Petition to the Governor in Council to Vary

Telecom Order CRTC 2019-288, Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services

Petition of
Bell Canada

13 November 2019
# Table of Contents

## 1.0 EXECUTIVE SUMMARY

1.1 Negative Impact for Rural and Remote Communities ........................................ 6
1.2 Negative Impact on Universal Service Objective ............................................. 7
1.3 Negative Impact on the Green Economy ......................................................... 7
1.4 Negative Impact on 5G Readiness ...................................................................... 8
1.5 No Sustainable Countervailing Benefits ............................................................ 8
1.6 Requested Remedy ............................................................................................ 10

## 2.0 BACKGROUND .......................................................................................... 10

## 3.0 WIRED BROADBAND ALREADY COMPETITIVE PRE-ORDER ...................... 13

3.1 Resellers' growth and declining retail prices show consumer choice and competition pre-Order ................................................................. 13
3.2 Order's wholesale rate reductions yield no real benefits for Canadians .......... 18

## 4.0 INVESTMENT CONSIDERATIONS ................................................................ 19

4.1 Inappropriately low wholesale rates deter investment from facilities-based carriers ......................................................................................... 19
4.2 Order has negative impact on investment at time when Canada needs massive digital infrastructure ................................................................. 22
4.3 Order makes it harder to bridge the digital divide and achieve universal broadband service ................................................................. 25
4.4 Order undermines transformation to Green economy ..................................... 27
4.5 Order chills much-needed investment in 5G ................................................... 28
4.6 Resellers' Investment will not offset the loss of Carrier Investment ............... 29

## 5.0 ORDER SETS UNREASONABLE RATES ......................................................... 31

5.1 The Commission set HSA rates that are below costs ..................................... 31
5.2 The Commission’s current rate setting approach is broken ........................... 32

## 6.0 ILLLOGICAL REGULATORY SEQUENCING .............................................. 33

## 7.0 RETROACTIVITY DISCRETION SHOULD BE CURTAILED ..................... 35

## 8.0 CONCLUSION AND PROPOSED ORDER ................................................... 36
1.0 **EXECUTIVE SUMMARY**

1. This Petition arises from an order (the Order\(^1\)) by the Commission to reduce by as much as 82% the rates that Internet resellers pay to access the broadband networks that Bell Canada (Bell) and other carriers have built across the country; networks that Canadians depend upon every day and which are essential to Canada's digital economy.

2. Today, Canadians receive their home and business Internet services from two types of providers: facilities-based providers like Bell who invest in network infrastructure and Resellers who, under the Commission's regulatory regime, are granted access to the networks Bell and others build at rates set by the Commission. Resellers purchase wholesale access and then resell that access and network capacity to retail customers.

3. Historically, the Commission has strived when setting wholesale rates to achieve a balance between maintaining incentives for network builders to invest and enabling Resellers to gain access to networks at rates that result in competitive retail offerings to consumers. This regime has generally maintained incentives to invest and the Canadian broadband market has reaped the benefits. In the Economist Intelligence Unit's annual international comparison of telecommunications for example, Canada ranks first among 100 countries in: (i) Internet affordability; (ii) the degree of broadband competition and (iii) the price component of fixed broadband access.\(^2\) For our part, we are recognized as offering one of the fastest available broadband speeds in North America.\(^3\)

4. The Commission's wholesale rates have allowed Resellers to flourish and in so doing have offered Canadian consumers additional retail options when purchasing Internet services. Resellers' market share has grown by nearly 50% since 2013\(^4\) and today they account for between 15% and 20% of the market in places like southern Ontario and Quebec where they

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\(^1\) Telecom Order CRTC 2019-288, *Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services.*


\(^3\) "Rogers and Bell's plans [being recognized as] among the fastest available in North America" and Canada now ranking 11th fastest fixed broadband average speeds in the World according to the September 2019 edition of The Speedtest Global Index. ([https://www.speedtest.net/global-index](https://www.speedtest.net/global-index)).

\(^4\) The last complete year with data is 2017, though the trend shows no abating after 2017.
focus their marketing efforts. More telling however is the fact that between 2013 and 2017 Resellers have accounted on average for 41% of all net subscriber additions. This is astounding: even before the Commission Order cut the wholesale rates, Resellers as a group gained almost as many net new customers as the Carriers did. If this pace continues (and it will only accelerate if the rates set by the Order are maintained) resale-based competition will supplant facilities-based competition and network investment will be significantly curtailed, especially in rural and remote areas.

5. This Petition seeks to restore the wholesale rates that were in place immediately prior to the issuance of the Commission’s Order. Restoring the pre-existing rates and maintaining the status quo will allow Resellers to continue to grow and at the same time preserve incentives for network investment at a critical juncture in the investment cycle as Canada transitions to higher speed fibre and 5G wireless networks and the benefits these bring to urban, rural and remote communities across the country.

6. Granting this Petition will avoid a number of negative outcomes for Canada that flow from the Order, each of which is summarized below and discussed in more detail throughout this Petition.

7. A mere week before the Order was issued, the Competition Bureau, after having conducted a comprehensive study on the state of broadband competition in Canada, cautioned that "regulators are faced with the difficult challenge of setting wholesale rates at an appropriate level to preserve investment". The Commission failed to heed this warning. Instead the Order essentially sets the same wholesale rate for a service providing a speed of 6 Megabits per second (Mbps) (i.e., $14.11 for Bell6) as for a service providing a speed of 940 to 1000 Mbps (i.e., $14.30 for Videotron and $13.44 for Rogers7). The incentive to invest in facilities capable of achieving a nearly 200-fold speed improvement has been completely negated by the Order. There is no clearer proof than the fact that Videotron has withdrawn its flagship gigabit Internet offer from the market, including for its own retail customers, explicitly as a result of the Order.8

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5 Competition Bureau Market Study 2019, page 17.
6 Bell Canada, General Tariff Item 5410.
7 Order, Appendix 1.
8 “We’ve announced to the CRTC and the resellers and our retail customers that we are withdrawing the 1 gig service. We will no longer offer the 1 gig service because it requires investments and because with the new regime we cannot afford it. We have to take decisions. We’ve taken that decision - it’s probably the most material one that we’ve taken so far, but it’s going to be followed by others.”, Jean-François Pruneau, CEO of Videotron, during earnings call relating to Quebecor’s 3rd quarter of 2019.
8. The Commission’s approach, consistently favouring resellers by systematically lowering wholesale broadband rates, has now reached the point that the rates are below our costs, incentives to invest are in many instances eliminated and consumers are being deprived of higher speed Internet service as providers withdraw uneconomic offerings from the retail market.

9. The rationale for the Order is further undermined by the fact that Resellers are already thriving in the market. As explained in detail in the Petition, since early 2016 (and, in fact, since 2013) Resellers benefitted from a healthy gross margin of at least 44%, allowing them to charge below the average retail price. The effect of the Order’s lowering of wholesale rates increases the Resellers’ gross margin to 71%. The result of these wholesale rate reductions has been to cut in half the Resellers’ costs of providing service.

10. Given these rates, which are now below our actual costs, it should be no surprise that industry participants and analysts realized immediately that the Order would have a significant negative impact on investment and result in permanent market distortion. The Order states that the new lower rates would apply retroactively, back to 2016. Carriers indicated that, collectively, they expect the direct impact of the retroactive portion of the Order to reach $325M. This forces Carriers to refund hundreds of millions of dollars to Resellers, exceeding in the case of Bell, a year’s worth of projected wholesale high-speed access (HSA) revenues if the new rates remain in effect, for Resellers that have no obligation to pass any of this regulatory windfall on to their own customers.

