



## Telecom Decision CRTC 2023-358

PDF version

References: 2023-56, 2023-56-1, and 2023-56-2

Ottawa, 6 November 2023

*Public record: 1011-NOC2023-0056*

### **Review of the wholesale high-speed access service framework – Temporary access to fibre-to-the-premises facilities over aggregated wholesale high-speed access services**

#### **Summary**

Canadians need access to reliable, affordable and high-quality Internet services for every part of their daily lives.

The Commission is taking action through a number of initiatives to improve Internet services. For example, the Commission has established the Broadband Fund to support projects that bring high speed Internet to rural, remote and Indigenous communities. To address the particular needs of Canadians living in the Far North, the Commission is advancing its ongoing proceeding on Internet and home phone services in that geographic area. And to make sure services are working when Canadians need them, the Commission recently launched a first consultation aimed at enhancing the resilience and reliability of Canada's telecommunications networks.

Most recently, the Commission launched this proceeding to review its approach to Internet services competition. The Commission recognized that its current approach has not met the objective of encouraging choice and affordability.

As part of this proceeding, the Commission launched an expedited process to determine whether large incumbent telephone and cable companies should provide third-party companies (wholesale-based competitors) with access to their fibre-to-the-premises (FTTP) networks. This decision is based on the evidence received as part of the expedited process.

For more than 20 years, the Commission has required large incumbent telephone and cable companies to provide wholesale access to their networks across Canada. Wholesale-based competitors use that access to sell Internet services to consumers, in direct competition with larger incumbent companies.

In recent years, the Commission has noted declining competitive intensity in this industry. The number of Canadians who buy Internet services from independent wholesale-based competitors has fallen by 40%, even as the overall number of Internet

subscribers in Canada has increased. In addition, a significant number of wholesale-based competitors have been bought by incumbent companies. When competitors exit the market, Canadian consumers are left with fewer options. It is therefore important that the Commission revise its approach to promote competition and protect the interests of Canadians.

The record of this proceeding shows that the competitive presence of wholesale-based competitors has declined most significantly in Ontario and Quebec. These provinces are where competitors have historically attracted the largest number of subscribers, and where they are currently losing subscribers the fastest. At the end of 2022, independent wholesale-based competitors served 47% fewer subscribers in Ontario and Quebec than they did two years prior.

Further, higher -speed Internet service, for which demand continues to grow rapidly, is a market segment where wholesale-based competitors have fallen behind incumbent companies. While competitors have had access to higher-speed services on cable networks, they do not have a practical way to sell Internet services over the FTTP networks operated by incumbent telephone companies. And these networks continue to grow, with 60% of the premises passed by incumbent telephone companies now having access to FTTP networks. By contrast, less than 5% of the premises passed by cable companies have access to FTTP networks.

This decision provides a temporary and expedited solution to those problems. Specifically, the Commission **directs** large incumbent telephone companies to provide workable wholesale access to their FTTP networks in Ontario and Quebec within **six months** of the date of this decision. This will enable wholesale-based competitors to offer FTTP-enabled services to more than five million Canadian households. Meanwhile, the Commission is continuing to work expeditiously through the ongoing proceeding to ensure that all Canadians benefit from a wide range of affordable high-speed Internet services, as quickly as possible.

At the same time, the Commission recognizes that continued investment by incumbent companies is crucial to ensuring that Canadians continue to benefit from robust and reliable Internet services. To achieve this, the Commission has established just and reasonable interim rates that wholesale-based competitors will pay those incumbent companies for access. These rates will ensure that large incumbent companies across Canada continue to have incentive to invest in their networks.

The Commission conducted this proceeding in a timely manner and has based its decisions on sound and recent evidence, as required by the 2023 Policy Direction.<sup>1</sup> Today's decision is intended to remain in effect until the Commission completes its broader review on the merits of establishing longer term wholesale access to FTTP networks across Canada. The Commission will continue to be guided by the 2023 Policy

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<sup>1</sup> *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, SOR/2023-23, 10 February 2023.

Direction, as well as the telecommunications policy objectives set out in section 7 of the *Telecommunications Act*, in monitoring the effectiveness of the wholesale access framework and making adjustments as necessary. Accordingly, the nature and scope of this wholesale access may grow, contract, or otherwise be modified as a result of that review.

## **Background**

1. Wholesale high-speed access (HSA) services must currently be made available by the large incumbent local exchange carriers (ILECs) and cable carriers (collectively, the incumbent carriers)<sup>2</sup> in both aggregated and disaggregated configurations. Aggregated wholesale HSA services (aggregated HSA) enable competitors to connect to the incumbent carriers' networks at a centralized point of interconnection. Competitors then use the incumbent carriers' transport and access infrastructure to offer Internet services to all end-users throughout the incumbent carriers' serving territories. Disaggregated wholesale HSA services (disaggregated HSA) are similar but require competitors to obtain transport facilities separately and to interconnect to incumbent carriers' networks at a larger number of points of interconnection to provide service throughout some or all of an incumbent carrier's serving territory.
2. In Telecom Regulatory Policy 2015-326, the Commission conducted an essentiality analysis of all wholesale HSA services and made the following determinations: (i) incumbent carriers had upstream market power over the provision of wholesale HSA services; (ii) if wholesale HSA services were not made available, competition would be lessened or prevented substantially in the downstream retail Internet service market (retail market); and (iii) access facilities could not be practically duplicated, while transport facilities could be duplicated.
3. The Commission then determined that disaggregated HSA was essential because it addressed competitive concerns in the upstream and downstream retail markets and provided wholesale access to the access facilities that were not economically duplicable. At the same time, the Commission determined that aggregated HSA was not essential because, although it addressed competitive concerns in the upstream and downstream retail markets, it also contained access to transport facilities that were economically duplicable. Moreover, competitive concerns in the upstream and downstream retail markets would be addressed provided that disaggregated HSA was made available.
4. Given these determinations, the Commission mandated the provision of essential disaggregated HSA to support competition in the provision of retail Internet services. At the same time, the Commission determined that aggregated HSA would no longer be mandated and would be phased out once disaggregated HSA was implemented.

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<sup>2</sup> "ILECs" refers to Bell Canada (including Bell Aliant Regional Communications, Limited Partnership, and Bell MTS Inc.), Saskatchewan Telecommunications, and TELUS Communications Inc. "Cable carriers" refers to Bragg Communications Incorporated, carrying on business as Eastlink; Cogeco Communications Inc.; Rogers Communications Canada Inc., and Videotron Ltd.

Limitations were imposed on aggregated HSA to encourage a transition to the new disaggregated HSA framework, notably by restricting access to fibre-to-the-premises (FTTP) facilities to the disaggregated HSA framework only.

5. Following the implementation of disaggregated HSA in Ontario and Quebec, there was minimal uptake of the service by competitors. The Commission therefore initiated a review to consider whether the service could be reconfigured to facilitate the deployment of disaggregated HSA to competitors, including in other markets across Canada. In Telecom Decision 2023-53, the Commission concluded that there was no effective way to reconfigure disaggregated HSA to make it viable. It also concluded that mandated disaggregated HSA had failed to achieve a key objective of the wholesale HSA service framework, notably to ensure that Canadian consumers benefit from a more competitive Internet services market.

