

**BEFORE THE CANADIAN RADIO-TELEVISION
AND TELECOMMUNICATIONS COMMISSION**

IN THE MATTER OF

**AN APPLICATION BY COMPETITIVE NETWORK OPERATORS OF CANADA
PURSUANT TO SECTIONS 24, 27, 47 AND 57, SUBSECTION 61(1) AND PARAGRAPH
32(G) OF THE *TELECOMMUNICATIONS ACT* AND PART 1 OF THE *CANADIAN
RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RULES OF
PRACTICE AND PROCEDURE***

**FOR AN EXPEDITED AND TEMPORARY RESALE REMEDY FOR COMPETITIVE
ACCESS TO INCUMBENT FIBRE-TO-THE-PREMISES FACILITIES**

8 JANUARY 2021

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EXECUTIVE SUMMARY¹

ES1. Canadians were promised service-based competition over Incumbent FTTP access facilities more than five years ago. That promise has yet to be fulfilled. The current regulatory regime does not support a workable path to the wholesale HSA services required to make this happen. While efforts to remedy the situation continue, a comprehensive and stable solution is at least two to three years away.

ES2. In the interim, the ILECs' FTTP rollout programs are very advanced, cover large portions of the country and are continuing at a significant pace. In addition, the demand by Canadian consumers for the higher broadband service speeds facilitated by that technology continues to increase rapidly. Without a viable wholesale FTTP option, competition in the provision of retail broadband services, which is already being eroded, will continue to deteriorate. Incumbents have been enriched by an extended regulatory holiday that has allowed them to exercise unfettered market power over retail FTTP-based Internet services.

ES3. This situation has gone on for far too long. The Commission has a legal duty to act now and end a worsening situation of undue preference. Doing so requires little more than applying a tried and tested approach that the Commission has consistently pulled from its regulatory toolbox to facilitate temporary wholesale access: retail Internet service resale or "RISR".

ES4. As informed by the Commission's numerous prior applications of RISR, CNOC's proposed "FTTP RISR Remedy" would require an Incumbent to make its retail Internet access services provided over FTTP access facilities available for resale at a 25% discount from the lowest non-zero retail rate charged to an Incumbent customer in the applicable serving area during any one-month period including any discounts or credits.

ES5. Other parameters of CNOC's FTTP RISR Remedy mirror those of the Commission's prior RISR regimes. This includes requirements regarding the characteristics of the service, bulk billing, retail promotions, equipment, service charges and more.

ES6. In order for this remedy to work, it will be particularly important for the Commission to specify very clearly how three aspects of the regime are to be applied.

¹ Note: Capitalized terms in the Executive Summary not defined therein are defined in the body of the Application.

ES7. First, FTTP RISR Remedy serving areas must be the same as the serving areas for Incumbents' aggregated wholesale HSA services, and rollout should occur simultaneously in all serving areas. This requirement avoids any prolongation of Incumbent head-starts that would otherwise occur.

ES8. Second, competitors must not be subject to any limitations on their intended use of resold Internet services over FTTP (e.g., prohibitions on use for telephony or video) that are not also present in the wholesale aggregated HSA tariffs of the Incumbents. This requirement prevents arbitrary restraints on the use of resold Internet services for the provision of a wide range of services to Canadians that require broadband connectivity.

ES9. Third, the FTTP RISR Remedy must continue until the Commission makes final determinations in all of the Outstanding HSA Proceedings.² Until then, the wholesale wireline framework will remain mired in a high level of regulatory uncertainty. The FTTP RISR Remedy will provide much needed support during this period.

ES10. It should also be emphasized that under the FTTP RISR Remedy, wholesale rates are always final since they are based on an Incumbent's retail rates. Accordingly, the remedy does not present any risk of regulatory uncertainty associated with potential retroactive adjustments.

ES11. Altogether, the FTTP RISR Remedy consists of a highly effective temporary solution to the absence of a viable wholesale FTTP option. The regime can be implemented almost immediately with minimal regulatory lag. If adopted, the remedy would end the Incumbents' regulatory holiday and create opportunities for entry in market segments that have been starved of competition for the better part of a decade. This outcome will significantly further the telecommunications policy objectives and the Policy Directions.

ES12. While the FTTP RISR Remedy is essential in these circumstances, CNOC notes that this Application should not be interpreted as an endorsement of resale or retail-minus rate-setting as a general practice. As always, the preferred approach involves interconnection-based wholesale access services with just and reasonable rates based on Phase II costs plus a reasonable mark-up.

² These proceedings include the one initiated by Telecom Notice of Consultation CRTC 2020-187, subsequent tariff proceedings, and any other proceedings related to the wholesale HSA framework up to and including the Commission's upcoming wholesale wireline services review.

1.0 INTRODUCTION, NATURE OF ORDER SOUGHT AND STRUCTURE OF SUBMISSION

1.1 Nature of order sought

1. Competitive Network Operators of Canada (“CNOc”) is submitting this application (“Application”) pursuant to Part 1 of the *Canadian Radio-Television and Telecommunications Commission Rules of Practice and Procedure*³ (“Rules”) and sections 24, 27, 47 and 57, subsection 61(1) and paragraph 32(g) of the *Telecommunications Act*⁴ (“*Telecommunications Act*”).

2. In the Application, CNOc seeks expedited relief to end the undue preference that ILECs⁵ and/or Cable Carriers⁶ (individually, each an “Incumbent”⁷; collectively, “Incumbents”) are conferring upon themselves with respect to the provision of retail Internet services (“IS”) over fibre-to-the-premises (“FTTP”) access facilities when no workable corresponding wholesale high-speed (“HSA”) service exists by which services-based competitors, such as CNOc members, can provide their own retail IS and other services that require broadband connectivity over those facilities.

3. Bringing an end to this undue preference as quickly as possible is critically important since, as acknowledged by the Commission in Telecom Decision CRTC 2018-44⁸ (“TD 2018-44”), “[c]urrently, aggregated HSA is the primary Commission-mandated wholesale service through which competitor Internet service providers (ISPs) [competitors] offer services such as retail Internet access, voice over Internet Protocol (VoIP), and Internet Protocol television (IPTV) services.”⁹

³ SOR/2010-277, as am. to 6 August 2015.

⁴ S.C. 1993, c. 38, as amended [“*Telecommunications Act*.”]

⁵ Bell Canada (“Bell”) including Bell Aliant which is a division of Bell Canada as well as Bell MTS, Saskatchewan Telecommunications (“SaskTel”) and TELUS Communications Inc. (“TELUS”).

⁶ Bragg Communications Incorporated, operating as Eastlink (“Eastlink”), Cogeco Communications Inc. and any predecessor (“Cogeco”), Quebecor Media Inc., on behalf of its affiliate Videotron G.P. and any predecessor (“Videotron”), Rogers Communications Canada Inc. and any predecessor (“Rogers”) and Shaw Cablesystems G.P. and any predecessor (“Shaw”).

⁷ Note: In this Application, CNOc also sometimes uses “Incumbent” as an adjective.

⁸ *Canadian Network Operators Consortium Inc. – Application for transitional access to incumbent carriers’ fibre-to-the-premises facilities through aggregated wholesale high-speed access services*, Telecom Decision CRTC 2018-44, 2 February 2018 [“TD 2018-44”], the Commission stated: “Currently, aggregated HSA is the primary Commission-mandated wholesale service through which competitor Internet service providers (ISPs) [competitors] offer services such as retail Internet access, voice over Internet Protocol (VoIP), and Internet Protocol television (IPTV) services.” [Emphasis added.]

⁹ *Id.*, at para 5 (emphasis added).

4. On that basis, CNOC is seeking an expedited order requiring the Incumbents to provide retail IS resale (“RISR”) of all retail IS they provide over their FTTP access facilities on a wholesale basis in accordance with the regime established in Telecom Decision CRTC 99-11¹⁰ (“TD 99-11”), Telecom Decision CRTC 2003-87¹¹ (“TD 2003-87”), Telecom Decision CRTC 2004-24¹² (“TD 2004-24”) and Telecom Decision CRTC 2016-67¹³ (“TD 2016-67”) (collectively, the “Cable Carrier RISR Decisions”), until such time as the Commission varies or rescinds this requirement following its determinations in the proceeding initiated by Telecom Notice of Consultation CRTC 2020-187¹⁴ (“TNC 2020-187”), subsequent tariff proceedings, and any other proceedings related to the wholesale HSA framework up to and including the Commission’s upcoming wholesale wireline services review¹⁵ (the foregoing proceedings collectively called “Outstanding HSA Proceedings”).

1.2 Rationale for Application

5. In Telecom Regulatory Policy CRTC 2015-326¹⁶ (“TRP 2015-326”), the Commission confirmed that applying its Essentiality Test to wholesale HSA services supported mandating the access component, including FTTP access facilities.¹⁷ Accordingly, Incumbents were required to provide wholesale HSA services over FTTP facilities, albeit only over disaggregated wholesale configurations that had yet to be established at that time.¹⁸ The Commission’s intent was for the provision of aggregated wholesale HSA services to no longer be mandated for the Incumbents under certain conditions and subject to an appropriate transition plan to corresponding

¹⁰ *Application concerning access by Internet service providers to incumbent carriers’ telecommunications facilities*, Telecom Decision CRTC 99-11, 14 September 1999 [“TD 99-11”].

¹¹ *Application by Cybersurf seeking resale of Shaw higher-speed retail Internet service*, Telecom Decision CRTC 2003-87, 23 December 2003 [“TD 2003-87”].

¹² *Cybersurf Corp. v. Shaw Cablesystems G.P. – Enforcement of Telecom Decision CRTC 2003-87*, Telecom Decision CRTC 2004-24, 2 April 2004 [“TD 2004-24”].

¹³ *The Canadian Network Operators Consortium Inc. – Application for relief regarding the pricing and availability of Eastlink’s higher-speed retail Internet service for resale*, Telecom Decision CRTC 2016-67, 24 February 2016 [“TD 2016-67”].

¹⁴ See *Call for comments – Appropriate network configuration for disaggregated wholesale high-speed access services*, Telecom Notice of Consultation CRTC 2020-187 (“TNC 2020-187”), 11 June 2020.

¹⁵ This proceeding was scheduled to commence in the 2020-21 fiscal year, but has not been initiated. See Canadian Radio-television and Telecommunications Commission, 2020-21 Departmental Plan, at p. 7.

¹⁶ *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015 [“TRP 2015-326”].

¹⁷ TRP 2015-326, at para 137.

