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December 13, 2021

VIA Intervention Comment Form

Mr. Claude Doucet
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Doucet,

Subject: **Broadcasting Notice of Consultation CRTC 2021-281: Rogers Communications Inc. application for approval to effect a change of ownership and effective control, from Shaw to Rogers**

1. The Canadian Communication Systems Alliance ("CCSA") speaks for independent communications distributors – smaller broadcasting distribution companies, telephone companies and ISPs – across Canada. CCSA represents more than 110 companies operating from sea to sea to sea, including across the North.

2. CCSA submits these Final Comments in response to Broadcasting Notice of Consultation CRTC 2021-281.

Executive Summary

3. Having reviewed the written record of this proceeding and the presentations at the public hearing, CCSA considers that the Applicant has failed to discharge its burden to offer benefits to the broadcasting system and to Canadian consumers that are commensurate with the size and nature of the proposed transaction.

4. Even with minor amendments to the Applicant's proposals made during the course of the hearing, the benefits to the broadcasting system and to Canadian consumers are very limited. Importantly, the Applicant has offered extremely little in response to numerous intervenors' legitimate calls for anti-competitive safeguards.

5. CCSA's central concern is with the continued availability of – and terms for – SRDU and discretionary signal transport services if the Shaw SRDU becomes but one piece of the Applicant's massive, vertically-integrated enterprise.

6. Under the Applicant's control, there would be increased potential and scope for anti-competitive behaviour in operation of the SRDU. CCSA also remains concerned with the Applicant's commitment to sustaining operation of the SRDU business in a manner that will support independent BDUs and their customers.

7. CCSA derives no comfort form the Applicant's repeated statement that: "We don't operate an SRDU business today. We have no experience operating an SRDU business and we will stand in the shoes of Shaw in operating one." To CCSA, that amounts to a dismissive and unhelpful response to the independent BDUs' serious concerns.

8. CCSA is troubled by the Applicant's outright rejection, in its undertaking responses, of any further remedies including application to the SRDU undertaking of the "Standstill Rule" and any of the commercial reasonableness measures set out in the Wholesale Code.

9. The Applicant cannot be left with an unfettered ability to drop signals, unilaterally, from the SRDU's signal transport service. <u>If Canadian consumers are to be protected from disruption of service then the Dispute Resolution Rules, including the "Standstill Rule", must apply to the Applicant's SRDU delivery of both OTA and discretionary signals.</u>

10. Furthermore, CCSA cannot see how certain principles for definition of "fair market rates" and reasonable commercial terms can possibly be "inappropriate" for application to the SRDU's signal transport services.

11. The existing SRDU services are not readily substitutable. There are substantial economic barriers to substitution of those services, especially for smaller, less financially capable independent BDUs; the ones that are most heavily reliant on SRDU transport services. In addition, there are qualitative differences between the services which diminish substitutability as between those two SRDUs.

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12. Finally, the Applicant asserts that there is “absolutely no incentive on the part of RSN to delay renewal negotiations”. CCSA cannot let that assertion lie uncontested. The simple fact is that history has shown that wholesale rates for BDU distribution of programming services, particularly those services owned by the VI companies, always go up and delay is always in the programmer’s favour.

13. CCSA considers that the Applicant can and must do more, especially with respect to acceptance of competitive safeguards, before this transaction can be considered to be unequivocally in the public interest.

14. CCSA thanks the Commission for the opportunity to provide these comments.

Sincerely,

Christopher J. Edwards
Vice-President, Regulatory Affairs

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CANADIAN COMMUNICATION SYSTEMS ALLIANCE INC.

Before the Canadian Radio-television and Telecommunications Commission

Broadcasting Notice of Consultation CRTC 2021-281: Rogers Communications Inc. application for approval to effect a change of ownership and effective control, from Shaw to Rogers

CCSA Final Comments

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Introduction

1. The Canadian Communication Systems Alliance ("CCSA") speaks for independent communications distributors – smaller broadcasting distribution companies, telephone companies and ISPs – across Canada. CCSA represents more than 110 companies operating from sea to sea to sea, including across the North.

2. There can be no doubt that the transaction proposed by the Applicant would represent a profound change to the existing balance of the broadcasting system.

