added to the record and indeed considered by the Commission in this case. However, going forward, applicants should ensure that their proposals are complete when submitted. All evidence required to demonstrate that the application is in the public interest, as well as the consistency of the proposal with Commission precedent and policies, should be provided in the initial application. Proposals should not be amended at the oral phase of the public hearing. The Commission considers that last-minute changes undermine the ability of the Commission to test and clarify proposals, and diminishes the ability of the public to meaningfully comment on applications.

73. Finally, as indicated in the Commission's recently published three-year plan, it has initiated an internal review of the criteria used to judge the eligibility of proposed tangible benefits initiatives. Details of this review will be announced at a later date.

Secretary General

Related documents

- *Notice of hearing*, Broadcasting Notice of Consultation CRTC 2012-370, 10 July 2012 as amended by Broadcasting Notices of Consultations CRTC 2012-370-1, 16 July 2012 and 2012-370-2, 14 September 2012
- *Regulatory framework relating to vertical integration*, Broadcasting Regulatory Policy CRTC 2011-601, 21 September 2011 as amended by Broadcasting Regulatory Policy CRTC 2011-601-1, 14 October 2011

- *A guide to the CRTC application process for change in effective control and certain transfers of shares of broadcasting undertakings as well as for the acquisition of assets of broadcasting undertakings*, Broadcasting Information Bulletin CRTC 2008-8-1, 23 December 2010
- *Campus and community radio policy*, Broadcasting Regulatory Policy CRTC 2010-499, 22 July 2010
- *Revised guidelines for the application of the Common Ownership Policy for Radio*, Broadcasting Information Bulletin CRTC 2010-341, 4 June 2010
- *Diversity of voices – Regulatory Policy*, Broadcasting Public Notice CRTC 2008-4, 15 January 2008
- *Determinations regarding certain aspects of the regulatory framework for over-the-air television*, Broadcasting Public Notice CRTC 2007-53, 17 May 2007
- *Commercial Radio Policy 2006*, Broadcasting Public Notice CRTC 2006-158, 15 December 2006
- *Acquisition of radio assets in Quebec*, Broadcasting Decision CRTC 2003-205, 2 July 2003
- *Building on success – A policy framework for Canadian television*, Public Notice CRTC 1999-97, 11 June 1999
- *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1993-68, 26 May 1993
- *Assessment of the Impact of the Benefits Test Applied at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1992-42, 15 June 1992
- *Elements assessed by the Commission in considering applications for the transfer of ownership or control of broadcasting undertakings*, Public Notice CRTC 1989-109, 28 September 1989
- *Western Cablevision Limited and M.S.A. Cablevision Ltd.*, Decision CRTC 77-456, 28 July 1977