

**BEFORE THE CANADIAN RADIO-TELEVISION
AND TELECOMMUNICATIONS COMMISSION**

IN THE MATTER OF

**AN APPLICATION BY CANADIAN NETWORK OPERATORS CONSORTIUM INC.
PURSUANT TO SECTIONS 24, 32 AND 47 OF THE *TELECOMMUNICATIONS ACT*
AND PART 1 OF THE *CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION RULES OF PRACTICE AND PROCEDURE***

**FOR TRANSITIONAL AGGREGATED WHOLESALE HIGH-SPEED ACCESS
SERVICES OVER INCUMBENT FIBRE-TO-THE-PREMISES FACILITIES**

30 MARCH 2017

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EXECUTIVE SUMMARY¹

ES1. Wholesale HSA Service Gaps are occurring throughout Canada, wherever an Incumbent has deployed FTTP access facilities and there are no other wireline access facilities available from that Incumbent capable of providing high-speed Internet services. As a consequence, there are no wholesale HSA services available from that Incumbent over which Competitors are able to offer retail high-speed Internet services in these Wholesale HSA Service Gap. This situation is a result of the lengthy and still ongoing process to implement the Commission's decision in TRP 2015-326 to link mandated wholesale access to FTTP access facilities with the future deployment of disaggregated wholesale HSA services.

ES2. The experience of CNOC members has shown that Wholesale HSA Service Gaps are becoming increasingly large and prevalent. These service gaps generally develop under three sets of conditions that have progressed significantly since the issuance of TRP 2015-326:

- 1) Greenfield FTTP deployments by an Incumbent where that Incumbent has only deployed FTTP access facilities over which wholesale HSA services cannot be provided;
- 2) Brownfield FTTP deployments by an Incumbent where the only wireline facilities available from that Incumbent to provide wholesale HSA services are legacy wireline facilities; and
- 3) Brownfield FTTP deployments by an Incumbent where that Incumbent has removed all of its previously existing wireline facilities over which wholesale HSA services could be provided.

ES3. Wherever Wholesale HSA Service Gaps exist, Competitors are foreclosed from offering competitive retail high-speed Internet services and Incumbents enjoy significant market power flowing from what are essentially localized monopolies over their high-speed access facilities and corresponding ability to offer retail high-speed Internet services over those facilities. The economic harms flowing from Wholesale HSA Service Gaps can last for years. Furthermore, the

¹ Note: Capitalized terms in the Executive Summary not defined therein are defined in the body of the Intervention.

situation prevents Competitors from achieving demand conditions that are necessary to justify investment in transport facilities and a transition to disaggregated services.

ES4. Consumers located in Wholesale HSA Service Gaps are deprived from the competitive benefits flowing from wholesale service regulation and therefore suffer the greatest harm. Notably, Wholesale HSA Service Gaps affect both Canadian consumers and businesses as they impact single family dwellings, multi-dwelling units, as well as commercial and office buildings. In addition, Wholesale HSA Service Gaps permeate Canadian residential and business communities in both urban and suburban areas alike. For example, there are massive Brownfield FTTP deployments throughout the Province of Ontario, Quebec, British Columbia, and Alberta as well as Atlantic Canada and elsewhere in the country. Additionally, Greenfield deployments occur on a constant basis from coast to coast. Data from the Commission's Communications Monitoring Reports also suggests that FTTP access facilities are being deployed in the absence of overlapping FTTN access facilities.

ES5. Wholesale HSA Service Gaps run contrary to the Commission's intentions with respect to the Commission's TRP 2015-326 transition plan, which explicitly states: "**This transition plan will serve to ensure that wholesale access to the access facilities required to provision downstream retail services is always provided for.**"

ES6. In order to eliminate Wholesale HSA Service Gaps and ensure that the transition to disaggregated wholesale HSA services unfolds in accordance with the Commission's intentions, CNOC is requesting relief consisting of Transitional FTTP Access on an aggregated basis, as more fully described in the body of the Application and summarized at paragraph 12.

ES7. There is a wealth of regulatory precedents for transitional wholesale access of the kind requested by CNOC. Transitional FTTP Access fits squarely within the mold that the Commission has applied as recently as November 2016, in TD 2016-446, which granted transitional access to RCCI's aggregated wholesale HSA services over FTTP access facilities. Other examples, include: (1) the transitional wholesale cable resale that the Commission has consistently implemented, including as recently as last year, pending the rollout of TPIA by a Cable Carrier; and (2) the transitional FTTN-based wholesale HSA services regime implemented by the Commission in 2011 pending a determination on the final rates, terms and conditions relating to such services that was issued later that year.

ES8. Overall, the case for Transitional FTTP Access is simple and straightforward. This relief is critical to ensure that the Commission's transition plan to disaggregated wholesale HSA services unfolds as intended. To this end, Transitional FTTP Access will categorically eliminate existing and future Wholesale HSA Service Gaps, thereby ensuring that wholesale access is always provided for.

ES9. Approval of Transitional FTTP Access is necessary at this time as disaggregated wholesale HSA services are far from being implemented. The process for implementing these services outside of Ontario and Quebec has not even begun. Furthermore, TRP 2015-326 follow-up proceedings to configure and cost disaggregated wholesale HSA services have been repeatedly delayed by failures by Incumbents to abide by Commission disclosure and information rules and guidelines. Considering the Commission's admonishing of the Incumbents in TO 2016-396 on similar grounds, CNOc submits that this consistent behavior suggests a pattern of conduct by Incumbents characterized by wilful disregard of the Commission's rules and past determinations.

ES10. Even once final rates are set, competitors may struggle to secure demand conditions in Wholesale HSA Service Gaps to justify a transition to disaggregated wholesale HSA services over FTTP facilities once they become available.

ES11. The relief sought by CNOc essentially seeks the application of the Commission's determinations in TD 2016-446 more broadly as a general rule that applies to all Wholesale HSA Service Gaps.

ES12. There are at least five reasons why a general rule is more appropriate than dealing with specific Wholesale Service Gaps via narrow *ad-hoc* Part 1 applications: (1) Competitors simply do not have the resources to prepare Part 1 applications to address these situations on an *ad-hoc* basis; (2) in contrast with a general rule that eliminates all existing and future service gaps, *ad-hoc* Part 1 applications involve a lengthy process which delays relief for the applicant; (3) retroactive relief via *ad-hoc* Part 1 applications is incapable of preventing competitive harms before they happen; (4) new *ad-hoc* Part 1 applications will be required every time a new Wholesale HSA Service Gap develops; and (5) *ad-hoc* Part 1 applications will needlessly consume limited industry and Commission regulatory resources.

ES13. As a feature of Transitional FTTP Access, CNOC requests access to all service speeds up to the highest speed offered on a wholesale basis by an Incumbent. This aspect of Transitional FTTP Access is critical given that Competitors have been precluded from competing at any retail service speed, much less speeds in excess of 100 Mbps, which is the speed threshold for aggregated wholesale HSA services established in TRP 2015-326. Given that TRP 2015-326 also grandfathered speeds in excess of 100 Mbps, CNOC submits that Transitional FTTP Access should provide for an extension of speed matching principles to offset the repressed state of competition wherever Wholesale HSA Service Gaps exist.

ES14. Transitional FTTP Access is urgently needed on an expedited basis. Expedited relief is critical to mitigating competitive harms resulting from existing Wholesale HSA Service Gaps and preventing further harms from future service gaps. If relief on an expedited basis is denied, irreparable harms to Competitors, competition and consumers would result even if Transitional FTTP Access is ultimately granted at the conclusion of a conventional non-expedited Part 1 proceeding.

ES15. Wholesale HSA Service Gaps allow Incumbents, without any meaningful competitive effort, to acquire and lock-in customers for years via fixed term service agreements that include early termination fees. It is therefore critical to prevent these wholesale service gaps, and resulting long-term harm to competition, from manifesting.

ES16. Expedited relief is critical to allow Competitors to begin developing a presence where Wholesale HSA Service Gaps exist. Expedited Transitional FTTP Access will allow Competitors to mitigate competitive harms incurred thus far, with a view to building a critical mass of demand that can justify infrastructure investment to support disaggregated wholesale HSA services in the future.

ES17. Expedited relief is also necessary to counteract the strong incentive for Incumbents to delay the follow-up costing proceedings to TRP 2016-379 via non-compliance with Commission disclosure rules and guidelines. Such delays push back the availability of disaggregated wholesale HSA services thereby creating additional Wholesale HSA Service Gaps that can be exploited by the Incumbents.

ES18. In order to facilitate expedited relief, CNOC requests an abbreviated period of fifteen (15) days for answers to the Application from Incumbents and interventions from other interested parties. CNOC would then have seven (7) days to reply. This abbreviated period for submissions strikes an appropriate balance between ensuring that parties have an adequate opportunity to provide meaningful comments with regards to the Application on one hand and on the other hand, appropriately accelerating this proceeding in light of the urgent nature of the relief that is being requested.