### **Telecom Notice of Consultation 2023-56**

6. The Commission initiated the current review of the wholesale HSA service framework in Telecom Notice of Consultation 2023-56 (the Notice). In the Notice, the Commission indicated that while wholesale regulation remained its preferred means to address competitive concerns in the retail market, the current framework was not accomplishing this goal effectively. The Commission therefore sought comments on broad policy matters with the intention of creating an updated and more effective framework.
7. The Commission's review was prompted by its recognition that retail market conditions are changing rapidly. As ILECs are steadily deploying FTTP facilities across their serving territories, consumers are increasingly adopting FTTP services. At the same time, wholesale-based competitors' market shares are declining. The Commission also recognized an existing asymmetry between the ILECs and the cable carriers in the number of subscribers to their aggregated HSA. In particular, the Commission noted that a large number of wholesale subscribers are purchasing cable carriers' aggregated HSA offerings at speeds that were higher than what was available over the ILECs' aggregated HSA. In these circumstances, and given the limited deployment of disaggregated HSA, the Commission was concerned that the resulting asymmetry had distorted the market, limited choice for competitors, and ultimately limited the overall competitiveness of the retail market, thereby negatively affecting Canadian consumers. The Commission considered that, in those circumstances, it was not reasonable to expect competitors to continue to rely on a framework that does not provide for viable access to FTTP facilities.
8. Given these concerns, as well as the significant amount of time that would be required to build a record sufficient to dispose of the key issues surrounding wholesale HSA services, the Commission established a distinct and expedited portion of the proceeding (the expedited process). In the expedited process, the Commission invited comments on its preliminary view that the provision of FTTP facilities over aggregated HSA should be mandated on a temporary and expedited basis, until the conclusion of the broader review of the wholesale HSA service framework (the broader review).

9. In the Notice, the Commission stated that any decision to mandate temporary access to FTTP facilities over aggregated HSA (referred to hereafter as aggregated FTTP access) was not in the nature of injunctive relief and was instead a broad policy question. As such, this question would not be assessed on the basis of the criteria set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v Canada (Attorney-General)*, [1994] 1 SCR 311 (*RJR-Macdonald*), known as the RJR-MacDonald test.<sup>3</sup> Rather, it would be examined with regard to the statutory powers and duties provided in the *Telecommunications Act* (the Act) and the Commission's mandate to exercise its powers and perform its duties to further the implementation of the Canadian telecommunications policy objectives set out in section 7 of the Act (the policy objectives of the Act) and applicable policy directions.
10. The Commission received interventions with respect to the expedited process from Beanfield Technologies Inc.; Bell Canada; Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); Campbell Patterson Communications; the Canadian Anti-Monopoly Project; Cogeco Communications inc. (Cogeco); the Community Fibre Company; the Competitive Network Operators of Canada (CNOC); Devtel Communications Inc.; IGS Hawkesbury Inc.; Iristel Inc.; National Capital FreeNet; OpenMedia; the Public Interest Advocacy Centre (PIAC); Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron); Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications (SaskTel); SkyChoice Communications Inc.; TekSavvy Solutions Inc. (TekSavvy); TELUS Communications Inc. (TCI); Truespeed Internet Services Inc.; Vaxination Informatique; Vaxxine Computer Systems Inc.; WaveDirect Telecommunications; and more than 300 individuals.

## Issues

11. The Commission has identified the following issues to be addressed in this decision:
  - Is the Commission required to apply the RJR-MacDonald test? If not, did the Commission comply with procedural fairness in describing the lens it would use to assess the issue under consideration?
  - If the Commission decides to mandate temporary aggregated FTTP access, will this prejudice the issue of whether such access should be mandated for the longer term?
  - Is the Commission's departure from the RJR-MacDonald test consistent with the 2023 Policy Direction?

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<sup>3</sup> The RJR-MacDonald test consists of three parts and each part of the test must be satisfied before injunctive or interlocutory relief will be issued: (i) it has been demonstrated that there is a serious issue to be tried, (ii) the person requesting the injunction has demonstrated that it would suffer irreparable harm should it not be granted the requested injunction yet ultimately prevail on the merits, and (iii) the balance of convenience favours the granting of the injunction.

- Should the Commission mandate aggregated FTTP access on a temporary and expedited basis until the broader review has concluded?
  - If the Commission mandates aggregated FTTP access on a temporary and expedited basis, what should the scope of that mandate be?
12. The other issues set out in the Notice will be addressed following the conclusion of the public hearing initiated in the Notice.

**Is the Commission required to apply the RJR-MacDonald test? If not, did the Commission comply with procedural fairness in describing the lens it would use to assess the issue under consideration?**

**Positions of parties**

13. Bell Canada and TCI argued that the interim relief the Commission proposed in its preliminary view in the expedited process is a mandatory interlocutory injunction. They argued this is so because the relief (i) is intended to last until the Commission rules on the matters set out in the Notice on a final basis, and (ii) requires the parties subject to it to act positively by offering temporary aggregated FTTP access pending the outcome of the broader review. Both Bell Canada and TCI submitted that the Commission ought to use the test for injunctive relief developed by the courts in *RJR-MacDonald* when considering the question at issue in the expedited process.<sup>4</sup> TCI further argued that failure to do so would constitute a legal error.
14. Bell Canada and TCI argued that if the Commission is not required to use the RJR-MacDonald test<sup>5</sup> then it must, consistent with procedural fairness requirements, justify its departure from its prior consistent practice and inform parties of the test it will use. Bell Canada, referring to the doctrine of legitimate expectation, argued that it would be unfair for the Commission to not apply the RJR-MacDonald test, which it set out in its 1997 Practice Note<sup>6</sup> as being the test it would apply in such situations, without clearly stating what alternative test the Commission intends to apply and

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<sup>4</sup> While both Bell Canada and TCI made further reference to the Supreme Court of Canada’s decision in *R v Canadian Broadcasting Corp.*, [2018] 1 SCR 196 (*R v CBC*), in which the court applied a heightened test where the relief sought would require mandatory action from the party against whom it is ordered, TCI argued that the Commission was required to apply this higher standard, which requires that the applicant demonstrate, under the first leg of the RJR-MacDonald test, the existence of a “strong prima facie case,” which is a much higher standard than “a serious issue to be tried.”

<sup>5</sup> Whether modified by *R v CBC* or not.

<sup>6</sup> In a Practice Note dated 28 February 1997, the Commission stated the following: “The Commission reminds parties participating in its proceedings that it intends to use, on a going forward basis, the same test for both stay applications and applications for interim relief. Accordingly, interim relief applications will, in the future, no longer be considered on the basis of the criteria in *Colins Inc. et al v. Bell Canada*, Telecom Decision CRTC 79-12, 7 June 1979 but, instead, will be assessed on the basis of the test set out in the Supreme Court of Canada’s decision in *Manitoba (Attorney-General) v. Metropolitan Stores Ltd.* [1987] 1 S.C.R. 110 (as supplemented by *RJR-MacDonald Inc. v. Canada (Attorney-General)* [1994] 1 S.C.R. 311).”

providing parties with an opportunity to comment on the departure from such precedent.

15. Bell Canada submitted that the Commission provided no meaningful guidance as to what framework would be applied but instead suggested that it would take into consideration its general statutory duties, powers, and mandate. TCI argued that this is not a test but rather a statement of the factors the Commission must consider in making all decisions.
16. CNOC, PIAC, TekSavvy, and Videotron disputed the arguments that the Commission had breached procedural fairness by failing to apply the RJR-MacDonald test and articulate the alternative test it intended to apply. In particular, they submitted that the Commission is under no obligation to apply the RJR-MacDonald test to determine whether to grant relief because the Practice Note is not binding, and Parliament has made the Commission the master of its own procedure.
17. CNOC submitted that the Commission fully complied with notice requirements when it stated its intention to assess the issue under consideration with regard to (i) the statutory powers and duties set out in the Act, and (ii) the Commission's mandate to exercise its powers and perform its duties so as to further the implementation of the policy objectives of the Act and applicable policy directions. CNOC argued that this is how the Commission makes most of its regulatory decisions and that proceeding in this manner is not an error of law.

