Regulatory

September 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 comments in response to Broadcasting Notice of Consultation CRTC 2021-281.

3. CCSA wishes to appear at the public hearing of this matter to address submissions at the hearing by third parties and responses from the Applicant.

Executive Summary

SRDU and TRDU Broadcast Signal Transport

4. CCSA members rely heavily on Shaw SRDU and TRDU undertakings for transport of programming signals to their headends.

5. CCSA's primary concern with respect to this application is to ensure the continued

availability of satellite and terrestrial fibre signal transport services from the Rogers distribution undertakings at reasonable rates and on reasonable terms.

6. The protections offered by the SRDU Conditions of licence are highly limited in that they apply only to the off-air services the SRDU is required to offer and they do not condition, in any way, the rates and commercial terms under which the services may be provided

7. As a result, Rogers, as an SRDU, could simply refuse to transport discretionary services to the independent BDUs via satellite. Rogers, as an SRDU, would also be free to charge whatever it wishes for transport of the obligatory off-air television stations.

8. With respect to fibre transport service, which currently is provided as an exempt TRDU service, Rogers could, again, simply refuse to deal with independent BDUs once existing transport contracts expire. Alternatively, it could increase rates and impose other commercial terms without restriction.

9. CCSA recommends that the satellite and terrestrial Relay Distribution Undertakings subject to the proposed transaction should be required to accept and comply with Conditions of Licence to;

- comply with the *Wholesale Code* in all of their contracts for the provision of wholesale signal transport services;
- comply with the undue preference provisions at s. 9 of the *Broadcasting Distribution Regulations*; and
- submit to the dispute resolution and standstill provisions at set out at ss. 12 – 15.01 of the *Broadcasting Distribution Regulations*.

10. If re-licensing of the TRDU is required to implement those protections then, in CCSA's view, the Commission should take that step and incorporate those rules as Conditions of Licence on the TRDU.

Corus Relationship

11. While Corus services are not directly involved in the proposed transaction, CCSA is concerned, nonetheless, that the Shaw Family Living Trust, as an owner of the Corus undertakings and, at the same time, a significant stakeholder in Rogers, stands to benefit financially from the Rogers distribution undertakings' success. Corus may, therefore, be incented to manage the Corus undertakings in such a manner as to prefer Rogers over other competing BDUs.

12. We urge the Commission to:

- consider carefully how such incentives may operate;
- monitor the dealing between the Corus broadcasting undertakings and the Rogers distribution undertakings closely; and
- respond quickly and decisively to any preferential or otherwise anti-competitive behavior which may result from the relationship between the two entities.

Growing Imbalance of Power and Effectiveness of Dispute Resolution

13. Approval of the proposed transaction will amount to another major step toward creation of a Rogers/Bell broadcasting duopoly in which independent undertakings – both distributors and programmers – are more likely than before to be squeezed out of the marketplace.

14. As the VI companies consolidate their market power and eliminate competition from the independents, the likelihood increases that Canadian consumers will face more limited content and distribution choices and that the VI companies will exercise their market dominance to increase retail prices to Canadians for their broadcasting services.

15. Rogers contends that the highly regulated environment in which broadcasting undertakings operate "is backstopped by a rigorous dispute resolution process and a Wholesale Code that prohibits BDUs and programming services from establishing terms and conditions for the distribution of programming that are commercially unreasonable, including by restricting consumer choice."

16. In CCSA's experience, the Commission's dispute resolution processes, while they may appear "rigorous" on paper, have not proved to offer anything close to the protections that independent broadcasting undertakings need in the face of the threats posed by the VI companies.

17. CCSA continues to experience intense frustration with open-ended mediation processes which the Commission allows to run for extremely long periods even as the independent BDUs suffer continuing and substantial economic harms including, especially, mounting and unrecoverable retroactive liability for wholesale fees.

18. CCSA is especially concerned that its urgent formal Part 1 applications for relief in the face of anti-competitive practices, such as the denial of access to programming pending formal contract renewals, are being permitted to lie fallow for long periods of time without so much as any form of written response from the Commission.

19. While CCSA acknowledges the existence of numerous competitive safeguards in the Commission's policies, such safeguards are worth nothing if they are not enforced in an effective and timely manner. In fact, the failure to backstop such safeguards with effective enforcement is imposing new harms on the independent BDUs that CCSA represents.

20. If the proposed transaction is permitted to proceed, the existence of associations such as CCSA and the IBG becomes all the more critical to the survival of independent undertakings and their ability to provide choice and competitive pricing to Canadians.

