

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

**IN THE MATTER OF**

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

**TO REVIEW AND VARY  
*REVIEW OF WHOLESALE WIRELINE SERVICES AND ASSOCIATED POLICIES,*  
TELECOM REGULATORY POLICY CRTC 2015-326**

**AND**

***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***

**COMMENTS IN SUPPORT OF INTERIM RELIEF  
TO REMOVE THE 100 MBPS CAP**

**3 DECEMBER 2018**

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## **EXECUTIVE SUMMARY**

ES1. CNOC is filing these comments in support of the approval for interim relief consisting of the removal of the 100 Mbps speed cap on aggregated HSA services prior to its coming into effect upon the final approval of disaggregated HSA tariffs and until the Commission issues a decision on the headings of final relief requested in the Application.

ES2. Unless interim relief is granted, **competitors will have no way of providing broadband service to customers requesting service speeds above 100 Mbps.**

ES3. The 100 Mbps speed cap will not serve its intended purpose of facilitating a transition to the disaggregated HSA model. Instead, the 100 Mbps speed cap will be punitive in effect due to the insurmountable barriers that prevent competitors from deploying disaggregated HSA services. In these circumstances, CNOC members and competitors more broadly will be stranded on legacy service speeds.

ES4. Competitors will be subject to irreparable harm if a 100 Mbps speed cap is maintained for any duration of time, even if the cap is ultimately rescinded when the Commission issues its determinations regarding the final relief that is requested in the Application.

### **Factual and Regulatory Background**

ES5. There is surging consumer demand for broadband speeds in excess of 100 Mbps. The 2017 CMR reports that the subscriber distribution for service speeds at and above 100 Mbps nearly doubled from 2015 to 2016, from 8% to 15.8%. Denial of wholesale access to access speeds in excess of 100 Mbps therefore threatens to severely undermine the competitiveness of the retail broadband services markets in Ontario and Quebec.

ES6. Three main barriers **individually and collectively** render a transition to disaggregated HSA impossible: (1) the lack of transport supply; (2) the cost of deploying disaggregated HSA services; and (3) the timelines for deploying disaggregated HSA services. Each of these barriers is summarized below. These barriers prevent access to disaggregated HSA services while the speed cap on aggregated HSA will remove the only alternative mandated wholesale input that competitors can rely upon to provide service speeds in excess of 100 Mbps.

ES7. The barriers preventing deployment of disaggregated HSA are structural in nature in that they are linked to the Commission's determinations in TRP 2015-326 and TD 2016-379. For this reason, the potential approval of final tariffs for disaggregated HSA services that feature reduced rates will not, in and of itself, render the current regulatory model workable for competition.

1) The lack of transport supply

ES8. Some transport segments to disaggregated POIs cannot be economically duplicated for a variety of reasons including: (1) the location of the POI is too remote; (2) the distance between the POI and neighbouring interconnection points or fibre facilities is too great; (3) the density of the customer base served by the POI cannot support a positive business case for the deployment of transport facilities; and (4) there may not be a secondary market to sell excess transport capacity to other service providers.

ES9. The lack of transport supply to disaggregated POIs will prevent deployment of disaggregated HSA services when tariffs are eventually approved on a final basis. Due to the speed cap on aggregated HSA, competitors will have no alternative mandated wholesale input for access services in excess of 100 Mbps.

2) Disaggregated HSA Service Costs

ES10. The massive costs to deploy disaggregated HSA services under the current regulatory framework are prohibitive.

ES11. In Ontario and Quebec, to deploy disaggregated HSA at each of the 149 Cable Carrier head-ends in order to duplicate the competitor's current coverage area under the aggregated HSA model would require upfront costs ranging from \$13M to \$30M. On the other hand, deploying disaggregated HSA at each of the 1016 Bell COs would require upfront costs ranging from \$81M to \$232M if co-location is used or \$147M to \$378M if using Bell's new proposed outside-meet-me-point.

ES12. By comparison, costs associated with aggregated HSA service range from \$91,500 to \$206,500 for Bell and \$95,000 to \$205,500 for the Cable Carriers.

ES13. Competitive service providers could never hope to generate \$81,280,000 to \$232,664,000 of CBB savings to offset the equivalent \$81,280,000 to \$232,664,000 in one-time costs of

deploying disaggregated HSA throughout Bell's serving area in Ontario and Quebec, leaving aside additional increased recurring costings associated with disaggregated HSA.

ES14. Thus, the prohibitive costs inherent in the current disaggregated HSA model will prevent deployment of such services. Due to the speed cap on aggregated HSA, competitors will have no alternative mandated wholesale input for access services in excess of 100 Mbps.

3) *Prolonged timelines to transition to disaggregated HSA services*

ES15. Based on the conditions established by the incumbents, estimated timelines for a single competitor to complete a full disaggregated HSA deployment in Ontario and Quebec are as follows:

- 1) 43 years to deploy to 1016 Bell COs;
- 2) 3.2 years to deploy to 60 Cogeco head-ends;
- 3) 2.2 years to deploy to 36 Rogers head-ends;
- 4) 2.9 years to deploy to 53 Videotron head-ends

ES16. To make matters worse, Bell's tariff includes a provision that allows Bell to limit the number of concurrent disaggregated HSA deployments to two COs per province. At a minimum, this restriction would prolong the deployment timeline to all 1016 Bell COs to 255 years.

ES17. Consequently, the prolonged timelines to deploy the disaggregated HSA model will prevent deployment of such services. Due to the speed cap on aggregated HSA, competitors will have no alternative mandated wholesale input for access services in excess of 100 Mbps

**Application of the Commission's Test for Interim Relief**

1) *There is a serious issue to be determined*

ES18. The speed cap will cause irreparable harm to competitors. By extension, the negative impact on competitors will translate into a lessening and prevention of competition in broadband markets and corresponding harms to consumers of broadband services in the provinces of Ontario and Quebec. These serious matters are neither frivolous nor vexatious.

ES19. The issue therefore satisfies the low threshold for the first step of the Commission's test for interim relief.

2) *Competitors will suffer irreparable damage if interim relief is not granted*

A. Irreparable pecuniary harms

ES20. CNOC members and competitors more broadly will suffer irreparable pecuniary harm in the form of lost customers and revenues.

ES21. The 100 Mbps speed cap will be universal – throughout all of Ontario and Quebec. Furthermore, consumer uptake of broadband service speeds in excess of 100 Mbps is easily predictable for the duration of the period in which a speed cap will be in effect, as informed by the trends observable in the data reported in the latest CMR, as discussed above and in section 2.1 of this submission.

ES22. Moreover, as emphasized throughout this submission, competitors do not have access to alternative wholesale HSA facilities from a different carrier. The 100 Mbps speed cap on aggregated HSA services applies to all Incumbents in Ontario and Quebec and insurmountable barriers prevent deployment of disaggregated HSA services.

ES23. Accordingly, if the cap is implemented, competitors will lose existing customers that are seeking speed upgrades. Likewise, competitors will be prevented from offering service to prospective new customers demanding service speeds above 100 Mbps. In either case, customers will necessarily be limited in choice to the Incumbents, who will be the only providers capable of offering service speeds above 100 Mbps once the speed cap on aggregated HSA comes into effect.

ES24. Whether the 100 Mbps speed cap is effective for weeks or months, competitors will lose existing and prospective customers. The longer the cap is maintained, the more pronounced and harmful these losses will be.

ES25. All losses will be unrecoverable. Some lost customers will enter into two-year agreements for broadband (and perhaps other services). Customers are also generally averse to the inconvenience of switching telecommunications service providers. Thus, even if the speed cap is ultimately rescinded, these factors work against the ability of competitors to compete aggressively to win back customers and mitigate the harm caused by the speed cap.

## B. Irreparable reputational harms

ES26. The speed cap on aggregated HSA will cause severe and irreparable harm to the business reputation of competitors.

ES27. When customers realize that they can only obtain broadband speeds above 100 Mbps from Incumbents, the logical deduction will be that competitors simply do not have the technical ability or capacity to offer higher service speeds. Speed is one of the most significant marketing aspects of broadband service, and a company that cannot offer competitive speeds will quickly be discounted as a serious option for customers. Customers in Ontario and Quebec will conclude that competitors are unable to compete with Incumbents when it comes to high speed broadband services.

ES28. The inability of competitors to respond to customer needs will promulgate a perception that competitors are second-class service providers. Competitors pride themselves on their reputation and rely heavily on customer goodwill. CNOC can think of nothing more damaging to the reputations that competitors have dedicated so much time and effort to cultivate.

ES29. Unless interim relief is granted, the 100 Mbps speed cap will subject competitors to severe depreciation of reputation and customer goodwill.

ES30. A recent 2018 Commission decision granted interim relief on the grounds that the applicant would suffer reputational harm. The Commission noted that “[t]his reputational harm cannot be cured by pecuniary damages, and the nature of this harm is precisely what interim relief is intended to prevent.” The facts leading to that determination involved denial of access to wholesale HSA service, which is precisely what will occur if the 100 Mbps speed cap on aggregated HSA comes into effect.

ES31. For all of the above reasons, CNOC’s request satisfies the second step of the Commission’s test for interim relief.

### *3) The balance of convenience*

ES32. Taking into account the public interest, the balance of convenience strongly favors interim relief – which would ensure that competitors have access to wholesale services that allow them to compete at service speeds above 100 Mbps until the Commission makes determinations on the

final headings of relief requested in the Application, which are necessary to address the issues with the current regulatory framework and Transition Plan.

