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IN A GOOD WAY.**

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19 July 2022

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**SUBMITTED BY EMAIL to [telecomsubmission-soumissiontelecom@ised-isde.gc.ca](mailto:telecomsubmission-soumissiontelecom@ised-isde.gc.ca)**

Dear Mr. Arbour:

**RE: TekSavvy representations concerning the *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy, Canada Gazette, Part I, Vol. 156, No. 23 published 4 June 2022***

TekSavvy Solutions Inc. is pleased to provide the attached representations concerning the proposed Policy Direction to the Canadian Radio-television and Telecommunications Commission presented by Innovation, Science, and Economic Development Canada on May 26, 2022.

Please do not hesitate to contact me should you require additional information.

Yours truly,

*[transmitted electronically]*

Andy Kaplan-Myrth  
VP, Regulatory and Carrier Affairs



## TABLE OF CONTENTS

A. EXECUTIVE SUMMARY .....	1
B. ABOUT TEKSAVVY .....	2
C. BACKGROUND: THE CURRENT WHOLESALE HSA REGIME IS FAILING.....	3
a. Current wholesale rates are artificially inflated, allowing incumbents' flanker brands to engage in predatory pricing .....	3
b. No speed matching via fibre-to-the-premises ("FTTP") .....	4
c. Lengthy regulatory delays equally undermine the speed-matching requirement.....	6
d. Prices are increasing at a time when consumers are already financially stretched .....	9
e. Market exits of wholesale competitors .....	11
f. CRTC's decision timelines allow incumbents' behaviour to go unchecked for unacceptable periods of time.....	11
g. There is a public crisis of confidence in the CRTC.....	15
D. NECESSARY MODIFICATIONS TO THE PROPOSED ORDER .....	17
a. Direct the CRTC to reduce existing wholesale rates and provide interim relief on rates in the meantime.....	17
b. Direct the CRTC to enforce speed-matching rules, including over FTTP, within 6 months of the Final Direction.....	18
c. Additional timelines to minimize regulatory delays.....	19
d. Require the CRTC to develop and publish an ethics code applicable to Commissioners.....	21
e. Direct the CRTC to examine the feasibility of structural separation.....	21

## A. EXECUTIVE SUMMARY

1. The wholesale internet broadband regime is in crisis. As the government itself acknowledges,<sup>1</sup> the already high prices for typical internet plans are rising, wholesale-based competitors are losing the already small share of the market they comprise, and incumbents are using flanker brands to price below what these competitors could charge based on the current inflated wholesale rates.
2. On May 26, 2022, citing these very concerns, the Minister of Innovation, Science, and Economic Development (ISED) proposed a new Policy Direction to be issued to the Canadian Radio-television and Telecommunications Commission (CRTC)<sup>2</sup>. The Proposed Direction emphasizes the importance of a healthy wholesale regime, and how such a regime can promote affordability and give consumers real choices in their telecommunications providers.
3. Yet the Proposed Direction does nothing concrete to address any of the basic problems that have destabilized the regime over the past 7 years. Indeed, the Proposed Direction was issued at the same the Governor-in-Council (“GIC”) rejected petitions to overrule the CRTC’s most destructive, anti-consumer decision in its history of wholesale regulation. In so doing, the GIC declined to ensure fair, evidence-based wholesale rates – namely, the linchpin of a healthy wholesale framework that would deliver more competition and lower prices to consumers.
4. If this bleak *status quo* is not immediately corrected, there will be few viable wholesale-based competitors remaining to benefit from the Proposed Direction in the long term. Several of the largest such competitors have already exited the market or even been purchased by incumbents.<sup>3</sup>
5. In this submission, we provide some background information about TekSavvy and the current state of the wholesale high speed access (HSA) regime. We detail how the CRTC has, over the past 7 years, dismantled key elements of the regime and further entrenched incumbents’ market power. We show how this caused markedly higher retail internet prices in Canada while peer countries have seen decreasing prices over the same time. We then propose additions to the Proposed Direction, which are necessary to repair the wholesale regime and deliver much-needed relief for consumers and competitors in the near term.
6. In particular, TekSavvy submits that the Proposed Order must be modified to direct the CRTC to achieve specific key deliverables within certain timelines, namely:

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<sup>1</sup> Regulatory Impact Analysis Statement, *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, Canada Gazette, Part I, Vol. 156, No. 23, 4 June 2022 [“RIAS”].

<sup>2</sup> *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, Canada Gazette, Part I, Vol. 156, No. 23, 4 June 2022 [the “Proposed Order” or the “Proposed Direction”].

<sup>3</sup> As discussed later in the submission, this includes for example the acquisition by Bell Canada (“Bell”) of EBOX, the insolvency of competitors including Primus Telecommunications Canada (“Primus Telecommunications”) and Frontline Broadband.

- i. Reduce existing wholesale rates, setting interim rates on a retail-minus basis within 1 month of the Final Direction, and setting final rates within 1 year thereof;
  - ii. Enforce equitable speed-matching rules, including with respect to fibre-to-the-premises, within 1 month of the Final Direction;
  - iii. Adopt and adhere to additional timelines that minimize regulatory delay and uncertainty;
  - iv. Issue a public ethics code applicable to Commissioners to address, at a minimum, standards for avoiding conflicts of interest, rules for *ex parte* meetings, guidance for recusals and other standards for maintaining the integrity of the institution; and
  - v. Report on the feasibility of structural separation in the telecommunications sector between businesses that build infrastructure and those that provide services.
7. Attached as Appendix A to the submission is a redline to the Proposed Direction, showing how the above recommendations can be easily incorporated into the text of the Proposed Direction in order to give proper effect to its intended goals.
8. Canada is suffering through a cost-of-living crisis, with inflation at the highest rate seen in almost 40 years.<sup>4</sup> Competitors are declining. Taking these specific actions would be an easy and long overdue win for consumers.

## **B. ABOUT TEKSAVVY**

9. TekSavvy Solutions Inc. (TekSavvy) is an independent internet and voice service provider based in Chatham, Ontario, and Gatineau, Quebec. TekSavvy has been proudly serving consumers with telecommunications services for more than 20 years, winning numerous awards for the quality of its user experience and for its commitment to fighting for and upholding consumers' rights online.
10. TekSavvy provides internet and voice services to residential and business customers in every Canadian province. TekSavvy offers internet and IP phone services over its own network facilities and through wholesale network access services provided by incumbent carriers across Canada. Currently, TekSavvy's network uses regulated wholesale services on three DSL networks and five cable networks.
11. In addition to wholesale-based offerings, TekSavvy has its own high-speed fibre broadband network in southwestern Ontario, in Chatham-Kent and neighbouring areas. TekSavvy's fibre network has currently connected approximately 13,455 residences and businesses in the region and is continuing to expand. TekSavvy also offers its own facilities-based fixed-wireless network access services within a number of underserved communities in southwestern Ontario. TekSavvy's affiliate, Hastings Cable Vision Ltd, also offers an IPTV television service and TekSavvy sees regular customer demand for a mobile service offering. Unfortunately, TekSavvy has had to shelve many of its future investment plans,

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<sup>4</sup> Pete Evans, "[Canada's inflation rate now at 7.7% — its highest point since 1983](#)", CBC, June 22, 2022.

including part of its plans to expand its fibre network and its plans to begin offering mobile services, as a result of the CRTC's 2021 reversal on wholesale HSA rates.