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21. As the Commission is aware, the VI companies repeatedly challenge CCSA's authority to act for its members in negotiation and in the Commission's dispute resolution proceedings. The Commission should put an end to that practice once and for all.

22. Most importantly, if the Commission is to permit continued consolidation of broadcasting undertakings and market power in the hands of the VI companies, then it must put its will and resources squarely behind timely and effective enforcement of the competitive safeguards it has introduced.

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

Sincerely,

Christopher J. Edwards
Vice-President, Regulatory Affairs

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CCSA

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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 Comments

September 13, 2021

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CCSA

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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. CCSA submits these comments in response to Broadcasting Notice of Consultation CRTC 2021-281

3. CCSA wishes to appear at the public hearing of this matter to address submissions at the hearing by third parties and responses from the Applicant.

4. CCSA recognizes that the scope of RCI's application is limited to a proposed acquisition of Shaw BDU, SRDU and TRDU undertakings. In that context, CCSA's primary concern is to ensure the continued availability of satellite and terrestrial signal transport services from the Rogers distribution undertakings at reasonable rates and on reasonable terms.

5. Nonetheless, CCSA also has serious misgivings about:

   - incentives which may create the potential for coordinated anti-competitive behavior in the relationship between Rogers distribution undertakings and the Corus programming services; and

   - the increased risk to independent distributors and programmers which will almost certainly result from further concentration of overwhelming market power in the hands of what is effectively becoming a duopoly of the vertically integrated Rogers and Bell enterprises.

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Signal Transport Services

Background

6. As the Commission notes in BNC 2021-281:

> Given the importance of Shaw's SRDU in the signal transport sector, and in consideration of Rogers's exempt TRDU, the Commission may wish to consider the impact of the proposed acquisition on the delivery of signals to distribution undertakings.[1]

7. Consistent with the Commission's observation, CCSA emphasizes the critical importance of the Shaw SRDU and TRDU services, in combination, to the ability of CCSA members to deliver programming to Canadians at affordable rates.

8. CCSA members rely heavily on Shaw SRDU and TRDU undertakings for transport of programming signals to their headends.

9. Due to the nature of the reception equipment installed in their headends, most CCSA members who take services from satellite are firmly tied to Shaw's SRDU service. Far fewer members are able to use Bell's SRDU offering.

10. CCSA members use the Shaw SRDU service for delivery of the signals of both off-air television stations and Canadian and non-Canadian discretionary services.

11. In recent years, as Shaw has expanded its terrestrial fibre network, a number of CCSA members have entered into contracts with Shaw for wholesale delivery of programming via fibre. The Shaw offering, in this regard, provides independent BDUs with a convenient source for virtually all of their broadcasting content through high-quality terrestrial broadband connections.

12. CCSA's understanding is that Shaw has been a good business partner to CCSA members

[1] Broadcasting Notice of Consultation CRTC 2021-281, 22 November, 2021, p.9 under the heading, "Satellite relay distribution undertakings".

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in its delivery of that fibre transport service and has played a crucial role in enabling independent BDUs to get the content they need on reasonable terms.

The Issue

13. The independent BDUs that CCSA represents already pay a premium to access programming in that, unlike most other BDUs, they must pay a signal transport cost in addition to wholesale fees payable directly to the programmers. That fact already places smaller independent BDUs at a serious competitive disadvantage.

14. Consolidation of transport services under Rogers will only exacerbate that problem.

15. Transfer of the Shaw SRDU and TRDU undertakings to Rogers will result in the vast majority – essentially all – of available wholesale signal transport services resting in the hands of two massive, vertically integrated companies who compete directly with the independent BDUs and who have every incentive to increase the costs of signal sourcing to such independents.

16. As a result of the proposed transaction, those two vertically integrated companies will control virtually all of the upstream inputs to the BDU businesses of smaller, independent broadcasting distributors.

17. The proposed transaction can only increase the potential for anti-competitive behavior which could be disastrous for independent BDUs. It can only increase the potential, as well, for coordinated anti-competitive behavior.

18. With respect to SRDU services, some protections exist in the existing Shaw SRDU Conditions of Licence, namely that the SRDU:

- "shall provide its service to all . . . terrestrial broadcasting distribution undertakings (BDUs) that are licensed by the Commission or that are operating in accordance with an exemption"; and that the SRDU

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- "shall submit to a dispute resolution process if the Commission so requires".[2]

19. However, those protections are highly limited in that they apply only to the off-air services the SRDU is required to offer and they do not condition, in any way, the rates and commercial terms under which the services may be provided.