ES33. While disaggregated HSA services remain unworkable, continued access to aggregated HSA services including at speeds above 100 Mbps is critical to ensure downstream competition in broadband markets in Ontario and Quebec. Preserving the levels of competition for retail broadband services in these markets is a matter of public interest. If CNOC's request for interim relief is denied, consumers in Ontario and Quebec will be limited to a choice between two Incumbents who share a duopoly over broadband service speeds over 100 Mbps.

ES34. Even if the Commission ultimately rescinds the speed cap when issuing a decision on the final heads of relief requested in the Application, competition in downstream retail markets will be substantially lessened and prevented for the effective period of the speed cap if the interim relief requested herein is not granted. This undesirable consequence from a public interest perspective is easily avoidable by granting the interim relief requested by CNOC.

ES35. No negative effects will result from granting the interim relief. Incumbents in Ontario and Quebec are already required to offer aggregated HSA services on a speed-matched basis, including for speeds above 100 Mbps. Incumbents will not be prejudiced from the continuation of this requirement. To the contrary, Incumbents will continue to benefit from the collection of just and reasonable compensatory rates for such services.

ES36. Incumbents might argue that the interim relief will have a negative effect because the speed cap was intended to incent a transition to disaggregated HSA services, which, in turn, was partly intended to facilitate competitor investments in facilities. However, deployment of disaggregated HSA services and any corresponding facilities investments are prevented by the barriers that frustrate the Transition Plan. Accordingly, the policy objective of facilitating facilities-investments will not be furthered by denying CNOC's request for interim relief.

ES37. The Commission has noted that the magnitude of the harm is a relevant factor to consider at the balance of convenience step of the test for interim relief. The magnitude of the harm associated with the 100 Mbps speed cap is extremely high. The speed cap will apply universally to aggregated HSA services throughout Ontario and Quebec. Furthermore, as discussed in the

preceding section of this submission, the speed cap will result in irreparable pecuniary and reputational harms.

ES38. For all of the above reasons, CNOC's request satisfies the third step of the Commission's test for interim relief.

**Conclusion**

ES39. CNOC requests interim relief on an expedited basis consisting of removal of the 100 Mbps speed cap on aggregated HSA services prior to its coming into effect upon the final approval of disaggregated HSA tariffs and until the Commission issues a decision on the headings of final relief requested in the Application.

ES40. This relief satisfies the Commission's test for interim relief, as informed by the *Metropolitan Stores* criteria and modified by *RJR MacDonald*.

## **1.0 INTRODUCTION AND STRUCTURE OF COMMENTS REGARDING INTERIM RELIEF**

### **1.1 Introduction**

1. On 7 November 2018, Canadian Network Operators Consortium Inc. (“CNOC”) filed a Part 1 Application (“Application”) seeking a review and variance of Telecom Regulatory Policy CRTC 2015-326<sup>1</sup> and Telecom Decision CRTC 2016-379<sup>2</sup> to address aspects of the Commission’s regulatory framework for wholesale high-speed access (“HSA”) services that will inadvertently and substantially lessen and prevent competition in downstream retail markets for telecommunications services.

2. CNOC requested the following four headings of relief:

- Removal of the 100 Mbps speed cap on aggregated HSA services on an expedited basis;
- Establishment of a significantly reduced level of disaggregation on the Bell Canada (“Bell”) network, and possibly those of Cogeco Communications Inc. (“Cogeco”), Rogers Communications Canada Inc. (“Rogers”) and Quebecor Media Inc. on behalf of its affiliate, Videotron Ltd. (“Videotron”);
- The addition of port and fibre strand sharing functionality for all Incumbent<sup>3</sup> disaggregated HSA services; and
- Access to FTTP facilities over aggregated HSA services, whereby such access will be phased-out subject to a forbearance framework.

3. On 20 November 2018, Commission staff issued a letter with procedural directions for dealing with the Application.<sup>4</sup> In its letter, the Commission noted that the “...pressing issue at

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<sup>1</sup> *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015 [“TRP 2015-326”].

<sup>2</sup> *Follow-up to Telecom Regulatory Policy 2015-326 – Implementation of a disaggregated wholesale high-speed access service, including over fibre-to-the premises access facilities*, Telecom Decision CRTC 2016-379, 20 September 2016 [“TD 2016-379”].

<sup>3</sup> Throughout these comments, “Incumbents” refers to Bell, Cogeco, Videotron and Rogers, and such references relate to those parties’ operations in Ontario and Quebec. A reference to “Incumbent” is a reference to any one of them, individually.

<sup>4</sup> Commission staff letter dated 20 November 2018 in Canadian Networks Operators Consortium Inc. Part 1 Application to Review and Vary Review of wholesale wireline services, Telecom Regulatory Policy CRTC 2015-326 and 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.

hand in the Application is the request for the removal, on an expedited basis, of the 100 Mbps speed cap on aggregated HSA services, which comes into effect once disaggregated HSA tariffs are approved on a final basis.”<sup>5</sup> In order to address this issue on an expedited basis, the Commission established timelines for addressing the Application in two stages.<sup>6</sup>

4. First, Stage 1 will be dedicated to the matter of suspending the 100 Mbps speed cap on an interim basis.<sup>7</sup> Thereafter, Stage 2 will address the other issues.<sup>8</sup> The Commission staff letter went on to set out a procedural timeline for Stage 1 and noted that process for Stage 2 will be determined at a later time.<sup>9</sup>

5. Pursuant to the Commission’s instructions and as the first step of Stage 1,<sup>10</sup> CNOC is filing these comments in support of approval of interim relief consisting of the removal of the 100 Mbps speed cap on aggregated HSA services prior to its coming into effect upon the final approval of disaggregated HSA tariffs and until the Commission issues a decision on the headings of final relief requested in the Application.

6. At the outset and as an aside, it is important to note that the interim relief under consideration represents a *de facto* continuation of the speed matching obligations that continues to apply to all incumbents. However, the granting of such relief will, practically speaking, result in the continuation the speed matching obligations on the wholesale HSA services of Cogeco, Rogers, and Videotron in Ontario and Quebec as competitors continue to be unable to access Bell HSA speeds that are equivalent to those it offers in the retail market.

7. In this context, CNOC is of the view that the Commission’s previous determinations on the importance of speed matching and the harm to competition if access to wholesale HSA is denied continues to be correct and applicable until such time that a workable framework for wholesale HSA exists. Specifically, in 2010-632, the Commission found that, “*in the absence of a speed-matching requirement, competition in retail Internet services would not continue to be sufficient to protect consumers’ interests.*” Further, in 2015-326, the Commission determined that

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

*“there would be a substantial lessening or prevention of competition in the downstream retail Internet services market, in all incumbent carrier serving regions, by denying access to wholesale HSA services, including those over FTTP access facilities.”*

8. While CNOC’s comments herein will focus on the issue of the removal of the 100Mbps cap until such time that the Commission issues its final decision on CNOC’s application, it should not be lost that the practical lack of speed matching on ILEC higher-speed infrastructure raises analogous concerns as raised by the application of the 100Mbps cap under consideration.

9. Turning back to the issue of the interim relief, as demonstrated in this submission, removal of the 100 Mbps speed cap on an interim basis meets the Commission’s test for interim relief. This relief is desperately needed to prevent imminent and irreparable harm to competitors and competition. Therefore, the granting of the interim relief sought is also aligned with the public interest.

10. As demonstrated in this submission, the removal of the 100 Mbps speed cap on an interim basis meets the Commission’s test for interim relief. This relief is desperately needed to prevent imminent and irreparable harm to competitors and competition. Therefore, the granting of the interim relief sought is also aligned with the public interest.

11. Due to fundamental changes of fact and circumstances, the 100 Mbps speed cap will not serve its intended purpose of facilitating a transition to the disaggregated HSA model. Instead, the 100 Mbps speed cap will be punitive in effect. This condition will prevent competitive broadband service providers, including CNOC members, from providing the service speeds demanded by customers and that are necessary to remain competitive.

12. Without interim relief, competitors will be stranded on legacy service speeds for an indefinite period until the Commission issues its determinations regarding the requests for final relief included in the Application. During this time, competitors will continue to face the insurmountable barriers preventing them from deploying disaggregated HSA services, which would be the only means of accessing wholesale HSA service speeds in excess of 100 Mbps once disaggregated HSA service tariffs are finalized.

13. In other words, unless interim relief is granted, **competitors will have no way of providing service to customers requesting speeds above 100 Mbps.** All customers expressing demand for service above this speed threshold will be limited in choice to the retail service offerings of the Incumbents. As a consequence, Incumbents will enjoy a monopoly or, in best case scenarios, a duopoly of Bell Canada and a Cable Carrier<sup>11</sup>, over retail service speeds in excess of 100 Mbps. Whether a monopoly or duopoly over such broadband speeds prevails in a given service market, consumers will be harmed.

14. Even if the Commission ultimately rescinds the 100 Mbps speed cap on a permanent basis when issuing its determinations regarding the final relief requested by CNOC, in the absence of corresponding interim relief, competitors will suffer irreparable harm from the loss of existing and prospective customers as well as a loss of reputation and customer goodwill. If the speed cap is implemented for any duration of time, the retail markets for broadband services in Ontario and Quebec will therefore be subject to a substantial lessening and prevention of competition.

15. To be clear, CNOC requests the removal and not an adjustment of the 100 Mbps speed cap on aggregated HSA services on an interim basis. Given the circumstances surrounding disaggregated HSA services, the preservation of any speed cap on aggregated HSA services will foreclose competitors from important segments of downstream retail markets.

16. For these reasons and those more fully described in these comments, CNOC urges the Commission to, pursuant to subsection 61(2) of the *Act*, suspend the 100 Mbps speed threshold on aggregated HSA services prior to final approval of disaggregated HSA tariffs and until the Commission issues its determinations regarding the headings of final relief requested by CNOC.