¹⁸ TRP 2015-326, at para 143.

disaggregated HSA services (“Transition Plan”).¹⁹ The Commission also decided that disaggregated wholesale HSA services should be implemented in phases, with the first rollout occurring in Ontario and Quebec.²⁰

6. It has now been more than five and half years since TRP 2015-326 was issued and, despite the Commission’s subsequent work to define disaggregated HSA service configurations in Telecom Decision CRTC 2016-379²¹ (“TD 2016-379”), a workable disaggregated configuration does not exist anywhere in Canada. The net result is that Incumbents that provide retail IS and other broadband services over FTTP facilities have benefitted (and continue to benefit) from an unjustified and lengthy head-start (which is effectively a “regulatory holiday”) with respect to the provision of such broadband services to the public. Under this *status quo*, Canadians are deprived of competitive choices for broadband services.

7. Since the attempt to create demand for disaggregated HSA services has been ineffectual, any concerns the Commission may have had since TRP 2015-326 was issued that, requiring Incumbents to provide wholesale access to their FTTP facilities would undermine the Transition Plan, are simply moot.²² The Transition Plan does not work and cannot work, as presently constructed, a fact that has been acknowledged by the Commission in TNC 2020-187.²³

8. Fortunately, a requirement for the Incumbents to provide RISR for their retail IS provided on FTTP access facilities (“FTTP RISR Remedy”) can be implemented very quickly and in the same manner as the Commission has done in the case of certain Cable Carriers²⁴ more generally (“General RISR Remedy”) before they introduced third party Internet access (“TPIA”).²⁵ Doing so now will ensure that Canadians have competitive choices in the delivery of the higher-speed IS services delivered over FTTP that are increasingly demanded.

¹⁹ *Ibid.* The details of the Transition Plan are set out at paragraphs 144-160 of TRP 2015-326.

²⁰ *Id.*, at para 152.

²¹ Those efforts included *Follow-up to Telecom Regulatory Policy 2015-326 – Implementation of a disaggregated wholesale high-speed access service, including over fibre-to-the premises access facilities*, Telecom Decision CRTC 2016-379, 20 September 2016 [“TD 2016-379”].

²² These concerns were summarized at para 70 of TD 2018-44.

²³ TNC 2020-187, at paras 11-17.

²⁴ Namely, Shaw and Videotron.

²⁵ Which is what Cable Carrier wholesale HSA services are also called.

9. In this Application we provide the justification for the expedited implementation of the FTTP RISR Remedy and explain how it will work in practice.

1.3 Structure of Application

10. The balance of this submission is structured as follows:

(a) In Part 2.0 of the Application, we provide a brief history of the roll out of FTTP by Incumbents and contrast that with the regulatory treatment of FTTP access facilities by the Commission;

(b) Part 3.0 clarifies how recent developments confirm that the Commission's Transition Plan does not work and cannot work under prevailing circumstances, leading to the urgent need for the Commission to implement the FTTP RISR Remedy;

(c) In Part 4.0 we explain how the General RISR Remedy constitutes a compelling precedent for the application of the FTTP RISR Remedy;

(d) Part 5.0 demonstrates that the FTTP RISR Remedy promotes the telecommunications policy objectives set out in section 7 of the *Telecommunications Act* ("Policy Objectives") and is consistent with the 2006 Policy Direction²⁶ and 2019 Policy Direction;²⁷ and

(e) Part 6.0 contains our conclusion.

²⁶ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006, SOR/2006-355, Canada Gazette Part II, Vol. 140, No. 26, 27 December 2006 ["2006 Policy Direction"].

²⁷ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227 ["2019 Policy Direction"].

2.0 HISTORY OF ILEC FTTP ROLL OUT AND THE REGULATORY TREATMENT OF FTTP

2.1 Incumbent roll outs of FTTP are significant and have been accelerating in recent years to meet consumer demand for higher IS speeds

11. While some Cable Carriers are deploying their own FTTP access facilities,²⁸ they are already currently able to provide retail IS, and required to provide corresponding HSA services, at 100 Mbps and higher download speeds over their existing DOCSIS²⁹ 3.1 hybrid fibre-coaxial (“HFC”) network architectures.³⁰

12. By contrast, ILECs can only provide retail IS at those speeds over their FTTP facilities,³¹ and they are only required to provide corresponding HSA services involving those facilities over disaggregated HSA configurations,³² yet there are no workable disaggregated HSA configurations. Accordingly, competitors are unable to obtain any wholesale HSA service at speeds of 100 Mbps or higher over ILEC access facilities.³³

²⁸ For example, see Cogeco Communications Inc. 2020 Annual Report, at p. 12. (http://corpo.cogeco.com/cca/application/files/7216/0384/7641/CCA.Q4.2020_-_Annual_Report_FINAL_SEDAR_1.pdf); See also Shaw Communications Inc. 2020 Annual Report, at p. 26 (https://images.ctfassets.net/tzb4ihmthaev/7MpVmb2gWeJQQ5Bjy7TG2F/9f4d9d9c78c15a72979e9d3b4cda6454/2020_Annual_Report_Filing_Version_PDF); See also Rogers Communications Inc. 2019 Annual report, at pp. 33 and 43 (https://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE_RCI_2019.pdf).

²⁹ Data over Cable Service Interface Specifications.

³⁰ For example, Appendix 1 to *Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services*, Telecom Order CRTC 2019-288, 15 August 2019 [“TO 2019-288”] confirmed that, as of the date of the order, Rogers highest approved service speed bands was for HSA service speeds between 751 and 1,024 Mbps. The corresponding highest speed bands for the other Cable Carriers were: (1) Cogeco – 121 to 250 Mbps; (2) Eastlink – 401 – 940 Mbps; (3) Shaw – 251 to 500 Mbps; and (4) Videotron – 501 to 1,000 Mbps.

³¹ For example, the highest non-bonded HSA service speed available over Bell fibre-to-the node (“FTTN”) access facilities, which can be accessed by competitors over aggregated HSA in Ontario and Quebec, is 50 Mbps downstream and 10 Mbps upstream in the case of a non-bonded services and 100 Mbps downstream and 10 Mbps upstream over two bonded connections, as set out in Item 5440.4(d) of Bell Canada General Tariff CRTC 6716. In the case of Manitoba, an unbonded service having a download speed of up to 75 Mbps and a bonded service having a speed of up to 100 Mbps are available over FTTN facilities in certain locations. See Item 5830.6 of Bell MTS Special Services and Facilities Tariff CRTC 24002. In the case of the Atlantic Provinces, maximum speeds over FTTN are 13 Mbps for business connections and 15 Mbps for residential connections. See Item 640.3 of Bell Aliant General Tariff CRTC 21491. In the case of SaskTel, the highest available FTTN speed is 50 Mbps. See SaskTel Competitor Access Tariff CRTC 21414. In the case of TELUS, non-bonded service having a speed of 50 Mbps is available and bonded services having speeds of up to 75, 100 or 150 Mbps are available over FTTN. See Item 226.3 of TELUS Carrier Access Tariff CRTC 21462.

³² TRP 2015-326, at para 143.

³³ One outlier is the TELUS 150 Mbps bonded aggregated HSA service speed, which is available over FTTN facilities, but since such services are distance-sensitive, it is not clear how widespread the actual availability of

13. As a result of the differences between Cable Carrier and ILEC networks, ILEC FTTP rollout has been essential for ILECs, so that they can keep up with the higher retail IS speeds that the Cable Carriers can offer over their HFC networks. As a result, ILECs have been deploying FTTP for many years.

2.1.1 Bell's FTTP rollout

14. As early as **February 4, 2010**, Bell announced an FTTP deployment³⁴ and Bell has never looked back. As Bell recently stated: “The rollout of our world-leading all-fibre network across 7 provinces continues apace alongside our unprecedented deployment of broadband Internet service to rural Canada.”³⁵ In fact, Bell’s rollout of all-fibre connections across its wireline footprint “reached over 5.1 million homes and businesses, 53% of target, by the end of 2019”.³⁶ Bell’s Toronto fibre project was largely completed in 2019, and Bell continues its major fibre build throughout Montréal, and is in the process of adding all-fibre links “to more than 200,000 residential and business locations in Hamilton and 275,000 in Winnipeg”.³⁷ This deployment is not limited to large urban centres.³⁸

15. FTTP technology empowers Bell to provide home Internet speeds as high as 1.5 Gbps.³⁹ It also drives significant cost reductions. For example, Bell estimates that its FTTP network rollout has reduced truck rolls by 24%.⁴⁰

this service is. Moreover, other ILECs only deliver much slower speeds over their FTTN-enabled aggregated HSA services. For example, SaskTel only provides a maximum speed of up to 50 Mbps over FTTN. Similarly, Bell Aliant’s top FTTN speeds are 13 Mbps for business and 15 Mbps for residences. See, *infra*, note 31.

³⁴ BCE Inc., “Bell high speed fibre rollouts enable new Internet and TV services”, February 4, 2010 (<https://www.bce.ca/news-and-media/releases/show/bell-high-speed-fibre-rollouts-enable-new-internet-and-tv-services>).

³⁵ BCE Inc. 2019 Annual Report, at p. 7.

³⁶ *Id.*, at p. 8.

³⁷ *Id.*, at p. 10.

³⁸ As noted at page 11 of the BCE Inc. 2019 Annual Report: “Bell MTS continues to expand our fibre network in communities throughout Manitoba, including to approximately 2,800 locations in the northern City of Flin Flon and 1,600 locations in the Town of Carman. Gigabit Fibe Internet service is now available in more than 20 communities across the province. Bell MTS is also working with the Opaskwayak Cree Nation to bring direct fibre connections and the latest telecommunications equipment to all public buildings in the Indigenous community located 600 kilometres north of Winnipeg.”

³⁹ *Id.*, at p. 13.

⁴⁰ *Id.*, at p. 17.

16. At the end of 2019, more homes and commercial locations were connected by Bell *via* FTTP (i.e., 5.1 million) than by fibre-to-the premises (“FTTN”) (i.e., 4.6 million),⁴¹ yet a workable wholesale service involving FTTP access facilities remains unavailable.

17. There is also no sign that the ILECs are going to slow down their FTTP deployments any time soon. In addition to helping them match speeds that the Cable Carriers can offer over the DOCSIS 3.1 HFC platform, ILECs also perceive that FTTP deployment will give them a longer-term competitive advantage over Cable Carriers when it comes to reduced latency and upload speed potential.⁴²

2.1.2 SaskTel’s FTTP rollout

18. SaskTel started its FTTP rollout in 2013.⁴³ That rollout is continuing and not limited to larger centres.⁴⁴ As SaskTel notes:

“The FTTP program has been a priority infrastructure investment. Our FTTP measures have tracked our success in bringing fibre to customers’ homes (passes) and enrolling customers in the service (connects). The original FTTP program and these measures were based on Saskatchewan’s nine major centres. Much of this work has been completed and we are expanding our fibre network beyond these initial communities. FTTP measures for the nine major centres will no longer be included on the balanced scorecard in 2020/21.”⁴⁵

19. SaskTel recognizes that its customers are demanding the higher speed services that only FTTP can deliver.⁴⁶ To that end, it is also replacing its 10 Mbps speed target for fixed broadband in the province with a 300 Mbps target.⁴⁷

2.1.3 TELUS’ FTTP rollout

20. TELUS’ FTTP rollout is also very advanced and by the end of 2019, its PureFibre coverage was expanded to approximately 70 per cent of the TELUS high-speed broadband footprint.⁴⁸ TELUS anticipates 80 per cent coverage by the end of 2020.⁴⁹ This represents 2.22 million

⁴¹ *Id.*, at p. 32.

