Before the Canadian Radio-television and Telecommunications Commission

In the matter of

Telecom Notice of Consultation CRTC 2023-56 (CRTC File No. 1011-NOC2023-0056), Review of the Wholesale High-Speed Access Service Framework

Intervention of TekSavvy Solutions Inc.

22 June 2023

ABRIDGED

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1. EXECUTIVE SUMMARY[1]

E1. TekSavvy provides its comments on the Commission's review of the wholesale high-speed access framework. As detailed herein, the current wholesale framework is broken and in need of urgent relief. The Incumbents have been permitted to engage in anti-competitive conduct and regulatory gaming for more than seven years, with the result that wholesale competition is significantly depleted.

E2. Swift, significant regulatory changes are needed to save what remaining wholesale competition is left, and to restore confidence in the regulator's ability to perform its core mandate: ensuring telecommunications pricing in Canada is just and reasonable. TekSavvy submits that sustainable wholesale competition can deliver the best results for consumers, as long as it is supported with strong and effective regulation.

E3. In short, TekSavvy submits that:

a. The Commission should mandate aggregated WHSA services on all types of facilities, including FTTP access facilities;

b. The Commission should immediately make material reductions to the Incumbents' interim WHSA rates since those rates are, on a *prima facie* basis, not based on reasonable costs due to unsubstantiated deviations from Phase II costing principles and unequivocal past Commission decisions;

c. The Commission should make use of forthcoming updated aggregated WHSA cost studies in order to set final, reduced disaggregated WHSA rates, which can co-exist with aggregated WHSA services;

d. To prevent Incumbents' from benefitting from regulatory delays and margin squeezing of competitors, the Commission should apply a "reasonableness test" to all WHSA access rates in the form of a retail-minus regulatory backstop;

e. The Commission should track wholesale-based competitor market shares on a more regular basis, and develop strategies for proactive, interim remedies going forward to quickly address future instances in which Incumbents abuse their market power;

f. The Commission should require public reporting of off-tariff agreements to ensure they do not escape regulatory oversight and scrutiny; and

g. The Commission should examine the feasibility of functional or structural separation between building and operating networks, and delivering internet services to customers.

[1] Capitalized terms in the executive summary are defined in the body of the submission.

2. INTRODUCTION

2. TekSavvy Solutions Inc. ("TekSavvy") is pleased to provide its comments in response to the Commission's review of the wholesale high-speed access service ("WHSA") framework initiated in Telecom Notice of Consultation CRTC 2023-56.[2].

3. In TNC 2023-56, the Commission requested comments on several different topics, including whether aggregated WHSA services should be mandated, how to address disaggregated WHSA services, other issues with the current WHSA framework and methods by which the Commission can improve its monitoring of the effectiveness of the framework going forward.

4. TekSavvy has sought to provide comments on each of the topics where relevant to its position in the market. As described below, TekSavvy submits that aggregated WHSA services should be mandated going forward in respect of all WHSA access facilities, including fibre-to-the-premises ("FTTP") facilities. TekSavvy also submits that disaggregated WHSA facilities should be mandated and can co-exist with aggregated WHSA services.

5. In addition to these broader topics, TekSavvy suggests other tangible steps the Commission can take to address the Incumbents' ongoing exercises of market power:

   a. To address ongoing instances where the Incumbents' interim WHSA rates deviate from unequivocal past Commission findings, the Commission should introduce further reductions to the interim rates on a priority basis;

   b. To prevent Incumbents' from benefitting from regulatory delays and predatory pricing, the Commission should apply a "reasonableness test" to all WHSA access rates in the form of a retail-minus regulatory backstop;

   c. The Commission should examine the feasibility of functional or structural separation between building and operating networks, and delivering internet services to customers;

   d. The Commission should track wholesale-based competitor market shares on a more regular basis, and develop strategies for proactive, interim remedies going forward to quickly address future instances in which Incumbents abuse their market power; and

   e. The Commission should require public reporting of off-tariff agreements to ensure they do not escape regulatory oversight and scrutiny.

6. Certain information contained in this letter is filed in confidence, consistent with Subsection 39(1) of the *Telecommunications Act*. This information is financial and commercial information that is treated consistently in a confidential manner by TekSavvy, and whose disclosure could be expected to result in material financial losses to TekSavvy and prejudice its competitive position. The information filed in confidence includes information concerning the financial impact of wholesale high-speed access services rates, TekSavvy's financial results and costs, confidential commercial

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2 Telecom Notice of Consultation CRTC 2023-56, *Notice of hearing – Review of the wholesale high-speed access service framework*, 8 March 2023 ["TNC 2023-56"].

agreements, TekSavvy's competitive marketing strategies and TekSavvy's investments. This information is subject to stringent confidentiality clauses and is consistently treated in a confidential manner by TekSavvy, including internally. The disclosure of this information on the public record would cause TekSavvy specific direct harm by giving its competitors and suppliers direct insight into its market position, its competitive strategies and its financial position. In the case of information subject to confidentiality clauses with third parties, it could also expose TekSavvy to legal action. The specific direct harm in disclosure clearly outweighs public interest in disclosure. Accordingly, TekSavvy is filing an abridged version of this letter. Throughout the abridged version, "#" indicates information filed in confidence.

2.1. About TekSavvy

7. TekSavvy is the largest independent, competitive internet service provider (ISP) in Canada. It has been providing Canadian consumers with wireline broadband internet services since 2002. TekSavvy is based in Chatham, Ontario and provides wireline and voice services to residential and business customers across Canada. It also markets an internet protocol television (IPTV) service to customers on behalf of its broadcasting affiliate, Hastings Cable Vision Ltd.

8. TekSavvy is a primarily wholesale-based competitor.[3] 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 ltée (together with its affiliate, Québecor Média inc, "Videotron"), Cogeco Connexion Inc. ("Cogeco"), Bragg Communications Inc. dba Eastlink ("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.

9. 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 their facilities to competitors such as TekSavvy.[4] As canvassed below, the market conditions in retail internet services have worsened in recent years, with TekSavvy now the only major wholesale-based competitor left.

3 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.

4 This mandated access is generally referred to as WHSA. Third-party Internet access ("TPIA") services refer to mandated WHSA services of large cable carriers in particular.

3. Relevant Regulatory Framework and Market Conditions

3.1. Consumers in Canada Pay Among the Highest Prices in the World for a Basic Necessity: Internet Service

10. Internet service is a basic necessity for consumers in Canada, on par with food, gas, and electricity. Consumers require internet access to meaningfully participate in many parts of society, including aspects of social, civic and economic engagement.[5]

11. Consumers in Canada are suffering a cost-of-living crisis. Amid soaring inflation and higher interest rates, recent polls show that more than a third of Canadians report they are in dire financial shape.[6] Recent reports also show that demand for food banks is expected to be 60% higher in 2023 over last year.[7] A survey conducted by Pollara showed that telecommunications prices are among consumers' largest cost-of-living pressures, ranking third on their list of stressors.[8]

12. According to the annual pricing report commissioned by Innovation, Science and Economic Development Canada (ISED), in 2021, broadband prices "increased in Canada in every basket in every year between 2019 and 2021", excluding the basket for speeds between 10-15Mbps.[9] The 2021 Wall Report noted that the "highest increase of 13.4% occurred in L5 (101–250 Mbps)"[10], with the average national price for Level 5 increasing "substantially in 2021, from $83.95 in 2020 to $95.00" in 2021.[11] The latest Wall Report notes more minor changes since those significant increases, finding that "fixed broadband average prices have decreased or increased just slightly in Canada in every basket between 2021 and 2022. In contrast, between 2020 and 2021 every basket had a price increase."[12]

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5 See for example Innovation, Science and Economic Development Canada (ISED), High-speed Internet for all Canadians, 27 March 2023. See also Canadian Radio-television and Telecommunications Commission, Communications Market Reports, Current trends – High-speed broadband, 06 March 2023 ["CMR 2023"].

6 Michael Lee, "One in three Canadians in 'bad' or 'terrible' financial shape, up from pandemic highs: Angus Reid survey", 8 April 2023.

7 Clara Psieka, "60% more Canadians per month expected to use food banks, other programs in 2023, survey finds", CBC, 11 January 2023.

8 Globalive Capital, "Frustrated Canadians rank cost of food, gas, and cell phones as top most concerning cost-of-living pressures", Newswire, 29 September 2022.

9 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, 15 February 2022 ["2021 Wall Report"], p 44.

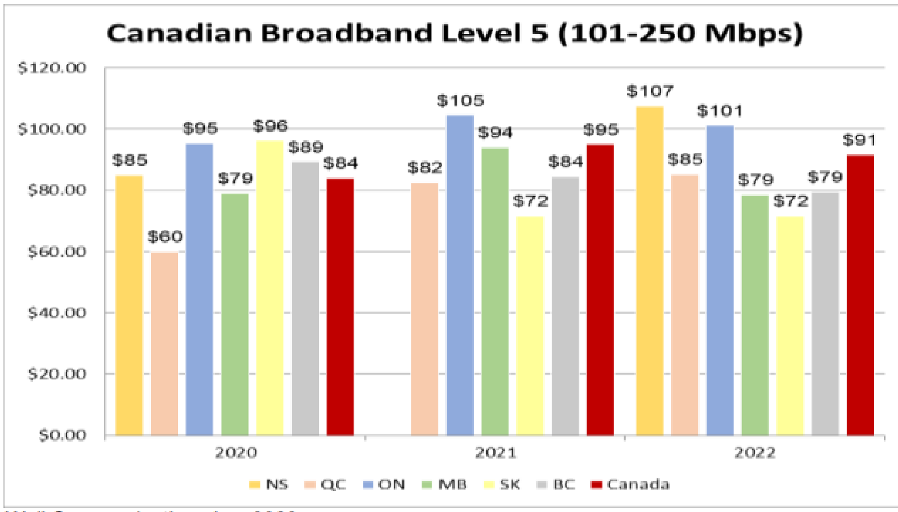
10 *Ibid*, p 44.

11 *Ibid*, p 46.

12 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", 2022 Edition, 5 February 2023 ["2022 Wall Report"], p 41.

13. The speed band with some of the most popular speeds in Canada, 101-250 Mbps, is illustrative here. In 2022, the average price declined somewhat from 2021, but still remained more than 8% higher than in 2020[13]:

Figure 1: Average Pricing 2020-2022, 101-250 Mbps
Source: Wall Communications Inc., 2022



Wall Communications Inc. 2022

14. Canada's average prices remain high compared to its international peers. In many service baskets, Canada's prices are the highest of its peers. For example, according to the 2022 Wall Report:

a. "For the Level 4 basket [41-100Mbps], Canada's average monthly price of $75.38 is higher than all other countries with matching baskets. Prices in the U.K. and Germany are under the $50 mark"[14];

b. "The Canadian Level 6 broadband price of $96.97 is highest among the surveyed countries. The lowest price of $40.76 is found in France"[15]; and

c. "The average price for Level 7 in Canada is $104.64, higher than all other countries. France, Italy and Germany all have prices less than $60."[16]

15. As the 2022 Wall Report concludes, Canada's prices continue to be higher than its peers:

> "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. U.S. average price, which has been similar or higher than

13 *Ibid*, p 44.