### **Commission's analysis**

18. The Commission considers that whether to mandate temporary aggregated FTTP access is a question of policy focused on advancing the policy objectives of the Act. Simply requiring a carrier to do something or not to do something using the extensive powers set out in the Act, even if on a temporary or interim basis, is not inherently injunctive. Rather, injunctive relief is a narrower type of relief designed to aid in the ability to properly and meaningfully litigate a substantive legal claim. The RJR-MacDonald test, whether or not it is modified as set out in *R v CBC*, reflects this goal.
19. The issue under consideration in the expedited process has characteristics that differentiate it from those informing interlocutory injunctive relief. The Commission established the expedited process to consider a policy issue in and of itself. The question posed is not whether temporary access must be granted to preserve the rights of the parties pending the outcome of an application. Rather, the question is whether immediate policy measures must be taken to ensure the fulfillment of the policy objectives of the Act. The process established in the Notice allowed for the building of a distinct record upon which to decide the issue. This process provided opportunities for interested persons to make their views known on the merits of the issue, offer supporting evidence, and engage with others' submissions.

20. Even if the current question was of an inherently injunctive nature, the Commission considers that it is not legally bound to apply the RJR-MacDonald test in all situations involving a request for a stay of proceedings or injunctive relief.<sup>7</sup> In this case, the Commission considers that it is not helpful or instructive to focus on whether, for example, failing to mandate temporary aggregated FTTP access will or will not cause irreparable harm to one individual company. Instead, the Commission's considerations are focused on the viability of the competitive market as a whole, and the availability of choice and affordability for Canadians in the short term.
21. With respect to procedural fairness concerns about the way that the Commission described the lens it would use to assess the issue under consideration, the Commission considers that there is no requirement for it to establish and identify a formalized test with discrete and sequential steps. The Notice indicated that the Commission will decide this matter on the basis of its full statutory powers, with regard to the duties set out in the Act and with a view to implementing the policy objectives set out therein and applicable policy directions. This is consistent with the Commission's usual practice.
22. The Commission notes that at paragraph 159 of Telecom Regulatory Policy 2021-130, it made a pronouncement to the effect that while there may be other bases upon which to ground regulatory intervention in wholesale markets, "as a general matter, it is appropriate to view such regulatory intervention as a means of addressing situations of undue preference or unjust discrimination." Considerations that inform whether the undue preference or unjust discrimination concerns arise under subsection 27(2) of the Act are varied, but not unknown. Some of these are identified in Telecom Regulatory Policy 2021-130 while others can be found in other Commission decisions. Similar considerations would also inform the Commission's reliance on other statutory powers, such as those set out in sections 24 and 32.
23. Furthermore, the issue being considered under the expedited process is not being considered in a regulatory vacuum. Numerous findings have been made that are relevant to a determination on the issue. The Commission considers that it has been more than 20 years since it found that there were problems in the retail market that warranted intervention in the wholesale market. Most recently, in Telecom Regulatory Policy 2015-326, the Commission found that mandated access to FTTP facilities is appropriate and necessary to address problems identified in the retail market. The Commission originally subjected this access to restrictions to encourage a migration from aggregated HSA to disaggregated HSA. However, after a number of regulatory proceedings, the Commission determined in Telecom Decision 2023-53

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<sup>7</sup> See *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc.*, 2011 FCA 312. While that decision dealt with a request for a stay and not an injunction, the considerations that inform the granting of injunctive relief and stays have been held to be the same – see *Manitoba (Attorney-General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110 at page 127.



that the intended implementation of and migration to disaggregated HSA was not addressing problems in the retail market.

24. While these underlying matters will continue to be examined as part of the broader review, the Commission has assessed the matter of temporary aggregated FTTP access taking these past findings into consideration.
25. Finally, with respect to procedural fairness, the Commission does not consider accurate the assertion that not applying the RJR-MacDonald test represents a departure from its stated practice as reflected in the 1997 Practice Note. The Commission notes that, by its very terms, that Practice Note was addressed to “applications,” whereas the Notice was issued by the Commission itself.

**If the Commission decides to mandate temporary aggregated FTTP access, will this prejudice the issue of whether such access should be mandated for the longer term?**

#### **Positions of parties**

26. Bell Canada, SaskTel, and TCI submitted that if the Commission requires an interim service to be made available before the broader review concludes, that requirement will prejudice the decision on whether to require the service on a more permanent basis. Bell Canada and TCI argued that to the extent that the Commission will not be applying the RJR-MacDonald test – either the original or as modified in *R v CBC* – then any determination that would require temporary aggregated FTTP access would effectively prejudice the outcome of issues under consideration in the broader review. Bell Canada and TCI argued that to the extent that the Commission would be using the same broad approach for resolving the issue considered under the expedited process as it would when resolving similar issues as part of the broader review, it would be unlikely that the Commission would reach a different determination in the broader review.
27. CNOC submitted that any arguments that the Commission is prejudging the outcome of the proceeding are without merit, since there is nothing that could prevent the Commission from mandating temporary aggregated FTTP access but then deciding later, after considering the evidence in the broader review, not to mandate it for the longer term.

#### **Commission’s analysis**

28. The Commission notes that, as a general matter, a person alleging that the outcome of a proceeding is pre-determined has a high evidentiary bar to meet.<sup>8</sup>

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<sup>8</sup> See, for example, *Committee for Justice and Liberty v National Energy Board et al* [1978] 1 SCR 369, at page 394, and *TELUS Communications Inc. v Telecommunications Workers Union*, 2005 FCA 262 at para 36 and *R v S (R.D.)*, [1997] 3 SCR 484.

29. The Commission considers that the issue under consideration in the expedited process and those under consideration in the broader review are not identical. The issue in the expedited process is whether policy considerations support a temporary aggregated FTTP access mandate. The broader review poses fundamental questions about the foundations of the whole regime itself, including aggregated HSA. For example, in the broader review, the Commission could mandate a longer-term aggregated FTTP service that is broader, narrower, or otherwise different than that resulting from the expedited process. The Commission could also make other adjustments to the HSA service framework beyond mandating aggregated FTTP access.
30. As discussed later in this decision, in its analysis of whether to implement temporary aggregated FTTP access, the Commission explicitly engages with the challenges that such access being temporary would entail and incorporates solutions that limit potential impacts in the broader review.
31. The Commission assesses the various issues on their own merits and on the basis of the distinct evidentiary records that are developed. Moreover, the Commission considers that an informed preliminary view does not suggest a likelihood of deciding a matter in a particular way.

### **Is the Commission's departure from the RJR-MacDonald test consistent with the 2023 Policy Direction?**

#### **Positions of parties**

32. Both Bell Canada and TCI argued that departing from the RJR-MacDonald test in the expedited process would be contrary to section 3 of the 2023 Policy Direction, which states that the Commission should ensure its proceedings and decisions are transparent, predictable, and coherent. Specifically, Bell Canada argued that administrative procedures such as the RJR-MacDonald test exist to ensure proceedings are transparent, predictable, and coherent. Moreover, it argued that ordering a temporary regime without ensuring compliance with this test would be contrary to section 3 of the 2023 Policy Direction. TCI argued that even if the Commission were not mandated to apply the RJR-MacDonald test, it must still exercise its discretion with a view to ensuring coherence. It added that the Commission risks incoherence if it does not justify its departure from the test.

#### **Commission's analysis**

33. The Commission considers that, by identifying the lens through which it will be considering the issue, which is a usual and predictable Commission practice of which parties are aware, it has ensured transparency in its decision-making process.
34. In the Commission's view, the expedited process established in the Notice has allowed for a fulsome analysis of the relevant matter. A comprehensive record has been compiled, providing parties with the opportunity to make their views known on this issue, file evidence in support, and reply to other parties' submissions.