12. TekSavvy is not a “reseller”. When TekSavvy sells an internet connection to an end-user, we do not merely put TekSavvy’s brand name on the incumbent’s internet service. Instead, TekSavvy buys access to carriers’ physical networks (the “hardware layer”), and we provide services directly to end-users (the “service layer”). We buy the “last mile” of access from incumbents to reach end-users’ residences and businesses, and then we leverage TekSavvy’s national IP network, including points of presence and transit networks from coast to coast across all of Canada’s provinces, to carry our end-user traffic to the internet or to other data services. TekSavvy has a direct customer relationship with our end-users; the underlying wholesale access network providers do not have any relationship with TekSavvy’s end-users. As such, in this submission, we refer to service providers like TekSavvy as “wholesale-based competitors”.
13. TekSavvy and other wireline competitors buy wholesale services such as access, capacity, and installation from incumbent network carriers at rates and on terms that are set by the CRTC and reflected in wholesale services tariffs. These tariffed rates include, among other elements, a monthly access rate for each subscriber line; and a monthly capacity rate, which is roughly speaking to account for the size of the point of interconnection with the wholesale carrier, for capacity to access the carrier’s network. The tariff also sets out any fees for service installation and end-user hardware requirements. It is important to note that these are mandatory services: to buy access to a given carrier’s last-mile access service, we are required to also pay to use that carrier’s technician.<sup>5</sup>
14. Mandated wholesale services are regulated by the CRTC in order to provide Canadians with more choice for high-speed connectivity, driving competition that results in innovative service offerings and reasonable prices for consumers. For over 20 years, TekSavvy has primarily offered retail services that rely on those wholesale inputs. As such, we are well placed to reflect on the competitive climate in the Canadian telecommunications market and, in particular, the impact of recent CRTC decisions and policies on wholesale wireline internet services.

### **C. BACKGROUND: THE CURRENT WHOLESAL HSA REGIME IS FAILING**

- a. Current wholesale rates are artificially inflated, allowing incumbents’ flanker brands to engage in predatory pricing
15. The CRTC is required under its governing legislation to set wholesale rates that are just and reasonable.<sup>6</sup> Despite this, the CRTC has set rates that allow incumbents to profitably set retail prices below wholesale rates for a sustained period of time; notably, wholesale rates are only one component of wholesale competitors’ costs. The incumbents engage in this strategy of pricing below wholesale through their flanker brands: Virgin (Bell), Fido (Rogers Communications Canada Inc. (“Rogers”)) and Fizz (Vidéotron Ltée (“Vidéotron”)). These

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<sup>5</sup> For more details about how regulated wholesale network access works and the many barriers facing new and smaller service providers, please see TekSavvy’s public abridged submission to the Competition Bureau’s Broadband Market Study, available at <https://bit.ly/TekSavvyCompBureauSubmission>.

<sup>6</sup> *Telecommunications Act*, SC 1993, c 38, ss 25 and 27 [“Telecommunications Act”].

flanker brands regularly offer *retail* prices for a given level of internet service at a price below the *wholesale* prices they inflated for competitors.<sup>7</sup>

16. This anti-competitive flanker brand strategy is not disputed by the government. The RIAS clearly states 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.”<sup>8</sup> ISED’s annual commissioned report from Wall Communications Inc. shows that flanker brand prices tend to be lower than the prices of wholesale-based competitors for equivalent service offerings.<sup>9</sup>
17. Incumbents openly acknowledge their flanker strategy undercuts wholesale competitors. In launching Fizz, Videotron called it a “weapon to fight the resellers”.<sup>10</sup> In March 2018, Bell’s then CEO recognized the obvious link between their roll-out of flankers and wholesale competition: “we had negative wholesale loading, or subscriber additions, which of course we would be very comfortable with...Of course, part of that is our strategy with the roll-out of the Virgin Internet brand.”<sup>11</sup>
18. The success of this predatory strategy is directly the result of inflated wholesale rates. When wholesale rates are inflated and not based on incumbents’ actual costs, incumbents can comfortably set retail rates slightly below the wholesale rates without worry that a competitor could compete. They thus preserve incumbent market power by shielding them from any real downward pricing pressure. Put another way, instead of forcing incumbents to price their retail offerings at competitive prices based on their costs and pricing pressure from competitors, the current inflated wholesale rates allow incumbents to maintain a comfortable price floor in place for competitors, insulating incumbents from any pricing pressure. The very fact that incumbents can comfortably price below wholesale rates demonstrates that wholesale rates are not just and reasonable.

b. No speed matching via fibre-to-the-premises (“FTTP”)

19. Speed matching is the long-standing regulatory requirement that incumbents provide wholesale services that enable competitors to offer internet services to their retail customers at speeds that match the internet speeds provided by those incumbents to their own retail

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<sup>7</sup> For further details on the degree of undercutting wholesale costs, see TekSavvy’s public abridged submission to the Competition Bureau’s Broadband Market Study, *supra* note ; see also [Petition by Competitive Network Operators of Canada](#) to The Governor In Council to Rescind Telecom Decision CRTC 2021-181, *Requests To Review And Vary Telecom Order 2019-288 Regarding Final Rates For Aggregated Wholesale High-Speed Access Services* and to Restore Telecom Order CRTC 2019-288, *Follow-Up To Telecom Orders 2016-396 And 2016-448 – Final Rates For Aggregated Wholesale High-Speed Access Services*.

<sup>8</sup> RIAS, *supra* note .

<sup>9</sup> Wall Communications Inc. prepared for Innovation, Science and Economic Development Canada, [“Price Comparisons of Wireline, Wireless and Internet Services in Canada and with Foreign Jurisdictions”](#), 2021 Edition [“Wall Report”].

<sup>10</sup> Greg O’Brien, “Fizz Internet the ‘right weapon’ to beat back resellers, says Vidéotron”, CARTT.ca, 27 March 2019.

<sup>11</sup> BCE Q3 2018 Results Conference Call Transcript, 1 November 2018, at page 8, <<http://www.bce.ca/investors/financial-reporting/2018-Q3/2018-q3-transcript.pdf>>.

customers.<sup>12</sup> Despite this long-standing requirement, incumbents continue to be insulated from any meaningful competition on their FTTP offerings. Together with predatory pricing on lower speeds, this monopoly over the faster speeds FTTP means that wholesale-based competitors cannot compete on either price or speed.

20. In Telecom Regulatory Policy 2015-326, the CRTC mandated wholesale access to all last-mile access facilities for precisely the same reason that it consistently upheld speed matching in earlier decisions: If competitors cannot match incumbent retail speeds, “there would be a substantial lessening or prevention of competition in the downstream retail Internet services market, in all incumbent carrier serving regions”.<sup>13</sup> Specifically, the CRTC determined that if competitors were unable to match incumbent retail speeds using higher speed access facilities, most of the competitors’ existing customers would “migrate to incumbent carrier retail internet service”<sup>14</sup> to obtain higher speeds. The CRTC found that competitors would also be unduly impaired from obtaining new customers, as their legacy speed offerings would be irrelevant to “more and more consumers desiring higher-speed internet services”.<sup>15</sup>
21. The CRTC held that in order to be able to deliver FTTP, wholesale competition would move to a disaggregated access model: that is, rather than connecting to incumbent networks through a single hub (i.e., “aggregated” through one location), competitors would be able to do so at multiple points (i.e., “disaggregated” access). Moving to this model would mean that wholesale ISPs’ customers’ traffic would be transferred onto that ISP’s own network much earlier, such that the competitor would control almost the entire connection to the customer via their own networks. This reduced reliance on incumbent’s networks could also reduce the likelihood that service outages on an incumbent’s network would also impact wholesale-based competitors’ customers.
22. Yet, seven years later, competitors still do not have viable wholesale FTTP access at viable rates. Where they are available, the interim disaggregated HSA access rates that would be used for FTTP access are even higher than access rates for aggregated HSA services. This is arbitrary: as explained above, disaggregated access requires even less access to the incumbents’ facilities; moreover, even where the exact same fibre-to-the-node facilities are used in both aggregated and disaggregated access services, the CRTC has set the disaggregated service at far higher rates than the same aggregated access service. This is also counterproductive: While the CRTC set a goal to phase out aggregated access in favour of disaggregated access, the arbitrarily higher rates it set disincentivize competitors from investing in disaggregated technology.

