TekSavvy WE'RE DIFFERENT. 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

7 January 2019

RE: **TekSavvy intervention concerning interim relief, suspension of 100 Mbps speed cap condition, and restoration of speed matching requirement**– 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 2015-326[1] and TD 2016-379[2].

2. Capitalized terms not defined in this intervention have the meaning given to them in CNOC's Application and CNOC's Speed Cap Comments. In addition, 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.

3. The Application requests, among other remedies, the expedited removal of the 100 Mbps speed cap on aggregated HSA services. In a procedural letter dated 20 November 2018, the Commission established timelines to address the Application in two stages, the first dealing with "the option of suspending the 100 Mbps speed cap condition when disaggregated rates are finalized as interim relief until the Application is fully addressed."

4. In the Application, CNOC argues that, without the expedited removal of the 100 Mbps speed cap,

> Canadian consumers will have but one choice for service speeds in excess of 100 Mbps: Incumbents. Competitors will lose opportunities to

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[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"].

> gain new customers or even upgrade the services of existing customers to speeds above the 100 Mbps cap. Furthermore, Incumbents stand to be enriched during this period by the undue exercise of their market power, since they will be the only class of providers capable of offering speeds in excess of 100 Mbps throughout their operating territories.[3]

5. TekSavvy supports the Application in its entirety, as well as CNOC's arguments for the expedited removal of the 100 Mbps speed cap on aggregated HSA services prior to its coming into effect upon the final approval of disaggregated HSA tariffs.[4]

6. TekSavvy further requests that the Commission reinstate, on an expedited basis, the long-standing regulatory requirement that ILECs 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 ("**Speed Matching Requirement**").[5]

7. TekSavvy submits that in TRP 2015-326, the Commission imposed two speed cap restrictions on aggregated HSA services, namely:

   i. the 100 Mbps speed cap, which will take effect on the Cable Carriers' aggregated HSA services, on such date that the Commission grants final approval to the Incumbents' disaggregated HSA tariffs (the "**100 Cap**"),[6] and;

   ii. the 50 Mbps speed cap, which is currently in effect on ILEC aggregated HSA services, due to the absence of a workable disaggregated HSA service that would enable competitors to access higher speed access facilities[7] (the "**50 Cap**", and together with the 100 Cap, the "**Speed Cap Restrictions**").[8]

8. The clear policy objective of both Speed Cap Restrictions was to encourage competitors to migrate from the aggregated HSA service to a new disaggregated HSA service.[9]

9. However, by imposing both Speed Cap Restrictions on the aggregated HSA service, before a workable disaggregated HSA service was made available, TRP 2015-326 failed

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[3] 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, [CNOC's "Application"], at para 214.

[4] CNOC Reply, "Comments in support of interim relief to remove the 100 Mbps cap", 3 December 2018, [CNOC's "Speed Cap Comments"].

[5] TRP 2010-632, at para 29.

[6] TRP 2015-326, para 154.

[7] Due to technical limitations, ILEC FTTN network architecture is limited to effective download speeds of 50 Mbps on single pair last-mile connections to the end-user premises.

[8] TRP 2015-326 para 143.

[9] *Id.*, at paras 148, 153-154.

to uphold the basic principles of the Speed Matching Requirement that has underpinned Canadian wireline broadband competition since its inception.

10. Moreover, in the 3½ years since TRP 2015-326 was issued, it has become clear that the disaggregated HSA services proposed by the Incumbents are unworkable for all of the reasons identified by CNOC in the Application and the Speed Cap Comments.

11. Accordingly, TekSavvy submits that both Speed Cap Restrictions together amount to an arbitrary ban on wholesale competition in retail markets for higher speed Internet services, reducing consumer choice for such services to the exclusive benefit of Incumbents.

12. In particular, TekSavvy submits that the existing 50 Cap has for the past three years already been causing irreparable harm to competitors who rely upon ILEC aggregated HSA services in Ontario and Quebec; precisely the harm that the Speed Matching Requirement successfully avoided and, ironically perhaps, the harm that TRP 2015-326 sought to avoid when mandating wholesale access to higher speed access facilities.

A. <u>Speed matching is a fundamental requirement for wireline competition.</u>

13. The Commission has consistently recognized the Speed Matching Requirement as a fundamental pre-requisite to competition in retail Internet service markets and a necessary safeguard for the protection of consumers' interests.