## **Should the Commission mandate aggregated FTTP access on a temporary and expedited basis until the broader review has concluded?**

### **Positions of parties**

35. Incumbent carriers other than Videotron generally argued that temporary aggregated FTTP access should not be mandated for three main reasons:
  - the Commission's preliminary view is unsubstantiated and fails to establish urgency for this measure, given that there is no evidence of significant harm to competitors resulting from a lack of aggregated FTTP access;
  - competitors already have access to higher-speed aggregated HSA on cable carriers' networks, and demand for this service has been limited; and
  - a decision to mandate temporary aggregated FTTP access would fail to consider the negative impact on investment, particularly given the current state of fibre deployment where ILECs have a large footprint without access to FTTP and where cable carrier FTTP is nascent.
36. Bell Canada and RCCI argued that market shares are not sufficient to demonstrate market dominance, and that aggregated national market shares are not conclusive or even suggestive of market power. They argued that absent a full essentiality review, including the defining of relevant markets and an assessment of supply and demand conditions in those markets, it would be premature to mandate aggregated FTTP access.
37. Bell Canada argued that recent acquisitions of competitors at high valuations are a sign that the wholesale-based market is strong, and that the acquired companies had value in furthering incumbent carriers' entry into new market segments.
38. Bell Canada and RCCI also argued that wholesale-based competitors are not likely to suffer significant harm if expedited relief is not granted. They argued that cable carriers provide aggregated HSA at speeds up to 1.5 gigabits per second (Gbps) but that there has been limited uptake of the service. They argued that wholesale-based competitors appear to be focused on lower-speed market segments.
39. Bell Canada, RCCI, and TCI argued that the introduction of temporary aggregated FTTP access would chill investment. They submitted that the Commission must maintain the proper conditions for continued investment in broadband networks so that companies can earn a reasonable return on investment and avoid increasing disparities in smaller and rural communities, where the typical incentive for private investment is not as strong.
40. Competitors, consumer groups, and Videotron generally supported the Commission's preliminary view that expedited, temporary aggregated FTTP access should be mandated. They argued that disaggregated FTTP access has proven unworkable and that, as a result, competitors have no effective ability to serve a

growing number of households served exclusively by FTTP facilities. In support of this argument, they noted that pre-existing HSA infrastructure is being decommissioned and, in new builds, incumbent carriers are deploying only FTTP.

41. Competitors, consumer groups, and Videotron also submitted that the retail market is facing a continued decline in competitive vigour. They noted that since 2019, the market share of small Internet service providers has declined, while the total number of residential Internet service subscriptions has risen, and that competition has been further diminished through acquisitions of competitors by incumbent carriers.
42. Competitors and consumer groups expressed concerns with the number of recent acquisitions of wholesale-based competitors. CNOOC, TekSavvy, and the Canadian Anti-Monopoly Project argued that the rapid acquisition of the largest wholesale-based competitors is evidence of an untenable market in which wholesale-based competitors are not properly incentivized to grow and are instead exiting at the cost of competition. PIAC submitted that these acquisitions further suggest a risk of imminent failure for the remaining independent Internet service providers.
43. Finally, with respect to the incentive to invest, competitors and consumer groups, as well as Videotron, argued that wholesale rates set through Phase II methodology provide effective compensation and a rate of return that incentivizes continued investment. They argued that incumbent carriers have had more than seven years without an effective mandate for access to wholesale FTTP facilities in which to recover their investments, and that public funding is available to incentivize investment in areas where FTTP has not yet been deployed.

### **Commission's analysis**

44. With respect to essentiality, the Commission recognizes that, after eight years, there is a need to review the framework set out in Telecom Regulatory Policy 2015-326 to determine if any adjustments are necessary to reflect current market conditions. For this reason, both the essentiality test and the conclusions related to essentiality set out in Telecom Regulatory Policy 2015-326 are included in the scope of the broader review. That said, given the urgent need for a solution that is demonstrated below, and the temporary nature of the service under consideration, the Commission considers that while the broader review is underway, it would not be appropriate to perform a separate and prolonged essentiality analysis. Instead, the Commission will continue to broadly rely on the conclusions with respect to market conditions that are set out in Telecom Regulatory Policy 2015-326.

### **Disaggregated HSA has failed to support competition**

45. In the years following the issuance of Telecom Regulatory Policy 2015-326, the Commission established service configurations and interim rates for disaggregated HSA in Ontario and Quebec. However, the implementation of the service was slow, and uptake since that time has been minimal. Despite the service being available for more than five years, the total number of wholesale subscribers to disaggregated HSA represents less than 1% of all HSA subscribers, none of whom are using a

disaggregated FTTP service. Furthermore, in Telecom Decision 2023-53, the Commission found that there was no effective way to reconfigure disaggregated HSA to increase demand. For these reasons, the Commission considers that disaggregated HSA is not a viable option to broadly support competition to meet the needs of Canadians.

#### **Disaggregated HSA is not viable and must be supplemented**

46. In Telecom Regulatory Policy 2015-326, the Commission concluded that the incumbent carriers had both upstream and downstream market power with respect to the provision of wholesale HSA services. While both disaggregated and aggregated HSA were viewed as potential remedies to address this market power, disaggregated HSA was initially mandated because it was an essential service.<sup>9</sup> However, the Commission notes that the decision to not mandate aggregated HSA was in part contingent on viable disaggregated HSA being in place to discipline markets. The Commission considers that, since disaggregated HSA is not viable, it is consistent with the existing framework to mandate the provision of aggregated HSA to address the incumbent carriers' market power.

#### **Concerns about unjust discrimination and undue or unreasonable preference**

47. In Telecom Decision 2021-130, the Commission set out the view that when an incumbent carrier with both upstream and downstream market power fails to provide meaningful access to an essential wholesale service, it confers upon itself an undue or unreasonable preference and subjects competitors to an unreasonable disadvantage.
48. In Telecom Regulatory Policy 2015-326, incumbent carriers were found to have upstream market power. As a result, if access to wholesale HSA services, including FTTP-based wholesale services, were denied, there would be a lessening of competition in the downstream retail market. The Commission considers that there is therefore a need to ensure there is a practical wholesale service available to address concerns of unjust discrimination and undue or unreasonable preference.
49. While disaggregated HSA was initially mandated to address those concerns, the Commission has since determined that the service is not broadly viable to support competition. As a result, there is currently no practical wholesale service available that provides access to incumbent carriers' FTTP facilities in a manner that effectively mitigates concerns with respect to unjust discrimination and undue or unreasonable preference.

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<sup>9</sup> The Commission notes that, in this regard, in Telecom Regulatory Policy 2015-326 it did not perform a standalone policy assessment surrounding the mandated provision of aggregated HSA.

## **Need for practical wholesale access to incumbent carriers' FTTP facilities**

50. In the Notice, the Commission identified several trends that suggested that wholesale-based competitors were experiencing difficult market conditions. As the incumbent carriers' fibre footprints expanded, the competitive impact of wholesale-based competitors declined.
51. Contrary to submissions made by the incumbent carriers that there is no urgency or evidence of harm to competitors, market information collected in the expedited process demonstrates that the subscriber base of wholesale-based competitors has dramatically declined. The total number of subscribers that were served by wholesale-based services, whether through wholesale-based competitors or through subsidiaries or affiliates of an incumbent carrier, declined by nearly 18.5% since the end of 2020.
52. Meanwhile, several competitors have recently been acquired by incumbent carriers,<sup>10</sup> further limiting competitive choices. Prior to 2020, incumbent carriers' subsidiaries accounted for fewer than 1% of subscriptions to wholesale-based services. Now, nearly 28% of those subscribing to wholesale-based services do so through one of the more than six former competitors that have been acquired by incumbent carriers since 2022. As a result, the total number of subscriptions to services provided by wholesale-based competitors unaffiliated with an incumbent carrier has declined nationwide by 40% since the end of 2020.
53. The incumbent carriers have also steadily increased their FTTP deployments in recent years such that, by the end of 2022, nearly two thirds of Canadian premises reached by the large incumbent carriers outside the territories had access to FTTP. While ILECs continue to have the largest FTTP deployments, cable carriers are also continuing to invest in fibre. This is reflected in the growth in the number of premises passed by cable carrier-owned FTTP, which increased by 45% from the end of 2020 to the end of 2022.
54. Further, consumer demand for higher-speed services has continued to grow over the past three years. Since 2020, the share of subscribers on gigabit download speeds<sup>11</sup> or higher has more than doubled, from less than 9% to more than 18% of all subscribers, with nearly two thirds of those customers subscribing to FTTP services offered by an ILEC.
55. The Commission recognizes that cable carriers provide wholesale services at higher speed tiers in many areas and that in those areas, competitors have the ability to offer higher-speed retail services through existing aggregated HSA. However, use of that

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<sup>10</sup> Since early 2022, Distributel Telecommunications Limited and EBOX Inc. were acquired by Bell Canada, Oxio was acquired by Cogeco, Altima Telecom and Start.ca were acquired by TCI, and VMedia Inc. was acquired by Videotron.

