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**

REPLY COMMENTS RELATING TO CNOC'S REQUEST FOR INTERIM RELIEF

17 JANUARY 2019

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EXECUTIVE SUMMARY[1]

ES1. The record of this proceeding includes strong supportive interventions from BCBA, Distributel, TekSavvy and Allstream-Zayo, which confirm: (1) the presence of insurmountable barriers to disaggregated HSA deployment; and (2) that CNOC has satisfied the Commission's test for interim relief.

ES2. Those opposing to the Application have failed to make a case that CNOC has not met the Commission's test for interim relief.

The timing of the Application is appropriate given the context in which disaggregated HSA has developed

ES3. The Incumbents claim that the timing of the Application suggests regulatory gaming and reveals that there is no urgency surrounding the request for interim relief. These claims are incorrect.

ES4. The Incumbents ignore the critical context that informs the Application and its timing. This context is marked by an existential industry crisis created by severely inflated CBB rates. With a view to obtaining relief from CBB rates, CNOC committed to the framework set out in TRP 2015-326 and actively participated in all follow-up proceedings. Ultimately, the Commission confirmed what CNOC has claimed all along – CBB rates were extremely inflated and *prima facie* not just and reasonable.

ES5. It was not until 2018 that CNOC obtained all the relevant data and analysis to definitively conclude that the disaggregated HSA model was unworkable.

ES6. Challenges to the Application based on the fact that it was filed outside of the 90-day deadline set by the *Rules* should also be rejected. The Application is based on several fundamental changes of fact and circumstances that raise substantial doubt as to the correctness of TRP 2015-326 and TD 2016-379. These changes could not have manifested within the default 90-day timeline and therefore qualify as an exception to the general rule.

ES7. Overall, Incumbent complaints about timing are merely a distraction from what is at stake: ensuring that consumers can benefit from competition in retail markets for broadband services.

[1] Terms not defined in the Executive Summary are defined in the body of this reply.

Claims that the interim relief will undermine the Commission's policy objectives are unfounded

ES8. Incumbents fail in their attempts to show that the interim relief will undermine policy objectives.

ES9. Until the insurmountable barriers to disaggregated HSA deployment are resolved, and disaggregated HSA services become workable, the regulatory framework will remain incapable of achieving the policy objectives that were cited in TRP 2015-326, including competitor investment in alternate transport facilities.

ES10. In fact, Cogeco confirms that the rate of disaggregated HSA deployment (under the imminent threat of a 100 Mbps speed cap) is near-zero. This is not a deployment level that could reasonably be expected from a workable framework. By extension, it is clear that the model will not be successful when it comes to encouraging investment.

The CNOC Transitional Access Application and TD 2018-44 are not dispositive of the within Application and related request for interim relief

ES11. Contrary to allegations made by the Incumbents, the Application and the Transitional Access Application are fundamentally distinguishable.

ES12. Whereas the Transitional Access Application was narrowly focused on the problem of temporary wholesale HSA gaps relating to certain greenfield and brownfield FTTP deployments, the Application is concerned with implementing broad headings of relief that are necessary to resolve the current permanently unworkable state of the wholesale wireline framework as a whole.

ES13. RCCI and Cogeco broadly contend that the determinations in TD 2018-44 refute CNOC's evidence of irreparable harm, asserted in the Application. This argument is fundamentally flawed.

ES14. In TD 2018-44, the Commission concluded that there was an absence of harm in FTTP-only areas on the basis of the availability of a variety of substitutable competitor services with comparable speeds. In contrast, if the 100 Mbps speed cap were to come into effect, speeds in excess of 100 Mbps would be unavailable on both ILEC and Cable Carrier platforms.

ES15. TD 2018-44 also found that the availability of (then recently) approved interim rates for disaggregated HSA services would provide a path to accessing FTTP facilities. It is now abundantly clear that insurmountable barriers have prevented this outcome.

ES16. RCCI and Cogeco claim that the Commission already considered service gaps in its prior determinations. They represent that any service gaps attributable to the 100 Mbps speed cap are therefore expected and acceptable. They are incorrect. The Commission allowed a speed cap, and the service gaps that it would create, on the premise of a workable disaggregated HSA model that would provide competitors with an option for competing in higher service speed retail markets. While the disaggregated model is unworkable, competitors have no such option. Consequently, the mere "service gaps" that the Commission may have expected – will now become a full stop foreclosure of competition in retail markets for service speeds above 100 Mbps.

ES17. Finally, while TD 2018-44 does acknowledge the theoretical importance of incentives to transition to disaggregated HSA services, it is now clear that in practice, those incentives will not encourage a transition to an unworkable platform for competition.

Current transport conditions do not provide a path to a sustainable disaggregated HSA regulatory framework

ES18. None of the Incumbents offered and evidence or theoretical grounds to dispute Section 2.2.1 of CNOC's Interim Relief Comments, which demonstrates that the Commission's analysis of the duplicability of transport is anchored on an inappropriately broad geographic market definition that fails to consider local supply conditions that are sensitive to several factors.

ES19. Attempts by Shaw and RCCI to undercut CNOC's transport evidence on the basis that CNOC either (i) did not provide a complete account of where a lack of transport exists or (ii) proposed requests for information to Incumbents on the topic of transport supply conditions, should be rejected. These arguments are not credible given that only Incumbents have access to the scope of information required to construct a detailed account of key transport information. It is also telling that none of these Incumbents themselves filed any relevant rebuttal evidence.

ES20. RCCI asserts that leasing transport misses one of the key objectives of the decision, which was to encourage self-supply driven investments in middle-mile facilities. Yet any degree of self-supply cannot occur while the regulatory framework remains unworkable.

ES21. Allstream-Zayo submitted compelling evidence to the effect that the development of competitive transport markets takes decades. Moreover, a significant proportion of locations outside of major metropolitan areas may never benefit from competitive transport supply.

Interim approved rates for disaggregated HSA do not diminish the need for interim relief

ES22. RCCI and TCI both suggest that the Application is premature as it does not account for the fact that final rates are forthcoming. The corresponding inference is that final rates could resolve the cost problem relating to disaggregated HSA services, as perceived by CNOC.

ES23. This argument fails to grasp that prohibitive costs are but one of the three main barriers that individually and collectively render a transition to disaggregated HSA impossible (the other two being the excessive timelines to implementation and the lack of feasible transport alternatives). More importantly, RCCI and TCI incorrectly represent that the cost problem is purely rate-based. In fact, the cost problem is actually driven by major structural elements of the regulatory framework.

ES24. RCCI notes that it had been denied interim relief on the basis that the impugned rates were interim. RCCI incorrectly argues this precedent should apply to the interim relief sought by CNOC. In reality, the main reason why RCCI was denied relief is because it did not provide evidence of harm. More fundamentally, RCCI's request for relief was purely rate-based while CNOC' request for interim relief relates to structural elements of the regulatory framework.

Incumbent complaints about wholesale rates are irrelevant

ES25. Bell, Shaw and Eastlink generally lament that the Commission's costing processes and mandated access are always detrimental to incumbents. All of these baseless and supported complaints have nothing to do with the policy issues raised in the Application and should therefore be rejected.

CNOC's positions on disaggregated HSA services and configurations are not inconsistent with the current need for interim relief

ES26. CNOC has always been consistent and transparent when it comes to its position that competition would be best served by the availability of both mandated aggregated and disaggregated HSA services. Suggestions to the effect that CNOC embraced disaggregated HSA

as to the exclusion of aggregated HSA in the proceeding leading to TRP 2015-326 are simply wrong.

ES27. Regardless, the Application proposes relief that is intended to stay true to the Commission's intent to transition to a disaggregated HSA model. The final relief proposed by CNOC will ensure that this transition occurs naturally, where deployments of disaggregated HSA service are economically feasible and efficient. Until this final relief is implemented, it is critical that the speed cap be suspended to ensure competition in retail markets for broadband speeds in excess of 100 Mbps.

ES28. Incumbents note that CNOC pursued a disaggregated configuration that is disaggregated to the maximum extent possible. This has been openly acknowledged throughout CNOC's submissions. This position is informed by the context explained in the Application. CNOC remains of the view that the availability of a fully disaggregated option can generate benefits where deploying higher levels of disaggregation is economically efficient. The fully disaggregated configuration should therefore continue as an option.

Claims that CNOC did not explain its cost values are without merit

ES29. Shaw submits various complaints about the cost values reported in CNOC's submissions. In response, CNOC notes: (1) that it explained its methodology in detail in the Application and in the Interim Relief Comments; (2) the costs of disaggregated wholesale HSA deployment for any size of competitor are *prima facie* prohibitive; and (3) existing competitor co-locations and fibre assets will not generate a level of efficiencies that would meaningfully lessen cost barriers to deployment.

THE TEST FOR INTERIM RELIEF HAS BEEN MET

There is a serious issue to be tried

ES30. Most Incumbents did not comment with respect to this criterion. This speaks to the low threshold that applies. The Commission should interpret the lack of comment as a concession that CNOC has met this threshold.

ES31. Cogeco and TCI are incorrect when they assert that a higher threshold applies. Such claims are unsubstantiated and based on misapplied legal principles and jurisprudence. Even if a higher

standard did apply, such as a requirement for the applicant to demonstrate the merits of its case – that standard is undoubtedly satisfied given that CNOC has demonstrated its entire case in the Application.

ES32. TCI argues that CNOC did not provide evidence to demonstrate a serious issue (or irreparable harm) outside of Ontario and Quebec. CNOC notes that the issues that have manifested are symptomatic of a regulatory framework that applies nationally. All headings of relief proposed by CNOC, both interim and final, should therefore apply on the same scale, that is – nationally. CNOC's evidence is naturally based on information from Ontario and Quebec given the Commission's decision to introduce disaggregated HSA in these provinces as a priority.

Irreparable harm will ensue in the absence of interim relief

Claims that the harm demonstrated by CNOC is exaggerated should be rejected

ES33. TCI and Videotron claim that competitors can simply rely on other competitive differentiations other than speed. In response, CNOC has highlighted herein several excerpts from past Commission decisions that confirm the importance of speed as a competitive attribute. Those passages emphasize the importance of the Speed Matching Requirement and the consequences that occur if the Speed Matching Requirement is denied.

ES34. If the interim relief is not granted, the Speed Matching Requirement will not be met for service speeds in excess of 100 Mbps. This will result in irreparable harm to competitors and a substantial lessening and prevention of competition in downstream markets for broadband services above 100 Mbps, to the significant detriment of consumers of those services.

ES35. The competitive importance of the broadband service market at speeds at and above 100 Mbps cannot be underestimated. The 2018 CMR reports that the rate of residential service subscriber distribution at speeds 100 Mbps and higher increased by 10 percentage points from 15.8% in 2016 to 25.8% in 2017. Certain Incumbents also represent that nearly half of their residential subscriptions are on plans of 100 Mbps or higher.

Claims that the harms demonstrated by CNOC are speculative should be rejected

ES36. Contrary to certain allegations, the harm demonstrated by CNOC, consisting of pecuniary and reputational harms are not mere "assumptions, speculations, hypotheticals or arguable

assertions". To the contrary, the substantial pecuniary and reputational harms that would result if interim relief is not granted are certain and unavoidable.

ES37. Without the interim relief, competitors will be prevented from accessing a segment of the market that represents 25.8% of Canadian residential broadband subscriptions and is constantly expanding.

ES38. Several intervenors confirmed that the irreparable harm demonstrated by CNOC would manifest if the interim relief is not granted.

ES39. The nature of the pecuniary and reputational harms demonstrated by CNOC is unquantifiable and may not be recoverable. The harms are therefore irreparable.

Claims that reputational harms are not presumed to be irreparable harm should be rejected

ES40. TCI misapplies the *Paul Sadlon Motors* case to argue that the reputational harms demonstrated by CNOC should not be presumed to be irreparable harms. The reason why reputational harms were not presumed to be irreparable harms in *Paul Sadlon Motors* is because on the facts of that case, the applicant would not be excluded from the marketplace. In contrast, if the interim relief is not granted, competitors will be completely excluded from broadband markets for service speeds in excess of 100 Mbps. The resulting reputational harms would be irreparable.

The claim that CNOC did not demonstrate irreparable harm based on where competitors operate should be rejected

ES41. TCI claims that CNOC erred by demonstrating harms throughout Ontario and Quebec rather than locations where competitors currently operate. This is a peculiar argument given that some of the larger competitors do in fact operate throughout the majority of Ontario and Quebec.

ES42. While smaller competitors, with smaller serving areas, will proportionately face the barriers described by CNOC to a lesser degree than large competitors operating province wide, that does not mean that the proportionate impact on them will not be just as great, given their smaller scales of operations.

Claims that the Transition Plan is workable should be rejected

ES43. RCCI argues that the Transition Plan is workable but fails to substantiate this claim.

ES44. RCCI attempts to disqualify the non-tariffed costs reported by CNOC on the basis that they are "not influenced by incumbents". That is irrelevant. The costs are a direct result of the structure of the regulatory framework and must therefore be considered.