14. In 2006, the Commission considered whether the Cable Carriers should be subject to the Speed Matching Requirement.[10] 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 Requirement to the Cable Carriers' HSA services because it "would enable competitors to compete on a more equitable basis."[11]

15. In 2007, the Commission applied the Speed Matching Requirement to ILEC aggregated HSA services,[12] 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"[13] so that "competitors in all parts of the country have the same range of options available to them and can compete in multiple markets."[14]

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10 *Cogeco, Rogers, Shaw, and Videotron - Third-party Internet access service rates*, Telecom Decision CRTC 2006-77, 21 December 2006, ["TD 2006-77"] at para 209.

11 *Ibid.*

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

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

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

16. The Commission briefly rescinded the Speed Matching Requirement for ILECs in 2007, in light of the then-new Policy Direction,[15] as well as the regulatory uncertainty arising from the ongoing proceeding to consider a new wholesale HSA framework.[16]

17. 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.

18. The Commission restored the Speed Matching Requirement for ILECs in 2008.[17] Noting that "service speed is an important competitive attribute"[18], 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."[19] The Commission further found that the Speed Matching Requirement complied with the Policy Direction,[20] advanced the objectives of the Telecommunications Act[21] and would not dampen ILEC investment incentives[22].

19. 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 or prevention of competition in the retail high-speed Internet services market. [23]

20. 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

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15 Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, P.C. 2006-1534, 14 December 2006.

16 *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.

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

18 *Id.*, at para 19.

19 *Id.*, at para 19.

20 *Id.*, at para 24.

21 *Id.*, at para 10.

22 *Id.*, at para 23.

23 *Id.*, at para 19.

clarified its intended scope of the Speed Matching Requirement as applying more broadly to Bell's next generation network and to both existing and new speeds.[24]

21. Finally, in response to an Order in Council,[25] the Commission reconsidered the Speed Matching Requirement, 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:

> 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. [26]

22. In light of the foregoing, TekSavvy submits that the Speed Matching Requirement is a fundamental cornerstone of the wholesale HSA framework, and that the Commission's above-cited determinations are as critical and relevant to wireline competition in Canada today as when first issued.

B. TRP 2015-326 dismantled the Speed Matching Requirement on aggregated HSA services and failed to produce a workable disaggregated HSA service

23. In TRP 2015-326, the Commission mandated wholesale access to all last-mile access facilities for precisely the same reason that it consistently upheld the Speed Matching Requirement in the above-cited decisions: If competitors cannot match Incumbent retail speeds, "there would be a substantial lessening or prevention of competition in the downstream retail Internet services market, in all incumbent carrier serving regions".[27]

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24 *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.

25 Order in Council P.C. 2009-2007.

26 *Wholesale high-speed access services proceeding*, Telecom Regulatory Policy CRTC 2010-632, 30 August 2010, at paras 54, 55.

27 TRP 2015-326 para 130.

24. 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"[28] to obtain higher speeds. The Commission 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".[29]

25. The Commission 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",[30] but ultimately, "most retail customers in Canada would eventually be left with a very limited choice of Internet service providers".[31]

26. Nonetheless, TRP 2015-326 imposed parallel Speed Cap Restrictions on the aggregated HSA framework: the 100 Cap and the 50 Cap. The Commission grounded both Speed Cap Restrictions 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.[32]

27. 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."[33] The Commission clarified that its "ultimate goal is to have a smooth transition, over time"[34], 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.[35]

28. Yet in the 3½ years since TRP 2015-326 was issued, a workable disaggregated HSA service has not been made available, 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.[36]

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28 TRP 2015-326, para 127.

