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IN A GOOD WAY.**

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Filed via My CRTC Account

Mr. Claude Doucet, Secretary General
Canadian Radio-television and Telecommunications Commission
1 Promenade du Portage
Gatineau, Quebec J8X 4B1

29 March 2019

RE: TekSavvy intervention concerning *Canadian Networks Operators Consortium Inc. Part 1 Application to Review and Vary Telecom Regulatory Policy CRTC 2015-326 and Telecom Decision CRTC 2016-379*,
CRTC Reference 8662-C182-201809534 (the "Application").

Dear Mr. Doucet:

1. TekSavvy Solutions Inc. ("TekSavvy") is in receipt of the above-noted Application filed by Canadian Network Operators Consortium Inc. ("CNOC") to review and vary TRP 2015-326¹ and TD 2016-379², and submits this intervention in support of that Application. Capitalized terms not defined in this intervention have the meaning given to them in CNOC's Application and CNOC's comments in the first phase of this proceeding for expedited interim suspension of the 100 Mbps speed cap. Certain information contained in this intervention is filed in confidence. Release of this information on the public record would provide existing or potential competitors with competitively sensitive information that would not otherwise be available to them, causing specific and direct harm to TekSavvy by giving its competitors direct insight into our market position.
2. Since October, 2013 with Telecom Notice of Consultation CRTC 2013-551³, the Commission has been reviewing the wholesale wireline framework, largely in order to determine how to introduce and regulate mandated access for incumbent FTTP access facilities. In TRP 2015-326, the Commission stated its objective to increase competition for HSA services, including those over FTTP facilities. In TD 2016-379, the Commission made determinations about the disaggregated wholesale HSA configurations.⁴ Since

¹ *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015 ["TRP 2015-326"].

² *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"].

³ *Review of wholesale services and associated policies*, Telecom Notice of Consultation CRTC 2013-551, 15 October 2013 ["TNC 2013-551"].

⁴ In this intervention, we refer to TRP 2015-326 and TD 2016-379 together as the wholesale wireline decisions.

that time, the Government has outlined its priorities for telecommunications policy, specifically that the CRTC should consider promotion of competition, affordability, consumer interests, and innovation.⁵

3. However, for the reasons outlined below, it is clear that the disaggregated framework that came out of that protracted process will only serve to reduce or even eliminate competition for HSA services.

A. Overview

4. In its Application, CNOC requested the following relief:⁶
 - a. Removal of the 100 Mbps speed cap on aggregated high-speed access (HSA) services on an expedited basis;
 - b. The option of a significantly reduced level of disaggregation on the Bell network, and possibly the networks of Cogeco, Rogers, and Videotron;
 - c. Port and fibre strand sharing; and
 - d. FTTP access over aggregated HSA service, subject to a forbearance framework.
5. Following an initial phase of this proceeding, on March 21, 2019, the Secretary General of the CRTC sent a letter to the parties to this proceeding detailing a decision of the Commission to suspend the 100 Mbps speed cap on an interim basis pending the Commission's final determinations on the Application.
6. TekSavvy supports CNOC's Application and endorses CNOC's arguments concerning the criteria to review and vary a decision of the Commission, as well as the relief sought in the Application.
7. At its core, the Application aims to repair the basic foundation for wholesale-based competition that was established in TRP 2015-326 and the follow up proceeding TD 2016-379, in order to meet the goals of increasing competition for HSA services including those over FTTP facilities and promoting competition, affordability, consumer interests, and innovation.
8. More broadly, it must be said that this protracted proceeding to open up FTTP facilities to wholesale-based competition bears lessons for the development of other regulatory frameworks that seek to promote competition and consumer choice. In the context of a proceeding that was ostensibly intended to promote competition, incumbents leveraged their existing privileged positions vis-à-vis the market and the regulatory process itself to ultimately erode the competitive market and to further entrench their systemic advantages at the expense of competitors and, ultimately, to the detriment of

⁵ Canada Gazette, Part I, Volume 153, Number 10: *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, 9 March 2019.

⁶ *Canadian Network Operators Consortium Inc. Part 1 Application to review and vary Telecom Regulatory Policy CRTC 2015-326 and Telecom Decision CRTC 2016-379*, ["CNOC Application"].

consumers. In that sense, the length of the proceeding and, in particular, the unavailability of critical inputs for the duration of that proceeding, is itself an insurmountable barrier to competition that creates irreparable harm. Unless the Commission recognizes the incumbents' proclivity for systemic regulatory gamesmanship, the same pattern is likely to play out in the coming review of mobile wireless services⁷.