⁴² *Id.*, at p. 67.

⁴³ SaskTel 2019/20 Annual report, at p. 56.

⁴⁴ *Id.*, at pp. 9, 11 and 25.

⁴⁵ *Id.*, at p. 33.

⁴⁶ *Id.*, at p. 42.

⁴⁷ *Id.*, at p. 33.

⁴⁸ TELUS 2019 Annual Report, at p. 18.

⁴⁹ *Ibid.*

premises in B.C., Alberta and Eastern Quebec as of the end of 2019,⁵⁰ and includes communities of all sizes.⁵¹ This technology has enabled TELUS to provide symmetrical Internet download and upload speeds as high as 750 Mbps.⁵²

2.1.4 ILEC FTTP rollout programs are very advanced, cover large portions of the country and are continuing at a significant pace

21. Canada's three large ILECs, Bell, SaskTel and TELUS, are very advanced in their FTTP roll out programs, which show no signs of slowing down prior to their completion. This is not only confirmed by the data from the ILECs summarized above, but also by the Commission's own Communications Monitoring Report 2020⁵³ ("2020 CMR"), which shows that the percentage of Canadian households that have access to FTTP wireline facilities increased from 22% in 2015 to 44.7% in 2019,⁵⁴ and the residential IS subscriptions provided over FTTP increased from 8.1% in 2015 to 17.7% in 2019.⁵⁵ Similarly, in 2019, 28.8% of business IS revenues were earned from services provided over FTTP access facilities.⁵⁶

22. Moreover, an increasing number of Canadians are demanding the higher speeds that older ILEC technologies cannot support. For example, the share of high-speed residential IS subscriptions at speeds of 100 Mbps and above increased from 8.0% in 2015 to 41.8% in 2019.⁵⁷

23. These supply and demand conditions relating to FTTP access technology can be contrasted with regulatory developments when it comes to FTTP access which have been stagnant, as described in the following section.

2.2 There is no effective FTTP access regulation in Canada

24. ILEC FTTP rollouts started at least as early as **February 4, 2010**, enabling them to provide high-speed retail IS to their own customers at speeds greater than 100 Mbps, but no discipline was

⁵⁰ *Id.*, at p. 25.

⁵¹ *Id.*, at p. 56.

⁵² *Id.*, at p. 62.

⁵³ Canadian Radio-television and Telecommunications Commission, Communications Monitoring Report 2020 ["2020 CMR"].

⁵⁴ 2020 CMR, Table 4.1, at p. 105 and Canadian Radio-television and Telecommunications Commission, Communications Monitoring Report 2018, Table 5.1 at p. 139 ["2018 CMR"].

⁵⁵ Government of Canada Open Government, Data – Retail fixed Internet (XLSX) ("CMR Open Data Application"), at Tab N-15.

⁵⁶ CMR Open Data Application at Tab N-17.

⁵⁷ CMR Open Data Application at Tab N-F9.

imposed on the ability of the ILECs to exercise market power in pricing services provided over those facilities, since there was no requirement, at that time, for the ILECs to make available any corresponding wholesale service to their competitors in accordance with the Commission's well-established speed-matching principle.⁵⁸

25. In TRP 2015-326 issued on **July 22, 2015**, the Commission required Incumbents to provide wholesale HSA services over FTTP facilities, but only over disaggregated wholesale configurations that had yet to be established at that time.⁵⁹ The Transition Plan was established to migrate the provision of wholesale HSA services from aggregated to disaggregated configurations,⁶⁰ starting with Ontario and Quebec.⁶¹

26. In TD 2016-379 issued on **September 20, 2016**, the Commission defined configurations for disaggregated HSA, including over FTTP access facilities, in Ontario and Quebec for Bell, Cogeco, Rogers and Videotron.

27. On **March 9, 2017**, the Commission started examining configurations for disaggregated HSA, including over FTTP access facilities, outside of Ontario and Quebec.⁶²

28. On **March 30, 2017**, CNOC filed an application with the Commission pursuant to Part 1 of the *Rules* requesting transitional access to Incumbent FTTP access over aggregated wholesale

⁵⁸ The speed-matching was applied to the ILECs with respect to their copper-based HSA services in *Bell Aliant Regional Communications, Limited Partnership for services provided in the Atlantic Provinces, ADSL Access Service and ADSL WAN Service*, Telecom Order CRTC 2007-21, 25 January 2007, *Bell Canada and Bell Aliant Regional Communications, Limited Partnership for services provided in Ontario and Quebec, Gateway Access Service and High Speed Access Service*, Telecom Order CRTC 2007-22, 25 January 2007, *MTS Allstream Inc., Asymmetric Digital Subscriber Line (ADSL) Data Access Service*, Telecom Order CRTC 2007-23, 25 January 2007, *Saskatchewan Telecommunications, Aggregated Asymmetric Digital Subscriber Line (ADSL) Service*, Telecom Order CRTC 2007-24, 25 January 2007, and *Telus Communications Company, Network-to-Network Interface Service, Wide Area Network ADSL Service, and wholesale Internet ADSL Service*, Telecom Order CRTC 2007-25, 25 January 2007. The principle was affirmed for ILEC FTTN services in *Wholesale high-speed access services proceeding*, Telecom Regulatory Policy CRTC 2010-632, 30 August 2010 and actually applied to them in *Billing practices for wholesale residential high-speed access services*, Telecom Regulatory Policy CRTC 2011-703, 15 November 2011 and *Billing practices for wholesale business high-speed access services*, Telecom Regulatory Policy CRTC 2011-704, 15 November 2011. In the case of the Cable Carriers, the principle was applied in *Cogeco, Rogers, Shaw and Videotron – Third-party Internet access service rates*, Telecom Decision CRTC 2006-77, 21 December 2006 and has continued to be applied to them as they went through various upgrades of DOCSIS technology that have facilitated the provision of ever faster broadband speeds.

⁵⁹ TRP 2015-326, at para 143.

⁶⁰ *Ibid.*

⁶¹ *Id.*, at para 152.

⁶² Commission staff letter, "Follow-up process to consider implementation issues of disaggregated wholesale HSA services, including over FTTP access facilities, in other regions", 9 March 2017, CRTC File 8638-C12-201509663 (<https://crtc.gc.ca/eng/archive/2017/lt170309a.htm>).

HSA services⁶³ (“FTTP Transitional Access Application”). That application was based on a number of considerations, the most important of which were:

- (1) Wholesale HSA service gaps are occurring throughout Canada, wherever an Incumbent has deployed FTTP access facilities and there are no other wireline access facilities available from that Incumbent capable of providing high-speed Internet services, thereby foreclosing competition in the provision of retail IS and depriving consumers of the benefits of competition;⁶⁴
- (2) Such an outcome runs contrary to the Commission’s intention that the Transition Plan “will serve **to ensure that wholesale access to the access facilities required to provision downstream retail services is always provided for**”;⁶⁵
- (3) Approval of transitional FTTP access is necessary as disaggregated wholesale HSA services are far from being implemented, and the process for implementing these services outside of Ontario and Quebec had not even begun.⁶⁶

29. In Telecom Order CRTC 2017-312⁶⁷ (“TO 2017-312”) issued on **August 29, 2017** and Telecom Order CRTC 2017-312-1,⁶⁸ (“TO 2017-312-1”) issued on **September 12, 2017**, the Commission approved interim rates and other tariffed terms and conditions for the provision of disaggregated HSA services, respectively, including those provided over FTTP access facilities.

30. In TD 2018-44, issued on **February 2, 2018**, the Commission denied the FTTP Transitional Access Application⁶⁹, on the basis that:

- (1) The Commission had considered service gaps over aggregated HSA when it had made its determinations in TRP 2015-326, and expected these gaps to continue during the Transition Plan.⁷⁰
- (2) There was insufficient evidence of harm from service gaps to justify approving the FTTP Transitional Access Application.⁷¹
- (3) “... by establishing interim rates for disaggregated HSA in Ontario and Quebec in Telecom Order 2017-312, the Commission has partially addressed CNOC’s concern that

⁶³ Canadian Network Operators Consortium Inc., “Application for Transitional Aggregated Wholesale High-Speed Access Services over Incumbent Fibre-to-the-Premises Facilities”, 30 March 2017, CRTC File 8663-C182-201702598 [“FTTP Transitional Access Application”].

⁶⁴ FTTP Transitional Access Application, at paras ES1–ES4.

⁶⁵ *Id.*, at para ES5, quoting TRP 2015-326, at para 143.

⁶⁶ FTTP Transitional Access Application, at para ES9.

⁶⁷ *Interim rates for disaggregated wholesale high-speed access services in Ontario and Quebec*, Telecom Order 2017-312, 29 August 2017 [“TO 2017-312”].

⁶⁸ *Interim rates for disaggregated wholesale high-speed access services in Ontario and Quebec*, Telecom Order 2017-312-1, 12 September 2017 [“TO 2017-312-1”].

⁶⁹ TD 2018-44, para 74.

⁷⁰ *Id.*, at para 19.

⁷¹ *Id.*, at paras 45, 50, 52, 69 and 73.

the tariff process was delayed. More importantly, competitors are provided with a path to accessing incumbent FTTP facilities in applicable markets, which will lessen much of the potential long-term competitive harm that could otherwise occur.”⁷²

(4) “... implementation of CNOC’s proposal, regardless of the rate-setting approach adopted, would undermine the determinations set out in the wholesale wireline decision by removing a key incentive for competitors to migrate to disaggregated HSA”⁷³ “before the transition has even begun”.⁷⁴

31. On **October 24, 2018**, the Commission suspended the proceeding to examine configurations for disaggregated HSA outside of Ontario and Quebec following a request by CNOC to pose interrogatories to the Incumbents that were parties to those proceedings regarding their proposed disaggregated configurations.⁷⁵

32. On **November 7, 2018**, CNOC filed an application to review and vary TRP 2015-326 and TD 2016-379⁷⁶ (“CNOC HSA Remedial Application”) on the basis that the Transition Plan to disaggregated HSA was not achievable without modifications to the wholesale HSA services regime,⁷⁷ for a number of reasons, the most important of which are: (1) prohibitive deployment costs;⁷⁸ (2) glacial deployment horizons and;⁷⁹ (3) lack of competitive transport.⁸⁰ The CNOC HSA Remedial Application also sought removal of the 100 Mbps speed cap (“100 Mbps Speed Cap”) on aggregated HSA services that was scheduled to take effect when disaggregated HSA tariffs are approved on a final basis.⁸¹

33. On **March 20, 2019**, the Commission suspended implementation of the 100 Mbps Speed Cap when the tariffs for the disaggregated HSA services of Bell Canada, Cogeco, RCCI, and

⁷² *Id.*, at para 72.