ES19. The relief requested in the Application is consistent with Subsections 7(a), (b), (c), (e), (f) and (h) of the *Act* and is also aligned with Subparagraphs 1(a)(ii), 1(b)(iv) and 1(c)(ii) of the Policy Direction. Transitional FTTP Access also furthers the specific policy objectives set out at paragraph 14 of TRP 2015-326.

1.0 INTRODUCTION AND NATURE OF ORDER SOUGHT

1.1 Introduction

1. Canadian Network Operators Consortium Inc. (“CNO”) is submitting this application (“Application”) pursuant to Part 1 of the *Canadian Radio-Television and Telecommunications Commission Rules of Practice and Procedure*² (“Rules”) and sections 24, 32 and 47 of the *Telecommunications Act*³ (“Act”).

2. In the Application, CNO seeks expedited relief that is necessary to address a situation that is creating wholesale high-speed access (“HSA”) service coverage gaps⁴ (“Wholesale HSA Service Gaps”) throughout the country. Wholesale HSA Service Gaps exist wherever an ILEC⁵ or Cable Carrier⁶ (individually, each an “Incumbent”⁷; collectively, “Incumbents”) has deployed fibre-to-the-premises (“FTTP”) access facilities and where no other wireline access facilities available from that Incumbent are capable of providing high-speed Internet services.⁸ As a consequence, wholesale HSA services are not available from that Incumbent over which competitive Internet service providers (individually, “Competitor”⁹; collectively, “Competitors”) can offer retail high-speed Internet services.

3. Wholesale HSA Service Gaps have emerged as a result of a combination of: (1) changing market circumstances; and (2) the lengthy and still ongoing process to implement the

² SOR/2010-277, 17 June 2015.

³ S.C. 1993, c. 38, as amended.

⁴ A Wholesale HSA Service Gap exists where an Incumbent has deployed only FTTP access facilities over which wholesale HSA services are not available or where an Incumbent has deployed FTTP but where the only other wireline facilities available from that Incumbent over which wholesale HSA services are available are legacy wireline facilities that can support Internet services speeds of 6-7 Mbps at most.

⁵ I.e., Bell Aliant, Bell Canada, MTS Inc. (“MTS”), Saskatchewan Telecommunications (“SaskTel”), and TELUS Communications Company (“TCC”).

⁶ Bragg Communications Incorporated, operating as Eastlink (“Eastlink”), Cogeco Cable Inc. (“Cogeco”), Quebecor Media Inc., on behalf of its affiliate Videotron G.P. (“Videotron”), Rogers Communications Canada Inc. (“RCCI”) and Shaw Cablesystems G.P. (“Shaw”) (these carriers are hereinafter called “Cable Carriers”).

⁷ Note: In this Application, CNO also sometimes applies the meaning of “Incumbent” as an adjective.

⁸ CNO defines high-speed Internet services as Internet services provided over mixed fibre and copper facilities (i.e. FTTH) and fibre-only facilities (i.e. FTTP). Internet services available over legacy wireline access services, which reach 6-7 Mbps at most, do not satisfy the definition of high-speed Internet services. This is consistent with the Commission’s determinations at paragraph 241 of *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015 (“TRP 2015-326”) that makes clear that wholesale legacy services, including low-speed DSL services that are not provided over FTTH or FTTP facilities, are distinct from wholesale high-speed access services.

⁹ Note: The Application also sometimes applies the term “Competitor” as an adjective (e.g. “Competitor access”).

Commission’s plan to transition from aggregated wholesale HSA services to a disaggregated model for wholesale HSA services, which will allow Competitors to access FTTP access facilities, as set out in Telecom Regulatory Policy CRTC 2015-326¹⁰ (“TRP 2015-326”).

4. Essentially, the Wholesale HSA Service Gap problem is rooted in a central feature of the Commission’s TRP 2015-326 transition plan: the determination that mandated wholesale access to FTTP facilities shall only be available through disaggregated wholesale HSA services – which are not yet available.¹¹

5. As the Commission is aware, the on-going proceedings and related costing exercises to implement disaggregated wholesale HSA services are lengthy and complex.¹² In addition, these proceedings have also been subject to multiple delays – many of which relate to the Incumbents’ failure to abide by Commission information disclosure rules and guidelines.¹³ So while over twenty months have passed since TRP 2015-326 was issued, disaggregated wholesale HSA services have yet to be implemented and CNOC doubts that the final rates and terms and conditions for such services can be approved very quickly at this juncture. Furthermore, as the first phase of disaggregated wholesale HSA service implementation will only occur in Ontario and Quebec,¹⁴ the roll out of the disaggregated model and access to FTTP access facilities in other areas of Canada will occur even later.

6. Meanwhile, Incumbents continue to deploy FTTP access facilities. In areas throughout Canada, FTTP consists of the only wireline facilities¹⁵ over which residential or business customers can obtain high-speed Internet access and related telecommunications services.¹⁶ Wherever this is the case, no wholesale HSA services at regulated cost-based rates are available to Competitors.

¹⁰ Review of wholesale wireline services and associated policies, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015.

¹¹ *Id.*, at para 153.

¹² *Follow-up to Telecom Regulatory Policy 2015-326 – Implementation of a disaggregated wholesale high-speed access service, including over fibre-to-the premises access facilities*, Telecom Regulatory Policy CRTC 2015-379, 20 September 2016.

¹³ *Ibid.*

¹⁴ TRP 2015-326, at para 152.

¹⁵ In other words, fibre-to-the-node (“FTTN”) facilities are not also available.

¹⁶ As noted at para 117 of TRP 2015-326, wholesale HSA services can be used to offer a variety of retail services including local phone, television, and Internet access services.

7. Wholesale HSA Service Gaps also exist in areas of Canada where FTTP access facilities are the only wireline facilities deployed by an ILEC (to which no wholesale obligations apply) and non-FTTP high-speed Internet services are available from the Cable Carrier (to which wholesale obligations apply), or vice versa. Competitors in these situations are often faced with prohibitively high costs of switching wholesale service platforms that prevent them from being able to provide service to customers that represent important business opportunities.

8. In all of the above circumstances, Incumbents enjoy significant market power flowing from what are essentially localized monopolies over their high-speed access facilities and corresponding ability to offer retail high-speed Internet services over those facilities (“monopolistic market conditions”), as Competitors are foreclosed from these key retail markets. In essence, the following expectation set out by the Commission in TRP 2015-326 is being realized at a very rapid pace:

“As FTTP deployment increases, however, the potential impact on competition will increase as more and more consumers desiring higher-speed Internet services would have fewer competitor alternatives to choose from.”¹⁷

9. Since TRP 2015-326 was issued, the market for retail Internet services has been in a constant state of flux driven by end-user demand for increasingly higher-speeds in excess of 100 Mbps that are necessary to power a full suite of next generation applications including, for example, 4k video streaming. Wholesale service gaps affecting FTTP access facilities are therefore damaging to Competitors who experience strong demand for retail service speeds in excess of 100 Mbps but are foreclosed from competition for such services.

10. However, the harm is not limited only to consumers seeking Internet services at increasingly high-speeds in excess of 100 Mbps. Indeed, wholesale service gaps also prohibit consumers seeking high-speed Internet service at any speeds greater than 6-7 Mbps that are currently supported by fibre-to-the-node (“FTTN”) technologies¹⁸ from enjoying competitive choice of Internet service providers. In these cases, consumers are limited to selecting Internet service speeds of 6-7 Mbps from Competitors or higher speed Internet services from the Incumbent.

¹⁷ TRP 2015-326, at para 128.

¹⁸ FTTN facilities exist both on ILEC and Cable Carrier (DOCSIS) platforms.

11. The wholesale service gaps that now exist and continue to develop run contrary to the Commission’s intentions with respect to the TRP 2015-326 transition plan, which explicitly states: “This transition plan will serve **to ensure that wholesale access to the access facilities required to provision downstream retail services is always provided for**.”¹⁹ (Emphasis added)

12. Fortunately, there is a straightforward and efficient solution to ensure that wholesale access to access facilities is always provided for. To this end, CNOC is requesting relief consisting of transitional access to wholesale high-speed access services over FTTP access facilities²⁰ on an aggregated basis for all speeds up to the highest speed offered on a wholesale basis by an Incumbent including speeds in excess of 100 Mbps (hereinafter called “Transitional FTTP Access”) in the operating territory in which such access is sought on the following terms:

- **Scope of the Transitional FTTP Access:** CNOC requests Transitional FTTP Access throughout Canada, wherever an Incumbent offers FTTP retail high-speed Internet access services but does not offer any wholesale HSA Services to Competitors at speeds currently supported by FTTN technologies (since this condition represents a Wholesale HSA Service Gap);²¹
- **Incumbent providers of Transitional FTTP Access:** The obligation to provide Transitional FTTP Access should apply equally to the ILECs and Cable Carriers that were directed to continue to provide mandated wholesale HSA services in TRP 2015-326;
- **Transitional nature of the relief:** Transitional FTTP Access is necessary in the circumstances described above until: (i) wholesale disaggregated HSA service is made available in an ILEC central office or cable head-end that is capable of serving a

¹⁹ TRP 2015-326, at para 143.