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<sup>12</sup> *Wholesale high-speed access services proceeding*, [Telecom Regulatory Policy CRTC 2010-632](#), 30 August 2010 at para 29.

<sup>13</sup> *Review of wholesale wireline services and associated policies*, [Telecom Regulatory Policy CRTC 2015-326](#), 22 July 2015 [“TRP 2015-326”] at para 130.

<sup>14</sup> *Ibid* at para 127.

<sup>15</sup> *Ibid* at para 128.

23. The higher rates for disaggregated access effectively deprive competitors of access to essential FTTP facilities.<sup>16</sup> This means that for seven years and counting (during which the last direction to the CRTC was issued):
- i. incumbents have had an extended anti-competitive head start to FTTP technology during which time they are insulated from competition;
  - ii. the CRTC has openly acknowledged this is an anti-competitive head start that will lead to a substantial lessening or prevention of competition; and
  - iii. the CRTC has done nothing to provide any sort of interim, exigent relief to competitors to promote access.
- c. Lengthy regulatory delays equally undermine the speed-matching requirement
24. The CRTC has a pattern of condoning anti-competitive head starts by incumbents when it is only wholesale-based competitors who are disadvantaged. Often, the CRTC simply refuses to take action and fails to meet its own statutory timelines for basic wholesale processes.
25. For example, the CRTC introduced the speed-matching requirement in 2006, specifically to address anticompetitive delays in wholesale access that benefit incumbents.<sup>17</sup> In that decision, the CRTC ruled that incumbent wholesale carriers must make the same service speeds available to both retail and wholesale customers—hence the term “speed-matching” — and held that speed-matching would enable “competitors to compete on a more equitable basis” than they would have otherwise.<sup>18</sup>
26. Despite this history, the CRTC has more recently not enforced this rule in situations where incumbents are afforded anti-competitive head starts. For example, when incumbents file tariff applications to introduce new wholesale HSA service speeds, even in established speed bands, the incumbent will most often file its tariff application for the wholesale service concurrently with its retail launch of the equivalent service speed. The Commission will then take some time to approve a wholesale tariff application, even on an interim basis, and the Incumbent benefits from an anticompetitive head-start during the period between the launch of its retail service and approval of the corresponding wholesale service. The incumbent is free to launch and offer its new speed at retail during this time, insulated from any wholesale-based competition.

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<sup>16</sup> The Commission acknowledged this by starting a new proceeding recently to consider less than fully disaggregated configurations for disaggregated HSA services. See *Call for comments – Appropriate network configuration for disaggregated wholesale high-speed access services*, Telecom Notice of Consultation CRTC 2020-187, 11 June 2020 [“TNC 2020-187”] at paras 11-15.

<sup>17</sup> See *Cogeco, Rogers, Shaw, and Videotron – Third-party Internet access service rates*, [Telecom Decision 2006-77](#), 21 December 2006 [“TD 2006-77”] at para 197 which first established the speed-matching requirement in response to concerns from competitors that included “that the delay between the introduction of cable carrier retail Internet services and the availability of those services under TPIA significantly prejudiced competition in the provision of retail Internet services.”

<sup>18</sup> TD 2006-77, *supra* note at para 209.

27. Under its own statute, the CRTC is required to respond to tariff applications within 45 business days.<sup>19</sup> However, under its current Chair, the CRTC has routinely ignored its own statutory deadlines where it operates to the disadvantage of wholesale-based competitors. Examples of competitor tariff filings introducing new wholesale HSA service speeds from 2020 and 2021 evidence the delays between the incumbent carrier's proposed effective date and the Commission's approval, and the resulting delay between the date the service speed is available at retail versus at wholesale:

Carrier Tariff Filing	Service Speed	Date offered to retail	Date tariff notice filed	TN proposed effective date	Date of CRTC Approval	Date offered to wholesale	Difference between retail and wholesale
Shaw TN 34	1000 Mbps download / 25 Mbps upload	May 27, 2020	June 12, 2020	"The later of July 13, 2020 and the Commission's determination on the Application"	February 11, 2021	February 23, 2021	9 months
Shaw TN 35, as amended by TN35/A	150 Mbps download/ 15 Mbps upload; 300 Mbps download/ 100 Mbps upload; and 750 Mbps download/ 100 Mbps upload	Sept. 11, 2020	Sept. 11, 2020	Sept. 10, 2020	To be determined	To be determined	22 months (ongoing)
Shaw TN 36	1500 Mbps download/ 100 Mbps upload	Unclear. Shaw never advised in its application, but this speed was available on its website at least as early as December 2021.	Nov. 5, 2020	"The later of December 6, 2020, and the date of the Commission's determination on the Shaw Part 1 Application"	5 April 2022	April 5, 2022	17 months

<sup>19</sup> *Telecommunications Act*, s 26.

Carrier Tariff Filing	Service Speed	Date offered to retail	Date tariff notice filed	TN proposed effective date	Date of CRTC Approval	Date offered to wholesale	Difference between retail and wholesale
Shaw TN 37	500 Mbps download/ 20Mbps and 100Mbps upload <sup>20</sup>	Jan. 28, 2021	Jan. 28, 2021	March 2, 2021	March 2, 2021	March 5, 2021	5 weeks
Shaw TN 38	1000 Mbps download / 100 Mbps upload	Sept. 11, 2020	February 22, 2021	February 22, 2021	To be determined	To be determined	22 months (ongoing)
Rogers TN 69	50 Mbps download/ 10 Mbps upload	As early as March 23, 2021	February 23, 2021	March 25, 2021	November 24, 2021	November 24, 2021	11 months
Shaw TN 39	600 Mbps download / 100 Mbps upload	Unknown; the tariff filing made no mention of the service being available to retail	March 25, 2021	March 25, 2021	July 30, 2021	August 5, 2021	Up to 5 months
Rogers TN 73	50 Mbps download/ 10 Mbps upload <sup>21</sup>	August 17, 2021	August 17, 2021	August 17, 2021	April 21, 2022	April 21, 2022	8 months

<sup>20</sup> In TN 37, Shaw introduced two new 500 Mbps services, both with 500 Mbps download speeds, one with 20 Mbps upload and the other with 100 Mbps upload (collectively, the 500 Mbps services).

<sup>21</sup> While Rogers' TN 69 introduced the same service speed, it was restricted to Ontario. Rogers' TN 73 introduced the service in Atlantic Canada.

