

Before the Canadian Radio-television and
Telecommunications Commission

In the matter of

A Part 1 Application by TekSavvy Solutions Inc.
To Address Undue Preferences Arising from Off-Tariff
Agreements, pursuant to section 27(2) of the
Telecommunications Act

20 January 2023



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1. EXECUTIVE SUMMARY

- E1. This is an Application by TekSavvy pursuant to Part 1 of the Canadian Radio-Television and Telecommunications Commission (CRTC) Rules of Practice and Procedure seeking (i) relief from the underlying causes that enable unduly preferential off-tariff agreements (OTAs), (ii) a review of Incumbents' use of OTAs in violation of section 27(2) of the *Telecommunications Act* and (iii) alternative interim relief from specific OTAs.
- E2. The current wholesale regime has resulted in wholesale high-speed access (HSA) rates that are so high that wholesale-based competitors are unable to viably compete using the CRTC's tariffed rates. The regime has also denied tariffed access to fibre-to-the-premises (FTTP) technology. The foregoing has created, among numerous other issues, an incentive for independent competitors to sell themselves to Incumbents to obtain off-tariff wholesale arrangements.
- E3. While it has allowed off-tariff agreements as a general principle, the Commission has acknowledged that these agreements nonetheless raise the potential for undue preference and unjust discrimination under section 27(2). The Commission retains oversight over OTAs to the extent that they raise issues of undue preference.
- E4. Over the past year, Incumbents have engaged in conduct that raises issues of undue preference relating to off-tariff rates and the provision of services outside of established CRTC tariffs. This application addresses two such instances of undue preference.
- E5. The first instance is the arrangements that Rogers has entered into with Videotron, pursuant to which Rogers offers Videotron preferred wholesale access rates, among other preferred treatment. These arrangements were not arrived at through negotiations based on natural market forces, but are instead an effort by Rogers to remove regulatory hurdles to its acquisition of another Incumbent, Shaw. The arrangement with Videotron is specifically designed to allow Videotron and its wholesale-based affiliate, VMedia, to better compete than it could using tariff rates.
- E6. In the second arrangement, Bell Canada appears to be offering its newly acquired affiliate, EBOX, wholesale aggregated FTTP access that is not made available to competitors and for which there is no wholesale tariff. Based on the retail internet prices charged by EBOX, Bell also appears to be providing these services at rates well below any comparable disaggregated wholesale tariff.
- E7. As explained below, this behaviour runs afoul of not only the *Telecommunications Act*, but directly undermines the Government of Canada's explicit policy objectives in its forthcoming Policy Direction. These include the goals of encouraging equitable application of the wholesale HSA framework, encouraging all forms of competition and reducing barriers to competition for new, regional and smaller telecommunication providers.
- E8. Given the void of public information on OTAs, the examples provided in this application are unlikely to be the only types of undisclosed undue preferences Incumbents grant to and between themselves. As we set out below, a full review of the current practice of off-tariff agreements and the implications with respect to section 27(2) of the

Telecommunications Act is therefore long overdue. While the Commission issued requests for information (RFIs) relating to OTAs in 2021, no formal proceeding has been opened and that information needs to be updated and actioned.

- E9. Further, these OTAs are but symptoms of larger systemic issues. The CRTC has allowed inflated wholesale tariff rates and an effective monopoly over FTTP access, putting Incumbents in the position in which they can profitably grant preferred rates, terms and access to some companies and not others. The Commission should address these underlying issues by fixing the tariff rates themselves, either temporarily on a retail-minus basis or by re-instituting the 2019 wholesale HSA access rates.
- E10. If the underlying causes enabling unlawful OTAs cannot be quickly addressed, interim relief is necessary to prevent Incumbents from continuing to unreasonably disadvantage wholesale-based providers. Specifically, TekSavvy requests that the Commission either void the OTAs in full or extend to all competitors, on an interim basis, the preferential access and rates that Rogers and Bell have already extended to at least one party each.

2. INTRODUCTION

1. The applicant, TekSavvy, is an independent, competitive internet service provider (ISP) based in Chatham, Ontario and Gatineau, Quebec, providing services to nearly 300,000 residential and business customers. It has been providing Canadian consumers with wireline broadband internet services since 2002.
2. TekSavvy is a primarily wholesale-based competitor.¹ In order to deliver competitive internet service to retail customers, TekSavvy purchases wholesale access to last mile wires owned by some of the large incumbent telephone and cable carriers, namely: Bell Canada (“Bell”), Rogers Communications Canada Inc. (“Rogers”), Shaw Communications Inc. (“Shaw”), Telus Communications Inc. (“TELUS”), Vidéotron Itée (“Videotron”), Cogeco Connexion Inc., Bragg Communications Inc. dba Eastlink and Saskatchewan Telecommunications (“Sasktel”) (collectively, the “Incumbents”). TekSavvy offers competing broadband internet services over its own network facilities and through these wholesale network access services in every province in Canada.
3. As a result of longstanding findings from the Commission that there is insufficient competition in retail internet services, Incumbents are mandated to offer this wholesale access to competitors such as TekSavvy.² According to the Commission’s well-established rules, Incumbents are required to provide competitors with wholesale

¹ In addition, TekSavvy also offers its own facilities-based high-speed fibre broadband network in Chatham-Kent, Ontario and surrounding communities, as well as a fixed-wireless network access in several communities in southwestern Ontario.

² This mandated access is generally referred to as wholesale high-speed access (“HSA”). Third-party Internet access (“TPIA”) services refer to mandated wholesale HSA services of large cable carriers in particular.

access to all of the same service speeds that Incumbents offer to their own retail subscribers (the “Speed-Matching Requirement”).³

4. Pursuant to section 25 of the *Telecommunications Act* (the “Act”),⁴ as a default, Incumbents must make such services available pursuant to a tariff filed with and approved by the Commission. However, as of 2012, the Commission has allowed off-tariff agreements as a general rule, provided that Incumbents file very brief summaries of such agreements with the Commission. While these off-tariff agreements are not allowed to violate section 27(2) of the Act by creating an undue preference, there are typically scant details available to competitors and as such these agreements tend to remain unreviewed by the Commission against section 27(2).
5. As evidenced by recent acquisitions of independent competitors, it has become abundantly clear that the current inflated wholesale access rates have created an environment where wholesale-based ISPs are not viable competitors. These inflated rates also allow undue preferences to flourish: Incumbents have more room to offer preferential rates and access to technologies to certain companies over others, promoting unfair competition. Incumbents should not be permitted to manipulate competition among wholesale-based providers.
6. Further, as set out in TekSavvy’s responses to information requests in August 2021 to the Commission, OTAs create other forms of unfair conduct, such as OTAs that involve discounted rates or waived charges only in exchange for accepting onerous financial risks tied to volume commitments, and those that only promote increasingly unpopular lower speed tiers.
7. In this application, TekSavvy describes two instances of clear undue preferences:
 - a. Rogers has entered into an agreement with Videotron offering Videotron reduced wholesale rates, among other preferred treatment. This agreement is not arrived at through negotiations based on natural market forces, but is instead an effort by Rogers to remove regulatory hurdles to its acquisition of Shaw. The arrangement with Videotron is specifically designed to allow Videotron, through its wholesale-based affiliate, VMedia, to better compete.
 - b. Bell Canada appears to be offering its newly acquired affiliate, EBOX Inc. / Telecommunications Inc. (“EBOX”)⁵ wholesale FTTP services that are not also available to competitors and for which there is no wholesale tariff. The services also appear to be provided at rates well below any comparable tariff that Bell does have.

³ [Telecom Decision CRTC 2006-77](#), *Cogeco, Rogers, Shaw, and Videotron - Third-party Internet access service rates*, 21 December 2006 [TD 2006-77]; [Telecom Decision CRTC 2008-117](#), *Cybersurf Corp.'s application related to matching service speed requirements for wholesale Internet services*, 11 December 2008 [TD 2008-117]; [Telecom Regulatory Policy 2010-632](#), *Wholesale high-speed access services proceeding*, 30 August 2010 [TRP 2010-632].

⁴ *Telecommunications Act*, SC 1993, c 38, s 25.

⁵ EBox Inc. is the entity registered as a telecommunications provider; however, EBOX Telecommunications Inc., newly incorporated as of July 7, 2022, also appears to be used by Bell, as further detailed below.

8. These off-tariff arrangements are a symptom of larger systemic issues. The CRTC has allowed inflated wholesale tariff rates and an effective monopoly over FTTP access, putting Incumbents in the position in which they can profitably grant preferred rates, terms and access to some companies and not others. This effectively leaves wholesale rate-setting in the hands of the Incumbents, rather than the Commission. The Commission should address these underlying issues by fixing the tariff rates directly, either temporarily on a retail-minus basis or by re-instituting the 2019 wholesale HSA access rates.
9. Moreover, a full review of the current practice of off-tariff agreements and the implications with respect to section 27(2) of the *Telecommunications Act* is long overdue.
10. If the underlying causes enabling unlawful OTAs cannot be quickly addressed, interim relief is necessary to prevent Incumbents from continuing to unreasonably disadvantage wholesale-based providers who are not subject to these preferred arrangements. Specifically, TekSavvy requests that the Commission void the Rogers-Videotron and Bell-EBOX arrangements in full. In the alternative, the Commission should, on an interim basis:
 - a. require Rogers to extend the same rates, access and terms to all competitors as it has granted and may grant to Videotron; and
 - b. enforce, on an expedited basis, the long-standing regulatory requirement that Incumbents provide wholesale services at the same speeds they offer to their own retail customers by mandating wholesale aggregated access to FTTP on the same terms as Bell offers to EBOX.

3. LEGAL AND REGULATORY FRAMEWORK

11. In order to contextualize the undue preferences that Incumbents perpetuate amongst themselves and the issues that off-tariff agreements pose, it is necessary to review the current legal and regulatory frameworks governing mandated access to wholesale HSA services and off-tariff agreements.

3.1. TELECOMMUNICATIONS ACT

12. Pursuant to section 25 of the *Telecommunications Act* (the “Act”), “[n]o Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.”⁶
13. Incumbents themselves acknowledge that tariffs are required for such mandated HSA services. For example, Rogers submitted that it could not offer wholesale HSA services to competitors without an approved tariff: “there is clear guidance from the Commission that tariff approval is needed prior to any new speed tier introduction.”⁷

⁶ *Telecommunications Act*, *supra* note 4.

⁷ Rogers Intervention, Rogers Tariff Notice 69, 2021 (File # 8740-R28-202101203).

