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Director General
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Industry Canada
16th Floor, 300 Slater Street
Ottawa, Ontario K1A 0C8

Subject : Industry Canada public consultation on options for the foreign investment restrictions in the telecommunications sector

Please find enclosed the submission of Astral Media Inc. in connection with the consultation paper *Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform* issued by Industry Canada.

We are pleased to have the opportunity to file our submission in this consultation.

Regards,

A handwritten signature in black ink, appearing to read 'S. Émond', with a long horizontal flourish extending to the right.

Sophie Émond
Vice president
Regulatory and Government Affairs

Encl.



**SUBMISSION IN RESPONSE TO
INDUSTRY CANADA PUBLIC CONSULTATION
ON OPTIONS FOR THE FOREIGN INVESTMENT RESTRICTIONS
IN THE TELECOMMUNICATIONS SECTOR**

ASTRAL MEDIA INC.

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Introduction

1. Astral Media Inc. (“Astral”) is a leading Canadian media company, fully engaged in the development of a thriving digital economy. Astral owns and operates 83 radio stations in over 50 markets in all regions of Canada, and 19 pay and specialty television services, including some of the country's most popular services such as The Movie Network, TELETOON, Canal D and VRAK.TV.
2. We run over 100 consumer websites attracting millions of Canadian visitors each month, and we also distribute our services over the Internet and mobile networks. Astral also operates major out-of-home advertising platforms including Canada's first and only national digital out-of-home advertising network.
3. As a broadcasting company, and therefore a user of telecommunications services, Astral will restrict its comments in this submission to the potential consequences of this debate for the broadcasting sector. Consequently, in this submission we do not intend to comment directly on the benefits and drawbacks to the telecommunications sector of changing the rules for foreign ownership.

Increasing Integration of Broadcasting and Telecom

4. Broadcasting and telecommunications are closely linked. Both are users of wireless and wired connections, and while over-the-air television and radio have always deployed their own independent transmission facilities, broadcasting has gradually increased its reliance on telecom facilities owned by others. Now, in 2010, the vast majority of Canadians use connections provided by satellite, cable, phone, internet and wireless providers to access television broadcasting services.
5. Perhaps because of this facilities-based relationship, our current business environment is characterized by increasing corporate integration between the two sectors. At the time that the foreign ownership rules were initially adopted, there was little or no vertical integration among Canada's media companies. The ownership patterns generally reflected “silos”, in which distribution and

programming activities were carried out by separate and distinct unaffiliated entities. However, the current environment is marked by far more ownership concentration and vertically integrated ownership structures.

6. Canada's largest providers of telecommunications services – the incumbent telephone and cable companies – offer consumers both telecommunications services, such as telephony and Internet services, and broadcasting distribution services – usually bundled together as a package. Some of these integrated companies also own programming services such as conventional over-the-air and specialty television channels, and even radio stations. The degree of integration varies: sometimes properties are structurally separated, but ultimately control of all properties is in large groups owned by the same shareholders.
7. Conceptually, it is possible to distinguish the functions of the two sectors on the basis of “carriage” and “content”. That is, telecommunications supplies the carriage, broadcasting supplies the content that is carried. This distinction is useful – it has allowed Canada to be successful in managing these sectors via two different *Acts* with different objectives and two different sets of regulations.
8. But in the practical world, there is an increasing blurring of functions between the two sectors that, when added to the corporate integration, solidifies the concern that changes in the telecom could affect broadcasting. The best example of this blurring occurs with Broadcast Distribution Undertakings (BDUs), who distribute broadcasting services on the same facilities used to carry telecommunications.
9. This blurring has reached the point that some BDUs have characterized themselves as providing activities similar to telecom carriers. This has the effect of understating or even downplaying the key role that BDUs have traditionally played and will continue to play in the Canadian broadcasting system.

Are BDUs like common carriers?

10. BDUs include: satellite DTH (direct-to-home) operators like Shaw Direct (formerly Star Choice) and Bell TV (formerly ExpressVu);

cable operators like Rogers, Shaw, Videotron, and Cogeco; operators using IPTV (Internet-protocol television) technologies like Telus and wireless cable operators.