Carrier Tariff Filing	Service Speed	Date offered to retail	Date tariff notice filed	TN proposed effective date	Date of CRTC Approval	Date offered to wholesale	Difference between retail and wholesale
Shaw TN 40	250 Mbps download / 15 Mbps upload	Unknown; the tariff filing made no mention of the service being available to retail nor is the service advertised on their retail website	August 5, 2021	August 5, 2021	December 10, 2021	December 10, 2021	Up to 4 months

28. While competitors suffer under these lengthy, anti-competitive head starts, by contrast, the CRTC takes concerted action to level the playing field between incumbents. For example, in considering Bell's delays in providing Videotron with access to support structures, the CRTC found that "a short lead in serving a market could confer a lucrative long-term advantage, since a customer who is served first by Bell Canada, because the company has furthered its FTTH network at its competitors' expense, will tend to remain a customer of Bell Canada for many years, allowing the company to benefit from its violations."<sup>22</sup> In an analogous context, the CRTC's standard approach is not so tolerant of delays: when Rogers was not granted timely access to a multi-dwelling unit, the CRTC 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.<sup>23</sup>

d. Prices are increasing at a time when consumers are already financially stretched

29. Purchasing power is steadily declining, with inflation at a nearly 40-year high in Canada.<sup>24</sup> The public needs affordable internet rates more than ever. This requires real and tangible action to constrain the market power that Canada's telecom oligopoly has shown it is all too willing to flex. Consumers in Canada are fed up with the *status quo*, and there is widespread consumer support for this form of relief.

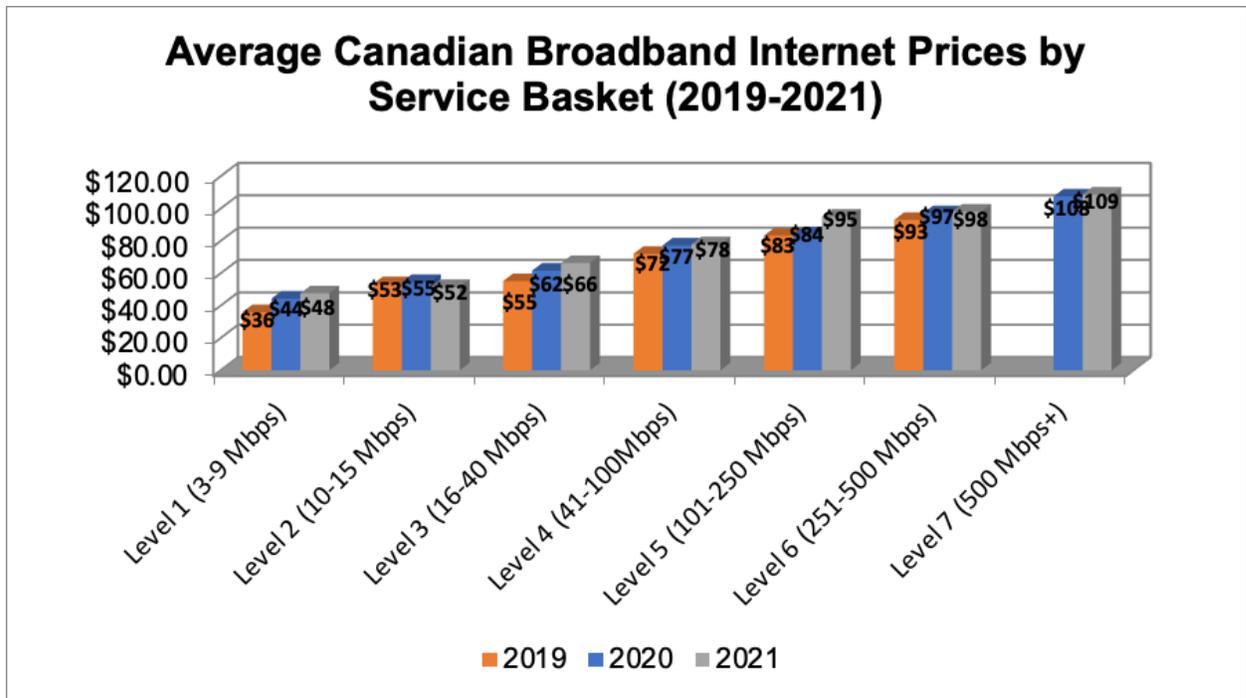
30. According to the Wall Report, prices for almost every tier of home internet service rose in 2021<sup>25</sup>:

<sup>22</sup> *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*, [Telecom Decision CRTC 2022-160](#), 15 June 2022 at para 65.

<sup>23</sup> 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*, [Telecom Decision CRTC 2022-148](#), 8 June 2022.

<sup>24</sup> Pete Evans, *supra* note .

<sup>25</sup> Wall Report, *supra* note , p 44.



31. As the Wall Report notes: “fixed broadband prices have increased in Canada in every basket in every year between 2019 and 2021” (excluding the level 2 basket, for internet speeds between 10-15 Mbps, which represents the decline in slower-speed DSL services as FTTP makes DSL a second-class service).<sup>26</sup> The fact that prices have been increasing is also acknowledged by the Minister and the RIAS itself.<sup>27</sup>
32. Unlike many pricing trends, these price increases cannot be tied to global market forces. The Wall Report notes that unlike Canada, prices for broadband have been trending down in peer countries, finding: “[r]elative to last year, all countries (except for Canada and Japan) have lower prices in a majority of baskets.”<sup>28</sup> This is true even for the U.S., which the report found, unlike Canada, “has followed a downward price trend over the last few years. Canada now has higher prices than the US in most baskets.”<sup>29</sup>
33. These increasing price trends are even more concerning considering Canada’s pricing already ranks high in comparison to other peer countries: “measured prices for the European countries included in the study (U.K., France, Italy and Germany) have consistently been lower than those in Canada — in some cases, by a wide margin.”<sup>30</sup>
34. There are many concerning inflation trends owing to global market forces such as supply shortages and increases in cost inputs. But telecommunications price increases, by comparison, cannot be chalked up to these global economic trends. Instead, they are the

<sup>26</sup> *Ibid*, p 44.

<sup>27</sup> RIAS, *supra* note .

<sup>28</sup> Wall Report, *supra* note , p 60.

<sup>29</sup> *Ibid*, p 9.

<sup>30</sup> *Ibid*, p 60.

result of regulatory decisions taken by the CRTC that, in recent years, have ostensibly been intended to advance the 2006 and 2019 Policy Directions. The Proposed Policy Direction must provide clear guidance that corrects the course of the CRTC for future decisions.

e. Market exits of wholesale competitors

35. Without exigent relief from the faulty regulatory regime the CRTC has created, market conditions will only worsen. The existence of predatory pricing has resulted in subscriber losses for wholesale-based competitors, which can only be expected to continue the longer that competitors cannot offer competitive pricing. As the RIAS notes, the already modest share of the market occupied by all independent competitors shrunk.<sup>31</sup> This trend has only continued into 2022.
36. Wholesale-based competitors are leaving the market, and will soon not be around to viably compete. A leading example of this trend is the formerly largest independent ISP in Quebec, EBOX, which was acquired by Bell in February 2022.<sup>32</sup> In 2016, Primus Telecommunications, a wholesale-based competitor that had over 225,000 customers in Canada, entered into creditor protection, citing declining revenues of 9% annually since 2012 combined with the high fixed overhead costs of purchasing wholesale access from incumbents.<sup>33</sup> Other wholesale based competitors have also fallen into insolvency including Telephone Navigata-Westel Communication in 2016<sup>34</sup> and Frontline Broadband in 2020<sup>35</sup>; meanwhile, incumbents continue to purchase smaller competitors, further benefiting from the failing wholesale regime.<sup>36</sup>
37. After years of arbitrary, unpredictable and drawn-out decisions, in order to preserve wholesale competition, the Proposed Direction must deliver tangible results: a base on which a reasonable businessperson can rely on to plan operations and investments and have faith that the CRTC will be held accountable to the Direction's goals.

f. CRTC's decision timelines allow incumbents' behaviour to go unchecked for unacceptable periods of time

38. Unlike many other government organizations, the CRTC does not provide any detailed statistics on the length of time taken for its decisions. This even includes decisions subject to statutory timelines, such as for reviewing tariff applications as discussed above.<sup>37</sup> Given

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<sup>31</sup> RIAS, *supra* note .