ES45. RCCI disputes the inclusion of POP costs reported by CNOC. According to RCCI, competitors can simply enter into off-tariff arrangements to lease transport from a Cable Carrier in order to avoid these costs. However, that is not the arrangement that is contemplated by the regulatory framework, which is built on the premise that competitors will self-supply or rely on competitive supply of transport. There is no guarantee that Cable Carriers will offer these services, whether the services would be available at every POI location, and whether the services would be offered on reasonable terms and conditions, including reasonable rates.

ES46. It is also ironic that RCCI argues that competitors should avoid these costs by leasing its transport facilities while simultaneously claiming that CNOC misses the point that a key objective of the original Commission decision was to increase investment by competitors. RCCI cannot have it both ways. If competitors are to self-supply – the POP build costs cited by CNOC are required.

ES47. Certain POP related efficiencies can be leveraged. These opportunities are fully and transparently described in CNOC's submissions. However, these options do not reduce materially the requirement for competitor POPs.

The claim that CNOC infers that financial benefit is the singular incentive for transitioning to disaggregated HSA services should be rejected

ES48. RCCI claims that CNOC infers that financial benefit is the singular incentive for transitioning to disaggregated HSA services. This is untrue. CNOC has long held that disaggregation ought to provide competitors with greater control over their networks and underlying costs, leading to service innovations that will benefit consumers.

ES49. However, under the current regulatory framework, all incentives to transition to disaggregated HSA services, whether Commission imposed or naturally occurring from the benefits of a disaggregated configuration, are incapable of encouraging a migration to the unworkable regulatory model that currently exists.

Bell did not comment with respect to irreparable harm

ES50. CNOC notes that Bell did not address any of CNOC's arguments relating to irreparable harm. This is a peculiar omission given the importance of this criterion of the Commission's test for granting interim relief.

Irreparable harm is aggravated by other consequences of the unworkable regulatory framework

ES51. TekSavvy's intervention highlights the irreparable harm to competition that has resulted from the inability of competitors to obtain wholesale HSA services in excess of 50 Mbps from Bell Canada over a period of years. In CNOC's view, the issues raised by TekSavvy illustrate the irreparable harm that competitors would suffer if the interim relief was not granted.

The balance of convenience favours the granting of interim relief

The presumption that the balance of convenience favours the granting of interim relief has not been rebutted

ES52. 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. Opponents to the interim relief sought by CNOC have not provided any rationale that would justify overturning this presumption.

Judicial precedent holding that impugned legislation was presumed to be in the public interest does not respond to the reality that the disaggregated HAS regime as currently constructed will not lead to outcomes that are in the public interest as envisioned by the Commission

ES53. TCI cites the *Right to Life* court case in support of its position that the balance of convenience favors the maintenance of impugned legislation that was undertaken in the promotion of the public interest. The evidence brought by CNOC in this proceeding overwhelmingly demonstrates that the current unworkable regulatory framework, while well intended by the Commission when articulated, will not achieve the public interest objectives that the Commission envisioned.

The claim that the interim relief would strand Incumbent investments should be rejected

ES54. Contrary to Cogeco's claim, the interim relief will not strand Incumbent investments. By Cogeco's own admission, there have been near-zero disaggregated HSA deployments under the framework that CNOC has deemed unworkable.

ES55. The *status quo* has not and will not facilitate any significant investments by industry participants. The 100 Mbps speed cap will not allow Cogeco to generate any additional benefits from the investments that it claims will be "stranded".

Claims that the interim relief would have "knock-on" effects should be rejected

ES56. RCCI claims certain knock-on effects would be prejudicial to the industry.

ES57. It is true that the interim relief would require regulatory changes, including changes to cost studies. However, this is a necessary undertaking to ensure that the regulatory framework is workable. As an additional counter-point, the implementation of the 100 Mbps speed cap would also require a significant number of changes that would be unnecessary if some or all of CNOC's final relief is granted.

ES58. RCCI claims that interim relief will affect internal budgets and resource deployments but does not explain this statement or provide any evidence in support of the claim.

ES59. Finally, RCCI claims that the "most serious" knock-on effect would be prejudice to incumbents and competitors that may have begun investing and deploying facilities to launch disaggregated HSA. Yet, RCCI provides no specific examples and it is clear based on the other evidence on the record that deployment has been near-zero.

Claims that the interim relief is contrary to competitive and technological neutrality should be rejected

ES60. RCCI claims that the interim relief would disproportionately affect Cable Carriers in contravention of paragraph 1(b)(iv) of the Policy Direction "since speeds above 100 Mbps on FTTN ILEC facilities do not exist." This argument is illogical. FTTN ILEC facilities currently do not support speeds over 50 Mbps.

ES61. Cable Carriers currently offer wholesale service speeds in excess of 100 Mbps while ILECs do not. Granting the interim relief would simply result in a continuation of this situation. Furthermore, the Commission determined that the exclusive availability of Cable Carrier wholesale services in areas where ILECs have no obligation to provide aggregated HSA services (i.e., in areas where only FTTP facilities are available), much less service at a maximum of 50 Mbps, is an acceptable outcome.

Conclusion: CNOC has discharged the burden of demonstrating the need and urgency for the interim relief sought

ES62. The Incumbents have failed to make a case that the interim relief should not be granted. CNOC's submissions demonstrate that CNOC has satisfied the Commission's test for interim relief. Moreover, there is considerable urgency in having CNOC's request for both interim and final relief adjudicated as promptly as possible, as the current regulatory uncertainty makes it very difficult for competitors of the Incumbents to formulate and execute business plans designed to foster greater competition in the markets for broadband services. Accordingly, CNOC urges the Commission to make its rulings as quickly as practicable.

RCCI's Gap Closure Proposal is irrelevant to a determination of CNOC's request for interim relief, but should be rejected in any event

ES63. RCCI's gap closure proposal presupposes the Commission's determinations on the Application and is therefore inappropriate in the context of submissions relating to interim relief.

ES64. On a more fundamental level, the speed cap, whether imposed on the terms prescribed by TRP 2015-326, or those proposed by RCCI, is not a regulatory mechanism that is sensitive to the economic conditions that will foster competition.

1.0 INTRODUCTION AND STRUCTURE OF REPLY COMMENTS

1.1 Introduction

1. Canadian Network Operators Consortium Inc. ("CNOC") has reviewed all interventions[2] responding to its request to suspend, on an interim basis, the 100 Mbps speed cap that would otherwise come into effect upon final approval of disaggregated wholesale high-speed access ("HSA") service tariffs. This submission constitutes CNOC's reply to those interventions.

2. At the outset, CNOC wishes to highlight the interventions of BCBA, Distributel, TekSavvy and Zayo-Allstream. These intervenors express strong support for the interim relief requested by CNOC. Each intervention affirms the irreparable harm that would befall the competitive industry if the 100 Mbps speed cap is implemented for any duration of time. Furthermore, these submissions confirm the presence of the insurmountable barriers that have rendered the current disaggregated HSA model unworkable. In particular, CNOC wishes to highlight the following passages:

> "CNOC has identified several insurmountable barriers to the use of [disaggregated HSA] services by competitors and to consumers realizing the benefits the Commission anticipated they would realize from such use. These barriers include the availability of affordable transport, the extreme costs to implement and the decades-long (or possibly centuries-long) rollout (in the event the transport and cost constraints can be overcome). Zayo/Allstream fully agrees with CNOC's analysis on these points, and provides the following corroboration..."[3]
>
> "Moreover, it is now known that the disaggregated HSA services proposed by the Incumbents are completely unworkable and will remain so for the foreseeable future, for all the reasons identified by CNOC in the Application and the Speed Cap Comments."[4]
>
> "…there is no means by which a competitive ISP could avoid the harm posed by the pending application of the 100Mbps speed cap. In this context, Telecom Policy 2015-326 envisioned that competitive ISPs would be able to smoothly transition to disaggregated

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[2] Namely, the interventions regarding CNOC's interim relief request (for simplicity collectively called "interventions" and each, individually an "intervention") of the British Columbia Broadband Associations ("BCBA") dated 7 January 2019; Bell Canada ("Bell") dated 13 December 2018; Cogeco Communications Inc. ("Cogeco") dated 7 January 2019; Distributel Communications Limited ("Distributel") dated 7 January 2019; Bragg Communications Inc. carrying on business as Eastlink ("Eastlink") dated 7 January 2019; Rogers Communications Canada Inc. ("RCCI") dated 7 January 2019; Shaw Cablesystems G.P. ("Shaw") dated 7 January 2019; TELUS Communications Inc. ("TCI") dated 7 January 2019; TekSavvy Solutions Inc. ("TekSavvy") dated 7 January 2019; Quebecor Media Inc. on behalf of its affiliate Videotron G.P. ("Videotron") dated 7 January 2019; and Allstream Business Inc., a wholly owned subsidiary of Zayo Canada Inc. ("Zayo-Allstream") dated 7 January 2019.

[3] Zayo-Allstream intervention, at para 8.

[4] TekSavvy intervention, at para 29.

> HSA services in order to continue providing retail Internet services at speeds greater than 100Mbps upon the application of the 100Mbps speed cap. However, as fully described in CNOC's Part 1 Application and its Interim Relief Comments, the smooth transition anticipated in Telecom Policy 2015-326 has not materialized. Instead, competitive ISPs currently face insurmountable barriers related to the use of disaggregated HSA services that include: 1) the level of approved disaggregation; 2) the amount of time required to deploy disaggregated HSA; 3) the lack of transport supply; and 4) the cost of deploying disaggregated HSA services…"[5] (footnotes omitted)

3. Not only are the barriers identified by CNOC confirmed by several parties in this proceeding, the Incumbents[6] also fail to provide any compelling evidence to the contrary.

4. For instance, not a single Incumbent challenges the timelines for disaggregated HSA service deployment described in CNOC's submissions[7]. This evidence is completely uncontested. Few challenges are made with respect to CNOC's cost estimates for disaggregated HSA deployment and those that were submitted are fundamentally flawed. Incumbents also do not offer any compelling evidence to dispute the non-duplicability and scarcity of transport.

5. And while the Incumbents are unable to make a case that the current regime is workable, they generally nonetheless submit that the current regime continues to be appropriate and that it will achieve the policy outcomes that the Commission envisioned in Telecom Regulatory Policy CRTC 2015-326[8], including increased competitor investment in middle-mile facilities.

6. This misses the fundamental message conveyed in CNOC's submissions: the wholesale wireline framework is in an unworkable state that is incapable of delivering the benefits that the Commission intended. Only the headings of final relief proposed in the Application will allow the regulatory framework to attain its objectives and serve as a platform for sustainable competition.

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5 Distributel intervention, at para 21.

6 "Incumbents" refers to Bell, Cogeco, Eastlink, RCCI, Shaw, TCI and Videotron. In Ontario and Quebec, the Incumbents are Bell, Cogeco, RCCI and Videotron.

7 "CNOC's submissions" refers to both CNOC's Part 1 Application dated 7 November 2018 to Review and Vary *Wholesale Wireline Services*, Telecom Regulatory Policy CRTC 2015-326 and *Follow-up to Telecom Regulatory Policy CRTC 2015-326 – Implementation of a Disaggregated Wholesale High-Speed Access Service, Including over Fiber-to-the-Premises Access Facilities*, Telecom Decision CRTC 2016-379 (the "Application") and CNOC's comments dated 3 December 2018 in Support of the Interim Relief to Remove the 100 Mbps Cap (the "Interim Relief Comments").

8 *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015, ["TRP 2015-326"]

Until that relief is granted, it is imperative that the 100 Mbps speed cap be suspended on an interim basis.

7. If the interim relief sought by CNOC is not granted, competitors will suffer irreparable pecuniary and reputational harm. Worse yet, if the speed cap on aggregated HSA services is imposed while the wholesale wireline framework remains unworkable, Canadian consumers will have drastically reduced competitive options for service speeds in excess of 100 Mbps. The choice – at best – would be between the services of the ILEC[9] or the Cable Carrier[10] in any given market. This outcome suits the Incumbents just fine. After all, it is an opportunity to exercise unfettered market power over the higher speed broadband services that are increasingly becoming the most important segment of the broadband market. However, this result is profoundly adverse to the public interest, which would, instead, be advanced by the greater choice of providers, service offerings, service features, service quality and lower prices that will be protected through the granting of the interim relief.

8. As CNOC demonstrated in its Interim Relief Comments, the suspension of the 100 Mbps speed cap on an interim basis satisfies the Commission's test for granting interim relief. Specifically, CNOC's proposed interim relief satisfies 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*").

9. The balance of these reply comments addresses all of the arguments submitted in opposition to CNOC's request for interim relief. First, Parts 2.0 through 9.0 reply to the overlapping general arguments of the Incumbents. Because Incumbents applied these arguments in different parts of their submissions (e.g. sometimes outside of the interim relief criteria, sometimes in different parts of the interim relief test, etc.), CNOC has decided to deal with these claims in dedicated sections of its reply comments. Thereafter, Part 10.0 of the reply then brings

[9] In Ontario and Quebec, "ILEC" or incumbent local exchange carrier refers to Bell. If other Provinces are included, the term also includes SaskTel and TCI.