11. The Order will also curtail future network investment at a time when Canada needs it most. To that end, TD Securities Equity Research estimated that total investments per annum in wireline and cable infrastructure in 2021 and beyond will decline by approximately $1.7B if the

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Eastlink, as reported by Globe and Mail “Eastlink will cut $50-million to capital investments over CRTC move on Internet rates” on 25 August 2019.
Order is not reversed\(^{10}\) and that the reduced investment "could render Canadian telecoms, and the Canadian digital economy as a whole, uncompetitive versus most other developed economies..."\(^{11}\)

1.1 **Negative Impact for Rural and Remote Communities**

12. The Order's impact on investment in networks will be most profound in Canada's rural communities; communities that are already struggling to overcome the digital divide. Today, 99% of Canadian homes in urban areas have access to at least 50 Mbps Internet speeds but only 37% of our rural and remote households are in the same situation. It is facilities-based carriers, not Resellers, that will build networks in these rural areas. As discussed below, the Order forced us to reduce our investment goals for rural and remote communities. Other facilities-based carriers have made similar announcements. Eastlink's CEO has called the Order "incomprehensible" given the efforts of all levels of government to ensure all Canadians, including those in rural areas, have broadband connectivity. Eastlink has also indicated that it would "slash...about 25 per cent, of its planned capital investments for the year and scale back on rural connectivity improvements because of the Order". SaskTel has stated that it is "...very concerned about the longer term impact [of the Order]...This and future decisions will significantly impact the economic viability of ongoing investment in rural Saskatchewan." Alberta-based Shaw has echoed these concerns, stating that in light of the Order it has already altered plans to launch higher speed Internet tiers and invest in wireless expansion beyond its current footprint.

13. Rural communities derive real benefits from high-speed broadband. It improves access to important public services, including advanced applications for health care, education and public safety/security. Having broadband available in rural communities also empowers advanced Internet of things (IoT) applications that improve productivity in many sectors, including resource-based industries and agriculture. The arrival of new broadband infrastructure through private sector investment also spurs broadband competition as long-standing lower speed providers are forced to respond. The Order places all of these benefits at risk and does not offer any alternative path to achieving these important outcomes. We invite

\(^{10}\) We See Good Odds of the CRTC Decision Being Revised/Overturned, TD Securities Inc., Industry Insights – Equity Research, 4 September 2019 [TD Securities Report], page 1

\(^{11}\) TD Securities Report, page 4.
you to watch the short videos referenced below to see first-hand how the arrival of high-speed broadband benefits rural communities.\textsuperscript{12}

\subsection*{1.2 Negative Impact on Universal Service Objective}

14. The Order also undermines the Government's stated goal of achieving universal high-speed Internet access. At a time when governments of all levels are spending billions on broadband subsidies, it is counter intuitive for the regulator to be taking actions that will so clearly reduce the private sector investment that would otherwise contribute in a material way to the fulfillment of the Government's broadband objectives.

15. Earlier this year, as a result of the Liberal Government's stimulus policy for Accelerated Investment Incentive program, we announced the immediate expansion of our Wireless Home Internet (WHI) program. WHI is an ambitious and innovative service using wireless technologies to bring high-speed Internet access to homes, farms and small businesses in rural areas where fibre builds are not economic. Originally planned for 800,000 homes, as a result of the Government's Accelerated Investment Incentive initiative we expanded the program to 1.2 million households (a 50\% increase). As result of the Order, we now have scaled back the program to 1 million households (a decrease of 200,000). The net result of the Order therefore will be fewer communities served by high-speed networks.

\subsection*{1.3 Negative Impact on the Green Economy}

16. Failing to overturn the Order would also be a missed opportunity in Canada's shift to a green economy and in our path towards reducing the nation's carbon emissions. The availability of next generation wireline and wireless networks in communities outside urban centres is vital to reducing our carbon footprint. For instance, broadband-enabled audio and video conferencing can substitute for business travel, high-speed Internet access allows workers to telecommute and leave their cars at home, and IoT applications can optimize fleet management as well as smart city initiatives. All of these innovations are made possible by the availability of up-to-date broadband networks, which in turn are made possible only by the continuous investments of facilities-based carriers. By undermining incentives to invest, the

\textsuperscript{12} Videos can be watched at the following links: for the French video \url{https://youtu.be/wn9mmuskLAc} and for the English video \url{https://youtu.be/TXLip5RIMQg}.
Order deprives Canada of the environmental benefits that ubiquitous connectivity and network access bring.

1.4 **Negative Impact on 5G Readiness**

17. While the Order pertains to rates for wireline network access, the quantum of the rate cut and its implications for future investment extends to the wireless side of our business as well. This is an important consideration given that Canada's facilities-based carriers are on the cusp of investing billions of dollars in next generation 5G networks; networks that will unlock unprecedented opportunities for our digital economy. 5G wireless services will provide advanced capabilities, including bandwidth with speeds over 600 times faster than today's long-term evolution (LTE) speeds. It is essential that Canada successfully and quickly transition to 5G if it wishes to be a world leader in the digital economy. Regulatory decisions such as the Order will further slowdown the ability of companies to invest in 5G at a time when Canada has already been ranked last in terms of 5G readiness because of Government delays that are beyond the industry's control.\(^{13}\)

1.5 **No Sustainable Countervailing Benefits**

18. In considering this Petition, the Governor in Council should not be comforted by promises that Resellers will fill the void and begin to invest in critical network infrastructure. History has proven that Resellers do not invest in networks. Indeed, between 2012 and 2017, facilities-based carriers like Bell invested $38.4B in networks and equipment while Resellers invested just $160M (less than half a percent of what facilities-based carriers invest).\(^{14}\)

19. The Order will only serve to ensure that Resellers have even less of an incentive to invest in networks of their own as they can now ride on the networks that others build at rates that are well below cost. As a result, the private investment dollars that will be displaced by the Order will need to be replaced by public funds; thereby placing an unnecessary and avoidable burden on an already overburdened tax paying public.

\(^{13}\) [Global Race to 5G – Update*, April 2019, Analysys Mason.]

\(^{14}\) [CRTC Communications Monitoring Report (CMR), 2017.]
20. Resellers are under no obligation to pass on to consumers any of the material savings from the wholesale rate reductions. However, in the event Resellers do lower their retail rates as a result of the Order, we will be forced to either reduce our retail prices below costs or else allow our customer base to erode. Regardless of the choice we make, the consequences will be significant.

21. In any event, any superficial affordability benefits, in the form of short-term potential consumer gains (assuming Resellers pass some of their refunds and lower rates to consumers) pale in comparison to the long-term harm of delayed or cancelled investment.

22. In considering this Petition, it is important to recognize that there is no countervailing public policy imperative that warrants the clear and present negative outcomes that flow from the Order. The primary beneficiaries of the Order are not Canadians, but rather the Resellers and the evidence is abundantly clear that Resellers are not in need of the incremental financial subsidy the Order grants them. The Resellers were flourishing under the rates in effect prior to the Order — under those rates they are able to offer retail services at rates that are 15-35% lower than the facilities-based carriers and this has enabled them to grow their market share so much so that have been gaining almost as many net new customers as the Carriers.

23. At the end of the day, Canada’s interests are better served if the Order is overturned and pre-existing rates re-instated. This will re-establish a regulatory balance that has ensured ongoing investment while at the same time fostering competition. It will ensure that next-generation networks are built, not just in Canada’s biggest cities but also in rural communities that are equally deserving of their place in the digital economy. It will support investment and the jobs that come with it and place the emphasis on network builds on a willing, well capitalized private sector rather than taxpayers.

24. It is not the first time that we raise investment concerns with Government. But, the dramatic impact of these latest rate reductions raises our concern to a new level, especially when the investment situation is already difficult in Canada; foreign inflows into Canadian stock are down 75% over the past year.15 As well, Encana recently announced it was changing its

15 "In the eye of the storm: foreign investors turn their back on Canadian stocks", Globe and Mail, 23 October 2019.
name and moving its headquarters to the United States.\textsuperscript{16} Our concerns about the Order's further impact on investment are shared. Financial analysts and institutional investors, even a past Vice Chair Telecom of the Commission have taken notice of the Order's unnecessary and, frankly, punishing, rate reductions.\textsuperscript{17} This comes right on the heels of the Competition Bureau's report which recognized recent real-world examples, right here in Canada, where wholesale regulation has caused reductions in investment.

1.6 \textbf{Requested Remedy}

25. Our primary request is that the Governor in Council restore the wholesale rates that were in place immediately prior to the issuance of the Order, with no retroactive effect. This will improve the balance between the competing objectives of affordability and investment, as well as return certainty and predictability to the industry. Our request is reasonable and easy to implement, without requiring the Government to engage in complex rate setting.

26. We also ask that the Commission be directed to reverse the order of two of its upcoming publicly announced proceedings. It would be more logical and constructive for the Commission to start with an overall wireline wholesale review (to see what services still need to be mandated in today's competitive environment) before conducting a review of its approach to rate-setting (i.e., how to price whatever remains mandated). The Commission's current plan, however, begins with rate-setting, before the wholesale review. Once these proceedings are completed in proper sequence, new rates or a new regime can be implemented on a going forward basis.

