



**WE'RE DIFFERENT.
IN A GOOD WAY.**

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SUBMITTED BY EMAIL to ic.telecomsubmission-soumissiontelecom.ic@canada.ca

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RE: TekSavvy representations concerning the *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests, and Innovation*, Canada Gazette, Part I, published 9 March 2019.

Dear Ms Miller:

1. On February 26, 2019, citing concerns with the state of competition, affordability, choice, consumer protection, and innovation in the telecommunications sector, the Minister of Innovation, Science, and Economic Development (ISED) proposed a new Policy Direction to be issued to the Canadian Radio-television and Telecommunications Commission (CRTC)¹. TekSavvy shares those concerns, and submits these representations concerning the proposed Order.
2. For the reasons detailed below, TekSavvy strongly supports this new Policy Direction. It represents a bold move for consumers and sends a long overdue signal to the CRTC to put consumers first in its decision-making. Competition serves consumers by lowering prices and offering service innovations and real choices in the market.
3. For too long, consumers have been frustrated by the lack of choice and high prices for Internet and mobile services. Every day, people come to TekSavvy looking for something different from the incumbents, including their flanker brands: services where they are not locked in, enjoy lower prices and unlimited data options, and where they are treated fairly.
4. Tens of thousands of Canadians have also voiced their support for the proposed Order during this consultation period. For example, TekSavvy launched paylesstoconnect.ca on March 29, to make it easy for consumers to submit a letter to ISED, the CRTC, and

¹ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests, and Innovation*, Canada Gazette, Part I, Vol. 153, No. 10, 9 March 2019 [the "Proposed Order" or the "Proposed Policy Direction"].

their Member of Parliament. In just 11 days, over 67,000 individuals submitted letters in support of increased competition and lower prices through enactment of the proposed Policy Direction. A copy of that letter is attached to this submission.

5. In this submission, we first provide some information about TekSavvy, and then some background about how the 2006 Policy Direction² has not only failed to create competitive markets, but led to CRTC policies that actually harmed competition and consumers' interests while conferring market power on incumbents. We then describe in detail how the 2006 Policy Direction has led to rampant regulatory gaming, a convoluted and inefficient tariff process, less competitive markets in the wholesale wireline side, and a complete lack of any competitive market on the mobile side, to the benefit of incumbents and to the detriment of consumers.
6. The proposed Order is a significant step in the right direction however, in our submission, two modifications are required to ensure that the CRTC addresses the challenges identified in the Order's Regulatory Impact Analysis Statement (RIAS)³, promoting real competition and truly putting Canadians at the forefront of future regulatory decisions. Those changes, further detailed below, are:
 - a. The 2006 Policy Direction must be repealed because, as discussed below, it is fundamentally incompatible with the purpose of the proposed Order; and
 - b. The new Policy Direction must apply more broadly to all activities of the CRTC, and not only to regulatory processes.

A. About TekSavvy

7. TekSavvy Solutions Inc. (TekSavvy) is an independent Internet and voice service provider based in Chatham, Ontario, and Gatineau, Quebec. TekSavvy has been proudly serving consumers with telecommunications services for 20 years, winning numerous awards for the quality of its user experience and for its commitment to fighting for and upholding consumers' rights online.
8. TekSavvy provides Internet and voice services to over 300,000 residential and business customers in every Canadian province. TekSavvy offers Internet over its own network facilities and through wholesale network access services provided by seven incumbent carriers across Canada. Currently, TekSavvy's network uses regulated wholesale services on three DSL networks and four cable networks.
9. In addition to wholesale-based offerings, TekSavvy also offers its own facilities-based fixed-wireless network access services within a growing number of underserved communities in southwestern Ontario, currently expanding to include 4G LTE technology, and exploring 5G technology. TekSavvy is also building a high-speed fibre broadband network in Chatham-Kent to connect more than 38,000 residences and

² *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355 [the "2006 Policy Direction"].

³ *Regulatory Impact Analysis Statement, Order under Section 8 of the Telecommunications Act – Policy Direction to the Canadian Radio-television and Telecommunications Commission*, Canada Gazette Part I, Vol. 140, No. 24, 17 June 2006 ["2006 RIAS"].

businesses in the region.⁴ We recently introduced a television service in some areas and see regular customer demand for a mobile service offering.