⁷³ *Id.*, at para 70.

⁷⁴ *Id.*, at para 71 and 73 (“emphasis added”).

⁷⁵ Commission staff letter, “Follow-up process to consider implementation issues of disaggregated wholesale HSA services, including over FTTP access facilities, in other regions – CNOC Request for process changes”, 24 October 2018, CRTC File 8638-C12-201808073.

⁷⁶ CNOC Part 1 Application dated 7 November 2018 to Review and Vary *Review of Wholesale Wireline Services and Associated Policies*, Telecom Regulatory Policy CRTC 2015-326 and *Follow-up to Telecom Regulatory Policy CRTC 2015-326 – Implementation of a Disaggregated Wholesale High-Speed Access Service, Including over Fibre-to-the-Premises Access Facilities*, Telecom Decision CRTC 2016-379 [“CNOC HSA Remedial Application”].

⁷⁷ CNOC HSA Remedial Application, at paras ES2-ES5.

⁷⁸ *Id.*, at paras ES28-ES30.

⁷⁹ *Id.*, at paras ES31-ES34.

⁸⁰ *Id.*, at paras 96-121.

⁸¹ *Id.*, at paras 209-215.

Videotron in Ontario and Quebec are made final, pending the Commission’s final determinations on the Application.⁸²

34. On **June 18, 2019**, the 2019 Policy Direction came into effect, and with it a number of new considerations that the Commission was required to take into account in making its decisions.

35. On **May 27, 2020**, Shaw filed an application under Part 1 of the *Rules*,⁸³ (“Shaw 1 Gigabit Speed-Matching Suspension Application”) seeking a suspension of the speed-matching obligation for Shaw’s new 1 Gbps service and any faster speed tiers, pending completion of two other proceedings and “elimination of asymmetrical wholesale high-speed access (**HSA**) obligations between Shaw and the Incumbent Local Exchange Carriers (**ILECs**) in the serving areas in which we operate”. Shaw’s reasoning for this application was explained in part as follows:

“The requested relief is urgently required to address the lack of competitive and technological neutrality pursuant to the Commission’s wholesale HSA regime. Five years have now passed since the last review of the Commission’s wholesale wireline framework and ILECs’ fibre-to-the-premises (FTTP) services continue to enjoy a regulatory holiday from mandated HSA requirements. In contrast, Shaw’s next-generation DOCSIS-based services remain subject to, and highly constrained by, the legacy aggregated wholesale HSA regime for all residential speed tiers up to 750 Mbps.”⁸⁴

36. On **June 11, 2020**, the Commission issued TNC 2020-187,⁸⁵ in which it initiated an examination of reducing the level of disaggregation for disaggregated HSA services, “given that such a reduction may be required to facilitate deployment of these services across the country and to minimize any negative effects on competition that might be occurring in the markets for wholesale HSA services”.⁸⁶

⁸² Commission letter, “Canadian Network Operators Consortium Inc. Part 1 Application to review and vary Telecom Regulatory Policy CRTC 2015-326 and Telecom Decision CRTC 2016-379 – Interim Relief – Commission Decision”, 20 March 2019, CRTC File 8662-C182-201809534. TELUS appealed this decision, but ultimately discontinued its appeal after TNC 2020-187 was issued. See *TELUS Communications Inc. v. Canadian Network Operators Consortium Inc.*, FCA Court File A-236-19.

⁸³ Shaw Cablesystems G.P. and Shaw Telecom G.P. Application dated May 27, 2020 Re: Request for Immediate Interim Relief from the Speed-Matching Requirement as it applies to Shaw’s Gigabit Residential Service Speeds [“Shaw 1 Gigabit Speed-Matching Suspension Application”].

⁸⁴ Shaw 1 Gigabit Speed-Matching Suspension Application, at para 3. [Emphasis added and footnotes omitted.]

⁸⁵ Subsequently, the Commission issued *Call for comments – Appropriate network configuration for disaggregated wholesale high-speed access services*, Telecom Notice of Consultation CRTC 2020-187-1, 22 July 2020.

⁸⁶ TNC 2020-187, at para 15.

37. In explain the reason for starting the proceeding, the Commission stated:⁸⁷

“The Commission notes that, in separate proceedings, parties have raised issues related to the regulatory framework for wholesale HSA services and, specifically, related to the transition from aggregated to disaggregated wholesale HSA services.

CNOC identified some of these issues in its application. In particular, CNOC raised significant concerns with respect to the current regulatory framework for wholesale wireline services and the deployment of and transition to disaggregated wholesale HSA services. Among other things, CNOC requested a significantly reduced level of disaggregation on Bell Canada’s network, and possibly on the networks of Cogeco, RCCI, and Videotron, to address barriers to the use of disaggregated wholesale HSA services.

In addition, parties to the follow-up proceeding raised concerns regarding the level of disaggregation required for the service configurations. For instance, wholesale HSA service providers in Western Canada proposed that the Commission adopt lower levels of disaggregation in their networks, submitting that this approach would minimize disruption to their networks and the impact on competitors.

The Commission does not have confirmation that there has been any implementation of the disaggregated wholesale HSA service regime in its existing configurations.”

38. Concurrently, the Commission also issued a letter⁸⁸ in which it stated:⁸⁹

“The Commission finds that [the CNOC HSA Remedial Application] raises serious questions with respect to the regulatory framework for wholesale wireline services, as well as the deployment of, and transition to disaggregated HSA services.

The Commission considers that these issues would require a fulsome analysis with wide participation from the industry across Canada. The Commission further considers it is important to ensure that the wholesale regulatory framework remains effective and relevant, particularly with respect to the implementation of the disaggregated wholesale HSA regime and the transition from the aggregated wholesale HSA regime to the disaggregated wholesale regime.

Accordingly, the Commission is closing the proceeding arising from CNOC’s Part 1 application and is issuing today a Telecom Notice of Consultation CRTC [2020-187](#) (the notice), to consider the appropriate level of and configurations for a disaggregated HSA regime for all incumbent carriers across the country.

The Commission is suspending the proceeding to set final rates, terms and conditions for disaggregated wholesale HSA services in Ontario and Quebec, as set out in the

⁸⁷ *Id.*, at paras 11-14 (“emphasis added”).

⁸⁸ Commission letter, “Canadian Network Operators Consortium Inc. Part 1 Application to Review and Vary Telecom Regulatory Policy CRTC 2015-326 and Telecom Decision CRTC 2016-379 – Commission Decision”, 11 June 2020, CRTC File 8662-C182-201809534.

⁸⁹ At pp. 2-3.

notice. The existing interim rates and terms and conditions for disaggregated HSA services established in Telecom Order CRTC [2017-312](#) will remain in effect.

The suspension of the implementation of the [100 Mbps Speed Cap] will continue until the Commission makes its determinations with respect to the wholesale disaggregated HSA services' tariffs on a final basis.

With respect to other issues not addressed in the notice and raised by CNOC in its application, namely the addition of port and fibre strand sharing functionality for all incumbent disaggregated HSA services, and access to FTTP facilities over aggregated HSA services, the Commission considers that it would be appropriate to address those in future proceedings.”⁹⁰

39. The review of regulatory developments related to FTTP access facilities clearly demonstrates that there is no workable wholesale disaggregated HSA service configuration available anywhere in Canada. Moreover, if and when such configurations do become available, additional process will be required to finalize rates and other terms and conditions.⁹¹ The process of finalizing any viable Incumbent wholesale disaggregated HSA configurations and establishing final rates and other terms and conditions can be expected to take somewhere between two and three years.⁹²

2.3 There is serious mismatch between the pace of ILEC FTTP rollout and lack of corresponding effective wholesale regulation

40. As noted in section 2.1, ILECs in Canada are very advanced in their rollout of FTTP. Bell has already completed 53% of its intended FTTP rollout, amounting to 5.5 million residential and commercial premises. TELUS has rolled out FTTP to approximately 70 per cent of its high-speed broadband footprint by the end of 2019, on the way to 80 per cent coverage by the end of 2020. SaskTel has already rolled out FTTP to its largest communities and is continuing to extend coverage to smaller centres. Its commitment to more ubiquitous coverage is epitomized by replacement of the previous 10 Mbps download speed target with a 300 Mbps target.

⁹⁰ The Commission repeated the observations made in this paragraph of the letter in paragraph 20 of TNC 2020-187.

⁹¹ In fact, the Commission has suspended the proceeding to set final rates, terms, and conditions for disaggregated wholesale HSA services in Ontario and Quebec until a later date, after the close of the proceeding initiated by TNC 2020-187 and has indicated that the existing interim rates, terms, and conditions established in TO 2017-312 will remain in effect. See TNC 2020-187, at para 19.

⁹² In making this assessment, CNOC notes that it took the Commission 15 months after TRP 2015-326 was issued to establish disaggregated HSA configurations for incumbents in Ontario and Quebec (in TD 2016-379) and another year for interim rates, terms and conditions to be approved for those service configurations (in TO 2017-312 and TO 2017-312-1).

41. As this rapid rollout continues, greater portions of the retail broadband market are foreclosed to competition due to the lack of a corresponding wholesale HSA services market. The description of developments relating to FTTP regulation in section 2.2 demonstrates that regulation is not keeping up with the market developments and related adverse consequences for competition.

42. In the next section we address why the need for relief and corresponding regulatory stability is urgent and cannot wait for determinations in the proceeding initiated by TNC 2020-187, and the related proceedings, as a matter of both law and policy.

3.0 URGENT WHOLESALE ACCESS TO FTTP ACCESS FACILITIES IS REQUIRED

3.1 There is no prospect of a stable and workable FTTP access regime in the near future

43. As discussed in section 2.1 of this Application: (1) ILECs have been rolling out FTTP access facilities for many years; (2) very high percentages of their end-users bases are connected to such facilities; and (3) no discipline was imposed on the ability of the ILECs to exercise market power in pricing services provided over those facilities, since no corresponding wholesale remedy was mandated.

44. At the same time, as discussed in section 2.2, the Commission's efforts to create a viable wholesale framework for disaggregated HSA services that includes FTTP access facilities have not succeeded so far. It will likely be a minimum of at least two to three additional years before any workable solution, if one is possible, could materialize.

45. In addition, in order for the Commission to arrive at a workable HSA regime additional issues will need to be resolved separately. Those issues include port and fibre strand sharing functionality for all incumbent disaggregated HSA services, and access to FTTP facilities over aggregated HSA services. Overlaying all of that is an upcoming review of wholesale wireline services. These matters and related proceedings may take additional time to resolve.⁹³

⁹³ Even if proceedings to consider port and fibre strand sharing, and aggregated HSA services that includes FTTP access facilities were commenced soon, it took 21 months from the commencement of the most recent wholesale wireline review (in *Review of wholesale services and associated policies*, Telecom Notice of Consultation CRTC 2012-551, 15 October 2013) until 2015-326 was issued (on 22 July 2015), and additional implementation proceedings ensued. If this happens in the next wholesale wireline review, it could take another four to five years until the dust settles on any revisions to the current HSA services regime.