[10] In Ontario and Quebec, Cable Carrier refers to Cogeco, RCCI or Videotron. If other Provinces are included, the term also includes Shaw and Eastlink.

engages the Commission's interim relief criteria more directly. A more precise breakdown of the structure of the submission is set out below in Section 1.2.

1.2 Structure of Submission

10. CNOC has organized its reply comments as follows:

- Part 2.0 addresses objections to the timing of the Application;
- Part 3.0 responds to claims that the interim relief would undermine the attainment of policy objectives that the current structure of the wireline framework was intended to achieve;
- Part 4.0 deals with arguments that CNOC is requesting the same relief that was denied by the Commission in Telecom Decision CRTC 2018-44[11];
- Part 5.0 sets out CNOC's reply to Incumbent submissions concerning transport;
- Part 6.0 addresses the fact that final rates for disaggregated HSA services are forthcoming;
- Part 7.0 responds to Incumbent complaints that mandated access is invariably detrimental to wholesale service providers;
- Part 8.0 replies to complaints that the disaggregated HSA model and the related disaggregated configurations were implemented at CNOC's request;
- Part 9.0 briefly addresses claims that CNOC did not explain its cost values;
- Part 10.0 sets out CNOC's reply comments relating to the Commission's test for interim relief, as informed by the *RJR MacDonald* criteria;
- Part 11.0 briefly addresses RCCI's gap closure proposal; and
- Part 12.0 sets out CNOC's conclusions.

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[11] *Canadian Network Operators Consortium Inc. – Application for transitional access to incumbent carriers' fibre-to-the-premises facilities through aggregated wholesale high-speed access services*, Telecom Decision CRTC 2018-44, 2 February 2018.

2.0 THE TIMING OF THE APPLICATION

11. The most recurrent complaint about the Application and CNOC's request for interim relief pertains to timing. The Incumbents contend that the fact that CNOC filed the application approximately three years following TRP 2015-326, and two years following Telecom Decision 2016-379[12], respectively, demonstrates that there is no urgency surrounding the interim relief and that CNOC is merely engaged in regulatory gaming.[13]

12. This complaint ignores the context surrounding CNOC's requests for relief. There is a reason why the background sections of the Application are so extensive. This context is critical for an understanding of not only the reasons justifying the relief sought by CNOC, but also the positions that CNOC has taken with respect to the regulatory framework and the configuration of disaggregated wholesale HSA services. Naturally, this important context also informs the timing of the Application.

13. When TRP 2015-326 was issued, CNOC had concerns about fundamental elements of the wholesale wireline framework, including the Transition Plan[14]. Notwithstanding these concerns, CNOC committed to the Commission's chosen path for the wireline services framework due to the fact that competitors faced an immediate existential threat of extremely inflated CBB rates. Disaggregated HSA services represented a plausible solution to the problem of CBB rates, which pervaded the industry and resulted in severely suppressed levels of competition in retail markets for broadband services.

14. The CBB problem was not speculative. As explained in Section 2.4 of the Application, the Commission ultimately confirmed in Telecom Order CRTC 2016-396[15] that CBB rates were grossly inflated by as much as 85%.[16] In doing so, the Commission stated that these rates were

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12 Follow-up to Telecom Regulatory Policy CRTC 2015-326 – Implementation of a Disaggregated Wholesale High-Speed Access Service, Including over Fiber-to-the-Premises Access Facilities, Telecom Decision CRTC 2016-379, 20 September 2016, ["TD 2016-379"]

13 Cogeco intervention, at paras 48-50; RCCI intervention at paras 32 and 41; Shaw intervention, at para 13; TCI intervention, at para 16; Videotron intervention, at para 14.

14 The "Transition Plan" is the sum of the regulatory determinations summarized throughout this section and is referred to throughout the Application as the "Transition Plan", as defined in paras 28 to 33 of the Application.

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

16 Appendix 1 of TO 2016-396.

prima facie not based on reasonable costs[17] and expressed concern that the Incumbents were not conducting their cost studies in accordance with Phase II costing principles and have not justified departures from the principles and methodologies set out in the Regulatory Economic Studies Manual ("Manual").[18]

15. Prior to and after TO 2016-396 was issued, CNOC remained determined to operate under the Commission's chosen regulatory framework and Transition Plan. CNOC was a full participant in all related configuration and costing proceedings and continues to contribute actively in the latter proceedings which are still ongoing. It was not until 2018 that CNOC acquired a critical mass of information to definitively conclude that the current wholesale wireline framework was unworkable. By extension, it became apparent that the impending speed cap on aggregated HSA services would completely foreclose competitors from competition in downstream markets for broadband services at speeds in excess of 100 Mbps.

16. As demonstrated later in this section of CNOC's reply comments, there were lengthy delays until certain critical information was made available to competitors regarding the disaggregated HSA model. However, the Commission should be aware that mere access to this information is insufficient to draw informed conclusions about the viability of the regulatory framework. As the Commission can certainly appreciate, the regulatory framework for wholesale wireline services is intricate. Its complexity is magnified greatly by extensive and interrelated costing and configuration follow-up proceedings. An in-depth analysis of the regulatory framework, like the analysis that is the basis for the Application, necessarily takes time and laborious fact checking.

17. CNOC brought its application as soon as reasonably possible in the circumstances, and not because of any tactical or strategic considerations. CNOC submits that Incumbent complaints about the timing of the Application are merely a distraction from what is truly at stake. There are more stakeholders in this matter than just the two classes of private parties with commercial interests, being competitors on one hand and Incumbents on the other. The stakeholders that have the most to win or lose in the outcome of the proceeding initiated by the Application – are Canadian consumers of broadband services. The timing of CNOC's Application is a trivial preoccupation

[17] TO 2016-396, at para 19.
[18] *Ibid.*

given what is at stake for consumers. The set of relief requested by the Application will engender the only solution that can ensure sustainable competition in retail markets for broadband services, including all service speeds. An important element of this relief is ensuring that Canadian consumers continue to benefit from competitive choices of broadband service providers that can deliver broadband speeds in excess of 100 Mbps during the period of time between the final approval of disaggregated HSA tariffs and the time that the Commission issues a decision on the final relief requested in the Application.

18. Cogeco[19] and TCI[20] also objected to the fact that the Application was filed beyond the 90-day deadline for review and vary applications that is established by Subsection 71(1) of the *Canadian Radio-Television and Telecommunications Commission Rules of Practice and Procedure*[21] ("*Rules*"). According to Cogeco, "…the Commission was well aware of the future challenges that the competitors and the incumbent carriers would be facing in the transition from an aggregated HSA model to a disaggregated HSA model."[22] On this basis, Cogeco concludes that the Application "… is no more than an exercise in disagreeing with the Commission's determinations…" thereby rendering the timing of the Application's filing unreasonable.[23]

19. These arguments are flawed. As explained in paragraphs 87 through 92 of the Application, there is substantial doubt as to the correctness of the Commission's determinations due to grounds that include four categories of fundamental changes of circumstances and fact. By their very nature, these fundamental changes of circumstances and fact could not have manifested within ninety days of either of the decisions that are being reviewed and varied by the Application. Consider the following examples:

- Major structural configuration elements of disaggregated HSA contributing to the cost barriers faced by competitors would not be known until TD 2016-379 was issued, 427 days after TRP 2015-326 was issued; and
- The wholly unreasonable timelines for deployment of disaggregated HSA that were proposed by Incumbents would not be approved on an interim basis until

19 Cogeco intervention, at paras 10-14.
20 TCI intervention, at para 17.
21 SOR/2010-277, 17 June 2015.
22 Cogeco intervention, at para 13.
23 *Id.*, at para 14.

Telecom Order CRTC 2017-312-1 was issued, 358 days after TD 2016-379 was issued.

20. Thus, Cogeco's and TCI's claims are incorrect. The reasons that CNOC has cited to demonstrate substantial doubt as to the correctness of TRP 2015-326 and TD 2016-379 are grounds that would justify an extension of the deadline for filing applications to review, rescind or vary a decision, pursuant to Subsection 71(2) of the *Rules.*

3.0 CLAIMS THAT THE INTERIM RELIEF WILL UNDERMINE POLICY OBJECTIVES

21. Another recurring argument from the Incumbents is that without the 100 Mbps speed cap, competitors will not migrate to the disaggregated HSA model thereby preventing the achievement of policy objectives cited in TRP 2015-326.[24] For example, Cogeco argues "…. the granting of CNOC's request would seriously undermine the Commission's policy objective of encouraging migration to a disaggregated wholesale HSA model to foster sustainable investment and support strong competitive service offerings in the wireline broadband market in Canada."[25]

22. Again, Incumbents have missed the point. These arguments are willfully blind to the fact that the disaggregated model is unworkable. Until the insurmountable barriers to disaggregated HSA deployment are resolved, the regulatory framework will remain incapable of achieving the policy objectives that were cited in TRP 2015-326, including competitor investment in alternate transport facilities.[26] Imposing the 100 Mbps speed cap while those issues are being considered will only exacerbate an already untenable situation to the ultimate benefit of the Incumbents.

23. It is woefully ironic that the Incumbents justify the retention of the current regulatory model on the basis of fulfilling policy objectives that the current disaggregated framework is plainly incapable of achieving. Furthermore, even the Incumbents have filed evidence confirming the unworkable state of the disaggregated HSA regime. Consider the following statement by Cogeco:

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[24] Bell intervention, at para 14; Cogeco intervention, at para 27; RCCI intervention, at para 2 and 35; Shaw intervention, at para 3; TCI intervention, at paras 4-5 and 46-47.

[25] Cogeco intervention, at para 29.

[26] TRP 2015-326, at para 139.

> "….Cogeco indicates to the Commission that it has already deployed two regional POIs in disaggregated areas to support the provision of wholesale HSA services and that these POIs remain unused by resellers as of today. In addition, the company has also received requests for two additional regional POI deployments."[27]

24. Cogeco admits that it has only received two requests for disaggregated POI deployments. To put that in context, only 2 out of the 60 Cogeco head-ends have been subject to disaggregated HSA deployment requests. The two disaggregated POIs that are already implemented were seemingly deployed at Cogeco's own initiative and they remain unused. The absence of demonstrated demand for access to disaggregated POIs clearly demonstrates the unworkable nature of the current regulatory framework. Cogeco's anemic deployment in the absence of demonstrated demand is not a level of disaggregated HSA deployment that would be expected under imminent threat of a 100 Mbps speed cap if the regime was truly working as intended.

25. No other Incumbent revealed any notable volume of disaggregated HSA deployment requests. RCCI only vaguely notes knowledge of "certain competitors" that have begun readying a launch of disaggregated HSA services.[28]

26. CNOC submits that the fact that the 100 Mbps speed cap has stimulated near-zero migration from aggregated HSA to disaggregated HSA, mere months away from the potential coming into force of the 100 Mbps speed cap is unequivocal proof that the current regulatory framework and Transition Plan are fundamentally broken. Thus, contrary to the claims of the Incumbents, the current disaggregated HSA regime and Transition Plan will not further any policy objective of TRP 2015-326, with or without a 100 Mbps speed cap. Worse yet, as demonstrated in CNOC's Interim Relief Comments,[29] maintaining the speed cap until the Commission issues its final ruling on the Application will cause irreparable harm to competitors while also substantially preventing and lessening competition in retail markets for broadband speeds in excess of 100 Mbps – to the significant detriment of Canadian consumers.

27. On a final note, it should be emphasized that the 100 Mbps speed cap is not the only incentive to encourage a transition to disaggregated HSA. Even if the Commission grants the interim relief and suspends the 100 Mbps speed cap, disaggregated HSA services will remain the

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27 Cogeco intervention, at para 33.
28 RCCI intervention, at para 34.
29 See Sections 3.2 and 3.3 of the Interim Relief Comments.

only option for accessing fibre-to-the-premises ("FTTP") facilities of the incumbents.[30] This incentive, in and of itself, would have undoubtedly encouraged migration to disaggregated HSA if the regime was functional. However, due to the presence of barriers that CNOC has exhaustively described, neither this incentive nor the looming implementation of the 100 Mbps speed cap (absent the granting of the interim relief sought by CNOC) will have any meaningful impact on wholesale HSA migration.

4.0 THE CNOC TRANSITIONAL ACCESS APPLICATION AND TD 2018-44

28. Certain Incumbents argue that CNOC's requests for relief constitute a repetition of the relief that was proposed in the Transitional Access Application[31] and ultimately denied by the Commission in TD 2018-44.[32] From there, these parties suggest that the Commission's determinations in TD 2018-44 ought to dispose of the matters raised in the Application. For the reasons that follow, this conclusion is flawed and should therefore be rejected by the Commission.

29. First, CNOC shall address the claims of RCCI[33] and Cogeco[34] that the Application and the Transitional Access Application essentially requested the same relief. Thereafter, CNOC addresses the applicability of TD 2018-44 to the matters raised in the Application.