9. In addition to the reasons outlined in CNOC's application, there are two key reasons why, unless they are corrected, the disaggregation decisions will not result in the intended outcomes, both of which go to the criteria required for the Commission to review and vary a decision. Those reasons, which we expand on below, are:
 - a. First, at the time of the consultation and the decision mandating disaggregated access to FTTP facilities, the incumbents' capacity rates were grossly inflated. The reduction of those rates in the aggregated framework constitutes a fundamental change in circumstances or facts since the decision. Unsustainably high capacity rates distorted wholesale-based competitors'⁸ input costs, increased retail service rates, and drained competitors' capital that otherwise would have been available for investment and innovation, and strongly influenced the positions of all parties in the proceeding leading up to TRP 2015-326 in July, 2015. The recognition that they were inflated, and the reduction of those rates to their current levels, therefore changed the entire context of the wholesale wireline review, but those rates were reduced only in October 2016⁹, after the wholesale wireline decisions had been made.
 - b. Second, while the Commission recognized the fundamental principle that carriers are to make wholesale services available at speeds matching their own service offerings (the "speed matching" principle)¹⁰, the Commission failed in its subsequent decisions to consider that basic principle. The consequence of that failure was that the transition plan did not provide for speed matching: While the framework is in development, competitors remain locked out of Bell Canada's FTTP facilities for as long as it takes for the framework to be developed and for us to migrate to the new disaggregated framework; Once the framework is in

⁷ Telecom Notice of Consultation CRTC 2019-57, *Review of mobile wireless services*, 28 February 2019.

⁸ Competition for wireline broadband services in Canada is largely based on a wholesale model, with wholesale-based competitors like TekSavvy purchasing "last mile" access services and capacity services from incumbents to connect customers. Wholesale-based competitors do not resell incumbent Internet services; rather, we buy access to part of their network to provide our own services to our customers. For more about this, see TekSavvy's submission to the Competition Bureau Market Study: Competition in Broadband Services (abridged), 25 February 2019, < [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/TekSavvy-Submission-CompetitionBureau-ABRIDGED.pdf/\\$file/TekSavvy-Submission-CompetitionBureau-ABRIDGED.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/TekSavvy-Submission-CompetitionBureau-ABRIDGED.pdf/$file/TekSavvy-Submission-CompetitionBureau-ABRIDGED.pdf) >.

⁹ *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, Telecom Order CRTC 2016-396, 6 October 2016 ["TO 2016-396"].

¹⁰ See TNC 2013-551, at para 17 and note 21.

place, pursuant to TRP 2015-326, competitors would face an arbitrary 100 Mbps speed cap on aggregated wholesale HSA.

10. The Commission must review the decisions to remove the substantial doubt raised here. TekSavvy supports CNOc's calls for relief required to resolve the problems they raised, including the removal of the 100 Mbps speed cap on a final basis, intermediate levels of disaggregation subject to costing, and FTTP access over aggregated HSA services. These issues are fundamental to the decision and there may be a lengthy process to fully address them, but competitors and consumers have already been waiting since October 2013 when the Commission launched its last review of the wholesale services framework. In our submission, immediate wholesale access to FTTP facilities over aggregated HSA services is a straightforward and simple solution that addresses a wide range of concerns and can be implemented quickly to restore the ability of competitors to compete and protect consumer choice for high speed services.

B. The reduced capacity rates are a fundamental change in circumstances and fact

11. As described above, when the Commission released TRP 2015-326 and TD 2016-379, the incumbents' capacity rates were grossly inflated. The recognition that they were inflated, and the reduction of those rates to their current levels, therefore changed the entire context of the wholesale wireline review, but those rates were only reduced in October 2016¹¹, after the Commission had made its decisions in the above proceedings. As such, the reduction of those rates in the aggregated framework constitutes a fundamental change in circumstances or facts since the decision, giving rise to substantial doubt as to the correctness of those decisions.
12. Furthermore, the historical unjustness of those inflated rates weighs in favour of the Commission reviewing its decisions that flowed from those rates. Simply put, the regulatory regime that comes out of this broader "disaggregated" proceeding is likely to govern wireline competition for many years, and the incumbents must not be permitted to leverage their regulatory manipulations of the earlier regime to further suppress competition under the new regime. To that end, it is important to remember the historical context for the inflated CBB rates that are again at issue here.
13. In 2011, following a complex and opaque costing process, the CRTC set astronomically high rates for the capacity of bandwidth purchased by wholesale-based competitors (known as CBB, for the billing model currently in place, Capacity Based Billing)¹²:

Carrier	CBB Rate (\$/100 Mbps/month)
Bell companies	\$2,213
Cogeco Cable Inc.	\$2,695
MTS Allstream Inc.	\$281
Rogers Communications Partnership	\$1,251
Videotron G.P.	\$1,890

¹¹ TO 2016-396, *supra* note 9.

¹² *Billing practices for wholesale residential high-speed access services*, Telecom Regulatory Policy CRTC 2011-703, 15 November 2011 ["TRP 2011-703"].