46. Moreover, if past behaviour is any indicator,⁹⁴ Incumbents can be expected to do their best to thwart and delay the ultimate resolution of workable disaggregated HSA service configurations and general improvements to the wholesale HSA service more generally.

47. The current situation has resulted in significant instability and uncertainty with respect to the wholesale HSA services regulatory regime. Without an interim remedy to address this situation, it will only deteriorate further in the next few years.

48. Competitors and, more importantly, Canadian consumers and businesses, cannot wait another two to three years or longer for workable competitive services to be provided over FTTP access facilities and for the HSA services framework to stabilize. A greater degree of regulatory certainty is required as quickly as possible.

3.2 The Commission's rationale for rejecting the Transitional FTTP Access Application no longer applies

49. As discussed in section 2.2 of this Application, when the Commission rejected the CNOC Transitional FTTP Access Application, it did so on the basis that: (1) service gaps were expected to continue over aggregated HSA during the Transition Plan;⁹⁵ (2) there was insufficient evidence of harm from the service gaps;⁹⁶ (3) by establishing interim rates for disaggregated HSA in Ontario and Quebec in Telecom Order 2017-312, the Commission had partially addressed CNOC's concern that the tariff process was delayed and provided competitors with a path to accessing incumbent FTTP facilities in applicable markets, "which will lessen much of the potential long-term competitive harm that could otherwise occur";⁹⁷ and (4) approving that application would remove a key incentive for competitors to migrate to disaggregated HSA⁹⁸ before the transition has even begun.

⁹⁴ This is a reasonable assessment based on the Incumbent conduct of delay and obfuscation that dragged out the approval process for aggregated HSA service rates to three and a half years followed by appeals of TO 2019-288 in three different forums.

⁹⁵ TD 2018-44, at para 19.

⁹⁶ *Id.*, at paras 45, 50, 52, 69 and 73.

⁹⁷ *Id.*, at para 72.

⁹⁸ *Id.*, at paras 70, 71 and 73.

50. All of these assessments were premised on the existence of a viable Transition Plan, which never materialized, as now acknowledged by the Commission.⁹⁹

51. What has actually continued to occur since TD 2018-44 was issued is that: (1) service gaps continue to increase significantly; (2) those service gap increases necessarily harm competition and hence end-users; (3) the interim rates for disaggregated HSA configurations in Ontario and Quebec are not helpful since disaggregated configurations are unworkable and so there is currently no path for accessing FTTP access facilities in those provinces; (5) the examination of disaggregated configurations outside of Ontario and Quebec in effect when TD 2018-44 was later terminated and was only recently restarted by TNC 2020-187; and (4) there can be no incentive for competitors to migrate to disaggregated HSA when no workable disaggregated HSA configuration exists.

52. In conclusion, the foundation for TD 2018-44 is now completely absent, and accelerating the approval of a wholesale service involving Incumbent FTTP facilities needs to be revisited on an expedited basis.

3.3 The Commission has a legal duty to act to ensure that Incumbents do not confer an unjust preference towards themselves in relation to telecommunications services provided over FTTP access facilities

53. Pursuant to subsection 27(2) of the *Telecommunications Act*, a Canadian carrier is prohibited from unjustly discriminating or giving an undue or unreasonable preference toward any person, including itself, or subjecting any person to an undue or unreasonable disadvantage in relation to the provision of a telecommunications service. Moreover, subsection 27(1) requires every rate charged by a Canadian carrier for a telecommunications service to be just and reasonable.

54. In TRP 2015-326, the Commission effectively recognized that rate regulation was necessary to ensure compliance with these statutory provisions when it comes to the provision of wholesale disaggregated HSA services, including over FTTP access facilities, when it found that such services must be tariffed, once disaggregated HSA service configurations are established.¹⁰⁰

⁹⁹ TNC 2020-187, at paras 11-14.

¹⁰⁰ TRP 2015-326, at para 159.

55. It is now clear that a workable disaggregated HSA framework does not exist. The Transition Plan has failed. The Commission has effectively confirmed this in TNC 2020-187¹⁰¹ and so have wholesale-based service providers besides CNOC.

56. For example, in its intervention in the proceeding initiated by TNC 2020-187, Allstream Business Inc. (“Allstream”) stated:

“The existing D-WHSA regime has clearly failed to support an orderly, cost-effective transition from aggregated to disaggregated wholesale services. ...”¹⁰²

57. Distributel Communications Limited (“Distributel”) expressed the same view:

“We continue to be firmly of the view that the existing disaggregated HSA service regime does not support an orderly, cost-effective transition from aggregated to disaggregated wholesale HSA services.”¹⁰³

58. The same view was endorsed by Public Interest Advocacy Centre (“PIAC”):

“In this intervention, PIAC generally supports CNOC’s analysis in its Part 1, that a fully disaggregated wholesale HSA regime is unworkable based on capital, regulatory and operating costs of interconnection and transport. The Commission must re-evaluate the appropriate level of disaggregation and provide the competing carriers with regulatory certainty as soon as possible. Competitors, while they wait for the Commission to make final determinations on not only the disaggregated wholesale rates but also aggregated rates, have had to raise their retail rates to remain economically viable.”¹⁰⁴

59. The assessment of British Columbia Broadband Association (“BCBA”) is even starker:

“The current disaggregated model for purchasing services from the incumbent providers of wholesale telecommunication products is unworkable and will lead to the disappearance from the marketplace of most of the smaller competitors who use this channel as a means to reach Canadians to provide alternative packages and services.”¹⁰⁵

60. Even Shaw (whose position favouring not mandating wholesale HSA service CNOC strenuously opposes) has recently argued that the current disaggregated wholesale HSA regime is

¹⁰¹ At para 14.

¹⁰² Intervention dated 5 October 2020 of Allstream, CRTC File 1011-NOC2020-0187, at para 15.

¹⁰³ Intervention dated 5 October 2020 of Distributel, CRTC File 1011-NOC2020-0187, at para 10.

¹⁰⁴ Intervention dated 5 October 2020 of PIAC, CRTC File 1011-NOC2020-0187, at para ES3.

¹⁰⁵ Intervention dated 5 October 2020 of BCBA, CRTC File 1011-NOC2020-0187, at subpara 2a.

unworkable and calls into question whether it is even possible for a workable disaggregated framework to be developed:

“However, it is no longer reasonable to rely on the eventual implementation of the disaggregated regime as an acceptable solution to resolving the attendant asymmetry between Shaw and Telus. In fact, the experience over the past 5 years seriously calls into question whether a disaggregated regime is feasible or beneficial to Canada’s telecommunications system....”¹⁰⁶

61. Under these circumstances, which include a significant degree of uncertainty regarding whether, and if so when, a viable disaggregated HSA regime will materialize, there is no basis on which the Commission can forbear from its duty to ensure that the Incumbents do not confer an undue preference on themselves by providing retail IS at speeds that only FTTP will support, while denying their competitors the same capability. Wholesale access to such facilities is required on an expedited basis that includes rates for corresponding wholesale services that are just and reasonable to prevent Incumbents from breaching subsection 27(1) and 27(2) of the *Telecommunications Act* insofar as the treatment of their FTTP access facilities is concerned. The FTTP RISR Remedy is the means by which such breaches can be stopped.

3.4 The 2019 Policy Direction adds to the urgency of addressing wholesale access to FTTP

62. The necessity of the expedited adoption of the FTTP RISR Remedy is further reinforced, as a matter of policy, by the recent passage of the 2019 Policy Direction, as discussed in the next section.

63. When the 2019 Policy Direction came into effect on June 18, 2019, it instructed the Commission to place greater emphasis on, among other things: (1) encouraging all forms of competition and investment;¹⁰⁷ (2) disciplining the market power that telecommunications service providers (“TSPs”) can exercise so as to foster affordability and lower prices;¹⁰⁸ (3) ensuring that affordable access to high-quality telecommunications services is available in all regions of Canada, including rural areas;¹⁰⁹ (4) reducing barriers to entry into the market and competition for TSPs

¹⁰⁶ Shaw Cablesystems G.P. and Shaw Telecom G.P., Shaw Part 1 Application – Request for Immediate Relief from the Speed-Matching Requirement as it applies to Shaw’s Gigabit Residential Internet Service Speeds, May 27, 2020, CRTC File 8661-S83-202003193, at para 24.

¹⁰⁷ Subpara 1.a.i of 2019 Policy Direction.

¹⁰⁸ Subpara 1.a.ii of 2019 Policy Direction.

¹⁰⁹ Subpara 1.a.iii of 2019 Policy Direction.

that are, among other things, new or smaller than the incumbent national service providers;¹¹⁰ and (5) enabling innovation in telecommunications services, not only through new technologies, but also through differentiated service offerings.¹¹¹

64. Subparagraph 1.a.i of the 2019 Policy Direction also requires more equal regulatory treatment of FTTP and HFC access facilities, such that investments made by wholesale-based competitors to use both types of facilities is valued more equally, and competition using both types of facilities is promoted. This is particularly so since the Commission has found that both ILEC and Cable Carrier access facilities meet the requirements for continued regulation *via* wholesale HSA services, based on the Commission's essentiality test and related policy considerations.¹¹²

65. Consistent with subparagraph 1.a.ii of the 2019 Policy Direction, the ability of wholesale-based service competitors to use Incumbent FTTP access facilities is required to discipline the market power that Incumbents could otherwise exercise in the provision of retail IS at the higher speeds that require the use of such facilities.

66. Consistent with subparagraph 1.a.iii of the 2019 Policy Direction, the ability of wholesale-based service competitors to use Incumbent FTTP access facilities is required to overcome Incumbent monopolistic or duopolistic market conditions in the provision of retail IS and broadband applications.¹¹³ Competitive choice of providers, services features and price will translate into the availability of more reliable and affordable services throughout the country.

67. Giving wholesale-based competitors the ability to compete using Incumbent FTTP access facilities is required to reduce barriers to entry in the markets for services provided over such facilities, consistent with subparagraph 1.a.v of the 2019 Policy Direction.

68. In order for wholesale-based service competitors to provide innovative, differentiated service offerings over Incumbent FTTP access facilities, as required by subparagraph 1.a.vi of the 2019 Policy Direction, those competitors must have access to those facilities.

69. None of the four outcomes just cited, which the 2019 Policy Direction promotes, can be attained without expedited mandated access to FTTP access facilities. Implementation of the FTTP

¹¹⁰ Subpara 1.a.v of 2019 Policy Direction.

¹¹¹ Subpara 1.a.vi of 2019 Policy Direction.