A. The Application and the Transitional Access Application are Fundamentally Distinguishable

30. Although both applications relate to the regulatory framework set out in TRP 2015-326, including aspects of the Transition Plan, the two applications are fundamentally distinguishable from one another. Whereas the Transitional Access Application was narrowly focused on the problem of temporary wholesale HSA gaps relating to certain greenfield and brownfield FTTP deployments, the Application is concerned with implementing broad headings of relief that are necessary to resolve the current permanently unworkable state of the wholesale wireline framework as a whole. Moreover, the Transitional Access Application was submitted as a new application as opposed to a review and variance of TRP 2015-326 and the Commission agreed

30 TRP 2015-326, at para 153.
31 CNOC Part 1 Application for Transitional Aggregated Wholesale High-Speed Access Services over Incumbent Fibre-to-the-Premises Facilities, 30 March 2017, ["Transitional Access Application"].
32 See for example, Cogeco intervention at paras 19 and 26; See also RCCI intervention at paras 3, 26-30.
33 RCCI intervention, at para 27.
34 Cogeco intervention, at para 19.

with this characterization of the application.[35] By contrast, the current Application proposes relief that explicitly seeks review and variance of significant policy and related determinations made in TRP 2015-326 and TD 2016-379.

31. Thus, the main high-level differences between the two applications can be summarized as follows:

- Distinct factual and regulatory backgrounds;
- Fundamentally distinguishable headings of relief; and
- Narrow application of relief (i.e., FTTP) in the case of the Transitional Access Application vs. broad application of relief (disaggregated and aggregated HSA framework plus Transition Plan) in the case of the Application;

B. The Applicability of TD 2018-44 to the Matters Raised in the Application

32. In addition to the distinguishing factors outlined above, the core substantive differences between the two applications are readily apparent when considering the Commission's determinations in TD 2018-44. As aforementioned, certain Incumbents contend that this decision has already determined the issues raised in the Application.[36] These arguments generally come in the following three flavours: (I) the TD 2018-44 determinations run contrary to the evidence of irreparable harm in the Application; (II) the Commission affirmed in TD 2018-44 that it considered and expected service gaps to continue; and (III) TD 2018-44 affirmed the importance of not undermining incentives to transition to the disaggregated model.

33. Each of these arguments is addressed, in turn.

I. TD 2018-44 and evidence of harm

34. Both RCCI[37] and Cogeco[38] broadly contend that the determinations in TD 2018-44 refute CNOC's evidence of irreparable harm, asserted in the Application. For example, paragraphs 26 to 29 of RCCI's intervention summarize the Commission's finding that there was no evidence of

35 TD 2018-44, at para 23.
36 See for example, Cogeco intervention, at paras 19 and 26; See also RCCI intervention, at paras 3, 26-30.
37 RCCI intervention, at Section 4.3.
38 Cogeco intervention, at para 65.

harm to competitors resulting from wholesale HSA service gaps. RCCI then went on to conclude "…CNOC is requesting transitional access again except in this case the "gaps" will occur where competitors do not have access to wholesale HSA services above 100Mbps."[39]

35. These arguments ignore key rationale supporting the Commission's determination that no evidence of harm was found with respect to the Transitional Access Application. The Commission effectively came to this finding on two grounds.

36. First, the Commission found irreparable harm was not demonstrated because end-users in FTTP-only areas (i.e., areas that CNOC characterized as "wholesale HSA service gaps") "will generally have access to **a variety of substitutable competitor services with comparable speeds using cable carriers coaxial facilities**"[40] (emphasis added).

37. However, were the 100 Mbps speed cap to come into effect, speeds in excess of 100 Mbps would be unavailable on both ILEC and Cable Carrier platforms, preventing the sale of services at these speeds entirely. This, of course, is due to the fact that under the regulatory framework as presently constituted (and in the absence of the interim relief sought by CNOC) only disaggregated HSA services can be used to provide service speeds in excess of 100 Mbps once the disaggregated HSA tariffs are granted final approval. However, as CNOC has demonstrated throughout its submissions, insurmountable barriers prevent disaggregated HSA deployment by competitors.

38. Second, in TD 2018-44, the Commission also represented that the availability of (then recently) approved interim rates for disaggregated HSA services would provide a "path to accessing incumbent FTTP facilities in applicable markets, which will lessen much of the potential long-term competitive harm that could otherwise occur."[41] Unfortunately, this has not come to pass. The major structural issues with the regulatory framework have prevented disaggregated HSA deployment despite interim approval of rates and terms and conditions. This reality is confirmed by the above-quoted rate of deployment cited by Cogeco and the absence of evidence of disaggregated deployments by other Incumbents.

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39 RCCI intervention, at para 30.
40 TD 2018-44, at para 50.
41 *Id.*, at para 72.

39. For these reasons, TD 2018-44 has no precedential value in terms of weighing the evidence of irreparable harm submitted in the Application.

II. Consideration of service gaps

40. RCCI[42] and Cogeco[43] both submit that the Commission had already considered service gaps in TD 2018-44 and TRP 2015-326. RCCI goes further and argues that the lack of access to 100 Mbps services is a "service gap" that the Commission considered.[44]

41. These arguments are flawed for similar reasons as those set out above in Subsection A. The Commission indeed confirmed in TRP 2015-326[45] and TD 2018-44[46] that it considered service gaps over aggregated HSA when it made its determinations and expected those gaps to continue during the transition phase. However, "gaps over aggregated HSA" is different than the problem described in CNOC's submissions. In the context of the interim relief requested by CNOC, the problem is that the speed cap will result in complete unavailability of wholesale HSA service (aggregated or disaggregated) for service speeds in excess of 100 Mbps.[47]

42. CNOC submits that the Commission did not intend for the disaggregated HSA regime to be unworkable. By extension, the Commission did not intend to deny competitors of any mandated wholesale HSA service option to access service speeds in excess of 100 Mbps. This outcome is simply not what the Commission was referring to when it acknowledged that "service gaps" would continue during the transition process.[48] The Commission was clearly referring to service gaps occurring where incumbents had deployed FTTP-only builds (and where Cable Carriers offered wholesale services at equivalent speeds to what is available on the FTTP platform of the ILEC).

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42 RCCI, at para 30.
43 Cogeco, at para 19.
44 RCCI, at para 30.
45 TRP 2015-326, at para 99.
46 TD 2018-44, at para 19.
47 As a reminder, any deployment of disaggregated HSA is currently unworkable, thereby precluding the offering of any service speeds including > 100 Mbps on this platform. On the aggregated HSA side, competitors would be prevented from competing at service speeds > 100 Mbps due to the speed cap, if implemented.
48 TRP 2015-326, at para 99; TD 2018-44, at para 19.

III. TD 2018-44 and incentives to migrate to disaggregated HSA services

43. Both RCCI[49] and Cogeco[50] quote paragraphs 70 and 71 of TD 2018-44 in support of the argument that CNOC's proposed interim relief would undermine incentives to transition to disaggregated HSA services.

44. The paragraphs in question read as follows:

> "70. Moreover, the Commission considers that implementation of CNOC's proposal, regardless of the rate-setting approach adopted, would undermine the determinations set out in the wholesale wireline decision by removing a key incentive for competitors to migrate to disaggregated HSA."[51]

> "71. The Commission is of the view that, alongside having more control over the costs of backhaul transport, access to new end-users in FTTP-only locations helps justify the risks for competitors to invest in transport facilities and interconnection at central offices and head-ends. The Commission considers that, if it were to adopt CNOC's proposal, many competitors would opt to remain on aggregated HSA as long as possible, thereby limiting investment in transport networks and discouraging facilities-based competition. Therefore, implementing CNOC's request – even if a speed cap or a different rate model were imposed – would undermine the transition to disaggregated HSA before it has begun."[52]

45. Part 3.0 of these reply comments responds to the essence of the argument that RCCI and Cogeco make on the basis of paragraphs 70 and 71 of TD 2018-44. Briefly, the speed cap incentive will not encourage migration to a disaggregated HSA platform that is unworkable for competition. Consequently, maintaining the speed cap will only serve to arbitrarily carve out one of the most (and ever increasingly) important segments of retail broadband markets from the reach of competition. Not only would this cause irreparable harm to competitors, it would be to the ultimate detriment of consumers of broadband services.

46. For all of these reasons, TD 2018-44 does not decide any of the issues raised in the Application.

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49 RCCI intervention, at para 3.
50 Cogeco intervention, at para 18.
51 TD 2018-44, at para 70.
52 *Id.*, at para 71.

5.0 TRANSPORT

47. Incumbents offer various non-compelling challenges to CNOC's evidence regarding the non-duplicability and scarcity of transport.

48. For example, Bell[53] and Cogeco[54] simply state that the Commission has found transport to be duplicable. Shaw submits that CNOC provides no evidence that its members have not been able to obtain access to transport.[55] For its part, RCCI challenges that CNOC did not do its research regarding transport because it requested, in a separate proceeding, that incumbents identify information relating to transport supply in their networks.[56]

49. All of the assertions outlined above consist of nothing more than superfluous observations. No party in this proceeding offered any evidence or theoretical grounds to dispute Section 2.2.1 of CNOC's Interim Relief Comments. More specifically, the opposition to the Application failed to address CNOC's evidence that the Commission's analysis of the duplicability of transport is anchored on an inappropriately broad geographic market definition that fails to consider local supply conditions that are sensitive to several factors.[57]

50. Furthermore, Roger Ware's expert evidence on transport duplicability has also not been contested in this proceeding. Professor Ware concluded:

> "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."[58]

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53 Bell intervention, at para 9.
54 Cogeco intervention, at para 56.
55 Shaw intervention, at para 9.
56 RCCI intervention, at para 25.
57 As explained in paragraph 33 of the Interim Relief Comments, some transport 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 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.
58 Ware Report, at para 50.

51. Attempts by Shaw[59] and RCCI[60] to undercut CNOC's transport evidence on the basis that CNOC either (i) did not provide a complete account of where a lack of transport exists or (ii) proposed requests for information to Incumbents on the topic of transport supply conditions, should be rejected.

52. These arguments are not credible given that it is the Incumbents that have access to the scope of information required to construct a detailed inventory of where alternative transport is available, the number of transport providers available at each segment, transport capacity at each segment and various other critical details that would further confirm the evidence cited in CNOC's submissions.

53. That is why CNOC sought production of this information in proposed requests for information. CNOC believes that this information will confirm the pervasive lack of transport supply in Ontario and Quebec, and is why Incumbents would not willingly provide it to competitors. The Incumbents could have sought to disprove CNOC's evidence concerning the non-duplicability and scarcity of transport by filing the same types of information sought in CNOC's RFIs, but have chosen not to do so. That omission speaks volumes as to the untenable position that they have adopted on this matter.

54. RCCI asserts that leasing transport misses one of the key objectives of the decision, which was to encourage self-supply driven investments in middle-mile facilities.[61] However, as demonstrated in Part 3.0 of these reply comments, this policy objective will remain unattainable until the final relief proposed by CNOC is implemented. Only then will the regulatory framework facilitate economically efficient investments in facilities. It also bears noting that CNOC purposely calculated its cost estimates[62] for disaggregated HSA deployment on the premise that one-time and recurring costs of leased fibres were included rather than the one-time and recurring cost of full transport builds. The costs associated with the latter scenario would greatly escalate the overall costs of a disaggregated HSA deployment beyond levels that are already extremely prohibitive.

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59 Shaw intervention, at para 9.
60 RCCI intervention, at para 25.
61 *Ibid*.
62 See Attachment 2 of the Application.

CNOC's cost model was intentionally built on conservative cost assumptions in order to gauge, as accurately as possible, the viability of the disaggregated regime.

55. Finally, Zayo-Allstream filed compelling evidence regarding the current and historical scarcity of transport.[63] In particular, CNOC wishes to highlight paragraph 9 of Zayo-Allstream's intervention:

> "The industry has a very clear record of the limited success of competitive efforts to build transport. Competition to provide transport services over private lines began in the 1970's. Roughly 40 years later, competitive transport has reached 226 exchanges in Ontario and Quebec, or roughly 20% of all Bell exchanges. The remaining 80%, which are primarily in small towns and rural and remote areas, have yet to be served by competitive facilities. It's unreasonable to expect a boom of competitive transport construction to support [disaggregated HSA] services." (footnote omitted)

56. As demonstrated in this excerpt, the development of competitive transport markets takes decades. Moreover, a significant proportion of locations outside of major metropolitan areas may never benefit from competitive transport supply.

57. In light of all of the above, CNOC submits that the opposition to the Application has failed to disprove that the non-duplicability and the scarcity of transport is an insurmountable barrier to the deployment of disaggregated HSA services.

6.0 THE RELEVANCE OF INTERIM RATES

58. RCCI[64] and TCI[65] both suggest that the Application is premature as it does not account for the fact that final rates are forthcoming. The corresponding inference is that final rates could resolve the cost problem relating to disaggregated HSA services, as perceived by CNOC.