<sup>11</sup> Defined as a download speed of 940 megabits per second (Mbps) to 1024 Mbps, depending on the provider and technology.

service is limited, with fewer than 6.5% of subscriptions to wholesale-based services at download speeds of 300 megabits per second or higher at the end of 2022, compared to more than 43% of subscriptions from the incumbent carriers at those higher speeds. Given that higher-speed wholesale services are available through the cable carriers' networks, it is not clear why wholesale-based competitors have not attracted more subscribers at higher speeds. This is an important consideration that may be reviewed as part of the broader review of the wholesale HSA service framework.

56. Moreover, the Commission considers that while competitor access to the cable carriers' higher-speed wholesale services mitigates some concerns, there are still many households where competitive options are currently limited by the lack of viable FTTP access, such as in many greenfield areas.
57. At the same time, it is clear to the Commission that consumer demand for Internet service at gigabit or higher speeds is growing rapidly. Both ILECs and cable carriers have invested heavily in network upgrades and fibre deployments in an apparent effort to meet this growing demand. In these circumstances, it is the Commission's view that competitors' inability to practically provide services over FTTP networks has severely affected their ability to effectively compete. Furthermore, the Commission is concerned that this negative impact on wholesale-based competition will become even more severe over time. Absent regulatory intervention, meaningful wholesale-based competition will continue to decline.

## **Conclusion**

58. Historically, the Commission has not found aggregated FTTP access to be essential and, therefore, has not mandated it. However, while aggregated HSA historically includes duplicable transport elements, it is the Commission's view that this service is currently the only viable means to quickly provide competitors with access to the incumbent carriers' FTTP facilities. Such access would support competitive alternatives for Canadians who seek higher-speed retail Internet services.
59. In these circumstances, it is the Commission's view that it is necessary to support competition by mandating temporary aggregated FTTP access. With this access, wholesale-based competitors can more effectively offer higher-speed services to consumers. The Commission considers that such a mandate would help stabilize competition and address concerns about unjust discrimination and undue or unreasonable preference while the Commission considers the issues raised in the broader review. At the same time, the Commission considers that this mandate would also be entirely consistent with the 2023 Policy Direction, which directs the Commission to make aggregated HSA available until it determines that broad, sustainable, and meaningful competition will persist, even if the provision of aggregated HSA is no longer mandated.

60. In light of the above, the Commission determines that it will mandate aggregated FTTP access, on a temporary and expedited basis, until it reaches a decision as to whether such access is to be provided for the longer term.
61. Having made this determination, the Commission must now establish the details of the temporary aggregated FTTP access mandate.

### **What should be the scope of temporary aggregated FTTP access?**

#### **Positions of parties**

62. The incumbent carriers, except Videotron, generally suggested that there is a risk to continued investment should temporary aggregated FTTP access be mandated. They argued that this effect would be particularly felt in less densely populated areas where the business case for deployment is weaker. Cable carriers submitted that a mandate would risk continued investment in their currently nascent FTTP deployment. Many incumbent carriers also argued that there is a risk of stranded investment should the Commission establish a broad temporary FTTP access and later narrow the scope or eliminate it entirely.
63. Competitors, along with Videotron, argued that mandated temporary aggregated FTTP access would not negatively impact the incumbent carriers' investment incentives. They argued that the incumbent carriers' FTTP investments would be recovered through wholesale rates set using the Phase II methodology.
64. Cable carriers submitted that, unlike the ILECs, their FTTP deployments are nascent and represent a small percentage of the total number of homes they pass. They also noted that they continue to provide aggregated HSA at gigabit or higher speeds over their extensive hybrid fibre-coaxial (HFC) networks. As a result, they argued that their inclusion in a mandate for temporary aggregated FTTP access would provide limited additional benefit to competition.
65. Videotron submitted that the Commission needs to act quickly to implement temporary aggregated FTTP access. It argued that undue delays create uncertainty and can impact investment decisions. It also claimed that the speed at which the Commission acts will have a direct impact on the success of Videotron's commercial aims to act as a wholesale-based competitor outside its incumbent serving territories.

#### **Commission's analysis**

66. The Commission considers that the purpose of temporary aggregated FTTP access is to address the ongoing and dramatic decline of wholesale-based competition in the retail market. Such access will also address concerns about unjust discrimination and undue preference with respect to FTTP facilities. Given the market information collected in this expedited process, it is the Commission's view that it must act quickly to stabilize the competitive market.



67. Concerns have been raised about the potential negative impact that mandated temporary aggregated FTTP access could have on investment in fibre facilities. The Commission is also aware that there are costs involved in implementing any wholesale service, and that some parties are concerned about incurring those costs to implement temporary access where there is minimal competitive presence. Those parties also question how those costs could be recovered in the event that the temporary aggregated FTTP access is withdrawn as a result of determinations made in the broader review. The Commission considers that such issues, should they arise, are not insurmountable from a regulatory perspective. The Commission is prepared to deal with these matters at a later date should this be required.
68. In light of the above, the Commission considers that it would be prudent to narrow the scope of the temporary aggregated FTTP access mandate so that it applies only to companies that provide service in areas where wholesale-based competition is most clearly declining. Based on the record of this proceeding, the Commission considers that a narrower scope would reduce the potential impact on both competitors and the incumbent carriers if the Commission later determines that aggregated FTTP access is not required on a longer-term basis or is to be provided under different service configurations. At the same time, a narrower scope would ensure more choice and affordability as quickly as possible, as the time required to establish rates, terms, and conditions for temporary aggregated FTTP access would be reduced.

### **Who should implement temporary aggregated FTTP access?**

#### **Positions of parties**

69. Cogeco, Eastlink, and RCCI submitted that their fibre deployment is still in its infancy. RCCI submitted that it has not yet fully deployed fibre to the majority of its existing wireline footprint. Cogeco indicated that most of its FTTP facilities have been deployed within the last year and that it does not yet have the critical mass of users necessary to begin amortizing the cost of the facilities. Eastlink noted that FTTP passes fewer than 1% of the homes in its network.
70. Cogeco, Eastlink, and RCCI also submitted that they generally only deploy FTTP facilities in areas where they do not have existing HFC facilities.
71. Cogeco, Eastlink, RCCI, and TCI submitted that they are not currently required to provide any wholesale FTTP services and argued that a temporary mandate should not apply to them.
72. CNOC, OpenMedia, and PIAC argued that any proposed restrictions, including those that are geographic in nature or that would exclude cable carriers, would prevent wholesale-based competitors from accessing underserved market segments and would limit the usefulness of temporary aggregated FTTP access. While TekSavvy generally agreed, they acknowledged that prioritizing the ILECs for a temporary aggregated FTTP service would support expediency.

## **Commission's analysis**

73. The Commission notes that ILECs are deploying FTTP almost exclusively, whether in new builds or to existing premises. At the end of 2022, they passed more than 10 million Canadian premises with FTTP, representing approximately 60% of premises passed by ILEC infrastructure outside the three territories.
74. However, with HFC networks already capable of delivering gigabit or higher download speeds, the Commission notes that the cable carriers have generally focused their FTTP deployment in new developments. As a result, the cable carriers' FTTP reach remains limited, representing approximately 625,000 Canadian premises, or less than 5% of premises passed by cable carrier infrastructure outside the territories at the end of 2022.
75. The Commission notes that cable carriers already service the majority of wholesale-based competitors over their HFC networks, accounting for over 75% of all wholesale-based subscriptions by the end of 2022. The Commission considers that further applying the temporary aggregated FTTP service to the cable carriers would affect only a limited number of additional premises, many of which are also passed by FTTP infrastructure owned by the ILECs. At the same time, such a mandate on cable carriers would bring about implementation costs and slow the Commission's ability to establish rates, terms, and conditions for temporary aggregated FTTP access. This would be contrary to the 2023 Policy Direction, which emphasizes the need for Commission processes to operate in a timely manner, particularly when those processes relate to adjustments to the regulatory framework for wholesale fixed Internet services.
76. The Commission is therefore of the view that, given the temporary nature of the aggregated FTTP access mandate being presently considered, it would be neither efficient nor proportionate to mandate cable carriers to implement it.