14. Section 27(2) of the Act provides that “No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.”⁸
15. As is plain in its wording, section 27(2) extends to a carrier conferring an undue or unreasonable preference to the carrier itself. The Commission has confirmed that it includes where the carrier extends such an advantage to its affiliate(s).⁹ It also extends to cases where one Incumbent is unduly preferred over another.¹⁰

3.2. OFF-TARIFF AGREEMENTS

16. As explained above, as a result of section 25(1) of the Act, all telecommunication services must be provided in accordance with a tariff, unless the Commission has chosen to forbear from regulating the service under section 34 of the Act.
17. As a mandated service, wholesale HSA access rates have not been forborne from regulation. However, as of 2012, the Commission chose to allow for off-tariff agreements (“OTAs”) between carriers relating to these services, provided that summaries of the agreements are filed with the Commission.¹¹ Prior to that decision, carriers were required to file the negotiated agreement for the public record.¹²
18. While allowing these off-tariff agreements as a general principle, the Commission has acknowledged that they nonetheless raise the potential for undue preference and unjust discrimination under section 27(2) of the Act.¹³ The Commission retains oversight over off-tariff agreements to the extent they raise issues of undue preference.¹⁴
19. Given section 27(2) is largely administered on a complaint-driven basis, the Commission designed the requirement to file summaries of any such agreement as a means of allowing market participants to access some (but not all) of the information necessary to administer section 27(2) of the Act.¹⁵

⁸ *Telecommunications Act*, *supra* note 4, s 27(2).

⁹ See for example [Telecom Decision CRTC 2002-76](#), *Regulatory safeguards with respect to incumbent affiliates, bundling by Bell Canada and related matters*, 12 December 2002 [TD 2002-76].

¹⁰ See for example, [Telecom Decision CRTC 2014-398](#), *Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*, 31 July 2014 [TD 2014-398].

¹¹ [Telecom Regulatory Policy CRTC 2012-359](#), *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application for revised filing requirements associated with wholesale negotiated agreements*, 2 July 2012 [TRP 2012-359] at paras 11, 19.

¹² *Ibid* at para 2.

¹³ *Ibid* at para 15: “The Commission considers that concerns with respect to the potential for undue preference or unjust discrimination remain.”

¹⁴ Even where a telecommunications service is forborne, the Commission retains oversight over issues under section 27(2); see for example [Telecom Decision CRTC 2014-398](#), *Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*, 31 July 2014.

¹⁵ TRP 2012-359, *supra* note 10 at para 18.

20. In deciding to remove the requirement that full copies of OTAs be filed, the Commission explained that it was guided by the 2006 Policy Direction¹⁶, which directed it to “rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives,” and “when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.”¹⁷ The Commission found that making full copies of OTAs public was likely interfering with the operation of market forces.

21. In developing this summary filing system for OTAs, however, the Commission indicated that a fuller review of the filing requirements for off-tariff negotiated agreements for all wholesale services was warranted:

The Commission notes that, in the Essential Services decision, it indicated that a review of the regulatory requirements regarding mandated wholesale services will take place in 2014. The Commission considers that a review of the filing requirements for off-tariff negotiated agreements for all wholesale services could occur at that time.¹⁸

22. In the decade since, no such review has occurred.

23. In August 2021, the Commission issued RFIs to Incumbents and competitors relating to off-tariff agreements.¹⁹ This was not done as part of a formal proceeding; there is therefore no file number, no record of this process on the Commission website and copies of parties’ responses are not made available to the public. TekSavvy is not aware of any further steps taken as a result of these requests for information.

3.3. SPEED-MATCHING REQUIREMENT

24. The Speed-Matching Requirement is a fundamental cornerstone of the wholesale HSA framework. The Speed-Matching Requirement was first introduced in 2006, in response to concerns from competitors including “that the delay between the introduction of cable carrier retail internet services and the availability of those services under TPIA [third-party internet access] significantly prejudiced competition in the provision of retail Internet services.”²⁰

25. By requiring Incumbents to make the same service speeds available to both retail and wholesale customers—hence the term “speed-matching”—the Commission enabled “competitors to compete on a more equitable basis” than they would have otherwise.²¹ The Commission has, on a number of occasions, upheld or reaffirmed the Speed-

¹⁶ TRP 2012-359, *supra* note 10 at paras 13, 17, 18 and 20.

¹⁷ Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR 2006-355 [“2006 Policy Direction”].

¹⁸ TRP 2012-359, *supra* note 10 at para 21.

¹⁹ Letter from Claude Doucet, Secretary General to Distribution List, 3 August 2021.

²⁰ TD 2006-77, *supra* note 3 at para 197.

²¹ TD 2006-77, *supra* note 3 at para 209.

Matching Requirement to ensure that an appropriate level of competition continues to exist in the retail internet service market to protect consumer interests.²²

26. One such occasion included a regulatory policy developed by the Commission following a comprehensive public proceeding in response to an Order in Council. In this policy, TRP 2010-632, the Commission again firmly concluded that the Speed-Matching Requirement is fundamentally necessary for wireline competition, specifically finding that “in the absence of a speed-matching requirement, competition in retail Internet services would not continue to be sufficient to protect consumers’ interests.”²³
27. The Commission (in hindsight, presciently) determined that, without a Speed-Matching Requirement applicable to all Incumbents, competition would be “unduly impaired”, resulting in a 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’ [independent local exchange carriers] aggregated ADSL [asymmetric digital subscriber line] 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. [emphasis added]”²⁴

28. Recently in 2020, Commission staff interpreted this long-standing Speed-Matching Requirement as requiring concurrent availability of a new speed at retail and wholesale:

“[T]he speed-matching requirement continues to apply with regards to the obligation to make the new speed (i.e. 1 Gig service) available concurrently on a wholesale basis pursuant to the speed-matching requirement set out in Telecom Decision 2006-77 and Telecom Regulatory Policy 2010-632.”[emphasis added].”²⁵

²² See for example TD 2006-77, TD 2008-117 and TRP 2010-632, *supra* note 3.

²³ TRP 2010-632 *supra* note 3 at para 76.

²⁴ TRP 2010-632 *supra* note 3 at paras 54-55.

²⁵ [Telecom Commission Letter addressed to Dean Shaik \(Shaw Communications\) Re: Shaw’s Gigabit Residential Internet Service](#), 29 May 2020.

3.4. WHOLESALE ACCESS TO FTTP

29. In Telecom Regulatory Policy 2015-326, the CRTC mandated wholesale access to all last-mile access facilities, including FTTP, for precisely the same reason that it consistently upheld the Speed-Matching Requirement in earlier 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”.²⁶ Specifically, the CRTC 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”²⁷ to obtain higher speeds. The CRTC 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”.²⁸
30. The CRTC determined that, in order to gain access to regulated FTTP access services, wholesale competition would move to a disaggregated access model: that is, rather than connecting to Incumbent networks through a single hub (i.e., “aggregated” through one location), competitors would do so at multiple points (i.e., “disaggregated” access). Moving to this model would mean that wholesale ISPs’ customers’ traffic would be transferred onto that ISP’s own network much earlier, such that the competitor would control significantly more of the connection to the customer via their own networks. The CRTC found that this reduced reliance on Incumbents’ networks could also reduce the likelihood that service outages on an Incumbent’s network would also impact wholesale-based competitors’ customers.
31. Unfortunately, despite consumers being highly motivated to use FTTP services where available and competitors being highly motivated to offer it to them, the reality is that seven years later, the disaggregated wholesale model has not yet extended beyond two Bell central offices activated for disaggregated access.²⁹ This is a consequence of a number of factors, surveyed in other proceedings³⁰, that have conspired to grant Bell an effective monopoly on its FTTP network. As a result, despite finding that a failure to extend wholesale access to FTTP speeds to competitors would result in competitors being unduly impaired, wholesale competitors have not had access to these speeds for seven years and counting. Unlike in TRP 2010-632, where the Commission found that cable should not be insulated from the obligation to provide regulated wholesale services, FTTP has been allowed an effective monopoly over higher symmetrical speeds.

²⁶ *Review of wholesale wireline services and associated policies*, [Telecom Regulatory Policy CRTC 2015-326](#), 22 July 2015 [TRP 2015-326] at para 130.

²⁷ *Ibid* at para 127.

²⁸ *Ibid* at para 128.

²⁹ See Bell Canada, [Access Services Tariff For Interconnection with Carriers and Other Service Providers](#), CRTC 7516, Tariff Page 61.24.

³⁰ Application by the Competitive Network Operators of Canada (CNOOC) for expedited and temporary resale remedy for competitive access to Incumbent fibre-to-the-premises facilities, 8 January 2021, CRTC File 8622-C347-202100080 [“2021 CNOOC Application”].

32. Bell itself touts the competitive advantage of this access. Reporting Bell's third-quarter 2022 results, Bell's chief executive stated that "[w]e're seeing clear demand from Canadians for differentiated fibre Internet services."³¹ Bell also heavily markets the benefits of fibre technology over cable technology, showing it views this exclusive access as a competitive advantage.³² It is no surprise that Bell, with its monopoly over these services with high customer demand, has experienced its "highest retail Internet net activations in 17 years, up 36.3% to 89,652." Prior to this increase, Bell already accounted for approximately 33% of wireline subscribers across Canada,³³ with its share likely to be much higher in markets in which its facilities (particular fibre) are most present, including Ontario and Quebec. Continued exclusive access to its fibre-based offerings has only (and will continue to) entrenched its dominant position further. With the addition of EBOX and soon Distributel, this dominant position can only be expected to be strengthened.

3.5. THE POLICY DIRECTION

33. On May 26, 2022, the Government of Canada introduced a new proposed Policy Direction to the CRTC outlining a renewed approach to telecommunications policy and repealing the 2006 and 2019 Policy Directions to the CRTC (the "Direction").³⁴ In repealing the previous two directions to the CRTC, the new Direction notably repeals the 2006 Policy Direction's requirement to "rely on market-based solutions to the maximum extent feasible as a means of achieving the policy objectives."³⁵
34. In proposing this new Direction, the Governor in Council precisely sought to address the uncompetitive *status quo* described above. Notably, the Proposed Direction specifically directs the Commission to mandate aggregated wholesale high-speed access:

the Commission must mandate the provision of an aggregated wholesale high-speed access service until it determines that broad, sustainable and meaningful competition will persist if the service is no longer mandated.³⁶

³¹ News Release, Bell, "[BCE reports third quarter 2022 results](#)", 3 November 2022.

³² See for example News Release, Bell, "[Bell Fibe Gigabit 8.0 with North America's fastest Internet speeds now available in Toronto](#)", which notes: "Bell pure fibre Internet Gigabit 8.0 Internet speeds deliver download speeds five times faster than cable technology and upload speeds 250 times faster than cable technology." See also Bell's internet landing page <https://www.bell.ca/Bell_Internet>, which refers to fibre as the "fastest Internet technology."