11. These operators aggregate packages of television and audio services and re-sell them to subscribers, more and more often bundled with telecom services. Because of the bundling, and because every operator uses proprietary receiving equipment, it is not a simple matter for consumers to change their BDU provider. Consequently they have “gatekeeping” power over their subscribers. A television specialty service that wants to reach Rogers’ subscribers must make a deal with Rogers – no other provider is capable of reaching Rogers’ subscribers.
12. This is an unusual economic situation, almost unique to this sector. In other sectors, a manufacturer may wish to make a deal with a major retailer to stock its product, but if it cannot make a satisfactory deal, it still knows that its customers can get its product by crossing the street to another retailer. Television specialty services have no such option. If a service cannot make a deal with a BDU, all of that BDU’s customers – and their revenue – are lost to that specialty service.
13. Because of this gatekeeping power, the CRTC has established access rules that require BDUs to carry some Canadian specialty services – those now categorized as “Category A”. Category B television services, however, have no protection whatever – their businesses are carried or not at the whim of BDUs, and consequently the majority of CRTC-approved Category B television services have never launched – they cannot compete in the marketplace unless BDUs agree to carry them.
14. Even those services that have access rights have little protection as the regulations now allow BDUs complete freedom to package them any way they wish. Services may find their revenue dropping suddenly and dramatically if BDUs decide to move them from a service package that is popular with subscribers to one with little appeal.
15. The reason for explaining these relationships here is simply to point out that while BDU operators may describe themselves as similar to

telecom carriers, they are anything but. Both BDUs and telecommunication common carriers engage in the distribution of “intelligence”. However, in contrast to a common carrier, which is prohibited under the *Telecommunications Act* from controlling the content or influencing the meaning or purpose of telecommunications carried by it to the public, one of the central roles of a BDU is precisely to control the content distributed to the public (BDU subscribers).

16. When a BDU offers television programming to its subscribers, unlike a pure common carrier, it has an active role in “controlling or influencing” the content that it offers to subscribers: the BDU makes critical decisions about which services to market, promote and offer to its subscribers, as well as the appropriate level of resources that should be devoted to such marketing and promotion. It also negotiates vital wholesale prices and sets program packages, sets retail prices and programs promotion channels.
17. BDUs are content aggregators, packagers, and marketers, and their decisions have a huge impact on what content Canadians watch – even more so now that the CRTC is “lightening” the rules which govern their content distribution decisions.

Changes in Telecom ownership rules can therefore have a significant impact on de facto control of broadcasting

18. In this environment, it is clear that changes in telecommunications ownership have the potential to create real impacts in the world of broadcasting. If telecommunications companies are foreign-owned, and they continue to own BDUs as they do now, there may well be unintended consequences within the area of broadcast programming, including a potential loss of Canadian control.
19. The government is certainly concerned with control over broadcasting, and in fact states, in the consultation paper,

With respect to broadcasting content and culture, the government will not consider any action that could impair its

ability to pursue Canadian culture and content policy objectives¹.

20. Astral agrees with this position, and therefore submits that no action should be taken with regard to foreign ownership in the telecommunications sector without first completing a thorough study of those actions' potential impact in broadcasting, and without the adoption of safeguards to ensure that control of broadcasting will remain in Canadian hands, as required by the *Broadcasting Act*.
21. Astral notes the government's criterion that it will "not consider any action that could impair its ability to pursue Canadian culture and content policy objectives". This is a high standard: it demands that the consideration of the impact on broadcasting be undertaken now, and not deferred to the future, after decisions have been taken regarding foreign ownership in telecom.

Astral proposes a Broadcasting Policy Review Panel

22. The discussion of the impact of telecom ownership changes on broadcasting is not new, though it cannot yet be considered comprehensive or thorough. Astral and others have put forward submissions to the Telecommunications Policy Review, the Competition Policy Review, and before the Parliamentary Standing Committee on Industry, Science and Technology.
23. The consideration of unintended consequences in the broadcasting sector is complex, and will require special expertise to determine how appropriate remedial actions could be adopted. There are different kinds of broadcasting undertakings – which actions are appropriate to which entity? Where can conduct remedies be preserved or re-introduced? And what should they consist of?
24. Astral therefore proposes the establishment of a Broadcasting Policy Review Panel to undertake this task. Astral previously proposed such a Panel in the context of the Digital Economy consultation; this work would extend that Panel's mandate. The

¹ P. 8, "Opening Canada's Doors to Foreign Investment in Telecommunications"
June 2010

panel would conduct a searching examination and recommend consequential solutions before modifications to telecommunications ownership rules are adopted.

25. In addition, Astral submits that the time required for such an examination is available, since the evidence placed on the record in recent months indicates that there is no current crisis requiring foreign capital. Canadian sources appear to be sufficient to supply capital for well-founded competitors. The nearest event that could cause a demand for foreign capital in telecommunications is likely the upcoming government spectrum auction of frequencies in the 700 MHz band, and it would not be fair to those who participated in the recent spectrum auction to change the rules for their potential competitors shortly after they have launched.