17. It should be noted that this submission will not repeat the application of the Commission's review and vary criteria, which is fully described in the Application. Instead, these comments are strictly focused on the matter of interim relief regarding the 100 Mbps speed cap, as instructed by the Commission's letter.<sup>12</sup>

18. As in the Application, these comments refer to the expert report of Professor Roger Ware entitled "Competition Issues in Facilities-Based Versus Service Based Competition and

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<sup>11</sup> For the purpose of this Application, unless otherwise noted, or the context requires otherwise, the term "Cable Carrier" is used to identify Cogeco, Rogers and/or Videotron.

<sup>12</sup> *Ibid.*

Disaggregated Wholesale HSA Transport” (the “Ware Report”), which is included as Attachment 1 to the Application. The Ware Report assesses the state of competition in Canada’s broadband markets with a focus on the limitations of facilities-based competition.

## **1.2 Structure of Submission**

19. These remainder of this submission is structured as follows:

- Section 2.0 sets out the factual and regulatory background for these comments with corresponding references to the background section of the Application;
- Section 3.0 applies the Commission’s test for interim relief;
- Section 4.0 sets out CNOC’s conclusions.

## **2.0 FACTUAL AND REGULATORY BACKGROUND**

20. The factual and regulatory background leading to the Application and this process to consider interim relief associated with the 100 Mbps speed cap is complex and goes back over five years to the proceeding that culminated with TRP 2015-326. CNOC provided a detailed summary of this background in Section 2.0 of the Application.

21. For brevity, CNOC is incorporating Section 2.0 of the Application into this submission by reference. However, Section 2.10 of the Application, addressing increasing consumer demand for higher service speeds, warrants emphasis in this submission and is therefore mostly reproduced below.

22. There are other parts from the body of the Application that provide critical context for the irreparable harm that would result from a 100 Mbps speed cap on aggregated HSA services. As noted in the introduction of this submission, competitors face insurmountable barriers that **individually and collectively** render a transition to disaggregated HSA services under the current structure impossible. As a consequence, the competitive side of the industry will soon be precluded from fulfilling customer demand for service speeds above 100 Mbps over both aggregated and disaggregated HSA services. If, however, the Commission grants interim relief, competitors will be ensured access to competitively relevant service speeds over aggregated HSA services while the Commission deliberates on CNOC’s proposed final relief to address the issues with the disaggregated HSA model.

23. There are three main barriers preventing competitors from using disaggregated HSA services: (1) the lack of transport supply; (2) the cost of deploying disaggregated HSA services; and (3) the timelines for deploying disaggregated HSA services. Each of these barriers is described in detail below with the support, for the most part, of evidence that was first raised in the Application.

24. Importantly, these barriers are structural in nature in that they are linked to the Commission’s determinations in TRP 2015-326 and TD 2016-379. For this reason, the potential approval of final tariffs for disaggregated HSA services that feature reduced rates will not, in and of itself, render the current regulatory model workable for competition. In order for disaggregated HSA services to become viable, just and reasonable rates for such services are indeed essential – but so too are all of the changes sought by the final relief requested in the Application.

## **2.1 Increasing Consumer Demand for Higher Service Speeds**

25. The issues at the heart of the Application and the matter of the suspension of the 100 Mbps speed cap on an interim basis must be assessed against the backdrop of surging consumer demand for increasingly higher broadband service speeds.

26. Unless the Commission grants interim relief suspending the speed cap, customers of competitors will only be able to access legacy broadband technologies and service speeds at least until the Commission issues its determinations regarding the final relief requested in the Application. In an era marked by rapid consumer uptake of higher speed broadband services, this result would represent a failure of the regulatory framework when it comes to increasing competition and protecting the interests of Canadian consumers who value the choice of service providers, services and pricing that competitive service providers bring to retail markets.

27. Consider the following table from the 2017 Communications Monitoring Report (“CMR”), which cites residential Internet service subscriber distribution by advertised download speed:<sup>13</sup>

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<sup>13</sup> Table 5.3.12 of the 2017 CMR.

<b>Advertised download speed</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
<b>Wideband 300 to 1400 Kbps</b>	2.9	2.7	1.9	1.0	0.7
<b>1.5 to 4 Mbps</b>	18.2	7.3	3.7	2.9	2.1
<b>5 to 9 Mbps</b>	41.3	32.8	26.9	23.4	19.9
<b>10 to 15 Mbps</b>	10.1	25.6	25.6	24.1	22.4
16 to 24 Mbps	-	-	4.5	1.3	0.8
25 to 29 Mbps	-	-	17.4	15.8	14.5
30 to 49 Mbps	-	-	9.9	12.3	13.2
<b>16 to 49 Mbps total</b>	23.5	26.3	31.9	29.4	28.6
50 to 99 Mbps	-	-	-	7.2	10.4
100 Mbps and higher	-	-	-	8.0	15.8
<b>50 Mbps and higher total</b>	3.6	5	9.8	19.2	26.2
<b>Total subscriptions in sample</b>	9,761.1	9,970.1	10,345.1	10,558.7	10,827.5

Source: CRTC data collection

28. CNOC wishes to highlight the following significant trends:

- The subscriber distribution for 100 Mbps and higher nearly doubled from 2015 to 2016, from 8% to 15.8%;
- The subscriber distribution for 50 Mbps and higher increased by 5% to 9.8% from 2013 to 2014; then again from 9.8% to 19.2% from 2014 to 2015; and again from 19.2% to 26.2% from 2015 to 2016; and
- While the subscriber distribution shifted to higher speeds, all lower speed service tiers between 0 and 49 Mbps, with one exception, decreased in percentage of subscriber distribution.

29. The data is indisputable. Canadians are increasingly subscribing to higher and higher broadband service speeds. Given this trend, which shows no sign of abating, the importance of access to competitively relevant wholesale HSA service speeds is paramount. Denial of this access due to a speed cap – even for a period of weeks or days – prevents wholesale-based competitors from responding to consumer demand for higher service speeds. As a consequence, the 100 Mbps speed cap threatens to severely undermine the competitiveness of the retail broadband services markets in Ontario and Quebec.

## 2.2 The Insurmountable Barriers Preventing a Transition to Disaggregated HSA Services

### 2.2.1 The lack of transport supply

30. The lack of transport supply to disaggregated points of interconnection (“POIs”) will prevent deployment of disaggregated HSA services when tariffs are eventually approved on a final basis.

31. What this means is that unless the Commission grants the interim relief sought herein, competitors will not have access to speeds above 100 Mbps via disaggregated HSA service while also being prohibited access to such service speeds over the aggregated model due to the speed cap prescribed by TRP 2015-326 – thereby precluding competitors from offering any competitively relevant service speeds to the increasingly larger group of existing and prospective retail customers who want service speeds greater than 100 Mbps.

32. As explained in the Application,<sup>14</sup> the Commission’s economic rationale for disaggregated HSA is anchored on a finding that transport is duplicable.<sup>15</sup> The Commission referred back to findings from its previous review of the wireline framework in Telecom Decision CRTC 2008-17<sup>16</sup>, which forbore from regulation of transport facilities on a national basis.<sup>17</sup> In that decision, the Commission determined that transport components were duplicable based on evidence of a high incidence of competitor self-supply or alternative supply of fibre-based transport facilities.<sup>18</sup> Several years later, in TRP 2015-326, the Commission determined that the transport component of wholesale HSA services remains generally duplicable in all incumbent carrier serving regions from an economic, technical and implementation perspective”<sup>19</sup> (emphasis added).

33. While it is true that transport segments have indeed been successfully duplicated and other segments may still be economically duplicated in certain densely populated markets, some segments cannot be economically duplicated for a variety of reasons including: (1) the location of the POI is too remote; (2) the distance between the POI and neighbouring interconnection points

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<sup>14</sup> Application, at para 111.

<sup>15</sup> TRP 2015-326, at para 135.

<sup>16</sup> *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008 [“TD 2018-17”].

<sup>17</sup> As noted in para 149 of TRP 2015-326.

<sup>18</sup> TRP 2015-326, at para 132.

<sup>19</sup> *Id.*, at para 135.

or fibre facilities is too great; (3) the density of the customer base served by the POI cannot support a positive business case for the deployment of transport facilities; and (4) there may not be a secondary market to sell excess transport capacity to other service providers.

34. Where one or more of the above-cited conditions exist at a POI, there will be very limited supply options for access to transport facilities. Given the prevalence of these conditions, there are undoubtedly too few supply options to ensure a competitive market for the supply of transport facilities throughout Incumbent serving regions or even a much smaller coverage area.

35. On the matter of the Commission's transport duplicability findings, the Ware Report concludes:<sup>20</sup>

“Depending on various factors, only one or two transport providers might be present at a given POI. This suggests that under the fully disaggregated model most competitors' connections to a local central office or cable head end would be made with a seller who was exercising market power, in many cases a monopolist. This would be a perverse outcome of the disaggregated HSA model, which was surely intended to encourage more competition rather than less.” (Footnotes omitted)

36. It is now known that transport facilities would have to be duplicable at 1016 Bell COs or the combined 149 Cable Carrier head-ends just in Ontario and Quebec in order to serve a customer base throughout the incumbent carrier serving region. This scale of duplication is simply not practical or feasible, especially in the case of Bell; not for a “reasonably efficient”<sup>21</sup> competitive provider of telecommunications services, not for would-be transport service providers and not for both of these potential sources of alternate transport supply combined.