³³ According to the CRTC, [Current trends- High-speed broadband](#), 29 November 2022, there were 12.23 million high-speed wireline internet subscriptions in the second quarter of 2022. Bell reported 3,977,387 total retail internet subscribers at the end of the same period in its second quarter 2022 results: News Release, Bell, "[BCE reports second quarter 2022 results](#)", 4 August 2022.

³⁴ *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, Canada Gazette, Part I, Vol. 156, No. 23, 4 June 2022 ["Proposed Direction"].

³⁵ 2006 Policy Direction, *supra* note 17, s 1(a).

³⁶ *Ibid*, s 10.

35. In the new Direction's proposed objectives, the Commission will be directed to consider how its decisions can promote competition, affordability, consumer interests and innovation, in particular the extent to which they (among other things):
- (a) encourage all forms of competition and investment;
 - (b) foster affordability and lower prices, particularly when telecommunications service providers exercise market power;
 - [...]
 - (e) reduce barriers to entry into the market and to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers.³⁷
36. In introducing the Proposed Direction, the Government of Canada also specifically highlighted that internet prices for "mid-range and top-range services also remain high relative to international peers".³⁸ Unsurprisingly, these plans are the same speeds for which Bell does not currently provide tariffed wholesale access.
37. The Government's backgrounder on the Direction will "enhance wholesale Internet access and competition for more affordable Internet", including by "directing the CRTC to ensure that wholesale Internet access is available evenly across the market, including on fibre-to-the-home networks."³⁹ It is clear that the Government expects that the Commission will ensure that wholesale competitors have equitable access to FTTP offerings.
38. The Government's backgrounder also specifically explains that the Direction will "requir[e] large companies to make the speeds that Canadians are demanding available to competitors" and that "the CRTC must take action to have more timely and improved wholesale rates available."⁴⁰

4. BACKGROUND FACTS

4.1. ROGERS' AGREEMENT WITH VIDEOTRON

39. On March 15, 2021, Rogers and Shaw announced they had entered into an agreement under which Rogers will purchase all of the issued and outstanding shares of Shaw for approximately \$26 billion.⁴¹

³⁷ *Ibid*, s 2.

³⁸ Innovation, Science and Economic Development Canada, "[Renewing Canada's approach to Telecommunications Policy: Context for Action](#)", 6 June 2022.

³⁹ Innovation, Science and Economic Development Canada, "[Summary of the Government of Canada's new proposed policy direction to the CRTC](#)", 6 June 2022.

⁴⁰ *Ibid*.

⁴¹ News Release, Shaw Communications Inc., "[Rogers and Shaw to come together in \\$26 billion transaction, creating new jobs and investment in Western Canada and accelerating Canada's 5G rollout](#)", 15 March 2022.

40. On May 9, 2022, the Commissioner of Competition filed an application under section 92 of the Competition Act seeking to prohibit the Rogers-Shaw transaction from closing.⁴² On June 12, 2022, Rogers, Shaw and Quebecor entered into a letter of intent and term sheet concerning the sale of Freedom to Videotron.⁴³ On July 28, 2022, media reported that Videotron had acquired VMedia, a wholesale-based independent ISP.⁴⁴
41. On August 12, 2022, Rogers, Shaw, Videotron and Quebecor entered into an agreement concerning the sale of Shaw's Freedom mobile business to Videotron.⁴⁵ In addition, Rogers and Videotron entered into multiple ancillary contracts for the provision of numerous other wholesale services, including backhaul, roaming and TPIA access (the "Rogers-Videotron Wholesale Arrangements"). The details of these arrangements are not available to the public; however, the Competition Tribunal made the finding of fact that these arrangements are "very favourable" to Videotron.⁴⁶ In any case, as detailed further below, a party alleging an undue preference only carries the burden of establishing there is a preference. The Rogers-Videotron Wholesale Arrangements include several instances of preferential rates, including:
- a. the provision by Rogers of aggregated and disaggregated TPIA services to Videotron at rates that are discounted from the tariff wholesale access rates;⁴⁷ and
 - b. the provision of fibre backhaul services to Videotron at rates preferential to market rates.⁴⁸
42. The preferred rates will also extend to Videotron's newly acquired wholesale-based affiliate, VMedia.⁴⁹ These preferred rates were specifically designed to allow Videotron to better compete: If Videotron were only able to use the tariffed rates, it was acknowledged in sworn testimony by an independent expert and another market participant (an executive of Distributel) that it would not be feasible to offer competitive mobile and internet bundles.⁵⁰ The Competition Bureau also found that the recent

⁴² News Release, Competition Bureau Canada, "[Statement from the Commissioner of Competition on the Competition Tribunal's Information Note regarding the Rogers-Shaw merger](#)", 9 December 2022.

⁴³ Commissioner of Competition Memorandum of Fact and Law, filed in Federal Court of Appeal File No. A-286-22 at para 23 ["Commissioner Appeal Factum"].

⁴⁴ Christine Dobby, "[If you live in the GTA, Quebecor could soon be your ISP as it snaps up small internet and TV provider VMedia](#)", Toronto Star, 28 July 2022.

⁴⁵ Commissioner Appeal Factum, *supra* note 43 at para 26.

⁴⁶ *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 1 at para 283.

⁴⁷ *Ibid* at paras 36 and 290.

⁴⁸ *Ibid* at paras 35 and 283.

⁴⁹ *Ibid* at para 289.

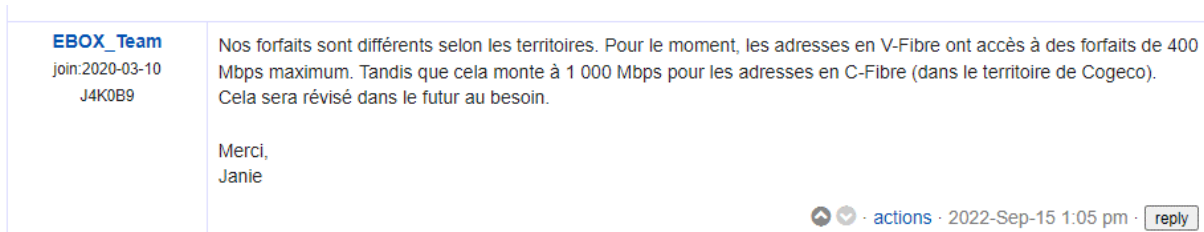
⁵⁰ *Ibid* at para 290.

market consolidation points to the negative economics of TPIA in Canada, pointing to the acquisitions of VMedia and Distributel.⁵¹

4.2. BELL OFFERS AGGREGATED ACCESS TO BELL'S FTTP SERVICES TO ITS AFFILIATE, EBOX

4.2.1. EBOX RETAIL LAUNCHES FTTP SPEEDS

43. Bell has now purchased or entered into agreements to purchase two of the largest independent competitors who would have been best placed to make the necessary investments to enable disaggregated access to FTTP: EBOX and Distributel Communications Limited ("Distributel").⁵²
44. Prior to its acquisition, EBOX, as with all other wholesale-based competitors, was not able to obtain aggregated wholesale access to Bell's FTTP and did not offer FTTP services at retail. Upon being acquired by Bell, EBOX has begun offering FTTP services.
45. As of September 12, 2022, EBOX made services with 400 Mbps, 200 Mbps, 120 Mbps, 60 Mbps, 30 Mbps and 5 Mbps symmetrical speeds available to customers. There is no competitor tariff for wholesale access to these speeds for either aggregated or disaggregated services.
46. EBOX made public statements confirming that it offered these service speeds via FTTP, including 400 Mbps symmetrical.⁵³



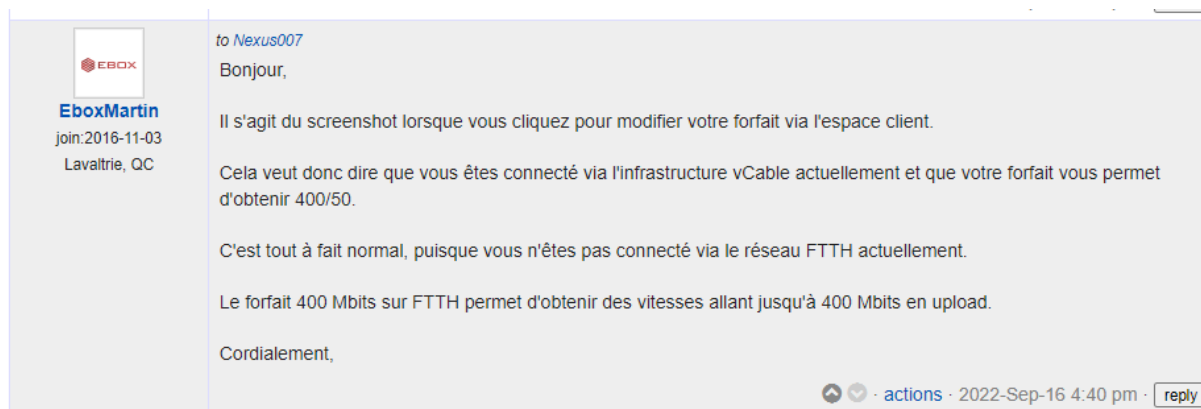
47. EBOX confirmed multiple times that the symmetrical speeds are made available through Bell's FTTP network and not cable. In one exchange, in responding to a

⁵¹ Final Written Argument of the Commissioner of Competition, filed in Competition Tribunal File No. CT-2022-002, 8 December 2022, at para 104: "Market consolidation speaks volumes about the negative economics of TPIA in Canada. Even since the 2021 increase in TPIA rates, resellers have been acquired or are being acquired by incumbents. VMedia was acquired by Quebecor, and Distributel is in the process of being acquired by Bell."

⁵² On February 24, 2022, Bell announced it had acquired EBOX, the then-largest wholesale-based internet service provider in Quebec. On September 2, 2022, Bell announced it had entered into an agreement to purchase Distributel, subject to regulatory approval. Distributel is one of the two largest wholesale-based internet service providers in Canada (TekSavvy being the other). Notably, Distributel had also just acquired a former large independent competitor, Primus Telecommunications, the previous year, such that three of the formerly largest independent ISPs in Canada — EBOX, Distributel and Primus Telecommunications — are now acquired or in the process of being acquired by Bell. Bell's acquisition of Distributel may remain subject to regulatory approval.