<sup>32</sup> Bell Canada News Release, "[Bell acquires Longueuil-based Internet provider EBOX](#)", February 24, 2022.

<sup>33</sup> CBC News, "[Primus in creditor protection as it completes sale to U.S. bidder](#)", January 21, 2016.

<sup>34</sup> See for example, *8640025 Canada Inc. (Re)*, 2019 BCSC 8.

<sup>35</sup> See for example, Insolvency Insider, "[Frontline Broadband](#)", July 6, 2020.

<sup>36</sup> For example, Rogers' acquisition of Mobilicity (a mobile virtual network operator) in 2016, following its restructuring proceedings.

<sup>37</sup> For example, other organizations and sectors within ISED do monitor and report on their decision times. ISED's Spectrum and Telecommunications Sector publishes statistics on how often its service standards are achieved on its [website](#). The Competition Bureau prepares an [annual report](#) to the Organisation for Economic Co-operation and Development which includes statistics on how often its service standards are met. The Investment Review Division publishes an [annual](#)

the lack of published data on decision times, it is difficult to provide full statistics on the average time taken to render decisions or how often the CRTC meets its statutory timelines (if any apply).

39. However, there are myriad representative examples of decisions the CRTC has taken unacceptable amounts of time to issue. In addition to the timelines listed above in section B(c), wherein the CRTC often exceeded its 45-business day review period for tariff filings, the CRTC takes several years to issue decisions, as illustrated in the table below:

Regulatory File	Date Opened	Deadline for Final Replies	Date of CRTC Decision	Total Time Taken for Final CRTC Decision
Telecom Notice of Consultation <a href="#">CRTC 2015-225</a> - <i>Review of costing inputs and application process for wholesale high-speed access services</i>	28 May 2015 (Date at which commission initiated proceeding to review)  31 March 2016 (Date at which CRTC directed providers to provide updated cost studies)	30 October 2017	Initial “final” decision: 15 August 2019  Review and vary decision: 27 May 2021	4-5 years
Telecom Notice of Consultation <a href="#">CRTC 2019-406</a> - <i>Call for comments regarding potential barriers to the deployment of broadband-capable networks in underserved areas in Canada</i>	10 December 2019	8 March 2021	Pending	2 years, 7 months (ongoing)
Telecom Notice of Consultation <a href="#">CRTC 2020-131</a> - <i>Call for comments – Review of the approach to rate setting for wholesale telecommunications services</i>	24 April 2020	11 February 2021	Pending	2 years, 2 months (ongoing)

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[report](#) which includes statistics as to the number of investments it reviews as well as statistics about the length of time of these reviews.

Regulatory File	Date Opened	Deadline for Final Replies	Date of CRTC Decision	Total Time Taken for Final CRTC Decision
Telecom Notice of Consultation <a href="#">CRTC 2020-187</a> - <i>Call for comments – Appropriate network configuration for disaggregated wholesale high-speed access services</i>	11 June 2020	7 December 2020	Pending	2 years, 1 month (ongoing)
Shaw Telecom G.P., Part 1 Application, <a href="#">File No. 8661-S83-202003193</a> , <i>Application for Immediate Interim Relief from the Speed-Matching Requirement as it applies to Shaw’s Gigabit Residential Internet Service Speeds</i>	1 June 2020	2 July 2020	5 April 2022	1 year, 10 months
<a href="#">Telecom Notice of Consultation CRTC 2020-83</a> - <i>Show cause proceeding and call for comments – Distinction between residential and business wholesale high-speed access services</i>	3 March 2020	26 May 2020	Pending	2 years, 4 months (ongoing)

40. The CRTC’s delays, lack of transparency around expected timelines, and failure to put into place any interim relief mechanisms cause ample uncertainty for all participants in the market, and favour larger, highly profitable incumbents who have the scale and profitability to withstand more regulatory uncertainty and accept more risk. The Standing Committee on Industry, Science and Technology (INDU) specifically noted the CRTC’s delays in the context of the wholesale rates review, including during appeals processes, as well as the ability for incumbents to use such delays to their benefit. INDU recommended in particular:

“[t]hat the Government of Canada issue a directive to encourage the CRTC to revise its process for implementing and appealing new rates so that incumbent telecommunications service providers stop using the appeals process as a delay tactic. For example, in cases where newly announced rates are appealed, the CRTC could: [a]pply an interim rate equal to a 50% difference between the old

rates and the newly announced rates; and [r]espect a strict time limit to issue a decision.”<sup>38</sup>

41. Many stakeholders have raised the issue of the CRTC’s delays. The Competitive Network Operators of Canada (“CNO”) sent a letter to Mr. Scott personally requesting that the backlog of CRTC decisions be resolved and citing the backlog’s profoundly corrosive effect on competition.<sup>39</sup> TekSavvy has filed an application with the CRTC seeking updates to the tariff application process to address unreasonable delays.<sup>40</sup> In questioning Mr. Scott at an INDU meeting on February 8, 2022, Ministers of Parliament (MPs) noted the lengthy time periods for decisions as well as the need for urgency in decisions in several contexts:

“One of the biggest complaints that I get is the time duration of CRTC decisions.”<sup>41</sup>

“[I]n May 2015 there’s a notice of consultation for wholesale rates. In March 2016, there’s an interim decision that determined that wholesale rates were likely not just or reasonable. A comprehensive review was undertaken for over three years. [...] that comprehensive review, despite its comprehensiveness, was incredibly incorrect, I guess, because less than two years later you reversed course almost entirely. How did you get it so wrong? How can we have confidence in your continued work if after three years of a comprehensive review you get it so completely wrong?”<sup>42</sup>

“[W]hen will we see the tabling of these terms [relating to MVNO]? If we’re talking about months, then let me stress the urgency, because everyone should have access to the Internet. Acting on these terms and conditions will allow people to negotiate with each other and establish connections in the regions. This is very important, and I urge you to act quickly.”<sup>43</sup>

42. The CRTC’s delays were also recently addressed in House of Commons debate by MP Kevin Waugh, citing both the CRTC’s delay in issuing a CBC broadcasting license renewal decision and in issuing a decision relating to the three-digit mental health crisis line:

“It has been 17 months, and we have heard nothing. That is the CRTC’s responsibility today: local licensing. We have heard nothing from chairman Ian Scott on CBC, saying, “We are busy. We are going through it.” [...] “I do not have to tell everyone in the House, all 338 of us, that we desperately want a three-digit

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<sup>38</sup> Standing Committee on Industry, Science and Technology, [Affordability And Accessibility of Telecommunications Services In Canada: Encouraging Competition To \(Finally\) Bridge The Digital Divide](#), June 2021, 43rd Parliament, 2nd Session.

<sup>39</sup> Letter from Competitive Network Operators of Canada, *A path forward: resolving the Commission’s backlog, and your ongoing participation in decision-making (Commission files 1011-NOC2020-0187, 1011-NOC2020-0131, 8622-C347-202100080, 8661-S83-202003193)*, 18 March 2022.