14. The CBB rates were set in a very unusual and complex process: the CRTC merged four major proceedings¹³ dealing with disparate issues, namely: speed-matching on fibre-to-the-node (“FTTN”), the level of aggregation on cable carrier networks, various tariff notices for wholesale services, and Bell’s proposal to replace its Usage Based Billing (UBB) proposals with a new billing model.
15. Ultimately, the Commission decided upon the structure of the new billing model, “Capacity Based Billing”, or CBB. At the same time, it set specific CBB rates pursuant to tariff notices and cost studies that had been filed under the pre-existing, overturned UBB rate structure.
16. In that decision, the Commission’s approach flowed from the Policy Direction that was given to it by the Governor in Council in 2006¹⁴ to rely on market forces and to make the tariff approval process as minimally intrusive to incumbents as possible. The Commission’s resulting preoccupation with promoting investment by incumbents and its narrow focus on facilities-based competition, combined with the high degree of confidentiality surrounding the information that had been filed in confidence in support of the incumbents’ UBB/CBB rate proposals, prevented wholesale-based competitors from effectively challenging the incumbents’ costing assumptions, despite our best efforts and the clearly inflated final CBB rates.
17. Upon setting the CBB rates, the Commission rejected competitors’ objections and requests to review those rates. In TRP 2011-703, the Commission rejected CNOC’s request for annual reviews of CBB rates, citing the 2006 Policy Direction that such a rate review would not be efficient, minimally intrusive, or proportionate to its purpose.¹⁵
18. In 2013, the CRTC rejected CNOC’s request to reduce CBB rates to a range between \$100 and \$400 (per 100 Mbps), on the basis that such rates would not allow incumbents to fully recover the costs of providing wholesale transport services.¹⁶
19. The Commission then rejected CNOC’s argument that the lack of transparency in CBB rate-setting had been procedurally unfair and denied CNOC’s request to conduct a full review of CBB rates using the more transparent costing guidelines that the CRTC had adopted in 2012¹⁷, and which had never been applied to the opaque costing process used to set CBB rates in 2011. In rejecting CNOC’s application, the CRTC determined “that it would be neither necessary nor appropriate to initiate another proceeding to

¹³ *Review of billing practices for wholesale residential high-speed access services*, Telecom Notice of Consultation CRTC 2011-77-2, 8 April 2011.

¹⁴ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 [the “2006 Policy Direction”].

¹⁵ *Supra* note 12, at para 169.

¹⁶ *Canadian Network Operators Consortium Inc. – Application requesting relief to address implementation of the capacity model approved in Telecom Regulatory Policy 2011-703*, Telecom Decision CRTC 2013-72, 21 February 2013, at para 36.

¹⁷ *Confidentiality of information used to establish wholesale service rates*, Telecom Regulatory Policy CRTC 2012-592, 26 October 2012.

reconsider the rates for the wholesale HSA services using a different process for the disclosure of confidential information, as requested by CNOC.”¹⁸

20. Finally, in the 2015 decision in the wholesale wireline review at issue in this Application, citing extremely high CBB costs, the CRTC implemented radical changes to the wholesale regulatory framework.¹⁹

[M]oving to a disaggregated wholesale HSA service model will better support the sustainability of competition and can be expected to provide benefits, such as reasonable prices and innovative services, to consumers. One of the main drawbacks of the current aggregated HSA service is the high cost incurred by competitors when transporting large amounts of traffic over incumbent carriers' facilities.²⁰

21. Extremely inflated CBB rates were already severely limiting the ability of wholesale-based competitors to compete with incumbents, and the CRTC expected that CBB costs would continue to increase in the future. On the basis of that assumption, the CRTC concluded that the existing aggregated regime threatened sustainable competition and would be replaced by a disaggregated regime:

[T]hese [CBB] costs are expected to exacerbate as consumption increases over time, given that a competitor must pay for all of its data traffic to be routed back to a central point of aggregation, no matter how far away a subscriber is located. The result is an expensive and often inefficient use of the network that will challenge the sustainability of competitors in the years ahead.²¹

22. The disaggregated HSA service was mandated in TRP 2015-326 and configured in TD 2016-379²².
23. Incredibly, less than three weeks later, the Commission found that aggregated CBB rates were unreasonably high and drastically reduced them.²³ This decision revealed that the main economic theory upon which the service was mandated and configured—the very fact that the high cost of aggregated transport posed a dire threat to competition and that such costs would continue to rise in the future—was profoundly false. In reality, the Commission determined, CBB rates had been vastly inflated all along because most incumbents simply “chose to disregard” the Commission’s costing regulations.²⁴ As stated by the then-Chairman and CEO of the CRTC, “The fact that these large companies did not respect accepted costing principles and methodologies is very disturbing. What’s even more concerning is the fact that Canadians’ access to a choice

¹⁸ *Canadian Network Operators Consortium Inc. – Application to review and vary Telecom Regulatory Policies 2011-703 and 2011-704*, Telecom Decision CRTC 2013-73, 21 February 2013, at para 18.