59. This argument fails to grasp that prohibitive costs are but one of the three main barriers that **individually and collectively** render a transition to disaggregated HSA impossible (the other two being the excessive timelines to implementation and the lack of feasible transport alternatives). More importantly, RCCI and TCI incorrectly represent that the cost problem is purely rate-based. In fact, the cost problem is actually driven by major structural elements of the regulatory framework.

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63 Zayo-Allstream intervention, at paras 9-11.
64 RCCI intervention, at para 16.
65 TCI intervention, at para 18.

60. CNOC's Interim Relief Comments fully considered the unique nature of disaggregated HSA deployment costs and the forthcoming final approval of tariffs.

61. CNOC explained:

> "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."[66]

62. Relatedly, RCCI argues "The fact that the rates are interim has been the basis for the Commission's denial of interim relief in the past, including RCCI's requested relief to update the capacity based billing (CBB) rates, and should also form the basis to deny CNOC's interim relief request."[67] RCCI goes on to cite the following excerpt from a Commission staff letter denying RCCI's request for interim approval of proposed CBB rates:

> "Furthermore, unless and until the new proposed CBB rate, and the costing information submitted in support of this rate are reviewed, there is no basis to assume that the proposed [interim] CBB rate is just and reasonable."[68]

63. RCCI's argument is flawed for two reasons.

64. First, the interim relief sought by RCCI was purely rate-based. RCCI requested interim approval of its proposed CBB rates.[69] This requested relief is fundamentally distinguishable from the relief sought in the Application, including the interim relief that is presently under consideration, all of which relates to structural elements of the regulatory framework that are rooted in the Commission's determinations in TRP 2015-326 and TD 2016-379. These are broad issues that cannot be addressed only through the final approval of tariffs for disaggregated HSA services. As demonstrated above, the need for the relief requested by CNOC cannot be addressed

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66 Interim Relief Comments, at para 24; See also Interim Relief Comments at ES7.

67 RCCI intervention, at para 16.

68 Commission staff letter dated 8 June 2018 Re: Follow-up to Telecom Order CRTC 2016-396 and Telecom Order CRTC 2016-448 – Rogers requests regarding a revised interim CBB rate, as cited in RCCI intervention, at para 16.

69 *Ibid.*

simply, by final approval of disaggregated HSA tariffs, regardless of the levels of final rates ultimately approved.

65. Secondly, RCCI fails to mention the main reason why Commission staff denied its request for interim approval of proposed CBB rates, as explained in the third paragraph of the referenced letter: "Commission staff is of the view that no evidence was provided to demonstrate that the existing interim CBB rate is causing the company undue harm."[70]

66. RCCI also references an excerpt of Telecom Order CRTC 2011-377[71] whereby the Commission states that interim rates do not reflect a final determination.[72] This excerpt provides no support for the argument that RCCI is attempting to make. As demonstrated above, final tariff approvals will not resolve the insurmountable barriers with disaggregated HSA services, or the negative impact on competition that would result in the period between the imposition of the 100 Mbps speed cap and the resolution of the issues in CNOC's Application. It is therefore critical that the 100 Mbps speed cap be suspended on an interim basis at least until the Commission renders its final determinations on the Application.

67. TCI also makes various submissions to the effect that interim rates are cost based and to the extent that they are high, this is because fibre networks are expensive.[73] For all the reasons set out above, these arguments are irrelevant to a determination of either the interim or final relief requested in the Application.

7.0 WHOLESALE RATE COMPLAINTS

68. Bell[74], Shaw[75] and Eastlink[76] generally lament that the Commission's costing processes and mandated access are always detrimental to incumbents.

69. For example, Bell states:

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70 *Ibid.*
71 *Interim rates for wholesale residential and business high-speed access services*, Telecom Order CRTC 2011-377, 15 June 2011.
72 *Id.*, at para 22.
73 See for example, TCI intervention, at paras 28 and 49.
74 Bell intervention, at para 6.
75 Shaw intervention, at para 10.
76 Eastlink intervention, at paras 9-16.

> "…mandated access rules always have a detrimental impact on incumbents. As we have repeatedly demonstrated in multiple proceedings, wholesale rates do not properly capture the costs incurred by incumbents. In particular, they fail to fully account for the risk and opportunity costs of deploying next-generation infrastructure in a competitive environment. They also ignore start-up costs and arbitrarily impose punitive depreciation, economic efficiency and cost of capital assumptions. In turn, these inappropriately low rates reduce our incentives to invest."[77]

70. These are bold statements to make without any supportive references, whatsoever. Eastlink similarly complains at length about what it repeatedly characterizes as "below-cost rates" that have been in force for years.[78] All of these baseless and unsupported complaints have nothing to do with the policy issues raised in the Application. Tariff proceedings and costing reviews are the forums for Bell and Eastlink to raise complaints that wholesale rates are not compensatory. Of course, both parties are active participants in those forums. Injecting unsubstantiated costing claims into this proceeding is nothing more than a diversionary tactic that should be disregarded by the Commission.

8.0 CNOC'S POSITIONS ON DISAGGREGATED HSA SERVICES AND CONFIGURATIONS

71. Eastlink[79] and Videotron[80] argue that CNOC requested disaggregated HSA in the first place and complain that CNOC creates inconvenience for the entire industry by changing its position on whether it prefers an aggregated or disaggregated HSA model. These unsupported complaints misrepresent CNOC's position leading up to TRP 2015-326, which has consistently and clearly been that the availability of both mandated aggregated and disaggregated HSA services would best serve competition and Canadian consumers of broadband services.[81] Even Shaw acknowledges CNOC's consistent position on this matter.[82]

72. Notwithstanding CNOC's longstanding position on the need for both aggregated and disaggregated HSA services, the Application proposes relief that is intended to stay true to the Commission's intent to transition to a disaggregated HSA model. The final relief proposed by CNOC will ensure that this transition occurs naturally, where deployments of disaggregated HSA

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77 Bell intervention, at para 6.
78 Eastlink intervention, at paras 9, 10, 15.
79 Eastlink intervention, at para 7.
80 Videotron intervention, at para 7.
81 See for example, CNOC's final argument dated 19 December 2014 in the proceeding leading to TRP 2015-326, at paras 58-59.
82 Shaw intervention, at para 12.

service are economically feasible and efficient. Until this final relief is implemented, it is critical that the speed cap be suspended to ensure competition in retail markets for broadband speeds in excess of 100 Mbps.

73. Bell[83], Eastlink[84], TCI[85] and Videotron[86] all note that CNOC pursued a disaggregated configuration that featured disaggregation to the maximum extent possible. This fact is openly acknowledged throughout CNOC's submissions.[87] Yet, these parties suggest that CNOC should have known what this configuration would entail from a cost perspective and should therefore be left to the consequences of the determinations in TD 2016-379.

74. These arguments ignore the context of the proceeding leading up to TD 2016-379, which informed CNOC's advocacy for the availability of a configuration that featured disaggregation to the maximum extent feasible. This context, which is summarized above in Part 2.0 of these reply comments and set out in greater detail in Part 2.0 of the Application, relates to the extremely inflated CBB rates of the time. Those CBB rates necessarily compelled CNOC to pursue a disaggregated configuration that eliminated traffic-sensitive elements of access networks of the Incumbents to the greatest degree possible. To this end, CNOC explained that maximum disaggregation ought to provide competitors with greater control over their networks and underlying costs, leading to service innovations that will benefit consumers.

75. As explained in the Application,[88] CNOC still believes that the availability of a fully disaggregated configuration on the Bell network can generate such benefits wherever deploying higher levels of disaggregation is economically efficient. The fully disaggregated configuration should therefore continue as an option. However, with the new information about the costs and deployment timelines applicable to disaggregated HSA services, it is now abundantly clear that the absence of an option of a significantly reduced level of disaggregation on Bell's network constitutes a barrier that contributes to the unworkable state of the Transition Plan. The

83 Bell intervention, at para, 10.
84 Eastlink intervention, at para,4.
85 TCI intervention, at paras 9-10.
86 Videotron intervention, at para, 4.
87 See Application, at paras ES9, 37, 51, 185-186.
88 Application, at paras 185-186.

continuation of this barrier at least until the Commission issues its determinations on the final relief requested by CNOC favors the granting of the interim relief proposed by CNOC.

9.0 CLAIMS THAT CNOC DID NOT EXPLAIN ITS COST VALUES

76. Shaw submits various complaints about the cost values reported in CNOC's submissions.[89]

77. For example, Shaw submits that CNOC provides "no detailed explanation on how the theoretical costs were derived."[90] This is an inaccurate statement given that CNOC's Application dedicated 11 pages of text to explaining its cost estimates as well as a seven-page Attachment with cost tables for each possible disaggregated HSA deployment scenario – and no fewer than 14 explanatory notes detailing methodology and relevant tariff provisions.[91] All of this information was also referenced in CNOC's Interim Relief Comments.[92]

78. Shaw also complains that CNOC provides no evidence that the costs are not financially viable for its members, who, according to Shaw, "have benefited from artificially low interim HSA rates for over two years."[93] With regards to the rate-related aspect of this statement, CNOC notes that Part 7.0 of these reply comments addresses Incumbent statements about wholesale rates.

79. With respect to the claim that CNOC has not demonstrated that costs are not viable for its members, CNOC wishes to reproduce paragraph ES11 from its Interim Relief Comments:

> "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."[94]

80. This level of costs for wholesale HSA access service deployment is *prima facie* prohibitive for any size of competitor. This is evermore evident when considering that deployment costs

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89 Shaw intervention, at para 10.
90 *Ibid.*
91 See Section 4.2.1 and Attachment 2 of the Application.
92 See Section 2.2.2 of the Interim Relief Comments; Attachment 2 is also referenced in paragraphs 44 and 96 of the Interim Relief Comments.
93 Shaw intervention, at para 10.
94 Interim Relief Comments, at para ES11.

associated with aggregated HSA service range from $91,500 to $206,500 for Bell and $95,000 to $205,500 for the Cable Carriers.[95]

81. Finally, Shaw argues that the suggested cost barriers would not impact larger CNOC members who already have co-location or fibre facilities to POIs.[96] Although it is true that larger CNOC members may have co-locations and fibre facilities, those assets were deployed as part of a network design influenced by a wholesale wireline regulatory framework built around mandated aggregated HSA service. By its very nature, aggregated HSA requires far fewer interconnections and backhaul links than disaggregated HSA services. As a result, pre-existing co-locations and fibre facilities are not optimally located and configured to generate significant efficiencies in the context of a transition to disaggregated HSA services. In other words, larger CNOC members will not benefit from significant savings due to pre-existing co-locations and fibre facilities.

82. For all of the above reasons, Shaw's criticisms of CNOC's cost values should be rejected by the Commission.

10.0 THE COMMISSION'S TEST FOR INTERIM RELIEF

10.1 Serious issue to be tried

83. Bell[97], RCCI[98] and Videotron[99] did not bother to comment with respect to the serious issue to be tried component of the Commission's interim relief test. This speaks to the low threshold that applies to this criterion. Further, CNOC submits that the Commission can interpret the lack of comment from the listed Incumbents as a concession that CNOC has met the low threshold for this criterion.

84. Cogeco[100] and TCI[101] argue that higher standards apply to determining whether there is a serious issue to be tried. These arguments are flawed and should be rejected. CNOC has correctly applied the applicable standard that is relevant to a determination of whether there exists a serious issue to be tried.

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95 *Id.*, at para ES12.
96 *Id.*, at para 10.
97 Bell intervention, at para 3.
98 RCCI intervention, at para 4.
99 Videotron intervention, at para 10.
100 Cogeco intervention, at para 57.
101 TCI intervention, at paras 14-15.

85. Cogeco only vaguely claims that CNOC has the burden to demonstrate that the motives of its request are serious.[102] Cogeco does not explain the basis for this claim nor does it link the proposed standard to any jurisprudence.

86. TCI's argument[103] is more developed than Cogeco but equally as erroneous. TCI quotes *RJR MacDonald* and alleges that the present case fits under one of the two exceptions to the general rule that CNOC applied in its Interim Relief Comments. According to TCI's interpretation of *RJR MacDonald*, a demonstration of the merits of the case is necessary "when the result of the interlocutory motion will in effect amount to a final determination of the action."[104] However, contrary to TCI's claim, this exception clearly does not apply to the present request for interim relief. The granting of the interim relief will in no way consist of a "final determination" of the action. The Commission will have to reconsider whether or not to definitively eliminate the 100 Mbps speed cap when issuing its final determinations on the Application.

87. Even if a higher standard, such as a requirement to demonstrate the merits of the case, did apply, CNOC would have invariably satisfied that threshold as well. In fact, CNOC disclosed its entire case in the Application. Even on the Interim Relief Comments, CNOC made its case that the speed cap will cause irreparable harm to competitors, which, by extension, will result in a lessening and prevention of competition in broadband markets and corresponding harms to consumers of broadband services in Ontario and Quebec. The merits of CNOC's case are therefore demonstrated and the case is unequivocally serious.