29 TRP 2015-326, para 128.

30 TRP 2015-326, para 129.

31 *Ibid.*

32 TRP CRTC 2015-326, at para 154.

33 TRP CRTC 2015-326, at para 143.

34 *Ibid.*

35 TRP CRTC 2015-326, at para 138.

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

29. 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 the Speed Cap Comments:

a. Incorrect economic assumptions.[37] The disaggregated HSA service was mandated in TRP 2015-326 and configured in TRP 2016-379. Less than three weeks later, TO 2016-396[38] revealed that the main economic theory upon which the service was mandated and configured (i.e. that the high cost of aggregated transport posed a dire threat to competition and that such costs would continue to rise in the future)[39] was profoundly incorrect. In reality, CBB rates were vastly inflated[40] because most Incumbents simply "chose to disregard"[41] the Commission's costing regulations. Hence, the disaggregated HSA service must be reconfigured as requested by CNOC, further delaying an already severely delayed deployment.

b. Geologic deployment timelines.[42] According to the interim tariffs filed by Bell, it would take a single competitor centuries to interconnect to Bell's proposed disaggregated HSA service at every POI in Ontario and Quebec.

c. Prohibitive costs.[43] The proposed disaggregated HSA services are cost prohibitive, not only due to the current inflated interim access and capacity rates but also due to the unreasonable costs of interconnection and the lack of port and fibre sharing, all of which would lead to much higher costs than competitors could ever recover from reductions in aggregated CBB costs.

d. Transport supply.[44] A full-scale migration to the disaggregated HSA service is impossible given the lack of transport supply across the Incumbents serving territories, and the inability of competitors to duplicate such facilities on the scale required by a full-scale migration.

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[37] Application, at paras ES6-ES15, 17, 35-37, and 44-54.

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

[39] "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. …these 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", TRP 2015-326, at para 145.

[40] The Commission reduced the proposed transport component rate for a number of companies by up to 89%. Additionally, proposed access component rates of certain companies were reduced by up to 39%.

[41] TO 2016-396, at para 22.

[42] CNOC's Speed Cap Comments, at paras 94-100; The Application, at paras 175-180.

[43] CNOC's Speed Cap Comments, at paras 40-86; The Application, at paras 124-174.

[44] CNOC's Speed Cap Comments, at paras 30-38; The Application, paras 111-121.

e. Financial Uncertainty.[45] Even if a workable disaggregated HSA service existed, competitors could not effectively plan, let alone complete, a full-scale deployment due to the utter lack of cost certainty arising from interim rates on both the existing aggregated HSA service and proposed disaggregated HSA services, as well the unknown extent of retroactivity for the material amounts Incumbents overbilled competitors, "due to deviations from Phase II costing principles".[46]

30. Since the proposed disaggregated HSA service is unworkable and a full-scale migration is impossible, the Speed Cap Restrictions imposed by TRP 2015-326 clearly serve not to fulfill their intended policy objective but, rather, to kneecap competitors.

31. Contrary to the policy intent of TRP 2015-326, competitors have no alternative to the aggregated HSA service, with its Speed Cap Restrictions and inflated interim rates.

32. Both Speed Cap Restrictions amount to arbitrary bans on wholesale competition in retail markets for higher-speed Internet services, to the exclusive benefit of the Incumbents.

33. The only discernable difference between the 50 Cap and the 100 Cap, is that the 100 Cap will take effect in the near future, whereas the 50 Cap is already in effect and causing irreparable harm to competitors. In all other respects, the harm inflicted by the 50 Cap is identical in nature to the harm that will be inflicted by the 100 Cap, for all of the same reasons noted by CNOC in its Speed Cap Comments.

34. It was precisely such irreparable harm to competition that the Commission had foreseen and avoided through its consistent and symmetrical application of the Speed Matching Requirement to both ILECs and Cable Carriers, and which the Commission sought to avoid when mandating access to higher speed access facilities in TRP 2015-326.

C. The Commission must immediately reinstate the Speed Matching Requirement on aggregated HSA services to relieve ongoing and irreparable harm to competition.

35. TekSavvy urgently requests that the Commission take immediate steps to restore, on an expedited basis, the Speed Matching Requirement on aggregated HSA services, both by (i) removing the proposed 100 Cap, and; (ii) removing the existing 50 Cap, by reinstating the requirement for ILECs to offer competitors wholesale speeds matching those offered to their own retail customers, including those offered over the higher speed access facilities mandated in TRP 2015-326.

36. TekSavvy's ability to offer retail speeds matching those provided by Incumbents is absolutely critical to its reputational, competitive, and financial position.