14 *Ibid*, p 52.

15 *Ibid*, p 53.

16 *Ibid*.

Canada's price for many years prior to 2021, is consistently lower in 2022 for the four baskets where both countries offer a comparable service".[17]

16. The federal government has acknowledged this comparison as well, noting that internet prices for "mid-range and top-range services also remain high relative to international peers."[18]

3.2. THE COMMISSION HAS AN OBLIGATION TO MAINTAIN JUST AND REASONABLE RATES FOR INTERNET SERVICES

17. The federal government has direct control and jurisdiction over this essential utility, including ultimately the prices charged by carriers for internet services at retail and wholesale. Setting prices and ensuring sufficient competition are core to the Commission's mandate.

18. Under section 27 of the *Telecommunications Act*, the Commission is charged with ensuring that every rate charged by a Canadian carrier for a telecommunications service is "just and reasonable."[19] Pursuant to section 25 of 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."[20]

19. The Commission can choose to forbear from regulating a telecommunication service under section 34 of the Act. However, the Commission is statutorily permitted to do so only where it finds "as a question of fact that to refrain [from regulating a service] would be consistent with the Canadian telecommunications policy objectives"[21] and only where refraining from regulating is not likely to unduly impair "the establishment or continuance of a competitive market for that service or class of services."[22]

20. The Commission has made the long-standing decision to forbear from regulating retail prices for internet services, with mandated wholesale-based competition designed to ensure that an adequate level of competition is available for consumers.[23] This context is the underpinning of the Commission's wholesale access framework and must inform its decisions in this respect. Put another way, apart from the Essentiality Test, the Commission must ensure that the wholesale access framework is designed such that it will ensure a sufficiently competitive market to justify its choice to forbear from regulating the price of retail internet services.

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17 *Ibid*, p 54.

18 ISED, "Renewing Canada's approach to Telecommunications Policy: Context for Action", 6 June 2022 ["Context for Action"].

19 *Telecommunications Act*, SC 1993, c 38, s 27 [the "Act"].

20 *Ibid*, s 25.

21 *Ibid*, s 34(1).

22 *Ibid*, s 34(3).

23 See for example, Telecom Decision CRTC 2023-55, *John P. Roman – Request for review of the Commission's determinations regarding forbearance from regulation*, 8 March 2023 at para 26.

21. As the core of the Commission's mandate, and in the context of a cost-of-living crisis, fixing the wholesale framework and delivering much needed price relief to consumers should be its number one priority.

3.3. The Commission's Decisions Relating to Aggregated and Disaggregated WHSA Services Have Led to Inequitable Outcomes

22. In Telecom Regulatory Policy 2015-326, the Commission found that all Incumbent last-mile access facilities, including FTTP, satisfied all three components of the essentiality test for mandating wholesale access in all the Incumbents' serving regions: the input component,[24] the competition component[25] and the duplicability component[26] (together, the "Essentiality Test").

23. The Commission also found that in the absence of mandating wholesale access to all last-mile access facilities, "there would be a substantial lessening or prevention of competition in the downstream retail Internet services market, in all incumbent carrier serving regions".[27] Specifically, the Commission determined that if competitors were unable to match Incumbent retail speeds using higher-speed access facilities, most of their existing customers would "migrate to incumbent carrier retail Internet service"[28] to obtain higher speeds. The Commission found that competitors would also be unduly impaired from obtaining new customers, as their legacy offerings would be irrelevant to "more and more consumers desiring higher-speed Internet services".[29]

24. Despite this finding, however, the Commission decided to mandate wholesale access to FTTP facilities only on a disaggregated basis and did not mandate aggregated access to FTTP facilities using the existing wholesale regulatory framework in the interim.[30] This decision thereby denied competitive access to an essential facility until such time that the Commission designed, costed and finalized its then-novel disaggregated regulatory framework in the future (and competitors and Incumbents enabled each point of aggregation for disaggregated access).

25. The Commission also decided to refrain from mandating aggregated WHSA services for all last-mile facilities where disaggregated services were available at a given point of aggregation, subject to a three-year phase out.

26. Unfortunately, the shift that the Commission predicted—of wholesale-based competitors' customers moving to Incumbents' higher-speed offerings—has now borne out. The Incumbent Local Exchange Carriers ("ILECs") have been granted an effective monopoly over FTTP services, their primary network facilities. In areas where ILEC

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24 Telecom Regulatory Policy CRTC 2015-326, *Review of wholesale wireline services and associated policies*, 22 July 2015 ["TRP 2015-326"] at para 120.

25 *Ibid* at paras 124 and 130.

26 *Ibid* at para 136.

27 *Ibid* at para 130.

28 *Ibid* at para 127.

29 *Ibid* at para 128.

30 *Ibid*.

facilities are the only facilities available, wholesale-based competitors remain stranded on their rapidly shrinking legacy network footprints, forced to offer competitively irrelevant, low-speed services at non-costed and inflated rates as their subscriber bases rapidly decline. Meanwhile, even in areas where cable facilities are available, rates for higher-speed WHSA services via cable facilities are so inflated that it is not economically feasible for competitors to offer these plans in many cases.

27. As a result, the wholesale framework has created technological asymmetry in the market, with carriers subject to different regulatory obligations depending on their technology. Wholesale-based competitors have seen their customer bases shift to being served via the cable carrier networks' last mile facilities[31], with a corresponding erosion in those served via ILEC facilities. Despite the Commission's findings that their facilities meet the Essentiality Test, ILECs have been shielded from mandated WHSA for nearly a decade.

3.4. Incumbents' Sustained Patterns of Predatory Pricing

28. At this point, explaining that Incumbents set prices at retail well below their tariff wholesale rates is trite; this need not be canvassed in detail. The Government made this specific finding itself in adopting the Policy Direction, noting in its accompanying Regulatory Impact Analysis Statement ("RIAS") that "[p]rices for select incumbent affiliated flanker brand plans in the market are below what a competitor ISP could reasonably charge based on the wholesale rates."[32] However, for completeness, TekSavvy has provided current representative examples of Incumbents (including flanker brands) pricing at retail well below even their wholesale monthly access rates alone. In some cases, Incumbents' retail price is less than *half* of the wholesale monthly access rate alone.

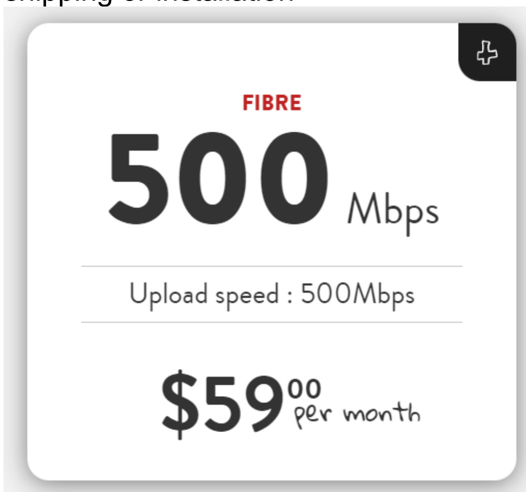
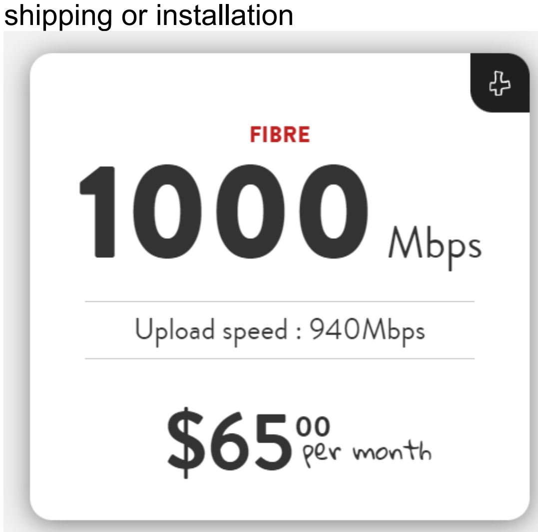
29. Note, the chart below includes a comparison only to the monthly tariff access rate and installation fees. It does not include the other costs that TekSavvy would incur in providing an equivalent service, including notably the capacity rates charged by Incumbents; any monthly colocation fees that to house its equipment at an Incumbent's central office (in the case of disaggregated services); costs for technician service visits; or TekSavvy's overhead and equipment costs.

Table 1 – Illustrative Examples of Incumbent Margin Squeezing			
Service Speed	**Illustrative Current Retail Rate[33]**	**Tariff Monthly Access Rate**	**Tariff Installation Fee**
Bell / EBOX			

[31] Cable Carriers is used herein to refer to Rogers (including its now affiliate, Shaw), Videotron, Cogeco, Eastlink and SaskTel.

[32] *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, Canada Gazette, Part II, Vol. 157, No. 5, 10 February 2023 ["Policy Direction"].

[33] Listed rates reflect rates advertised on the Incumbents' websites as of 18 June 2023.

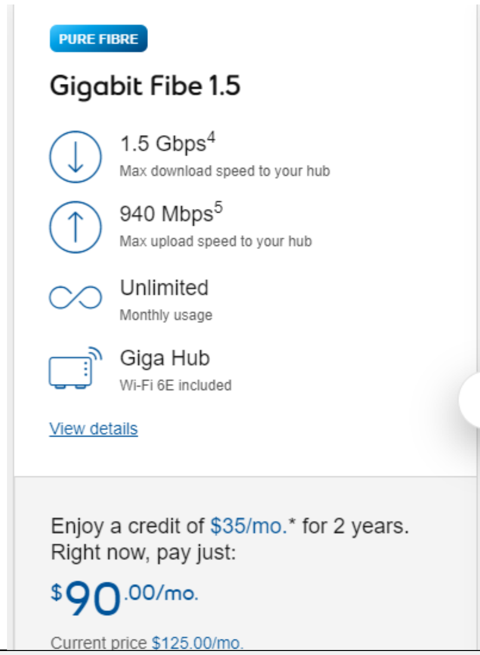
500 Mbps download / 500 Mbps upload	**$59.00** No additional charge for equipment, shipping or installation 	**$121.79**[34]	Installation fee: **$247.90**[35]
1000 Mbps download / 940 Mbps upload	**$65.00** No additional charge for equipment, shipping or installation 	**$121.79**[36]	Installation fee: **$247.90**[37]

34 Bell Access Services Tariff for Interconnection with Carriers and Other Service Providers, Part 2 Item 151, Section 5 Rates and Charges ["Bell Access Tariff"].