37. TRP 2015-326 concluded that transport facilities are generally duplicable from an economic, technical and implementation perspective, but then goes on to declare that the market conditions associated with the provision of appropriate transport facilities will be assessed during the forbearance process.<sup>22</sup> In doing so, the Commission correctly recognizes that in areas where disaggregated wholesale HSA service has been implemented, there may nonetheless be an absence

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<sup>20</sup> Ware Report, at para 50.

<sup>21</sup> This being the standard for assessing duplicability pursuant to TRP 2015-326, at para 44.

<sup>22</sup> *Id.*, at para 156.

of competitive transport supply conditions to justify phase-out of overlapping aggregated HSA services in those areas.

38. However, by building in this check on local transport conditions at the back-end of the wholesale services framework rather than upfront, the Commission has inadvertently created significant barriers to entry in the Transition Plan<sup>23</sup> itself. So long as the Transition Plan remains unworkable, competitors will be unable to access disaggregated HSA services on an economically efficient basis due to lack of transport supply. By extension, competitors and their customers will be stranded on legacy wholesale HSA service platforms at speeds that tap out at 100 Mbps.

39. As a consequence, if the interim relief sought in this submission is not granted, competitors will be unable to offer, and their customers will not be able to access, services at speeds which are competitive to the offerings of the incumbents for the duration of the period between the time disaggregated HSA service tariffs are approved on a final basis and the time the Commission issues its decision on the final relief requested in the Application. Whether this period is measured in days, weeks or months, competitors will suffer irreparable damage consisting of lost customers, lost opportunity of increased revenues and most importantly – damage to reputation and customer goodwill.

## **2.2.2 Disaggregated HSA is Cost Prohibitive**

### ***A. Disaggregated HSA Service Costs***

40. The second barrier that renders the Commission’s Transition Plan unworkable is the cost prohibitive nature of the current disaggregated model. As in the case with limited transport supply, the cost prohibitive nature of disaggregated HSA services will prevent competitors from offering retail service speeds in excess of 100 Mbps, or at any speed for that matter, via disaggregated HSA services. At the same time, competitors will be subject to a 100 Mbps speed cap on aggregated HSA – the only alternative mandated wholesale service – unless the Commission grants the interim relief requested in this submission.

41. To be clear, the prohibitive costs associated with disaggregated HSA services are not merely a result of the current interim rates. Rather, the costs are prohibitive as a result of the

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<sup>23</sup> The “Transition Plan” is the sum of the regulatory determinations summarized throughout this section and is referred throughout the Application as the “Transition Plan”, as defined in paras 28 to 33 of the Application.

combination of rates, the lack of port and fibre sharing functionality and the level of disaggregation currently featured in the configurations of the Incumbents. Thus, and as aforementioned, even if rates are lowered upon final approval of the disaggregated HSA service tariffs, major structural issues will still prevent the disaggregated HSA model from being workable until the Commission grants the final headings of relief requested in the Application. That is why interim relief is so important when it comes to the 100 Mbps speed cap on aggregated HSA.

42. As explained in the Application,<sup>24</sup> the disaggregated HSA model requires that wholesale customers interconnect at many POI locations to establish the same retail geographic coverage area that can be served via interconnection at a single POI (i.e., CO or cable head-end) under the aggregated HSA model. In Ontario and Quebec, this means that competitive service providers must interconnect at 149 head-ends to serve throughout the combined footprints of the Cable Carriers, and at 1016 COs to serve Bell Canada's footprint.

43. The costs for disaggregated HSA at a single CO or cable head-end are substantial. There are two cost scenarios for Bell's disaggregated HSA services and one scenario for Cable Carrier disaggregated HSA services. Each scenario is addressed in turn, below. CNOC has also listed monthly recurring costs associated with each interconnection scenario.

44. Attachment 2 to the Application includes a schedule outlining additional details that inform the cost estimates included in this Section.

45. Every scenario discussed in this section reflects prohibitive costs that contribute to the barriers that render the Transition Plan unworkable. Even with the CBB rate reductions for aggregated HSA service approved on an interim basis in Telecom Order CRTC 2016-396<sup>25</sup>, the CBB cost savings of aggregated HSA service do not come close to offsetting the staggering costs inherent in this model.

46. In particular, the costs of the Bell configurations are exorbitant. Comparatively, the lesser level of disaggregation inherent in the Cable Carrier configurations results in lower albeit still prohibitive costs.

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<sup>24</sup> Beginning at para 124.

<sup>25</sup> *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, Telecom Order CRTC 2016-396, 6 October 2016 [“TO 2016-396”].

47. **Bell Disaggregated HSA Service via Co-location.** The costs to interconnect via co-location at a single CO for the purpose of obtaining Bell’s disaggregated HSA service is between \$80,000 and \$229,000. These figures are comprised of tariffed charges payable to Bell including Make-Ready Charges<sup>26</sup>, Enablement Charges<sup>27</sup>, Co-location build costs<sup>28</sup> and CBB Order Service Charges<sup>29</sup>. These costs also include additional non-tariffed costs comprised of leased fibre from the CO to the wholesale customer’s single point of presence (“POP”) for its network (note: as explained above, transport supply may not be available at the CO). Unlike Bell disaggregated HSA service via outside meet-me point, co-location does not require the build-out of a POP for each CO.

48. Recurring costs associated with co-location would be between \$3,500 and \$12,500 per CO per month.

49. Under this scenario, the one-time cost to interconnect at 1016 COs would be \$81,280,000 to \$232,664,000 with recurring costs in the range of \$3,556,000 to \$12,700,000 per month!

50. There are additional cost considerations related to the options available to a competitor to access transport from its co-location. One such consideration relates to the application of the primary purpose rule, which is intended to ensure that competitors who co-locate with ILECs do so to primarily interconnect with the ILEC services and facilities.<sup>30</sup> Due to the manner in which this rule has been applied to date, a wholesale customer co-located in a CO may not be able to make use of competitive transport supply available from another party co-located in the same CO. In these circumstances, the wholesale customer would need to build fibre to a POP outside of the CO and interconnect with the party offering competitive transport supply at that location.

51. It may be possible for a wholesale customer co-located in a CO to avoid these costs if competitive transport supply is available outside the CO and the third-party transport supplier permits interconnection to such competitive transport supply outside the CO. However, this will

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<sup>26</sup> Bell Access Services Tariff, CRTC 7516, Item 151, 4.(d).(1).

<sup>27</sup> *Id.*, Item 151, 4.(d).(2).

<sup>28</sup> *Id.*, Item 110., 4.

<sup>29</sup> *Id.*, Item 151, 5.(f).

<sup>30</sup> As established in *Co-location*, Telecom Decision CRTC 97-15, 16 June 1997 and reaffirmed in *Canadian Network Operators Consortium Inc. – Application to review and vary Telecom Decision 2012-209 regarding the co-location rule*, Telecom Decision CRTC 2013-100, 1 March 2013, at para 12.

not be the case where competitive transport supply is available only from a party that is also co-located in the CO.

52. This is an important qualification because the cost to deploy a POP is very substantial, ranging from \$75,000 and \$175,000 with an additional \$1,500 and \$2,000 in monthly recurring costs. Therefore, co-location becomes dramatically more expensive in disaggregated HSA deployment scenarios involving third-party transport.

53. **Bell Disaggregated HSA Service via Outside-meet-me-point.** The fibre that connects to an outside-meet-me-point must have another end that connects to suitable facilities. In most cases, this means that the wholesale customer will need to bring back the other end of the fibre to a POP. As quantified above, the costs to deploy a POP are very substantial, especially when compared to the other cost components of the outside-meet-me-point interconnection option (itemized below).

54. The extent of costs for interconnection via outside-meet-me-point is therefore largely driven by the number of POPs that a competitor must build in order to utilize this interconnection option. A full-scale disaggregated HSA deployment in Bell's serving territory using the outside-meet-me-point option exclusively would require POP builds at a very significant number of COs.

55. In certain cases, the wholesale customer might have opportunities to benefit from certain efficiencies. CNOC has identified four such cases. First, a wholesale customer might leverage a pre-existing POP that it previously deployed (for some other purpose) in proximity to a CO. Second, in a few very dense metropolitan areas with several COs in close proximity to one another, there may be an opportunity to leverage a fewer number of POPs, each connected to multiple COs. However, this opportunity is largely dictated by the equipment included in Bell's COs.<sup>31</sup> Third, if the port and fibre strand sharing functionality requested by CNOC is implemented, wholesale customers will have an opportunity to share POPs and their associated costs. Fourth and finally, other service providers (e.g., transport providers) may have established POPs in proximity to the CO with excess capacity that the providers are willing to sell to a wholesale customer looking to connect the other end of its fibre at the outside-meet-me-point.

56. It bears emphasizing that all of the above exceptions are only likely to occur in a limited number of cases that are unique to each wholesale customer. Putting aside these variables, which

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<sup>31</sup> In particular, the power of the fibre optics equipment and the corresponding distance of the laser.

cannot be factored in a straightforward cost-analysis, it is useful to quantify the range of costs that can be expected assuming that POPs are needed to interconnect at all COs.

57. Costs for outside-meet-me-point interconnection at a single CO are between \$145,500 and \$372,500. These figures are comprised of tariffed charges payable to Bell including Make-Ready Charges<sup>32</sup>, Enablement Charges<sup>33</sup>, CBB Order Service Charges<sup>34</sup>, Meet-me-point Application Charges<sup>35</sup> and Meet-me-point Charges<sup>36</sup>. As noted above, these costs also include additional non-tariffed costs comprised of establishing a POP and obtaining leased fibre from the CO to the wholesale customer's POP (note: as explained above, transport supply may not be available at the CO).