37. For over a decade, TekSavvy relied upon the certainty, symmetry and retail parity afforded by the Commission's consistent application of the Speed Matching Requirement to build its business as Canada's largest independent wholesale-based competitor, with over 300,000 subscribers in every province, offering retail high-speed

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45 CNOC's Speed Cap Comments, at paras 81 and 87-90; The Application, at paras 36, 69-73, 169-172.

46 TO 2016-396, at para 19.

Internet services over the aggregated HSA services provided by seven ILECs and Cable Carriers.

38. TekSavvy's largest markets are Ontario and Quebec, where TekSavvy relies upon Bell's aggregated HSA services to deliver retail service to over ######## retail customers.

39. TekSavvy has spent years acquiring its DSL customer base in Ontario and Quebec, and building and investing in the extensive business operations and network facilities required to service it.

40. TekSavvy's DSL customer base in Ontario and Quebec is a vital, integral business asset to TekSavvy, a core revenue stream that underpins TekSavvy's overall financial well-being, its ability to expand its wholesale-based retail Internet offerings in other provinces and territories, and to invest in the construction of TekSavvy's own fixed-wireless and wireline network facilities in Ontario.

41. The 50 Cap stranded TekSavvy's DSL base on antiquated speeds that are competitively irrelevant in Bell's incumbent territories of Ontario and Quebec, historically TekSavvy's most important retail markets. As a result, TekSavvy is prohibited from offering those customers higher service speed options over Bell's aggregated HSA facilities, and unduly restricted from acquiring new customers on that service platform.

42. Accordingly, TekSavvy submits that in the 3½ years since TRP 2015-326 was issued, the 50 Cap has irreparably harmed competitors who rely upon the ILECs' aggregated HSA services and that the anticompetitive impacts of the 50 Cap are being felt most strongly and immediately in Ontario and Quebec, where, due to Bell's already extensive FTTP footprint and accelerated rollout of FTTP throughout its incumbent serving territories,[47] Bell currently offers six retail Internet service speeds above the 50 Cap, all of which are rapidly being adopted by consumers.[48]

43. To reiterate: TekSavvy is denied access to any wholesale speed on Bell's network that is as fast as the 6 highest retail speeds offered by Bell throughout its incumbent serving territories. To understand how the 50 Cap impairs competitors in Ontario and Quebec, look at Bell's website,[49] which is promoting <u>Bell's retail monopoly on 1.5 gigabit speeds</u>:

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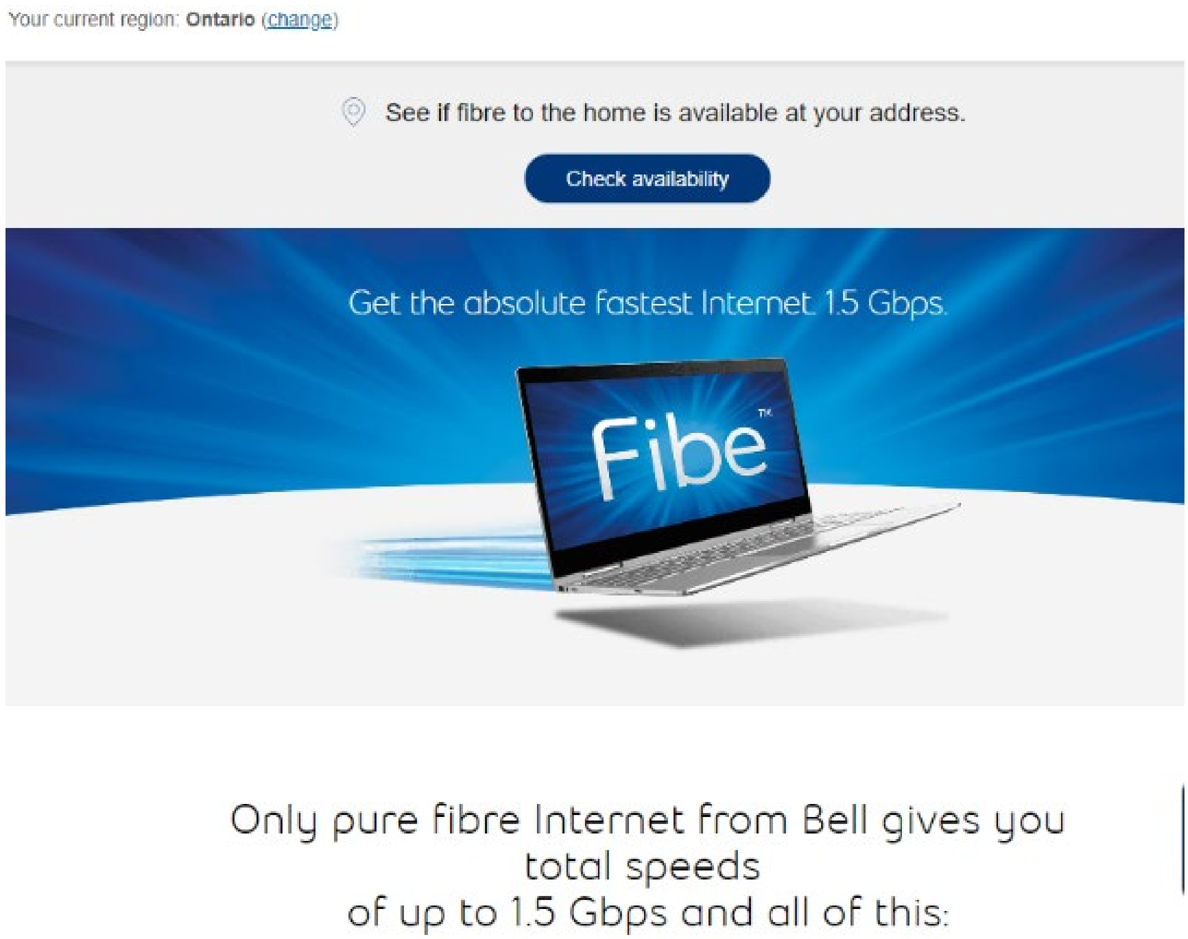
[47] The Application, paras 80-85.