35 *Ibid*.

36 *Ibid*.

37 *Ibid*.

1.5 Gbps / 940 Mbps	**$90.00** No additional charge for equipment, shipping or installation[38]  	**$121.79**[39]	Installation fee: **$247.90**[40]
Videotron / Fizz			
200 Mbps download / 30 Mbps upload	**$50.00** No additional charge for equipment, shipping or installation	**$53.15**[41]	$82.93[42]

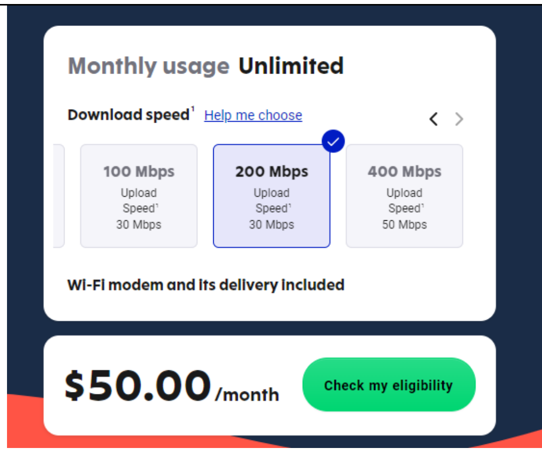
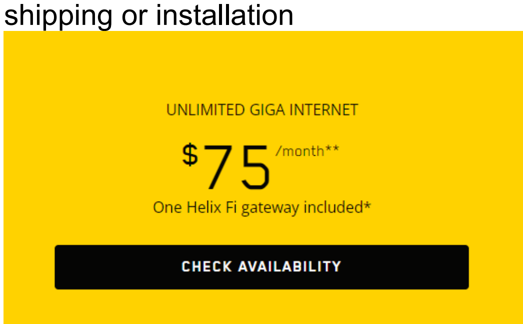
38 A $150 professional install fee applies for customers who elect not to self-install where self-installation is available.

39 Bell Access Tariff, *supra* note 34.

40 *Ibid*.

41 Videotron Access Service Tariff for Interconnection with Customers, Part B Item 200 section 4 Rates and Charges.

42 *Ibid*.

			
940 Mbps download / 50 Mbps upload	**$75.00** No additional charge for equipment, shipping or installation 	$81.60[43]	$82.93[44]

3.5. Abuses of Off-tariff Agreements

30. In addition to the inflated wholesale rates and margin squeezing tactics described above, Incumbents have also exercised their market power through the use of off-tariff agreements (OTAs). These OTAs have further distorted the market.

31. Some Incumbents offer OTAs to wholesale-based competitors; many are contracts of adhesion with little to no room for negotiation. Many offer benefits designed to push independent competitors toward selling the lower-speed tiers only and involve material financial ramifications for not meeting set growth targets (often on these same lower speeds). These growth targets can be particularly onerous when considering some are on declining technologies. TekSavvy's narrative responses to Commission requests for information dated 3 August 2021, which are attached in full as Confidential Appendix A hereto (without attachments), further detail specific instances of this conduct.

32. These volume-based OTAs often offer wholesale rates well below the tariffed cost for the lower speed services. Within the context of Incumbents' predatory retail pricing,

43 *Ibid*.

44 *Ibid*.

many wholesale-based competitors have little choice but to accept the reduced rates offered by OTAs and the conditions effectively confining them to competing in those lower-speed categories. Wholesale-based competitors have little negotiating power in the face of Incumbents' market power. Moreover, the Incumbents impose strict confidentiality over the terms of OTAs, which prevents competitors from disclosing their terms or even their existence. Due to the inability to otherwise compete based on tariff rates, which has now borne out, competitors were essentially forced to accept these OTAs and their conditions to survive.

33. As a result, Incumbents used their market power to push wholesale-based competitors to compete on lower-priced, slower-speed services. This further insulates them from competition on the higher-speed services that consumers demand, which are more lucrative to Incumbents.

34. In addition to the market delineation perpetuated through OTAs, TekSavvy notes that OTAs are also ripe for other forms of abuse. For instance, they allow Incumbents to pick and choose their competitors by offering reduced rates to some but not others. TekSavvy's application regarding two forms of unduly preferential OTAs engaged in by Bell and Rogers, respectively, provides examples of this type of unlawful conduct.[45] TekSavvy notes that allowing Incumbents to pick winners also appears likely only to enhance coordination in the market as Incumbents become further dependent on each other.

3.6. THE RESULTING DECLINE OF WHOLESALE-BASED COMPETITION

35. The Commission outlined some of the cumulative impact of the market developments above in its call for comments, noting that:

> "incumbent carriers have enhanced their Internet service market dominance over the past years, growing in terms of both overall revenues and subscribers. Many incumbent carriers have launched flanker brands to support their growth, offering services comparable to those offered by competitors at a lower price point, while some have acquired competitors to further their expansion. At the same time, many competitors have begun losing subscribers. In 2019, competitors accounted for almost 10% of all fixed Internet service subscribers, while in 2021 this number had dropped to just over 8%."[46]

36. Within the span of one year, almost all major wholesale-based competitors have been acquired by Incumbents. This consolidation is visible in Bell's acquisitions of EBOX Inc. ("EBOX"), Distributel (including its affiliate Primus) and B2B2C Inc.; TELUS' takeover of Start.ca and Altima; Videotron's purchase of Vmedia; and Cogeco's acquisition of Oxio's internet business. As not all acquisitions are public, there are likely numerous other smaller acquisitions as well; we note for example that the British Columbia

45 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 ["TekSavvy Part 1 Application"].

46 TNC 2023-56, *supra* note 2.

Broadband Association stated it has lost 12 of its 15 members through acquisitions.[47] As a result, the 8% market share occupied by independent competitors in 2021 has since further significantly declined.

37. TekSavvy is one of the last standing competitors, and the only large wholesale-based competitor remaining. However, TekSavvy continues to face the risk of significant subscriber losses because of the broken regulatory framework. TekSavvy was losing approximately # # subscriptions per month at the beginning of the year. To prevent it from continuing to lose subscribers, TekSavvy has increased its marketing spending to # # its typical marketing costs, as well as # # # # # # # # #. This approach is clearly not sustainable long-term.

38. With fewer and fewer independent competitors, the internet market today looks similar to the wireless market in Canada: The large Incumbent carriers each have home territories and provide wholesale access to their networks based on negotiated off-tariff agreements. As the Competition Bureau has explained, based on its review of wireless carriers' internal documents, the markets for wireless services in Canada are "highly susceptible to coordination"[48] and "there is a history of parallel or coordinated behaviour in th[e] industry."[49] There is little reason to expect this not to be the case in wireline should independent competitors be fully extinguished and with Incumbents having increased exposure to each others' networks.

3.7. THE NEW POLICY DIRECTION

39. On February 10, 2023, the Government of Canada issued a new Policy Direction to the Commission outlining a renewed approach to telecommunications policy and repealing its 2006 and 2019 Policy Directions to the Commission (the "Direction").[50]

40. In proposing this new Direction, the Governor in Council sought to address the uncompetitive status quo described above and to empower sustainable wholesale-based competition. The RIAS accompanying the Direction notes that the wholesale access framework is "critical to supporting competition in the retail Internet services market"[51] and that the issues plaguing the framework are "particularly acute."[52]

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47 See The Wire Report, "Small player groups like direction of CRTC under Eatrides", 30 March 2023.

48 *Commissioner of Competition v. Rogers Communications Inc. and Shaw Communications Inc.*, Commissioner of Competition Notice of Application filed in Competition Tribunal File No. CT-2022-002, 8 May 2022 at para 81. ["Commissioner of Competition Notice of Application"].

49 *Ibid* at para 85.

50 Policy Direction, *supra* note 32.

51 *Ibid*.

52 *Ibid*.

41. The RIAS specifically notes that the share of residential internet access subscriptions provided by wholesale-based ISPs has declined in two consecutive years since 2019.[53] It further notes that prices for select incumbent affiliated flanker brand plans in the market are below what a competitor ISP could reasonably charge based on the wholesale rates, and at the same time, "prices for typical plans have been increasing."[54] In a publication accompanying the then-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".[55]

42. The RIAS also addresses the importance of wholesale access to FTTP, stating that "stakeholders and the public would benefit if mandated wholesale access to fibre-to-the-home networks were to be fully implemented."[56]

43. With this context in mind, the Direction clearly instructs the Commission to maintain a mandated WHSA framework with just and reasonable rates, stating that,

> "[i]n order to foster fixed Internet competition that is sufficient to protect the interests of users, the Commission must
>
> > (a) maintain a regulatory framework mandating the provision — at just and reasonable rates — of wholesale services for fixed Internet;
> >
> > (b) monitor the effectiveness of the framework; and
> >
> > (c) adjust the framework as necessary and in a timely manner, including by making proactive adjustments."[57]

44. With respect to aggregated WHSA services in particular, the Direction specifically directs the Commission to mandate aggregated wholesale high-speed access services:

> 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.[58]

45. Further, the Commission is directed to "mandate the provision of wholesale high-speed access services with a variety of speeds, including low-cost options, for the purpose of ensuring affordable options for consumers while allowing for the modernization of networks."[59]

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53 *Ibid*

54 *Ibid*.

55 Context for Action, *supra* note 18.

56 *Ibid*.

57 *Ibid*, s 9.

58 *Ibid*, s 10.

59 *Ibid*, s 11.

46. In the new Direction's objectives, the Commission is instructed 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.[60]

47. The Commission is directed to "set interim and final tariffs expediently, including by reforming the tariff-setting process and considering external expertise or international best practices."[61] It is also directed to "conduct proceedings and issue decisions in a timely manner, in recognition of the need for market clarity."[62]

48. The Government's backgrounder on the Direction specifically notes that it 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."[63] It is clear that the Government expects that the Commission will ensure that wholesale-based competitors have equitable access to FTTP offerings, that aggregated services remain mandated, and that access rates will be just and reasonable, without delay.

49. Finally, the Government's backgrounder also specifically explains its view 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."[64]

4. THE PROVISION OF AGGREGATED WHSA SERVICES SHOULD BE MANDATED ON A PERMANENT BASIS

50. The Commission has invited comments on its preliminary view that the provision of aggregated WHSA services should be mandated. The Commission has also invited comments on the applicability of its previous essentiality analysis and whether there are any significant developments that would warrant a reconsideration or change to those findings.