## **Conclusion**

77. In light of the above, the Commission determines that ILECs will be mandated to provide temporary aggregated FTTP access over existing aggregated HSA platforms. This determination is subject to what follows.

## **Where should temporary aggregated FTTP access be made available?**

### **Positions of parties**

78. TCI argued that any temporary aggregated FTTP access should be limited to Ontario and Quebec, where disaggregated FTTP access is already mandated, and where most wholesale-based competitors have historically concentrated their marketing efforts.
79. SaskTel submitted that the Commission should not mandate aggregated FTTP service as a wholesale service in areas of Canada where there is only one fibre or coaxial-based service provider, or none. It suggested that a temporary aggregated

FTTP access mandate in these areas is unnecessary, since there are no facilities to provide access to and because such a policy would be harmful because it would tend to have a dampening effect on any investment decisions.

### **Commission's analysis**

80. The Commission considers that temporary aggregated FTTP access is intended to quickly provide competitors with an increased ability to compete, and that it would be prudent to apply the mandate where it would provide the most aid to those competitors. Competitors, to date, have concentrated their business efforts in Ontario and Quebec. More than 82% of subscribers to services provided by wholesale-based competitors at the end of 2022 were in those two provinces, while those provinces accounted for just 62% of overall residential wireline Internet subscribers.
81. Further, the competitive presence of wholesale-based competitors has declined most significantly in Ontario and Quebec in recent years. At the end of 2022, wholesale-based competitors served 25% fewer subscribers in Ontario and Quebec than they did two years prior. Meanwhile, in western Canada, subscribers to services provided by wholesale-based competitors have increased by 17% since 2020, while Atlantic Canada saw a 44% increase in subscribers.
82. After accounting for incumbent carrier acquisitions of wholesale-based competitors, the number of subscribers to wholesale-based competitors in Ontario and Quebec has nearly halved since the end of 2020 (specifically, a decrease of 47%).

### **Conclusion**

83. Given that Ontario and Quebec are the markets where competitors have recently seen the most significant market decline, and where a temporary mandate would have the most impact for competitors, the Commission determines that ILECs must offer temporary aggregated FTTP access within their incumbent Ontario and Quebec serving territories. Consequently, the Commission's determination applies to Bell Canada's serving territories in Ontario and Quebec, and to TCI's serving territory in Quebec.

### **What should be the rates for temporary aggregated FTTP access?**

84. Bell Canada and TCI, for its incumbent serving territory in Quebec, filed proposed rates for temporary aggregated FTTP access, as well as rates for certain service charges. In addition to access rates, TCI filed proposed rates for network-to-network interface and service charges, as well as a capacity-based billing (CBB) rate to apply to its aggregated HSA services. The Commission has reviewed these proposals and made several adjustments to expeditiously establish interim rates.<sup>12</sup> Based on the

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<sup>12</sup> The rates established were based on information in tariff notices filed as part of the proceeding related to the Notice. The Commission did not consider any revised costing information submitted after the tariff notices were filed when establishing the interim rate for the temporary FTTP access. The Commission may

adjustments identified below, the rates approved on an interim basis are set out in the appendix to this decision. The Commission notes that it will continue to review the costs associated with FTTP access, as it contemplates the issues raised in the broader review, before setting final rates.

### **Installed first cost factor for shared feeder plant**

#### **Positions of parties**

85. Bell Canada submitted that it had distributed the costs of the shared feeder plant<sup>13</sup> across users, by way of an installed first cost (IFC) factor<sup>14</sup> for each service speed band, that reflected that users of higher-speed accesses will use a higher share of the capacity on the feeder network. Bell Canada allocated the cost between the speed-specific rate bands based on the usage of the shared facility within those bands.
86. Bell Canada stated that the feeder fibre and splitter in the central splitting point are provisioned to support 32 end-users, regardless of the speed to which they subscribe. Bell Canada also clarified that the driver for the next unit of demand is the additional user (or access), not growth in user traffic.
87. TCI proposed a similar allocation for shared fibre facilities, dividing costs for shared components in the access network across the speeds based on usage profiles.
88. TCI submitted that its allocation is not a function of capital spending and argued that, in Telecom Decision 2021-181, the Commission recognized that a single rate for all service speeds, as determined in Telecom Order 2019-288, could dramatically shift the expected usage patterns of competitors' end-users, since there is no price incentive for lower-speed end-users, who typically have less usage, to stay on lower speeds.

#### **Commission's analysis**

89. The Commission considers that the driver of the incremental cost to be included within the cost study (and the proposed interim rate) should be the 1:32 capacity ratio of the shared feeder plant, not the usage that each one of those 32 accesses consumes. The Commission is of the view that the impact of allowing a shared IFC factor for shared feeder plant could inhibit the demand for higher-speed FTTP services due to their higher rates. The Commission is also of the view that, since the proposed allocation was done on the basis of a given mix of lower- and higher-speed

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only consider the revised information when establishing a final rate, should the revised cost studies be accepted.

<sup>13</sup> The shared feeder plant includes the optical line terminal, feeder fibre, and central splitting point.

<sup>14</sup> The IFC represents the capital expenditure associated with the use of a unit of plant and can be made up of several components. The IFC per asset is generally made up of the following elements: equipment price, engineering and installation labour, non-company labour, and warehouse and distribution loading.

users making use of a single fibre facility, as more users migrate to higher speeds, there could be an over-recovery of costs by Bell Canada.

90. The Commission considers that the issues it examined with respect to TCI's allocation approach are similar to those it examined for Bell Canada's IFC factor.

#### **Conclusion**

91. In light of the above, the Commission **denies, on an interim basis**, Bell Canada's application of an IFC factor for shared feeder plant. Removal of this factor results in a single interim rate for all FTTP accesses for Bell Canada on GPON [gigabit passive optical network, for speeds up to and including 1.5 Gbps] and a single rate for all FTTP accesses for Bell Canada on XGS-PON [10 gigabit symmetrical passive optical network, for speeds above 1.5 Gbps].
92. Further, the Commission **denies, on an interim basis**, TCI's allocation method for shared plant in its Quebec serving territory.

#### **Option value markup for multi-gigabit speeds**

##### **Positions of parties**

93. Bell Canada submitted that the rates for its multi-gigabit temporary FTTP access should include a supplementary markup of 33.2% to account for the risk the company bears when it grants competitors the ability to request access at a predetermined and fixed rate. Bell Canada called this supplementary markup the real option value markup.
94. Bell Canada argued that the real option value markup is an additional markup that will ensure that the proper economic incentives are provided for all market participants – both the incumbent carriers and competitors. It argued that, to support efficient network investment, the markup needs to be applied to the portion of Phase II costs that are non-redeployable.

##### **Commission's analysis**

95. Bell Canada did not provide sufficient evidence to support why the real option value markup should be applied to non-redeployable assets for multi-gigabit FTTP access, while the same assets are not similarly affected in non-multi-gigabit FTTP access.

#### **Conclusion**

96. In light of the above, the Commission **denies, on an interim basis**, Bell Canada's application of a proposed 33.2% real option value markup.