58. Recurring costs per outside-meet-me-point interconnection would be between \$4,000 and \$12,000 per CO per month.

59. Under this scenario, the one-time cost to interconnect at 1016 COs would be \$147,828,000 to \$378,460,000 with recurring costs in the range of \$4,064,000 to \$12,192,000 per month.

60. It may seem surprising that the cost range for the outside-meet-me-point scenario is greater than the cost of the co-location scenario. That is because the entire justification of a meet-me-point configuration is to provide competitive service providers with an interconnection option that is significantly less costly than co-location. Indeed, the Commission concluded that the outside meet-me-point is cheaper for competitors than a co-location option over one, three and five-year periods.<sup>37</sup> However, after further network analysis, it is clear that configurations involving meet-me-points will require competitors to build POPs near most outside-meet-me-points. This entails significant costs that completely offset upfront tariff savings of the outside-meet-me-point option compared to co-location. This surprising outcome is attributable to the need to establish POPs at a substantial number of COs.

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<sup>32</sup> *Id.*, Item 151, 4.(d).(1).

<sup>33</sup> *Id.*, Item 151, 4.(d).(2).

<sup>34</sup> *Id.*, Item 151, 5.(f).

<sup>35</sup> *Id.*, Item 152, 4.(a).

<sup>36</sup> *Id.*, Item 152, 4.(c).

<sup>37</sup> Bell Canada – Application to review and vary Telecom Decision 2016-379 regarding the implementation of an outside meet-me point for disaggregated wholesale high-speed access service, Telecom Decision CRTC 2017-459, 20 December 2017 [“TD 2017-459”], at para 22.

61. Although outside-meet-me-points do not provide the cost savings that the industry and Commission had hoped for, this interconnection option remains beneficial in situations where they can be leveraged to generate the situational efficiencies described above. In light of these significant on-going benefits of outside-meet-me-points, CNOC continues to support the continued availability of this interconnection option.

62. **Cable Carrier Disaggregated HSA Service.** The costs to interconnect at a single Cable Carrier head-end for the purpose of obtaining disaggregated HSA service is between \$90,500 to \$205,500. These figures are comprised of tariffed charges payable to the Cable Carrier<sup>38</sup> including the POI Entrance Fee, POI Configuration Fee, ISP Registration and the Initial Report Fee. These costs also include additional non-tariffed costs comprised of establishing a point of presence and obtaining leased fibre from the head-end to the wholesale customer's POP (note: as explained above, transport supply may not be available at a POI). As is the case with Bell disaggregated HSA, Cable Carrier disaggregated HSA requires a wholesale customer POP near every Cable Carrier meet-me-point. Colocation is not available from Cable Carriers.

63. Recurring costs are between \$4,000 and \$12,000 per head-end per month.

64. Under this scenario:

- The one-time cost to interconnect at 36 Rogers head-ends would be \$3,258,000 to \$7,398,000 with recurring costs in the range of \$144,000 to \$432,000 per month.
- The one-time cost to interconnect at 60 Cogeco head-ends would be \$5,430,000 to \$12,330,000 with recurring costs in the range of \$240,000 to \$720,000 per month.
- The one-time cost to interconnect at 53 Videotron head-ends would be \$4,796,500 to \$10,891,500 with recurring costs in the range of \$212,000 to \$636,000 per month.

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<sup>38</sup> All tariffed costs are set out in the respective tariffs of the Cable Carriers: Rogers Access Services Tariff CRTC 21530, Part G, Item 703, Section 1, 1.15; Cogeco TPIA Tariff CRTC 26400, Item 103, Section 1, 1.2; Videotron TPIA Tariff CRTC 26950, Item 201, Section 7.

*B. Aggregated HSA Costs*

65. The above-listed costs to deploy disaggregated HSA throughout an Incumbent's serving area are alarming. However, the true gravity of the matter is not evident until these figures are compared with the costs of aggregated HSA services, which are set out below.

66. **Bell Aggregated HSA Service.** The costs to obtain Bell's aggregated HSA service is between \$16,500 and \$31,500. These figures are comprised of tariffed charges payable to Bell including<sup>39</sup> an activation fee, domain path mapping, gateway mapping administration, AHSSPI and CBB Order Service Charges. These costs also include additional non-tariffed costs comprised of leased fibre from the CO to the wholesale customer's single POP for its network (note: as explained in Section 5.1.2 above, transport supply may not be available at the CO).

67. A single POP is necessary for aggregated HSA, at a cost of between \$75,000 and \$175,000, with recurring costs between \$1,500 and \$2,000.

68. Recurring costs associated with Bell aggregated HSA are between \$2,500 and \$10,000 per month.

69. Under aggregated HSA, wholesale customers do not need to interconnect at more than one POI. In other words, the one-time and recurring costs just quantified are the bottom line.

70. **Cable Carrier Aggregated HSA Service.** The costs to interconnect at a single Cable Carrier head-end for the purpose of obtaining aggregated HSA service is between \$15,500 to \$30,500. These figures are comprised of tariffed charges payable to the Cable Carrier<sup>40</sup> including the POI Entrance Fee, POI Configuration Fee, ISP Registration and the Initial Report Fee. These costs also include additional non-tariffed costs comprised of obtaining leased fibre from the head-end to the wholesale customer's single POP for its network (note: as explained above, transport supply may not be available at the POI).

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<sup>39</sup> Bell Access Services Tariff CRTC 6716 Item 5410, Section 4, sets out the rates for Gateway Access Service ("GAS"); Bell Access Services Tariff CRTC 6716 Item 5440, Section 4, sets out the rates for Gateway Access Service - FTTN ("GAS-FTTN");

<sup>40</sup> All tariffed costs are set out in the respective tariffs of the Cable Carriers: Rogers Access Services Tariff CRTC 21530, Part G, Item 703, Section 1, 1.15; Cogeco TPIA Tariff CRTC 26400, Item 103, Section 1, 1.2; Videotron TPIA Tariff CRTC 26950, Item 201, Section 7.

71. A single POP is necessary for aggregated HSA, at a cost of between \$75,000 and \$175,000, with recurring costs between \$1,500 and \$2,000.

72. Recurring costs associated with aggregated HSA are between \$2,500 and \$10,000 per head-end.

73. Again, under aggregated HSA, wholesale customers do not need to interconnect at more than one POI. In other words, the one-time and recurring costs just cited are the bottom line.

C. Costs of Disaggregated HSA are Not Offset by CBB Savings

74. It should be readily apparent that the costs of transitioning to disaggregated HSA on a Cable Carrier platform is very substantial whereas the cost to do so on Bell's disaggregated configuration is simply unworkable for any size of competitive service provider. The above-cited figures do not even include the cost of capital and other substantial costs that would need to be incurred by the wholesale customer.<sup>41</sup>

75. One of the principal justifications cited by the Commission for moving to a disaggregated HSA model is to cut out "...the high cost incurred by competitors when transporting large amounts of traffic over incumbent carriers' facilities."<sup>42</sup> As further noted by the Commission, "These costs are expected to exacerbate as consumption increases over time, given that a competitor must pay for all of its data traffic to be routed back to a central point of aggregation, no matter how far away a subscriber is located."<sup>43</sup>

76. These Commission pronouncements are important. It is absolutely correct that at the time of the proceeding leading to TRP 2015-326, competitors faced very high CBB charges associated with aggregated HSA services. In fact, the state of CBB rates during this time was one of the greatest threats to the continued survival of competitors relying on aggregated HSA services. However, this threat was not at all a by-product of the aggregated HSA model. The problem was purely a result of rates that were not cost based and therefore not just and reasonable. CNOC

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<sup>41</sup> For instance, equipment costs.

<sup>42</sup> TRP 2015-326, at para 145.

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

argued this very point back in 2013 and 2014 throughout the proceeding leading to TRP 2015-326.<sup>44</sup>

77. As recounted in Section 2.4 of the Application, the Commission ultimately confirmed that CBB rates were highly inflated in TO 2016-396.<sup>45</sup> In this decision, the Commission adjusted proposed CBB rates of the Incumbents that were not *prima facie* based on reasonable costs.<sup>46</sup> These adjustments ranged from between 36% and 85% reductions to Incumbent CBB rates.

78. The very substantial adjustments to CBB rates constitute a key dimension of the fundamental change in circumstances regarding disaggregated HSA supply conditions raising substantial doubt as to the correctness of TRP 2015-326.

79. The takeaway here is that even though the Commission has yet to set final rates, the CBB justification anchoring the policy shift to a disaggregated HSA model is not at all what it appeared to be at the time of TRP 2015-326. Based on the current market share distribution for competitive service providers,<sup>47</sup> it is abundantly clear that the staggering costs of Bell's disaggregated HSA configuration will never be offset by lower CBB rates applicable under disaggregated HSA.

80. Quite simply, competitive service providers could never hope to generate \$81,280,000 to \$232,664,000 of CBB savings to offset the equivalent \$81,280,000 to \$232,664,000<sup>48</sup> in one-time costs of deploying disaggregated HSA throughout Bell's serving area in Ontario and Quebec, leaving aside the \$4,064,000 to \$12,192,000 in recurring monthly charges associated with disaggregated HSA. Instead, costs would overwhelmingly eclipse the modest CBB savings offered by Bell's disaggregated HSA platform and run competitors out of business in short order.

81. The prospect of deploying disaggregated HSA throughout Bell's serving area becomes even more improbable when considering that Bell's tariffed monthly FTTP access charge to wholesale customers is \$121.79, which is \$46.84 higher than Bell's promotional rate for the equivalent 1 Gbps / 750 Mbps retail service or \$21.84 higher than the non-discounted rate for that

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<sup>44</sup> See CNOC final argument dated 19 December 2014 in the proceeding leading to TRP 2015-326, at Section 5.1; See also oral hearing transcript from 25 November 2014, at paras 1762 to 1805.