¹⁹ TRP 2015-326, *supra* note 1.

²⁰ *Ibid.*, at para 145 [emphasis added].

²¹ *Ibid.*

²² TD 2016-379, *supra* note 2.

²³ TO 2016-396, *supra* note 9.

²⁴ *Ibid.*, at para 22.

of broadband Internet services would have been at stake had [the Commission] not revised these rates.”²⁵

24. Likewise, the inflated capacity rates, which were prima facie not just and reasonable, served to unjustly enrich the incumbents. One need only look at the rates themselves, and how they changed over time as further information came forward revealing them to be inflated. For example, over a five year period while competitors were overcharged, Bell’s rates were gradually reduced by nearly 95%:
- In 2011, the CRTC set the cost of Bell CBB at \$2,213 per 100 Mbps/month.²⁶
 - In 2013, the CRTC corrected the cost of Bell CBB to \$1,030 per 100 Mbps/month.²⁷
 - In 2016, the CRTC further corrected the cost of Bell CBB to \$130 per 100 Mbps/month.²⁸
25. Altogether, as noted by CNOC²⁹, competitors were overbilled over \$300 million between 2011 when CBB rates were first implemented, and 2016 when they were reduced. Even then, we note that CBB rates and access remain higher than they ought to be; as we pointed out in our earlier intervention on expedited relief, Bell Canada has continued to undercut its own wholesale rates for 50 Mbps service with perpetual predatory offers through its flanker brand, “Virgin”.³⁰
26. In fact, the introduction of flanker brands in the broadband wireline market constitutes a further change in circumstance that is material to this proceeding. As we outlined in our earlier intervention on expedited relief, Bell has systematically and deliberately used its flanker brand to attack wholesale competition, not only by undercutting its own wholesale rates but also by casting it as a competitive offering while enjoying the benefits of being a house brand. Those benefits include having access to their fibre footprint, offering 100 Mbps service on fibre, and not being subject to the progressive erosion of Bell’s copper footprint.
27. To understand the methodical and deliberate nature of this damage to competitors and wholesale-based competition, one need only refer to statements made to investors by Bell’s CEO George Cope:

²⁵ CRTC News Release, “CRTC finds proposed wholesale high-speed access rates unreasonable”, 6 October 2016.

²⁶ TRP 2011-703, *supra* note 12.

²⁷ TD 2013-73, *supra* note 18.

²⁸ TO 2016-396, *supra* note 9.

²⁹ See the CNOC Application, *supra* note 6, at paras 157 to 165.

³⁰ *TekSavvy intervention concerning interim relief, suspension of 100 Mbps speed cap condition, and restoration of speed matching requirement*, 7 January 2019, at para 47.

“So, on our churn rates on broadband, wholesale is by far our highest churn rate...”³¹

“[W]e had negative wholesale loading, or subscriber additions, which of course we would be very comfortable with...Of course, part of that is our strategy with the roll-out of the Virgin Internet brand.”³²

“[O]ur wholesale additions declined year-over-year and is not a focus of our business...”³³

“[W]e can see that we know we captured more than 50% of the growth in the quarter. So, maybe it gets a little bit away from just subscriber growth now and now more mix of subscribers or wholesale versus retail that will drive it, and our focus is 100% on retail. The wholesale is a regulatory obligation, not a business strategy for us.”³⁴

28. Since that time, Videotron has joined Bell and Rogers with a flanker brand in the broadband wireline market, called “Fizz”, launched in order to be a “weapon to fight the resellers”.³⁵
29. Flanker brands weaponize incumbents’ accrued privileges against competitors and strengthen the incumbents’ dominance in the market, all in the guise of increased competition and, as such, they now strongly influence pricing in the competitive market. Flanker brands substantially drive retail pricing and, more to the point of this proceeding, they benefit from the advantages of the incumbents, using newer facilities and enjoying a head-start advantage for new service speeds, all of which were critical considerations in the proceeding following TNC 2013-551. But flanker brands only entered the wireline Internet market, after the Commission rendered the wholesale wireline decision in TRP 2015-326.³⁶ Their presence in the market and the deliberate way in which they are used to attack competitors is therefore a fundamental change in circumstances that raises substantial doubt as to the correctness of these decisions.
30. Given this historical background leading up to the wholesale wireline decisions, it is clear that the reduction of CBB rates in 2016 constitutes a fundamental change in circumstances and facts, giving rise to substantial doubt as to the correctness of the Commission’s decisions related to the disaggregated regime. That rate reduction in 2016 served to at least temporarily adjust CBB rates going forward in the aggregated regime. We look forward to seeing a refund of past overpayments by competitors in the ongoing

³¹ BCE Q3 2018 Results Conference Call Transcript, 1 November 2018, at page 19 <<http://www.bce.ca/investors/financial-reporting/2018-Q3/2018-q3-transcript.pdf>>.