60 *Ibid*, s 2.

61 *Ibid*, s 12.

62 *Ibid*, s 7.

63 Innovation, Science and Economic Development Canada, "Summary of the Government of Canada's new proposed policy direction to the CRTC", 6 June 2022.

64 *Ibid*.

51. As explained in TekSavvy's first intervention of 24 April 2023 ("First Intervention"), wholesale access to all Incumbent last-mile facilities is critical to competitors' ability to compete in internet services. While written in the context of expedited, temporary wholesale access to FTTP facilities, the arguments and factual underpinnings in that First Intervention are equally applicable to long-term, permanent access to Aggregated WHSA services across all technologies. As noted in the First Intervention, the Essentiality Test is met for all WHSA services, including those delivered over FTTP facilities.

52. TekSavvy therefore strongly supports the Commission's preliminary view that:

> "the provision of aggregated wholesale HSA services should be mandated and should no longer be subject to the limitations imposed in Telecom Regulatory Policy 2015-326 – including the unavailability of FTTP facilities over the incumbent carriers' aggregated wholesale HSA services – to encourage the transition to disaggregated wholesale HSA services; and can effectively co-exist with disaggregated wholesale HSA services and should not be subject to any phase-out, even where disaggregated wholesale HSA services have been implemented."[65]

4.1. THE ESSENTIALITY TEST CONTINUES TO BE MET FOR ALL WHSA SERVICES

53. The Commission generally bases its decision to mandate the provision of a service by first applying the Essentiality Test. As part of this analysis, the Commission then moves on to consider whether policy considerations should modify or support the findings of this test.[66] TekSavvy submits that the Essentiality Test remains a useful analytical tool for this purpose, particularly as it flexible and can be adapted based on critical policy considerations.

54. The Commission previously applied the Essentiality Test to aggregated WHSA services in TRP 2015-326. In 2015, the Commission took a broad view of the relevant product market, defining the product as WHSA services, which included aggregated and disaggregated wholesale services offered over various technologies, including digital subscriber line (DSL) over copper, or over a hybrid of copper and fibre (including fibre to the node), hybrid fibre-coaxial cable (HFC), and FTTP access facilities.[67] As the Commission noted, some degree of aggregation can be appropriate when defining product markets, since it would be exceedingly onerous to gather data for every wholesale service product market, and a balance must be struck between the use of meaningful and practical definitions for product and geographic markets.[68]

55. In 2015, the Commission considered that all WHSA services represented variants of high-speed access facilities that enable similar downstream retail services to be

65 TNC 2023-56, *supra* note 2.

66 TRP 2015-326, *supra* note 24 at para 29.

67 *Ibid* at para 115.

68 *Ibid* at para 35.

provided to end users and were sufficiently close substitutes in that they have the potential to enable competition in the various associated downstream markets.

56. TekSavvy is of the view that WHSA services over FTTP facilities may in fact constitute a separate product market, considering that there is a subset of downstream retail customers for whom, based on their use of the technology, cable-based internet would likely not be considered as a viable competitive option. As detailed in TekSavvy's First Intervention, for example, there appears to be a specific demand for FTTP-based internet services for those customers.[69] That said, as in TRP 2015-326, TekSavvy considers that applying the Essentiality Test on a service-by-service basis would not be practical nor necessary, and that there are at least some customers who would consider the downstream retail services of all WHSA services to be sufficiently close substitutes. Accordingly, all WHSA services, including aggregated and disaggregated WHSA services offered over various technologies, remain an appropriate product market against which the Essentiality Test should be considered.

57. The Commission's determination in TRP 2015-326 that the access component of all WHSA services satisfy the Essentiality Test remains true in today's market conditions. That is:

a. <u>The input component is satisfied:</u> as in 2015, WHSA services are a required input for retail internet services and there is demand for them in all the Incumbents' serving regions. TekSavvy, for example, purchases WHSA services from Incumbents across their serving territories;

b. <u>The competition component is fulfilled:</u> there would be a substantial lessening or prevention of competition in the downstream retail internet services market in all the Incumbents' serving regions by denying access to WHSA services; and

c. <u>The duplicability component continues to be met:</u> competitors cannot feasibly or practically duplicate last-mile HSA facilities.

58. Importantly, not only do these factors all continue to be met as they were in 2015, but current market conditions have only increased the degree by which each is satisfied.

4.2. WHSA SERVICES MEET THE INPUT COMPONENT

59. The first component of the Essentiality Test is met where the facility is required as an input by competitors to provide telecommunications services in a relevant downstream market.[70] In assessing this, the Commission will generally consider "(i) the downstream market(s) for which the wholesale service is an input; (ii) the technical aspects of the wholesale service; (iii) the past, current, and anticipated demand for the wholesale

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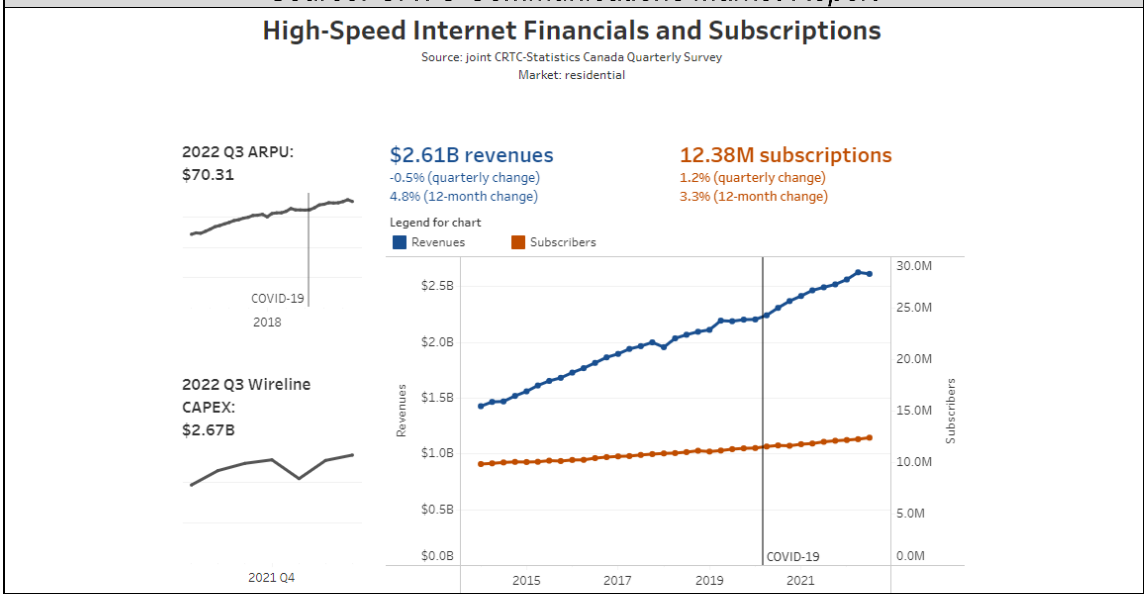
69 See for example the explanation from Bell executives outlining the demand for multi-gig speeds and network reliability, described as being "at the forefront of the purchase decision", and noting that there is "a clear demand for multi-gig services because symmetrical upload and download actually does matter."

70 TRP 2015-326, *supra*, note 24 at para 38.

service; and (iv) trends in demand to assess whether there is sustained growth or decline."[71]

60. As in 2015, WHSA services clearly continue to meet this test. There has been no technological change since that time that obviates the need for these facilities as an input to provide downstream retail internet services. Since 2015, demand for downstream retail internet services has only increased, with consumers using the internet more than ever.[72] By extension, the demand for WHSA services can also be expected to continue.

Figure 2: High-Speed Internet Subscriptions, 2015-2022
Source: CRTC Communications Market Report



61. As a result, market conditions have progressed such that WHSA services meet the Essentiality Test more than ever, with demand for internet services continuing to increase.

4.3. THE COMPETITION COMPONENT OF THE ESSENTIALITY TEST CONTINUES TO BE MET

62. The competition component of the Essentiality Test is satisfied where the facility in question is controlled by a firm that possesses upstream market power such that denying (or withdrawing) access to the facility would likely result in a substantial lessening or prevention of competition in the relevant downstream market.[73]

71 *Ibid* at para 37.

72 See for example CMR 2023, *supra* note 5, in which the Commission reports: "Revenue growth for residential high-speed Internet has increased since the pandemic as many Canadians rely on it more for work and entertainment at home and have increased the speed of their service packages" and "demand for wireline internet remains steady as exhibited by a steady increase in subscribers since 2014."

73 TRP 2015-326, *supra* note 24 at para 15.

63. In TRP 2015-326, the Commission noted in particular that WHSA services have not been provided voluntarily by the industry, requiring regulatory intervention to do so, and there is no convincing basis upon which the Commission could conclude that this will change in the foreseeable future.[74] This remains true today: as a representative example, Bell has successfully managed to avoid giving any competitors real access to its FTTP facilities (other than when it has purchased a competitor itself) for more than seven years.

64. In TRP 2015-326, the Commission found there would be a substantial lessening or prevention of competition in the downstream market for retail internet services in all the Incumbents' serving regions by denying access to WHSA services.[75] This risk remains the same today: no market changes have occurred to alter this conclusion. If anything, as acknowledged in the Regulatory Impact Statement accompanying the Policy Direction, the share of residential internet subscriptions provided by wholesale-based ISPs has declined in two consecutive years since 2019, such that Incumbents' dominance has only entrenched.[76] In its call for comments in TNC 2023-56, the Commission correctly noted that the large Incumbents hold a dominant market position, occupying 84% of the national market share collectively. The largest Incumbent providers have recently touted large subscriber gains, and made statements suggesting they have been able to keep prices higher than needed, a standard indicator of market power.[77]

4.4. The Duplicability Component Continues to be Met

65. The duplicability component of the Essentiality Test will be met where "it is not practical or feasible for competitors to duplicate the functionality of the facility."[78] In TRP 2015-396, the Commission found it is not practical or feasible for competitors to duplicate the access component of WHSA services for each of the Incumbents in their respective serving regions. The Commission found it was generally practical and feasible for competitors to duplicate the transport component of WHSA services.

66. The duplicability of access components of WHSA services has not changed. There has been no change in the market conditions rendering it practical or feasible for competitors to duplicate Incumbents' access facilities. As canvassed in TekSavvy's First Intervention, Bell executives have explained the lengthy time and intense capital requirements they expect any competitor would face in replicating Bell's current fixed

74 *Ibid* at para 121.

75 *Ibid* at para 130.