88. TCI also claims that there is no serious issue to be tried on account of the alleged speculative nature of CNOC's claims.[105] TCI repeats these claims with respect to irreparable harm.[106] CNOC has chosen to address these arguments in Section 10.2, below.

89. Finally, TCI takes issue with the fact that CNOC did not provide evidence of a serious issue in areas outside of Ontario and Quebec.[107] Naturally, the evidence in the Application focuses on changes in fact and circumstances that have occurred as configuration and costing proceedings

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102 Cogeco intervention, at para 57.
103 TCI intervention, at paras 14-15.
104 *Id.*, at para 14.
105 TCI intervention, at para 19.
106 *Id.*, at para 30.
107 TCI intervention, at para 20; Note that TCI also makes this argument with respect to irreparable harm at para 35 of its intervention – those claims are also addressed by CNOC in this paragraph of Section 10.1.

for disaggregated HSA services in Ontario and Quebec progressed and other relevant information became available with respect to these serving areas. However, the issues that have manifested are symptomatic of a regulatory framework that applies nationally. All headings of relief proposed by CNOC, both interim and final, should therefore apply on the same scale, that is – nationally. As an aside, it is possible that the Commission's final decision on the Application will come before the final approval of disaggregated HSA service tariffs outside of Ontario and Quebec. Should this occur, the need to suspend the 100 Mbps speed cap outside of Ontario and Quebec would be moot.

10.2 Irreparable harm[108]

A. Claims that the harm demonstrated by CNOC is exaggerated

90. Certain parties attempt to diminish the harms demonstrated by CNOC as being exaggerated. For instance, TCI[109] and Videotron[110] claim that competitors can simply rely on competitive differentiations other than speed.

91. In response, CNOC wishes to direct special attention to Part A. of TekSavvy's intervention, which recounts the history surrounding the fundamental requirement of speed matching (the "Speed Matching Requirement"). A few highlights warrant particular emphasis. For instance:

- in Telecom Decision CRTC 2006-77[111], the Commission affirmed that the Speed Matching Requirement "would enable competitors to compete on a more equitable basis"[112];
- in Telecom Order CRTC 2007-21[113] and Telecom Order CRTC 2007-22[114], the Commission recognized "the importance of providing comparable competitor ADSL

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108 CNOC notes that RCCI and Cogeco raise TD 2018-44 related arguments that relate to irreparable harm. Those arguments are addressed in Section 4.0 of these reply comments. Similarly, RCCI and Cogeco argue that the fact that disaggregated HSA rates are interim is relevant to CNOC's evidence of harm. Those claims are addressed in Section 6.0 of these reply comments.

109 TCI intervention, at para 40.

110 Videotron intervention, at para 11.

111 *Cogeco, Rogers, Shaw, and Videotron - Third-party Internet access service rates*, Telecom Decision CRTC 2006-77, 21 December 2006, ["TD 2006-77"].

112 *Id.*, at para 209.

113 Bell Aliant Regional Communications, Limited Partnership for services provided in the Atlantic Provinces, Telecom Order CRTC 2007-21, 25 January 2007, ["TO 2007-21"].

114 Bell Canada and Bell Aliant Regional Communications, Limited Partnership for services provided in Ontario and Quebec, Telecom Order CRTC 2007-22, 25 January 2007, ["TO 2007-22"].

access services"[115] so that "competitors in all parts of the country have the same range of options available to them and can compete in multiple markets"[116];

- in Telecom Decision CRTC 2008-117[117], the Commission found that "[s]ervice speed is an important competitive attribute… often being a major differentiation point from a marketing standpoint"[118]

- in TD 2008-117, the Commission also found that "…absent a matching service speed requirement, the ability of competitors that rely on the mandated aggregated ADSL service to compete in the retail market would be significantly restricted, which would likely result in a substantial lessening or prevention of competition in the retail high-speed Internet services market"[119];

- in Telecom Regulatory Policy CRTC 2010-632 ("TRP 2010-632")[120], the Commission confirmed that "…if speed matching were not required for both the ILECs' aggregated ADSL access services and the Cable Carriers' TPIA services, competitors would be effectively prevented from offering higher service speed options to their own customers";

- the Commission further concluded in TRP 2010-632[121] that "…without a speed-matching requirement for wireline aggregated ADSL access and TPIA services, it is likely that competition in retail Internet service markets would be unduly impaired. In the Commission's view, an ILEC and Cable Carrier duopoly would likely occur in the retail residential Internet service market, and competition might be reduced substantially in small-to-medium-sized retail business Internet service markets. The

115 TO 2007-22, decision preamble.
116 TO 2007-21, at para 23.
117 Cybersurf Corp.'s application related to matching service speed requirements for wholesale Internet services, Telecom Decision CRTC 2008-117, 11 December 2018 ["TD 2008-117"].
118 *Id.*, at para 18.
119 *Id.*, at para 19.
120 Wholesale high-speed access services proceeding, Telecom Regulatory Policy CRTC 2010-632, 30 August 2010, ["TRP 2010-632"].
121 *Id.*, at para 54.

Commission considers that, in such circumstances, retail Internet service competition would not continue to be sufficient to protect consumers' interests".[122]

92. As demonstrated throughout CNOC's submissions, competitors are unable to deploy disaggregated HSA services, even while this platform is the only path to access wholesale HSA services over FTTP facilities and possibly destined to become the only option for access to service speeds in excess of 100 Mbps. Without the interim relief sought by CNOC, the only alternative option for access to wholesale HSA services above 100 Mbps will be eliminated. Altogether, the practical effect of these policy outcomes will be that the Speed Matching Requirement could no longer apply to service speeds above 100 Mbps.

93. As the Commission has itself recognized in the above-listed determinations, denial of the Speed Matching Requirement deprives competitors of an important competitive attribute and a key dimension of competitive differentiation. This is irreparable harm.

94. CNOC's submissions include exhaustive evidence on the competitive relevance of 100 Mbps service speeds.[123] Since the filing of the Application and the Interim Relief Comments the Commission has released the 2018 CMR, which further confirms the increasing consumer demand for higher speed services. More specifically, the 2018 CMR reports that the rate of residential service subscriber distribution at speeds 100 Mbps and higher increased by 10 percentage points from 15.8% in 2016 to 25.8% in 2017[124] – continuing the trend of rapidly increasing adoption rates year after year. Moreover, the average download speed of retail plans rose to 68 Mbps in 2017, up from 15 Mbps in 2013[125] (2013 data would have informed trends upon which the 100 Mbps speed cap was established).

95. Notably, RCCI disclosed in 2017 that its subscriber distribution greatly exceeded this 25.8% mark. During an investment community teleconference call in January of 2017, RCCI CFO Antony Staffieri declared: "Nearly half of our residential Internet customers are now on plans of 100 megabits per second or higher."[126]

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122 *Id.*, at para 55.
123 See Section 2.1 of the Interim Relief Comments; See also Section 2.10 of the Application.
124 Table 15.5(s) of 2018 CMR Fixed Internet Open Data Set.
125 2018 CMR, infographic 5.2.
126 RCCI Q416 Investment Community Teleconference Transcript (Jan. 26, 2017).

96. The fact that 25.8% of Internet subscribers are now choosing service speeds at 100 Mbps or higher eliminates any conceivable doubt as to the competitive relevance of this segment of the market, if there ever was any.

97. Interestingly, Videotron claims that less than 5% of its wholesale subscriptions are at speeds of 100 Mbps or higher.[127] This can be explained as a rational commercial response by Videotron's wholesale customers to the regulatory uncertainty that surrounds the current wireline wholesale framework.

98. Ultimately however, the evidence is clear that consumers exhibit strong and increasing demand for service speeds at or above 100 Mbps. Therefore, the denial of the Speed Matching Requirement that would result from imposing a 100 Mbps speed cap would cause irreparable harm to competitors.

B. Claims that the harms demonstrated by CNOC are speculative

99. Cogeco[128] and TCI[129] argue that the harms demonstrated by CNOC are speculative in nature. In support of its position, Cogeco cites excerpts from civil law textbooks that contend that irreparable harm must be real, tangible and non-hypothetical.[130] TCI relies on the Federal Court of Appeal's determination that to establish irreparable harm, there must be evidence that "demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted…Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight."[131]

100. CNOC does not dispute these principles. The harm demonstrated by CNOC, consisting of pecuniary and reputational harms are not mere "assumptions, speculations, hypotheticals or arguable assertions"[132]. To the contrary, the substantial pecuniary and reputational harms that would result if interim relief is not granted are certain and unavoidable.

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127 Videotron intervention, at para 11.
128 Cogeco intervention, at paras 22-27.
129 TCI intervention, at paras 30 and 41.
130 See Cogeco intervention, at paras 24 and 25.
131 TCI intervention at para 24, citing Glooscap Heritage Society v. The Minister of National Revenue, 2012 FCA 255, at para. 31.
132 *Ibid.*

101. As demonstrated throughout CNOC's submissions, including these reply comments, the implementation of a 100 Mbps speed cap on aggregated HSA services while the disaggregated HSA model remains unworkable will result in a denial of the Speed Matching Requirement for service speeds in excess of the speed cap. In turn, this will prevent competitors from accessing a segment of the market that represents 25.8% of Canadian residential broadband subscriptions and is constantly expanding. As a consequence, competitors will invariably suffer the pecuniary and reputational harms, respectively described in Section 3.3.1 and Section 3.3.2 of the Interim Relief Comments.

102. Distributel[133], TekSavvy[134] and Allstream-Zayo[135] confirmed that the irreparable harm demonstrated by CNOC would manifest if the interim relief is not granted.

103. Distributel also raises an important principle that was ignored by the opposition to the Application. That is, as the Commission found, "irreparable harm requires an analysis of the nature of the harm, rather than the magnitude" and that, "harm is more likely to be irreparable where is an unquantifiable loss or a loss that the applicant may not be able to recover."[136]

104. Both CNOC[137] and Distributel[138] have demonstrated that the pecuniary harms that competitors would incur, consisting of the loss of existing and prospective customers, would not be quantifiable. For instance, there is no way to track the number of potential new customers that turn to an incumbent upon the realization that competitors are unable to offer 100 Mbps services.[139] Nor is it possible to track the number of existing customers that ultimately decide to cancel their services in order to upgrade to a service speed in excess of 100 Mbps that only Incumbents can provide.[140] Furthermore, the pecuniary losses faced by competitors may not be recoverable. As explained in the Interim Relief Comments, fixed contract terms and switching inconveniences may

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133 Distributel intervention, at paras 13-21.
134 TekSavvy intervention, at paras 5 and 34.
135 Allstream intervention, at paras 6, 23, 24 and 27.
136 Distributel intervention, at para 12 citing Telecom Commission 31 August 2015 Letter, Re: Part 1 Application by CNOC - Request for relief with regard to the pricing and availability of Eastlink's cable retail Internet access services for resale by ISPs - CNOC's request for Interim Relief & Telecom Commission 7 July 2016 Letter, 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
137 CNOC Interim Relief Comments, at paras 118-119.
138 Distributel intervention, at paras 17-18.
139 *Id.* at para 17.
140 *Ibid.*

significantly constrain the potential for winning-back a customer that has left a competitor due to their inability to offer service speeds in excess of 100 Mbps.

105. Parties in this proceeding also confirm that the reputational harms to competitors resulting from the 100 Mbps speed cap are by their very nature unquantifiable and non-recoverable.[141] As the Commission found in a recent proceeding involving Frontier Networks Inc. and Eastlink, these kinds of reputational harms are precisely what interim relief is intended to prevent.[142]

106. For all these reasons, the Incumbents fail to provide any compelling arguments to dispute the direct correlation between the 100 Mbps speed cap and the harms demonstrated by CNOC. Their remaining few attempts to do so are dealt with in the balance of this Section 10.2.

C. Claims that reputational harms are not presumed to be irreparable harm

107. TCI cites an Ontario court case in support of its position that reputational harms are not necessarily irreparable harms.[143] TCI therefore concludes that the mere presence of reputational damage does not mean that CNOC has satisfied the irreparable harm criterion of the Commission's test for interim relief.[144]

108. The Ontario court case that TCI recites in support of this position is *Paul Sadlon Motors Inc. v. General Motors of Canada Ltd.*, 2011 ONSC 4432 ["*Paul Sadlon Motors*"], citing *Bell Canada v. Rogers Communications Inc.*, [2009] O.J. No. 3161 (S.C.J.). Contrary to TCI's submission, this case does not apply to the facts at hand.

109. The facts of *Paul Sadlon Motors* involves a Chevrolet dealership in Barrie, Ontario that claimed reputational harms resulting from GM Motors' granting of an additional Chevrolet dealership in Barrie, Ontario.[145] While it is true that the court found that reputational harm is not necessarily irreparable harm[146], TCI ignores the additional qualifications that the court established

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141 For example Distributel intervention, at para 12.

142 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").