³² *Id.*, at page 8.

³³ BCE Q2 2018 Results Conference Call Transcript, 2 August 2018, at page 8, <<http://www.bce.ca/investors/financial-reporting/2018-Q2/2018-q2-transcript.pdf>>.

³⁴ *Supra* note 31, at page 17.

³⁵ Greg O’Brien, “Fizz Internet the ‘right weapon’ to beat back resellers, says Vidéotron”, CARTT.ca, 27 March 2019.

³⁶ Rogers launched its Fido brand’s wireline service in November, 2015. Bell launched its Virgin brand’s wireline service in July, 2016. Videotron launched its Fizz brand’s wireline service in March, 2019.

aggregated costing proceeding³⁷. This Application presents the Commission with an opportunity to correct the legacy of those CBB rates and to ensure that the incumbents' past manipulation of the costing process does not shape the entire regulatory regime for broadband wireline competition including access to FTTP facilities, and instead fosters affordable and lower prices, reduces barriers to competition, and properly promotes competition and consumer interests.

C. The Commission did not consider the basic principle of speed matching

31. In its Application, CNOC details errors in fact and fundamental changes in circumstances and facts that raise substantial doubt as to the correctness of TRP 2015-326 and TD 2016-379. In particular, there were errors and changes that contribute to the disaggregated regime not being useable for competitors. There was also a lack of planning in the decisions for how drawn out the entire proceeding would be. Taken together, these issues have resulted in FTTP facilities not being open to competition, despite the stated intention of the proceedings to increase competition for HSA services, including those over FTTP facilities. These errors stem from the Commission ignoring the basic principle of speed matching, which had previously been at the core of its decision making with respect to wholesale-based competition.
32. Speed matching is the long-standing regulatory requirement that ILECs (traditional incumbent phone companies) and cable carriers provide wholesale services that enable competitors to offer Internet services to their retail customers at speeds that match the Internet speeds provided by those incumbents to their own retail customers.³⁸ Predictably, and critically for competitors, the consequence of setting aside speed matching in this proceeding is that the resulting disaggregated regime has implicitly prevented competitors from matching speeds during this prolonged transitional period, and it would further explicitly erode speed matching with the 100 Mbps speed cap, as currently conceived.
33. Specifically, competitors' inability to access FTTP facilities and their associated higher speeds, especially on Bell Canada's network, has for the past three years already caused irreparable harm to competitors who rely upon ILEC aggregated HSA services in Ontario and Quebec. This is precisely the harm that the speed matching principle successfully avoided in the past and, ironically, the very harm that TRP 2015-326 sought to avoid when mandating wholesale access to higher speed access facilities.
34. To be clear, unless speed matching is restored and competitors are able to buy services on ILEC FTTP facilities at fair rates, we expect that competitors would no longer be able to compete with ILECs like Bell Canada. As stated in our submission supporting expedited relief in this Application³⁹, #####

As long as

³⁷ *Review of costing inputs and the application process for wholesale high-speed access services*, Telecom Decision CRTC 2016-117, 31 March 2016, and TO 2016-396, *supra* note 9.

³⁸ *Wholesale high-speed access services proceeding*, Telecom Regulatory Policy CRTC 2010-632, 30 August 2010 ["TRP 2010-632"], at para 29.

³⁹ *TekSavvy intervention concerning interim relief, suspension of 100 Mbps speed cap condition, and restoration of speed matching requirement*, 7 January 2019.

we remain unable to access FTTP facilities, we anticipate that this trend will only accelerate. Moreover, now that their copper facilities only serve wholesale-based customers, ILECs no longer maintain those facilities leading to an accelerating reduction in the market available for competition at all, even for lower speeds. In short, the irreparable harm would not be in terms of merely the number of lost customers or lost revenues, but due to a complete loss of our ability to compete, and ultimately a loss of consumer choice.

35. Similarly, if the Commission imposes a 100 Mbps speed cap on the aggregated framework without making critical changes to the disaggregated regime so that it could actually be used by competitors then, in our submission, wholesale-based competitors may no longer be able to compete at all in the cable-based broadband market. Based on the trends since 2015⁴⁰, with consumer demand nearly doubling year over year, we anticipate that on average in 2019 over 50% of consumers would subscribe to service speeds over 100 Mbps on the open market. If competitors are not able to provide those speeds, they will not be able to effectively compete. Again, the irreparable harm would not be in terms of the number of lost customers or lost revenue; it would be severe harm that would in effect render us unable to compete at all. Again, this would ultimately result in a loss of consumer choice.
36. The Commission took the view in February, 2018 that the competitive harm caused by the lack of access to FTTP facilities is “generally reduced”⁴¹ by the availability of higher speeds in Ontario and Quebec through the cable carriers’ aggregated HSA services. That is incorrect. The fact that the 100 Mbps speed cap does not currently ban competitors from providing higher retail speeds using the cable carriers’ aggregated HSA services does nothing to address the irreparable harm caused by the harvesting of competitors’ stranded DSL assets and Bell’s unchecked abuse of market power in retail markets for higher speed Internet services.
37. As noted above, the policy intent of the wholesale wireline decisions, including the 100 Mbps speed cap, was to facilitate a smooth transition from aggregated to disaggregated HSA services. It was emphatically not intended to force competitors to mount a migration from ILEC to cable carrier aggregated HSA services in a desperate bid to survive speed restrictions caused by the absence of a workable disaggregated HSA service.
38. At any rate, a migration from ILEC to cable carrier aggregated HSA services would only hasten the competitive devastation initiated by the current lack of access to FTTP facilities. Even assuming that adequate cable facilities are present at all DSL customers premises, and that all such DSL customers desired cable Internet services and pricing, competitors would still incur the crippling disruption and enormous one-time costs