²⁰ For additional certainty, fibre facilities include passive optical network (“PON”) facilities and radio frequency over glass (“RFOG”) facilities.

²¹ For clarity, CNOC is requesting Transitional Access to the FTTP facilities of any Incumbent (i.e., ILEC or Cable Carrier) that offers FTTP retail high-speed Internet access but does not offer any wholesale HSA Services to Competitors at speeds currently supported by FTTN technologies even where wholesale HSA Services from an Incumbent (i.e., Cable Carrier or ILEC) using an alternate platform may be available. This dimension of Transitional FTTP Access is critical given that Competitors often have no choice but to commit to one wholesale HSA service platform or the other. Once committed, the Competitor is bound by prohibitive switching costs which constitute a daunting barrier to competition in areas that may be served by another wholesale HSA service platform.

Wholesale HSA Service Gap; and (ii) a three-year phase out period has elapsed, consistent with the determinations in TRP 2015-326;²²

- **Rates applicable to Transitional FTTP Access:** Transitional FTTP Access should be subject to the rates applicable to equivalent service speeds available over FTTN facilities.

13. As will be demonstrated throughout this submission, there is a wealth of Commission precedents for the kind of transitional wholesale access that Transitional FTTP Access represents.

14. Eliminating Wholesale HSA Service Gaps is an essential step towards achieving the objectives underpinning TRP 2015-326²³, including: “enhancing the effectiveness of the wholesale service regime to facilitate vibrant and sustainable retail competition that provides Canadians with reasonable prices and innovative services of high quality that are responsive to their evolving social and economic requirements.”²⁴

15. Urgent time sensitivity surrounds the relief requested in the Application. In fact, expediting the relief requested in the Application is virtually as important as the relief itself. Expedited relief will prevent additional Wholesale HSA Service Gaps and associated long term market distortions from occurring. Expedited relief is also critical for providing Competitors with an opportunity to mitigate the economic harms created by existing Wholesale HSA Service Gaps. For instance, Transitional FTTP Access on an expedited basis will allow Competitors to immediately attempt to attract customers that, in turn, will create demand to justify investment in transport facilities necessary to support disaggregated wholesale HSA services.

16. In order to facilitate expedited relief, CNOC requests an abbreviated period of fifteen (15) days for answers to the Application from Incumbents and interventions from other interested parties. CNOC would then have seven (7) days to reply. This abbreviated period for submissions strikes an appropriate balance between ensuring that parties have an adequate opportunity to provide meaningful comments with regards to the Application on one hand and on the other hand,

²² TRP 2015-326, at para 155.

²³ *Id.*, at para 14.

²⁴ *Ibid.*

appropriately accelerating this proceeding in light of the urgent nature of the relief that is being requested.

17. The next section of this submission provides an overview of the structure of the Application.

1.2 Structure of the Application

18. The structure of the balance of this Application is described in this Section 1.2.

19. Part 2.0 of this submission provides a comprehensive overview of the regulatory *status quo* as it relates to wholesale HSA services in Canada. This statement of facts and accompanying analysis provide the contextual background for Transitional FTTP Access. This part of the Application also identifies key precedents for the relief requested by CNOC.

20. Part 3.0 then goes on to describe the circumstances that give rise to Wholesale HSA Service Gaps throughout the country and how those conditions have progressed since TRP 2015-326.

21. Part 4.0 makes the case for relief consisting of Transitional FTTP Access based on past Commission determinations and the prevailing market conditions.

22. Part 5.0 explains why Transitional FTTP Access is urgently needed on an expedited basis.

23. Part 6.0 then demonstrates why the relief requested in the Application is consistent with the telecommunications policy objectives set out in section 7 of the *Act* as well as the Policy Direction²⁵.

24. Part 7.0 sets out CNOC's conclusions.

2.0 WHOLESALE HSA REGULATORY STATUS QUO AND KEY PRECEDENTS FOR TRANSITIONAL FTTP ACCESS

25. Although the introduction to the Application provides a brief overview of the regulatory context justifying CNOC's request for relief, a more fulsome review of the regulatory *status quo* is warranted. The foregoing sections explain how Wholesale HSA Service Gaps have developed.

²⁵ Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, P.C. 2006-1534, 14 December 2006, SOR/2006-355, Canada Gazette Part II, Vol. 140. No. 26, 27 December 2006 ("Policy Direction").

CNOC also underscores notable Commission precedents where transitional wholesale access was granted to prevent wholesale service coverage gaps leading up to the final implementation of core regulatory policies and approval of related wholesale rates, as well as terms and conditions.

2.1 Telecom Regulatory Policy CRTC 2015-326

26. As aforementioned, the current wireline wholesale services framework was established in TRP 2015-326. The core features of the framework are as follows:

- Disaggregated wholesale HSA services, including over FTTP access facilities, are now mandated for the Incumbents;²⁶
- Competitors desiring access to customers served by FTTP access facilities will only be able to do so by using disaggregated wholesale HSA service;²⁷
- Disaggregated wholesale HSA services will be implemented in phases, starting with Ontario and Quebec;²⁸
- Aggregated wholesale HSA over FTTP access facilities will not be mandated for the Incumbents;²⁹
- Aggregated wholesale HSA services will be phased out for each Incumbent as of three-years from the date that disaggregated wholesale HSA service is provided at a given central office or head-end;³⁰
- After the phase-out period has ended, the Incumbent will have a choice to continue offering aggregated wholesale HSA services at tariffed rates, withdraw service or provide the service on a forbearance basis, following approval of a forbearance application;³¹

²⁶ TRP 2015-326, at para 143.

²⁷ *Id.*, at para 153.

²⁸ *Id.*, at para 152.

²⁹ *Id.*, at para 153.

³⁰ *Id.*, at para 155.

³¹ *Id.*, at para 156.

- A download speed cap of 100 Mbps will apply to service speeds available over aggregated wholesale HSA services, however, existing aggregated wholesale HSA service speeds available at the time of the decision are to be grandfathered by Incumbents;³²

27. In TRP 2015-326, the Commission went on to describe a follow-up implementation proceeding to be initiated within 30 days of the decision and a related tariff process that would apply once the configurations for disaggregated wholesale HSA services are approved by the Commission.³³ As emphasized above, the Commission expressed a clear intent that its transition plan from aggregated to disaggregated wholesale HSA services would ensure that wholesale access to access facilities required to provision downstream retail services is always provided for.³⁴

2.2 The Telecom Decision CRTC 2016-379 process

28. Congruently with the publication of TRP 2015-326, the Commission issued a letter setting out a process for the follow-up proceeding that would ultimately lead to Telecom Decision CRTC 2016-379³⁵ (“TD 2016-379”). The exact details of the disaggregated wholesale HSA configuration approved by the Commission in TD 2016-379 are not germane to the matters at hand. However, the procedural timelines surrounding TD 2016-379 and its follow-up costing proceedings have a notable significance for the Application. CNOC wishes to emphasize the following aspects of the process leading to and following TD 2016-379:

- By way of a letter dated 31 July 2015, Bell, Cogeco, RCCI and Videotron (the “TD 2016-379 Incumbents”) filed a request for a one month extension to file disaggregated service configurations. The Commission granted this request on 13 August 2015.
- On 21 August 2015, the TD 2016-379 Incumbents filed responses to Commission requests for information (“RFIs”).

³² *Id.*, at para 154.

³³ *Id.*, at para 160.

³⁴ *Id.*, at para 143.

³⁵ *Follow-up to Telecom Regulatory Policy 2015-326 – Implementation of a disaggregated wholesale high-speed access service, including over fibre-to-the premises access facilities*, Telecom Decision CRTC 2016-379, 20 September 2016.