20. As a result, Rogers, as an SRDU, could simply refuse to transport discretionary services to the independent BDUs via satellite. Rogers, as an SRDU, would also be free to charge whatever it wishes for transport of the obligatory off-air television stations.

21. With respect to fibre transport service, which currently is provided as an exempt TRDU service, Rogers could, again, simply refuse to deal with independent BDUs once existing transport contracts expire. Alternatively, it could increase rates and impose other commercial terms without restriction.

22. Those facts are not changes from the current state of affairs. However, for CCSA members, the transition would force them out of a business relationship that has worked for them and into a business relationship that is a complete unknown. What they do know is that Rogers, as a VI company in a duopoly environment, may have a greater incentive than Shaw did to either devalue the independent BDUs' companies or to simply drive them out of the competitive marketplace.

23. Transport services are a necessary input to the businesses of independent BDUs. CCSA greatly fears that, with consolidation of these transport functions completely under a Rogers and Bell duopoly, independent BDUs will be denied access to transport services and/or subjected to classic, anti-competitive margin squeezes – possibly in a coordinated manner – by the two largest VI companies.

[2] Appendix to Broadcasting Decision CRTC 2019-386, "Conditions of licence for the satellite relay distribution undertaking operated by Shaw Satellite Services Inc.", COLs 6 and 11, respectively.

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Remedies

24. In Broadcasting Regulatory Policy CRTC 2012-94, the Commission considered the question of whether SRDUs should be required to transport discretionary services. In deciding they should not, the Commission reiterated its prior conclusion that transport was an element of the programmer's delivery of its signal to the BDU and that "uplinking activities constitute broadcasting by a broadcasting undertaking".[3]

25. That conclusion would necessarily apply whether satellite or fibre is the medium of transportation. Transport services are an integral link in the supply chain for delivery of broadcasting from programmers to Canadian content consumers.

26. Transport arrangements, whether by satellite or fibre, are made by commercial agreements between the transporter and the customer BDU. They are contracts relating to broadcasting activities among regulated broadcasting undertakings. SRDUs and TRDUs are regulated "distribution undertakings" within the meaning of the *Broadcasting Act*.

27. As such, signal transport contracts are rightly subject to the legislative objective at s. 3(t)(ii) of the *Act* whereby distribution undertakings "should provide efficient delivery of programming at affordable rates using the most effective technologies available at reasonable cost".

28. The Commission has a duty, in relation to such contracts, to regulate and supervise the broadcasting system in a manner, pursuant to ss. 5(2)(d) and (e) of the *Act*, that "facilitates the provision of broadcasting to Canadians" and that "facilitates the provision of Canadian programs to Canadians".

29. There is no principled basis upon which, for the purposes of regulating and supervising the broadcasting system, the Commission should differentiate between affiliation agreements made between programmers and BDUs and transport agreements made

[3] Broadcasting Regulatory Policy CRTC 2012-94, "Licensing and other issues relating to satellite relay distribution undertakings" at para. 36.

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between SRDUs and TRDUs, on the one hand, and BDUs on the other.

30. All of those contracts are vital to the process of making programming available to Canadians at affordable rates using the most effective technologies available.

31. There is no reason why transport agreements should not be subject to the same competitive safeguards that currently apply to affiliation agreements between programmers and BDUs.

32. Such agreements should be subject to the same rules that have been set out in the *Wholesale Code*, to the undue preference rules including the presumption of reverse onus, to the standstill rule and to the dispute resolution provisions set out in the regulations.

33. As, by virtue of its acquisition of the Shaw SRDU and TRDU undertakings, Rogers will become the primary transporter of signals to independent BDUs, it should have Conditions of Licence whereby all Rogers broadcasting undertakings, including its SRDU and TRDU operations, are required to comply with those various competitive safeguard rules.

34. Specifically with respect to the Shaw Broadcast Services SRDU, Shaw Satellite Services Inc., as a subsidiary of Rogers Communications Inc., should be required to accept and comply with Conditions of Licence to;

- comply with the *Wholesale Code* in all of its contracts for the provision of satellite transport services;

- comply with the undue preference provisions at s. 9 of the *Broadcasting Distribution Regulations*;[4] and

[4] Currently COL 10 at Appendix to Broadcasting Decision CRTC 2019-386.