<sup>45</sup> As summarized in Section 2.4 of the Application.

<sup>46</sup> TO 2016-396, at para 19.

<sup>47</sup> Non-incumbent providers account for 11.9% of residential Internet access service revenues, as set out in 2017 CMR at Table 5.3.2; This market share is distributed amongst a substantial proportion of the more than 550 companies registered as telecommunications service providers.

<sup>48</sup> This being the co-location scenario, which is cheaper than the outside-meet-me-point interconnection scenario.

service. What's more, the FTTP access charge is merely a single component of the competitor's retail Internet service. In other words, Bell's fully finished retail product is priced much lower than a single wholesale circuit input to the retail services of Bell's competitors. This leaves no margin for competition over Bell's FTTP access facilities, which wholesale customers can only access via Bell's disaggregated HSA service. Additionally, there is no guarantee that final rates will be lower than interim rates. This further drives home the point that there can be no positive business case whatsoever for transitioning to disaggregated HSA over Bell's configuration, even under a long-term horizon.

82. Although the problem is less severe in the case of Cogeco, Rogers and Videotron than in the case of Bell, it is also present in those cases.

*D. Competitors Should Not Be Forced to Forgo Customers Due to an Unworkable Transition Plan*

83. As a counter-point, one might argue that a competitive service provider could choose to deploy disaggregated HSA at a small subset of Incumbent POIs in Ontario and Quebec. This approach might seem particularly relevant for the Bell configuration featuring 1016 POIs.

84. Effectively, this strategy would have the competitive service provider exclusively deploy at COs which serve the highest number of existing (i.e. under the aggregated HSA framework) and potential customers. The competitive service provider would then ultimately lose any existing customers in areas served by COs where there is a weaker case for disaggregated HSA deployment.<sup>49</sup> In doing so, the competitor would also forgo the opportunity to compete for new customers in those areas.<sup>50</sup>

85. This idea is at odds with the fundamental purpose of the wholesale services framework, which is to facilitate competition and choice of providers, services and price throughout as much of Canada as possible. No Canadian customer should be stranded simply because it happens to reside in a low-density area that is a particularly weak candidate for disaggregated HSA deployment.

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<sup>49</sup> This would ultimately occur when aggregated HSA service is phased out in the area in question, pursuant to the Commission's direction in TRP 2015-326. Until the conditions for phase-out manifest, it is important to recognize that aggregated HSA services in these areas will be subject to a 100 Mbps speed cap and no service will be available over FTTP facilities. These are factors that severely limit the potential for wholesale-based competition.

<sup>50</sup> See above footnote.

86. This proposal is also not a solution to the imminent and irreparable harm that would occur if the interim relief requested by CNOOC is not granted. Competitors would still be foreclosed from competing in retail market segments for broadband services above 100 Mbps in substantially all of their respective serving areas.

*E. The Cost of Disaggregated HSA in an Industry that is Subject to Regulatory Uncertainty*

87. As demonstrated throughout this section, the proposed costs of disaggregated HSA service are staggering. An additional layer of complexity that makes these massive costs even more daunting is the effect of regulatory uncertainty in this industry.

88. The Commission reviews its regulatory framework for wireline services roughly every five years. The Commission also periodically reviews the status of regulated services, issues forbearance orders and changes policies that have a significant impact on the telecommunications industry and Canada's retail Internet services markets specifically. This degree of uncertainty makes it very difficult for a rational investor to justify investments in the tens and hundreds of millions of dollars if one year to the next, the regulatory framework changes in a manner that could completely erase the value of these investments in the short and long term.

89. For instance, the Commission could adopt another wholesale HSA model or forbear from the continued regulation of a critical component to the disaggregated HSA configuration (e.g. colocation or the outside-meet-me-point). As a consequence, investments in disaggregated HSA deployment could be lost or devalued substantially.

90. It is understood that there will always be a degree of investment risk in a regulated industry for Incumbents and competitors alike. However, from the perspective of competitive service providers, the price tag and risk of disaggregated HSA deployment are proportionately so high as to constitute very considerable barriers that contribute to an unworkable Transition Plan. Unlike Incumbents, competitors do not have access to the very significant amounts of capital required to mitigate comfortably regulatory risks of this scale.

*F. Conclusion: Disaggregated HSA Costs and Interim Relief*

91. In summary, the costs of disaggregated HSA constitute a major problem within the Transition Plan. The Transition Plan requires a province-wide shift to disaggregated HSA services

despite massive and prohibitive up-front costs that render this objective impossible. Furthermore, the Transition Plan penalizes competitors for failing to follow-through with the unworkable transition expectations by limiting access to FTTP access facilities and speeds above 100 Mbps.

92. As CNOC has emphasized thus far, the cost to transition to disaggregated HSA services will still be prohibitive even if final rates are substantially lowered upon the final approval of disaggregated HSA service tariffs. This is because the main cost component is driven by the structural aspects of the disaggregated HSA model and Transition Plan, as determined by TRP 2015-326 and TD 2016-379. More specifically, costs will remain prohibitive due to the lack of port and fibre sharing functionality and the high level of disaggregation featured in Incumbent disaggregated HSA configurations.

93. What this means from a practical perspective, is that competitors will not have access to service speeds in excess of 100 Mbps via disaggregated HSA services due to the prohibitive costs associated with the state of the disaggregated model. At the same time, competitors will not have access to service speeds over 100 Mbps via aggregated HSA service due to the speed cap imposed by TRP 2015-326. If this situation is allowed, competitors will have no means to provide service to retail customers expressing ever increasing demand for higher speed broadband services, as evidenced above in Subsection 2.1.

### **2.2.3 Timelines for Transition to Disaggregated HSA Service**

94. The third barrier to a workable Transition Plan is the prolonged timelines to implement disaggregated HSA services.

95. This section outlines estimates of projected disaggregated HSA deployment timelines. As will be evident, even the most aggressive deployment strategies can be measured in multiple years, decades and in one case, even in centuries. The implication is that even if there were a size of competitor with access to capital that could take on the astronomic costs of a full-scale disaggregated HSA transition over 149 POIs (in the case of the Cable Carriers' combined serving areas) or 1016 COs (in the case of Bell's serving area), the likes of which does not exist, the minimum transition timelines for deployment would still render the Transition Plan unworkable. Effectively, the competitor would be deprived of FTTP access and speeds above 100 Mbps in all areas that find themselves in the long and slow-moving queue for disaggregated HSA deployment.

96. To produce these deployment timeline estimates, CNOC referred to models that ran aggressive schedules for disaggregated HSA deployment. Details about these models are set out in Attachment 2 of the Application.

97. The models utilized by CNOC assumed that the competitive service provider would initiate disaggregated HSA deployment at a POI every two weeks. Over the course of time, this leads up to simultaneous disaggregated HSA deployment work at 30 POIs. It should be emphasized the resource burden generated by this scale of deployment would overwhelm the capacity of virtually all competitive service providers in today's markets. Nevertheless, at this pace, the timelines for disaggregated HSA deployment are approximately the following:

- 43 years to deploy to 1016 Bell COs;
- 3.2 years to deploy to 60 Cogeco head-ends;
- 2.2 years to deploy to 36 Rogers head-ends;
- 2.9 years to deploy to 53 Videotron head-ends

98. To make matters worse, Bell's disaggregated HSA tariff includes a provision that allows Bell to delay applications for disaggregated HSA service from competitors if Bell has two ongoing projects in COs in that province.<sup>51</sup> This would prolong the timeline for deployment by orders of magnitude. Given that this calculation depends on unknown variables such as the number of applications from other service providers, it is impossible to determine just how long it would take to complete a full disaggregated HSA build with Bell. However, just to put this in perspective, if one were to apply a much more flexible constraint that limits the amount of concurrent disaggregated HSA builds to two COs per wholesale customer, we can predict that it would take 255 years to complete a disaggregated build to all central offices within Bell's Ontario and Quebec footprint.

99. In the final stages of the costing proceeding associated with disaggregated HSA service, Incumbents continue to recommend disaggregated HSA implementation restrictions and corresponding timelines that are wholly unworkable. For instance, Rogers recommends a 50-week

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<sup>51</sup> Bell Access Tariffs, CRTC 7516, Item 151, Section 3(g).

minimum implementation period for outside work related to the initial POI application at any Rogers head-end.<sup>52</sup> For its part, Bell’s latest comments reveal that Bell expects to deploy disaggregated HSA service to 60 COs in a period of five years.<sup>53</sup> To be clear, that is 5 years to deploy 60 of Bell’s 1016 COs. Finally, both Cogeco<sup>54</sup> and Videotron<sup>55</sup> also continue to advocate for unreasonably prolonged deployment timelines.

100. For these reasons, even if the other two daunting barriers (i.e., lack of transport supply and prohibitive costs) to deploying disaggregated HSA service did not exist, competitors would still have to endure delays measured in years, decades and centuries in order to deploy disaggregated HSA services. Meanwhile and unless the Commission grants interim relief here, competitors would be locked out of business for higher service speeds due to the 100 Mbps speed cap over aggregated HSA services.