3. The comments of the intervenors in this proceeding reveal a wide range of legitimate concerns regarding the potential negative impacts of the proposed transaction on various participants in the sector and on the broadcasting system as a whole. The Applicant has done little to propose constructive responses to those concerns.

4. Rather, the Applicant appears to presume that an offering of its Ignite and SmartStream services, backed by the Applicant's greatly increased scale, would amount to a panacea for the broadcasting system and Canadian consumers. We do not accept that presumption.

The Applicant Has Not Met Its Burden

5. In its closing day presentation, the applicant said:

> 5390 We have, in our application, in our response to RFI questions, in our written reply, and in our appearances this week demonstrated that this transaction is in the public interest. We have discharged our burden.[1]

6. With respect, saying so does not make it true. We agree with the CMPA's comment that:

> 4448 . . . . The Applicant bears the burden here; it must establish that its proposed benefits are commensurate with the size and nature of the transaction, and that its application represents the best possible approach in the circumstances. The Applicant has not met this onus. It can and must do better.

[1] Hearing Transcript, Volume 5 at 5390. CCSA will quote extensively from the Hearing Transcript in this submission and, for ease of reference, will include transcript line numbers in its quotations without further footnoting.

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7. While the Applicant proposed some improvements to its tangible benefits package during the hearing, the following CMPA comments remain substantively true:

> 4452 This is a $26 billion transaction.
>
> 4453 The annual incremental value to shareholders of the combined companies is reported to be $1 billion.
>
> 4454 The Applicant proposes that the public will receive $5.746 million in tangible benefits, in total, roughly one half of one percent of the annual shareholder value.
>
> 4455 To be crystal clear, under the Applicant's proposal, shareholders will receive an increased value of $1 billion each year. And the public will only receive a couple of hours' worth of new television programs once.

8. As PIAC pointed out, various components of what the Applicant has put forward as benefits to the broadcasting system are not new value to the system or consumers:

> 3383 "SmartStream" is not an incremental benefit. It is not incremental as Rogers and Shaw both are in the process of transitioning users to an IPTV system on which users can access streaming platforms through an app front-end or set top box.
>
> 3384 If it is incremental, its benefit is minor. SmartStream is just a proprietary version of any number of devices and software offered by other vendors, with in fact, fewer services and features.
>
> 3385 Rogers' "Connected For Success" program is not incremental. Rogers offers this program in the east. As it expands into Shaw territory, it is expected, as a cost of doing business, that they would offer the same program in the west.

9. CCSA agrees with the general proposition put forward by these and other intervenors that the Applicant has failed to discharge its burden to offer benefits to the broadcasting system and to Canadian consumers that are "commensurate with the size and nature of the transaction" and that its application "represents the best possible approach in the circumstances".

10. We agree with the CMPA's conclusion that the Applicant "can and must do better".

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Why the SRDU Situation Would Be "Different" Under Rogers

11. During the public hearing, the Chairperson questioned intervenors as to why the existing Shaw SRDU operation would somehow be different under Rogers' control.[2]

12. There are two components to the response to that question. First is the increased potential and scope for anti-competitive behaviour. Second is the matter of Rogers' commitment to sustaining operation of the SRDU business in a manner that will continue to support independent BDUs and their customers.

Increased Potential and Scope for Anti-Competitive Behaviour

13. In our view, Commissioner Lafontaine succinctly described that difference as follows:

> 486 And I also understand that Rogers has never had an SRDU service but this isn't just Rogers stepping in to Shaw's shoes. This is Rogers stepping into Shaw's shoes with regard to SRDU, becoming the largest terrestrial BDU in the country, having a national DTH service. So there is a whole package here which would allow, or potentially allow, Rogers to exert quite a lot of market power.
>
> 487 So the question is, would it be problematic? We are hearing from you, from your submission, that everything will be fine. You're going to treat everybody nicely. We want to continue to serve the rural and remote communities. So if it is not a problem for the business to comply with the rules or to comply with fair dealings with the industry participants, why then would it be problematic to have terms such as the wholesale code imposed on these types of services?