- On 27 August 2015, CNOC filed a 12 page letter regarding the responses to the Commission RFIs and requested disclosure of information improperly designated as confidential and additional information that is necessary for interested parties to meaningfully scrutinize the materials filed by the TD 2016-379 Incumbents.
- On 25 September 2015, the TD 2016-379 Incumbents filed proposed disaggregated wholesale HSA configurations.
- On 12 October 2015, CNOC filed a 5 page letter and an accompanying 17 pages of RFIs that were intended to produce information necessary to address critical informational gaps in the proposed wholesale HSA configurations filed by the TD 2016-379 Incumbents. In response to this letter, the Commission issued further RFIs to the TD 2016-379 Incumbents on 6 November 2015.
- On 3 December 2015, the TD 2016-379 Incumbents filed responses to the Commission's RFIs received on 6 November 2015.
- On 11 December 2015, CNOC filed a 6 page letter seeking disclosure of information improperly filed as confidential and additional information relating to the above noted RFI responses. The Commission granted additional disclosure pursuant to these requests on 15 January 2016.
- Following the submission of interventions and replies from TD 2016-379 Incumbents as well as interested parties, the Commission issued TD 2016-379 on 20 September 2016 in which the Commission ordered the TD 2016-379 Incumbents to file tariffs as well as Phase II cost studies for their disaggregated wholesale HSA service configurations that reflect the determinations in the decision.³⁶
- On 30 September 2016, Bell filed a request for an extension for all TD 2016-379 Incumbents amounting to an additional six weeks to file tariffs and Phase II cost studies. On 1 November 2016, the Commission ultimately approved a more reasonably balanced three week extension proposed by CNOC.

³⁶ *Id.*, at para 161.

- Over the course of the tariffing process, CNOC filed: (1) a 21 page letter on 25 January 2017 addressing egregiously deficient tariff notices and supporting cost studies filed by the TD 2016-379 Incumbents and requesting appropriate levels of disclosure and additional information that is necessary so that interested parties could meaningfully scrutinize the Incumbent cost studies; and (2) a request for disclosure and additional information dated 10 February 2017 relating to Bell’s separate Tariff Notice and cost study associated with disaggregated wholesale HSA service meet-me-points.

29. On 9 March 2017, as amended by a subsequent letter on 10 March 2017, the Commission issued a letter explaining that a procedural letter can be expected in the near future to explain the next steps in the disaggregated wholesale HSA evaluation process.

30. The summary provided above is meant to emphasize the extent to which the implementation of disaggregated wholesale HSA services has been delayed. To be clear, CNOC acknowledges that in most cases, the extensions to deadlines requested by the TD 2016-379 Incumbents were either partially or fully justified. The grounds supporting Commission approved extensions are clearly legitimate. Based on its own experience in these follow-up proceedings, CNOC can confirm that the technical design and costing work relating to disaggregated wholesale HSA services is complex and requires dedicated resources. However, the TD 2016-379 process has also been frustrated and delayed by repeated Incumbent failures to abide by the Commission’s disclosure rules and guidelines. These delays simply do not have the same air of legitimacy as approved requests for extensions to filing deadlines.

31. The incidence of blatant Incumbent non-compliance with Commission rules and directives is seemingly increasing. In Telecom Order CRTC 2016-396³⁷ (“TO 2016-396”), the Commission found that most wholesale HSA service providers are choosing to wilfully disregard the Commission staff’s guidance, the Phase II Costing Manual and relevant past Commission determinations.³⁸ To accompany TO 2016-396, the Commission also issued a press release

³⁷ *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, Telecom Order CRTC 2016-396, 6 October 2016.

³⁸ *Id.*, at para 22.

admonishing the conduct of the Incumbents.³⁹ The press release included the following resounding quote from Jean-Pierre Blais, Commission Chairman and CEO:

“Competitors that provide retail Internet services to Canadians using wholesale high-speed services must have access to these services at just and reasonable prices. The fact that these large companies did not respect accepted costing principles and methodologies is very disturbing. What’s even more concerning is the fact that Canadians’ access to a choice of broadband Internet services would have been at stake had we not revised these rates. As always, we strive to create a dynamic competitive telecommunications market for Canadians.”⁴⁰

32. Following TO 2016-396, CNOC is concerned that the Incumbents continue to have strong incentives to wilfully disregard the Commission’s rules and directives in the follow-up process to TD 2016-379.

33. Whether ongoing procedural delays are legitimate or not, they result in increasingly widespread instances of Wholesale HSA Service Gaps. Every delay to the implementation of disaggregated wholesale HSA results in new business for the Incumbents, lost business for Competitors and a missed opportunity to ensure that consumers can enjoy the benefits that flow from competitive choice supported by wholesale HSA services.

2.3 Telecom Decision CRTC 2016-446

34. On 4 December 2015, CNOC member TekSavvy Solutions Inc. (“TekSavvy”) filed a Part 1 application⁴¹ requesting transitional wholesale access to aggregated wholesale HSA service in the Bayview Mills Condominium Townhouse community (the “Bayview Mills complex”). TekSavvy identified a situation whereby RCCI had upgraded its cable distribution network from DOCSIS-hybrid fibre-coaxial (“HFC”), which has long been considered a wholesale HSA service platform, to DOCSIS over Radio Frequency over Glass (“RFOG”). In doing so, RCCI characterized its deployment in the Bayview Mills complex as an FTTP access facility to which wholesale obligations did not apply. In response, TekSavvy requested that the Commission: (i) direct RCCI to halt the removal of existing coaxial infrastructure at the Bayview Mills complex

³⁹ CRTC finds proposed wholesale high-speed access rates unreasonable, 6 October 2016, <http://news.gc.ca/web/article-en.do?nid=1133779>.

⁴⁰ *Ibid.*

⁴¹ *TekSavvy Solutions Inc. Application in respect of ensuring transitional wholesale access*, 4 December 2015, CRTC File No. 8663-T117-201513325.

until the issues raised in its application have been disposed of; or (ii) ensure that wholesale access to the access facilities required to provision downstream retail Internet services is always provided for pursuant to existing tariffs in a technology-neutral manner. The Commission issued its ruling regarding TekSavvy's application by way of Telecom Decision CRTC 2016-446⁴² ("TD 2016-446").⁴³

35. TekSavvy's application sought transitional access to aggregated wholesale HSA service with respect to a Wholesale HSA Service Gap. The Commission's determinations in TD 2016-446 are therefore of profound importance to this Application, which seeks identical transitional access, albeit as a general rule, wherever Wholesale HSA Service Gaps exist. The Commission's findings in TD 2016-446 with pronounced precedential significance are as follows:

- DOCSIS over RFOG constitute FTTP, and not FTTN, facilities;⁴⁴
- During the oral phase of the proceeding leading to TRP 2015-326, "...the incumbent carriers generally assured the Commission that they had no intention of removing existing copper or coaxial access facilities when installing entirely fibre access facilities". Because of this assurance, the Commission did not specifically address what regulatory obligations, if any, should apply when Incumbents remove copper or coaxial access;⁴⁵
- RCCI should continue to provide TekSavvy and other competitors with access to aggregated wholesale HSA service over FTTP access facilities in the Bayview Mills complex;⁴⁶
- RCCI's removal of coaxial access facilities in the Bayview Mills complex resulted in the foreclosure of competitor access to new end-users located in this complex by way of the company's existing aggregated wholesale HSA service;⁴⁷ and perhaps most importantly:

⁴² *TekSavvy Solutions Inc. – Application regarding transitional access to aggregated wholesale high-speed access service*, Telecom Decision CRTC 2016-446, 9 November 2016.

⁴³ *Id.*, at para 4.

⁴⁴ *Id.*, at para 18.

⁴⁵ *Id.*, at para 23.

⁴⁶ *Id.*, at para 36.

⁴⁷ *Ibid.*

“By denying competitors the ability to seek new end-users in the Bayview Mills complex on the aggregated wholesale HSA service over FTTP access facilities, RCCI would be conferring upon itself an undue preference and subjecting competitors to an undue disadvantage, since only RCCI would be able to access new end-users in that complex until such time as RCCI has an approved disaggregated wholesale HSA service that competitors wish to use. In addition, if the Commission were to accept RCCI’s request that TekSavvy should not be allowed to acquire any new end-users on the aggregated wholesale HSA service over FTTP access facilities, it would result in less consumer choice and competition in the Bayview Mills complex, as well as undermine competitors’ ability to acquire sufficient end-user demand to migrate to a disaggregated wholesale HSA service in the future.”⁴⁸ (Emphasis added.)

- The existence of wholesale HSA services from another Incumbent in the Bayview Mills complex was not a factor in the Commission’s determinations that RCCI should continue to provide TekSavvy and other competitors with access to aggregated wholesale HSA service over FTTP access facilities in the Bayview Mills complex.

36. Based on the above-noted findings, the Commission directed RCCI to provide TekSavvy and other competitors with access to existing and new end-users in the Bayview Mills complex by way of aggregated wholesale HSA service provisioned over its FTTP access facilities, at the same speeds and rates provided for in its aggregated wholesale HSA service tariff, and subject to the conditions imposed in TRP 2015-326.⁴⁹

37. TekSavvy also submitted a list of 169 Toronto-area residential multi-dwelling units that have been foreclosed from competition under similar circumstances to those affecting the Bayview Mills complex.⁵⁰ However, the Commission decided that there was insufficient evidence to establish a clear record of the situations prevailing at these locations and therefore chose not to take any further action.⁵¹

38. The significance of TD 2016-446 to the Application should be abundantly clear. Presented with a clear situation involving a Wholesale HSA Service Gap, the Commission applied a remedy

⁴⁸ *Id.*, at para 35.