⁴⁰ As documented in open data associated with the 2018 Communications Monitoring Report, Table 5.15(S), *Residential Internet service one-month subscriber distribution (%)*, by advertised download speed: 100 Mbps and higher had rates of 8.0% (2015), 15.8% (2016), and 25.8% (2017).

⁴¹ Telecom Decision CRTC 2018-44, Canadian Network Operators Consortium Inc. – Application for transitional access to incumbent carriers’ fibre-to-the-premises facilities through aggregated wholesale high-speed access services, 2 February 2018, [“TD 2018-44”] at para 49.

associated with the reinstallation of its single DSL customer base onto three different cable carrier service platforms across Ontario and Quebec.

39. There is simply no business case to justify such a migration from DSL to cable. Until final rates are set, competitors would pay higher monthly costs on the cable carriers aggregated HSA service, due to the inflated interim tariffs. For example:

Rogers wholesale rates and costs

Speed	Access	CBB	Total
25	\$14.45	###	#####
75	\$23.32	###	#####
150	\$34.57	###	#####

Bell wholesale rates and costs

Speed	Access	CBB	Total
25	\$25	###	###
50	\$25	###	###

40. Most importantly: TekSavvy regards FTTP as the superior technology for broadband connectivity. In the 3½ years since TRP 2015-326 was issued, TekSavvy has sought to maintain its DSL base, at significant expense, for the very purpose of eventually migrating those customers to higher speed ILEC facilities provisioned over a disaggregated HSA service, thereby securing the continued growth and evolution of the customer base it established using ILEC aggregated HSA services.

41. #####

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42. Again, the importance of speed matching to this decision is best understood with the benefit of its historical context.

Speed Matching is a basic principle, a cornerstone supporting wholesale-based competition

43. The Commission has consistently recognized speed matching as a fundamental prerequisite to competition in retail Internet service markets and a necessary safeguard for the protection of consumers’ interests.

44. In 2006, the Commission considered whether the cable carriers should be subject to the speed matching requirement.⁴² Having heard arguments from incumbents and competitors that would give any observer of this and other ongoing aggregated and disaggregated HSA proceedings a strong sense of déjà vu, the Commission applied the speed matching principle to the cable carriers’ HSA services because it “would enable competitors to compete on a more equitable basis.”⁴³

⁴² Cogeco, Rogers, Shaw, and Videotron - Third-party Internet access service rates, Telecom Decision CRTC 2006-77, 21 December 2006, at para 209.

⁴³ Ibid.

45. In 2007, the Commission applied speed matching to ILEC aggregated HSA services,⁴⁴ for the same reasons as the cable carriers. When finalizing tariffs for Bell Canada and Bell Aliant, the Commission considered “the importance of providing comparable competitor ADSL access services”⁴⁵ so that “competitors in all parts of the country have the same range of options available to them and can compete in multiple markets.”⁴⁶
46. The Commission briefly rescinded speed matching as a requirement for ILECs in 2007, in light of the then-new Policy Direction,⁴⁷ as well as the regulatory uncertainty arising from the ongoing proceeding to consider a new wholesale HSA framework.⁴⁸
47. In response, notably, the ILECs promptly imposed speed caps on their aggregated HSA services, which restricted wholesale competitors to lower speeds than those that the ILECs provided to their own retail customers.
48. The Commission restored speed matching as a requirement for ILECs in 2008.⁴⁹ Noting that “service speed is an important competitive attribute”⁵⁰, the Commission restated the fundamental purpose of the speed matching requirement: “to ensure that competition in the retail high-speed Internet access services market is not substantially lessened or prevented.”⁵¹ The Commission further found that mandating speed matching complied with the Policy Direction,⁵² advanced the objectives of the Telecommunications Act⁵³ and would not dampen ILEC investment incentives⁵⁴.
49. Crucially, the Commission determined that competitors who relied on the ILECs’ aggregated HSA services would suffer harm if the speed matching requirement were withdrawn:

The Commission considers that absent a matching service speed requirement, the ability of competitors that rely on the mandated aggregated ADSL service to compete in the retail market would be significantly restricted, which would likely result in a substantial lessening

⁴⁴ See Telecom Orders CRTC 2007-21 to 2007-25.