14. Essentially, this is a matter of the much-increased ability and the incentives for a dominant VI company to act anti-competitively. As TELUS put it:

> 1669 So signal transport, in this case, you've got Rogers who is our BDU competitor; Rogers who holds one of the most important and popular programming services in Canada; and it will be Rogers who is relied upon to provide its own competitors access to those signals. And I think anytime you have that many abilities in a chain to thwart competition, foreclose, raise rates for your competitors, it's just -- it's too tempting not

[2] Hearing Transcript, Volume 2 at 1770 (TELUS appearance) 1960 (CCSA appearance) and Volume 3 at 3770-3772 (Cogeco appearance).

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> to take those opportunities, and this [increasing the price of signal transport] is one of them.

15. We also note, in this respect, the Applicant's repeated and entirely irrelevant assertions that, as stated for example on the hearing's opening day:

> 5358 . . . . There is no evidence that Shaw has ever acted in an anti-competitive manner against any independent distributor, despite the fact that Shaw has been the leading provider of SRDU services for decades.

16. In fact, this is precisely CCSA's concern. Shaw has been a good and long-standing partner for independent BDUs. We gave grave doubts about whether that partnership will continue under Rogers.

Rogers' Commitment to the SRDU Transport Business

17. We note the following comments from Cogeco's hearing appearance:

> 3782 MR. PERRON: I might simply add quickly, Mr. Chairman, that this business would become such a small percentage of Rogers overall that they would not have the same incentive to manage focus on that business and give a good quality service the same way Shaw did.

18. TELUS pointed out, as well, that:

> 1673 . . . . We come back to the fact that Rogers is paying a 70 percent premium for this transaction. The reality is that through the course of the competitive and other proceedings, there will be a desire to ensure that wireless and other assets might get divested. And in this case, on the SRDU, satellite transmission is a profitable and mature business, but then at the time where you have to launch new satellites, it's a very capital-intensive business.
>
> 1674 So there's no guarantees that have been provided with respect to this particular business, and we're, as well as other very small and independent BDUs, dependent on those signals to provide service to many remote and Indigenous communities.

19. We also suggest that even the Applicant's own promised billion-dollar investment in fibre to serve rural and remote communities will almost certainly cannibalize its SRDU business. Those communities are precisely the ones that rely most on SRDU transport services.

20. In a seeming effort to make its billion-dollar rural broadband investment somehow relevant in this broadcasting proceeding, the Applicant has, for the first time, offered that those funds

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would help introduce BDU competition into new markets currently served by a single distribution undertaking. Notably, the Applicant has never identified any of those markets.

21. Should the Applicant actually expand fibre into such a rural or remote market, where the incumbent BDU currently relies on SRDU signal transport, two results could emerge:

- if it chooses not to open access to its new fibre, the Applicant will have both the incentive and means to undermine its new BDU "competitor" by withholding signal transport services or increasing the rates for the transport of signals to that BDU; or

- if it chooses to make fibre interconnection available to the "competitor" BDU, it will encourage that BDU to interconnect and drop the SRDU services it had previously used.

22. In either case, the Applicant's SRDU business would lose a customer. In that way, the Applicant's fibre investment would undermine its own SRDU business.

23. There are real challenges to the SRDU business model and accelerated broadband infrastructure investment is contributing to those challenges. While the Applicant touts its investment in broadband facilities as a benefit of the proposed transaction, that same investment can only increase the challenge to its SRDU transport business.

24. All of those factors contribute to CCSA's concern about the Applicant's commitment to the SRDU business and to support delivery, especially of discretionary services, to independent BDUs beyond the immediate short-term future.

25. Finally, the Applicant, in its opening day presentation said:

> 483 MR. WOODHEAD: It really comes down, Commissioner, to a matter of principle. We don't operate an SRDU business today. We have no experience operating an SRDU business and we will stand in the shoes of Shaw in operating one.

26. That refrain has been repeated throughout this proceeding. To CCSA, that amounts to a dismissive response to the independent BDUs' serious concerns. Frankly, that response heightens CCSA's concern regarding the Applicant's commitment to the SRDU business.

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SRDU Remedies

27. In its responses to its Undertaking 1 from the hearing, the Applicant stated that:

> Rogers – as the owner of Shaw Broadcast Services, which provisions both the SRDU service and transport service to BDUs – will continue to honour all existing contracts for SRDU and transport services entered into by Shaw Broadcast Services <u>for the full term of each such agreement</u>. [emphasis added]

28. CCSA wishes to underscore the importance of the limitation expressed in that commitment. The Commission should not assume that a commitment to honour existing SRDU transport contracts throughout their terms amounts to a long-term commitment to transport discretionary signals or to support the HITS-QT Plus platform that is an essential service to many CCSA members. It does not.