143 TCI intervention, at para 36.

144 *Ibid.*

145 *Paul Sadlon Motors*, at paras 1-10.

146 *Id.*, at para 78.

to determine whether the reputational harm does not qualify as irreparable harm. The court provided that the inquiry must be whether, if an interlocutory junction is not granted, the claimant will suffer the loss of the competitive advantage of an excluded or neutered competitor.[147] On the facts, the court went on to determine that not granting the injunction[148] would not exclude the applicant from the marketplace.[149]

110. Unlike in *Paul Sadlon Motors*, competitors will be completely excluded from broadband markets for service speeds in excess of 100 Mbps if the interim relief is not granted. Thus, the reasoning in the *Paul Sadlon Motors* case cannot be used to conclude that the reputation harms demonstrated by CNOC do not qualify as irreparable harms. CNOC believes it is abundantly clear that competitors will suffer reputational harm if they are not able to sell services at speeds which are competitive to those offered by the Incumbents and which customers increasingly demand.

D. The claim that CNOC did not demonstrate irreparable harm based on where competitors operate

111. TCI claims that CNOC's evidence of harm is misleading because "…irreparable harm could only possibly exist in areas where competitors currently operate and where customers obtain speeds above 100 Mbps."[150] From this perspective, TCI goes on to claim that "To claim harm in all of Ontario and Quebec where a competitor might decide to operate in the future is an exaggeration and vastly overstates the issue. In order to properly support its claim of irreparable harm, CNOC should have provided a view of all communities where competitors actually operate and assess the current and immediate future requirements of end-users who purchase services from competitors."[151]

112. This is a very peculiar argument. TCI ignores the reality that some of the larger competitors do in fact operate throughout the vast majority of Ontario and Quebec. It is worth noting that these competitors would face the totality of the insurmountable barriers described in CNOC's

147 *Id.*, at para 79.
148 As per paragraph 3 of *Paul Sadlon Motors*, the applicant sought an order enjoining GM Motor's from revising Sadlon Motors' market area in Barrie, Ontario, and from appointing an "additional dealer" to sell Chevrolet vehicles in the Barrie marketplace.
149 *Id.*, at para 80.
150 TCI intervention, at para 33.
151 *Ibid.*

submissions. More importantly, competitors do "actually operate" in communities throughout all of Ontario and Quebec and therefore would be subject to irreparable harm throughout all of these areas.

113. TCI also seems to take issue with CNOC's cost estimates based on the fact that not all competitors operate throughout all of Ontario and Quebec.[152] TCI concludes that CNOC's methodology of calculating costs based on the cost to connect the total number of central offices and head-ends "are not factual bases of harm".[153] In response, CNOC notes that TCI confuses CNOC's evidence of irreparable harm with CNOC's evidence of the insurmountable barriers to disaggregated HSA deployment. Even then, TCI is mistaken. As explained in the preceding paragraph, some larger competitors do operate throughout substantially all of Ontario and Quebec. Consequently, the full force of the barriers described by CNOC, including the estimates of prohibitive costs and the prolonged times for deployment of disaggregated HSA services would apply to these competitors.

114. While smaller competitors, with smaller serving areas, will proportionately face the barriers described by CNOC to a lesser degree than large competitors operating province wide, that does not mean that the proportionate impact on them will not be just as great, given their smaller scales of operations.

115. CNOC's Application, the Interim Relief Comments and these final reply comments, inclusive of their attachments, comprise hundreds of pages. TCI suggests that CNOC should have submitted separate cost analyses for each one of its over 35 members.[154] CNOC disagrees. This course of action would have unduly complicated and burdened the Commission and interested parties in this proceeding. A singular model that illustrates the costs and timelines to deploy throughout Ontario and Quebec provides the Commission and interested parties with an accurate representation of the barriers imposed by the disaggregated HSA model – for competitors of all sizes.

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152 TCI intervention, at para 34.
153 *Ibid.*
154 *Ibid.*

E. Claims that the Transition Plan is workable

116. RCCI takes the position that the Transition Plan is workable and therefore, no irreparable harm would result from not granting the interim relief.[155] RCCI offers three arguments in support of this position. Each argument fails for the reasons set out below.

117. First, RCCI objects to CNOC's evidence that the interim transition plan is unworkable because the cost values that CNOC uses include non-tariffed costs that, according to RCCI, represents over 90% of the total cost values reported by CNOC.[156] RCCI goes on to submit that "[n]ot only are these costs beyond the scope of this proceeding, they are in no way influenced by the incumbents and as such are not relevant to this regulatory proceeding."[157] This is a puzzling statement. The relevance of cost evidence is not determined on the basis of whether or not costs are "influenced by the incumbents". The non-tariffed costs in question are a direct result of the structure of the current wholesale wireline framework. As RCCI itself acknowledges, these costs represent a significant proportion of the costs associated with disaggregated HSA deployment. This evidence is therefore relevant and material.

118. RCCI then goes on to argue that the Point of Presence ("POP") cost, which ranges from $75,000 to $175,000 in one time costs with up to an additional $10,000 in monthly recurring costs for every disaggregated POI, is "simply not incurred".[158] According to RCCI, competitors did not incur this expense during the previous disaggregated HSA regime.[159] Instead, RCCI contends, competitors leased backhaul circuits that connected the disaggregated head-ends directly to each competitor's POP at 151 Front Street in Toronto, where the competitor connects to the World Wide Web.[160] Using this approach, RCCI submits that competitors will have one or two POPs in Ontario, at most.[161] On this basis, RCCI adjusts CNOC's cost estimates to exclude the POP costs that were reported in the Application and in the Interim Relief Comments, leading RCCI to the conclusion

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155 RCCI intervention, at Section 4.2.
156 *Id.*, at para 20.
157 *Id.*, at para 20.
158 *Id.*, at para 21.
159 *Ibid.*
160 *Ibid.*
161 *Ibid.*

that the one-time cost to interconnect at RCCI's 36 head-ends will be about 20% of the cost calculated by CNOC.[162]

119. The arrangements described by RCCI are not consistent with the default model that is prescribed by the Commission's disaggregated HSA determinations[163] and the interim tariffs of the Incumbents.

120. CNOC does not dispute that if a competitor were to lease backhaul circuits from a Cable Carrier to transport traffic from a disaggregated head-end to an existing POP such as at 151 Front Street in Toronto – the competitor would not need to build additional POPs.

121. However, this assumes a specific off-tariff arrangement between the competitor and the Cable Carrier. There is no guarantee that such an arrangement: (1) would be made available by the Cable Carrier at all; (2) if made available, would be made available by the Cable Carrier at every location or even the majority of locations; (3) would be made available on reasonable terms and conditions; (4) would be subject to reasonable rates (especially given the traffic sensitive nature of backhaul and the *prima facie* unreasonable wholesale rates that Incumbents persistently seek to apply for such components[164]); and (5) would result in prompt access to the facilities.

122. The disaggregated HSA model should be assessed as the backstop that it is intended to provide – not on the basis of speculative off-tariff arrangements that could provide competitors with theoretical efficiencies. The premise underpinning the disaggregated HSA framework, as determined by the Commission[165], provides that competitors are to either self-supply or rely on competitive transport supply.

123. It is contradictory for RCCI to argue that the solution to avoid costs is to lease backhaul from the Incumbents while simultaneously claiming: "CNOC appears to miss the point that a key objective of the original Commission Decision was to increase investment by the Competitors,

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162 *Id.*, at para 23.
163 I.e., stemming from TRP 2015-326, TD 2016-379 and TD 2017-312-1.
164 See TO 2016-396; See also Incumbent complaints about "below cost rates" in Section 9.0.
165 TRP 2015-326, at para 135.

meaning investment by them to self-supply."[166] RCCI cannot have it both ways. If competitors are to self-supply – the POP build costs cited by CNOC are required.

124. Contrary to RCCI's suggestion, CNOC has consistently been transparent about the variables that determine the number of POP builds that will be required for disaggregated HSA deployment.[167]

125. Paragraph 55 of CNOC's Interim Relief Comments expressly acknowledged four scenarios where competitors could benefit from efficiencies based on the need to deploy fewer POPs to interconnect with POIs. As CNOC explained, these exceptions are only likely to occur in a limited number of cases that are unique to each wholesale customer.[168] Therefore, CNOC put aside those variables, which cannot be factored in a straightforward cost-analysis, in order to quantify a range of costs that can be expected assuming that POPs are needed to interconnect to all POIs.[169]

126. Using RCCI's example that assumes that a competitor has a POP at 151 Front St. in Toronto, it is possible that this POP could be used to deploy disaggregated HSA at the seven cable head-ends that are in close proximity to the POP, namely, the following RCCI head-ends: McNicoll Ave., Scarlett Road, Greensboro Dr., Comstock, Dupont St., Bloor Street East and York Mills Road. However, this POP could not be used to deploy disaggregated HSA at the 29 more distant head-ends in RCCI's serving area, including the head-ends situated at, for example: Woodstock, Alliston, Stratford, Brantford, Orangeville, and Keswick. In all such cases, the competitor will need to: (1) build a POP; (2) deploy fibre from the POP to the RCCI head-end; (3) deploy fibre from the POP to an interconnection point with an underlying transport provider that will backhaul the traffic back to 151 Front.

127. In summary, and consistent with CNOC's submissions throughout this proceeding, certain POP build efficiencies are possible, but these cases will be an exception to the general rule for disaggregated HSA deployment throughout Ontario and Quebec.

166 RCCI intervention, at par 25.
167 Application, at paras 138-139; Interim Relief Comments, at paras 55-56.
168 *Id.*, at para 56.
169 *Ibid.*

128. The third argument that RCCI offers in an attempt to support its position that the Transition Plan is workable is an allegation that CNOC has not done its research regarding the availability of transport. This argument is addressed in Part 5.0.

129. In summary, RCCI fails to substantiate its claim that there exists a workable Transition Plan. Therefore, RCCI's claim does not disprove the irreparable harm to competitors if the interim relief is not granted.

130. TCI also submits that there is no irreparable harm because the Transition Plan is workable. TCI correctly summarizes CNOC's position that removal of the 100 Mbps speed cap on an interim basis is necessary to ensure that competitors are not foreclosed from retail markets for broadband speeds in excess of 100 Mbps.[170] However, TCI then remarks as follows:

> "This is simply not true. There will be an option readily available to competitors - where an incumbent offers speeds greater than 100 Mbps, it is required to offer those speeds over to competitors via the disaggregated HSA service. Therefore, the simple solution to this for competitors is to lease the service that the Commission has mandated to be provided, meaning that any harm is certainly avoidable."[171]

131. TCI conveniently ignores the exhaustive body of evidence that CNOC has filed on the record of this proceeding as proof that the disaggregated HSA regime is unworkable. This evidence will not be repeated yet again. Suffice to note that the irreparable harm resulting from not granting the interim relief is unavoidable.

F. The claim that CNOC infers that financial benefit is the singular incentive for transitioning to disaggregated HSA services

132. In a section of its intervention addressing irreparable harm, RCCI points to CNOC's comparison between the costs associated with aggregated and disaggregated HSA services and argues that this analysis infers that financial benefit is the singular incentive for transitioning to disaggregated HSA service.[172] Although it is not clear how this argument relates to irreparable harm, CNOC will deal with this argument in this section.

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170 TCI intervention, at para 27.
171 *Ibid.*
172 RCCI intervention, at para 18.

133. CNOC agrees with RCCI that financial benefit is not the singular incentive to transition.[173] However, CNOC disagrees with RCCI that the Commission imposed incentives for migration to disaggregated HSA are the only incentives.[174]

134. CNOC has long held that disaggregation ought to provide competitors with greater control over their networks and underlying costs, leading to service innovations that will benefit consumers. It is for this reason that CNOC has advocated for the continued availability of a fully disaggregated configuration for Bell, alongside a newly introduced lower level of disaggregation that is necessary to facilitate entry on economically feasible terms. These types of benefits associated with disaggregation should provide a natural incentive to transition to the disaggregated model. However, under the current regulatory framework, all incentives to transition to disaggregated HSA services, whether Commission imposed or naturally occurring from the benefits of a disaggregated configuration, are incapable of encouraging a migration to the unworkable regulatory model that currently exists.

G. Bell did not comment with respect to irreparable harm

135. CNOC notes that Bell did not address any of CNOC's arguments relating to irreparable harm. This is a peculiar omission given the importance of this criterion of the Commission's test for granting interim relief.

H. Irreparable harm is aggravated by other consequences of the unworkable regulatory framework

136. TekSavvy's intervention highlights the irreparable harm to competition that has resulted from the inability of competitors to obtain wholesale HSA services in excess of 50 Mbps from Bell Canada over a period of years.[175] Subsection 10.2 A. of these reply comments explained the irreparable harm resulting from the loss of the Speed Matching Requirement with respect to speeds in excess of 100 Mbps. CNOC also quoted Commission determinations that confirmed that the lack of a Speed Matching Requirement would result in a lessening or prevention of competition in

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173 *Ibid.*
174 *Ibid.*
175 TekSavvy's intervention, Section C.

retail markets.[176] As TekSavvy explains, the practical lack of a Speed Matching Requirement on ILEC higher-speed infrastructure causes identical harm.[177] In CNOC's view, the issues raised by TekSavvy illustrate the irreparable harm that competitors would suffer if the interim relief was not granted.