<sup>40</sup> TekSavvy Solutions Inc., Part 1 Application, CRTC File No. 8657-T117-202201888, *Application Seeking Updates to the Approval Processes for Competitor Tariff Filings*, 3 May 2022.

<sup>41</sup> Standing Committee on Industry and Technology, 44<sup>th</sup> Parl, 1<sup>st</sup> Sess, No 007, February 8, 2022; transcript available online at: [www.ourcommons.ca/DocumentViewer/en/44-1/INDU/meeting-7/evidence](http://www.ourcommons.ca/DocumentViewer/en/44-1/INDU/meeting-7/evidence) [“INDU Meeting 8 February 2022 Transcript”].

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

suicide line. As of the month of June the request is a year old. We still have not got it. Why? It is because of the CRTC.”<sup>44</sup>

g. There is a public crisis of confidence in the CRTC

43. Finally, the foregoing must be contextualized by the very real public crisis of confidence in the integrity of the CRTC. The CRTC’s chair and CEO has attracted significant media attention for his practices regarding *ex parte* meetings with incumbents, as well as his comments regarding his “personal preference” for facilities-based competitors. As reported on June 12, 2021, by the Toronto Star, in one such meeting, Ian Scott met privately with the chief executive of Bell, Mirko Bibic, on December 19, 2019 (“December Meeting”).<sup>45</sup> The December Meeting was photographed by an eyewitness; the photograph shows it took place at a bar.<sup>46</sup> Two beers are visible on the table. This private meeting took place approximately one week after Bell filed an application to the CRTC asking it to review and vary its decision regarding wholesale rates (which the CRTC later approved). On February 1, 2022, Mr. Scott told media that no rule was broken, and that the December Meeting was simply a beer with a friend.<sup>47</sup>
44. The December Meeting has garnered much public attention. Following the article reporting on Mr. Scott’s explanation, he was questioned before the House of Commons Standing Committee on Industry and Technology (“INDU”) on February 8, 2022. The questioning of Mr. Scott in the INDU meeting was reported by numerous media outlets.<sup>48</sup> In that questioning, Mr. Scott again insisted that he did nothing wrong by meeting with Mr. Bibic. He stated that the approach he takes with respect to meetings is grounded in well-established rules and he “meet[s] with everyone pursuant to the rules.”<sup>49</sup> He went on to state that whether he has meetings with Bell, Shaw or Rogers, the same process is followed in all cases.<sup>50</sup>
45. Mr. Scott did not clarify which rules he was referring to, or how the December Meeting could have followed these rules; there are no public-facing rules about *ex parte* meetings,

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<sup>44</sup> House of Commons Debates, Hansard Report, 44<sup>th</sup> Parl, 1<sup>st</sup> Sess, No 087, Vol 151, June 13, 2022; transcript available online at: [www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-87/hansard](http://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-87/hansard).

<sup>45</sup> Christine Dobby, “[Is the CRTC getting too cosy with big telecom? Star analysis finds major telecoms met with government and CRTC officials hundreds of times prior to reversal on wholesale internet rates](#)”, Toronto Star, June 12, 2021. Mr. Bibic was announced as Bell’s CEO and President on January 6, 2020. At the time of the December Meeting, Mr. Bibic was its Chief Operating Officer.

<sup>46</sup> Michael Lee-Murphy, “[Scott defends CRTC decisions, and himself, at Industry committee](#)”, *The Wire Report*, February 2, 2022.

<sup>47</sup> Tony Wong, “[‘No rule was ever broken:’ CRTC chair Ian Scott says meeting with Bell executive was a drink with a friend](#)”, Toronto Star, February 2, 2022.

<sup>48</sup> See for example *The Wire Report* and Toronto Star articles, *supra* notes and ; see also Anja Karadeglija, “[CRTC chairman Ian Scott defends meeting with Bell CEO at pub](#)”, National Post, February 9, 2022 and Jeff Labine, “[CRTC chair defends objectivity after meeting Bell executive](#)”, iPolitics, February 8, 2022.

<sup>49</sup> INDU Meeting 8 February 2022 Transcript, *supra* note .

<sup>50</sup> *Ibid.*

although court decisions have referred to internal CRTC guidelines and rules.<sup>51</sup> The court decisions indicate that the CRTC has internal written guidelines setting out basic requirements and guidance for managing meetings with stakeholders; these rules include that:

- i. “if a meeting was held there should be a clear record generated of what was discussed and meetings should be held in a business setting, meaning boardrooms not restaurants, and to the extent possible should not be held alone”;<sup>52</sup>
- ii. Commissioners should “always check with Senior General Counsel and the relevant Executive Directors to determine whether accepting the meeting invitation creates a real or perceived conflict and how or if the risk can be mitigated”;<sup>53</sup>
- iii. Commissioners should “ask staff to conduct internal research for any files that involve or may involve the requestor”;<sup>54</sup>
- iv. Commissioners should “ask if other Commissioners have received the same meeting request”;<sup>55</sup> and
- v. Commissioners should “invite a CRTC employee to be present at the meeting”.<sup>56</sup>

46. Based on access to information requests TekSavvy has made, as well as the photograph itself, there is no clear record or notes of what was discussed at Mr. Scott’s *ex parte* meeting, no staff research was conducted prior to the meeting, no other CRTC employees were invited to the meeting and no advice from the CRTC senior general counsel or executive directors appears to have been sought. The meeting was also not held in a business setting. Therefore, none of the rules that are even somewhat available to the public for scrutiny appear to have been followed.

47. Mr. Scott’s appearance of bias is one of the grounds of appeal for which leave has been granted by the Federal Court of Appeal.<sup>57</sup> His appearance of bias was also the subject of a request for his recusal from an industry association.<sup>58</sup> Mr. Scott’s conduct will also be the

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<sup>51</sup> *Shoan v. Canada (Attorney General)*, 2017 FC 426 [“Shoan 2017”] and *Shoan v. Canada (Attorney General)*, 2018 FC 476 [“Shoan 2018”].

<sup>52</sup> Shoan 2017, *supra* note at para 145.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *TekSavvy Solutions Inc. v. Bell Canada et. al*, File No. 21-A-15, Order of Justice Webb dated September 15, 2021.

<sup>58</sup> Christine Dobby, “[CRTC chair faces call to recuse himself amid renewed questions about bias](#)”, Toronto Star, February 3, 2022.

subject of a report to the Prime Minister by the Conflicts of Interest and Ethics Commissioner.<sup>59</sup>