76 Policy Direction, *supra* note 32.

77 For example, in BCE Inc, "BCE Q4 2022 Results & 2023 Financial Guidance Call", 2 February 2023, available online at: <www.bce.ca/investisseurs/rapports-financiers/2022-T4/2022-t4-transcription.pdf>, p 11, Bell chief executive stated that "we have the room to compete on price if anyone wants to take us there, and we have the room because we're really good at managing costs and because of the scale of our fibre network, and then the bundling strategy."

78 TRP 2015-326, *supra* at note 24 at para 15.

internet facilities, noting that it "will literally take years and billions of dollars of capex for them to materially overlap our fiber footprint."[79]

67. It is apparent that at the very least, last-mile access facilities continue to meet the duplicability component of the Essentiality Test. Whether the transport component of WHSA services meets the Essentiality Test should not alter the outcome of the decision to mandate Aggregated WHSA services. The seven years since the decision in TRP 2015-326 have shown that both access to last-mile facilities and transport to an aggregation point are necessary to deliver feasible competitor access to WHSA services. There are also many instances where competitors face difficulties in duplicating or obtaining competitive access to the transport facilities necessary to enable FTTP, some of which are canvassed in other ongoing proceedings.[80]

68. TekSavvy also heeds the Commission's initial views that "there are ongoing unexplored issues surrounding the availability of competitive transport services, the Commission's assessment of the duplicability component of the Essentiality Test for aggregated wholesale HSA services would likely be inconclusive absent a detailed review."[81] In TekSavvy's submission, it is already abundantly clear that without aggregated access, competitors are not able to feasibly access WHSA. Moreover, explained below, policy considerations favour mandating aggregated WHSA services. As a result, the duplicability of transport services would not alter whether aggregated access to WHSA services should be mandated in any case.

4.5. Policy Rationales Reinforce that Aggregated WHSA Services Should be Mandated on an Ongoing Basis for All Last-Mile WHSA Facilities

69. For the reasons set out above, WHSA services over all last-mile facilities continue to meet the long-established Essentiality Test. It follows that these services must be mandated in a form that will actually allow for their use.

70. As part of the Essentiality Test, the Commission should consider whether policy considerations modify or support the findings of this test.[82] The policy considerations outlined in the new Policy Direction are instructive here. First, the Policy Direction instructs the Commission to maintain a regulatory framework mandating the provision of wholesale services for fixed internet.[83] In that sense, the Government has already made its view apparent that WHSA services in general clearly meet the Essentiality Test.

71. With respect to Aggregated WHSA services in particular, the Policy Direction also instructs the Commission to mandate Aggregated WHSA services "until it determines

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79 BCE Inc, "BCE Q2 2022 Results Conference Call", 4 August 2022, available online at: <www.bce.ca/investisseurs/rapports-financiers/2022-T2/2022-t2-transcription.pdf>, p 16.

80 See for example [Telecom Notice of Consultation 2019-406](), *Call for comments regarding potential barriers to the deployment of broadband-capable networks in underserved areas in Canada*, 10 December 2019, as well as Quebecor Media Inc., *Application against Bell Canada regarding the abusive increase of its wholesale fiber access and transport rates*, 3 March 2023.

81 TNC 2023-56, *supra* note 2 at para 36.

82 TRP 2015-326, *supra* note 24 at para 29.

83 Policy Direction, *supra* note 32, s 9.

that broad, sustainable and meaningful competition will persist even if the provision of an aggregated service is no longer mandated."[84] As explained above, competition in retail internet is in no way broad, sustainable or meaningful. As a result, according to section 10 of the Direction, the Commission is expected to mandate aggregated WHSA services to all last-mile access facilities, including FTTP facilities.

72. Further, the Policy Direction specifies that the "Commission must mandate the provision of wholesale high-speed access services with a variety of speeds."[85] As described in the First Intervention, to give effect to this direction, the Commission should ensure that aggregated WHSA services are mandated for all last-mile access facilities, including FTTP facilities.

73. Finally, the Policy Direction directs the Commission to "ensure that its regulatory framework mandating the provision of wholesale services for fixed Internet applies equitably to carriers that are subject to the framework."[86] As described above, the status quo is not equitable for any carriers. Only mandating aggregated WHSA services on cable and DSL-based WHSA services, but not on FTTP facilities, effectively requires Cable Carriers to serve all of the demand for WHSA services on higher speeds. As these speeds occupy an ever-increasing share of the market, the ILECs' share of WHSA services has shrunken dramatically by contrast.

74. This technological asymmetry allows ILECs a de facto monopoly over the higher and symmetrical service speeds that can only be offered by FTTP facilities, such that other carriers have inequitable access to them.

75. The RIAS accompanying the Policy Direction also edifies the Government's intent. It explicitly finds that stakeholders and the public would benefit if mandated wholesale access to fibre-to-the-home networks were to be fully implemented. As a result, policy rationales overwhelmingly favour mandating aggregated WHSA services to all last-mile facilities, including FTTP access facilities.

5. Disaggregated FTTP Services Should Continue to be Mandated

76. The Commission has invited comments on the future of disaggregated WHSA services, including the potential demand for such services and whether the Commission should consider changes to the existing disaggregated WHSA service rates—for example, whether the interim rates should be made final; whether it would be appropriate to consider rate reductions; how the associated costs should be recovered; or whether another rate-setting methodology should be applied to establish revised rates.

5.1. Aggregated WHSA Services Can and Should Co-exist with Disaggregated WHSA Services

77. As the largest wholesale-based competitor who has made investments in pursuing disaggregated access, and who currently has # # points of aggregation enabled for disaggregated access (with another # # ordered prior to 8 March 2023 that are

[84] *Ibid* at s 10.

[85] *Ibid* at s 11.

[86] *Ibid* at s 13.

expected to be completed by #   #), TekSavvy is well-positioned to comment on this topic.

78. TekSavvy submits that both aggregated and disaggregated wholesale services should be available to competitors. Aggregated services are needed to facilitate entry for smaller competitors in all geographic markets. In many geographies, aggregated services will be the only type of wholesale access that is feasible for all competitors. In other markets with sufficient demand, the disaggregated model will be more beneficial to competitors as they grow.

79. TekSavvy has consistently called for a framework that allows disaggregation to the greatest extent possible; this is because the cost curve for aggregated service does not scale as usage increases. While the aggregated model allows competitors to easily access large geographies and may be efficient for smaller providers even in dense markets, it does not scale. Simply put, usage on TekSavvy's network grows exponentially per year, but its capacity costs are linear. That is, the hundredth Gbps costs the same as the second Gbps, even though adding that hundredth Gbps only increases capacity by slightly more than 1%, while adding the second Gbps doubles network capacity. This contrasts with the cost curves of Incumbents which allow them to take advantage of economies of scale. Disaggregated services allow competitors to take advantage of economies of scale and create more efficient networks.

80. Moreover, disaggregated services have added benefits such as reducing reliance on Incumbents' networks, which in turn decreases the risk that wholesale-based competitors are affected by Incumbent outages. Wholesale-based competitors such as TekSavvy will invest in disaggregation in those areas where the business case can be made, provided the rates for disaggregated access are just and reasonable.

81. Meanwhile, in areas where underlying retail demand renders aggregated service more efficient, competitors would be able to serve a broader region more quickly without investing additional capital for relatively low demand; Incumbents would not be required to set up disaggregated access in areas where no wholesale demand develops.

82. In areas where there is demand for both services, there should be little issue with aggregated and disaggregated services co-existing. As confirmed by Bell, these services are fully complementary and subject to common rates:

> "We note that one ISP can be purchasing GAS-FTTN at one CO and DBS-FTTN at another CO – even though it will likely choose to market both the services to its retail customers without making any distinction between them. Further, even in the same CO, one ISP who has migrated to DBS would be purchasing DBS-FTTN access while another ISP who has not migrated will be purchasing GAS-FTTN. For all these reasons, we submit it is logical and fair to have a common rate between GAS-FTTN and DBS-FTTN."[87]

83. Accordingly, TekSavvy submits that both aggregated and disaggregated wholesale services should be available to competitors. Aggregated services are needed to

[87] Bell Canada, Report on the Economic Valuation for the Introduction of Disaggregated Broadband Service, Fibre to the Node, 9 January 2017 at para 11 ["Bell Disaggregated Report"].

facilitate entry and geographic expansion for newer competitors and will continue to be used by all competitors in some geographic markets where demand is never expected to support disaggregated services; disaggregated services meanwhile are needed to enable competitors to scale and create more efficient networks in appropriate locations. Competitors who invest in disaggregated access could enjoy the benefits of the cost reduction in certain locations, while those who find the aggregated model is more efficient for their current usage can continue to use it.

5.2. Demand for Disaggregated Services

84. As explained above, the disaggregated model will deliver benefits for competitors when done correctly and can therefore be expected to see increased demand naturally over time. However, uptake has so far been hampered by years of inflated interim pricing and regulatory uncertainty. With prices for disaggregated services unreasonably high, competitors have had little incentive to transition to disaggregated interconnection.

85. However, provided feasible wholesale rates are set, demand can be expected for disaggregated services in some locations. For example, as Bell noted in 2020, TekSavvy “is actually investing in backbone infrastructure and other necessary assets in order to leverage disaggregated HSA services”[88] and “[w]e too have witnessed that certain ISPs are investing in pursuit of disaggregated HSA services.”[89]

86. TekSavvy has already made significant investments of over # #, as of February 2023, to support transitions to the disaggregated model, and has been working on implementing this access in certain locations for years. These investments were made even without just and reasonable rates; there is every reason to expect that competitors will seek to enable disaggregated access in some locations in the future, provided it remains an option and has just and reasonable rates.

87. Mandating both aggregated and disaggregated access has been competitors’ longstanding position. For example, as canvassed by the Commission in TRP 2015-326:

> “CNOC indicated that, in addition to <u>mandating the continued provision</u> of aggregated wholesale HSA service, the Commission should mandate a disaggregated service
>
> […]
>
> Primus supported CNOC’s proposal, and argued that a disaggregated wholesale HSA service would enable competitors to offer more innovative services and avoid the traffic management practices of the incumbent carriers. Primus submitted that the economic feasibility of aggregated wholesale HSA services is expected to diminish over time, given the general appetite of

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88 Reply Comments of Bell Canada, Telecom Notice of Consultation 2020-187-1, *Call for comments – Appropriate network configuration for disaggregated wholesale high-speed access services*, 7 December 2020 at para 31.

89 *Ibid*.