2.0 \textbf{BACKGROUND}

27. Facilities-based carriers such as Bell, Telus and cable companies are competing fiercely against each other. These carriers are also making substantial investments across Canada to deliver ever faster speeds and technologies so that all Canadians, whether they live in urban or rural areas, can continue to work, play and participate fully in a wide range of economic and social activity.

\textsuperscript{16} Encana moving to the U.S., changing name as Canada becomes a dirty word in the oilpatch, Financial Post, 31 October 2019.

\textsuperscript{17} See TD Securities Report, page 4, and David Colville, "CRTC's Market Intrusion Will Hurt Internet Competition", Financial Post, 29 August 2019.
28. The Commission requires the largest facilities-based carriers (i.e., Bell, Cogeco, Eastlink, Rogers, Shaw, SaskTel, Telus and Videotron, collectively referred to as "Carriers") to provide Resellers with wholesale access to their HSA Internet network. The Commission sets the rates that Carriers are permitted to charge Resellers for wholesale HSA through tariffs.

29. The current pricing model for HSA, with both an access fee and a capacity fee, dates back to 2011.\textsuperscript{18} In 2013, after addressing comments from both Carriers and Resellers, the Commission set revised rates, on a final basis, for HSA.\textsuperscript{19} The wholesale rates were designed to remain unchanged until 2021:

Large and small independent service providers now have the certainty they need to continue offering Canadians a choice of innovative and competitive services," said Jean-Pierre Blais, Chairman of the Commission. "\textbf{We are pleased to finally close this chapter after a careful examination of the wholesale rates, which included a review of the costing information.} (emphasis added)\textsuperscript{20}

30. The Commission further stated that the 2013 rates, which it explicitly said resulted from a careful examination, would "enable large companies to recover their costs and make further investments in their networks."\textsuperscript{21}

31. Despite these clear statements, in March 2016 the Commission made the majority of HSA rates interim.\textsuperscript{22} Shortly thereafter, in October and November 2016, the Commission significantly reduced the capacity fees of the Carriers, still on an interim basis.\textsuperscript{23}

32. Finally, this last August, the Commission issued the Order, which further reduced the Carriers' capacity fees and very significantly cut their access fees, all on a retroactive basis back to March 2016. Tables 1 and 2 below provide the quantum of the large wholesale rate decreases.

\textsuperscript{18} Telecom Regulatory Policy CRTC 2011-703, \textit{Billing practices for wholesale residential high-speed access services} and Telecom Regulatory Policy CRTC 2011-704, \textit{Billing practices for wholesale business high-speed access services}.

\textsuperscript{19} Telecom Regulatory Policy CRTC 2013-70, \textit{Disposition of review and vary applications with respect to wholesale high-speed access services: Introductory statement}.

\textsuperscript{20} CRTC News Release CRTC finalizes wholesale rates for independent service providers, accompanying issuance of TRP 2013-70.

\textsuperscript{21} Ibid.

\textsuperscript{22} Telecom Decision CRTC 2016-117, \textit{Review of costing inputs and the application process for wholesale high-speed access services}. The HSA access rates for legacy copper facilities were not affected.

\textsuperscript{23} Telecom Order CRTC 2016-396, \textit{Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates} (applicable to all Carriers except Eastlink) and Telecom Order CRTC 2016-448, \textit{Bragg Communications Incorporated, operating as Eastlink – Revised interim rates for aggregated wholesale high-speed access service}. 
33. The Order destroys any sense of balance between Resellers and facilities-based carriers by cutting the rates, by up to 82%, that Resellers pay Carriers for mandated access to their high-speed broadband networks. In our case, the Order's rate reductions are such that the Order forces us to provide wholesale service at rates that are now below our costs.

34. The Order's disruptive impact is compounded by the fact the Commission also determined that the new lower rates would apply retroactively, back to 2016. This forces Carriers to refund hundreds of millions of dollars to Resellers, which in our case, could exceed a year's worth of projected wholesale HSA revenues if the new rates remain in effect.

35. The following sections of this Petition will show that the Order is not in the public interest for two inter-related reasons. First, under the wholesale rates that prevailed between 2013 and the date of the Order, retail wireline Internet prices have been declining and Resellers were thriving. Pre-Order, there was no pressing retail competition problem to fix. While the wholesale rate reductions obviously benefit Resellers, the Order does not generate benefits for Canada, or Canadians, in general. Second, the Order's reductions to wholesale rates, to below costs level, will have a significant detrimental impact on network investment in Canada. Curtailed and/or delayed investment in next-generation networks with make Canada fall even further behind in bridging the digital divide, achieving universal broadband access, reaching environmental targets, launching 5G and improving overall economic productivity.

Note: SaskTel and Telus do not have a separate capacity fee, it is included in the access fee.
3.0 **WIRELINE BROADBAND ALREADY COMPETITIVE PRE-ORDER**

3.1 **Resellers’ growth and declining retail prices show consumer choice and competition pre-Order**

36. The most recent in-depth examination by the Commission of the state of competition in wireline broadband dates back to 2015\(^{24}\), based on facts from 2013 and 2014. In 2013, early into the new HSA regime established in 2011, Resellers had achieved a 9% market share.

37. At the wholesale rates that prevailed between 2013 and the Order, resellers grew their market share to 13% (by 2017) and likely to over 15% by now. We reproduce below, as Figure 1, a figure from the Competition Bureau Market Study 2019, which shows the Resellers' growing market share, based on data compiled by the Commission itself.

![Figure 1: Share of Canadian Internet subscribers served by ISPs other than large telephone and cable companies](image)

Source: Competition Bureau Canada, *Delivering Choice: A Study of Competition in Canada’s Broadband Industry, August 2019*

38. This data is national and ignores the even greater success of Resellers in the markets they select to focus their efforts. To that end, the Competition Bureau recently found "wholesale-based competitors, who use the access regime to serve customers, currently provide services to more than 1,000,000 Canadian households"\(^ {25}\) (which amounts to a market share of approximately at least 13% nationally and 20% in areas where they focus their efforts).

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\(^{24}\) Telecom Regulatory Policy CRTC 2015-326, *Review of wholesale wireline services and associated policies.*

39. Market share data is supported by other data. Figure 2 below summarizes net subscriber additions in Canada between 2004 and 2017, also based on the Commission's own data:

![Figure 2: Share of net subscriber additions (national)](image)

40. Notably, between 2013 and 2017, Resellers have accounted on average for 41% of all net subscriber additions. This is astounding: even before the Commission Order cut the wholesale rates, Resellers as a group gained almost as many net new customers\(^\text{26}\) as the Carriers did.

41. The financial situation of Resellers has also been very positive, even before the Order. We estimated the gross margin earned by Resellers when they subscribe to our 50/10Mbps HSA service\(^\text{27}\), our highest wholesale speed tier offered during the 2016-2018 analysis period. To that end, we compared the average retail Internet rate for 50/10Mbps, as reported by the

\(^{26}\) Net new customers reflect the overall change in the total number of customers served. To illustrate, say a carrier has 10,000 customers at the beginning of a quarter. Over the quarter, the provider gains 1500 new customers but 500 of its pre-existing customers leave for a competitor. The number of net new customers for the quarter is 1000, or 1500 minus 500, representing the change in the carrier’s overall customer base.

\(^{27}\) 50/10 Mbps stands for up to 50Mbps download speed and up to 10Mbps upload speed.
Commission\textsuperscript{28}, with the tariffed rates of each component of 50/10Mbps HSA (i.e., access, capacity and dry loop charges). Figure 3 below shows that since early 2016 (and, in fact, since 2013) Resellers benefitted from a healthy gross margin of 44\%, allowing them to charge below the average retail rate. The Fall 2016 capacity rate cuts increased this gross margin to 58\%. Now the Order unnecessarily increases the Resellers’ gross margin further to 71\%.\textsuperscript{29}

![Figure 3: Estimated gross margins for Resellers associated with 50/10 Mbps service](image)

- Avg monthly price for Internet in 2016\textsuperscript{*} $82.05
- Estimated avg wholesale cost at March 2016 rates\textsuperscript{**} $45.72 (44\%)
- Estimated avg wholesale cost at October 2016 rates\textsuperscript{**} $34.08 (58\%)
- Avg monthly price for Internet in 2018\textsuperscript{*} $79.40
- Estimated avg wholesale cost at August 2019 rates\textsuperscript{**} $23.22 (71\%)

\textsuperscript{*}Communications Monitoring Report, 2019
\textsuperscript{**} Bell estimates

42. The result of these wholesale rate reductions has been to cut by half the Resellers’ wholesale costs of providing service. For example, Figure 4\textsuperscript{30} below looks at the estimated wholesale costs to provide 50/10 Mbps in 2016 based on the three applicable rate decisions for this time period, specifically:

\textsuperscript{28} 50/10 Mbps is the highest speed whose retail rates was reported by the Commission. However, we are confident that Resellers earn similar, if not higher margins, with the faster wholesale speeds offered by cable providers.