137. CNOC is also sympathetic to the relief that TekSavvy has requested to ensure that the Speed Matching Requirement is respected on all Incumbent networks.[178]

I. Conclusion: Irreparable harm

138. For all of the reasons set out in the preceding subsections, the opposition to the Application and the Interim Relief Comments has failed in its attempts to disprove that competitors will be subject to irreparable harm if the interim relief is not granted. Thus, the second criterion of the Commission's test for interim relief is satisfied.

139. Next, CNOC addresses the balance of convenience.

10.3 The Balance of Convenience

A. Presumption favouring the granting of interim relief

140. At the outset, CNOC wishes to emphasize an important principle that the opposition to the Application and the Interim Relief Comments has chosen to ignore. As noted in the Interim Relief Comments, 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.[179] Thus, as explained by Distributel:

> "…competitive ISPs, including Distributel, will be subject to irreparable pecuniary and reputational harm if the 100Mbps speed cap comes into effect as presently planned. In accordance to the Commission's previous considerations on requests for interim relief, the

[176] TD 2008-117, at para 19.
[177] TekSavvy's intervention, Section C.
[178] *Id.*, at para 35.
[179] 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.

> presumption is that the balance of convenience therefore favours granting the interim relief."[180]

141. CNOC fully agrees with Distributel's assessment. Accordingly, the analysis of the balance of convenience begins on a presumption that favours the granting of interim relief. As will be demonstrated in the subsections that follow, the Incumbents fail to overturn this presumption.

B. The claim that the impugned regulation was engaged in the promotion or protection of the public interest

142. TCI suggests that principles from *Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour)* 2018 FC 102 ["*Right to Life*"] should inform the approach to the balance of convenience test.[181] According to TCI:

> "…[T]he Federal Court held that in the case of a public authority, such as the CRTC, that is engaged in the promotion or protection of the public interest, all that is necessary is that there is some indication that "the impugned legislation, regulation or activity was undertaken pursuant to that responsibility." Once those requirements have been met, the balance of convenience favours the maintenance of the regulatory policy."[182] (footnote omitted)

143. In response, CNOC first notes that the quoted principle applies in contexts whereby the public authority is itself a respondent to an application seeking interlocutory injunction. Indeed, in *Right to Life*, the public authority, the Minister of Employment, Workforce and Labour, appeared before the Federal Court as a respondent and defended its own government program as being in the public interest.

144. In the present case, the Commission is clearly not a respondent to an action before a court. Notwithstanding, CNOC acknowledges that the Commission undoubtedly rendered its determinations with a view to furthering the public interest. However, the evidence in CNOC's submission demonstrates that the imposition of the 100 Mbps speed cap will not achieve the public interest objectives that the Commission envisioned.

145. As explained in Part 3.0 of these reply comments, insurmountable barriers have rendered the transition to disaggregated HSA impossible, which consequently prevents the achievement of

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180 Distributel intervention, at para 25.
181 TCI intervention, at para 43.
182 *Id.*, at para 43.

policy objectives underpinning TRP 2015-326 such as increasing competitor investment in middle-mile facilities.

146. Under these circumstances, the 100 Mbps speed cap has also completely lost its purpose. As explained in the Interim Relief Comments[183], the speed cap will in fact greatly harm the public interest. Fundamentally, the effect of the speed cap will be to deny the Speed Matching Requirement for service speeds in excess of 100 Mbps. The Commission itself recognized that denial of the Speed Matching Requirement will have consequences that it characterized as follows:

- "a substantial lessening or prevention of competition in the retail high-speed Internet services market"[184]
- "an ILEC and cable carrier duopoly would likely occur in the retail residential Internet service market, and competition might be reduced substantially in small-to-medium-sized retail business Internet service markets. The Commission considers that, in such circumstances, retail Internet service competition would not continue to be sufficient to protect consumers' interests".[185]

147. For these reasons, it is abundantly clear that the "impugned legislation" will not further the public interest. Therefore, the mere fact that TRP 2015-326 and TD 2016-379 were decided by a public authority does not overturn the presumption that the balance of convenience favors the granting of the interim relief.

C. The claim that the interim relief would strand Incumbent investments

148. Cogeco broadly claims that a review and vary of the decision would cause prejudice to Cogeco.[186] Cogeco's description of this prejudice is focused predominantly on stranded costs.[187] It is unclear whether these parts of Cogeco's submission relate to the interim relief. However, CNOC will assume that they do and that these arguments are relevant to balance of convenience considerations.

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183 Interim Relief Comments, at paras 133-140.
184 TD 2008-117, at para 19.
185 TRP 2010-632, at para 55.
186 Cogeco intervention, at para 28.
187 *Id.*, at paras 28-34.

149. CNOC must again repeat the overarching refrain that echoes throughout its submissions: Unless the final relief requested by CNOC is granted, disaggregated will remain unworkable. That outcome is the biggest threat to incumbent investments in disaggregated deployments.

150. As it stands, Cogeco itself noted that it does not have any competitors at its only two disaggregated enabled POIs (out of 60 regional head-ends). Furthermore, these two disaggregated POIs were not deployed in response to competitor requests. What's more, Cogeco has only received two requests for additional disaggregated HSA deployments. As demonstrated in Part 3.0 of these reply comments, this rate of disaggregated HSA deployment under imminent threat of a 100 Mbps speed cap is not indicative of a workable regulatory framework.

151. The *status quo* has simply not facilitated any significant investment by any industry participants. The realization of benefits stemming from the limited investments that have been made in disaggregated will depend on the granting of the final relief requested by CNOC. More importantly for the matter at hand, the 100 Mbps speed cap will not allow Cogeco to generate any additional benefits from the investments that it claims will be "stranded".[188]

152. CNOC therefore submits that Cogeco's argument relating to stranded costs does not overturn the presumption favouring the granting of the interim relief.

D. Claims that the interim relief would have "knock-on" effects

153. RCCI argues that the interim relief would have three "knock-on" effects that would be prejudicial to the industry.[189] According to RCCI, these knock-on effects sway the balance of convenience in favour of not granting the interim relief.[190] CNOC deals with each perceived knock-on effect in the paragraphs that follow.

154. First, RCCI argues that interim relief would negatively impact Incumbent cost studies, e.g. by reducing demand forecasts. CNOC acknowledges that its proposed interim and final relief will require regulatory changes, including adjustments to cost studies. However, as advocated throughout CNOC's submissions, this is the only path to a workable wholesale wireline framework. Distributel submits an accurate counter-point that the 100 Mbps speed cap would

188 *Id.*, at paras 33-34.
189 RCCI intervention, at para 34.
190 *Id.*, at Section 5.1.

require a number of changes that would be unnecessary if some or all of CNOC's final relief is granted. Distributel describes these changes as including, but not limited to: modifications to aggregated HSA provider ordering processes, aggregated HSA provider ordering systems, aggregated HSA provider tariffs, competitive ISP ordering procedures and systems, aggregated HSA provider and competitive ISP staff training and education, aggregated HSA provider qualification tools, competitive ISP websites, competitive ISP qualification tools, competitive ISP marketing materials, and numerous other competitive ISP systems, processes, and customer facing items.[191] CNOC agrees with Distributel that these changes would be enormously disruptive for all industry participants.[192] Moreover, all of those efforts could be undone if the Commission grants the final relief requested by CNOC. These inconveniences therefore favour the granting of the interim relief.

155. Secondly, RCCI argues that the interim relief will affect internal budgets and resource deployments.[193] Neither RCCI nor any other Incumbent provides evidence to support this claim. Therefore, CNOC submits that the Commission should not consider this unsubstantiated claim when assessing the balance of convenience.

156. Third and finally, RCCI states that the "most serious" knock-on effect relates to competitors and Incumbents that may have begun investing and deploying facilities to launch disaggregated HSA services.[194] RCCI provides no specific examples. Instead, RCCI merely acknowledges that it "…is aware of certain competitors that have already begun readying a launch of disaggregated HSA services."[195] In reality, no significant investment in disaggregated HSA deployments, by competitors or Incumbents, has occurred to date due to the unworkable state of the wholesale regime. This is more thoroughly explained above in Subsection 10.3 D.

157. In summary, the prejudicial impact of the knock-on effects described by RCCI is simply not substantiated. Even if the Commission finds that the interim relief does create certain inconveniences for Incumbents, those inconveniences do not outweigh the inconvenience

191 Distributel intervention, at para 26.
192 *Ibid.*
193 RCCI intervention, at para 34.
194 *Ibid.*
195 *Ibid.*

associated with the irreparable harm that competitors would suffer as a result of a 100 Mbps speed cap.

E. Claims that the interim relief is contrary to competitive and technological neutrality

158. RCCI notes that removing the 100 Mbps cap disproportionately affects Cable Carriers "since speeds above 100 Mbps on FTTN ILEC facilities do not exist."[196] On this basis, RCCI submits that interim relief would be in contravention to paragraph 1(b)(iv) of the Policy Direction[197] that requires the Commission to "ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent possible".[198]

159. In fact, as CNOC noted above[199] and TekSavvy emphasizes throughout its intervention, FTTN ILEC facilities are unable to provide speeds above 50 Mbps. That aside, RCCI's argument is illogical. Cable Carriers currently offer wholesale service speeds in excess of 100 Mbps while ILECs do not. Granting the interim relief would simply result in a continuation of this situation.

160. CNOC also wishes to remind RCCI that in TD 2018-44, the Commission determined that the exclusive availability of Cable Carrier wholesale services in areas where ILECs have no obligation to provide aggregated HSA services (i.e. in areas where only FTTP facilities are available), much less service at a maximum of 50 Mbps, is an acceptable outcome.[200]

161. Therefore, the interim relief would not create a situation that is contrary to paragraph 1(b)(iv) of the Policy Direction.

F. Conclusion: Balance of convenience

162. The opposition to the Application and the Interim Relief Comments has not demonstrated any evidence that would overturn the presumption that the balance of convenience favours the granting of the interim relief. The Incumbents also do not demonstrate any compelling public policy grounds for denying the interim relief. As explained in Part 3.0 of these reply comments,

196 *Id.,* at para 36.
197 Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355.
198 *Ibid.*
199 See Section 10.2 H.
200 TD 2018-44, at para 50.

Incumbent claims that the interim relief would compromise policy objectives of TRP 2015-326 are flawed and should be rejected by the Commission.

163. For these reasons, the balance of convenience, taking into account the public interest, favors the granting of the interim relief.

11.0. RCCI'S GAP CLOSURE PROPOSAL

164. Prior to outlining CNOC's conclusions, it should be noted that RCCI's "gap closure" proposal in Section 6.1 of its intervention should be rejected. This proposal presupposes that the Commission will deny CNOC's request for the elimination of the 100 Mbps speed cap on a final basis. The proposal is therefore inappropriate in the context of submissions relating to interim relief.

165. On a more fundamental level, the speed cap, whether imposed on the terms prescribed by TRP 2015-326, or those proposed by RCCI, is not a regulatory mechanism that is sensitive to the economic conditions that will foster competition.

166. In RCCI's proposed approach, and in the unlikely event that disaggregated HSA is deployed at a POI prior to the granting of final relief requested by the Commission, it is likely that disaggregated HSA at the location in question will remain uneconomical for the vast majority of competitors in the area. Those competitors, and their customers should not be arbitrarily punished by a speed cap in conditions where deployment is not possible. In contrast to a speed cap, CNOC's final relief proposes a regulatory approach to aggregated HSA that is grounded on sound economic principles that have been a cornerstone of the Commission's regulatory policies for decades: where the conditions for economically efficient disaggregated HSA deployment become detectable by a forbearance test for aggregated HSA – aggregated service will become forborne, subject to an appropriate phase out period.

12.0 CONCLUSION

167. CNOC's case for interim and final relief rests on the evidence that competitors face insurmountable barriers that prevent the deployment of disaggregated HSA services. The opposition to the Application and the Interim Relief Comments has failed in its attempts to disprove or undermine this evidence. Conversely, the existence of insurmountable barriers has been resoundingly confirmed by the BCBA, Distributel, TekSavvy and Zayo-Allstream. On the

backdrop of this evidence, CNOC has demonstrated that its request for interim relief satisfies each criterion of the Commission's test for interim relief. Accordingly, CNOC urges the Commission to suspend, on an interim basis, the 100 Mbps speed cap on aggregated HSA services prior to the final approval of disaggregated HSA tariffs.

168. Moreover, there is considerable urgency in having CNOC's request for both interim and final relief adjudicated as promptly as possible, as the current regulatory uncertainty makes it very difficult for competitors of the Incumbents to formulate and execute business plans designed to foster greater competition in the markets for broadband services. Accordingly, CNOC urges the Commission to make its rulings as quickly as practicable.

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