⁴⁹ *Id.*, at para 36.

⁵⁰ *Id.*, at para 39.

⁵¹ *Id.*, at para 41.

with strong resemblance to Transitional FTTP Access. TD 2016-446 therefore stands as a pivotal and recent precedent for the relief requested in this Application.

2.4 Cable resale regimes pending the availability of third party Internet access services

39. In the cable realm, the Commission has a longstanding practice of applying transitional resale regimes pending the availability of third party Internet access (“TPIA”) services within the operating territory of a Cable Carrier. For example, Telecom Decision CRTC 99-11⁵² represents the inception of mandated cable resale obligations until incumbent Cable Carriers are able to provide TPIA. Thereafter, in Telecom Decision CRTC 2003-87⁵³ and Telecom Decision CRTC 2004-24⁵⁴, the Commission extended the cable resale obligation to Shaw. More recently, in Telecom Decision CRTC 2016-67⁵⁵, the Commission directed Eastlink to provide cable resale in its serving territory in the Atlantic Provinces until Eastlink TPIA services were implemented.

40. All of these Commission decisions represent precedents for a solution that provides Competitors with transitional wholesale access in anticipation of the establishment of a more permanent wholesale services framework. The relief requested in this Application is no different.

2.5 Telecom Order CRTC 2011-377

41. Telecom Order CRTC 2011-377⁵⁶ (“TO 2011-377”) constitutes yet another example of a transitional wholesale access regime. Notably, this regime was first proposed by the Commission by its own initiative, in recognition of “the importance of providing competitors with access to higher-speed and increased POI aggregation services as soon as possible in order to respond to the needs of consumers.”⁵⁷ To this end, TO 2011-377 was a short-term measure that established an interim resale framework for wholesale HSA services supported by FTTN facilities. This

⁵² *Application concerning access by Internet service providers to incumbent cable carriers' telecommunications facilities*, Telecom Decision CRTC 99-11, 14 September 1999.

⁵³ Application by Cybersurf seeking resale of Shaw higher-speed retail Internet service, Telecom Decision CRTC 2003-87, 21 December 2003.

⁵⁴ *Cybersurf Corp. v. Shaw Cablesystems G.P. - Enforcement of Telecom Decision CRTC 2003-87*, Telecom Decision CRTC 2004-24, 2 April 2004.

⁵⁵ *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.

⁵⁶ *Interim rates for wholesale residential and business high-speed access services*, Telecom Order CRTC 2011-377, 15 June 2011.

⁵⁷ *Id.*, at para 2.

transitional model would last until final rates, terms and conditions for wholesale HSA services were established by way of Telecom Regulatory Policy CRTC 2011-703⁵⁸ (“TRP 2011-703”) and Telecom Regulatory Policy CRTC 2011-704⁵⁹ (TRP 2011-704”).

42. The transitional wholesale access regime introduced by TO 2011-377 is a template for the relief requested in this Application. Transitional FTTP Access and the interim wholesale regime established in TO 2011-377 share the same fundamental purpose: to address gaps in the regulatory framework governing wholesale HSA services such that Competitors can respond to the needs of consumers. Likewise, the Commission orders in TO 2011-377 and the relief requested in the Application are of a transitional nature that is intended to persist until a final regulatory policy can take hold. In the case of TO 2011-377, the final regime was cemented by way of TRP 2011-703 and TRP 2011-704. In the case of the relief requested in this Application, the final regime will take hold once disaggregated wholesale HSA services are implemented at the conclusion of the TRP 2016-379 follow-up proceedings.

43. The next part of the Application provides insight into the nature and prevalence of Wholesale HSA Service Gaps.

3.0 WHOLESALE HSA SERVICE GAPS ARE BECOMING INCREASINGLY LARGE AND PREVALENT

44. Wholesale HSA Service Gaps generally develop under three sets of conditions that have progressed significantly since TRP 2015-326: (1) Greenfield⁶⁰ FTTP deployments by an Incumbent where that Incumbent has only deployed FTTP access facilities over which wholesale HSA services cannot be provided ; (2) Brownfield⁶¹ FTTP deployments by an Incumbent where the only wireline facilities available from that Incumbent to provide wholesale HSA services are legacy wireline facilities; and (3) Brownfield FTTP deployments by an Incumbent where that

⁵⁸ *Billing practices for wholesale residential high-speed access services*, Telecom Regulatory Policy CRTC 2011-703, 15 November 2011.

⁵⁹ *Billing practices for wholesale business high-speed access services*, Telecom Regulatory Policy CRTC 2011-704, 15 November 2011.

⁶⁰ In the Application, “Greenfield” means a new network installation occurring in conjunction with new construction of the end-user premises over undeveloped or repurposed land (e.g., a new residential single family home development or multi-dwelling unit building)

⁶¹ In contrast with the above definition of “Greenfield”, “Brownfield” means a network installation, upgrade or configuration occurring at existing end-user premises on developed land.

Incumbent has removed all of its previously existing wireline facilities over which wholesale HSA services could be provided.

45. A comparison between the 2014 Communications Monitoring Report (“2014 CMR”) and the 2016 Communications Monitoring Report (“2016 CMR”) provides revealing insight into the prevalence of the above-listed Wholesale HSA Service Gaps. Consider that the 2014 CMR⁶² reported that FTTP represented 2.9% of residential lines using fibre optic while the remaining percentage of lines was made up of 23.5% FTTN and 73.6% non-fibre.⁶³ Two years later, the 2016 CMR⁶⁴ reported that FTTP represented 8.9% (a difference of 6%) of residential lines using fibre optic while the remaining percentage of lines was made up of 22.9% FTTN (a difference of -0.6%) and 68.1% non-fibre (a difference of -5.5%). In other words, there has been a disproportionate increase in FTTP residential lines relative to FTTN and non-fibre residential lines over a two-year period. This disproportionate increase immediately suggests that Incumbents are deploying FTTP access facilities in areas where they do not also control FTTN access facilities.

46. It is also important to acknowledge the incentives that Incumbents have to deploy FTTP facilities as the sole wireline access facilities that connect end-users.

47. From a technological perspective, FTTP is the superior choice of access facilities when compared to FTTN or legacy wireline facilities.⁶⁵ The technology is at the dawn of its life cycle and presents opportunities for practically unlimited capacity.⁶⁶ By comparison, legacy facilities have reached peak service speeds long ago and while FTTN facilities continue to be pushed to their limits, the ceiling for this technology will also be reached in the near future.⁶⁷

48. The current regulatory environment, as summarized above in Part 2.0 of the Application, also unintentionally provides powerful incentives for Incumbents to deploy FTTP access facilities on an exclusive basis, wherever possible. Incumbents are well aware that in the wake of TRP 2015-

⁶² Note: the 2014 CMR reports data for the 2013 year.

⁶³ 2014 Communications Monitoring Report, at Figure 5.1.6.

⁶⁴ Note: the 2016 CMR reports data for the 2016 year.

⁶⁵ For instance, see Section 3.3 of the Nordicity Report entitled “Wireless Substitutability: Examination of the Substitutability of Wireless for Wireline Broadband Connectivity” (the “Nordicity Report”) filed as Attachment “B” to the CNOC intervention dated 27 June 2014 in the proceeding leading to TRP 2015-326, which explores FTTP technologies and compares them to FTTN facilities.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

326, FTTP access facilities represent a gateway to localized monopolistic market conditions given that these facilities are free of any wholesale HSA service obligations.

49. Incumbents stand to profit immensely from localized monopolistic market conditions in both Greenfield and Brownfield conditions. This situation ensures that the Incumbent will enjoy exclusive access to a specific customer base for an indeterminate period of time. Although TRP 2015-326 creates a future opportunity for competitive access to FTTP facilities on a disaggregated basis, the transition to disaggregated wholesale HSA services is contingent upon a Competitor's acquisition of sufficient end-user demand that is necessary to justify investment in transport facilities. As recognized by the Commission in TD 2016-446,⁶⁸ Wholesale HSA Service Gaps could preclude Competitors from ever establishing a critical mass of demand that will justify a transition to disaggregated wholesale HSA services over FTTP access facilities. Accordingly, ILECs and Cable Carriers can eliminate wireline-based competition by any other service providers by ensuring that their FTTP access facilities are deployed to the exclusion of all other wireline platforms.

50. The balance of this Part 3.0 of the Application addresses each of the above-listed conditions leading to Wholesale HSA Service Gaps.