#### **D. SPECIFIC MODIFICATIONS TO THE PROPOSED ORDER ARE NEEDED**

48. Given the failing wholesale regime the CRTC has created, specific modifications to the Proposed Direction are needed to ensure the government's stated goals will reasonably be met. Taking these specific actions would be a clear win for consumers, who are in dire need of improved affordability during Canada's current cost-of-living crisis.
- a. Direct the CRTC to reduce existing wholesale rates and provide interim relief on rates in the meantime
49. The RIAS and the Minister acknowledge that wholesale rates need improving and are currently resulting in both increased prices and reduced wholesale-based competition.<sup>60</sup> The urgent need to fix this situation must be more clearly reflected in the Proposed Direction and the CRTC must be provided with clear directions to solve this situation.
50. Wholesale rates are the linchpin to a functioning wholesale regime: where incumbents can price at retail below wholesale rates (proving that wholesale rates are artificially inflated above the incumbents' true costs), wholesale competition cannot constrain the incumbents' pricing. This undermines the entire purpose of the wholesale regime as a means of constraining the incumbents' market power.
51. Considering the last aggregated wholesale rates process took more than seven years in total, including one and a half years spent on a review and vary process to merely revert to interim rates from 2016, leaving the timeline to the CRTC's discretion offers no significant relief for competitors and therefore consumers.
52. Moreover, despite the fact that prices are increasing across all baskets in Canada and that wholesale-based competitors are losing their already small combined market share, the CRTC has previously stated that it is "convinced of the validity of [its] approach" and that its current approach to wholesale is "helping to lay the foundation for the continued growth of smaller service providers and new entrants into the market."<sup>61</sup> Without specific guidance on the exigent need for relief, and what that relief should look like, the CRTC may simply continue to view its current approach as compliant with the Proposed Direction's goals.
53. Hence, it is imperative that the Proposed Direction direct the CRTC to immediately open a consultation to revise wholesale rates and to conclude that process within a defined period of time, such as one year. We note for example that the 2006 Policy Direction specifically directed the CRTC to complete a review of its regulatory framework regarding mandated

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<sup>59</sup> James Gaughan, "[Conflict of interest and ethics commissioner will hear TekSavvy's complaint against CRTC chair](#)", The Lawyer's Daily, LexisNexis Canada, May 6, 2022.

<sup>60</sup> RIAS, *supra* note .

<sup>61</sup> Canadian Radio-television and Telecommunications Commission, "[Ian Scott to the Canadian Telecom Summit](#)", November 15, 2021.

access to wholesale services; this Proposed Direction should similarly be explicit on this point.<sup>62</sup>

54. Pending the outcome of such a review, the Proposed Direction should also direct the CRTC to provide interim relief on aggregated wholesale rates within a specified period of time, such as within one month of the Final Direction, on a retail-minus basis. Considering the exigent need for interim relief and that the RIAS specifically recognizes that the incumbents engage in predatory pricing, to ensure the interim relief is both effective and timely, the CRTC should be directed to set interim rates on a retail-minus basis.

55. Retail-minus as a tool for temporary relief is not novel; the Commission has applied this concept on several occasions:

- In Telecom Decision CRTC 99-11<sup>63</sup>, the Commission required cable carriers (with the exception of Eastlink) to make available to competitors their high-speed retail internet service for resale within 90 days of the decision at a 25% discount from the lowest retail internet service rate charged by the carrier, until they provided TPIA service pursuant to an approved tariff.
- More recently, in Telecom Decision CRTC 2016-67<sup>64</sup>, the Commission applied this very same approach to Eastlink in anticipation of Eastlink's deployment of TPIA service pursuant to an approved tariff. The Commission directed Eastlink to apply a 25% discount to the lowest retail internet service rate charged to a cable customer in a month in the applicable serving area.

56. Linking wholesale rates to the lowest retail rates charged by an incumbent on a temporary basis directly prevents the incumbents from engaging in predatory pricing. Since it would only be on an interim basis (subject to retroactivity pending the CRTC's determination of final rates), and in response to the demonstrated, exigent need for this type of relief, such a direction would not interfere with the CRTC's overall jurisdiction to set wholesale rates. Once the CRTC concluded its review of wholesale rates based on guidance from the issued Direction, the CRTC's chosen method of setting just and reasonable rates would take over.

b. Direct the CRTC to enforce speed-matching rules, including over FTTP, within one month of the Final Direction

57. As detailed above, the CRTC's own restrictions and inflated rates effectively deprive competitors of regulated access to essential FTTP facilities.<sup>65</sup> This means that for seven years and counting (during which the last direction to the CRTC was issued), incumbents

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<sup>62</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355 at para 1(c)(ii).

<sup>63</sup> *Application concerning access by Internet service providers to incumbent cable carriers' telecommunications facilities*, [Telecom Decision CRTC 99-11](#), 14 September 1999.

<sup>64</sup> *The Canadian Network Operators Consortium Inc. – Application for relief regarding the pricing and availability of Eastlink's higher-speed retail Internet service for resale*, [Telecom Decision CRTC 2016-67](#), 24 February 2016.

<sup>65</sup> The Commission acknowledged this by starting a new proceeding recently to consider less than fully disaggregated configurations for disaggregated HSA services. See TNC 2020-187, *supra* note at paras 11-15.

have had an extended anti-competitive head start to FTTP technology during which time they are insulated from competition; the CRTC has openly acknowledged this is an anti-competitive head start that will lead to a substantial lessening or prevention of competition; yet the CRTC has done nothing to provide any sort of interim, exigent relief to competitors to promote access.

58. Similarly to aggregated rates, the Proposed Direction should also direct the CRTC to provide interim relief on disaggregated wholesale rates within a specified period of time, such as within one month of the Final Direction, on a retail-minus basis. Currently, where interim FTTN access rates for disaggregated HSA services are available, they are generally even higher than the rates for equivalent aggregated HSA services. Not only does this disincentivize the disaggregated regime, but it is arbitrary: there is no justification for charging higher rates for the same services. More reasonable interim rates will be one step towards allowing competitors wholesale access to FTTP, which has been insulated from competition for far too long.
59. To further uphold the speed-matching principle, the CRTC should also be directed to require aggregated access to FTTP, within one month of the final direction, on at least an interim basis while the disaggregated regime can be properly implemented.

c. Additional timelines to minimize regulatory delays

60. As detailed above, the CRTC has a pattern of lengthy decision times. Despite this, the CRTC has in the past suggested its decision times are acceptable: for example, the current CRTC chair has called concerns about the length of the CRTC's decisions "somewhat unfair" and suggested its timelines are appropriate for decisions of this type and are not slower than similar regulators.<sup>66</sup> If it is left to the CRTC to determine whether it is providing timely reviews, the Proposed Direction risks not achieving its goals. What use is regular monitoring and proactive adjustment to existing wholesale regimes, if needed, if the CRTC only does so once many wholesale-based competitors have already shuttered?
61. Moreover, after a seven-year process of attempting to set appropriate rates, the CRTC ultimately abandoned its duty to review the rates and reverted to interim rates set in 2016. Despite acknowledging these rates are not supporting healthy and balanced wholesale competition, the Governor-in-Council did not alter the rates. This begs the question: what would be different in the future if the CRTC simply again did not follow the requirements of the Proposed Direction?

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<sup>66</sup> For example, in testifying to INDU on February 8, 2022, Mr. Scott defended the CRTC's timeliness: "We're not slower than other regulators dealing with similar issues. Some of these issues are complex and take a long time." (INDU Meeting 8 February 2022 Transcript, *supra* note 41.)

As a point of comparison, the Competition Bureau's service standard for reviewing non-complex merger reviews is 15 days; its service standards for complex mergers is 45 days. The Canada Border Services Agency's dumping and subsidy investigations, which involve extensive records of potentially hundreds of exhibits from both importers and exporters, including detailed economic evidence, are frequently concluded within 6 months, as indicated in the CBSA's record of [Dumping and Subsidy Investigations](#).