⁵³ DSLReports, Ebox Forum, "["new technologies" coming to IISP soon? - Ebox | DSLReports Forums \(Page 4\)](#)".

customer, EBOX explains that in regions connected to cable, only service speeds of 400 Mbps download / 50 Mbps upload are available, while in areas connected to the FTTP network, 400 Mbps download / 400 Mbps upload were offered:



48. Moreover, EBOX gives every impression that it maintains its own distinct network from Bell and operates as an affiliate. For example, EBOX notes that “nos comptes fibre sont installés par un technicien de Bell et passeront par leur infrastructure afin de se rendre à la nôtre” [*“our fibre accounts are installed by a Bell technician and will pass through their infrastructure in order to get to ours”*], implying that EBOX is provided with access to Bell’s infrastructure, but that the fibre service is also delivered through a distinct EBOX network.⁵⁴
49. EBOX even provided sample traceroutes that indicate the EBOX fibre offering uses peering arrangements with a number of non-Bell autonomous systems.⁵⁵ Based on these traceroutes, Bell has not taken over all these peering arrangements itself and integrated the peering functions into its own network; instead, these arrangements appear to be those that EBOX had already entered into and set up to function within its own network prior to being acquired by Bell. This is not consistent with EBOX either simply selling Bell’s own fibre offering via the EBOX brand. As Bell has only two central offices activated for disaggregated access (in Toronto and Montreal), and EBOX sells FTTP in many areas of Ontario and Quebec, EBOX’s retail sales of FTTP are also not consistent with disaggregated access to Bell’s FTTP. This indicates therefore that EBOX is granted aggregated access to Bell’s FTTP offerings.
50. Bell did not have a corresponding wholesale tariff for the FTTP services above. No other carriers have corresponding wholesale tariffs for these FTTP services. Bell therefore appeared to be offering FTTP speeds at retail, through EBOX, that it does not offer at wholesale, violating the Speed-Matching Requirement. Further, as EBOX appears to operate as a separate telecommunications operator, Bell appears to be providing EBOX with a non-tariffed service at undisclosed wholesale rates. No

⁵⁴ DSLReports, Ebox Forum, “[“new technologies” coming to IISP soon? - Ebox | DSLReports Forums \(Page 3\)](#).”

⁵⁵ DSLReports, Ebox Forum, “[“new technologies” coming to IISP soon? - Ebox | DSLReports Forums \(Page 4\)](#)”; also reproduced in Appendix A, p 7.

summary for such an off-tariff agreement relating to this service appears to have been filed with the Commission.⁵⁶

4.2.2. BELL MISPRESENTS EBOX'S SERVICE OFFERINGS TO COMPETITORS

51. On September 26, 2022, after EBOX had been offering FTTP service speeds for more than ten days, TekSavvy sought clarification from Bell Canada regarding its failure to file wholesale tariffs for these service speeds.⁵⁷ Bell Canada responded indicating that it was not offering the service speeds in question (including 400 Mbps, 200 Mbps, 120 Mbps, 60 Mbps, 30 Mbps and 5 Mbps symmetrical speeds).⁵⁸
52. When TekSavvy sought further clarification, clarifying that the speeds were currently offered on EBOX's website, on October 5, 2022, a Bell Canada employee stated that they had "looked into it internally and can confirm that the speeds below are offered over Cable and as a result [Bell's] tariff would not apply."⁵⁹
53. TekSavvy again raised this issue with Bell on October 11, 2022, noting that despite Bell's denial that EBOX offered any FTTP services, EBOX was specifically marketing the services as FTTP.⁶⁰

4.2.3. EBOX UPGRADES EXISTING CUSTOMERS TO BELL'S FTTP RETAIL PLANS

54. Three weeks later, on November 2, 2022, Bell acknowledged to TekSavvy that EBOX was offering service speeds at retail for which there was no wholesale tariff:

"Thank you for bringing to our attention that certain Ebox FTTP Internet download speed profiles did not have a match in our disaggregated FTTP tariff."⁶¹

55. Bell noted that it would instead migrate EBOX users on these speeds to speeds that matched its disaggregated wholesale tariff. However, as noted above, EBOX appears to be receiving aggregated access to Bell's FTTP, rather than disaggregated, such that Bell is still offering EBOX a service that is not subject to a wholesale tariff and is not offered to any independent competitors.
56. In line with this migration to new speeds, EBOX announced it would now be selling slightly different FTTP speeds⁶²:

⁵⁶ See the summaries of OTAs published by the Commission at: https://crtc.gc.ca/Part1/eng/2012/8663/b54_201200501.htm.

⁵⁷ Attached as Appendix A, p 1.

⁵⁸ Attached as Appendix A, p 2.

⁵⁹ Attached as Appendix A, p 4.

⁶⁰ Attached as Appendix A, p 5.

⁶¹ Attached as Appendix A, p 6.

⁶² DSLReports, Ebox Forum, "[Mise à jour des forfaits](#)".

Afin d'uniformiser notre offre, nous procéderons à une mise à jour de la vitesse de téléchargement et de téléversement de votre forfait internet illimité à compter du **1er novembre** prochain.

Le prix que vous payez actuellement pour votre forfait internet sera maintenu. Vous n'avez aucune démarche à faire de votre côté.

Veuillez vous référer au tableau ci-bas pour prendre connaissance des changements à votre forfait Internet.

Vitesse de téléchargement et téléversement	
Vitesse actuelle	Vitesse à compter du 1^{er} novembre
30 Mbit/s - 30 Mbit/s	50 Mbit/s - 50 Mbit/s
60 Mbit/s - 60 Mbit/s	150 Mbit/s - 150 Mbit/s
120 Mbit/s - 120 Mbit/s	150 Mbit/s - 150 Mbit/s
200 Mbit/s - 200 Mbit/s	300 Mbit/s - 300 Mbit/s
400 Mbit/s - 400 Mbit/s	500 Mbit/s - 500 Mbit/s

Nous sommes heureux de vous compter parmi nos clients.

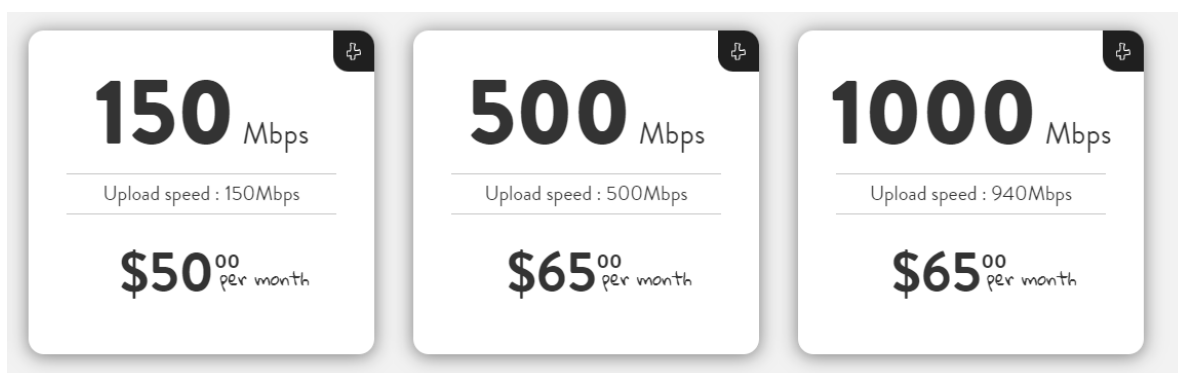
57. As noted above, while these speeds are theoretically available through a disaggregated tariff, it is clear that EBOX is not obtaining them through wholesale disaggregated access given only two central offices have been activated. Moreover, based on EBOX's retail rates, they do not appear to be paying tariffed rates to access these services, as their retail rates are well below Bell's tariff wholesale monthly access rates alone:

DBS Speed (Download/Upload)	EBOX Retail Rate⁶³	Bell's disaggregated tariff monthly rate⁶⁴
150 Mbps / 150 Mbps	\$50	\$121.79
300 Mbps / 300 Mbps	\$65	\$121.79

⁶³ As offered via the EBOX website on November 8, 2022, using a qualifying address in Quebec, QC as a representative example.

⁶⁴ Bell Canada, [Access Services Tariff For Interconnection with Carriers and Other Service Providers](#), CRTC 7516, Tariff Page 61.16, Item 151.5.

500 Mbps / 500 Mbps	\$65	\$121.79
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EBOX also does not charge its customers any installation fee for its FTTP offerings, despite Bell’s tariffed disaggregated wholesale installation cost of \$247.90^{65,66}.

5. UNJUST WHOLESALE RATES AND FTTP ACCESS HAVE ALLOWED INCUMBENTS TO UNDULY PREFERENCE THEMSELVES

58. Current wholesale access rates are not viable for competitors. This is evidenced by the dearth of remaining independent competitors: three out of four of the largest wholesale competitors have exited the market since the Commission’s final decision on wholesale rates.⁶⁷ The Competition Bureau acknowledges these market exits speak to the negative economics of the TPIA regime.⁶⁸ The now-former CRTC Chair Ian Scott himself acknowledged that wholesale HSA rates are not resulting in adequate competition.⁶⁹ The Competition Bureau has submitted that the TPIA regime is a “quagmire,” does not provide stable prices that businesses can plan for and suggests that the Commission has not developed the regime effectively.⁷⁰ Further, buoyed by

⁶⁵ *Ibid.*

⁶⁶ As offered via the EBOX website on November 8, 2022, using a qualifying address in Quebec, QC as a representative example.

⁶⁷ [Telecom Decision CRTC 2021-181](#), *Requests to review and vary Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services*, 27 May 2021 [TD 2021-181]. Since TD 2021-181, EBOX, Distributel and VMedia have been acquired by Incumbents.

⁶⁸ *Supra*, note 51.

⁶⁹ See for example, Canada, “[Ian Scott to the Canadian Telecom Summit](#)”, 21 November 2022: “We developed our HSA framework a number of years ago. [...] We know our framework is not producing the expected results and that we need to fix it. [...] We want Canadians to have access to high-quality broadband services. We want to see sustainable competition develop in the market. We want prices to come down. See also Ahmad Hathout, “[Outgoing CRTC chair hints at work in ‘coming months’ to address broadband pricing](#)”, CARTT, 4 January 2023: “The task for the commission now is to remake or work on the regime such that it does produce the desired results, which are to reduce broadband rates.”

⁷⁰ Michael Lee-Murphy, “[CRTC’s regulatory policy plays central role in Rogers-Shaw closing arguments](#)”, The Wire Report, 16 December 2022; see also *supra*, note 51.

these inflated tariff rates, retail prices for broadband continue to increase for consumers, discussed in Section 5.3 below.