29. We note the Applicant's new commitment, given in its undertaking responses (Answer 1), to submit to the Commission's Dispute Resolution procedures in respect of transport of both over-the-air and discretionary signals.

30. However, we are deeply concerned with the Applicant's outright rejection in its undertaking responses (Answer 5) of any further remedies including application of the "Standstill Rule" and any of the commercial reasonableness measures set out in the *Wholesale Code*.

31. It is important to understand how limited a protection the Applicant's commitment to Dispute Resolution, without more, really is.

32. Consider a scenario in which, during a formal dispute, the Applicant decides not to continue to offer transport of a number of discretionary signals, say, for example, those owned by Bell Media, to CCSA members.

33. Absent CCSA's recourse, within the CRTC's Dispute Resolution process, to the "Standstill Rule" in respect of those signals, there is nothing to prevent the Applicant from ceasing to deliver those services to CCSA members as a negotiating pressure tactic. In that case, the damage to the BDUs and, more importantly, the Canadians they serve would be immediate and, for all intents and purposes, irremediable.

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34. In that case, those Canadians would lose all of their Bell Media channels until a resolution of the dispute was achieved. Unable to offer those services, the affected CCSA members would be severely harmed and their customers would suffer substantial disruption.

35. Such disruption to effective operation of the broadcasting system and, especially, the legislated objective of delivering Canadian programming to Canadians at affordable prices, can and should not be tolerated.

36. So, without an accompanying application of the "Standstill Rule", the Applicant's commitment to submit to Dispute Resolution is meaningless. The Applicant knows that.

37. <u>If Canadian consumers are to be protected from such massive disruption then the Dispute Resolution Rules, including the "Standstill Rule", must apply to the Applicant's SRDU delivery of both OTA and discretionary signals.</u>

38. With respect to the matter of application of commercial reasonableness principles included in the Wholesale Code, CCSA notes Commissioner Lafontaine's question, quoted above, as to "why then would it be problematic to have terms such as the wholesale code imposed on these types of services?"

39. CCSA does not accept the Applicant's assertions about the unfairness of applying such rules only to its undertaking or the inappropriateness of applying such rules to transport services.

40. CCSA also considers that little, if any, weight should be given to Mr. Woodhead's response, at paragraph 488 of the transcript, to Commissioner Lafontaine's question that: "As with every regulation there are costs associated with it potentially." To CCSA, that response amounts to a somewhat cavalier dismissal of the intervenors' legitimate concerns in the context of this proposed, industry-changing transaction.

41. The Applicant is making a huge "ask" of the Commission in this proceeding and, given the nature of the proposed transaction and the dominant VI company that would emerge, it should expect to have unique conditions of approval placed upon it.

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42. CCSA cannot see how certain principles for definition of "fair market rates" and reasonable commercial terms can possibly be inappropriate for application to the Applicant's transport services.

43. As CCSA stated in its initial comments, those transport services are an integral part of the supply of broadcasting services to Canadians. It is therefore entirely appropriate that principles of commercial reasonableness should apply to those services. In fact, CCSA would submit that the objectives at s. 3(t)(ii)[3] and s. 5(2)(b)[4] of the *Broadcasting Act* virtually demand such application.

44. The Applicant's resistance to imposition of any such measures greatly heightens CCSA's concerns about the Applicant's intentions regarding ongoing operation of the SRDU.