What unintended consequences should be considered?

26. This submission is not the place to attempt a comprehensive list of the unintended consequences that might result from greater foreign ownership in telecommunications or broadcasting.
27. However, it is useful to consider some examples that show how the worlds of broadcasting and telecommunications intersect, since not all of the parties involved in this discussion are familiar with economic relationships in the broadcasting world. Astral is not arguing that the scenarios described here would occur exactly as described, but believes that these and others must be examined carefully, in part because of their nuances and complexity.

Foreign ownership of program undertakings

28. Our first concern relates to the issue of cross-ownership, specifically a situation in which a non-Canadian who acquires control of a Canadian BDU (e.g. satellite or cable television distributor), also acquires (or retains) a voting interest in a Canadian programming undertaking (e.g. an over-the-air or specialty television station.)
29. In this context, the combination of BDU ownership and programming ownership creates a total interest that goes beyond the spirit of the *Broadcasting Act*. For a foreign investor who owns

a Canadian BDU to hold a significant voting interest in a Canadian channel would constitute an unacceptable level of influence over programming decisions.

30. Astral submits that no remedial conduct measure would effectively capture the concern that the current structural foreign ownership limitation on broadcasting undertakings is aimed to prevent. The potential for influence is magnified by the fact that under the current rules, non-Canadian media companies are permitted to take significant minority ownership stakes in Canadian programming services. Once you introduce non-Canadian BDU control alongside existing cross-ownership of programming services, it becomes far more difficult to ensure continued Canadian control over programming decisions, thereby placing the “checks and balances” of our current system at risk.
31. Therefore, any liberalization of the current rules governing non-Canadian control over BDUs could easily result in an unacceptable level of influence by non-Canadians over the broadcasting system. This could occur, even if the programming ownership rules remain unchanged. It is not simply a matter of a U.S.-owned BDU operating in Canada complying with CRTC requirements.
32. If, ultimately, changes to the BDU ownership rules are recommended, Astral submits that “ownership limitations” should be introduced: if a non-Canadian acquires control of a Canadian telecommunications company or a BDU, it would be limited from thereafter acquiring or retaining any interest in a Canadian programming company.

BDUs and the issue of “undue preference”

33. In addition, we should consider the situation in which a foreign owned telecommunications company owns a Canadian BDU and also has ownership in foreign television services that may be authorized for carriage in Canada.
34. As noted above, BDUs have gatekeeper power over the economic strength of Canadian specialty services, and will soon have complete freedom to re-package services. This relaxed regulatory situation is not one in which Canadian cultural policy would be

furthered if a foreign-owned BDU had an economic interest in preferring a foreign service to a Canadian service, thereby putting Canadian services at a disadvantage.

35. Currently, BDU behaviour may be controlled by Commission rules prohibiting “undue preference” in a BDU’s programming decisions. This tool has not been completely reliable as a protection for Canadian services in the past; they have sometimes found that the BDU decision that arbitrarily assigned them a new channel number or packaging position was not ruled “undue”. Moreover, the regulator has neither the resources nor the inclination to “micro manage” the BDU-programmer relationship.
36. In short, in this situation, the opening up of foreign ownership in telecom could create unintended consequences in broadcasting, which must be addressed. Some might argue that foreign ownership should not be permitted in the case of BDUs – and that therefore full or partial divestiture of BDUs would be required from foreign-owned telecom companies.
37. For its part, while Astral sees divestiture as a solution to foreign ownership of program undertakings, for BDUs we see the application of stricter conduct remedies, rather than divestiture. We must note, however, that the retention or re-imposition of stricter regulation would represent a change in direction for regulators – and therefore adds to the urgency of ensuring a full study of consequences and their remedies.

Context: the relationship of US and Canadian Services

38. To understand the consequences anticipated above, it may be useful to describe the unique forces governing the economics of English Canadian programming undertakings in their relation to US services.
39. Canadian licensees have obligations to carry a certain amount of Canadian programming, which may be unprofitable due to the size of the Canadian market. They pay for these obligations through the profits of imported American programming. In many cases, the programming is imported via a general program supply agreement with an American service, which chooses not to attempt to be

authorized for direct entry into Canada, but instead sells its programming, and often its branding, to an equivalent Canadian service. Discovery Channel Canada, History Channel Canada, and many others exemplify this market/regulatory strategy.