59. The Incumbents' artificial inflation of wholesale rates and effective exclusion of competitors from access to fibre has left them with the ability to pick winners by offering off-tariff agreements. The ability for Incumbents to profitably offer wholesale rates well below the tariff rates creates an inequitable environment that is ripe for undue preference.
60. Continuing to allow OTAs of this type will continue to erode independent ISPs' competitive position —ISPs who already occupy an increasingly shrinking segment of the market.⁷¹ Two problematic uses of off-tariff arrangements, whether concluded through formal agreements or not, are outlined below.

5.1. ROGERS IS PROVIDING VIDEOTRON WITH AN UNDUE PREFERENCE

5.1.1. PROVIDING DIFFERENTIAL RATES TO ONE COMPETITOR IS AN ESTABLISHED FORM OF PREFERENCE

61. In Telecom Decision CRTC 2020-268⁷², the Commissioner confirmed that a party alleging an undue preference carries only the burden of establishing that there is a preference:

the Commission's general approach to allegations of unjust discrimination or undue preference against a carrier, the party making the allegation must first establish the discrimination or preference. Once this is done, the onus then shifts to the respondent carrier to establish that the discrimination or preference is not unjust or undue, as required by subsection 27(4) of the Act.⁷³

62. As described above, the Competition Tribunal has made a finding of fact that, via the Rogers-Videotron Wholesale Arrangements, Videotron is receiving preferred wholesale access rates and preferred fibre backhaul rates. These preferred rates formed part of the Tribunal's reason for finding that Videotron would be able to charge competitively-priced mobile and internet bundles. These preferred rates have not been extended to competitors other than Videotron and its affiliate VMedia, as far as TekSavvy is aware. While the full details of this preference are not public, it is irrefutable that such a preference exists.
63. The Commission has previously concluded that a "variation in rates [offered to different companies] constitutes discrimination and/or preference within the meaning of the

⁷¹ Proposed Direction, *supra*, note 34; see Regulatory Impact Analysis Statement, which noted: "further measures to improve the regulatory framework are required. For example, the CRTC reported that the share of residential Internet access subscriptions provided by wholesale-based ISPs declined for the first time".

⁷² [Telecom Decision CRTC 2020-268](#), *Iris Technologies Inc. and TELUS Communications Inc. – Applications for final relief regarding the termination of traffic to certain 867 numbering plan area telephone numbers*, 14 August 2020 [TD 2020-268].

⁷³ *Ibid* at para 94.

Act.”⁷⁴ The Rogers-Videotron Wholesale Arrangements on their face offer rates that vary from those offered to competitors.

5.1.2. ROGERS CANNOT DEMONSTRATE THAT THE PREFERENCE GRANTED TO VIDEOTRON IS REASONABLE

64. As a result, in accordance with TD 2020-268⁷⁵, once it has been shown that a preference exists, the burden of establishing that any discrimination or preference is not undue or unjust is on the respondent carrier. The burden therefore shifts to Rogers and Videotron to explain how the preference granted by the Rogers-Videotron Wholesale Arrangements is not undue.
65. As the Commission noted in Telecom Decision CRTC 2021-398⁷⁶, courts have confirmed that subsection 27(2) of the Act confers a wide discretion to the Commission to determine in the circumstances of any case what preference or advantage is “undue” or “unreasonable.” In addition, the Act requires the Commission to exercise its powers and perform its duties with a view to implementing the Canadian telecommunications policy objectives.
66. Though the Rogers-Videotron Wholesale Arrangements have been described as “very favourable”, the scale of the preference Rogers is affording to Videotron is not known, as the terms are confidential.⁷⁷ In the past, the Commission has found that even factors such as reciprocity, different geographic coverage and traffic volume can explain some but not all of the discrepancies between wholesale rates offered between different companies.⁷⁸ Even these factors do not appear to be strictly applicable here: there does not appear to be any reciprocal wholesale between Rogers and Videotron, nor any particularly different geographic coverage offered as opposed to the geography offered to other wholesale competitors, and while there may be a minimum volume in the agreement, Videotron does not appear to be locked in to this volume commitment with any penalty.⁷⁹

⁷⁴ TD 2014-398, *supra* note 10 at para 25.

⁷⁵ *Supra* note 72.

⁷⁶ [Telecom Decision CRTC 2021-398](#), *TELUS Communications Inc. – Application to review and vary Telecom Decision 2020-268*, 1 December 2021.

⁷⁷ As the terms of the agreements do not form part of any enforceable consent agreement or court order, it is also open to Rogers and Videotron to amend the terms of the Rogers/Videotron Wholesale Arrangements afterward without any scrutiny.

⁷⁸ See a discussion of these possible mitigating factors in TD 2014-398, *supra* note 10 at para 29.

⁷⁹ With respect to any locked-in volume commitments, see the Competition Tribunal’s finding that “Videotron/Freedom would remain free to opt out of its favourable arrangements with Rogers for the supply of TPIA and backhaul, at any time”; no penalty for doing so is mentioned and thus to the extent the preferred rates are based on volume, there does not appear to be any actual guaranteed or locked-in volume. 2023 Comp Trib 1, *supra* note 46 at para 286.

67. The Commission can also look to the policy objectives outlined in the Proposed Direction; this is the approach the Commission has taken in its recent decision in Telecom Order CRTC 2022-335.⁸⁰ These objectives include notably:
- a. encouraging all forms of competition; and
 - b. reducing barriers to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers.
68. The Rogers-Videotron Wholesale Arrangements run directly contrary to these objectives. They do not encourage all forms of competition or reduce barriers for smaller telecommunication providers. Instead, the Rogers-Videotron Wholesale Arrangements, transparently entered into to achieve regulatory approval over a merger of two large Incumbents, would distort the market in favour of one wholesale-based competitor: Videotron. They would allow Videotron and VMedia to compete more aggressively while independent competitors struggle to compete at all. The Rogers-Videotron Wholesale Arrangements would only serve to enhance barriers to competition for already disadvantaged independent competitors, who would face yet another competitor capable of charging retail rates that are simply not viable for competitors who pay tariffed wholesale rates.
69. Moreover, the Proposed Direction also guides the Commission to ensure that its regulatory framework for wholesale HSA access applies equitably to carriers that are subject to the framework. Allowing two large carriers to distort the market to favour one competitor at the expense of others frustrates this goal.
70. Significantly, even if the 2006 Policy Direction were in place, the Rogers-Videotron Wholesale Arrangements would nonetheless not be reasonable. Far from the result of natural market forces or negotiations, the agreement between Rogers and Videotron were plainly entered into in an attempt by Rogers to waylay the concerns of a different regulator. That is, the agreement was entered into for regulatory purposes as opposed to the result of natural competitive market forces and negotiations. Absent the regulatory review of Rogers-Shaw transaction, Rogers would surely not have offered Videotron the “very favourable” terms it has.

5.2. BELL IS PROVIDING ITSELF AND ITS AFFILIATE, EBOX, WITH AN UNDUE PREFERENCE

5.2.1. PROVIDING OFF-TARIFF SERVICES TO AN AFFILIATE AND OFFERING RETAIL SPEEDS NOT AVAILABLE AT WHOLESALE ARE ESTABLISHED FORMS OF SELF-PREFERENCE

71. Bell’s self-preferencing hearkens to its behaviour leading to Telecom Decision CRTC 2002-76, in which Bell provided engineering and technical support, help desk and back-office services provided to Bell Nexxia not in accordance with approved tariffs.⁸¹ In that decision, the Commission stressed that it was “important to ensure that all service providers, including ILEC affiliates, are subject to the same procedures to access ILEC tariffed services.” Further, the Commission also noted that, as Bell provided those

⁸⁰ [Telecom Order CRTC 2022-335](#), *TELUS Communications Inc. – Introduction of a credit card processing fee for regulated services in Alberta and British Columbia*, 8 December 2022.

⁸¹ *Supra*, note 9.

services pursuant to approved tariffs to non-affiliates, “there is no reason why Bell Nexxia should not be required to obtain these types of services on the same basis.” [emphasis added]⁸²

72. Bell’s current treatment of EBOX is analogous to the above. To the extent that Bell offers wholesale telecommunications services to its affiliate, EBOX Inc. / EBOX Telecommunications Inc., it must do so according to an approved wholesale tariff or file a summary of its OTA with the Commission. Bell and EBOX have made public statements that Bell is offering FTTP services to EBOX. It is clear that these FTTP services are not made available to EBOX via Bell’s established disaggregated tariffs:
- a. Bell has only two central offices enabled for disaggregated access located in Toronto, Ontario and Montreal, Quebec; EBOX is offering FTTP services in many locations in Ontario and Quebec; and
 - b. EBOX charges monthly retail fees that are approximately 50% of Bell’s monthly access fees and does not charge any fee for installation.
73. By offering off-tariff aggregated FTTP services to its affiliate, Bell is providing itself and its affiliate with an undue preference contrary to section 27(2) of the *Telecommunications Act*.
74. Bell might claim that it is making FTTP available to EBOX as an internal retail offering of Bell, with EBOX operating as a “brand” rather than as a wholesale-based provider. If Bell were allowed to consider EBOX as merely a “brand” while still operating it separately for all intents and purposes, including with its own network infrastructure, Bell would be allowed to merely use a legal fiction to avoid its full regulatory obligations. As the Federal Court of Appeal held in *Bell Mobility Inc. v. Klass*⁸³, “a company cannot avoid regulation under the *Telecommunications Act* by choosing a particular corporate structure.” To the extent that Bell makes aggregated FTTP services available to EBOX, these services should be made equally available to wholesale competitors regardless of the legal structure Bell Canada creates for the EBOX entity.

5.2.2. BELL’S BEHAVIOUR PUTS COMPETITORS AT A SIGNIFICANT AND UNREASONABLE DISADVANTAGE

75. As outlined above, once it has been shown that a preference has been provided, the burden of establishing that such a preference is not undue or unjust is on the respondent carrier. As shown above, EBOX and Bell have clearly enjoyed the benefits of extending wholesale aggregated FTTP access to EBOX that is not made available to competitors and below any comparable access rates. This is a clear preference, such that the burden shifts to Bell to establish why this preference is not undue.
76. It is difficult to conceive that any telecommunications policy objectives would support a preference that not only limits competitive access to the fastest service speeds and technologies, but also allows a large Incumbent to mislead consumers about the

⁸² *Ibid* at para 84.

⁸³ *Bell Mobility Inc. v. Klass*, 2016 FCA 185 at para 70.

independent operation of its “brands,” flout existing speed-matching rules, and mislead competitors about the services it is offering.