## **Feeder/distribution capital unit costs and poles/conduit structure cost factors**

### **Positions of parties**

97. Bell Canada submitted that the average unit costs for distribution fibre, pre-connect drop wires, feeder fibre and central splitting point, and support structures (poles and conduit) were developed using its capital expenditures associated with the specific assets extracted from the company's financial system from 2018 to 2022, and from company-specific forecasts for 2023 to 2027, divided by the historical and forecasted total demand of homes passed associated with each of those years.

### **Commission's analysis**

98. Bell Canada's use of total capital spending and demand (i.e., five years historical plus five years forecast) deviates from the standard costing methodology, set out in Appendix B of the company's Phase II Manual, to derive the IFC for outside plant equipment including support structures (poles and conduit). The Commission considers that the methodology Bell Canada used to develop its IFCs is difficult to validate due to the subjectiveness of its forecasts of network build (both cost and location). These factors could result in significant variation of unit costs. In addition, Bell Canada did not identify how the costs for poles and conduit were adjusted to account for the fact that support structures are a shared asset for multiple services.
99. In light of the above, the Commission is of the view that, on an interim basis, a more appropriate approach would have been for Bell Canada to develop the IFCs for outside plant equipment (i.e., distribution fibre, pre-connect drop wires, and feeder fibre and central splitting point) as detailed in the Phase II Manual. The Commission considers it appropriate at this time to use the historical five-year average information provided by Bell Canada to develop the unit costs for the outside plant equipment in deriving the interim rate. This will help mitigate potential variation of the unit costs over time, balance potential issues related to network build mix, and result in unit costs without the potential for misstatements in a forecast.
100. With regard to the support structures (poles and conduit), the Commission notes that poles and conduit are shared assets and that the methodology stated in the Phase II Manual (section 3-44) identifies the use of Bell Canada's capital cost factors, specifically the structure cost factors for the development of the costs of these shared assets.

### **Conclusion**

101. In light of the above, the Commission determines that to derive the interim rate, it will use the historical five-year average information provided by Bell Canada to develop the unit costs for the outside plant equipment. This will help mitigate potential variation of the unit costs over time, balance potential issues related to network build mix, and result in unit costs without the potential for misstatements in a forecast.

102. For support structures, the Commission determines that it will apply Bell Canada's approved structural cost factors for the appropriate asset classes to estimate the pole and conduit IFCs, in line with the methodology set out in the Phase II Manual, on an interim basis.

### **Weather-related events (capital and expense)**

#### **Positions of parties**

103. Bell Canada submitted that the proposed temporary aggregated FTTP access rates include costs which account for unexpected impacts from weather-related events. It argued that such events have become common over the past several years and, as a result, the impacts should be included in the proposed rates.

#### **Commission's analysis**

104. In Appendix 1 to Telecom Decision 2008-14, the Commission stated which expenses were to be considered as sunk expenses and were subsequently not to be included in Phase II submissions. The Commission considers that the "catastrophic events" inclusion was meant to cover weather-related events. While Telecom Decision 2008-14 is strictly related to expenses and does not deal explicitly with issues related to capital for non-recurring events, the Commission considers that the same argument holds true for capital inclusions.

105. The Commission notes that Bell Canada raised arguments about cost inclusions that the Commission, in Telecom Decision 2008-14, determined were to be excluded. In Telecom Decision 2023-196, the Commission determined it was important and necessary to hold a follow-up proceeding to examine and determine whether its existing directives were adequate or required further revisions. Since the inclusion of costs related to unforeseen events would amount to changes to the Commission's policy as set out in Telecom Decision 2008-14, the Commission considers that this future proceeding would be the appropriate forum for this debate.

#### **Conclusion**

106. In light of the above, the Commission **denies, on an interim basis**, Bell Canada's inclusion of costs for weather-related events in the FTTP access rates.

### **Unrecovered costs**

#### **Positions of parties**

107. Bell Canada proposed to recover a portion of the unrecovered upfront and development costs related to its disaggregated wholesale HSA service (Disaggregated Broadband Service [DBS]) in its proposed FTTP access rates.

108. Bell Canada submitted that the inclusion of unrecovered DBS costs in the FTTP access rates is warranted, since it is continuing to provide DBS in its Ontario and Quebec serving areas, despite demand being almost non-existent.

### **Commission's analysis**

109. The Commission acknowledges, as per the Notice, that DBS has not yielded the expected demand. However, as per paragraphs 1–8 of the ILECs' Phase II Manuals, cross-impacts of one service are not meant to be recovered in the rates of another service. Because DBS is separate and distinct from temporary aggregated FTTP access, the unrecovered costs of DBS should not be recovered through the interim rates for temporary aggregated FTTP access.

110. In Telecom Decision 2023-53, the Commission determined that disaggregated HSA would remain in place in Ontario and Quebec pursuant to its existing configurations, terms and conditions, and rates. In the Notice, the Commission invited parties to comment on the future of disaggregated HSA, including any changes to the existing rates. If parties want the Commission to account for the unrecovered costs of disaggregated HSA, they should be included in the adjusted rates for disaggregated HSA itself, if and when that is to be considered in the course of the broader review.

### **Conclusion**

111. In light of the above, the Commission **denies, on an interim basis**, Bell Canada's proposal to recover claimed unrecovered DBS costs by means of the company's FTTP access rates.

### **Markup**

#### **Positions of parties**

112. Bell Canada submitted that, given its investment in FTTP and the Commission's prior determinations on its fibre-to-the-node (FTTN) services, a standard markup of 40% should be applied to its FTTP access rates.

113. TCI submitted that markups of 30% to 50%, depending on the speed of the service, should be applied to its FTTP access rates for Quebec.

### **Commission's analysis**

114. In Telecom Regulatory Policy 2011-703, the Commission allowed a 30% markup and a 10% supplementary markup for the ILECs' FTTN over aggregated HSA. However, the cable carriers' rates were determined without the inclusion of the supplementary 10% markup.

115. The ILECs' 10% supplementary markup was removed in Telecom Order 2019-288, and the removal was upheld in Telecom Decision 2021-181. This led to all the aggregated HSA rates in place, irrespective of speed or access technology, currently having a 30% markup.



## **Conclusion**

116. In light of the above, the Commission **approves, on an interim basis**, a markup of 30% for the FTTP access rates of Bell Canada in Ontario and Quebec and of TCI in Quebec, and determines that it will apply one interim rate for FTTP access for TCI in its Quebec serving territory.

## **CBB rates**

### **Positions of parties**

117. TCI, in its cost studies for FTTP and FTTN access over aggregated HSA, proposed to separate access and traffic-driven rate elements into an access rate and a CBB rate.<sup>15</sup>

### **Commission's analysis**

118. The Commission notes that TCI's CBB rates were calculated using historical costs, which were then restated by applying a combined capital increase factor / productivity factor. The Commission also notes that, in Telecom Decision 2016-117, it determined that a -26.4% factor was to be applied against all traffic-driven components.<sup>16</sup>

119. Accordingly, the Commission considers that, on an interim basis, the -26.4% factor should continue to be in place until it assesses whether a change is warranted, based on the incumbent carriers providing specific incremental cost information related to these capital items.

## **Conclusion**

120. In light of the above, the Commission determines that it will adjust, on an interim basis, TCI's CBB rate to apply the annual -26.4% factor to the costs for all traffic-sensitive components. The Commission determines that, on an interim basis, this will apply only in TCI's Quebec serving territory.

## **What should be the timelines for implementation of temporary aggregated FTTP access?**

### **Positions of parties**

121. The incumbent carriers proposed several different timelines for implementing temporary aggregated FTTP access. These timelines focused on the companies' need to build and upgrade high-speed network-to-network facilities, develop information service and information technology systems and integrate them with billing systems

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<sup>15</sup> In the FTTN configurations, TCI used a blended rate where the two elements are blended into a single rate by speed band.