Greenfield FTTP deployments

51. Greenfield deployments of FTTP access facilities are prevalent given that the business case for deploying future-looking FTTP technology in Greenfield situations is especially palpable due to the cost-efficiencies inherent to new developments⁶⁹ (for example, running fibre to individual homes in a residential community development is greatly facilitated by ease of access to subterranean conduits⁷⁰).

⁶⁸ TD 2016-446, at para 35.

⁶⁹ The Nordicity Report, at p. 20.

⁷⁰ In contrast, buried deployments in a Brownfield scenario involves significant additional costs and construction time delays. These obstacles are overcome in Greenfield situations that provide ease of access to subterranean conduits without significant public disruption. The cost and delays associated with Brownfield buried deployments are main reasons why aerial fibre builds are generally preferred over buried deployments in Brownfield conditions, as acknowledged in recent Bell press releases, for instance: "More than 90% of Bell's network in the city is on aerial structures already in place, which will help to speed the deployment of the new fibre links." As stated in *Bell investing \$854 million in Montréal to bring the fastest broadband fibre technology directly to homes and businesses across the city*, 27 March 2017, <<http://www.bce.ca/news-and->

52. Greenfield FTTP deployments have resulted in Wholesale HSA Service Gaps throughout the country. CNOc members have been foreclosed from competition in both urban and suburban areas. These Wholesale HSA Service Gaps affect single family dwellings as well as multi-dwelling units. The situation applies to large residential community developments and smaller development projects within established communities. Greenfield FTTP access facilities without overlapping FTTN access facilities is also a common occurrence for new commercial and business developments including malls, store outlets and office buildings.

53. In summary, Wholesale HSA Service Gaps due to Greenfield FTTP deployments are now commonplace and the problem is worsening.

54. Greenfield developments ought to represent competitive battlefields for the business of new customers. Instead, Greenfield residential and business markets have become competitive dead zones which the Incumbents are exploiting to their sole benefit.

Brownfield FTTP deployments which bypass FTTN access facilities

55. CNOc members have also been precluded from wholesale HSA services in situations where Incumbents have introduced FTTP access facilities to a location where no wireline facilities otherwise exist or where only legacy wireline facilities also exist. In other words, in these instances, Incumbents bypass FTTN access facilities entirely. Wherever this occurs, Competitors only have access to wholesale services that allow them to compete at retail service speeds that max out at 6-7 Mbps – assuming that legacy access facilities exist at all at the location in question. In contrast, a Brownfield FTTP deployment allows the Incumbent to enjoy monopolistic market conditions over retail service speeds ranging from 7 Mbps to in excess of 1 Gbps. Consequently, the effect of bypassing FTTN access facilities in Brownfield deployments results in an acute Wholesale HSA Service Gap.

56. CNOc members have generally encountered the situation described above with respect to business and commercial single or multi-dwelling unit buildings such as malls, store outlets or

media/releases/show/Bell-investing-854-million-in-Montr-al-to-bring-the-fastest-broadband-fibre-technology-directly-to-homes-and-businesses-across-the-city-1?page=1&month=&year=>.

office buildings as well as residential multi-dwelling unit buildings.⁷¹ These situations occur in urban and suburban areas alike.

57. There are several examples of large scale Incumbent FTTP projects that involve sweeping brownfield conversions to FTTP access facilities. For instance, within the province of Quebec , the following locations have undergone significant Bell FTTP builds: Beloeil, Blainville, Chambly, Châteauguay, Gatineau, Joliette, La Prairie, Laval, Lévis, Magog, Montreal, Québec City, Repentigny, Saint-Constant, Saint-Eustache, Saint-Jean-sur-Richelieu, Saint-Jérôme, Saint-Luc, Sherbrooke, Salaberry-de-Valleyfield, Sorel-Tracy, Terrebonne and Vaudreuil-Dorion.⁷² In fact, on 27 March 2017, Bell announced that it would invest a further \$854 million to bring FTTP throughout Montreal.⁷³ Cogeco has also deployed FTTP in several Quebec communities.⁷⁴

58. In Ontario, Bell's FTTP footprint covers Toronto, Sudbury, North Bay, Peterborough, Kingston and many more cities.⁷⁵

⁷¹ For example, with respect to FTTP deployments at commercial premises, Bell issued the a press release stating the following: "With the fast growth of Fibe TV in Ontario and Québec and FibreOP TV in Atlantic Canada, Bell's IPTV coverage footprint has now reached 6.1 million homes, up from 5.1 million at the start of 2014. Fibe is also making significant inroads with small and medium business as medical and dental offices, restaurants, repair shops and other customer-service focused businesses switch to Fibe TV to entertain and inform their customers." in *Bell's Fibe TV and FibreOP TV now serve 1 million Canadians*, 17 April 2015, <<http://www.bce.ca/news-and-media/releases/show/Bell-s-Fibe-TV-and-FibreOP-TV-now-serve-1-million-Canadians?page=2&month=&year=>>

⁷² *Bell Gigabit Fibe: Canada's fastest Internet service now available to 1.3 million homes*, 10 August 2015. <<http://www.bce.ca/news-and-media/releases/show/Bell-Gigabit-Fibe-Canada-s-fastest-Internet-service-now-available-to-1-3-million-homes-1>>.

⁷³ *Bell investing \$854 million in Montréal to bring the fastest broadband fibre technology directly to homes and businesses across the city*, 27 March 2017, <<http://www.bce.ca/news-and-media/releases/show/Bell-investing-854-million-in-Montr-al-to-bring-the-fastest-broadband-fibre-technology-directly-to-homes-and-businesses-across-the-city-1?page=1&month=&year=>>.

⁷⁴ See for example, the following Cogeco press releases: *Cogeco Connexion announces expansion of its fibre optic network, bringing service to the city of Saint-Jérôme-de-Matane*, 1 February 2016 <<https://www.cogeco.ca/corpo/ccc/showMedia.php?mediaSourceId=3331>>; *Cogeco Connexion launches its new Ultrafibre 120 high-speed Internet package in several regions of Québec*, 11 January 2017, <<https://www.cogeco.ca/corpo/ccc/showMedia.php?mediaSourceId=4665>>; See also *Cogeco Connexion announces expansion of its fibre optic network to the municipalities of Saint-Adolphe-D'Howard and Morin-Heights*, 6 June 2016, <<https://www.cogeco.ca/corpo/ccc/showMedia.php?mediaSourceId=3717>> .

⁷⁵ *Bell Gigabit Fibe bringing the fastest Internet to Toronto residents with a billion-dollar+ network investment, creation of 2,400 direct jobs*, 25 June 2015, <<http://www.thepeterboroughexaminer.com/2015/01/15/bell-to-invest-35-million-in-new-technology-locally.>>

59. In Atlantic Canada, Bell FTTP is available in over 100 communities⁷⁶ including Saint-John, Charlottetown, Halifax, Fredericton and Moncton.⁷⁷

60. In Western Canada, TELUS FTTP connections are available in Chilliwack, Burnaby, Kitimat, Surrey, Edmonton and many other locations in British Columbia and Alberta.⁷⁸

61. All of the examples outlined above are but a small sample of the ever increasing Incumbent Brownfield FTTP projects throughout the country. These massive FTTP deployment projects invariably create Wholesale HSA Service Gaps that cover communities, neighbourhoods and individual buildings.

Brownfield FTTP deployments with corresponding removal of legacy wireline facilities

62. CNOC members have also reported instances where Incumbent Brownfield FTTP deployments have resulted in corresponding removal of pre-existing legacy wireline facilities. Such occurrences are especially disturbing given that Incumbents assured the Commission over the course of proceeding leading to TRP 2015-326 that they had no intention of removing existing copper or coaxial access facilities when installing entirely fibre access facilities.⁷⁹ In spite of these assurances, CNOC members have witnessed removal of legacy wireline facilities following the deployment of FTTP access facilities. These circumstances have affected Brownfield locations such as those described above.

63. Wherever legacy wireline facilities are removed and replaced with FTTP access facilities, Competitors are precluded from competing for customers at even the lowest end of the retail Internet service speed spectrum.

⁷⁶ *More speed and more TV - Bell Aliant gives customers more this fall with FibreOP*, 29 September 2015, <<http://www.bce.ca/news-and-media/releases/show/More-speed-and-more-TV-Bell-Aliant-gives-customers-more-this-fall-with-FibreOP-1?page=2&month=&year=>>.

⁷⁷ *Bell Gigabit Fibe bringing the fastest Internet to Toronto residents with a billion-dollar+ network investment, creation of 2,400 direct jobs*, 25 June 2015, <<http://www.thepeterboroughexaminer.com/2015/01/15/bell-to-invest-35-million-in-new-technology-locally.>>

⁷⁸ See various related press releases published on https://about.telus.com/community/english/news_centre/news_releases/blog.