77. Instead, the forthcoming Direction from the Governor in Council guides against exactly this type of behaviour — including by making clear that competitors should have aggregated access to FTTP and that the Commission should ensure its regulatory framework mandating wholesale high-speed access services applies equitably to carriers, in this case, by way of symmetrical speed matching for ILECs and cable companies.
78. The Commission has explained that “any action that provides a competitive advantage should be taken seriously given the potential for broad harm in the telecommunications marketplace.”⁸⁴ The Commission has already found that a lack of parity when it comes to technology and access to higher speeds does just that. In 2015, the Commission reiterated that 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”.⁸⁵ The Commission specifically found 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”⁸⁶ to obtain higher speeds, and that competitors would also be unduly impaired from obtaining new customers.
79. As noted above, Bell has explicitly touted the specific demand it sees for its differentiated FTTP offerings. It’s clear this behaviour perpetuates Bell’s competitive advantage and that this competitive gap can only be expected to increase once Bell completes its acquisition of Distributel/Primus and affords it this same undue preference.
80. No amount of time is acceptable for Bell and its affiliates to enjoy this unfair advantage. The Organisation for Economic Co-operation and Development has long recognized that “first mover status and the presence of an installed base can yield significant competitive advantages.”⁸⁷ The Commission has also made findings in the past that even short head starts to access technology confer a lasting long-term competitive advantage. For example, in considering a case in which Bell delayed providing Videotron with access to support structures, the CRTC found that “a short lead in serving a market could confer a lucrative long-term advantage, since a customer who is served first by Bell Canada, because the company has furthered its FTTH network at its competitors’ expense, will tend to remain a customer of Bell Canada for many years, allowing the company to benefit from its violations.”⁸⁸ In another context, when Rogers

⁸⁴ [Telecom Decision CRTC 2022-160](#), *Imposition of an administrative monetary penalty on Bell Canada in relation to the processing and granting of access permit applications for support structures in accordance with its National Services Tariff*, 15 June 2022 [TD 2022-160] at para 63.

⁸⁵ TRP 2015-326, *supra* note 26 at para 130.

⁸⁶ *Ibid* at para 127.

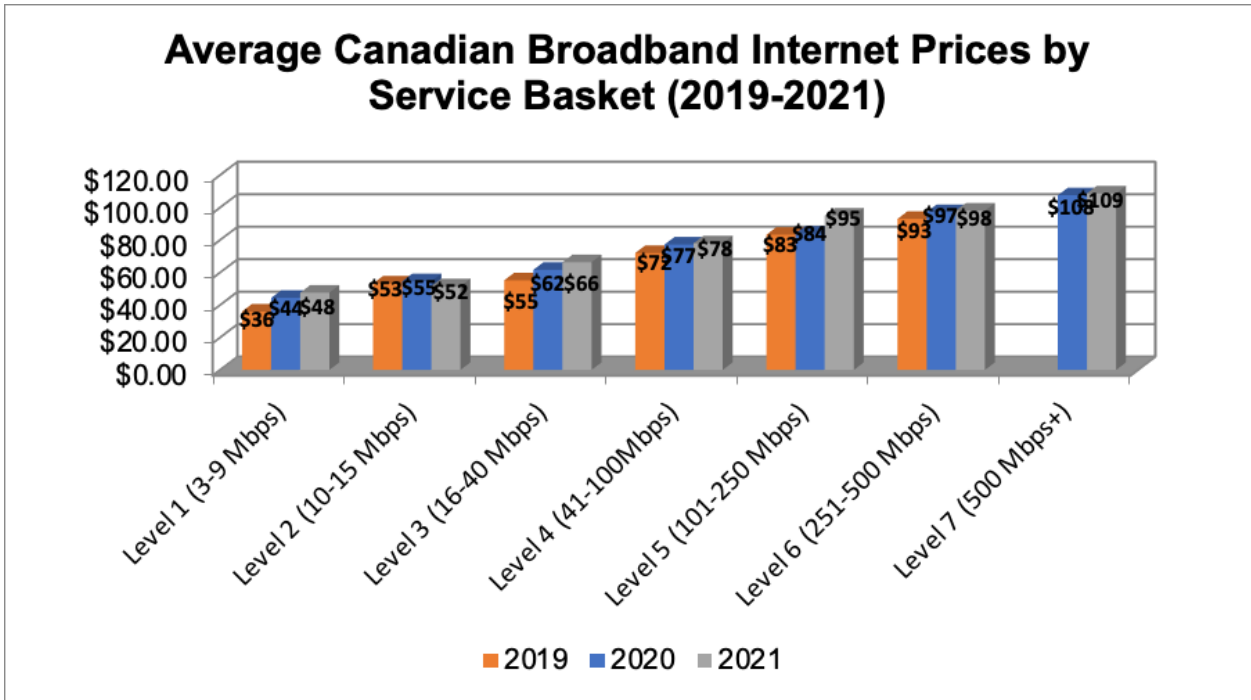
⁸⁷ OECD Competition Committee, Policy Roundtables, “[Application of Competition Policy to High Tech Markets](#)”, 1996.

⁸⁸ TD 2022-160, *supra* note 84 at para 65.

was not granted timely access to a multi-dwelling unit, the CRTC recognized that early access is unacceptable and issued a decision preventing any carriers with existing access to the building from providing services to any new occupants if access were not granted to Rogers within 30 days of the decision.⁸⁹ By contrast, Bell has already had a multi-year lead, and significant harm has already been done to competitors.

5.3. SERIOUS IMPACTS ON CONSUMERS

81. As noted above, the government has openly acknowledged that prices for mid-range and top-range services remain high relative to international peers. The government-commissioned Wall Report found that prices for almost every tier of home internet service rose in 2021⁹⁰:



82. The report found that “fixed broadband prices have increased in Canada in every basket in every year between 2019 and 2021” (excluding the level 2 basket, for internet speeds between 10-15 Mbps, which represents the decline in slower-speed DSL services as FTTP makes DSL a second-class service).⁹¹ Notably, the speed tier with the most popular speeds in Canada (101-250 Mbps) saw a 13% price increase.⁹²

83. Unlike many pricing trends, these price increases cannot be tied to global market forces. The Wall Report notes that unlike Canada, prices for broadband have been

⁸⁹ [Telecom Decision CRTC 2022-148](#), *Rogers Communications Canada Inc. – Application for non-discriminatory and timely access under reasonable terms and conditions to the multi-dwelling unit at 70 Yorkville Avenue, Toronto, Ontario*, 8 June 2022 [TD 2022-148].

⁹⁰ Wall Communications Inc. prepared for Innovation, Science and Economic Development Canada, “[Price Comparisons of Wireline, Wireless and Internet Services in Canada and with Foreign Jurisdictions](#)”, 2021 Edition [“Wall Report”], p 44.

⁹¹ *Ibid*, p 44.

⁹² *Ibid*, p 8.

trending down in peer countries, finding: “[r]elative to last year, all countries (except for Canada and Japan) have lower prices in a majority of baskets.”⁹³ This is true even for the United States, which the report found, unlike Canada, “has followed a downward price trend over the last few years. Canada now has higher prices than the US in most baskets.”⁹⁴

84. These increasing price trends are even more concerning considering Canada’s pricing already ranks high in comparison to other peer countries: “measured prices for the European countries included in the study (U.K., France, Italy and Germany) have consistently been lower than those in Canada — in some cases, by a wide margin.”⁹⁵ This widest margin is most often found in the higher speed tiers.
85. Without meaningful competition from independent competitors outside of large Incumbents, prices for consumers can only be expected to increase. Further, it is clear that affordability for the higher speed tiers increasingly demanded by Canadians is suffering — the same tiers for which Bell has granted itself and its affiliate discriminatory access.

6. REMEDIES REQUESTED

6.1. THE COMMISSION SHOULD ADDRESS THE UNDERLYING CAUSES OF OTAS

86. As described above, the root causes allowing unduly preferential OTAs are: (i) artificially inflated wholesale HSA rates and (ii) a lack of realistic mandated wholesale access to FTTP. The Commission’s decisions on those issues have created the environment in which Incumbents can profitably offer preferential rates and differential access to technologies. The best way to address many of the issues posed by this application is to solve these underlying causes.
87. There is an open consultation regarding a review of rate-setting in wholesale telecommunications services⁹⁶, which has been pending since 2020. Considering the last aggregated wholesale rates process took more than seven years in total, including one and a half years spent on a review and vary process to merely revert to interim rates from 2016, there is no relief in sight for deteriorating wholesale competitors. As a result, the Commission should issue interim relief on wholesale rates pending the conclusion of its review of rate-setting in TNOC 2021-131. There are several ways in which the Commission could do so:

⁹³ Wall Report, *supra* note 90, p 60.

⁹⁴ *Ibid*, p 9.

⁹⁵ *Ibid*, p 60.

⁹⁶ [Telecom Notice of Consultation CRTC 2020-131](#), *Call for comments – Review of the approach to rate setting for wholesale telecommunications services*, 24 April 2020 [TNOC 2021-131].

- a. the Commission could revert to rates substantially similar to those set in Telecom Order 2019-288 (before the Commission reversed itself to untested rates),⁹⁷ the last rates that involved a full review by the Commission; or
 - b. the Commission could provide interim relief on aggregated wholesale rates in the form of retail-minus, a tool which the Commission has applied on several occasions.⁹⁸ Linking wholesale rates to the lowest retail rates charged by an Incumbent on a temporary basis directly prevents Incumbents from engaging in pricing below what is feasible on tariffed rates.
88. To address the second underlying issue relating to FTTP, there is an open proceeding before the Commission that could offer immediate, interim relief: an application seeking interim wholesale access to FTTP on a retail-minus basis.⁹⁹
89. If the underlying causes of these OTAs cannot be quickly addressed, we propose other forms of targeted interim relief below.

6.2. THE COMMISSION SHOULD OPEN AN INVESTIGATION INTO INCUMBENTS' PREFERENTIAL BEHAVIOUR AND INSTITUTE APPROPRIATE MEASURES TO PREVENT UNDUE PREFERENCE

90. The Incumbents preferential behaviour has been established. At that point, the burden shifts to the Incumbents to establish it is not undue. To better understand the nature and the impact of the preference resulting from (i) the Rogers-Videotron Wholesale Arrangements and (ii) Bell's off-tariff provision of services to EBOX, the Commission should open an investigation into off-tariff agreements offered by Incumbents.
91. As part of this investigation, the Commission should direct Incumbents to file documents and responses to information requests similar to the RFIs it issued in August 2021 relating to OTAs. The requests should at least obtain full information regarding any OTAs entered into by Rogers, Videotron, and Bell in the period since the August RFIs were answered, including copies of all such OTAs.
92. In order to permit the Commission to understand precisely what services Bell is providing to EBOX and any other of its wholesale-based affiliates, such as Distributel and Primus, the Commission should also ensure its requests cover Bell's commercial dealings with EBOX, Distributel and Primus including:

⁹⁷ [Telecom Order CRTC 2019-288](#), *Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services*, 15 August 2019 [TO 2019-288].