¹¹² TRP 2015-326, at para 143.

¹¹³ Such applications include telephony and video services, among others.

RISR Remedy provides wholesale-based service competitors the access to Incumbent FTTP access facilities that ensures all of these outcomes can be attained as required by the 2019 Policy Direction.

4.0 IMPLEMENTATION OF THE FTTP RISR REMEDY IS THE QUICKEST METHOD OF PROVIDING A VIABLE WHOLESALE SERVICE INVOLVING INCUMBENT FTTP ACCESS FACILITIES

4.1 Using the Commission’s tried and tested retail-minus RISR approach is required as a temporary measure to end Incumbent FTTP head-starts

70. CNOC believes that true interconnection-based wholesale services for which rates are set on a Phase II cost plus basis constitute the most appropriate manner of rolling out and pricing wholesale services. This is the method that provides competitors with the most flexibility to develop innovative services and is the most economically efficient overall. Relative to this approach all others are inferior and have various shortcomings.

71. Nevertheless, the development of mandated wholesale services, or extension of existing wholesale services to encompass new technologies and finalizing applicable rates and other terms and conditions can take considerable time. In such situations, it is appropriate for the Commission to adopt a retail-minus RISR approach to foster competition for a limited period of time in order to prevent the start or continuation of Incumbent head-starts for services in retail markets in which they are dominant. This is exactly what the Commission did when it adopted the General RISR Remedy for Shaw and Eastlink pending their rollout of TPIA. This is exactly what the Commission should do now, pending the availability of a wholesale disaggregated HSA service that includes FTTP access facilities and the resolution of structural issues relating to the wholesale HSA services regime.

4.2 The Commission has consistently implemented the General RISR Remedy on a temporary basis to enable retail IS competition

72. The Commission has a longstanding and successful practice of applying the General RISR Remedy on a temporary basis to enable retail IS Competition. Section 4.2 recounts this history going back to 1999, when the Commission first applied the General RISR Remedy to the Cable Carriers.

4.2.1 The General RISR Remedy was applied to the Cable Carriers in 1999 pending the rollout of wholesale HSA services

73. In TD 99-11, the Commission noted that the members of the Canadian Cable Television Association, including Rogers, Shaw, Cogeco, and Vidéotron, expected to implement what is now known as TPIA by mid-2000, after those cable carriers started providing retail IS in 1996, and undertook, in 1998, to implement access (i.e., wholesale HSA services) as soon as possible.¹¹⁴

74. Since no Cable Carrier wholesale HSA services had been rolled out at the time TD 99-11 was issued, the Commission, pursuant to section 24 of the *Telecommunications Act*, imposed “as a condition of the provision of higher speed retail IS by incumbent cable carriers, the requirement that such a carrier make its higher speed retail IS available for resale to provide IS at a 25% discount from the lowest retail IS rate charged by that carrier to a cable customer in the applicable serving area during any one month period”.¹¹⁵ The Commission went on to specify that service charges would not be subject to the discount, but could not be set at levels that are higher than those cable carriers charged their own IS customers.¹¹⁶ This condition would continue to apply until access is provided pursuant to an approved tariff.¹¹⁷

75. Significantly, the Commission mandated the temporary General RISR Remedy, even though it had only been one year since Rogers, Shaw, Cogeco, and Vidéotron had committed to provide tariffed access, and such access was expected to become available within less than another year.

4.2.2 The General RISR Remedy was applied to Shaw in 2003-2004 pending its rollout of HSA services

76. In 2003, Cybersurf Corp. (“Cybersurf”) sought relief from the Commission in the form of resale of Shaw’s retail IS due to significant delays of indeterminate duration in the availability of TPIA service.¹¹⁸

¹¹⁴ TD 99-11, at para 16.

¹¹⁵ *Id.*, at para 20.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ TD 2003-87, at para. 6.

77. Following a thorough review of the situation, the Commission granted Cybersurf relief based on its prior rulings in TD 99-11. More specifically, pursuant to section 24 of the *Telecommunications Act*, the Commission imposed as a condition on the provision by Shaw of higher-speed retail IS, that it make that service available for resale, until Shaw provides TPIA under approved tariffs, on the following terms requiring Shaw:¹¹⁹

- To provide resale service with characteristics identical to Shaw's regular service in all respects, including, but not limited to throughput;
- To provide the service such that ISPs can resell the service as a branded ISP service;
- To provide ISPs with the ability to bill ISP end-user customers directly, and for that purpose to bulk bill the ISP for all charges, with the bulk bill to contain sufficient information to differentiate charges between the ISP end-users and permit the ISP to bill its end-users;
- To make its higher-speed retail Internet service available for resale to provide Internet service at a 25% discount from the lowest retail rate, other than \$0.00, charged to a cable customer for the retail Internet service in question in the applicable serving area during any one-month period including any discounts or credits; and
- To resell the proprietary modems used for its higher-speed retail IS to ISPs, as required to serve ISP resale customers, at the lowest retail rate Shaw charges its customers until Shaw provides TPIA under approved tariffs using non-proprietary modems that are available from manufacturers.

78. Following a subsequent complaint by Cybersurf to the Commission due to Shaw's non-compliance with TD 2003-87, in TD 2004-24, the Commission further clarified how the rules set out in TD 2003-87 were to be applied. It is important to note that, at the time, Shaw was preparing to provide a disaggregated TPIA service that involved six serving areas.¹²⁰ In that scenario, the Commission clarified the regime by specifying, among other things that:

- Shaw's obligation to provide its higher-speed retail IS to Cybersurf for the purpose of resale would only cease in a Shaw serving area when Shaw is in a position to provide TPIA to Cybersurf throughout the entire serving area, so that Cybersurf can serve its customers anywhere in that serving area using TPIA;¹²¹

¹¹⁹ *Id.*, at paras 43-44.

¹²⁰ TD 2004-24, at para 21.

¹²¹ *Ibid.*

- The 25% discount specified in TD 2003-87 relates to the lowest non-zero dollar rate, within an entire applicable serving area rather than on an individual customer basis;¹²²
- The higher-speed retail IS was to be made available to business as well as residential end-users;¹²³
- Although Shaw and Cybersurf were directed to enter into a higher-speed retail IS agreement within 45 days of TD 2004-24 being issued, the absence of such an agreement was not to delay making higher-speed retail IS available for resale.¹²⁴

79. The Commission also set out a schedule for resale to be rolled out by service area.¹²⁵

80. In Telecom Order CRTC 2004-331¹²⁶ (“TO 2004-331”), the Commission imposed a resale agreement on the parties based on a draft proposed by Cybersurf, further modified to take into account the submissions of both parties and Commission amendments, since the parties were unable to settle on the terms of an agreement on their own.¹²⁷

4.2.3 The General RISR Remedy adopted in TD 99-11, TD 2003-87 and TD 2004-24 was further clarified and upheld in the case of Eastlink in 2016 pending its rollout of HSA services

81. In TD 2016-67, the Commission confirmed its previous approach from TD 2003-87 and TD 2004-24 to the General RISR Remedy pending the rollout of TPIA by Eastlink.

82. More specifically, the Commission confirmed that Eastlink’s resale IS rates must be applied consistently to all competitors’ end-customers, regardless of the duration of any relevant promotions offered by Eastlink to its own retail Internet service end-customers and no modification should be made to Eastlink’s formula for calculating such rates (“Wholesale Formula”).¹²⁸

¹²² *Id.*, at para 24.

¹²³ *Id.*, at para 25.

¹²⁴ *Id.*, at para 26.

¹²⁵ *Id.*, at para 22.

¹²⁶ *Cybersurf Corp. v. Shaw Cablesystems G.P. – Reseller agreement*, Telecom Order CRTC 2004-331, 1 October 2004 [“TO 2004-331”].

¹²⁷ TO 2004-331, at paras 4 and 15.

¹²⁸ TD 2016-67, at para 19.

83. The Wholesale Formula had two parts, one applicable when Eastlink’s retail IS was included in a service bundle in a serving area, and the other when it was not included in such a service bundle.¹²⁹

84. In the cases where Eastlink’s retail IS was part of a service bundle, the Wholesale Formula involved three steps. The first step is a determination of the portion that retail IS represents of a multi-service bundle expressed as a ratio which is obtained by dividing the full price of the retail IS forming part of the bundle into the sum of the full prices of all services forming part of the bundle. The second step applies that ratio to the total promotional price applicable to the bundle to yield the *promotional price applicable to the retail IS in the applicable serving area*. In the last step, *the promotional retail IS price in the serving area is discounted by 25%* to yield the applicable wholesale (i.e., General RISR Remedy) price. This price is lower than the stand-alone retail IS promotional price discounted by 25%, which means that applying the rate yielded using the bundle formula is the correct wholesale rate in accordance with applicable Commission decisions. All rates are monthly.¹³⁰

85. In those cases where an Eastlink retail IS is not included in a service bundle the applicable Commission decisions require *discounting the stand-alone promotional retail IS price in the serving area by 25%* to arrive at the wholesale (i.e., General RISR Remedy) price.¹³¹

86. The Commission also confirmed that Eastlink was required to make all of the retail IS speeds that it provides to its own end-customers in the Atlantic Provinces available under the General RISR Remedy, consistent with the rating structure, terms, and conditions specified in TD 99-11, as further clarified in TD 2003-87 and TD 2004-24.

87. Finally, in TD 2016-67, the Commission imposed the same timeline it had imposed on Shaw in TD 2004-24 for the rollout of resale by service area when it came to the rollout of resale of Eastlink’s retail IS at service speeds not already offered to Eastlink’s competitors.

¹²⁹ Canadian Network Operators Consortium Inc., “Part 1 Application relating to the pricing and availability of Eastlink’s Internet access services on a wholesale basis”, 7 August 2015, CRTC File 8661-C182-201508417 [“CNOOC Application regarding Eastlink Retail IS Resale”], para 5, footnote 3 and para 5, footnote 4.

¹³⁰ CNOOC Application regarding Eastlink Retail IS Resale, at para 5, footnote 3.

¹³¹ *Id.*, at para 5, footnote 4.

88. It is CNOC's understanding that after a few service areas were opened sequentially according to the prescribed schedule, Eastlink voluntarily applied the General RISR remedy to all other remaining services areas in which it provided retail IS speeds greater than 20 Mbps.¹³²

4.2.4 CNOC's proposed relief is consistent with the Commission's application of the General RISR Remedy

89. In the present case, no workable wholesale HSA service involving FTTP access facilities has been implemented since ILECs started rolling out FTTP as early as 2010, or since the Commission determined that access to FTTP access facilities should be provided in 2015, and the industry is still a minimum of two to three years away from any workable disaggregated HSA service that includes FTTP access facilities. Access to these facilities is urgent. Unfortunately, this urgency will not allow for a process to establish Phase II cost-based rates and other tariffed terms and conditions for the provision of an aggregated HSA service that incorporates FTTP access facilities.