\textsuperscript{29} Our estimate is based on our 50 Mbps tariff rates (including access, capacity and dry loop costs). To calculate the capacity fee (given that it is set per 100 Mbps unit basis rather than on a per user basis), we used internal data about the wholesale and retail traffic patterns associated with 50 Mbps service. We then compared these costs with the average monthly price for 50/10 Mbps Internet plans as reported by the Commission in Figure 2.1 of its 2019 Communications Monitoring Report.

\textsuperscript{30} This figure compares estimated average wholesale costs to offer Bell 50/10 Mbps using the same methodology as in the previous figure. This figure compares costs using rates that were effective until October 2016 when the Commission established interim rates and finally rates as a result of the Commission recent retroactive adjustments of the 2016 rates.
a. Telecom Decision CRTC 2016-117 (31 March 2016), which made interim the rates that had been established in 2011 and revised in 2013;
b. Telecom Order CRTC 2016-396 (6 October 2016), which substantially lowered CBB rates (by 86% in Bell’s case) on an interim basis; and
c. Telecom Order CRTC 2019-288 (15 August 2019), the recent Order which yet again lowered rates substantially and applied retroactively to 2016.

Figure 4:
Estimated wholesale costs in 2016 for Bell’s 50/10 Mbps under three Commission rulings

$45.72
- 25%
$34.08
- 49%
$23.22

 Telecom Decision 2016-117
 Telecom Order 2016-396
 Telecom Order 2019-288

43. Resellers have had great success, both in terms of customer gains and financial returns, relying on HSA at their then current rates. The positive data above is reflected by the Competition Bureau findings that:

– Even consumers who are not switching to Resellers benefit from the presence of Resellers to negotiate lower prices and other inducements from their current provider31;
– Consumers can readily switch to competitive alternatives, including to Resellers32;
– Consumers, except those in rural and remote regions of Canada, are generally satisfied with both their current Internet service provider (ISP) and their choice among ISPs33.

32 Ibid., page 32.
33 Ibid., page 23.
44. Looking at current facts gathered in 2018 and 2019, the Competition Bureau concluded that "the wholesale access regime appears to be fulfilling its promise to bring about greater consumer choice and increased levels of competition for Canadian consumers".\(^\text{34}\)

45. Canada's enviable position was also noted by the Economist Intelligence Unit, a sister publication to the well-known Economist magazine. In the Economist Intelligence Unit's annual international comparison of telecommunications, Canada ranks first among 100 countries: a) in internet affordability, b) the degree of broadband competition (unsurprisingly as Canada enjoys strong facilities-based competition from two wireline providers and three or four wireless providers in most areas of the country) and c) the price component of fixed broadband access.\(^\text{35}\)

46. Ignoring all these positive developments, the Order, following a more than three-year process that did not include any assessment of the level of competition in the Canadian broadband market today, gives Resellers an unprecedented regulatory windfall, as well as an unfair cost advantage over Carriers, by forcing Carriers to provide access to their crucial, multi-billion dollar investments, at non-compensatory, below cost rates.

47. Looking at up-to-date evidence, it is clear the regulatory environment in place prior to the Order has been extremely beneficial for Resellers, and it is therefore puzzling that the Commission chose to reduce wholesale rates so drastically through the Order.

48. A very apt summary of the situation was provided by TD Securities Equity Research commenting after the Order that:

> Internet resellers in Canada have already been achieving big market share gains in recent years, and especially since the interim wholesale rates were announced in October, 2016. Our own analysis (unchanged from October, 2016) also concludes that resellers can earn attractive financial returns via the system of interim access rates, while they also provide lower advertised prices than incumbents, which benefits consumers. In other words, the system seems to be working well for consumers, resellers, and facilities-based carriers, so we wonder if there is a problem that the Commission is trying to solve with material incremental reductions to the wholesale rates.\(^\text{36}\)

\(^{34}\) Ibid., page 7.


\(^{36}\) TD Securities Report, page 7
49. Accordingly, the Competition Bureau, financial analysts and international benchmarks all conclude that the wholesale access regime worked well enough that massively lower rates were not required.

3.2 **Order's wholesale rate reductions yield no real benefits for Canadians**

50. Moreover, the windfall received by Resellers thanks to the lowered wholesale rates will yield no countervailing benefits for consumers or in terms of Reseller investment.

51. The Montreal Economic Institute recently identified the harm to investment and lack of consumer benefits:

   Most recently, the Commission decided to further reduce the wholesale rate large internet providers can charge their smaller competitors. There is no reason to believe that this new legal hardship will affect operators differently this time, nor improve retail customers' experience in a significant way in the long term. Rather, this redistribution will further reduce larger operators' incentives to develop and compete with each other on value creation.\(^{37}\)

52. Former Commission Chair Konrad von Finckenstein (and now Chair of the consumer rights group, PIAC) rightly comments that while the Order may benefit Resellers, it does not benefit consumers:

   In addition, it does nothing for consumers. The money will go to small ISPs and not consumers and it is far from clear as to what portion will be invested in further network capacity, what portion will go to enhance profits and what, if any will be passed on to their customers.\(^{38}\)

53. Resellers are under no obligation to pass on to consumers any of the material savings from the wholesale rate reductions. However, in the event Resellers do lower their retail rates as a result of the Order, we will be forced to either reduce our retail prices below costs or else allow our customer base to erode. Regardless of the choice we make, the consequences will be significant.

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\(^{38}\) "The CRTC Should Revisit Part of Its Wholesale ISP Decision, Konrad Von Finckenstein, CARTT.ca."
54. Any superficial affordability benefits, in the form of short-term potential consumer gains (assuming Resellers pass some of their refunds and lower rates to consumers) pale in comparison to the long-term harm of delayed or cancelled investment as discussed in the next section.

4.0 INVESTMENT CONSIDERATIONS

4.1 Inappropriately low wholesale rates deter investment from facilities-based carriers

55. Facilities-based competition among companies that invest in their own broadband networks has been the crucial driver keeping Canada as a global leader in broadband despite our challenging geography. As the Competition Bureau rightly remarked, facilities-based competition, the kind we see between the telephone companies and cablecos, is the kind of competition that is the most likely to lead to robust and effective long-term competition.39

56. As a result of facilities-based competition, projects like our $1.5B investment in fiber-to-the-premises (FTTP) in Toronto are delivering to consumers unprecedented speeds (now up to 1.5 Gbps) and intensely competitive retail prices.40 Our all-fibre network footprint encompasses now more than 5 million homes and businesses, which is more than 50% of our broadband footprint. We have also deployed Bell WHI in more than 130 communities using new 5G-capable advanced LTE wireless technology over 3500 Mhz spectrum band. Designed to extend broadband Internet access to smaller towns, rural locations and underserved communities, we anticipate ultimately extending our WHI service to 1 million households across seven provinces (a significant undertaking, that is unfortunately nevertheless 200,000 households less than previously anticipated before the Order forced us to curtail our plans). And, we are on the cusp of significant investments for the deployment of 5G infrastructure.

57. It is a well-accepted economic principle that wholesale rates affect network investment decisions. Earlier this year, the Competition Bureau re-iterated this clear correlation41 when it cautioned about "the potential negative effects that a wholesale access regime can have on the


41 Competition Bureau Market Study 2019, page 47.
incentive for facilities-based competitors”. The Competition Bureau stressed that the negative impact of mandated wholesale access and low rates were not simple theoretical concerns, as some had argued, but was seen in practical examples. Among these real-world examples, we know that two of them related to prior Bell experiences with a detrimental wholesale regime.

58. The Competition Bureau underscored “the importance of setting wholesale access rates at the correct level to ensure that investment incentives are maintained, while at the same time ensuring sufficient scope for wholesale-based competitors to continue to offer competitive discipline in the marketplace.” A “balance” therefore must be struck between the need for more investment and the desire to spur increased competition via resale.