⁹⁸ See for example [Telecom Decision CRTC 99-11](#), *Application concerning access by Internet service providers to incumbent cable carriers' telecommunications facilities*, 14 September 1999; and [Telecom Decision CRTC 2016-67](#), *The Canadian Network Operators Consortium Inc. – Application for relief regarding the pricing and availability of Eastlink's higher-speed retail Internet service for resale*, 24 February 2016.

⁹⁹ See 2021 CNOC Application, *supra* note 30, pursuant to which CNOC requested relief requiring, among other things, Incumbents to make their 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.

- a. Details and copies of all arrangements between Bell and its wholesale-based affiliates currently in effect;
 - b. A list of all services offered to EBOX, Distributel and Primus by Bell Canada and the corresponding tariff and/or off-tariff arrangement;
 - c. Copies of any materials or representations made to the Competition Bureau regarding Bell Canada's intention to operate EBOX and/or Distributel as separate entities; and
 - d. An accounting of the volume of customers who EBOX has been able to serve via FTTP.
93. These requests are similar to and consistent with much of the information Bell was required to provide to the Commission in Telecom Decision CRTC 2002-76, when it appeared to be offering its affiliate off-tariff services.
94. The above information would aid the Commission to determine what measures may be necessary to bring Rogers, Videotron and Bell into compliance and to remedy the undue preference with which they have provided themselves to date. Should the Commission find these agreements violate section 27(2) of the Act, the Commission should render them void.
95. Depending on the outcome of this investigation, the Commission should also consider, with input from interested parties, what measures would be appropriate to ensure that Incumbents are not able to retain the benefits of any head start they have afforded themselves.¹⁰⁰

6.3. PENDING THE OUTCOME OF THIS INVESTIGATION, THE COMMISSION SHOULD ORDER INTERIM RELIEF FOR COMPETITORS TO ALLOW FOR MORE EQUITABLE COMPETITION

6.3.1. THE COMMISSION SHOULD DIRECT ROGERS TO OFFER COMPETITORS ACCESS TO THE SAME TERMS AS THOSE ENJOYED BY VIDEOTRON

96. As of August 2022, Rogers entered into a binding agreement with Videotron agreeing to provide it with (among other things) advantageous off-tariff rates for wholesale HSA services. It is not known whether these preferred rates and terms are already in effect.
97. Considering the complexity of commercial agreements and possible number of agreements, a regulatory review of OTAs could result in a lengthy decision timeline.¹⁰¹ If Rogers is permitted to offer reduced rates to Videotron and VMedia to the detriment of

¹⁰⁰ For example, TekSavvy is not aware whether Videotron already benefits from the Rogers-Videotron Wholesale Arrangements. EBOX has been able to obtain off-tariff access to FTTP since September 2022.

¹⁰¹ Consider for example, the last review of wholesale rates which took over seven years for a final decision, which is still pending appeal: It was initiated as a proceeding in 2015 in Telecom Notice of Consultation CRTC 2015-225 - *Review of costing inputs and application process for wholesale high-speed access services*, 28 May 2015, and concluded with an initial decision five years later in 2019 (TO 2019-288). Following a review and vary decision, TO 2019-288 was subsequently reversed in TD 2021-181, and remains subject to an open appeal before the Federal Court of Appeal in Court File No. A-299-21.

other wholesale-based competitors, this will have lasting consequences for competitors whose competitive position in the retail market is already tenuous. Competitors can expect to lose customers based on their inability to compete on price. The telecommunications market is notorious for “sticky” customers, such that once competitors have lost their customers, it would be difficult to regain them.¹⁰²

98. In order to prevent this unnatural distortion of the market, pending the outcome of the Commission’s review of OTAs, the Commission should either void the Rogers-Videotron Wholesale Arrangements, or order Rogers to offer access to the same terms for wholesale services as those enjoyed by Videotron. This remedy should not cause hardship: by entering freely into the Rogers-Videotron Wholesale Arrangement (namely, it was not a condition imposed by the Competition Bureau), Rogers has already demonstrated that it considers these rates to continue to be profitable. If offering the same lower rates to all competitors does in fact create hardship to Rogers, this would only demonstrate that the Rogers-Videotron Wholesale Arrangements require the rest of the wholesale market to be anti-competitively suppressed.

6.3.2. THE COMMISSION SHOULD DIRECT BELL TO OFFER COMPETITORS ACCESS TO FTTP ON THE SAME TERMS AS THOSE ENJOYED BY EBOX

99. As demonstrated above, Bell has already granted itself an unfair advantage by making speeds available at retail that are not available at wholesale by misleading competitors when questioned regarding these speeds and by offering its affiliate non-tariffed services not available to wholesale competitors.
100. As the Commission has recognized above, even short head starts can confer lasting competitive advantages. Critically, Bell has already been insulated from the Speed-Matching Requirements on its FTTP offerings for seven years and counting.
101. Further, the Commission has recognized that “Bell Canada has a history of non-compliance with Commission decisions” and “a history of non-compliance with the Act.”¹⁰³ In Telecom Decision 2006-17, the Commission found that Bell Canada was in violation of the local exchange service win-back restrictions initially established in 1998.¹⁰⁴ In Telecom Decision 2020-106, the Commission found that Bell failed to comply with the competitive local exchange carrier framework established in 1997.¹⁰⁵ Bell has violated the undue preference law as recently as within the last two years: In Telecom Decision CRTC 2021-131, the Commission found that Bell Canada violated of

¹⁰² See for example Environics Research Group prepared for Innovation, Science and Economic Development Canada, “[Competition Bureau Market Study: Consumer Switching in Broadband Providers – Final Report](#)”, 23 May 2019, which found: “[s]witching activity is limited. Fewer than one in five (17%) Internet subscribers have switched ISPs in the past two years”.

¹⁰³ TD 2022-160, *supra* note 84 at paras 59 and 60.

¹⁰⁴ [Telecom Decision CRTC 2006-17](#), *Quebecor Media Inc. Part VII application - Alleged violations of winback rule by Bell Canada*, 6 April 2006.

¹⁰⁵ [Telecom Decision CRTC 2020-106](#), *Cloudwifi Inc. – Application for an order completing the company’s registration as a competitive local exchange carrier or requiring Bell Canada to sign a Special Master Agreement for Local Interconnection*, 26 March 2020.

section 24 and subsections 25(1) and 27(2) of the Act, as well as its own tariffs and agreements, by failing to provide efficient access to its support structures.¹⁰⁶

102. In consideration of Bell's continued pattern of disregard for long-established requirements and the Act, and to avoid allowing it to continue to distort the market while the Commission conducts its investigation, the company should be required to immediately provide wholesale competitors with aggregated access to those same FTTP service speeds it has provided EBOX. This requirement would also be wholly consistent with the new Proposed Direction, which the Government clearly intends to result in equitable access to FTTP speeds.
103. This access should be under the same cost and terms as has been provided to EBOX. To the extent that Bell is not able to quickly account for the costs paid by EBOX for the FTTP access it receives from Bell, allowing access at a retail-minus basis would be an appropriate interim solution to avoid undue delay.
104. Anything short of this remedy would simply reward Bell for its repeated violations of Commission rules and the Act. Bell would have every incentive to again disregard rules and the Act until a competitor files an application, reaping the benefits of first-mover advantages and facing no meaningful consequences.

6.4. REMEDIES REQUESTED ARE REQUIRED TO ENSURE ADHERENCE TO THE POLICY DIRECTION

105. As outlined above, the Policy Direction and the Government's statements in introducing it make clear that the *status quo* of competition in broadband internet is not acceptable. The Government has explicitly stated that the Direction intends to require speed-matching across all speeds (including FTTP), intends to ensure equitable application of the wholesale framework and to reduce barriers to competition, and is designed to improve affordability for consumers, including explicitly on mid- and top-range service speeds (i.e., those served by FTTP).
106. Moreover, the Direction instructs the Commission to be more responsive, including in conducting proceedings and issuing decision in a timely manner, but also in making timely and proactive adjustments to the wholesale framework.¹⁰⁷
107. The proposed remedies are also consistent with the existing 2019 Policy Direction, which similarly directs the Commission to consider how its decisions can promote competition, affordability, consumer interests and innovation.¹⁰⁸ This includes in particular the extent to which they (among other things):

(i) encourage all forms of competition and investment,

¹⁰⁶ [Telecom Decision CRTC 2021-131](#), *Videotron Ltd. – Application concerning the issuance of orders related to the processing and granting by Bell Canada of access permit applications for support structures*, 16 April 2021.

¹⁰⁷ Proposed Direction, *supra* note 34, ss 7, 9.

¹⁰⁸ 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"].

(ii) foster affordability and lower prices, particularly when telecommunications service providers exercise market power,

[...]

(iii) reduce barriers to entry into the market and to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers.¹⁰⁹

6.5. INTERIM REMEDIES REQUESTED MEET THE TEST FOR INTERIM RELIEF

108. The interim remedies requested herein meet the criteria for interim relief set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*¹¹⁰, and modified in *RJR-MacDonald Inc. v. Canada (Attorney General)*¹¹¹ (the “RJR-MacDonald Test”). That is:

- a. there is a serious issue to be determined
- b. the party seeking relief will suffer irreparable harm if the interim relief is not granted; and
- c. the balance of convenience, taking into account the public interest, favours granting the interim forms of relief.

6.5.1. THERE ARE SERIOUS ISSUES TO BE DETERMINED

109. If an application is not clearly frivolous, it will generally meet the first criterion of interim relief: there is a serious issue to be determined.¹¹² The Commission has found that the threshold for finding that there is a serious issue to be tried is low.¹¹³ As set out above, Rogers has granted Videotron a clear preference, in the form of preferential rates. This is indisputable, and meets the burden required of an application seeking to address issues of undue preference. As for Bell’s conduct with respect to EBOX, Bell is clearly granting access to its affiliate to technology that it has not granted to other competitors. Again, differential access to technology is a clear preference. As a result, this application raises serious issues to be heard, and is not frivolous.

6.5.2. TEKSAVVY WILL SUFFER IRREPARABLE HARM SHOULD THE INTERIM RELIEF NOT BE GRANTED

110. In the second prong of the test, TekSavvy will continue to suffer irreparable harm should relief not be granted, in the form of financial losses that could not be remedied

¹⁰⁹ *Ibid*, s 2.

¹¹⁰ [1987] 1 SCR 110.

¹¹¹ [1994] 1 SCR 311.

¹¹² See [Telecom Decision CRTC 2020-342](#), *Requests to stay the implementation of Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services*, 28 September 2020 [TD 2020-342] at para 18.