> consumers for greater bandwidth and services, as well as the associated network challenges.
>
> […]
>
> Fibernetics also supported the mandated provision of a disaggregated wholesale HSA service in addition to the existing aggregated wholesale HSA service offerings. Fibernetics submitted that while aggregated services foster competitive retail Internet access service offerings on a broad provincial basis, competitors wishing to provide services to consumers in localized markets can only do so economically through an appropriately priced disaggregated service."[90] [emphasis added]

88. As a result, the transition to disaggregated access has failed so far not because there was no demand for disaggregated services in some locations, but primarily because of a failure to set rates at just and reasonable levels, and the misguided decision to mandate disaggregated services only, at the expense of aggregated services.

5.3. Finalizing Rates for Disaggregated Services

89. The Commission simply needs to provide the industry with the certainty required to make the investments necessary to transition points of aggregation to the disaggregated model by finalizing rates. TekSavvy submits that this process should not involve significant additional work; the Commission can rely on much of the same cost studies and tariffs it will be reviewing in respect of aggregated WHSA services.

90. There is major overlap in carrier costs for aggregated and disaggregated services. The same facilities are used; disaggregated access simply relies on less of the Incumbents; facilities. As Bell explains in its cost study, the access rate component is identical for both aggregated and disaggregated services, such that Bell proposes a "uniform common rate" for its FTTN services:

> "Furthermore, we note that applying a uniform rate between GAS-FTTN and DBS-FTTN access services is reasonable and appropriate given that the underlying network configuration, network elements and the technology are the same between the two services and the cost associated with those network configurations and network elements is the same. In addition, having rate disparity between the two services will only incent customers to target the service with lower rate, and cannot be justified on the basis of cost. […] For all these reasons, we submit it is logical and fair to have a common rate between GAS-FTTN and DBS-FTTN."[91]

91. The same is true for Bell's disaggregated FTTP service:

> "Similar to the rate proposal we filed on 30 June 2016 for our GAS-FTTN access services in TN 7504, we are proposing a single rate for DBS FTTP regardless of the speed provided. The costs of the access portion included in our study do

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90 TRP 2015-326, *supra* note 24 at paras 80-83. Note TekSavvy was at that time a member of CNOC.

91 Bell Disaggregated Report, *supra* note 87 at para 11.

> not change based on the speed provided given the retail speeds we offer at the date of this filing."[92]

92. The access component is the same regardless of the interconnection and transport. Bell confirms it only needs to file one cost study for both aggregated and disaggregated FTTP and FTTN access services:

> "In support of the introduction of a single uniform rate that would be applicable to our GAS-FTTN access services irrespective of speed, and also to our DBS-FTTN access services also irrespective of speed, we have conducted one cost study using the combined demand for these access services and the unit costs and study assumptions used in our GAS-FTTN study".[93]

93. Accordingly, TekSavvy submits that when the Commission sets aggregated access rates, it can simply use the same monthly access rate for disaggregated services. As for capacity, the Commission can require the Incumbents to identify the components of their aggregated capacity rates that would not be utilized for disaggregated access, such that the Commission can finalize those tariffs with relative ease. New cost studies and prolonged analysis of disaggregated rates could be avoided.

6. THE APPLICATION OF AN INTERIM RATE REDUCTION THAT REFLECTS A 10% REDUCTION IN THE COST OF TRAFFIC-SENSITIVE COMPONENTS USED TO INFORM THE CURRENT RATES FOR AGGREGATED WHSA SERVICES

6.1. CABLE CARRIER ACCESS RATES INCLUDE USAGE-SENSITIVE COSTS, IN VIOLATION OF PHASE II COSTING METHODOLOGY AND RELEVANT PAST COMMISSION DETERMINATIONS

94. In TNC 2023-56, the Commission made the rates for aggregated WHSA services interim and applied "an immediate interim reduction to existing rates that reflects a 10% decrease in the costs of traffic-sensitive components used to inform the current rates."[94] The Commission directed the incumbent carriers to "to file updated tariffs reflecting this reduction."[95]

95. Following that determination, Commission staff sent a letter instructing incumbent carriers to apply that interim reduction by lowering their CBB rates by 10%:

> "Incumbent carriers that use the capacity-based billing (CBB) model, are to reduce their rate for CBB increments by 10%. Incumbent carriers that use the flat rate model, i.e. that charge a per-end customer fixed monthly access rate per speed band that includes traffic-sensitive components in the monthly access rate, are to adjust their rates to reflect a 10% reduction to the traffic-sensitive components of each of those rates. No further adjustments are to be

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92 Bell Cover Letter re: Associated with Bell Canada Tariff Notice (TN) 7522 – Disaggregated Broadband Service (DBS), 9 January 2017, at para 15.

93 Bell Disaggregated Report, *supra* note 87 at para 12.

94 TNC 2023-56, *supra* note 2 at para 53.

95 *Ibid* at para 54.

made to the rates other than the 10% reduction in traffic-sensitive components."[96]

96. In its procedural letter dated 23 March 2023,[97] TekSavvy expressed concern that certain Cable Carriers that use the CBB model also include usage-sensitive costs in their monthly access rates, contrary to Phase II costing principles and relevant past Commission decisions. As a result, these costs escaped the Commission's interim adjustment. In its decision dated 2 June 2023,[98] the Commission acknowledged TekSavvy's concerns and stated its view that this issue would be best addressed when final rates are set.[99]

97. TekSavvy respectfully submits that it may take years before final rates are set. Competitors should not bear the inequity of inflated interim rates in the meantime. This is especially true in the present case, where the interim rates are *prima facie* not based on reasonable costs due to non-compliance with Phase II costing and unequivocal past Commission decisions. Therefore, TekSavvy maintains that further interim rate reductions are required on a priority basis, including reductions relating to the proper assignment of usage-sensitive costs to the traffic-driven component of the Cable Carrier's rate structure. There is a clear basis and ample precedent for such further reductions, as detailed below.

98. In TNC CRTC 2015-225,[100] the Commission specifically considered whether usage-sensitive costs should be assigned to the traffic-driven portion of carrier cost models. As Bell's intervention in that proceeding explained, the issue of including usage-sensitive costs in the access rates was "more relevant to the Cable Carriers as opposed to the ILECs, as the usage-sensitive equipment the Commission identifies as examples in the question is equipment used by the cable companies. We confirm that based on our costing practices, our usage-sensitive equipment is assigned to the traffic-driven portion of our cost models or is treated as traffic-driven in our cost studies."[101]

99. Subsequently in TD 2016-117,[102] which was not challenged by Incumbents, the Commission specifically considered the proper assignment of usage-sensitive costs, and unequivocally determined that all wholesale providers—in particular the Cable

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96 Telecom - Staff Letter addressed to Distribution List, 8 March 2023 in TNC 2023-56.

97 TekSavvy Procedural Letter dated 23 March 2023, TNC 2023-56 Review of the wholesale high-speed access service framework; CRTC direction to incumbent carriers to file revised tariffs — Response to Bell's request for an extension, and procedural request from TekSavvy.

98 Telecom Decision CRTC 2023-169, *Review of the wholesale high-speed access service framework – Reduction of traffic-sensitive costs*, 2 June 2023.

99 *Ibid* at para 20.

100 Telecom Notice of Consultation 2015-225, *Review of costing inputs and application process for wholesale high-speed access services,* 28 May 2015 ["TNC 2015-225"].

101 Bell Canada Intervention, Telecom Notice of Consultation 2015-225, *Review of costing inputs and application process for wholesale high-speed access services*, at para 74.

102 Telecom Decision CRTC 2016-117, *Review of costing inputs and the application process for wholesale high-speed access services*, 31 March 2016 ["TD 2016-177"].

Carriers—must ensure that all equipment costs accounted for in the access portion of their cost models include costs for only non-usage-sensitive equipment:

> "For the large telephone companies that use the CBB model for wholesale HSA rate-setting purposes, most of the costs of their usage-sensitive equipment are already accounted for in the traffic-driven portion of their cost models.
>
> The large cable companies have some costs for usage-sensitive equipment in the access portion of their cost models (e.g. the CMTS chassis) that are traffic-driven. These usage-sensitive costs can be identified and removed from the access portion of cost models and assigned to the traffic-driven portion, whether the wholesale HSA service provider is using the CBB model or the flat rate model. This reassignment of costs would aid in the creation of speed-bands by reducing variability in the access costs between the various service speeds within a speed-band.
>
> In light of the above, the Commission determines that wholesale HSA service providers must ensure that all equipment costs accounted for in the access portion of their cost models include costs only for non-usage-sensitive equipment."[103]

100. Pursuant to TD 2016-117, the proper assignment of usage-sensitive costs to the traffic-driven component of carrier cost studies formed the basis for uniform common access rates, regardless of the service speed. As Bell's subsequent cost studies explain:

> "As we noted in our 30 June 2016 submission, our proposal to apply a single uniform rate to all of our GAS-FTTN access services (and now an uniform rate for all GAS-FTTN and DBS-FTTN access services) is consistent with the Commission's directive in Decision 2016-117 that rate setting for all wholesale high-speed access services is to be done in accordance with the speed banding approach outlined in the same Decision to simplify the tariff setting process. In that Decision, the Commission noted that under this approach, the speed bands, for rate setting purposes, would be determined by grouping together the speeds whose underlying access costs had little or no variability."[104]

101. TekSavvy notes that this determination in TD 2016-117 was specifically affirmed in TO 2019-288[105] and was not varied in 2021-181.[106] TekSavvy further notes that following

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103 *Ibid* at paras 84-86.

104 Bell Disaggregated Report, *supra* note 87 at para 10.

105 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"] at para 161.

106 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"].

TD 2016-117, the Commission issued TO 2016-396[107] and TO 2016-488[108], which made material adjustments to Incumbents' interim rates upon finding those rates were, on a *prima facie* basis, not based on reasonable costs due to deviations from Phase II costing and relevant past Commission decisions.

102. TekSavvy submits that this issue is highly relevant to the current proceeding. In its call for comments, the Commission acknowledged that it set the current access rates in TD 2021-181[109] without performing "a more detailed review of the associated costs."[110] The existing Cable Carrier access rates do not comply with the Commission's unequivocal, uncontested determination in TD 2016-117 that all usage-sensitive costs must be assigned to the traffic-driven portion of their rate structure. This allows the Cable Carriers to shield usage-sensitive costs from the Commission's interim reduction.

103. Accordingly, TekSavvy respectfully requests that the Commission require Incumbents who use the CBB model to identify any such usage-sensitive components that are improperly included in the Cable Carrier access rates, in violation of Phase II costing methodology and the Commission's unequivocal past decisions.

104. This will enable the Commission to apply any interim reductions in usage-sensitive costs to these components as well, effective on March 8, 2023, which will result in a more equitable and technologically neutral treatment of Cable Carrier costs vis-à-vis the ILECs. It will also allow the Commission to identify where rates proposed by the Cable Carriers fail to comply with Phase II costing principles and past Commission decisions, such that they can be corrected as part of the Commission's final rate review. A reassignment of costs would also reduce arbitrary disparity in the Cable Carrier access rates between speed bands, thereby removing a primary barrier for the adoption of higher speed services by competitors using Cable Carriers' aggregated WHSA services.