[48] The Application, paras 75-79. at paras 27-29, citing the 2017 Communications Monitoring Report. TekSavvy further notes that the consumer trend toward subscribing to higher speeds continues, with the subscriber distribution for 50 Mbps and higher increasing from 26.2% in 2016 to 38.6% in 2017, as reported in the 2018 Communications Monitoring Report, dated 20 December 2018. Unfortunately, while it was reported for 2015 and 2016 in the 2017 CMR, the 2018 CMR does not report on the subscriber distribution for 100 Mbps and higher.

[49] Screenshot taken January 6, 2019.



44. Notably, Bell offers its 1.5 gigabit retail speed at significantly lower monthly prices than the wholesale rates to which the Commission granted interim approval[50] on Bell's already unworkable disaggregated HSA service.

45. Furthermore, using its flanker brand, Virgin, Bell is methodically exploiting the 50 Cap to target the stranded DSL base of its wholesale competitors, in two respects.

46. First, Bell/Virgin offers retail service speeds of 100 Mbps, provided on Bell's FTTP facilities, at nearly half of the price of Bell's wholesale rates[51] to target customers that wholesale competitors cannot upgrade on Bell's aggregated HSA service as a result of the 50 Cap on their FTTN facilities.

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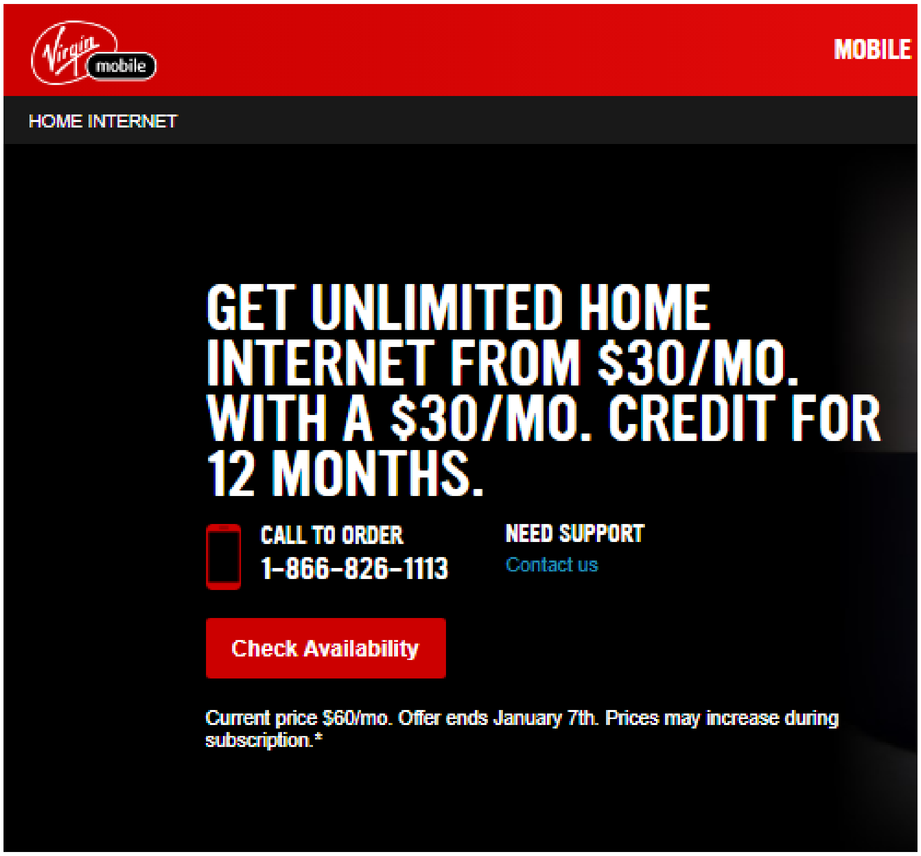
50 1.5 Gigabit Retail Pricing (Bell) January 6, 2019. $114.95/mo ($89.95/mo for 6 months) with $59.95 activation. Wholesale rates: $121.79/mo with $247.90 activation per Bell's proposed tariff for Disaggregated Broadband Service, CRTC 7516, Item 151.5.a, page 61.16, version 3, issued 19 March 2018 as approved in Telecom Order CRTC 2018-395, 10 October 2018, following approval of other FTTP access rates in Telecom Order 2017-312, *Interim rates for disaggregated wholesale high-speed access services in Ontario and Quebec*, 29 August 2017.

51 100 Mbpas Retail Pricing (Virgin) January 6, 2019. $70/mo (first month free) with $59.95 activation. Wholesale rates: $121.79/mo with $247.90 activation.

47. Second, Bell/Virgin undercuts wholesale competitors' 50 Mbps retail speed offerings—the maximum retail speed which competitors can offer in Ontario and Quebec using Bell's aggregated HSA service—due to the still-inflated interim wholesale rates on Bell's aggregated HSA service, by perpetually promoting the below predatory offer at retail rates that are lower than competitors' wholesale costs:



GOOD TO KNOW:

- Promotion of $30/mo. on a 50 Mbps Unlimited plan is based on a $30 credit applied to the current price for 12 months and continued subscription to an eligible Home Internet plan. The current price can increase during your subscription. If the current price increases, your monthly price will increase but you will continue to receive your monthly credit during the promo. This credit is available to eligible Members in Ontario only on new activations. May not be combined with other offers; subject to change without notice.

48. These twin pressures—Bell's retail monopoly on higher speeds and predatory pricing on lower speeds subject to inflated aggregated HSA tariffs—squeeze competitors' margins and drive churn on Bell wholesale DSL subscriber bases left stranded by the 50 Cap. In addition to lost revenue from increased churn, competitors face higher costs of acquisition, as they must dramatically lower retail rates to net or retain customers at 50 Mbps, to compete with predatory flanker offers and general consumer preferences for higher speeds.

49. 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:

> "So, on our churn rates on broadband, wholesale is by far our highest churn rate..."[52]
>
> "[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."[53]
>
> "[O]ur wholesale additions declined year-over-year and is not a focus of our business..."[54]
>
> "[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."[55]

50. Therefore, while TekSavvy regards both Speed Cap Restrictions as existential threats, the 50 Cap has unduly impaired and destabilized a core business operation and revenue source that previously anchored TekSavvy's position in its most important retail markets of Ontario and Quebec, secured its status as a competitive service provider in other provinces, and enabled TekSavvy's growth and investment in its own network facilities.

51. Indeed, our subscriber trends over the past three years bear out these concerns. ##
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52. Without access to higher speeds that customers demand, and facing predatory pricing from Bell's flanker brand, competitors already face a choice between operating at a loss, or losing our existing customer base, not because of the 100 Cap, but because of the 50 Cap and the ongoing regulatory gaming by Incumbents like Bell.