¹¹³ *Ibid*.

with damages, including the loss of actual and potential customers, and the long-term loss of market share, both of which are accepted forms of irreparable harm.¹¹⁴

111. In the case of Rogers' preferential treatment of Videotron, for the time taken to reach a full decision, Videotron would be granted an anti-competitive head start offering reduced rates in Western Canada. It would be able to compete well below the prices other competitors can offer during that head start; this is indisputable: it is a finding of fact made by the Competition Tribunal that Videotron has a discounted TPIA arrangement.¹¹⁵ This renders it likely and probable that TekSavvy and other wholesale competitors will lose potential and actual customers to Videotron, customers who are unlikely to be recovered in the near future. As a result, interim relief to neutralize this competitive advantage, whether in the form of voiding the Rogers-Videotron Wholesale Arrangements, extending them to all competitors, or providing equally reduced interim rates to all competitors, is necessary to avoid long-lasting anti-competitive effects on competitors including TekSavvy.
112. This is even more true of Bell's arrangements with EBOX. As described above, the Commission found as far back as 2010 that Incumbents were offering "increasingly higher retail Internet service speeds to consumers,"¹¹⁶ and without access to the technology enabling those speeds, wholesale-based competitors "would be effectively prevented from offering higher service speed options to their own customers."¹¹⁷ The Commission found that if wholesale access to these higher speeds was not mandated, competition in retail Internet would be unduly impaired, and an ILEC and cable carrier duopoly would likely occur.¹¹⁸ This exact scenario has played out to an even greater extent in the past seven years with respect to access to FTTP: Bell has been effectively insulated from wholesale competition on its FTTP offerings, all while publicly recognizing the competitive advantage that FTTP confers on it.¹¹⁹ Faster speeds and more reliable technology are even more important today than at the time of the Commission's findings on this point in 2010.¹²⁰ The market share of wholesale-based competitors is declining according to the government's own data; three of the largest

¹¹⁴ See for example, *Dymon Storage Corporation v. Nicholas Caragianis*, 2022 ONSC 5883 which the court found the applicant would suffer irreparable harm "because it would likely result in loss of actual and potential customers, goodwill, and market share."

¹¹⁵ *Supra*, note 46 at para 290.

¹¹⁶ TRP 2010-632 *supra* note 3 at paras 54-55.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ See for example the discussion of Bell's own description of its competitive advantage in paragraph 34 herein.

¹²⁰ See for example CRTC, "Annual highlights of the telecommunications sector 2020", 15 December 2021, which noted: "Migration towards higher speed Internet packages continued as the needs of Canadians changed during the pandemic and expanded deployment of fibre and enhanced fixed wireless technologies improved accessibility to these types of packages. The proportion of residential subscriptions to services offering speeds of 100 Mbps or faster grew from 41.7% in 2019 to 47.8% in 2020. 8.3% of subscriptions were for services offering speeds of at least a gigabit in 2020 compared to 5.6% in 2019."

wholesale-based competitors have in fact exited the market.¹²¹ Continuing to impair wholesale competitors' meaningful access to FTTP, while allowing Bell to grant this same access to its own acquired wholesale-based competitor, results in the loss of actual and potential customers of TekSavvy (along with other smaller competitors).

113. The harms outlined above are irreparable as they could not be remedied with damages. In the case of the loss of potential or actual customers, similarly to the Federal Court and Federal Court of Appeal's finding in *Reckitt Benckiser LLC v. Jamieson Laboratories Ltd*, such losses would be impossible to calculate as TekSavvy would never have had the chance to operate its business in the absence of the impugned behaviour.¹²² Given the complexity of the retail internet market, even were TekSavvy to account for its declining number of customers, and the number of new subscribers for Bell, EBOX and Videotron could be determined, it would be impossible to demonstrate with precision the cause of each customer's switch or indeed what percentage of the new customers would have considered TekSavvy had it been able to offer FTTP or reduced prices made viable through an OTA similar to the Rogers-Videotron Wholesale Arrangement. It would also be impossible to determine the number of existing Bell, EBOX and Videotron customers who might otherwise have been contestable on the market and switched to TekSavvy, but opted not to switch as a result of the above forms of preferential arrangements. This is similar to the case of *Sleep Country Canada Inc. v. Sears Canada Inc*, in which the Federal Court found that even if all possible sales data were tracked and available, and other obstacles surmounted, at most the parties could find merely a "range for an estimate of the overall damages and guesses at the quantification of the harm", which in effect meant the calculation of damages would be difficult to the point of impossible.¹²³
114. Moreover, the Incumbents themselves recognize these as forms of irreparable harm. In TD 2020-342, Bell submitted that the loss of subscribers and market share are forms of irreparable harm, as such subscribers are difficult to recover and will likely migrate to other services, resulting in lost revenue across multiple product lines.¹²⁴ The cable carriers (including Rogers and Videotron) similarly argued that lost subscribers and market share losses constitute irreparable forms of harm.¹²⁵
115. The Commission has also made similar factual findings. The Commission has found even "a short lead in serving a market could confer a lucrative long-term advantage", noting that a customer who is served first by one company will tend to remain a customer of that company for many years, allowing the company to benefit from its

¹²¹ *Supra*, note 71. See also the discussion above with respect to the acquisitions by Incumbents of EBOX, Distributel/Primus and VMedia.

¹²² See *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104 at para 13, upholding *Reckitt Benckiser LLC v. Jamieson Laboratories Ltd*, 2015 FC 215.

¹²³ *Sleep Country Canada Inc. v. Sears Canada Inc.*, 2017 FC 148. Note the Court also found an accounting of customers would not be sufficient, as it could not be determined if the customers would have switched because of the impugned behaviour.

¹²⁴ TD 2020-342, *supra* note 112 at paras 20 and 33.

¹²⁵ *Ibid* at para 34. Note as the Commission found another form of harm existed, it did not move on to consider these forms directly.

violations.¹²⁶ In TD 2022-148, where access to a multi-dwelling unit was impaired to some carriers, the CRTC required any carriers with existing access to the building to cease providing services to any new occupants if access were not granted to the complainant within 30 days of the Commission's decision, clearly recognizing that an immediate form of relief was merited.¹²⁷

116. Finally, the market exits of most of the largest wholesale-base competitors in the last year also speak volumes to the financial harms caused by the inflated wholesale rates. The Federal Court of Appeal has established that where financial harm "could threaten the very viability of the business concerned", it is irreparable.¹²⁸

6.5.3. THE BALANCE OF CONVENIENCE, INCLUDING THE PUBLIC INTEREST, FAVOURS GRANTING THE RELIEF

117. The third criterion requires an assessment of which of the parties would suffer greater harm, or inconvenience, from granting or refusing to grant the interim relief pending the final determination of the issues.¹²⁹ In addition, the assessment at this stage takes into account public interest considerations.¹³⁰
118. As explained above, the inconvenience of the interim remedies on the Incumbents would be minor:
- a. setting wholesale-rates on retail-minus basis would not cause harm, as Incumbents would still be free to control their retail prices, ensuring they recover a margin acceptable to them;
 - b. extending the Rogers-Videotron Wholesale Arrangements to other competitors is not likely to cause Rogers any hardship. Rogers arrived at the preferred rates and terms in the agreement through its own choice: it was not a remedy imposed by another body. There is no suggestion that offering these rates and terms cause Rogers hardship or are not profitable to it;
 - c. offering wholesale access to aggregated FTTP on an interim basis offers no more hardship than does the mandated wholesale access required of other technologies. Bell was able to offer this wholesale FTTP access to EBOX in short order, within months of acquiring it. The ability to offer this interim relief is already further addressed in the 2021 CNOC Application.¹³¹
119. By contrast, the status quo is precarious for TekSavvy and other competitors. Unlike for example in TD 2020-342, in which the Commission found competitors' market share was growing under the status quo, TekSavvy and other competitors' market share is in

¹²⁶ TD 2022-160, *supra* note 84 at para 65.

¹²⁷ TD 2022-148, *supra* note 89.

¹²⁸ *Apotex Inc v Wellcome Foundation Inc* (1998), 82 CPR (3d) 429 (FCA).

¹²⁹ TD 2020-342, *supra* note 112 at para 87.

¹³⁰ *Ibid.*

¹³¹ 2021 CNOC Application, *supra* note 30.

fact declining.¹³² TekSavvy continues to lose subscribers per month.¹³³ Meanwhile, Bell recently stated it has experienced its “highest retail Internet net activations in 17 years” and explicitly mentions the clear demand it sees for FTTP, including noting: “we also gained a significant share of Internet subscriber growth with over 95,000 new net fibre-to-the-home customers this past quarter, up 33% over last year and our best-ever result.”¹³⁴ As for Videotron, the Competition Tribunal found that Videotron was an experienced market disruptor who was likely to be able to grow its market share due in part to the Rogers-Videotron Wholesale Arrangements.¹³⁵

120. Further, the same reasons the relief sought are indicated under the Policy Direction also show that the public interest overwhelmingly favours the grant of these interim measures. As described above, prices for retail internet continue to rise, despite the government of Canada’s stated goals of affordability and promoting competition. By enabling competitors to charge reduced retail rates to consumers and increasing the number of providers able to offer FTTP, the interim remedies would result in improved affordability for consumers and provide meaningful customer choices in the high demand FTTP offerings. Given that customers are already suffering through a cost of living crisis, erring on the side of improved affordability rather than increasing prices is the clear public interest choice.

7. CONCLUSION

121. TekSavvy therefore requests that the Commission:
- (1) Rectify the underlying causes of unduly preferential OTAs by reducing inflated wholesale tariff rates and allowing competitive wholesale access to FTTP;
 - (2) Open an investigation into Roger’s and Bell’s unlawful undue preferences;
 - (3) Issue interim relief in the form of voiding the unduly preferential OTAs or:
 - a. Directing Rogers to offer competitors access to the same terms for wholesale services as those enjoyed by Videotron; and
 - b. Granting competitors interim wholesale aggregated access to the same FTTP services offered to EBOX by Bell and on the same terms on an expedited basis.

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¹³² TD 2020-342, *supra* note 112 at para 87. See also *supra*, note 71.

¹³³ TekSavvy has experienced sustained net monthly subscriber losses in the retail internet market. See also for example Irene Galea, “[As last remaining large wholesaler, TekSavvy faces tough market conditions](#)”, The Globe and Mail, 29 December 2022: “TekSavvy has been losing customers to incumbents for years and had to raise its prices during the pandemic in order to stop losing money.”

¹³⁴ Bell News Release, *supra* note 31.

¹³⁵ *Supra* note 46 at para 251.