### **3.0 INTERIM RELIEF IS REQUIRED**

#### **3.1 The Commission’s Test for Granting Interim Relief**

101. Before granting a request for interim relief, the Commission requires the applicant to demonstrate that its request meets the criteria set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110 (“*Metropolitan Stores*”), as modified in *RJR MacDonald Inc. V. Canada (Attorney General)* [1994] 1 S.C.R. 311 (“*RJR MacDonald*”). These criteria are that:

- a) there is a serious issue to be determined;

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<sup>52</sup> Rogers Final Comments dated 12 October 2018 in Follow-up to Telecom Decision CRTC 2016-379, (“RCCI’s Final Comments”), at para 58; See also Rogers Final Reply Comments dated 16 November 2018 in 16 in Follow-up to Telecom Decision CRTC 2016-379, Implementation of a disaggregated wholesale high-speed access (HSA) services, at paras 17-20.

<sup>53</sup> Bell Final Reply Comments dated 16 November 2018 in Follow-up to Telecom Decision CRTC 2016-379, Implementation of a disaggregated wholesale high-speed access (HSA) services, including over fibre-to-the-premises access facilities and Follow-up to Telecom Order CRTC 2016-396, Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates, at para 62.

<sup>54</sup> Cogeco Final Reply Comments dated 16 in Follow-up to Telecom Decision CRTC 2016-379, Implementation of a disaggregated wholesale high-speed access (HSA) services, including over fibre-to-the-premises access facilities, at paras 78 to 81.

<sup>55</sup> Videotron Final Reply Comments dated 16 in Follow-up to Telecom Decision CRTC 2016-379, Implementation of a disaggregated wholesale high-speed access (HSA) services, including over fibre-to-the-premises access facilities, at Section III a).

- b) the party seeking the interim relief will incur irreparable harm if the relief is not granted; and
- c) the balance of convenience, taking into account the public interest, favours granting the interim relief.

102. Each of these criteria are addressed in the subsections that follow.

### **3.2 There is a Serious Issue to be Determined**

103. The threshold for a serious issue to be determined is a low one.<sup>56</sup> In general, the applicant need only demonstrate that the application is neither frivolous nor vexatious.<sup>57</sup> This standard has been applied by the Commission on several occasions.<sup>58</sup>

104. The implications of a 100 Mbps speed cap on aggregated HSA services while a transition to disaggregated HSA services remains unworkable undoubtedly exceeds the low threshold for this criterion on the Commission's test for interim relief.

105. Without interim relief, competitors will be stranded on legacy service speeds for an indefinite period until the Commission issues its determinations regarding the requests for final relief included in the Application. During this time, competitors will continue to face the insurmountable barriers preventing them from deploying disaggregated HSA services, which would be the only means of accessing wholesale HSA service speeds in excess of 100 Mbps once disaggregated HSA service tariffs are finalized. In other words, unless interim relief is granted, competitors will have no way of providing service to customers requesting speeds above 100 Mbps

106. The speed cap will cause irreparable harm to competitors. By extension, the negative impact on competitors will translate into a lessening and prevention of competition in broadband markets and corresponding harms to consumers of broadband services in the provinces of Ontario and Quebec.

107. These matters are neither frivolous nor vexatious.

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<sup>56</sup> *RJR MacDonald*, at p.33.

<sup>57</sup> *Ibid.*

<sup>58</sup> See, e.g., Commission letter dated 31 August 2015 Addressed to William Sandiford (Canadian Network Operators Consortium Inc.) and Natalie MacDonald (Eastlink) (CRTC File No. 8661-C182-201508417) available at: <https://crtc.gc.ca/eng/archive/2015/lt150831a.htm>.

108. For these reasons, CNOC’s request satisfies the first step of the Commission’s test for interim relief.

### **3.3 Competitors will Suffer Irreparable Damage if Interim Relief is not Granted**

109. If interim relief is not granted, CNOC members and competitors more broadly will suffer irreparable harm.

110. As explained in background sections 2.2.1 through 2.2.3 of this submission, competitors will be foreclosed from retail markets for broadband speeds in excess of 100 Mbps as soon as disaggregated HSA tariffs are approved on a final basis and the speed cap comes into effect. The speed cap was intended to encourage a transition to the disaggregated HSA model. However, this transition is and will remain impossible until the final relief requested by CNOC is granted.

111. The final relief described in the Application is necessary to eliminate or greatly mitigate the barriers to implementing disaggregated HSA services, which are: (1) the lack of transport supply to disaggregated POIs; (2) the prohibitive cost of implementing disaggregated HSA services; and (3) the extremely prolonged timelines to deploy disaggregated HSA services. Individually and collectively, these barriers render the Transition Plan unworkable. Under such conditions, any speed cap on aggregated HSA services will cause irreparable harm to competitors.

112. The Commission described the relevant considerations in an assessment of irreparable harm as follows:

“Irreparable” harm requires an analysis of the nature of the harm, rather than the magnitude. Harm is more likely to be irreparable where there is an unquantifiable loss or a loss that the applicant may not be able to recover.”<sup>59</sup>

113. As will be demonstrated below, unless the interim relief is granted, competitors will be subject to unrecoverable pecuniary and reputational harm. CNOC submits that the nature of this harm therefore meets the Commission’s definition of “irreparable” harm.

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<sup>59</sup> *Ibid.* See also Commission letter dated 7 July 2016 in Re: Part 1 application by Ice Wireless Inc. relating to Rogers Communication Inc. attempt to disconnect Ice Wireless Inc. and the proper interpretation of Telecom Regulation Policy CRTC 2015-177 – Request for interim relief (CRTC File No. 8620-J106-201601633) available at:

### **3.3.1 Irreparable pecuniary harm**

114. Any speed cap on aggregated HSA services will subject competitors to irreparable pecuniary harm in the form of lost customers and revenues. For example, a significant number of competitors' existing retail customers will inevitably request service upgrades to service speeds in excess of 100 Mbps while the speed cap is in effect. As demonstrated in Section 2.1 of this submission, the demand for these services is steadily increasing.

115. Competitors will be forced to notify those customers that they are unable to fill orders for any speeds above 100 Mbps. Many customers so notified will promptly seek service elsewhere. Due to the 100 Mbps speed cap and the unworkable state of disaggregated HSA services, those customers will be limited in choice to one, or at best, two Incumbents.

116. Then there is the matter of attracting new customers. Quite simply, competitors will have nothing to offer to new prospective customers who are shopping for broadband services above 100 Mbps. Once again, the 100 Mbps speed cap will force competitors to turn these customers away, leaving them to find their way to the only suppliers able to offer broadband speeds in excess of 100 Mbps – the Incumbents.

117. Whether the 100 Mbps speed cap is effective for weeks or months, competitors will lose existing and prospective customers.

118. Thus, competitors will be subject to losses that compound over time. Some customers will also be lost permanently. A reality of the telecommunications services industry is that customers are averse to the inconvenience of switching providers. What's more, one or two-year contract terms for broadband services are becoming commonplace in the marketplace. When factoring switching inconvenience and contract terms, it is not surprising that residential high-speed Internet access service subscriptions exhibit a low churn rate that has consistently declined over the last few years to the current rate of 1.74%.<sup>60</sup>

119. What all of this means in practice is that the 100 Mbps speed cap will cause competitors to lose existing and prospective customers, some of whom may go on to enter one or two-year service agreements with Incumbents and all of whom will be deterred from going back to their former

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<sup>60</sup> 2017 Communications Monitoring Report, at p. 254.

competitive provider due to switching inconvenience. Even if competitors manage to eventually regain lost customers, revenue losses will be extensive, unrecoverable and a direct result of the 100 Mbps speed cap on aggregated HSA. From this perspective, CNOC submits that the pecuniary losses faced by competitors should be considered irreparable harm.

120. Importantly, broadband services are often subscribed to as part of a discounted bundle of services that may also include voice, television and other services. Customers seeking service speeds in excess of 100 Mbps might therefore also be inclined to bundle other services with their new broadband subscription. Accordingly, the speed cap puts competitors at risk of losing existing and prospective bundled subscriptions to Incumbents that can include broadband services in excess of 100 Mbps in their bundles. Clearly, this consequence of the speed cap greatly exacerbates the pecuniary losses that competitors will face unless interim relief is granted.<sup>61</sup>

121. The harms that will accrue if the 100 Mbps cap is not rescinded on an interim basis are not speculative – they are very real.

122. First, there is nothing speculative about the pecuniary harms that the 100 Mbps speed cap will impose on competitors. Such harms are a certainty. Unlike the situation giving rise to the TekSavvy Application, the 100 Mbps speed cap will not merely be imposed on an isolated townhouse condominium that competitors may or may not actively target for the sale of broadband services. The 100 Mbps speed cap will be universal – throughout all of Ontario and Quebec. Furthermore, consumer uptake of broadband service speeds in excess of 100 Mbps is easily predictable for the duration of the period in which a speed cap will be in effect. As highlighted in Section 2.1 of this submission, the subscriber distribution for 100 Mbps and higher nearly doubled from 2015 to 2016 from 8% to 15.8%.<sup>62</sup> Similar annual increases can be expected going forward. It is therefore a certainty that competitors will lose existing and prospective customers seeking broadband services above 100 Mbps.

123. Second and finally, CNOC has demonstrated that competitors do not have access to alternative wholesale HSA facilities from a different carrier. The 100 Mbps speed cap on

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<sup>61</sup> Service and product bundling also exacerbate the switching inconvenience described in the preceding paragraph. Afterall, switching multiple services to a new provider is far more arduous than only switching providers for broadband services.

<sup>62</sup> 2017 CMR, at Table 5.3.12.

aggregated HSA services applies to all Incumbents in Ontario and Quebec. Although the Commission had intended for disaggregated HSA services to serve not merely as an alternative wholesale HSA input, but as the primary wholesale HSA platform going forward, it is now abundantly clear that disaggregated HSA services are incapable of fulfilling this function unless the final relief requested in the Application is granted. To be clear, and as emphasized throughout this submission, disaggregated HSA services are unworkable due to the following pervasive and insurmountable barriers that individually and collectively prevent deployment: (1) the lack of transport supply to disaggregated POIs; (2) the prohibitive costs of deploying disaggregated HSA services; and (3) the prolonged timelines associated with disaggregated HSA deployment.