53. To that point, and with respect to Bell's comments filed on December 13, 2018 in which Bell dismissed CNOC's application an abuse of process, TekSavvy notes that Bell's systematic abuse of the Commission's costing proceedings for aggregated HSA services not only unjustly enriched Bell—amounts measured in hundreds of millions of dollars, to the severe detriment of competitors—but also distorted the core economic assumptions upon which the Commission mandated and configured the disaggregated HSA service and Transition Plan.

54. Likewise, Bell's thorough abuse of the Commission's disaggregated costing proceedings rendered Bell's disaggregated HSA service completely unworkable, effectively foreclosing wholesale access to Bell's higher speed access facilities contrary to the

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52 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>.

53 *Id.*, at page 8.

54 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>.

55 *Supra* note 52, at page 17.

intent of TRP 2015-326 and protecting Bell from wholesale competition in retail markets for such speeds while consumer demand skyrockets.

55. In short, Bell's sustained and successful abuse of the Commission's costing processes has achieved what Bell's 2015 appeal to the Governor in Council could not[56]: To deny consumer choice for higher speed services.

56. Accordingly, the Commission's view that the competitive harm caused by the 50 Cap is "generally reduced"[57] by the availability of higher speeds in Ontario and Quebec through the Cable Carriers' aggregated HSA services is incorrect. The fact that the 100 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.

57. As noted above, the policy intent of the Speed Cap Restrictions was to facilitate a smooth transition from aggregated to disaggregated HSA services. The Speed Cap Restrictions were emphatically not intended to force competitors to mount an additional, preliminary migration from ILEC to Cable Carrier aggregated HSA services in a desperate bid to survive the Speed Cap Restrictions due to the absence of a workable disaggregated HSA service.

58. At any rate, a migration from ILEC to Cable Carrier aggregated HSA services would only hasten the competitive devastation initiated by the Speed Cap Restrictions. 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 associated with the reinstallation of its single DSL customer base onto three different Cable Carrier service platforms across Ontario and Quebec.

59. 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	$#	$##

56 Statement by the Government of Canada on Bell Canada petition of CRTC wholesale decision, Ottawa, 11 May 2016 <https://www.canada.ca/en/innovation-science-economic-development/news/2016/05/statement-by-the-government-of-canada-on-bell-canada-petition-of-crtc-wholesale-decision.html>.

57 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.

60. Most importantly: TekSavvy regards FTTP as the superior technology for broadband connectivity, and 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 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. Accordingly, the Commission must reinstate the Speed Matching Requirement on ILEC aggregated HSA networks until such time that a workable disaggregated HSA service is made available.

D. <u>Conclusion</u>

61. Since the proposed disaggregated HSA service is unworkable and a full-scale migration is impossible, the Speed Cap Restrictions imposed by TRP 2015-326 clearly serve not to fulfill their intended policy objective but, rather, to kneecap competitors.

62. The only discernable difference between the 50 Cap and the 100 Cap, is that the 100 Cap will take effect in the near future, whereas the 50 Cap is already in effect and causing irreparable harm to competitors. In all other respects, the harm inflicted by the 50 Cap is identical in nature to the harm that will be inflicted by the 100 Cap, for all of the same reasons explained above and as noted by CNOC in its Speed Cap Comments.

63. If there is sufficient doubt regarding the design and costing of the demonstrably unworkable disaggregated HSA service to suspend or remove the 100 Cap in order to ensure a competitive market for higher speeds on the Cable Carriers' aggregated HSA services, then the same reasoning demands the expedited removal of the parallel 50 Cap that is already irreparably harming competitors using Bell's aggregated HSA service in Ontario and Quebec.

64. Competition in retail high-speed Internet service markets in Ontario and Quebec has been unduly impaired by the 50 Cap which causes irreparable harm to competition such that, unless the Speed Matching Requirement is immediately restored for all Incumbents, an ILEC and Cable Carrier duopoly will soon occur.

65. TekSavvy will have further comments on the substance of CNOC's Application in Stage 2, as suggested in the CRTC's procedural letter.

Yours truly,

[transmitted electronically]

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