⁷⁹ TD 2016-446, at para 23.

4.0 THE CASE FOR TRANSITIONAL FTTP ACCESS

64. Having summarized the regulatory *status quo* and described the prevalence of Wholesale HSA Service Gaps, CNOC will now justify its request for Transitional FTTP Access based on these Commission policies and prevailing market conditions.

65. The justification for Transitional FTTP Access is simple and straightforward. In TRP 2015-326, the Commission determined that the transition from aggregated to disaggregated wholesale HSA services must ensure that wholesale access to access facilities required to provision downstream retail services is always provided for.⁸⁰ However, without Transitional FTTP Access, the Commission's transition plan cannot live up to this purpose. As explained in Part 3.0 of this submission, Competitors currently lack the wholesale access that is necessary to provide downstream retail services in several localized areas throughout the country where an Incumbent's only access facilities capable of supporting high-speed Internet services consist of FTTP access facilities, which are currently free of any wholesale HSA obligations.

66. Immediate regulatory action is critical. The problems described in the Application will not simply go away once disaggregated wholesale HSA services become available. Wholesale HSA Service Gaps create localized market failures that have economic consequences that will persist long after Competitors finally gain access to wholesale HSA services over FTTP facilities on a disaggregated basis.

67. Wholesale access to FTTP access facilities on a disaggregated basis is not simply 'around the corner'. The TRP 2015-326 follow-up proceedings⁸¹ to configure and cost disaggregated wholesale HSA services have been repeatedly delayed by Incumbent failures to abide by Commission disclosure and information rules and guidelines. A substantial amount of work lays in front of the industry and the Commission before rates for disaggregated wholesale HSA services can be approved on a final basis for Ontario and Quebec. The rest of Canada faces an even longer period of time until the deployment of disaggregated wholesale HSA services and Competitor access to FTTP facilities.

⁸⁰ TRP 2015-326, at para 143.

⁸¹ I.e., the proceeding leading to TRP 2016-379 and the follow-up costing process.

68. Further, even once final rates are set, Competitors may struggle to secure demand conditions in Wholesale HSA Service Gaps to justify a transition to disaggregated wholesale HSA services over FTTP facilities once they become available.

69. Wholesale HSA Service gaps create profound consequences for competition wherever they exist. Invariably, consumers will suffer the greatest economic harm as a result of the monopolistic market conditions that have and will continue to flourish absent any form of transitional access to FTTP access facilities. Fundamentally, these are the same circumstances which prompted the Commission to establish interim wholesale access regimes in anticipation of TPIA tariff approval, in the case of Cable Carriers, and more broadly with respect to the wholesale HSA services of all Incumbents, in TO 2011-377 as a stop gap measure until TRP 2011-703 and TRP 2011-704 were issued. If these precedents were not enough, TD 2016-446 consists of a far more recent Commission ruling on virtually identical facts to those supporting the Application.

70. In TD 2016-446, the Commission was explicit that the wholesale HSA service gap at the Bayview Mills complex was unacceptable and transitional access over FTTP access facilities consisted of an appropriate remedy. The Application essentially seeks to apply the TD 2016-446 determinations more broadly as a general rule that applies to all Wholesale HSA Service Gaps.

71. There are at least five reasons why a general rule governing Wholesale HSA Service Gaps is more appropriate than maintaining the current expectation that Competitors may only obtain regulatory relief by submitting narrow *ad-hoc* Part 1 applications addressing specific instances of Wholesale HSA Service Gaps.

- First, Competitors who rely on wholesale HSA services have limited regulatory resources. The cost of preparing a Part 1 application with supportive evidence to address a narrow set of Wholesale HSA Service Gaps is prohibitively expensive. Many Competitors who are affected by Wholesale HSA Service Gaps simply cannot afford to redirect personnel resources from critical operational duties to regulatory matters, especially on a case-by-case basis.
- Second, a general rule instantly addresses all current and future Wholesale HSA Service Gaps. By contrast, an *ad-hoc* Part 1 application involves a lengthy process,

which, in turn, delays relief for the applicant. For reference, TD 2016-446 was issued 11 months after TekSavvy originally filed its Part 1 application.

- Third, even if future *ad-hoc* Part 1 applications for transitional relief are resolved more quickly, a lapse of even a few months before the Commission grants relief is enough for monopolistic market conditions to take a firm hold in a Wholesale HSA Service Gap. Retroactive relief via *ad-hoc* Part 1 applications is incapable of preventing competitive harms before they happen. In the period of time ranging from when a Wholesale HSA Service Gap first emerges to when a Competitor prepares and files a Part 1 application seeking relief and finally, when the Commission issues a ruling – irreparable competitive damage will have already occurred. In the interim, Incumbents will continue to benefit from monopolistic market conditions in a manner that will make competitive entry in many areas extremely difficult and even insurmountable, now, thereby creating significant competitive disadvantages and market distortions that will translate into a substantial lessening of competition even when FTTP access facilities becomes available via the disaggregated model.
- Fourth, if a general rule regarding Wholesale HSA Service Gaps is not established, Competitors will be required to file new Part 1 applications each and every time a new Greenfield or Brownfield Wholesale HSA Service Gap develops.
- Fifth and finally, Transitional FTTP Access is a far more efficient approach to resolving Wholesale HSA Service Gaps from the perspective of the industry and the Commission. Conversely, the continued expectation that Competitors must deal with these situations via several narrowly framed *ad-hoc* Part 1 applications will needlessly consume precious regulatory resources for the Commission and all interested parties.

72. For all of the above reasons, CNOC submits that the relief requested in the Application, as a rule of general application, will serve as an efficient and effective solution to all current and future Wholesale HSA Service Gaps throughout Canada. This outcome conforms to the Commission’s intention to establish a transition plan that “...will serve to ensure that wholesale

access to the access facilities required to provision downstream retail services is always provided for.”⁸²

73. An essential feature of Transitional FTTP Access is that it must also unambiguously make available wholesale HSA services for all service speeds up to the highest speed offered on a wholesale basis by an Incumbent – even if that speed is greater than 100 Mbps, which is the speed threshold set by TRP 2015-326.⁸³ This feature of Transitional FTTP Access is essential given that Wholesale HSA Service Gaps have precluded Competitors from any competition in downstream retail markets for true high-speed Internet and related telecommunications services, while TRP 2015-326 also contemplates the grandfathering of existing aggregated wholesale HSA customers that are served above the speed threshold.⁸⁴ As such, Competitors have been denied an opportunity to order any wholesale HSA services, much less service speeds in excess of 100 Mbps. Thus, where there are Wholesale HSA Services Gaps, there can be no grandfathering of service speeds in excess of 100 Mbps at the present time. As a result, a speed limit of 100 Mbps would further prejudice Competitors that have endured Wholesale HSA Service Gaps. This prejudice is exacerbated by the significant and growing customer demand for retail service speeds in excess of 100 Mbps that CNOC members are witnessing.

74. It is for these reasons that CNOC’s proposed solution is to ensure that Transitional FTTP Access is available for all service speeds up to the highest speed offered on a wholesale basis by an Incumbent. Fundamentally, this consists of a simple extension of the speed matching principles. CNOC submits that this proposal is a reasonable, principled and fair solution that will meaningfully improve levels of competition wherever Transitional FTTP Access will apply.

75. On all of the above grounds, the case for Transitional FTTP Access is clear and compelling.

76. As explained in the next section, the need for relief on an expedited basis is as important as the relief itself.

⁸² TRP 2015-326, at para 143.

⁸³ *Id.*, at para 154.

⁸⁴ *Id.*, at para 154.

5.0 THE NEED FOR EXPEDITED RELIEF

77. Leading up to this Part 5.0 of the Application, CNOC has emphasized the urgency of implementing Transitional FTTP Access. Expedited relief is critical to mitigating competitive harms resulting from existing Wholesale HSA Service Gaps and preventing further harms from future service gaps. If relief on an expedited basis is denied, irreparable harms to Competitors, competition and consumers would result even if Transitional FTTP Access is ultimately granted at the conclusion of a conventional non-expedited part 1 proceeding.

78. Wherever Wholesale HSA Service Gaps exist, the Incumbents do not have to win customers since market conditions do not feature meaningful levels of consumer choice generated by the availability of wholesale HSA services. Wholesale HSA Service Gaps provide the Incumbent with an opportunity, unimpeded by real competition, to sign-up end-users to retail telecommunications service contracts. These service agreements are often subject to two-year terms that contemplate termination fees for early cancellations by end-users. Thus, Wholesale HSA Service Gaps allow Incumbents, without any meaningful competitive effort, to acquire and lock-in customers for years.