6.2. THE INTERIM REDUCTION OF USAGE-SENSITIVE COSTS SHOULD BE MUCH HIGHER THAN 10%, FOR BOTH THE CABLE CARRIERS AND THE ILECS.

105. In addition to other interim rate adjustments that are required due to deviation from Phase II costing rules, TekSavvy submits that the Commission's immediate 10% reduction of usage-sensitive costs must be significantly expanded for both the Cable Carriers and the ILECs in light of its determination in TD 2016-117 to apply an annual capital cost change of -26.4% to all traffic-driven equipment as explained below.

106. In TD 2016-117, the Commission found that annual capital unit costs per Mbps for traffic-sensitive equipment had been declining much more rapidly than the then-current

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

[108] Telecom Order CRTC 2016-448, *Bragg Communications Incorporated, operating as Eastlink – Revised interim rates for aggregated wholesale high-speed access service*, 10 November 2016.

[109] TD 2021-181, *supra* note 106.

[110] TNC 2023-56, *supra* note 2 at para 49.

assumption of minus 10% annually.[111] The Commission instead determined that the annual capital unit cost change assumption for traffic-driven equipment should be changed from the previously applied annual rate of minus 10% to an annual minus of 26.4%.[112]

107. This annual capital unit cost change of minus 26.4% was reaffirmed in TO 2019-288[113], and this costing directive from 2016 was not varied or rejected in TD 2021-181.[114]

108. TekSavvy notes that the current WHSA rates are based on five-year studies, covering the period mid-2016 to mid-2021 during which the annual minus 26.4% rate for traffic-sensitive equipment was applied. It is therefore clear that since mid-2021, the annual capital cost reductions of minus 26.4% identified above have not been accruing to the traffic-driven equipment for the past two years (mid-2021 up to mid-2023), with the exception the 10% reduction applied by the Commission in TNC 2023-56 as of 8 March 2023.

109. Accordingly, as an interim measure to give effect to this existing costing determination, in addition to properly assigning the Cable Carriers usage-based costs to the CBB portion of their rate structure, TekSavvy requests that the interim rates be adjusted to reduce costs for traffic-driven equipment by an amount equivalent to the annual 26.4% reduction applied as of mid-2021, less the Commission's offsetting 10% interim rate reduction, for both ILECs and Cable Carriers.

7. How the Commission Could Better Support Wholesale-based Competition Across all Regions of the Country

110. The Commission calls for comments on how it can better support wholesale-based competition across all regions of the country, "particularly areas that do not currently have significant wholesale-based competition, including many indigenous communities."[115]

111. Where TekSavvy relies on a given Incumbent's last mile facilities, it offers its internet services across the Incumbent's entire footprint. TekSavvy does not limit its wholesale footprint to urban areas in any way.

112. To the extent that TekSavvy is not able to service a rural community, it is therefore because there is no feasible wholesale access. This is largely the case where the community is served by FTTP, to which TekSavvy does not have feasible wholesale

111 TD 2016-117, *supra* note 102.

112 *Ibid* at para 63.

113 TO 2019-288, *supra* note 105 at para 23: "the Commission determines that the previously approved annual capital unit cost change assumption of minus 26.4% continues to be a reasonable estimate for the annual capital unit cost change assumption for all traffic-driven equipment and should be applied accordingly to all wholesale HSA service providers' cost studies."

114 TD 2021-181, *supra* note 106.

115 TNC 2023-56, *supra* note 2.

access. One of the interventions filed in this proceeding by an individual provides a helpful illustration of this type of situation:

> "FTTP (FTTH) Access should be provided to wholesalers. It is the future of internet, and pricing is already abysmal. A lot of FTTP development has been subsidized by tax payer dollars as well, but in return consumers only get a higher price. I find it important that consumers get more competitive pricing, and this begins with breaking the monopoly, and forcing the bigger, mainstream ISP's to share access of FTTP with wholesalers. In my area wholesalers typically can only offer me DSL, with on Bell offering Fibre. This in tandem with Bell's regional pricing allows Bell to price gouge consumers in my area as they have no other alternative, and wholesalers can only offer a much inferior DSL network. Opening FTTP access to all wholesalers, will allow competitve pricing, and help put a stop to the regional price gouging tactics employed by ISP's like Bell." [*sic*][116]

113. As a result, should the Commission mandate aggregated WHSA to FTTP facilities, TekSavvy will immediately become a competitive option to those rural communities who currently have only one FTTP provider. TekSavvy expects there will be significant demand for wholesale competitor services in rural communities, provided the Commission sets rates that allow for meaningful competition.

8. OTHER MATTERS THAT MAY BE PREVENTING OR DISCOURAGING THE ADOPTION OF HIGHER-SPEED SERVICES BY COMPETITORS

114. As explained above, there are two principal barriers to the adoption of higher-speed services by competitors:

   a. the inability to access higher speed facilities (*i.e.,* FTTP facilities); and

   b. inflated wholesale rates for higher speed services (on both cable and FTTP facilities) that do not comply with Phase II costing and Commission determinations.

115. In addition to these primary factors, Incumbents have also imposed a further type of market distortion that discourages wholesale-based competitors from marketing higher-speed services through their use of OTAs, described above. Through the use of off-tariff rates selectively offered on lower speeds, as well as growth targets tied to material financial penalties, Incumbents have used their market power to push wholesale-based competitors to compete on lower-priced, slower-speed services, allowing them to stifle competition on higher-speed services.

116. The Incumbents have therefore used inflated wholesale rates to distort the market even further to their advantage, by effectively restricting wholesale-based competitors' competitive activity to only certain parts of the market. TekSavvy notes that the effects of this conduct can be analogized to a form of civilly reviewable conduct, "market restriction," under section 77 of the *Competition Act*.[117]

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116 Intervention #146, Daniel Ainsley, 9 March 2023, submitted in TNC 2023-56, *supra* note 2.

117 *Competition Act*, RSC, 1985, c C-34.

117. In addition to market segmentation, TekSavvy notes that OTAs are also ripe for other forms of abuse as they allow Incumbents to pick and choose their competitors by offering reduced rates for some but not others. TekSavvy's application regarding two forms of unduly preferential OTAs engaged in by Bell and Rogers, respectively, provides examples of this type of conduct.[118] Considering the current marketing conditions in which Incumbents have purchased all the major independent wholesale-based competitors, excepting TekSavvy, Incumbents will have even more ability to grant each other undue preferences at the expense of any remaining independent competitors.

118. Accordingly, TekSavvy implores the Commission to require all off-tariff agreements to be registered with the Commission in full immediately upon entering into these agreements. Further, the terms of OTAs should be made public so that the public and competitors are able to scrutinize the full effects of these agreements and seek relief for any undue preference they may cause. The current practice of requiring Incumbents to disclose only the bare minimum of information to the Commission (which does not even include the names of parties, let alone details of rates or other preferences) does not provide the Commission or the public with sufficient information to assess the effect of an OTA.

119. Moreover, when the Commission decided in 2012 to remove the requirement that full copies of OTAs be filed, it explained that it was guided by the 2006 Policy Direction[119], which directed it to "rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives".[120] The Commission found that making full copies of OTAs public was likely interfering with the operation of market forces. The 2006 Policy Direction is no longer in force and the Commission is no longer directed to rely on market forces to the maximum extent possible. The Commission is instead directed to ensure that the WHSA framework applies to carriers equitably and in a manner that fosters internet competition. As a result, the Commission should have proper oversight over OTAs and their effects on the wholesale HSA framework.

9. Other Issues Associated with the Asymmetry or the Equitable Application of the Commission's WHSA Service Framework

120. The Commission also invites comments on "[a]ny other issues associated with the asymmetry or the equitable application of the Commission's wholesale HSA service framework."[121] A key recurring issue with the current WHSA framework is the issue of delay.

121. Delays affect participants in the framework very differently. Delays in setting final tariffs, in reducing access rates where Incumbent costs have declined, and in granting access

118 TekSavvy Part 1 Application, *supra* note 45.

119 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]

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

121 TNC 2023-56, *supra* note 2.

to new service speeds and to FTTP facilities stifle competition to the benefit of the Incumbents. For smaller competitors, these delays can have —and in fact have had— disastrous consequences as their subscribers shift to the Incumbents, further entrenching their dominance. Unlike the large Incumbents with revenues in the billions, smaller competitors cannot afford to lose subscribers every month or price below cost in an effort to ebb subscriber losses.

122. 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."[122] Margin squeezing of competitors, inequitable access to all service speeds and technologies, and OTAs that perpetuate undue preferences and segment markets all provide Incumbents with inappropriate competitive advantages.

123. 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."[123] The Commission has also made findings in the past that even short head-starts to accessing 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 Commission 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."[124] In another context, when Rogers was not granted timely access to a multi-dwelling unit, the Commission 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.[125] By contrast, Incumbents have already had a near-decade lead in exclusive access to their FTTP access facilities and have engaged in predatory pricing for years.

124. As a result, the Commission should develop better strategies for taking swift interim action to address issues that distort the competitive market for internet services. Considering the anti-competitive status quo in which Incumbents exercise their market power as descried above, interim action should not favour the status quo. Instead, interim remedies should be developed with a view toward the best outcomes for promoting competition and avoiding delays being weaponized against smaller competitors.

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122 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.

123 OECD Competition Committee, Policy Roundtables, *"Application of Competition Policy to High Tech Markets*", 1996.

124 TD 2022-160, *supra* note 122 at para 65.

125 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"].

125. One prime example of the role such temporary remedies can play is the Commission's upcoming review of aggregated WHSA rates. Based on the retail pricing in market, examples of which are provided above, it is apparent that the current WHSA rates do not allow wholesale-based competitors to viably compete. However, the Commission's review of cost studies can be expected to take a significant amount of time given the volume of studies and the detailed costing exercise involved in reviewing each.

126. As a result, TekSavvy agrees with the suggestion of Videotron that the Commission should implement some form of "reasonableness test" against which to combat Incumbents' sustained predatory pricing strategies going forward. In Videotron's proposed solution, where an Incumbent decides to offer FTTP access in its serving territory at a retail price lower than the corresponding FTTP wholesale tariff (including promotional prices and subsidized prices), the Incumbent would be obliged to offer wholesale FTTP access at the same price as the retail price minus 15% for its entire service territory until the Commission revises tariffs.