⁴⁵ *Bell Canada and Bell Aliant Regional Communications, Limited Partnership for services provided in Ontario and Quebec*, Telecom Order CRTC 2007-22, 25 January 2007.

⁴⁶ *Bell Aliant Regional Communications, Limited Partnership for services provided in the Atlantic Provinces*, Telecom Order CRTC 2007-21, 25 January 2007, at para 23.

⁴⁷ 2006 Policy Direction, *supra* note 14.

⁴⁸ *Review of regulatory framework for wholesale services and definition of essential service* Telecom Public Notice CRTC 2006-14, 9 November 2006, decided in *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008.

⁴⁹ *Cybersurf Corp.'s application related to matching service speed requirements for wholesale Internet services*, Telecom Decision CRTC 2008-117, 11 December 2008.

⁵⁰ *Ibid.*, at para 19.

⁵¹ *Ibid.*

⁵² *Ibid.*, at para 24.

⁵³ *Ibid.*, at para 10.

⁵⁴ *Ibid.*, at para 23.

or prevention of competition in the retail high-speed Internet services market.⁵⁵

50. When Bell later refused to abide by the speed matching requirement for aggregated HSA services provided over its higher speed access facilities, the Commission further clarified its intended scope of the speed matching obligation as applying more broadly to Bell's next generation network and to both existing and new speeds.⁵⁶
51. Finally, in response to an Order in Council,⁵⁷ the Commission reconsidered speed matching and again firmly concluded that it is fundamentally necessary for wireline competition. The Commission determined that, without a speed matching requirement applicable to all incumbents, competitors would be "unduly impaired" from retaining their existing customers and from competing for new customers, resulting in retail market controlled by an incumbent duopoly [emphasis added]:

The Commission notes the significant extent to which competitors use existing wireline wholesale services to provision their retail Internet services. The Commission also notes that the incumbents are offering increasingly higher retail Internet service speeds to consumers. In the Commission's view, if speed matching were not required for both the ILECs' aggregated ADSL access services and the cable carriers' TPIA services, competitors would be effectively prevented from offering higher service speed options to their own customers.

The Commission concludes that, without a speed-matching requirement for wireline aggregated ADSL access and TPIA services, it is likely that competition in retail Internet service markets would be unduly impaired. In the Commission's view, an ILEC and cable carrier duopoly would likely occur in the retail residential Internet service market, and competition might be reduced substantially in small-to-medium-sized retail business Internet service markets. The Commission considers that, in such circumstances, retail Internet service competition would not continue to be sufficient to protect consumers' interests.⁵⁸

52. TekSavvy therefore submits that speed matching as a principle is a fundamental cornerstone of the wholesale HSA framework, and the Commission's above-cited determinations are as critical and relevant to wireline competition in Canada today as when first issued.

TRP 2015-326 did not consider speed matching as it pertains to the implementation of the disaggregated framework

53. In TRP 2015-326, the Commission mandated wholesale access to all last-mile access facilities for precisely the same reason that it consistently upheld speed matching in the above decisions: If competitors cannot match incumbent retail speeds, "there would be a

⁵⁵ Ibid., at para 19.

⁵⁶ *Cybersurf's application related to the implementation of Telecom Decision 2008-117 regarding the matching speed requirement*, Telecom Order CRTC 2009-111, 3 March 2009.

⁵⁷ Order in Council P.C. 2009-2007.

⁵⁸ TRP 2010-632, *supra* note 38, at paras 54, 55.

substantial lessening or prevention of competition in the downstream retail Internet services market, in all incumbent carrier serving regions”.⁵⁹

54. Specifically, the Commission determined that if competitors were unable to match incumbent retail speeds using higher speed access facilities, most of the competitors’ existing customers would “migrate to incumbent carrier retail Internet service”⁶⁰ to obtain higher speeds. The Commission further found that competitors would also be unduly impaired from obtaining new customers, as their legacy speed offerings would be irrelevant to “more and more consumers desiring higher-speed Internet services”.⁶¹
55. The Commission also recognized that the anticompetitive impact of a decision to deny wholesale access to higher speeds would be “felt most strongly and immediately in Ontario and Quebec”,⁶² but ultimately, “most retail customers in Canada would eventually be left with a very limited choice of Internet service providers”.⁶³
56. Nonetheless, despite being apparently motivated by the need for speed matching, TRP 2015-326 imposed implicit and explicit speed caps on the aggregated HSA framework as described above. The Commission grounded both speed caps in the same policy rationale: that retail Internet speed restrictions would be required to encourage competitors to migrate from the existing aggregated HSA framework to an as-yet-unknown disaggregated HSA framework that would be configured, costed and operationalized at a later date.⁶⁴
57. Despite the significant uncertainty around the disaggregated HSA service, competitors were assured that the Transition Plan would “serve to ensure that wholesale access to the access facilities required to provision downstream retail services is always provided for.”⁶⁵ The Commission clarified that its “ultimate goal is to have a smooth transition, over time”⁶⁶, predicated upon the availability of a disaggregated HSA service:

With respect to aggregated wholesale HSA services, a decision to no longer mandate the provision of such services would not impact investment in high-speed access facilities by incumbent carriers or competitors, nor would it significantly affect consumer adoption of Internet access services, so long as a disaggregated service is made available.⁶⁷
58. Very simply put, there has been no smooth transition over time. Instead, in the 3½ years since TRP 2015-326 was issued, while incumbents expand their FTTP networks and lock in customers on term contracts, in some cases shrinking their copper networks at

⁵⁹ TRP 2015-326, *supra* note 1 at para 130.

⁶⁰ *Ibid.*, at para 127.

⁶¹ *Ibid.*, at para 128.

⁶² *Ibid.*, at para 129.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, at para 154.

⁶⁵ *Ibid.*, at para 143.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, at para 138.

the same time, and introduce flanker brands intended to destroy wholesale-based competition, no workable disaggregated HSA service has been made available, all despite the above cited intention of TRP 2015-326 and the Commission's prior projection that final rates for both aggregated and disaggregated HSA services would be set in 2017 or 2018 at the latest.⁶⁸

59. Moreover, it is now known that the disaggregated HSA services proposed by the incumbents are completely unworkable and will remain so for the foreseeable future, for all the reasons identified by CNOC in the Application and in their comments supporting expedited interim relief, as well as TekSavvy's submission supporting expedited relief⁶⁹.
60. Having not considered the speed matching principle in the implementation of the disaggregated regime in TRP 2015-326 and TD 2016-379, it is clear that during this prolonged transitional period there has been, in effect, no speed matching requirement for ILECs and, if the 100 Mbps speed cap were imposed on aggregated services following a final decision in the broader wireline proceeding, there would be no speed matching requirement for cable companies either.
61. The Commission's failure to consider that basic principle in those key wholesale wireline decisions therefore raises substantial doubt as to the correctness of those decisions. Worse still, the Commission's failure to apply the speed matching principle is tantamount to creating an insurmountable barrier to competition, denying Canadians the benefits of competition such as lower prices and more affordable services.

D. Relief sought

62. To achieve the goal of competition for HSA services including those over FTTP facilities, the Commission must correct the framework that was established in the wholesale wireline decisions in light of the substantial doubts that have been raised in the Application and in our comments above.
63. Ultimately, **TekSavvy continues to call for full disaggregation**, subject to appropriate rates and terms. A fully disaggregated configuration would give competitors more control over their networks and more incentives to invest, while moving the wireline economy away from entrenched incumbent monopolies. A disaggregated model is necessary to encourage competition, foster affordability and lower prices where incumbents exercise market power, ensure that affordable access to high quality telecommunications services are available, and reduce barriers to entry and barriers to competition for new and smaller telecommunications service providers.
64. First, however, the Commission must **restore speed matching immediately by mandating access to FTTP facilities** at fair rates on an aggregated basis in order to restore stability to the competitive industry, which has not even had access to a significant portion of necessary inputs in order to offer customers the services they want.

⁶⁸ Canadian Radio-television and Telecommunications Commission, *Three Year Plan 2016-2019*, at pages 19 and 20.

⁶⁹ *Supra*, at note 39.

65. Then, knowing as we do now that capacity rates were grossly inflated during the proceedings leading up to the wholesale wireline decisions, the Commission must revisit its determinations in the wholesale wireline decisions in light of reduced capacity rates. All sides would have made substantially different arguments and it is likely the Commission would have come to a substantially different conclusion in TRP 2015-326 if the determination had been made at that time, as we had argued earlier, that capacity rates were inflated. Simply put, **the recognition that incumbents had chosen to disregard the Commission's costing regulations and that capacity rates had been grossly inflated for years totally undermines the foundations on which arguments were made, and distorted the rationale for the decision, cutting off competition instead of promoting it.**
66. Finally, the **Commission must approach its processes in this proceeding keeping in mind the principle of speed matching.** As the Commission revisits its wholesale wireline decisions, including the transition plan and the delays in implementing the new framework and the transition plan, it is critical that it actually maintains speed matching. As explained above, the unavailability of critical inputs for the duration of the proceeding—including from the extended period of time this proceeding has already taken and anticipated delays that it will still take—is itself an insurmountable barrier to competition that creates irreparable harm. Competitors will not be able to plan any transition to a new model until there is cost certainty about that new model.

Yours truly,

[transmitted electronically]

Andy Kaplan-Myrth
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Distribution List in CRTC procedural letter dated 20 November 2018

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