62. Because of this, specific timelines are required throughout the Proposed Direction to ensure timely decisions and to have defined standards against which to measure the CRTC's compliance with the Direction.
63. For example, section 7 of the Proposed Order directs the CRTC to conduct proceedings and issue decisions in a timely manner. This direction should provide some indication of what period of time is considered "timely". As noted above, the CRTC's own determination of what constitutes timely and efficient decision-making is at odds with the expectations of many parties and in apparent flagrant violation of its statutory obligations, and therefore requires specific direction.
64. Many government departments set service standards for themselves as a guide to assess whether they are working in a timely manner. These service standards also reflect that where fee payments are made by third-party clients to support the department's efforts, there should be some standard against which the department is held accountable. In some cases, where departments do not achieve their service standards, a percentage of the fees paid by a client is remitted. Comparing other government organizations' service standards or typical timelines for similar reviews involving economic evidence would be a useful starting point for assessing the proper expectations for the CRTC's decision timelines.
65. Examples of comparable timelines for government reviews include:
- i. The Competition Bureau's service standard for reviewing non-complex merger reviews is 15 days; its service standards for complex mergers is 45 days.<sup>67</sup>
  - ii. The Canada Border Services Agency's (CBSA) dumping and subsidy investigations, which involve extensive records of often hundreds of exhibits from both importers and exporters, including detailed economic evidence, are frequently concluded within 6 months.<sup>68</sup>
  - iii. Reviews of investments above a certain threshold into Canadian businesses to assess whether they are of net benefit to Canada were concluded on average in 77 days in 2020-21.<sup>69</sup>
  - iv. ISED's service standards for spectrum and telecommunication license applications, certification applications and investigations range from 2 business days to 130 calendar days.<sup>70</sup>
66. Similar specific timeline guidance for different types of proceedings before the CRTC would help guide all parties' expectations and could serve as a benchmark for reporting on whether the CRTC is meeting the Direction's goals or as evidence it requires additional resources.

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<sup>67</sup> See [Competition Bureau Bulletin](#), *Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters*, 23 June 2022.

<sup>68</sup> As indicated in the CBSA's record of [Dumping and subsidy investigations](#).

<sup>69</sup> ISED, [Investment Canada Act, Annual Report](#), 2 February, 2022.

<sup>70</sup> ISED, [Spectrum and Telecommunications Service Standards](#), January 2020.

67. Adding specific timelines would also improve sections such as:

- i. section 9 (to require proactive adjustments of effectiveness of the wholesale framework for fixed internet on at least an annual basis)<sup>71</sup>;
- ii. section 12 (timelines for tariff processes, by reiterating the CRTC's obligation to meet its statutory deadlines)<sup>72</sup>; and
- iii. section 14 (monitor and assess effectiveness of mobile frameworks on at least an annual basis)<sup>73</sup>.

68. In Appendix A, we have proposed incorporating these specific timelines into the Proposed Direction.

d. Require the CRTC to develop and publish an ethics code applicable to Commissioners

69. As described above, the ethics of the CRTC chair have been called into question. His impartiality remains a ground of appeal before the Federal Court of Appeal; an industry association (Competitive Network Operators of Canada) applied to the CRTC requesting his recusal from certain files, and his behaviour has been questioned in the media and by members of parliament of all major political parties. The Conflicts of Interest and Ethics Commissioner will be producing a report to the Prime Minister concerning his conduct. A previous CRTC commissioner was fired in part for engaging in similar conduct with respect to *ex parte* meetings, and court documents have documented that the CRTC has internal-facing guidance and rules for *ex parte* meetings. Mr. Scott has stated that he complied with all rules. Based on these court decisions, therefore, it is apparent that some ethics rules or guidance exist internally; however, they are not published and therefore not open to full scrutiny by the public.

70. Regardless of the outcome of inquiries into Mr. Scott's conduct, this amount of public commentary on the impartiality of the CRTC's chair is detrimental to the integrity of the institution. To address this issue, the government should direct the CRTC to publish a set of standards of conduct to which CRTC commissioners must adhere. This would provide the public and stakeholders who may be engaging with the CRTC with a concrete set of expectations of Commissioners, removing some of the obscurity of the "internal guidance" that commissioners should follow. The public could assess for themselves whether a commissioner was indeed compliant with CRTC rules rather than being expected to trust the Commissioner's own opinion on his or her behaviour. How can the public trust that government institutions are following ethics rules if they are not privy to those rules?

71. A clear set of ethics rules would improve the CRTC's accountability, increasing the public's trust in the institution and by extension, the government.

e. Direct the CRTC to examine the feasibility of structural separation

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<sup>71</sup> Note that this section is now section 10 in Appendix A.

<sup>72</sup> Note that this section is now section 14 in Appendix A.

<sup>73</sup> Note that this section is now section 16 in Appendix A.

72. Finally, while we agree with many of the goals of the Proposed Direction, these same goals could be better achieved by structural separation. We submit that the policy direction should direct the CRTC to examine the feasibility of implementing structural separation between companies that build and maintain telecommunications infrastructure, and those that provide telecommunications services. In fact, examining the feasibility of implementing structural separation is the recommended policy by the INDU committee.<sup>74</sup>
73. If companies that built infrastructure did not have an ability to provide themselves with preferential treatment as detailed above, including with respect to access rates, delayed access to speeds for wholesale competitors, delayed or unfair conditions for access to facilities, the system would function better and achieve its intended competitive outcomes as all competitors would be on an even playing field. The objectives of all competitors at retail would align and there would be far fewer lengthy regulatory decisions with drawn out appeals. The strain on the CRTC's resources would be reduced, leading to reduced regulatory delays and ensuing uncertainty.
74. Further, incumbents could not use sustained predatory pricing techniques to the same advantage. In addition to fair wholesale rates providing competitors with the ability to set affordable prices, incumbents could not use their structural advantages to sustain higher prices. Removing incumbent structural advantages would mean that customers would have better access to technologies such as FTTP from a variety of providers, instead of typically being limited to a single FTTP provider (if any at all) at their home.
75. Finally, if all retail competitors competed on an even 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 have the ability to choose better service. In the current environment, many customers do not have this option as wholesale rates prevent service-based competitors from charging competitive prices in many cases, and inflated rates combined with procedural delays have resulted in an effective FTTP monopoly. Customers therefore may not have the ability in many cases to find a provider that is both very competitive on price as well as offers quality and fair service, without the use of misleading tactics: they must compromise one or the other.
76. Many consumer protection issues in Canada's telecommunications markets are a symptom of the incumbents' market power. If the CRTC fostered more competitive markets, whether through structural separation or at the very least, implementing fair and just wholesale access rates, consumers would have the ability to simply switch to a different provider without compromising affordability, service speed or other factors if they were dissatisfied with a current provider's customer service.
77. 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-

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<sup>74</sup> Standing Committee on Industry, Science and Technology, "[Proposed Acquisition of Shaw Communications by Rogers Communications: Better Together?](#)", March 2022, 44th Parliament, 1st Session.

based competitors report higher satisfaction with their provider than those who use incumbent providers.<sup>75</sup>

78. It is because customers currently have so few options available at affordable prices that additional consumer protection measures are necessary. This further underscores that change to the wholesale HSA regime is needed urgently, to ensure that consumers' already limited options are preserved.

## **E. Conclusion**

79. In closing, we reiterate the urgent need for explicit and meaningful relief if there can be any hope of reversing current trends and growing wholesale competition in Canada. The Proposed Direction with the modifications we outline in this submission would make the government's intentions clear, precise and impossible for the CRTC to ignore. Finally, we encourage the government to finalize and issue the Proposed Direction, with the necessary modifications, as quickly as possible.

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<sup>75</sup> Competition Bureau, "[Delivering Choice: A Study of Competition in Canada's Broadband Industry](#)," 8 August 2019, pp 7, 51.