127. TekSavvy submits that such a "reasonableness test" would be appropriate across all WHSA services (not just those offered via FTTP facilities) as an ongoing regulatory backstop and form of temporary relief pending the WHSA rate review. Setting interim rates via retail-minus is a tool the Commission has applied on several previous occasions in the wholesale context, including in TD 99-11,[126] TD 2003-87[127] (reiterated in TD 2004-24),[128] and TD 2016-67.[129] This tool would deliver timely relief to wholesale-based competitors, finally allowing them to viably compete while waiting for the Commission to complete its review.

128. TekSavvy submits that the appropriate rate for retail-minus relief, consistent with previous uses of this form of relief, would be a 25% discount from the lowest retail internet service rate charged by the given Incumbent, including any discounts or promotional offers. The 25% rate is the standard rate adopted by the Commission when it has employed retail-minus as a tool in the past, including in each of the four examples listed above. Considering the dire state of competition in the market, in which Incumbents have been able to charge inflated rates for years, the Commission should not water down its standard rate to a less effective retail-minus rate.

10. POTENTIAL MARKET INDICATORS OR METRICS THAT THE COMMISSION COULD ADOPT TO MEASURE THE COMPETITIVE HEALTH OF THE RETAIL INTERNET SERVICE MARKET

129. As described above, the Commission should require reporting of all OTAs as part of monitoring the WHSA framework going forward. In addition, TekSavvy submits that the

[126] Telecom Decision CRTC 99-11, *Application concerning access by Internet service providers to incumbent cable carriers' telecommunications facilities*, 14 September 1999 ["TD 99-11"].

[127] Telecom Decision CRTC 2003-87, *Application by Cybersurf seeking resale of Shaw higher-speed retail Internet service,* 23 December 2023 ["TD 2003-87"].

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

[129] 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 ["TD 2016-67"].

Commission should monitor competitor and Incumbent subscriber losses and gains on a quarterly basis in order to quickly identify the effectiveness of the framework and identify if further proactive steps are needed.

130. Finally, as part of the reasonableness test identified above, Incumbents should be required to monitor and identify where their retail prices, including any promotional and subsidized prices, fall below the corresponding wholesale tariff rate.

11. Whether Wholesale Regulation and the Competition it Supports Can and Should Continue to be Relied Upon to Address Concerns Regarding Market Concentration and the Potential Exercise of Market Power

131. The Commission has invited comments on whether wholesale regulation and the competition it supports can and should continue to be relied upon to address concerns regarding market concentration and the potential exercise of market power. It has also invited comments on what market conditions should trigger the adoption of additional regulatory measures at the retail level.

132. Regulation that allows for sustainable wholesale-based competition remains the most effective means of ensuring better prices and choice for consumers. Considering the issues described above, including inflated wholesale rates, predatory pricing, inequitable access to facilities and issues of undue preference, it is apparent that regulation has to date fallen short of its goals. However, provided wholesale competition is adequately supported, it will achieve better policy outcomes than retail regulation. The Policy Direction makes clear that the Government expects the Commission to support and create meaningful wholesale competition through mandated WHSA services.

133. In view of the exercises of market power described above and the resulting changing market dynamics, the most appropriate regulatory backstop to ensure effective wholesale competition is to implement some form of functional or structural separation. The Commission should examine implementing separation between the sections of the companies that build and maintain telecommunications infrastructure, and those that provide telecommunications services. The House of Commons Industry, Science and Technology committee has in fact recommended that the Commission examine the feasibility of structural separation.[130]

134. If companies that build infrastructure did not have an ability to provide themselves with preferential treatment in respect of retail competition, including with respect to access rates, delayed access to new service speeds or technologies, or delayed or unfair conditions for access to facilities, the system would better achieve its intended competitive outcomes. Competitors at retail would be on a more equitable playing field in servicing their customers. All retail competitors would have an interest in achieving fair and workable access rates, such that there would be fewer lengthy regulatory

130 Standing Committee on Industry, Science and Technology, “Proposed Acquisition of Shaw Communications by Rogers Communications: Better Together?”, March 2022, 44th Parliament, 1st Session.

decisions with drawn-out appeals. The strain on the Commission's resources would be reduced, leading to reduced regulatory delays and ensuing uncertainty.

135. Further, with all retail competitors paying the same rates, Incumbents could not use sustained predatory pricing techniques to the same advantage. Finally, if all retail competitors competed on a level playing field, consumers would be able to rely on competitive market forces to improve customer service quality. That is, in a competitive environment, customers have a range of competitive options and are able to select providers based on both price and quality factors. Many customers do not have this option in the current environment. In many cases, the current wholesale rates prevent wholesale-based competitors from charging competitive prices; in other cases, such as where they are served only by FTTP, consumers have no meaningful choice of internet service provider at all. The result is that many consumers must compromise between affordability, technical quality and customer service.

136. As described above, TekSavvy agrees that the Commission must always ensure that its wholesale framework is adequately allowing for sustainable competition in order to justify continuing to forbear from regulating retail prices. In TekSavvy's view, implementing separation between telecommunications network building on the one hand and retail internet services delivery on the other will ensure this sustainable competition going forward.

137. Simply employing retail price regulation as a regulatory backstop does little to address many of the systemic issues in Canadian telecommunications and should not be the Commission's focus in the near future. Regulating retail prices instead of empowering wholesale competition deprives consumers of the true benefits of competition. First, the Commission will still face the difficult challenge of setting appropriate rates and ensuring that they remain efficient as costs decrease. However, without strong independent competitors remaining, there will be few parties left to advocate for lower rates before both the Commission and in the myriad appeals that inevitably follow any decision on rates. Consumers will still be left waiting for affordable rates while prolonged litigation continues for years. Moreover, without strong wholesale competition, consumers lose the non-price benefits that accompany it, including internet providers that deliver better customer support, different plan options and innovative service delivery. Fostering wholesale competition will improve customer satisfaction not only because of improved affordability, but because it will force Incumbents to compete to provide better customer service instead of simply relying on their entrenched structural advantages. The Competition Bureau's research has shown that consumers who are served by wholesale-based competitors report higher satisfaction with their provider than those who use incumbent providers.[131]

138. Many of the interventions filed in this proceeding by individuals provide illustrations of the importance of choice of providers, beyond simply pricing issues:

> "As a long time customer of independent internet service providers, I was disappointed when my only option for symetic high speed service with fibre from Bell. Bell's anti-competitive and anti-consumer business practices leave much to

[131] Competition Bureau, "Delivering Choice: A Study of Competition in Canada's Broadband Industry," 8 August 2019, pp 7, 51.

> be desired, especially when compared to the consumer-centric service of Teksavvy. I had vowed in 2003 to never be a customer of Bell again after repeated mistreatment, however no longer had a choice to use the provider of my choice."[132] [*sic*]

> "I am a software developer that has been working specifically on networking software for over 20 years. One of the issues seen in my industry is lagging support for modern networking technologies, notably IPv6. Like many people, my residential Internet service is provided by Bell. The connection at my company office is also provided by Bell. Neither of those connections support IPv6 but the software I work on does support it and I am unable to properly test it on Bell connections. Unfortunately, the lack of reasonable upstream bandwidth keeps me from switching to a cable provider. […] Some of our customers are ISPs that do support IPv6 on their own networks but are unable to provide FTTP service without running additional fiber to each residence. […] Having real competition should not just be about prices. Competition should also drive innovation and allow Canadian businesses to develop and access new services."[133]

> "It has been the access/availability of television services that has forced me to stay with Shaw Cablesystems. Over the last one and a half years I have become extremely disappointed with Shaw's products and services. My current contract ends in August 2023. I have started looking for a new provider or providers of services I currently use."[134]

> "I struggle with affordable internet because everything is expensive. It's unfair that there aren't more competitors. Smaller telecoms should get very very low rates in order to offset the unfair environment in which they exist. I deserve competitors so I can have choice."[135]

> "Actuellement j'utilise un service fourni par un plus petit fournisseur avec un meilleur service à la clientèle à un prix similaire par contre la vitesse est limitée car les gros joueurs bloquent l'accès, ce qui est innacceptable."[136] [*sic*]

139. Finally, wholesale-based competition, when done properly, allows for smaller competitors to gain a foothold into an industry with high barriers to entry. This allows companies to grow and invest in their own facilities in underserved areas. TekSavvy, for example, has invested in its own fibre-to-the-home network serving communities near Chatham, Ontario, as well as its own LTE network in southwestern Ontario. Prior to its acquisition by TELUS, Start.ca had also invested in its own FTTP network in London, Ontario. The development of facilities by additional competitors would not be enhanced by retail regulation.

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[132] Intervention #289, Devon Stopps, 9 April 2023, submitted in TNC 2023-56, *supra* note 2.

[133] Intervention #294, James Oakley, 16 April 2023, submitted in TNC 2023-56, *supra* note 2.

[134] Intervention #308, Robert Fraser, 23 April 2023, submitted in TNC 2023-56, *supra* note 2.

[135] Intervention #283, Paul McLeod, 3 April 2023, submitted in TNC 2023-56, *supra* note 2.

[136] Intervention #365, Jonathan Gervais, 18 May 2023, submitted in TNC 2023-56, *supra* note 2.

140. Provided the Commission empowers wholesale competition, including mandating aggregated WHSA services across all technologies and setting appropriate rates, TekSavvy expects that smaller wholesale competitors and newer entrants will be able to grow meaningfully in the future.

12. CONCLUSION

141. For the reasons set out above, TekSavvy strongly supports the Commission's initial views that aggregated WHSA services should be mandated for all types of facilities, including FTTP access facilities. Moreover, TekSavvy submits that there are several concrete steps that the Commission can take to quickly improve the WHSA framework. These include:

a. The Commission should make use of forthcoming updated aggregated WHSA cost studies to set final, reduced disaggregated WHSA rates for those competitors who choose to invest in this model. Disaggregated and aggregated access should be available where demand for both exists at a given point of interconnection;

b. The Commission should immediately make material reductions to the Incumbents' interim WHSA rates since those rates are, on a *prima facie* basis, not based on reasonable costs due to unsubstantiated deviations from Phase II costing principles and unequivocal past Commission decisions;

c. The Commission should apply a "reasonableness test" to all WHSA access rates by applying a retail-minus regulatory backstop to prevent Incumbents from benefitting from regulatory delays and margin-squeezing of competitors;

d. The Commission should track wholesale-based competitor market shares on a more regular basis, and develop strategies for proactive, interim remedies going forward to quickly address future instances in which Incumbents abuse their market power;

e. The Commission should require public reporting of off-tariff agreements to ensure these agreements do not escape regulatory oversight and scrutiny; and

f. The Commission should examine the feasibility of functional or structural separation between building and operating networks, and delivering internet services to customers.

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