59. The investment situation is already difficult in Canada: a recent article remarked how foreign inflows into Canadian stock are down 75% over the past year, commenting that “foreign investors are bailing on Canada”. As well, Encana (whose name is short for Energy Canada), a giant in Western oil and gas sector, recently announced it was changing its name and moving its headquarters to the United States. There is no doubt that government policies can affect business decisions to invest in Canada and pursue better opportunities elsewhere.

60. Uncertainty is also presently a significant irritant to Canada’s business community. As noted by Craig Alexander of Deloitte “When asked which regulatory issue represented the most significant problem for their company, a majority of the country’s top business leaders listed

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42 Ibid., page 48.
43 After the Commission mandated wholesale access to services enabled by FTTN facilities in 2010, the result was that our fibre networks were rolled out to approximately 400,000 fewer homes over the two subsequent years. As well, the impact of mandated access is also supported by a financial analysis of one of our recent FTTP business cases. We undertook very detailed financial analysis which demonstrated how mandated wholesale access would have negatively affected the business case for our 2014 FTTP investment program in 21 communities in Atlantic Canada, rural Quebec and Ontario. We showed that, using the same location-specific footprint prioritization model we used for business decision making purposes, the business case worsened for all these communities with the introduction of mandated wholesale access over FTTP, yielding for nine of these 21 locations a negative net present value. As a result, for those nine communities, had mandated wholesale access over FTTP been in place in 2014 (it was introduced in 2015), deployment would not have taken place. That is simply the unavoidable result of a business case that involves building brand new access networks, achieving significant penetration at the retail level, and earning revenues from the entire broadband home. Mandated access undermines every one of these core elements of the underlying business case.
44 Competition Bureau Market Study 2019, pages 7 and 8.
45 "In the eye of the storm: foreign investors turn their back on Canadian stocks", Globe and Mail, 23 October 2019.
46 Encana moving to the U.S., changing name as Canada becomes a dirty word in the oilpatch, Financial Post, 31 October 2019.
uncertainty and/or a lack of predictability in regulatory processes as the most significant regulatory problem for their company.\textsuperscript{47}

61. By cutting wholesale rates by as much as 82%, the Order does not strike this "balance": the Order essentially rewrites the Carriers' investment equation.\textsuperscript{48} Instead the Order sets the same wholesale rate for a service providing a speed of 6 Mbps (i.e., $14.11 for Bell\textsuperscript{49}) as for a service providing a speed of 940 to 1000 Mbps (i.e., $14.30 for Videotron and $13.44 for Rogers\textsuperscript{50}). The incentive to invest in facilities capable of achieving a nearly 200-fold speed improvement has been completely negated by the Order. There is no clearer proof than the fact that Videotron has withdrawn its flagship gigabit Internet offer from the market explicitly as a result of the Order.

62. As of August 2016, Videotron was selling its flagship tier, Internet Giga, for $145.95. The Commission then set, in its August Order, wholesale access rates to Videotron's gigabit service at $14.30. By adding necessary capacity costs we estimate that Resellers could resell Videotron's gigabit service at an average cost of less than $25 per month. In other words, the Commission mandated Videotron to offer its next generation gigabit tier at a rate that provides Resellers more than a 83% gross margin. As a result, Videotron withdrew its flagship tier from the market, including for its own retail customers. As stated by Videotron's CEO:

\begin{quote}
We've announced to the CRTC and the resellers and our retail customers that we are withdrawing the 1 gig service. We will no longer offer the 1 gig service because it requires investments and because with the new regime we cannot afford it. We have to take decisions. We've taken that decision - it's probably the most material one that we've taken so far, but it's going to be followed by others.\textsuperscript{51}
\end{quote}

\begin{thebibliography}{9}
\item \textsuperscript{48} To illustrate, consider an investor who decided to deploy new fibre in 2013, when capacity rates were set at $1,036 (and with the Commission messaging that prior rating uncertainty was finally resolved), who saw these rates melt to $149 in 2016, on an interim basis, and now with the Order sees that not only are rates going-forward as low as $102, but that Resellers are owed refunds for three-years' worth of business. And, this for a long-lived asset which RBC estimates may take 11 to 18 years of revenues to recoup\textsuperscript{48} in a presumably "normal" pricing environment. Relative to when the investment decision was made in our example, 2013, only 10% of the expected revenue stream will now materialize. RBC estimate from \url{https://ca.rbcwealthmanagement.com/delegate/services/file/617544/content}.
\item \textsuperscript{49} Bell Canada, General Tariff Item 5410.
\item \textsuperscript{50} Order, Appendix 1.
\item \textsuperscript{51} Supra, note 8.
\end{thebibliography}
63. We note that our own wholesale gigabit service is not in scope of the Order because: a) for us, gigabit speeds are only achievable over FTTP infrastructure and b) final wholesale rates over that specific technology are currently being considered by the Commission in a separate proceeding. However, our statement above that "the incentive to invest in facilities capable of achieving a nearly 200-fold speed improvement has been completely negated by the Order" nevertheless applies just as much to us as it does to cable Carriers. Since the Order allows Resellers to offer retail gigabit Internet via the networks of the cable Carriers at deep discounts, our incentive to invest in FTTP networks in order to offer competing retail gigabit Internet services is substantially undermined.

64. The Order does even worse than negate the reward for investing: it punishes Carriers with a negative rate of return.

65. We discuss in the next sub-sections how the Order's unreasonably low wholesale rates will have a devastating impact on investment, with specific impact on the digital divide, universal broadband access, the green economy and even the deployment of 5G infrastructure.

4.2 Order has negative impact on investment at time when Canada needs massive digital infrastructure

66. The Order states that the new lower rates would apply retroactively, back to 2016. Carriers indicated that, collectively, they expect the direct impact of the retroactive portion of the Order to reach $325M. This already sizable figure is only part of the impact. We also need to consider the impact of the Order going forward.

67. As a result of the Order, we have announced that we had to reduce the scope of our WHI broadband Internet buildout for rural communities by approximately 200,000 households.

Eastlink, as reported by Globe and Mail "Eastlink will cut $50-million to capital investments over CRTC move on Internet rates" on 25 august 2019.

53 Ibid.
Eastlink also indicated that it would slash, or about 25 per cent, of its planned capital investments for the year and scale back on rural connectivity improvements because of the Order.\(^\text{54}\) On a recent year-end conference call Shaw’s CEO Brad Shaw also noted that:

The recent regulatory environment creates unnecessary uncertainty that has the potential to do more harm over the long term. If companies can no longer have the opportunity to earn an appropriate return, they will change their investment profile and innovative technologies such as 5G, Internet of Things and... artificial intelligence will diminish along with the service levels that Canadians have been accustomed to. [...] Since the announcements of the wireless MVNO hearings and the reduced TPIA rates, we have already altered our plans with respect to launching new higher-speed Internet tiers and additional wireless expansion beyond our current footprint.\(^\text{55}\) [Emphasis added]

68. TD Securities Equity Research estimates that total investments per annum in wireline and cable infrastructure in 2021 and beyond will decline by approximately $1.68B if the Order is not reversed.\(^\text{56}\) It believes "the implications will go far beyond network extension into rural areas, and even projects geared towards increased broadband capacity, quality and innovation in urban areas will be reduced. In fact, we believe the wholesale rates are so low relative to the true costs of building and maintaining these next generation networks, that even incumbent telcos and cablecos in some cases will start leasing access from each other within their home territories as opposed to proceeding with planned FTTH and DOCSIS 3.1 plus node segmentation initiatives."\(^\text{57}\) It also predicts that the reduced investment "could render Canadian telecoms, and the Canadian digital economy as a whole, uncompetitive versus most other developed economies..."\(^\text{58}\)

69. The Order became the subject of immediate and widespread condemnation. Commentators have made it clear that the Order will have significant negative consequences for the Canadian economy and undermine investment in telecommunications services.

\(^{54}\) Eastlink, as reported by Globe and Mail "Eastlink will cut $50-million to capital investments over CRTC move on Internet rates" on 25 August 2019.

\(^{55}\) As quoted in Big Carriers made the wrong moves with wireless re-priced says Freedom’s McAleese – Shaw CEO also warns regulators not to change things now, CARTT.ca 25 October 2019.

\(^{56}\) TD Securities Report, page 1.

\(^{57}\) Ibid.