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- submit to the dispute resolution[5] and standstill provisions at set out at ss. 12 – 15.01 of the *Broadcasting Distribution Regulations.*

35. Specifically with respect to the Shaw TRDU, Rogers Communications Canada Inc. ("RCCI"), as the new licensee of the former Shaw terrestrial BDUs and notwithstanding the TRDU's current exempt status, should be required to accept and comply with requirements to:

- comply with the *Wholesale Code* in all of its contracts for the provision of fibre transport services to licenced and exempt BDUs;[6]

- comply with the undue preference provisions at s. 9 of the *Broadcasting Distribution Regulations*; and

- submit to the dispute resolution[7] and standstill provisions at set out at ss. 12 – 15.01 of the *Broadcasting Distribution Regulations.*

36. If re-licensing of the TRDU is required to implement those protections then, in CCSA's view, the Commission should take that step and incorporate those rules as Conditions of Licence on the TRDU.

37. As a matter of regulatory symmetry, the Commission should, in a follow-up proceeding, make such rules applicable to all SRDUs and TRDUs.

Independence of Corus Services

38. CCSA understands that Rogers does not propose to acquire any of the Corus television

[5] Currently COL 11 at Appendix to Broadcasting Decision CRTC 2019-386 but note the absence of any requirement to continue providing service during a dispute.
[6] The Condition of Licence at paragraph 1 of Appendix 1 to Broadcasting Decision CRTC 2018-265 should be clarified as applying to dealings "including the provision of wholesale transport services" with any licensed or exempt broadcasting undertaking.
[7] Currently set out as a term of exemption at Appendix to Broadcasting Order CRTC 2009-638, para. 5 but note the absence of any express requirement to continue providing service during a dispute.

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stations or discretionary programming undertakings and has represented that those undertakings will continue to operate independently.

39. CCSA notes Rogers' comments to the effect that, while the Shaw family, through the Shaw Family Living Trust ("SFLT") will be a significant shareholder of the non-voting stock of Rogers and will be represented on the Rogers Board of Directors[8], it will not exercise material control over Rogers by virtue of either of those facts.

40. CCSA is concerned, nonetheless, that the SFLT, as an owner of the Corus undertakings and, at the same time, a significant stakeholder in Rogers, stands to benefit financially from the Rogers distribution undertakings' success and may, therefore, be incented to manage the Corus undertakings in such a manner as to prefer Rogers over other competing BDUs.

41. While CCSA acknowledges that control issues are not present, we remain concerned that the financial incentive just described may result in anti-competitive behavior to the detriment of the independent BDUs that CCSA represents.

42. We urge the Commission to:

- consider carefully how such incentives may operate;
- monitor the dealing between the Corus broadcasting undertakings and the Rogers distribution undertakings closely; and
- respond quickly and decisively to any preferential or otherwise anti-competitive behavior which may result from the relationship between the two entities.

[8] Rogers letter to CRTC, "Re: Shaw Communications Inc. – Application for authority to change the ownership and control through the transfer of shares Application No: 2021-0228-4", July 29, 2021 at response t Question 11. Application No: 2021-0228-4

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Growing Imbalance of Power

43. Approval of the proposed transaction will amount to another major step toward creation of a Rogers/Bell broadcasting duopoly in which independent undertakings – both distributors and programmers – are more likely than before to be squeezed out of the marketplace.

44. Contrary to Rogers' assertions that approval of the proposed transaction will result in "greater choice and enhanced offerings for Canadian consumers"[9], including in Canada's remote and rural areas[10], CCSA considers that the increased threat to independent distribution undertakings is just as likely to have the opposite effect.

45. That is because of the increased threat that independent distributors – especially those that serve remote and rural markets – will be either be driven out of the market entirely or gobbled up, at reduced valuations, by the two, now-massive VI companies.

46. As those VI companies consolidate their market power and eliminate competition from the independents, the likelihood increases that Canadian consumers will face more limited content and distribution choices and that the VI companies will exercise their market dominance to increase retail prices to Canadians for their broadcasting services.

47. Rogers contends that the highly regulated environment in which broadcasting undertakings operate "is backstopped by a rigorous dispute resolution process and a Wholesale Code that prohibits BDUs and programming services from establishing terms and conditions for the distribution of programming that are commercially unreasonable, including by restricting consumer choice."[11]

48. With respect, CCSA disagrees.

[9] Rogers Supplementary Brief at para. 3
[10] Rogers Supplementary Brief at para. 50.
[11] Rogers Supplementary Brief at para. 30.

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49. As the Commission is aware, the VI companies have been very busy challenging the Commission's competitive safeguard rules in the courts. Recent challenges have been made to the Commission's authority to implement the *Wholesale Code* by way of a mandatory order and to its authority to establish the "standstill rule" by regulation.