90. Experience has shown that where access to essential wholesale facilities is urgent, the General RISR Remedy is a proven measure that can facilitate near-immediate service-based competition on a temporary basis. Thus, on the facts described in this Application, recourse to the FTTP RISR Remedy is not only appropriate - it is essential.

4.3 The approach that the Commission has applied in Cable Carrier RISR Decisions can and should be readily applied as an FTTP RISR Remedy

91. Due to the ground-breaking work that the Commission did in the Cable Carrier RISR Decisions to blunt Shaw's and Eastlink's head-starts in the provision of retail IS in the absence of corresponding HSA services, there is a ready-made solution that the Commission can implement almost immediately to provide end-users competitive choice when it comes to FTTP-based retail IS.

92. We therefore propose that the Commission adopt the regime approved in those determinations to retail IS provided over Incumbent FTTP access facilities. Taking into account

¹³² A full rollout of the 20 Mbps retail IS in all Eastlink service areas had already occurred before the proceeding culminating in TD 2016-67 was initiated.

all of the clarifications made in each of the Cable Carrier RISR Decisions, the requirements of the FTTP RISR Remedy would be as follows:

- The Incumbent must provide a resale retail IS with characteristics identical to its own retail IS in all respects, including, but not limited to throughput;
- The Incumbent must provide the resale retail IS such that ISPs can resell the service as a branded ISP service;
- The Incumbent must provide ISPs with the ability to bill ISP end-user customers directly, and for that purpose shall bulk bill the ISP for all charges, and the bulk bill shall contain sufficient information to differentiate charges between the ISP end-users and permit the ISP to bill its end-users;
- The Incumbent must apply the Wholesale Formula so as to make its retail IS available for resale to provide Internet service at a 25% discount from the lowest retail rate, other than \$0.00, charged to an Incumbent customer for the retail IS in question in the applicable serving area during any one-month period including any discounts or credits;
- The 25% discount specified herein relates to the lowest non-zero dollar rate, within the entire applicable serving area rather than on an individual customer basis;
- The Incumbent's resale IS rates must be applied consistently to all competitors' end-customers, regardless of the duration of any relevant promotions offered by the Incumbent to its own retail Internet service end-customers;
- The Incumbent must make all of the retail IS speeds that it provides to its own end-customers over FTTP access facilities available for resale consistent with the rating structure, terms, and conditions specified herein;
- The retail IS shall be made available to business as well as residential end-users;
- No resale agreement shall be required as a pre-condition to the provision of a resale IS;
- Service charges are not subject to the 25% discount, but an Incumbent must not be allowed to set them at any levels that are higher than those Incumbents charge their own IS customers and must include all items, such as, without limitation, the fibre drops and optical line termination equipment Incumbents include when providing retail IS over FTTP to their own customers;
- A wholesale customer shall be allowed to use any modem that the Incumbent uses in connection with resale retail IS;
- The Incumbent shall be required to resell any proprietary modems used for its retail IS to ISPs, as required to serve ISP resale customers, at the lowest retail rate the Incumbent charges its customers until it allows the use of non-proprietary modems that are available from manufacturers.

93. For the reasons described in the following three sections, respectively, the FTTP RISR Remedy should also include the following requirements:

- The FTTP RISR Remedy shall be applied to the serving areas each Incumbent has defined for the purpose of its wholesale aggregated HSA services simultaneously;
- Resold IS provided pursuant to the FTTP RISR Remedy to wholesale customers shall not be subject to any limitations on how wholesale customers use the resold retail IS provided by the Incumbent that are not also present in the wholesale aggregated HSA tariffs of the Incumbent when it comes to the use of those services by wholesale customers; and
- The FTTP RISR Remedy shall continue until the Commission makes final determinations in all of the Outstanding HSA Proceedings.

4.4 The serving areas in which the FTTP RISR Remedy is applied and related rollout should reflect the aggregated nature of the relief sought

94. Given the urgency of rolling out the FTTP RISR Remedy, it will be important for serving areas to be defined in a manner that reflects the definition of aggregated HSA serving areas and the rollout should occur at the same time in all serving areas.

95. In TD 2004-24, Shaw was required to rollout its higher-speed retail IS for resale at the sequential rate of one serving area every two weeks on request.¹³³ The total number of Shaw serving areas to which that decision applied was six.¹³⁴ The same schedule applied to Eastlink in TD 2006-67. Although Eastlink had defined approximately 45 serving areas, after rolling out retail IS resale to approximately half a dozen serving areas, it opened all of the remaining ones, at once.

96. Since the purpose of the FTTP RISR Remedy in the present case is to provide a wholesale remedy that applies to Incumbent FTTP access facilities across the country and no such access has been granted to date despite a head start of up to 10 years for Incumbents in the provision of retail IS and other broadband services over those facilities, it is very important for the rollout to occur as quickly as possible, so as to provide a remedy that is analogous to wholesale aggregated HSA on an expedited basis. This means that service areas for the purpose of the retail IS resale remedy should correspond to the aggregated HSA serving areas of incumbents.

¹³³ TD 2004-14, at para 22. Shaw was required to roll out the first serving area 45 days after receiving the first request.

¹³⁴ *Id.*, at para 21.

97. The number of aggregated serving areas for each Incumbent are:

- (1) Bell Aliant, a division of Bell Canada (Atlantic Provinces) – one serving area¹³⁵
- (2) Bell Canada (Ontario and Quebec) – one serving area¹³⁶
- (3) Bell MTS (Manitoba) – one serving area¹³⁷
- (4) SaskTel (Saskatchewan) – one serving area¹³⁸
- (5) TELUS (British Columbia and Alberta) – one serving area¹³⁹
- (6) Eastlink (Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick and Ontario) – eight serving areas, one for each of Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick and four for Ontario¹⁴⁰
- (7) Vidéotron (Quebec) – one serving area¹⁴¹
- (8) Cogeco (Ontario and Quebec) – two serving areas, one per Province¹⁴²
- (9) Rogers (Ontario, New Brunswick and Newfoundland) – two serving areas, one for Ontario and one combined for New Brunswick and Newfoundland¹⁴³
- (10) Shaw (British Columbia and Alberta) – 11 serving areas, three in British Columbia, four in Alberta, one in Saskatchewan, one in Manitoba and two in Ontario¹⁴⁴

98. For those Incumbents that have more than one aggregated serving area and have deployed FTTP facilities in more than one such serving area, the rollout of retail IS resale should be rolled out at the same time in all serving areas to avoid any prolongation of the head-starts that the Incumbents have already enjoyed. There is no reason such a rollout should be delayed any further.

¹³⁵ See, e.g., Bell Aliant General Tariff CRTC 21491, Item 626.1.c).

¹³⁶ See, e.g., Bell Canada General Tariff CRTC 6716, Item 5440.2(c)(1).

¹³⁷ See, e.g., Bell MTS Supplementary Tariff Special Services and Facilities CRTC 24002, Item 5830.3.A.4).

¹³⁸ See, e.g., SaskTel Competitor Access Tariff CRTC 21414, Item 650.34.1.

¹³⁹ See, e.g., TELUS Carrier Access Tariff CRTC 21462, Item 226.1

¹⁴⁰ See Eastlink TPIA General Tariff CRTC 21271, Item 104.

¹⁴¹ See Vidéotron General Tariff CRTC 26950, Item 200.3.e).

¹⁴² See Cogeco TPIA Tariff CRTC 26400, Item 104.

¹⁴³ See Rogers Access Services Tariff CRTC 21530, Part G, Item 704.

¹⁴⁴ See Shaw TPIA Service Tariff 26300, Item 104.

99. Allowing the rollout to be staggered by more narrowly defined definitions of serving areas, such as Cable Carrier head-ends or ILEC central offices should not be allowed, as it would result in the same time delay problems associated with disaggregated HSA, thereby crippling the FTTP RISR Remedy.

100. For example, in the case of Bell's 1,016 Ontario and Quebec central offices,¹⁴⁵ if each central office was considered to define a serving area, and each was deployed two weeks after the previous one, it would take more than 39 years to roll out retail IS resale in Ontario and Quebec.

101. Such delays would make the rollout of the FTTP RISR Remedy useless and should not be countenanced.

4.5 There must be no limitation on the services for which resold IS provided under the FTTP RISR Remedy may be used by wholesale customers relative to how TPIA services may be used

102. When the General RISR remedy was first conceived, the retail IS provided by Cable Carriers and resold to wholesale customers were being offered at relatively low speeds by today's standards and wholesale providers were using the retail IS resold to them only to provide retail IS of their own.

103. Since then, retail IS speeds have increased significantly and the speeds of such services provided over FTTP are in the hundreds of Mbps and even Gbps range. It is now routine for retail IS services to be used for many other kinds of services such as telephony and video. Previous limitations on types of equipment that can be connected to Incumbent facilities used to deliver retail IS have also been dropped. Consequently, Incumbents, have over time, removed the limitations on how wholesale customers can use wholesale HSA services.¹⁴⁶

104. Based these development and in order to prevent any potential anti-competitive obstacles being placed by Incumbents in the path of competitors using the FTTP RISR Remedy to deliver

¹⁴⁵ Bell Canada(CRTC)22Jul15-1 TRP 2015-326, as filed in Follow-up to Telecom Regulatory Policy CRTC 2015-326, CRTC File No. 8663-C12-201313601, available at <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?Key=108884&Type=Notice>.

¹⁴⁶ The Commission has also required Incumbents to remove such provisions from their tariffs even when they were not necessarily being enforced in every case. The most recent example of that may be found in *Terms and conditions of access to the cable carriers' aggregated wholesale high-speed access services*, Telecom Order CRTC 2020-60, 14 February 2020.

broadband services to their own end-users, the Commission should add a requirement to the FTTP RISR Remedy stating resold IS provided thereunder to wholesale customers shall not be subject to any limitations on how wholesale customers use the resold retail IS provided by the Incumbent that are not also present in the wholesale aggregated HSA tariffs of the Incumbent when it comes to the use of those services by wholesale customers.

4.6 The FTTP RISR Remedy must continue until the Commission makes determinations in all of the Outstanding HSA Proceedings

105. Finally, we ask the Commission to leave the FTTP RISR Remedy in place until it issues final determinations in all of the Outstanding HSA Proceedings.

106. Although the Commission is conducting a proceeding aimed at the mandating of wholesale disaggregated HSA configurations that are more workable by having a lower level of disaggregation than what the Commission approved in TD 2016-379, it is not clear whether the approved configurations will be workable.

107. Moreover, whether they are workable will also be dependent on other considerations, such as whether port and fibre strand sharing will be allowed and what rates (interim and final) will be approved for wholesale disaggregated HSA services that also encompass FTTP access facilities.

108. In addition, in light of the history of wholesale HSA services, including the problems that have occurred with disaggregated HSA services, it would be appropriate for the Commission to extend the aggregated HSA services regime to include FTTP access facilities, however consideration of that issue and implementation of such an extension will also take time.