\(^{58}\) Ibid, page 4.
70. David Colville, a former Commission Vice-Chair, wrote in the Financial Post:

...in reality, carriers will be forced to adjust their business plans to account for lost revenue in offering services below cost. I believe the commission has made an unwarranted regulatory intrusion into the competitive marketplace for which the likely outcome will be a slowdown or even elimination in investment... The Commission has made a grave error in ordering carriers to offer internet access at below cost at a time when carriers, at government encouragement, have been extending high-speed-internet services to more rural and remote areas. This decision is short-sighted with the direct, unfortunate and unintended effect of reducing investment in internet networks and stifling rural development.\textsuperscript{59}

71. In the same vein, Gael Campan of the Montreal Economic Institute wrote in the Financial Post that:

The Commission's misguided attacks risk gutting [Canada's] world-class system. Why would companies spend billions of dollars every year building networks only to have to rent them at a loss? Without steady new investment, Canadians might quickly lose their world-class speeds and be stuck with an increasingly outdated network that would come to feel like an old 56k modem would today.\textsuperscript{60}

72. The Order was also noticed beyond Canada. Merrill-Lynch noted that "[a]s a result of the lower final wholesale rates, nearly all the facilities-based carriers will re-evaluate investments in broadband infrastructure in rural and more remote communities. The focus on affordability could diminish future broadband investment" and that "[a]s a result of the Commission decision, the majority of companies in the industry are currently reviewing investment plans for rural and remote areas."\textsuperscript{61}

73. While the Order pertains to rates for wireline network access, the Commission's apparent disregard for investment considerations sends a chilling signal to the investment community about the Canadian regulatory environment in general, at a time when Canada desperately needs billions in investment dollars to close the digital divide and to ensure that Canada remains a leader in wireline and wireless technology. The Order has the potential of being the first in a series of Commission decisions that could make investors further shun

\textsuperscript{59} "CRTC's Market Intrusion Will Hurt Internet Competition", Financial Post, 29 August 2019.
\textsuperscript{60} The CRTC needs to get out of the way — its attacks risk gutting our world-class telecom system, Gael Campan, in Financial Post of 31 October 2019.
Canada: the Commission will imminently set final rates for Disaggregated HSA$^{62}$ and it is currently re-assessing whether it should establish a mandated Mobile Wireless Network Operator regime (and if so, at unknown rates).

74. We acknowledge that it is not the first time that we raise investment concerns with Government. But the dramatic impact of these latest rate reductions raises our concern to a new level.

4.3 **Order makes it harder to bridge the digital divide and achieve universal broadband service**

75. Approximately 99% of Canadian homes in large population centres have access to at least 50 Mbps speeds, which is the universal service objective set by the Commission. But only 37% of rural and remote homes are in the same situation.$^{63}$

76. To address this concern, Government at all levels (federal, provincial, municipal) have developed funding programs to spur broadband deployment where private incentives alone may not be sufficient.$^{64}$ But this is a colossal undertaking that will require several billions of dollars, both from public and private sources.$^{65}$

77. The Order severely undermines private incentives to invest and will thus increase the amount of money that the government, rather than private investors, will have to devote to rural broadband deployment. Ultimately, this heavier burden on government will need to be shouldered by Canadian taxpayers, including broadband consumers.

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$^{62}$ Disaggregated HSA is a configuration of HSA services that only includes the last-mile access facility between a local hub and the customer premises. It also enables Reseller access over fibre-to-the-home infrastructure. To date, Bell has no wholesale customers using this service but significantly lower wholesale rates for Disaggregated HSA may precipitate Reseller demand.

$^{63}$ CMR 2018, Tables 5.18 and 5.19.

$^{64}$ Notable examples of this are the federal Connect to Innovate initiative (https://www.budget.gc.ca/2019/docs/plan/chap-02-en.html#Part-3-Connecting-Canadians), the Commission's Broadband Fund (https://crtc.gc.ca/eng/internet/internet.htm) and the recent Régions branchées program of the Quebec government (https://www.economie.gouv.qc.ca/bibliotheques/programmes/aide-financiere/quebec-haut-debit/appel-de-projets-regions-branchees/).

$^{65}$ We note that in 2016, ISED estimated that connecting all Canadians through fibre could cost between $40B and $50B. Relying on other technologies such as fixed wireless or satellite where appropriate, ISED estimated it might cost at least $6.5B to achieve a speed target of 50/10 Mbps in all areas of the country. See paragraph 1.36 of 2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada – Report 1—Connectivity in Rural and Remote Areas.
78. Indeed, according to Eastlink's CEO, Lee Bragg, the Order "is incomprehensible when our governments have been actively promoting the importance of ensuring all Canadians, including those in rural areas, are connected. It compromises the future of investment in internet networks and infrastructure across Canada, which ultimately will lead to a deterioration of the internet service available to all Canadians." Cogeco and Shaw made similar comments.

79. Of course, we too recognized the impact of the Order on rural investment, immediately announcing that we would reduce by 200,000 households the planned deployment of our new WHI service, a service meant to bring high-speed Internet access to houses, farms and small businesses in areas that are difficult for providers to reach with wireline networks. Ironically, our initial plan to serve 800,000 small-town households in Manitoba, Ontario, Québec and Atlantic Canada was expanded to more than 1.2 million locations following the federal government's introduction of the Accelerated Investment Incentive in November 2018. But the Order pushed us to scale it back by 200,000 households. The Order, patently, is at odds with the Government's own broadband deployment policies as well as a step back, in the wrong direction.

80. The Order's counter-productive effect on investment threatens the future well-being of millions of Canadians outside of urban centres. Rural communities derive real benefits from true high-speed broadband deployment can bring to communities. When next-generation broadband becomes available in a rural community, it provides significant benefits. It improves access to important public services, including advanced applications for health care, education and public safety/security. It also empowers new economic tools such as advanced IoT applications that can improve the productivity and outlook of many sectors, including resource-based industries such as agriculture. Consumers gain new information and entertainment options. As well, the arrival of new infrastructure can boost broadband competition as long-standing lower speed providers may be spurred into a competitive response.

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66 As quoted in TPIA: Bains "disappointed" but believes others will step up as incumbents pull back from network investment (updated), CARTT.ca 21 August 2019.
68 As quoted in Big Carriers made the wrong moves with wireless re-pricing says Freedom's McAleese – Shaw CEO also warns regulators not to change things now, CARTT.ca 25 October 2019.
81. We have already deployed WHI to over 130 small towns in Ontario and Quebec and we see first-hand how it transforms communities. For example, when we deployed WHI to Northumberland and Prince Edward County in Ontario earlier this year, consumers and businesses became able to enjoy download speeds of up to 25 Mbps with generous usage options, whereas in many cases they could still be limited to dial-up. As noted by the director of community development and strategic infrastructure for Prince Edward County, "[t]he demand for fast and reliable Internet is increasingly critical to the day-to-day operations of all businesses and the lack of true high-speed Internet has been recognized as a significant bottleneck for expanding businesses in rural areas of our community."\(^70\)

82. We invite you to watch the short videos linked below, titled "New, fast Internet in your area" in English and "Nouveau, Internet rapide maintenant dans votre communauté" in French, that convey more powerfully than words can the transformative power of broadband for rural communities.\(^71\)

83. With private investment in retreat, the government's goal of universal high-speed service for all Canadians will necessarily require more public funds from a finite tax base – raising difficult policy and political choices for government. The Order thus makes it much less likely that Canadians in rural and remote areas will be served by new high-speed networks, and for those that do achieve it, in all likelihood it will take more time for the construction projects to be funded and completed.

4.4 **Order undermines transformation to Green economy**

84. Failing to overturn the Order would also be a missed opportunity in Canada's shift to a green economy and in our path towards reducing the nation's carbon emissions. The availability of next generation wireline and wireless networks in communities outside urban centres is vital to reducing our carbon footprint. The services and processes enabled by next-generation networks, whether wireline and wireless, help reduce carbon emissions: for instance audio and video conferencing can substitute for business travel, high-speed access allows workers to tele-commute and leave their cars at home, and IoT applications can optimize train

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\(^70\) *Bell building on EORN infrastructure to bring high-speed wireless to more homes, Picton gazette of 9 April 2019.*

\(^71\) Videos can be watched at the following links: for the French video [https://youtu.be/wn9mmuskLAc](https://youtu.be/wn9mmuskLAc) and for the English video [https://youtu.be/TXLip5RIMQg](https://youtu.be/TXLip5RIMQg).*
and truck fleet management as well as smart city initiatives. Cloud computing and virtualization, part of the new business service solutions portfolio, can make a difference in the global pursuit of lower-carbon economies.