Competition and Substitutability

45. The Applicant has repeatedly asserted that the SRDU business is "competitive", despite the Commission's finding to the contrary in Broadcasting Decision CRTC 2012-94.[5]

46. SRDU services are not readily substitutable. As Bell said in its undertaking responses:

> We note that Shaw's satellite relay undertaking (SRDU) and Bell ExpressVu's SRDU each use distinct satellites, encryption, frequencies and distribution platforms, resulting in the equipment used by Shaw's SRDU customers being incompatible with Bell ExpressVu's system. As such, switching from Shaw's SRDU would require the purchase of new equipment by broadcasting distribution undertakings (BDUs) in order to receive signals from Bell ExpressVu's SRDU. [6]

47. That statement is consistent with evidence filed by both CCSA and Cogeco in response to their own undertakings. In short, the barrier to transition from one SRDU to the other is high

[3] *Broadcasting Act*, s. 3(t)(ii): "distribution undertakings . . . should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost".
[4] *Broadcasting Act*, s. 5(2)(b): The Canadian broadcasting system should be regulated and supervised in a flexible manner that . . . takes into account regional needs and concerns".
[5] Broadcasting Regulatory Policy CRTC 2021-94, Ottawa, 14 February 2012, at para. 23, "However, the Commission notes that because of geographical, economic and technological reasons, competition is still very limited in rural and remote areas, where TRDU services are not always offered. The Commission considers that there is no evidence to conclude that the signal transport situation in remote areas is likely to change in the near future."
[6] Bell Undertaking Response, BCE(CRTC)25Nov21-1 BNC 2021-281, 29 November, 2021.

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and the services are not readily substitutable. That is especially true for CCSA members, given the very broadly established base of headend and CPE equipment they operate, which is compatible with the Shaw SRDU service but not with Bell's, and the reliance of a number of our members on Shaw's HITS-QT service.

48. There is also a qualitative difference between the two SRDU services. We note Cogeco's statement at the hearing, as follows:

> 3778 THE CHAIRPERSON: And maybe just one last point. Do you consider that there are significant barriers to entry that would stop a new competitor from Bell expanding its service or a new competitor providing a similar service?
>
> 3779 MR. BEAUDRY: . . . . But also, one thing, there is a scarcity of satellite space, and there is a possibility that -- for us, it's more of a question of a seamless transition.

49. Indeed, Cogeco's concern about capacity is borne out by recent press coverage which indicates that the Bell SRDU is ceasing delivery of some OTA SRDU signals precisely because of Nimiq satellite capacity concerns.[7]

50. To summarize, there are substantial economic barriers to substitution of SRDU services, especially for smaller, less financially capable independent BDUs; the ones that are most heavily reliant on SRDU transport services. In addition, there are qualitative differences between the services which diminish substitutability as between the two SRDUs.

Dispute Resolution Timing and Retroactivity

51. CCSA wishes briefly to address the matter of Dispute Resolution timing and retroactivity. The Applicant asserts that there is "absolutely no incentive on the part of RSN to delay renewal negotiations" and that a rule which limited retroactivity when the Commission is seized of a dispute would "provide little or no incentive to independent BDUs to ever renew their carriage agreements for RSN services."[8]

[7] CARTT.ca article, "Bell makes some CTV stations SD-only on satellite", December 3, 2021, accessed at https://cartt.ca/bell-makes-some-ctv-stations-sd-only-on-satellite/ on December 9, 2021.
[8] Hearing Transcript, Volume 5 at 5365-5366.

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52. CCSA could not disagree more strongly. The simple fact is that history has shown that wholesale rates for BDU distribution of programming services, particularly those services owned by the VI companies, <u>always</u> go up and delay is <u>always</u> in the programmer's favour.

53. Independent BDUs also require rate certainty and the ability to accrue properly for increases. Most importantly, they need to avoid large retroactive liability for payments they cannot recover from their customers.

Conclusion

54. Given the positions taken by the Applicant at the hearing, CCSA is more concerned than ever with the future of the Shaw SRDU transport service and its members' continuing ability to rely on that service.

55. Without the application of, at a bare minimum, the Dispute Resolution Rules, including the "Standstill Rule", and key Wholesale Code rules to the Applicant's SRDU distribution of both OTA and discretionary services, many CCSA members' ability to continue their BDU operations will be entirely at the mercy of a massively dominant VI company whose past behaviour would indicate, frankly, that it would like to see them gone.

56. More broadly, CCSA concludes from the submissions made in this matter that there is little real, incremental benefit to the broadcasting system which would result from the approval of the proposed transaction. Certainly, the benefits offered are nowhere close to being "commensurate with the size and nature of the transaction".

57. The Applicant has not met its burden of demonstrating that the proposed transaction is in the public interest.

58. CCSA thanks the Commission for the opportunity to provide these comments.

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