40. In the scenarios noted above, foreign services would have much less interest in such supply arrangements – their affiliated BDUs in Canada would try to help them serve the Canadian market directly without regulatory hindrance or the obligations of a Canadian licence. Under such circumstances, these foreign services – operating outside the CRTC’s jurisdiction – might well refuse to sell program rights to Canadian services. Were they to withdraw their program supply agreements, Canadian services – and a great deal of Canadian programming – would lose its economic underpinnings.
41. Again, Astral is not arguing that these scenarios will occur as described. Nor are we trying to overwhelm the reader with the complexity of the business and regulatory relationships in broadcasting. Our point is simply that it is a complex situation in which long-standing balances in the market could be upset by a change in rules, and that therefore a review of the complete situation is necessary before irrevocable steps are taken.

Considerations Around Option 1

42. While still maintaining the Review panel is required before decisions are taken, Astral notes that of the three options presented in the Discussion Paper, Option 1, if understood correctly, would be preferred. However, we have one concern around the interpretation of this Option.
43. If we understand this option correctly, it is intended to capture the proposal made by the CRTC, in which both broadcasting and telecommunications would be subject to the same rule. Since broadcasting entities cannot be majority foreign owned, the proposal is to limit foreign voting ownership of a Canadian operating company to 49% by both direct and indirect means.

Here is a simple approach consisting of two rules that we propose. First, no foreign entities should be allowed to own directly or indirectly more than 49% of the issued voting shares

of a Canadian communications company. Secondly, no foreign entity should have control in fact of a Canadian communications company. This would apply to all communications companies, whether engaged in telecommunications or broadcasting. It would also apply to both incumbents and new entrants².

44. We understand the “direct and indirect” provision to mean that no combination of holding company and operating company interests could result in more than 49% foreign voting control in the operating company. In Astral’s view, this is a proposal that could minimize the unintended consequences of relaxed ownership rules on broadcasting.
45. We note however that the mechanics of Option 1 in the discussion paper may need further changes to get to the intended result.
46. The discussion paper proposes that section (b) of the Direction to the CRTC (Ineligibility of non-Canadians) would be amended, permitting 49% ownership of an operating company. However, it mentions that, “All other current provisions ... would remain unchanged”. This suggests that Section (c) of that Direction, which governs the holding company, would remain unchanged, and would therefore continue to permit 33 1/3% foreign ownership of the holding company as well.
47. It would appear, then, that an operating company could be 49% directly owned by a non-Canadian, while the 51% owned by a Canadian holding company could be 33 1/3% owned by non-Canadians. The total “direct and indirect” foreign ownership and control of the Canadian broadcasting licensee would then exceed 50%, which would be contrary to the meaning and intent of the *Broadcasting Act*, and of the proposal made by the CRTC.

Options 2 and 3

48. Options 2 and 3 appear to involve only telecommunications companies, would have no impact on broadcasting, and

² Konrad von Finckenstein; (appearing before the Standing Committee on Industry, Science and Technology on Tuesday, April 13, 2010)

consequently ought to be beyond the scope of Astral's comments here.

49. However, that is only the case if BDUs are not classed as telecommunications companies but are rightly considered broadcasting undertakings and subject to the *Broadcasting Act*. Under that correct understanding, if option 2 or 3 were adopted, any telecommunications company that exceeded the foreign ownership rules for broadcasting would have to make separate ownership arrangements for its broadcasting assets, including BDUs, that would bring it back into compliance with the rules for broadcasting.
50. Many of the benefits of corporate integration might be compromised in such a situation, but it would be necessary, since, as noted above, BDUs are not common carriers but exert significant control over the content that Canadians watch. This is another reason to prefer Option 1, if an option must be adopted before a complete study of consequences can take place.

Conclusion

51. In conclusion, Astral recommends the appointment of a Broadcasting Policy Review Panel, which would make general recommendations concerning broadcasting in the digital economy and specifically would be charged with analyzing in detail the impact of changes in telecommunications ownership on broadcasting. It would make recommendations on how unintended consequences of changes in the foreign ownership of telecommunications companies can be prevented from eroding Canadian control of broadcasting. It would look at a comprehensive set of consequential scenarios and recommend appropriate measures.
52. However, should the government feel that such a process is not required, and should it decide to adopt changes in foreign investment in telecommunications, then the proposal put forward by the CRTC, implemented so that foreign ownership and control of Canadian operating companies cannot exceed 49% control, whether held directly or indirectly, will have the most manageable



consequences for the Canadian broadcasting system, since this proposal would prohibit majority foreign ownership of BDUs and program undertakings.

53. Astral thanks the Department for this opportunity to comment on this important issue.

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