85. These environmental gains are not theoretical. We developed a methodology in collaboration with Groupe AGÉCO to quantify the environmental benefits of our products and services. Our analysis concluded that, in 2017, our technologies enabled carbon abatement for our customers of more than 885 kilotonnes, which is equivalent to more than 2.4 times our corporate carbon footprint. Overall, this is a net gain for the planet. More widespread reach and use of high-speed broadband will only increase this positive equation. Future benefits are also becoming clearer: for example, according to the Global eSustainability Initiative (GeSI) SMARTer2030 report, widespread deployment of business service solutions could save up to 10 times the carbon emissions generated by the sector itself by 2030.

4.5 Order chills much-needed investment in 5G

86. While the Order pertains to rates for wireline network access, the quantum of the rate cut and its implications for future investment extends to the wireless side of our business as well. This is an important consideration given that Canada's facilities-based carriers are on the cusp of investing billions of dollars in next generation 5G networks; networks that will unlock unprecedented opportunities for our digital economy. 5G wireless services will provide advanced capabilities, including bandwidth with speeds over 600 times faster than today's LTE speeds. It is essential that Canada successfully and quickly transition to 5G if it wishes to be a world leader in the digital economy. Regulatory decisions such as the Order will further slow down the ability of companies to invest in 5G at a time when Canada has already been ranked last in terms of 5G readiness because of Government delays that are beyond the industry's control.  

87. Yet, to realize the economic, environmental, and societal benefits associated with 5G technology, Canada must shoulder a massive undertaking. Prior to the Order, Accenture estimated that approximately $26B will be spent by facilities-based carriers for the deployment

72 Global Race to 5G – Update", April 2019, Analysys Mason.
of 5G infrastructure in Canada in the next five to six years. In addition, 5G is expected to create 150,000 short-term jobs in construction and engineering while the networks are built, and a further 250,000 permanent jobs through the adoption of 5G in the Canadian economy. The Order undermines the incentive and ability for carriers to invest putting all of these benefits at risk.

4.6 **Resellers’ Investment will not offset the loss of Carrier Investment**

We note that ISED Minister Bains was reported as saying that he expected that the private investments from Carriers would be replaced by other private sources. However, as Figure 5 below makes starkly clear, Resellers have no history of investment in broadband infrastructure. Over the 2012-2017 period, the industry invested over $38B in wireline plant and equipment – Resellers represented $160M of that total, not even one percentage point.

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74 Ibid.
75 As quoted in *TPA: Bains “disappointed” but believes others will step up as incumbents pull back from network investment (updated)*, CARTT.ca 21 August 2019.
76 CMR 2017.
89. Distributel, one of the largest Resellers, essentially admits its very limited investment in network facilities through repeated references to how its "network" is constructed out of pieces obtained from facilities-based carriers, even as it tries to show the opposite in recent court filings.\footnote{According to Distributel:} 

90. The lack of investment by Resellers is also not surprising. As long as mandated access to existing networks exists, the incentives for Resellers to invest their own capital to compete using their own networks are at best minimal, as they can gain wholesale access at artificially low rates without incurring any of the associated risk.

91. Moreover, what little incentives a Reseller may have had, pre-Order, to invest in broadband networks have evaporated given the very low rates at which they can simply subscribe to a competitor's existing facility rather than build their own.

92. In our view, the private investment displaced by the Order (and its accompanying chilling expectation on the direction of the Canadian regulatory environment) will need to be replaced by public funds – there will be no private white knight.

93. In summary, Carriers, industry commentators and the investment community agree that the Order threatens much-needed investments in broadband infrastructure, with negative consequences for rural and more remote communities, for the timely and widespread deployment of 5G infrastructure, and for the transformation to a greener economy.

\footnote{According to Distributel:} 

203. Competitive service providers like Distributel and CNOC members do make investments in various telecommunications infrastructure, including fibre-based networks, although the details are usually not publicly available, since most competitors are privately owned.

204. For Distributel specifically, we have made significant investments in non-transmission network facilities and equipment in order to be able to offer a full suite of retail telecommunications services to residential and business customers. Although Distributel is a private company and, as such, does not disclose its financial results or investments publicly, I can state that Distributel maintains points of presence in Calgary, Edmonton, Montreal, Ottawa, Prince George, Toronto, and Vancouver that are connected via a national fibre backbone network comprised of transmission facilities obtained on an unregulated basis. In addition to that national fibre backbone network, Distributel's network is comprised of other fibre transmission facilities that are obtained on an unregulated basis or, in some cases, owned by Distributel, as well as fixed wireless facilities that utilize both licenced and unlicensed spectrum.\footnote{Affidavit of Chris Hickey of Distributel, filed as part of an appeal of the Order, Court File No. 19-A-59, \textit{Bell Canada, Bell MTS and MTS Inc vs. CNOC, Distributel and other respondents}, paragraphs 203 and 204.}
94. It is therefore imperative that the Governor in Council, in reversing the Order and re-instating the pre-Order rates, send a clear message both to the Commission and to the investment community that Canada is not becoming hostile to investment.

5.0 ORDER SETS UNREASONABLE RATES

95. When the Commission initially set the rates for HSA in 2011, it acknowledged that, in setting rates, the Commission "balances the need to ensure that network providers are reasonably compensated for their costs with the need to ensure that markups are not so high as to significantly impede independent service providers from providing competitive alternatives in the marketplace."[78][Emphasis added] In contrast, the Order makes no reference to this delicate trade-off.

96. Over time, it thus appears that the Commission has lost this perspective and has focused solely on reducing wholesale rates as further explained below.

5.1 The Commission set HSA rates that are below costs

97. The Commission typically sets rates using a theoretical cost model based on incremental costing (called Phase II). Phase II does not examine the costs that were truly spent but rather restricts its analysis to costs on a going forward basis. In that sense, it often does not reflect reality. However, in setting rates through the Order, the Commission did not completely follow its own Phase II costing principles entirely when it established the rates.

98. In Order 2008-237[79], the Commission approved the costing methodologies that Carriers should use to develop the company-specific costs that are included in their regulatory economic studies, and clearly stated that regulatory cost studies should be based on company-specific costs. However, in its latest decision, Order 2019-288, the Commission ignored this directive and disallowed us from recovering our actual costs for a number of cost elements that were included in our HSA cost studies, without proper justification. Conversely, where the

[78] Ibid. para 78.
Commission relied on inaccurate and outdated third-party data, it denied our submission of updated data from the same source that was relied upon by the Commission.  

99. This is not hyperbole. Based on an analysis of our actual capital costs using capital investment information extracted from our own financial record databases, we have applied the Commission's methodology, as expressed in its latest decision, to our actual capital costs (even leaving out some known costs). We also used the same operating expenses that were accepted by the Commission. The analysis conclusively shows that the per-subscriber per-month cost of FTTN access is substantially higher than the $14.78 rate ordered by the Commission in the Order. As such, the Order would force us to provide HSA at rates that are below cost.

100. The unreasonableness of the rates resulting from the Order is apparent to institutional investors that look at rates within the context of historical capital investments and the current marketplace. As remarked in a TD Securities Equity Research report, the new low wholesale access rates neither seem fair or accurate.  

5.2 The Commission's current rate setting approach is broken  

101. The Order exemplifies the accelerating drive to lower wholesale broadband rates. Rates set in 2013, based on a 10-year horizon and supposedly "final" after proceedings which lasted years, were re-opened in March 2016, only half-way through their expected duration.

102. The 2016 review was made only shortly after the then Chair had clearly indicated in 2013 the Commission's intent to "close the chapter" on wholesale HSA rates having already been the subject of years of proceedings on the issue of wholesale HSA:

We are pleased to finally close this chapter...the [wholesale] rates enable large companies to recover their costs and make further investments in their networks.  

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80 In the case of the annual capital unit cost change assumption that the CRTC proxied by 26.4%, a figure which was based on an outdated external report by the Dell'Oro Group, the Commission denied our and other Carriers' submission of more recent Dell'Oro reports which justified a lower cost change assumption. The Commission rejected the updated data on the basis that facilities-based carriers should provide company specific data. Yet, in doing so, the Commission chose to continue to rely on outdated and inaccurate third-party data despite the existence of more recent corrections to the report.

81 TD Securities Report, page 3.

103. Figure 6 below illustrates the significant wholesale rate changes we have experienced since 2013, all the while Resellers were growing their market share.