124. For all of the above reasons, CNOC submits that competitors face irreparable harm in the form of non-recoverable and non-speculative pecuniary harm that will occur due to the 100 Mbps speed cap on aggregated HSA services.

### **3.3.2 Irreparable reputational harm**

125. The inability<sup>63</sup> of competitors to offer broadband speeds higher than 100 Mbps will cause severe and irreparable harm to the business reputation of those competitors.

126. When customers realize that they can only obtain broadband speeds above 100 Mbps from Incumbents, the logical deduction will be that competitors simply do not have the technical ability or capacity to offer higher service speeds. Speed is one of the most significant marketing aspects of broadband service, and a company that cannot offer competitive speeds will quickly be discounted as a serious option for customers. Customers in Ontario and Quebec will conclude that competitors are unable to compete with Incumbents when it comes to high speed broadband services. From here, a customer might extrapolate: if competitors can't provide a high tier of broadband services, what is to say that they can provide a high tier of any kind of service be it telecommunications, broadcasting or otherwise?

127. The reasons why competitors will be unable to provide broadband services above 100 Mbps cannot be easily explained to customers in a storefront setting or during a customer service call. Indeed, it took CNOC twenty-two pages in its Application to cover the regulatory and factual

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<sup>63</sup> *I.e.*, either via aggregated HSA services due to the speed cap or via disaggregated HSA services due to the barriers rendering the disaggregated HSA model unworkable at present.

background leading to that point.<sup>64</sup> On one hand, prospective new customers might not care. Providers either offer a service or they don't. If they don't, the customer will promptly go elsewhere and is unlikely to check-in again with a company that couldn't even present a service offering let alone a price for it. On the other hand, existing customers seeking a broadband speed increase above 100 Mbps might be disappointed and confused that their preferred service provider is unable to offer broadband service speeds that are quickly becoming industry standard.

128. The inability of competitors to respond to customer needs will promulgate a perception that competitors are second-class service providers. Competitors pride themselves on their reputation and rely heavily on customer goodwill. CNOC can think of nothing more damaging to the reputations that competitors have dedicated so much time and effort to cultivate. Unless interim relief is granted, the 100 Mbps speed cap will subject competitors to depreciation of reputation and customer goodwill.

129. A recent 2018 Commission decision on interim relief included notable findings on reputational harm.<sup>65</sup> On 16 April 2018, Frontier Networks Inc. ("Frontier") filed a Part 1 application<sup>66</sup> requesting, in part, expedited interim relief regarding the refusal of Bragg Communications Incorporated, carrying on business as Eastlink ("Eastlink") to allow Frontier to continue to resell third-party Internet access ("TPIA") services to two reseller customers. In that case, Eastlink refused to process any orders from Frontier to activate new customers until its dispute with Frontier was resolved.<sup>67</sup> On the matter of irreparable harm, the Commission found:

"End-users are likely to associate with Frontier and its two reseller customers the prolonged installation delays and delayed access to competitive high-speed Internet services resulting from Eastlink's stop orders, which will likely result in harm to the reputation of both Frontier and its two resellers. This reputational harm cannot be cured by pecuniary damages, and the nature of this harm is precisely what interim relief is intended to prevent."<sup>68</sup>

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<sup>64</sup> See Section 2.0 of the Application.

<sup>65</sup> Commission letter dated 17 May 2018 Re: Interim Relief in the Part 1 application by Frontier Networks Inc. against Eastlink relating to the resell of Third Party Internet Access - Commission Decision (CRTC No. 8622-F40-201802372) available at <https://crtc.gc.ca/eng/archive/2018/lt180517.htm>, ("Commission Letter Re Frontier").

<sup>66</sup> Frontier Part 1 application for Expedited Interim and Final Relief Regarding Eastlink's Refusal to Allow Frontier to Resell TPIA Services, 16 April 2018.

<sup>67</sup> *Id.*, at para 2.

<sup>68</sup> Commission Letter Re Frontier, at p.2.

130. A parallel can be drawn between the Commission's determinations regarding Frontier's request for interim relief and the present request for interim relief made by CNOC. As in the Frontier situation, customers are likely to associate competitors with the unavailability of broadband service offerings above 100 Mbps due to the lack of viable access to wholesale services that can enable such downstream retail connections.

131. Stated in another way, the Commission concluded that Frontier's reseller customers and subsequent end-users would not know that their lack of service was attributable to Eastlink's refusal to process orders. Thus, absent interim relief, Frontier's reputation would be seriously impaired. Likewise, existing and prospective end-users of competitors would not know that their competitive provider's inability to offer services at 100 Mbps and above is a result of a problematic regulatory framework. It is likely that this impression will persist for some customers even after the issues associated with the Application are resolved in a manner which permits competitors to offer these services. Consequently, absent interim relief, competitors' reputations would be irreparably harmed.

132. As the Commission explicitly acknowledged, reputational harms cannot be cured by pecuniary damages and the nature of this harm is precisely what interim relief is intended to prevent. CNOC submits that competitors face irreparable reputation harms in this present instance and urges the Commission to grant interim relief on an expedited basis.

### **3.3 The Balance of Convenience**

133. The Commission has found that where irreparable harm is very likely to occur, the presumption is that the balance of convenience favours the granting of interim relief and that it would require special circumstances to rebut this presumption.<sup>69</sup> As demonstrated in the previous section, irreparable harm is a certainty on the facts at hand. Unless interim relief is granted, competitors will face unrecoverable pecuniary losses and irreversible damage to their reputations.

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<sup>69</sup> Commission letter dated 7 July 2016 Re: Part 1 application by Ice Wireless Inc. relating to Rogers Communication Inc. attempt to disconnect Ice Wireless Inc. and the proper interpretation of Telecom Regulation Policy CRTC 2015-177 – Request for interim relief (CRTC File No. 8620-J106-201601633) available at <https://crtc.gc.ca/eng/archive/2016/lt160707.htm>.

134. CNOC therefore submits that there is a presumption that the balance of convenience favours the granting of interim relief. Further, there are no special circumstances to rebut this presumption.

135. Taking into account the public interest, the balance of convenience strongly favors interim relief – which would ensure that competitors have access to wholesale services that allow them to compete at service speeds above 100 Mbps until the Commission makes determinations on the final headings of relief requested in the Application, which are necessary to address the issues with the current regulatory framework and Transition Plan.

136. While disaggregated HSA services remain unavailable, continued access to aggregated HSA services including at speeds above 100 Mbps is critical to ensure downstream competition in broadband markets in Ontario and Quebec. Preserving the levels of competition for retail broadband services in these markets is a matter of public interest. If CNOC's request for interim relief is denied, consumers in Ontario and Quebec will be limited to a choice between two Incumbents who share a duopoly over broadband service speeds over 100 Mbps. Even if the Commission ultimately rescinds the speed cap when issuing a decision on the final heads of relief requested in the Application, competition in downstream retail markets will be substantially lessened and prevented for the period of the speed cap and beyond (on the basis of the reputational harms outlined in the previous section) if the interim relief requested herein is not granted. This undesirable consequence from a public interest perspective is easily avoidable by granting the interim relief requested by CNOC.

137. No negative effects will result from granting the interim relief. Incumbents in Ontario and Quebec are already required to offer aggregated HSA services on a speed-matched basis, including for speeds above 100 Mbps. Incumbents will not be prejudiced from the continuation of this requirement. To the contrary, Incumbents will continue to benefit from the collection of just and reasonable compensatory rates for such services.

138. Incumbents might argue that the interim relief will have a negative effect because the speed cap was intended to incent a transition to disaggregated HSA services, which, in turn, was partly intended to facilitate competitor investments in facilities.<sup>70</sup> This argument is not persuasive. As

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<sup>70</sup> TRP 2015-326, at para 139.

CNOC explained throughout Sections 2.2.1 through 2.2.3 of this submission, deployment of disaggregated HSA services and any corresponding facilities investments are prevented by the barriers that frustrate the Transition Plan. Accordingly, the policy objective of facilitating facilities-investments will not be furthered by denying CNOC's request for interim relief.

139. The magnitude of the harm is a relevant factor to consider at the balance of convenience step of the test for interim relief.<sup>71</sup> In the present case, the magnitude of the harm associated with the 100 Mbps speed cap is extremely high. The speed cap will apply universally to aggregated HSA services throughout Ontario and Quebec. Furthermore, as discussed in the preceding section of this submission, the speed cap will result in irreparable pecuniary and reputational harms.

140. For all of these reasons, the balance of convenience strongly favors the granting of the interim relief requested by CNOC.

#### **4.0 CONCLUSION**

141. CNOC requests interim relief on an expedited basis consisting of removal of the 100 Mbps speed cap on aggregated HSA services prior to its coming into effect upon the final approval of disaggregated HSA tariffs and until the Commission issues a decision on the headings of final relief requested in the Application.

142. As demonstrated above, this relief satisfies the Commission's test for interim relief, as informed by the *Metropolitan Stores* criteria and modified by *RJR MacDonald*.

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<sup>71</sup> Commission letter dated 15 December 2015 in RE: Part 1 application by TekSavvy Solutions Inc. with respect to wholesale access to Rogers' facilities – Disposition of request for interim relief (CRTC File No. 8663-T117-201513325) available at: <https://crtc.gc.ca/eng/archive/2015/lt151215.htm>.