109. Overlaying all of this is the uncertainty surrounding how the wholesale HSA services regime may be affected by the outcome of the next wholesale wireline review. This is not a trivial issue, especially considering that there is very little competitive transport in Canada, yet ILEC transport services are not regulated.

110. For example in Telecom Notice of Consultation CRTC 2019-406¹⁴⁷ (“TNC 2019-406”), the Commission identified access to affordable transport services as a potential barrier “that service

¹⁴⁷ *Call for comments regarding potential barriers to the deployment of broadband-capable networks in underserved areas in Canada*, Telecom Notice of Consultation CRTC 2019-406, 10 December 2019 [“TNC 2019-406”].

providers and communities face in building new facilities, or interconnecting to or accessing existing facilities, to extend networks into underserved areas in order to offer universal service objective-level services".¹⁴⁸ However, this barrier, which is not potential, but actual, also exists in areas of the country (including urban areas) where universal service objective-level services are available.¹⁴⁹ How this issue is ultimately affect may have a significant impact on wholesale HSA services.

111. The regulatory uncertainty created by all of these matters, some being considered now and others to be considered later in the various Outstanding HSA Proceedings will persist until final determinations are made in all of them.

112. Expedited implementation of the FTTP RISR Remedy is required to provide much needed regulatory stability and reduce uncertainty during what is and will continue to be a transitional period for HSA wholesale services.

113. This stability would be further enhanced by the fact that under this mechanism, wholesale rates are always final since they are always based on an Incumbent's retail rates and therefore the regulatory uncertainty associated with potential retroactive adjustments when rates are initially set on an interim basis and only later finalized can be avoided.

114. If the status quo remains in place instead, this turbulence and the regulatory uncertainty accompanying it, coupled with the relentless pace of FTTP access facilities rollouts by Incumbents that are not available to competitors will result in an undue lessening of competition in the provision of retail IS, and especially the higher speed services increasingly demanded by Canadians.

115. Equally important is ensuring that the FTTP RISR Remedy is not removed prematurely, leading to a potentially catastrophic impact on competition in the provision of broadband services in Canada.

116. For these reasons, it is critical for the Commission to leave FTTP RISR Remedy in place until it issues final determinations in all of the Outstanding HSA Proceedings

¹⁴⁸ *Id.*, at para 12.

¹⁴⁹ A discussion of this topic is contained in section 2.1.3 of the reply of CNOC dated 7 December 2020 in the proceeding initiated by TNC 2020-187, at pp. 12-15.

5.0 CNOC DOES NOT MAKE THESE REQUESTS LIGHTLY

117. CNOC does not make the requests contained in this Application lightly. The retail-minus resale model implicit in the FTTP RISR Remedy has no long-term appeal to CNOC members.

118. While the retail-minus FTTP RISR Remedy is preferable to the status quo because it will allow competition in the provision of broadband services provided over FTTP access facilities, which are of increasing importance, to take place, the preferred form of service-based competition is based on separate wholesale HSA services, priced to recover Phase II costs plus a reasonable mark-up.

119. Retail-minus resale is inferior as it inherently limits wholesale-based service competitors' ability to differentiate their services from those of the Incumbents whose services they are reselling. It also limits the degree of control that wholesale-based service competitors have over the quality of the corresponding retail IS. No CNOC member wants to be in a position where its retail pricing strategy is limited by the retail prices of the Incumbent whose services it sells, instead of by the competitor's own cost structure, related efficiencies and marketing strategy.

120. It is for these reasons that CNOC, (while being well aware of the availability of the General RISR Remedy and its imposition on an incumbent as recently as 2016), has not brought an application such as this one to the Commission earlier, and has instead tried to address the deficiencies of the HSA regime solely within that regime.

121. However, after five and half years during which workable disaggregated HSA services have not developed, and that problem being coupled with other deficiencies within the wholesale HSA services regulatory framework as a whole that will also take years to remedy, CNOC now finds itself in the unenviable position of urging the Commission to adopt the FTTP RISR Remedy on an expedited basis for a temporary period as set out in this Application.

122. We trust that the urgency of the situation is self-evident based on the fact that we are making this request. CNOC members want nothing more than a viable and stable wholesale HSA framework and will be quite happy to transition away from the regime sought under the FTTP RISR Remedy to an interconnection-based wholesale access services with rates that based on Phase II costs plus a reasonable mark-up, as soon as such a framework is available.

6.0 THE EXPEDITED AND TEMPORARY AVAILABILITY OF THE FTTP RISR REMEDY WILL FURTHER THE CANADIAN TELECOMMUNICATIONS POLICY OBJECTIVES AND IS CONSISTENT WITH THE POLICY DIRECTIONS

6.1 The proposed relief advances the Policy Objectives

123. Transitional FTTP Access on an expedited basis furthers the Policy Objectives in a manner that is consistent with the 2006 Policy Direction and 2019 Policy Direction.

124. First, with respect to the Policy Objectives, the relief requested in the Application is aligned with the following Policy Objectives:

- Paragraph 7(a) of the *Telecommunications Act*: CNOC's requested relief will facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions. The FTTP RISR Remedy will eliminate service gaps in retail broadband services¹⁵⁰ and applications¹⁵¹ resulting from lack of wholesale availability HSA services involving FTTP access facilities, thereby improving competitive conditions that can advance this objective.
- Paragraph 7(b) of the *Telecommunications Act*: The FTTP RISR Remedy will render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada. CNOC's requested relief will introduce consumer choice in areas where any Incumbent currently enjoys monopolistic or duopolistic market conditions in the provision of retail broadband services and applications. Competitive choice of providers, services features and price will translate into the availability of more reliable and affordable services throughout the country.
- Paragraph 7(c) of the *Telecommunications Act*: The FTTP RISR Remedy will enhance the efficiency and competitiveness at the national and international levels, of Canadian telecommunications. In particular, this remedy will enhance the efficiency and competitiveness of broadband services and applications in the

¹⁵⁰ References to services in Parts 6.0 and 7.0 of the Application are intended to refer to retail IS.

¹⁵¹ References to applications in Parts 6.0 and 7.0 of the Application are intended to encompass telephony and video services provided over broadband connections, among others.

serving territories of all Incumbents that provide broadband services over FTTP access facilities, to the benefit of end-customers in those regions.¹⁵²

- Paragraph 7(f) of the *Telecommunications Act*: The FTTP RISR Remedy is intended to be temporary. It will help transition the Canadian telecommunications industry from the current situation involving an unworkable wholesale disaggregated HSA services and deficient wholesale aggregated HSA services (due to the lack of inclusion of services provided over Incumbent FTTP access facilities) to a future situation that will feature a viable and stable wholesale HSA regulatory framework. The method chosen to do this is the minimally intrusive retail-minus resale based approach that the Commission has used in the past to promote competition in the provision of retail IS pending the implementation of wholesale HSA regimes. Implementation of the FTTP RISR Remedy on an expedited basis is therefore regulation that is efficient and effective.
- Paragraph 7(h) of the *Telecommunications Act*: The relief sought by way of the Application is intended to improve the levels of competition in downstream retail markets for broadband services and applications. This goal is therefore intrinsically responsive to the economic and social requirements of users of telecommunications.

6.2 The proposed relief is consistent with the 2006 Policy Direction

125. Implementation of the FTTP RISR Remedy on an expedited basis is aligned with the following provisions of the Policy Direction:

- Subparagraph 1(a)(ii): The relief sought by CNOC consists of regulation that is efficient and proportionate to its purpose, which is to give effect to the Commission’s intent to ensure “wholesale access to the access facilities required to provision downstream retail services”.¹⁵³ Furthermore, the rationale

¹⁵² At paragraph 32 of TD 2016-67, the Commission observed that the General RISR Remedy imposed on Eastlink in that decision would “advance the policy objectives of the Act, especially the objective set out in paragraph 7(c). Specifically, these determinations will enhance the efficiency and competitiveness of Internet service in Eastlink’s serving territory in the Atlantic Provinces, to the benefit of Internet service end-customers in that region.”

¹⁵³ TRP 2015-326, at para 143.

described in section 6.1 with respect to the promotion of the policy objective set out in Paragraph 7(f) of the *Telecommunications Act* also applies here.

- Subparagraph 1(b)(ii): The FTTP RISR Remedy is of an economic nature. It neither deters competitive entry, nor promotes economically inefficient entry. It merely rectifies the unjust preference that Incumbents who use FTTP access facilities to provide retail broadband services without providing wholesale access confer on themselves and rectifies the asymmetrical wholesale treatment of Incumbents who use FTTP vs HFC platforms to provide retail broadband services and applications.
- Subparagraph 1(b)(iv): The FTTP RISR Remedy is proposed in a technological and competitively neutral manner by applying to any Incumbent using non-price regulated FTTP facilities to provide broadband services and applications. In so doing, it does not artificially favor either Canadian carriers or ‘resellers’. This relief will apply to all similarly situated Incumbent carriers on both ILEC and cable platforms and will place those competitors who use either FTTP or HFC technology to achieve the same types of retail outcomes in more similar positions. Furthermore, the FTTP RISR Remedy is intended to eliminate a situation of preference that exists for certain Incumbents, whereby Incumbent carriers are able to profit from monopolistic or duopolistic market conditions that the Commission did not intend to foster through TRP 2015-326 for an extended period of time.
- Subparagraph 1(c)(i): By relying on a retail-minus resale mechanism, instead of tariff approval mechanisms, the FTTP RISR Remedy conforms to the requirement for the Commission to use only tariff approval mechanisms that are as minimally intrusive and as minimally onerous as possible.

6.3 The proposed relief is consistent with the 2019 Policy Direction

126. In section 3.4 of the Application, CNOC demonstrates how the relief sought in the Application is consistent with paragraphs 1.a.i, ii, iii, v and vi of the 2019 Policy Direction. Those submissions need not be repeated here.

7.0 CONCLUSION

127. CNOC has not brought this Application lightly. CNOC members want nothing more than a viable and stable wholesale HSA framework and will be quite happy to transition away from the regime sought under the FTTP RISR Remedy as soon as such a framework is available.

128. However, at the present time, wholesale disaggregated HSA services are not workable and the ongoing lack of an effective wholesale regulation of Incumbent FTTP access facilities harms competition in the provision of downstream broadband services and applications. It will take a few years to remedy that situation. In the meantime, the current wholesale HSA regulatory framework is rife with uncertainty and competition in the provision of retail IS, especially at the higher speeds increasingly demanded by Canadians, is diminishing.

129. We urge the Commission to adopt the FTTP RISR Remedy on an expedited basis until the larger framework issues associated with the wholesale HSA regime can be resolved through final determinations in the Outstanding HSA Proceedings. That is the only way in which much needed stability and regulatory certainty can be attained while the work associated with repairing the wholesale HSA services framework takes place during the next few years.

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