![Figure 6: Reductions in Bell wholesale HSA rates](image)

104. The Canadian broadband market has now been involved in more than a decade of costing reviews and disputes regarding the same wholesale HSA services with no end in sight. Not only does the Commission's approach result in frequent, protracted proceedings, we witness that where the Commission's methodology allows for discretion and judgment, the Commission regularly, and unnecessarily, opts for significant and material reductions of wholesale rates.

### 6.0 ILLOGICAL REGULATORY SEQUENCING

105. As a complement to our request to re-instate the pre-Order wholesale rates, so as to restore investment incentives and certainty to the industry, we ask the Governor in Council to direct the Commission to slightly adjust the Commission's proceedings sequencing, in order to generate more efficient and coherent regulation.

106. The Order substantially changed the wholesale rates of HSA, the most significant mandated wholesale service.
107. Yet, right after setting final rates for HSA services, the Commission proposes to embark (before March 2020, according to its plan\textsuperscript{83}) on a review of its approach to costing, of its own initiative, notably to "ensure that the rates that the Commission sets for wholesale services continue to be just and reasonable".\textsuperscript{84} If there is something potentially wrong with the Commission's costing (and we submit that there is as we discussed in the previous section), then it seems puzzling that the Commission did not choose to correct costing \textit{before} setting final rates for the most important wholesale services.

108. In any event, the Commission's current plan also contemplates that it will launch an examination of "various wireline wholesale services [including HSA] to ensure...the development of a competitive Canadian telecommunications market, while balancing the incentives to invest in innovative networks."\textsuperscript{85}

109. As we make clear throughout this Petition, we believe that the Commission's costing framework is broken and can yield rates that are not just and reasonable – the costing regime should indeed be overhauled. However, we submit that it would be more practical if the Commission first conducted a review of the wholesale services framework, to see which services, in 2020 and onwards, still warrant mandated status and any changes that may be appropriate to that regime, and only afterwards explore how to best set the rates of mandated wholesale services. We believe that an updated understanding of wholesale dynamics would inform the Commission's approach to rate-setting.

110. In light of the importance of facilities-based competition on innovation and investment, we request that the Governor in Council reverse the proposed proceeding sequencing in order to start with the basics (i.e., whether HSA and other wholesale services do indeed need to be mandated) before turning to the details (i.e., if they must be mandated, what is the best way to set their rates). Accordingly, we propose that the Governor in Council instruct the Commission to conduct its already planned wholesale wireline review before it performs its rate-setting review.

\textsuperscript{83} \url{https://crtc.gc.ca/eng/backgrnd/vis.htm}.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid.
7.0 RETROACTIVITY DISCRETION SHOULD BE CURTAILED

111. We recognize that the Commission has the legal ability to set interim rates, and that once it finalizes these rates, the final rates may have retroactive effect back to the beginning of the interim period.

112. However, we submit that retroactivity should be used very sparingly, as it creates significant uncertainty in the industry, both for providers and customers. We also note that while retroactive impacts have historically tended to reflect decreases from interim to final rates (and thus benefit wholesale customers), retroactivity can also run the other way, with higher final rates that customers must reimburse providers — it is a two-sided problem.

113. With respect of the HSA services and the Order in particular, the Commission's approach to rate regulation has been a constant source of uncertainty that has negatively impacted the industry. As we indicated earlier, the rates for the current model of HSA were introduced in 2011, revised on what was supposed to be a long-term final basis in 2013, re-opened and made interim in March 2016, lowered in October 2016 and made final in the Order. The substantial rate reductions from the Order applied to rates that had been interim for over three years – they had become the industry "normal". Moreover, these 2016 rates, that had been in place for the longest span since 2011, already struck the right balance between supporting competitive pressure from Resellers and the investment incentives of Carriers.

114. In light of the sizable (and unreasonable) rate reductions from the Order, it is inappropriate for the Commission to allow more than a three-year retroactive effect, essentially re-engineering years, and hundreds of millions of dollars, of supplier/customer relationships.

115. We asked Gilbert + Tobin, a leading transactions, regulatory and disputes law firm based in Australia, to conduct a review of key Commonwealth jurisdictions to see how local regulatory frameworks handled retroactivity. The report confirms that few regulators have the ability to implement retroactive rate changes, and when they do their reliance on such an exceptional tool is very circumspect. More importantly, they conclude that even if the regulators that they

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86 Such as Telecom Decision CRTC 2012-226, Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Revised co-location power rates.
examined had those powers, none of them would choose to exercise their discretion to order retroactive rates in a similar situation to that found here.

116. As Gilbert + Tobin note, the Commission's decision to give retroactive effect to the Order is "out of step with international best practice", "...the CRTC's decision would not (or could not) be replicated in our comparison jurisdictions..." and it "sits uncomfortably with the core principles of ex ante regulatory frameworks, which are designed to create conditions for efficient future behaviour, including efficient investment, operation and use of critical infrastructure, by setting future rates to align with expected future efficient costs." 87

117. The purpose of setting rates is to provide Carriers and Resellers alike with regulatory certainty for the term of the determination. As mentioned above, and even acknowledged by the former Chair of the Commission, the retroactive ruling is nothing but a windfall for Resellers who have no obligation to invest or share the benefits with their customers. 88

118. As a result, we submit that the Governor in Council should provide the Commission with clear directions about how retroactivity should be only an exceptional resort, as a general principle, and that in the specific matter of the Order and the rates for HSA, to direct that any rate set by the Order are not to apply retroactively.

8.0 CONCLUSION AND PROPOSED ORDER

119. There is no countervailing public policy imperative that warrants the clear and present negative outcomes that flow from the Order. The primary beneficiaries of the Order are not Canadian consumers, but rather the Resellers and the evidence is abundantly clear that Resellers are not in need of the incremental financial subsidy the Order grants them. The Resellers were flourishing under the rates in effect prior to the Order—under those rates they are able to offer retail services at rates that are 15-35% lower than the facilities-based carriers and this has enabled them to grow their market share so much so that they have been gaining almost as many net new customers as the Carriers.

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87 Gilbert + Tobin Report, Attachment, page 1.
88 The CRTC Should Revisit Part of Its Wholesale ISP Decision, Konrad Von Finckenstein, CARTT.ca.
120. At the end of the day, Canada’s interests are better served if the Order is overturned and pre-existing rates re-instated. This will re-establish a regulatory balance that has ensured ongoing investment while at the same time fostering competition. It will ensure that next-generation networks are built, not just in Canada’s biggest cities but also in rural communities that are equally deserving of their place in the digital economy. It will support investment and the jobs that come with it and place the emphasis on network builds on a willing, well capitalized private sector rather than taxpayers.

121. It is not the first time that we have raised investment concerns with Government. But, the dramatic impact of these latest rate reductions raises our concern to a new level. These concerns are shared. Financial analysts and institutional investors, even a Vice Chair Telecom have taken notice of the Order’s unnecessary and, frankly, punishing, rate reductions. This comes right on the heels of the Competition Bureau’s report which recognized recent real-world examples, right here in Canada, where wholesale regulation has caused reductions in investment.

122. In light of all the above considerations, we request that the Governor in Council:

a) vary Telecom Order CRTC 2019-288 such that the interim wholesale HSA service rates for Bell Canada, Bell MTS, Cogeco, Eastlink, Rogers, SaskTel, Shaw, Telus, and Videotron set out in Telecom Decision CRTC 2016-117, as revised in Telecom Order CRTC 2016-396 and Telecom Order CRTC 2016-448, are established as the final wholesale HSA service rates as of the date of Order 2019-288;

b) vary Telecom Order CRTC 2019-288 such that the wholesale HSA service rates established in Telecom Order CRTC 2019-288 are not applied retroactively; and

c) direct the Commission to conduct a review of the wholesale wireline framework before a review of its approach to wholesale rate-setting.

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89 Capacity rates were initially made interim in March 2016 (for Bell at $1,036) before being cut (for Bell by 86% to $149) in the Fall of 2016, and further still with the Order this August (for Bell by 90% to $102). While we could request that the capacity rates be returned all the way back to their March 2016 level (i.e. $1,036), we are only seeking a return to the capacity rates in place right before the Order (i.e., $149). The industry has been operating with the Fall 2016 interim capacity rates for the last three years – hence in the interest of business certainty we ask that the final rates, both for access and for capacity, only re-instate the post Fall 2016 circumstances. That said, we request that no retroactivity apply, including for the period between April and October 2016 for the capacity rates.

90 See supra, note 17.