79. As a result of the regulatory *status quo*, an Incumbent can secure monopolistic market conditions over a very long period of time. Even when disaggregated wholesale HSA services become available at a given location served exclusively via FTTP access facilities, end-users will face substantial barriers to switching providers as a result of their contractual commitments to the Incumbent. Consequently, it will be extremely difficult for Competitors to acquire sufficient demand to invest into the transport infrastructure that is necessary to support disaggregated wholesale HSA services. This outcome threatens a core tenet of TRP 2015-326: the expectation that disaggregated wholesale HSA service will encourage Competitor investment in alternate transport facilities, thereby serving to develop a more robust telecommunications system.⁸⁵

80. In summary, the competitive harms that call for Transitional FTTP Access occur immediately, as soon as a Wholesale HSA Service Gap develops, and are likely to persist for very long periods of time. Only expedited relief can prevent further competitive foreclosures resulting from new Wholesale HSA Service Gaps that will otherwise occur over the course of the better

⁸⁵ *Id.*, at para 139.

portion of the proceeding initiated by the Application. In addition, expedited relief is critical to allow Competitors to begin developing a presence where Wholesale HSA Service Gaps previously existed. Expedited Transitional FTTP Access will allow Competitors to mitigate competitive harms incurred thus far, with a view to building a critical mass of demand that can justify infrastructure investment to support disaggregated wholesale HSA services in the future.

81. Finally, expedited relief is necessary to counteract the strong incentive for Incumbents to delay the follow-up proceeding to TRP 2016-379 to implement disaggregated wholesale HSA services. As summarized in Part 2.0 of the Application, Incumbents have created extensive delays through failures to comply with the Commission's disclosure and information rules. Such delays push back the final approval of disaggregated wholesale HSA rates and terms and conditions thereby creating additional opportunities to create and exploit Wholesale HSA Service Gaps. Transitional FTTP Access will counteract this incentive to delay the TRP 2016-379 follow-up costing proceedings and the eventual final approval of disaggregated wholesale HSA services.

82. Ultimately, expedited relief will allow the Commission to give effect to its intentions surrounding a disaggregated wholesale HSA service transition plan, as explicitly stated in TRP 2015-326, as of the soonest possible date. For this reason, and those described above, CNOC urges the Commission to grant Transitional FTTP Access on an expedited basis.

83. In order to facilitate expedited relief, CNOC requests an abbreviated period of fifteen (15) days for responses to the Application from the Incumbents and interventions from other interested parties. CNOC would then have seven (7) days to reply. CNOC submits that this abbreviated period for submissions strikes an appropriate balance between ensuring that parties have an adequate opportunity to provide meaningful comments with regards to the Application on one hand and on the other hand, appropriately accelerating this proceeding in light of the urgent nature of the relief that is being requested.

6.0 THE CANADIAN TELECOMMUNICATIONS POLICY OBJECTIVES AND THE POLICY DIRECTION

84. Transitional FTTP Access on an expedited basis furthers the telecommunications policy objectives outlined in Section 7 of the *Act* in a manner that is consistent with the Policy Direction.

85. First, with respect to the telecommunications policy objectives, the relief requested in the Application is aligned with the following objectives of Section 7 of the *Act*:

- Section 7(a) of the *Act*: CNOC's requested relief will facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions. Transitional FTTP Access will eliminate Wholesale HSA Service Gaps throughout Canada and restore the conditions that can sustain a competitive telecommunications system in the affected areas.
- Section 7(b) of the *Act*: Transitional FTTP Access will render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada. CNOC's requested relief will introduce consumer choice in areas where any Incumbent currently enjoys monopolistic market conditions. Competitive choice of providers, services features and price will translate into the availability of more reliable and affordable services throughout the country.
- Section 7(c) of the *Act*: Transitional FTTP Access will enhance the efficiency and competitiveness at the national and international levels, of Canadian telecommunications. The competitiveness of Canadian telecommunications services is threatened by the increasing incidence of Wholesale HSA Service Gaps that create competitive harms that can persist for several years. Expedited Transitional FTTP Access will eliminate Wholesale HSA Service Gaps that would otherwise occur in the future while also mitigating the economic harms associate with existing service gaps.
- Section 7(e) of the *Act*: Transitional FTTP Access will allow Competitors to develop the demand conditions that will one day allow them to invest in the transport infrastructure that is necessary to support disaggregated wholesale HSA services. This outcome therefore promotes the use of Canadian transmission facilities for telecommunications within Canada.

- Section 7(f) of the *Act*: Transitional FTTP Access is intended to give effect to the Commission’s TRP 2015-326 intent with respect to a transition plan for disaggregated wholesale HSA services. CNOC has carefully calibrated this relief so that it accords with TRP 2015-326, Commission precedents and speed matching principles. Transitional FTTP Access on an expedited basis is therefore regulation that is efficient and effective.
- Section 7(h) of the *Act*: The relief sought by way of the Application is intended to improve the levels of competition in downstream retail markets for Internet services and related telecommunications services. This goal is therefore intrinsically linked with the economic and social requirements of users of telecommunications.

86. Transitional FTTP Access on an expedited basis is also aligned with the following aspects of the Policy Direction:

- 1(a)(ii) the relief sought by CNOC consists of regulation that is efficient and proportionate to its purpose, which is to give effect to the Commission’s intent to ensure “wholesale access to the access facilities required to provision downstream retail services”.
- 1(b)(iv) Transitional FTTP Access is proposed in a technological and competitively neutral manner that does not artificially favor either Canadian carriers or ‘resellers’. This relief will apply to all Incumbent carriers on both ILEC and cable platforms. Furthermore, Transitional FTTP Access is intended to eliminate a situation of preference that exists for Canadian carriers, whereby Incumbent carriers are able to profit from monopolistic market conditions that the Commission did not intend to foster through TRP 2015-326.
- 1(c)(ii) Transitional FTTP Access will increase incentives for investment in and construction of competing network facilities. As aforementioned, this relief will eliminate a daunting barrier to the demand conditions that Competitors require to invest in transport infrastructure necessary to support disaggregated wholesale HSA services.

87. Transitional FTTP Access on an expedited basis is also consistent with the additional policy objectives that the Commission set out explicitly at paragraph 14 of TRP 2015-326. More specifically, CNOC's requested relief is aligned with the Commission's objective of:

- First, enhancing the effectiveness of the wholesale service regime to facilitate vibrant and sustainable retail competition that provides Canadians with reasonable prices and innovative services of high quality that are responsive to their evolving social and economic requirements⁸⁶ - without Transitional FTTP Access, Canadians who happen to be situated in one of the many Wholesale HSA Service Gaps that are located throughout the country will be precluded from a choice of telecommunications services that includes reasonable prices and a full array of innovative services and service features.
- Second, incenting efficient network investment to further the development of facilities-based competition⁸⁷ - as discussed throughout this submission, Wholesale HSA Service Gaps prevent the development of demand conditions that are a condition precedent for competitive investment in transport facilities that are necessary to support disaggregated wholesale HSA services.
- Third, considering network efficiency, competitive neutrality, and technological neutrality when establishing wholesale regulations⁸⁸ - as explained above with respect to subparagraph 1(b)(iv) of the Policy Direction, CNOC has proposed Transitional FTTP Access in a manner that is both technologically and competitively neutral.
- Fourth and finally, recognizing differences in regional markets⁸⁹ - the Application is especially concerned with this objective of TRP 2015-326. Transitional FTTP Access will ensure that regional and more localized markets are not compromised by a Wholesale HSA Service Gap. The relief sought by

⁸⁶ TRP 2015-326, at para 14.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

CNOC is intended first and foremost, to ensure consistent wholesale access in all of Canada.

7.0 CONCLUSION

88. TRP 2015-326 is an intricate regulatory policy which carefully balances competing interests with a view to holistically furthering the Canadian telecommunications policy objectives in a manner that is consistent with the Policy Direction.

89. An effective transition plan to disaggregated wholesale HSA services is the very linchpin of TRP 2015-326.

90. It is now abundantly clear that the Commissions' expectations regarding this transition plan have not unfolded as intended. The Commission committed to ensuring that wholesale access is always provided for. Instead, FTTP deployments in Greenfield and Brownfield situations have resulted in widespread Wholesale HSA Service Gaps.

91. Fortunately, the Commission has tools at its disposal to mitigate existing harms and prevent future consequences associated with Wholesale HSA Service Gaps. There is a wealth of regulatory precedent for the type of relief that CNOC is proposing. Very recently, in TO 2016-446, the Commission granted transitional wholesale access on a virtually identical, albeit narrower, set of circumstances. Expanding this relief as a general rule, wherever Wholesale HSA Service Gaps exist, is desperately needed. On these grounds, CNOC urges the Commission to grant Transitional FTTP Access on an expedited basis and to shorten the remaining periods for filings associated with this proceeding as described herein.

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