50. Generally, the VI companies continue to advance a position that the Commission has no authority to interfere in commercial arrangements between private parties. While the recent Federal Court of Appeal decision[12] regarding validity of the "standstill rule" found otherwise, we have no reason to believe these challenges will diminish.

51. Furthermore, in CCSA's experience, the Commission's dispute resolution processes, while they may appear "rigorous" on paper, have not proved to offer anything close to the protections that independent broadcasting undertakings need in the face of the threats posed by the VI companies.

52. CCSA continues to experience intense frustration with open-ended mediation processes which the Commission allows to run for extremely long periods even as the independent BDUs suffer continuing and substantial economic harms including, especially, mounting and unrecoverable retroactive liability for wholesale fees.

53. CCSA is especially concerned that its urgent formal Part 1 applications for relief in the face of anti-competitive practices, such as the denial of access to programming pending formal contract renewals, are being permitted to lie fallow for long periods of time without so much as any form of written response from the Commission.

54. As the Commission knows, one such application has now been permitted to lie dormant for well over a year despite its urgent nature. As that application asserts, some CCSA members are being prevented entirely from executing their business plans by the anti-competitive actions of which CCSA has complained.

[12] 2021 FCA 153.

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55. CCSA considers that the Commission's failure to address such matters promptly and, indeed, in compliance with its own published service standards amounts to a denial of due process, procedural fairness and natural justice.

56. While CCSA acknowledges the existence of numerous competitive safeguards in the Commission's policies, such safeguards are worth nothing if they are not enforced in an effective and timely manner. In fact, the failure to backstop such safeguards with effective enforcement is imposing new harms on the independent BDUs that CCSA represents.

57. In light of those facts, CCSA is deeply concerned that approval of the proposed transaction will elevate the competitive threat to the independents posed by the untrammeled VI companies.

58. In that environment, the existence of associations such as CCSA and the IBG becomes all the more critical to the survival of independent undertakings and their ability to provide choice and competitive pricing to Canadians.

59. Again, as the Commission is aware, the VI companies repeatedly challenge CCSA's authority to act for its members in negotiation and in the Commission's dispute resolution proceedings.

60. The Commission should put an end to that practice once and for all.

61. If the Commission is to permit continued consolidation of broadcasting undertakings and market power in the hands of the VI companies, then it must put its will and resources squarely behind timely and effective enforcement of the competitive safeguards it has introduced.

62. Otherwise, as CCSA has stated, the future appears to be the elimination of the independent broadcasting undertakings and the emergence of a near-complete broadcasting duopoly.

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63. That result can only result in more limited choices and higher prices for Canadian broadcasting consumers.

Conclusion

64. CCSA's primary concern, within the limited scope of this proceeding, is with the continued availability of wholesale satellite and terrestrial transport services at reasonable prices and on reasonable terms.

65. We remain deeply concerned that, without adequate competitive safeguards, it will be entirely possible for the SRDU and TRDU involved in the proposed transaction to either increase the rates for such services to unreasonable levels or to simply deny access to those services to CCSA members.

66. CCSA therefore recommends the application of competitive safeguard rules to the SRDU and TRDU which are comparable to those in the *Wholesale Code* and, with respect to undue preference, dispute resolution and standstill, those in the *Broadcasting Distribution Regulations*.

67. While Corus undertakings are not part of the proposed transaction, CCSA remains concerned with the relationships between the parties involved and the financial incentives for Corus, under SFLT ownership, to contribute to the success of the Rogers BDUs.

68. CCSA urges the Commission to examine those relationships closely, to consider the possible effect of such incentives, to monitor the relationship between Corus and the Rogers BDUs closely and to respond quickly and effectively to any preferences or other anti-competitive practices such scrutiny may uncover.

69. Finally, from CCSA's point of view, the Commission's dispute resolution processes are not working. Those processes are permitted to operate in an open-ended manner, without defined timelines, even as independent BDUs suffer substantial ongoing harms.

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70. It is simply untenable and inconsistent with the Commission's mandate that urgent applications for relief from anti-competitive abuses are simply allowed to lie fallow for extended periods in violation of the Commission's own published service standards.

71. We say again, that, without timely and effective enforcement, all the competitive safeguards in the world are worth nothing.

72. As it considers approval of this application, the Commission must deal with the matter of how it will effectively enforce any conditions it places on the approval of a proposed transaction which amounts to a fundamentally important change in the structure of Canada's broadcasting sector.

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

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