<sup>16</sup> In Telecom Orders 2016-396, 2016-448, and 2018-99, and Telecom Decision 2017-287, the Commission upheld the -26.4% factor to be applied against traffic-sensitive components.

and configuration tools, and develop customer service and technical support capability. Bell Canada, Cogeco, and RCCI submitted that the implementation timeline would be nine to twelve months, Eastlink submitted that it would be six months, and Videotron submitted that it would be three months. SaskTel and TCI did not propose any implementation timelines.

122. CNOC, TekSavvy, and Videotron submitted that the Commission should require the provision of temporary aggregated FTTP access within 90 days of the approval of the service. They noted RCCI's rapid implementation of aggregated HSA over radio frequency over glass (RFoG) in the Bayview Mills condominium complex after the Commission issued Telecom Decision 2016-446, and that EBOX Inc. (EBOX) began offering retail FTTP services within weeks of being amalgamated into Bell Canada.

### **Commission's analysis**

123. The Commission considers that the timeline suggested by CNOC, TekSavvy, and Videotron would not be reasonable to support implementation of temporary aggregated FTTP access, but that Bell Canada and TCI should be able to implement the service quicker than the 10 months proposed in Bell Canada's intervention.

124. Bell Canada has extensive experience in offering FTTN over aggregated HSA. Bell Canada has also been mandated to provide FTTP over disaggregated HSA in Ontario and Quebec since 2015 and, while demand for disaggregated HSA in general has been limited, the Commission considers that Bell Canada could leverage its experience to implement temporary aggregated FTTP access in a shorter time frame than it has indicated.

125. Bell Canada was able to implement FTTP services for and integrate its billing systems with its subsidiary EBOX in Quebec within approximately six months. The Commission considers that Bell Canada can leverage that experience to efficiently implement temporary aggregated FTTP access in Ontario and Quebec.

126. The Commission expects that TCI could implement temporary aggregated FTTP access on a similar timeline to Bell Canada due to its extensive experience in deploying access to FTTN facilities over aggregated HSA.

127. The Commission therefore determines that temporary aggregated FTTP access must be made available within **six months** of the date of this decision.

### **Conclusion**

128. In light of all the above, the Commission **directs** Bell Canada and TCI to provide competitors with access to FTTP facilities over aggregated wholesale HSA, within their Ontario and Quebec serving territories, by **7 May 2024**. The rates to be charged, on an interim basis, are set out in the appendix to this decision.

## 2023 Policy Direction

129. The Commission considers that mandating temporary aggregated FTTP access addresses the urgent need to support wholesale-based competition in the face of declining competitive presence. In the Commission's view, this promotes the objectives set out in section 2 of the 2023 Policy Direction. Namely, the temporary service being mandated as a result of this decision

- is limited in scope and, as such, encourages all forms of competition while minimizing negative impacts on investment [subsection 2(a)];
- fosters affordability and lower prices, particularly when telecommunications service providers exercise market power [subsection 2(b)]; and
- reduces barriers to entry in the market and to competition for telecommunications service providers that are new, regional, or smaller than the incumbent national service providers [subsection 2(e)].

130. The Commission notes that section 10 of the 2023 Policy Direction requires the Commission to mandate the provision of aggregated HSA until it determines that broad, sustainable, and meaningful competition will persist even if the provision of such a service is no longer mandated. The Commission considers that its determinations in this decision are wholly consistent with that direction.

131. Additionally, the Commission notes that throughout the 2023 Policy Direction there is a strong emphasis on the need for the Commission to operate in a timely manner. Section 7 specifically directs the Commission to conduct proceedings and issue decisions in a timely manner, in recognition of the need for market clarity. The Commission considers that its determinations in this proceeding align with this direction.

Secretary General

### Related documents

- *Review of the approach to rate setting for wholesale telecommunications services*, Telecom Decision CRTC 2023-196, 7 July 2023
- *Notice of hearing – Review of the wholesale high-speed access service framework*, Telecom Notice of Consultation CRTC 2023-56, 8 March 2023; as amended by Telecom Notices of Consultation CRTC 2023-56-1, 11 May 2023; and 2023-56-2, 4 July 2023
- *Network configuration for disaggregated wholesale high-speed access services*, Telecom Decision CRTC 2023-53, 8 March 2023

- *Requests to review and vary Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services*, Telecom Decision CRTC 2021-181, 27 May 2021
- *Review of mobile wireless services*, Telecom Regulatory Policy CRTC 2021-130, 15 April 2021
- *Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services*, Telecom Order CRTC 2019-288, 15 August 2019; as amended by Telecom Order CRTC 2019-288-1, 22 August 2019
- *Wholesale mobile wireless roaming service tariffs – Final rates*, Telecom Order CRTC 2018-99, 22 March 2018
- *Northwestel Inc. – Application to review and vary certain determinations in Telecom Decision 2016-443 regarding Wholesale Connect service*, Telecom Decision CRTC 2017-287, 17 August 2017
- *Bragg Communications Incorporated, operating as Eastlink – Revised interim rates for aggregated wholesale high-speed access services*, Telecom Order CRTC 2016-448, 10 November 2016
- *TekSavvy Solutions Inc. – Application regarding transitional access to aggregated wholesale high-speed access service*, Telecom Decision CRTC 2016-446, 9 November 2016
- *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, Telecom Order CRTC 2016-396, 6 October 2016
- *Review of costing inputs and the application process for wholesale high-speed access services*, Telecom Decision CRTC 2016-117, 31 March 2016
- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015; as amended by Telecom Regulatory Policy CRTC 2015-326-1, 9 October 2015
- *Billing practices for wholesale residential high-speed access services*, Telecom Regulatory Policy CRTC 2011-703, 15 November 2011; as amended by Telecom Regulatory Policy CRTC 2011-703-1, 22 December 2011
- *Review of certain Phase II costing issues*, Telecom Decision CRTC 2008-14, 21 February 2008; as amended by Telecom Decision CRTC 2008-14-1, 11 April 2008

## **Appendix to Telecom Decision CRTC 2023-358**

### **Rates approved on an interim basis with adjustments**

The Commission **approves, on an interim basis**, the following adjusted rates for Bell Canada's temporary access to fibre-to-the-premises (FTTP) facilities over aggregated wholesale high-speed access (HSA) services (temporary aggregated FTTP access) for Ontario and Quebec, for TELUS Communications Inc.'s (TCI) temporary aggregated FTTP access in Quebec, and for TCI's capacity-based billing (CBB) to be used with its temporary aggregated FTTP access in Quebec.

#### **Bell Canada's temporary aggregated FTTP access rates – Ontario and Quebec**

- 3 megabits per second (Mbps) to 1500 Mbps – \$68.94
- 1501 Mbps to 8000 Mbps – \$78.03

#### **TCI's temporary aggregated FTTP access rate – Quebec**

- All speeds – \$65.25

#### **TCI's temporary aggregated FTTP CBB rate – Quebec**

- Per 100 Mbps – \$83.62

### **Rates approved on an interim basis without adjustments**

Other rates were proposed by both Bell Canada (service charges) and TCI (service charges and network-to-network interface [NNI] charges) in relation to temporary aggregated FTTP access. The Commission recognizes that, for the temporary aggregated FTTP access to be active for wholesale customers, and to allow for cost recovery for wholesale service providers, the rates must be granted interim approval. The Commission therefore **approves, on an interim basis**, the following charges:

#### **Bell Canada's service charges – Ontario and Quebec**

- FTTP install, move, or change (with site visit) – \$246.30
- FTTP install, move, or change (no site visit) – \$10.60

#### **TCI's service charges – Quebec**

- FTTP install or move – \$159.67
- CBB capacity service charge (per order per interface) – \$685.44
- E100 interface service charge (per interface) – \$1,199.00
- E1000 interface service charge (per interface) – \$1,538.44
- 10G interface service charge (per interface) – \$1,593.60
- A-NNI change fee – \$500.00

**TCI's asymmetric digital subscriber line (ADSL) NNI service – Quebec**

- E100 interface (per interface) monthly charge – \$55.15
- E1000 interface (per interface) monthly charge – \$59.01
- 10G interface (per interface) monthly charge – \$313.36