10. TekSavvy is not a “reseller”. When TekSavvy sells an Internet connection to an end-user, we do not merely put TekSavvy’s brand name on the incumbent’s Internet service. Instead, TekSavvy buys access to carriers’ physical networks (the “hardware layer”), and we provide services directly to end-users (the “service layer”). We buy the “last mile” of access from incumbents to reach end-users’ residences and businesses, and then we leverage TekSavvy’s national IP network, including points of presence and transit networks from coast to coast across all of Canada’s provinces, to carry our end-user traffic to the Internet or to other data services. TekSavvy has a direct customer relationship with our end-users; the underlying wholesale access network providers do not have any relationship with TekSavvy’s end-users. As such, in this submission, we refer to service providers like TekSavvy as “wholesale-based competitors”.
11. Mandated wholesale services are regulated by the CRTC in order to provide Canadians with more choice for high-speed connectivity, driving competition that results in innovative service offerings and reasonable prices for consumers. For over 20 years, TekSavvy has primarily offered retail services that rely on those wholesale inputs. As such, we are well placed to reflect on the competitive climate in the Canadian telecommunications market and, in particular, the impact of the 2006 Policy Direction on wholesale wireline Internet services.

B. Background: The 2006 Policy Direction has harmed consumers and competition

12. Prior to the 1990s, the telecommunications sector was substantially a monopoly or duopoly industry with, for example, Bell Canada protected from competition since at least 1880. Broadly speaking, throughout the 1990s and the early 2000s, telecommunications legislation served to enable the gradual introduction of competition to some parts of the telecommunications sector.
13. With competition still in a nascent state, and with new and smaller providers such as TekSavvy beginning to enter the Internet and broadband services market, the Government of Canada in 2006 gave the CRTC a Policy Direction, developed under then Minister Bernier, to rely on market forces to the maximum extent possible, to use regulation to the minimum extent possible, and to emphasize facilities-based competition over service- (or wholesale-) based competition.⁵
14. In introducing that 2006 Policy Direction, the government cited the recommendations of the Telecommunications Policy Review Panel that was established in 2005, and relied on the finding “that competition in telecommunications markets has evolved to the point where market forces can be relied upon to achieve many telecommunications policy

⁴ *TekSavvy and Chatham-Kent plan joint effort for high-speed fibre broadband across municipality*, 23 July 2018, <<https://teksavvy.com/en/why-teksavvy/in-the-news/press-releases/2018-press-releases/teksavvy-and-chatham-kent-plan-joint-effort-for-high-speed>>.

⁵ The 2006 Policy Direction.

objectives and the need for regulation should no longer be presumed.”⁶ That Policy Direction imposed on the CRTC the government’s “vision for the telecommunications regulatory regime”:

...a regime where market forces are relied on to the maximum extent feasible; regulation is minimally intrusive and clearly identifies the policy objectives which regulatory measures are intended to advance; and reduction or streamlining of regulation is continuously pursued.⁷

15. With the call for less regulation in that 2006 Policy Direction, the Government expected to see benefits including “fewer regulatory proceedings; more streamlined tariff approval processes; and more competitive markets.”⁸
16. Today, those goals look like a pipe dream in the context of the numerous harmful downstream impacts of the 2006 Policy Direction. On the contrary, by undermining the very regulatory framework that was starting to allow a competitive market to develop, the 2006 Policy Direction led to the CRTC almost single-mindedly focusing its regulatory approach on facilities-based investment by incumbents to the detriment of real competition. To paraphrase Justice Ruth Bader Ginsburg, throwing out regulation when it was working to foster competition in telecommunications was like throwing away your umbrella in a rainstorm because you are not getting wet.⁹
17. When incumbent carriers can block wholesale competition to entrench their monopoly and duopoly positions, market forces are clearly not sufficient to promote competition and serve consumers. Today, consumers need bold action to restore a climate that promotes competition, affordability, consumer interests, and innovation. To that end, TekSavvy recommended a new Policy Direction to the Broadcasting and Telecommunications Legislative Review¹⁰, and now supports the proposed Order.

C. The 2006 Policy Direction led to more regulatory gaming, a more complex tariff process, and less competitive markets

18. TekSavvy and other wireline competitors buy wholesale services such as access, capacity, installation, and service fees from incumbent network carriers at rates and on terms that are set by the CRTC and reflected in wholesale services tariffs. These tariffed rates include, among other elements, a monthly access rate for each subscriber line; and a monthly capacity rate, which is for the size of the point of interconnection with the wholesale carrier, for capacity to access the carrier’s network. The tariff also sets out any fees for service installation and end-user hardware requirements. It is important to

⁶ *Regulatory Impact Analysis Statement regarding “Order under Section 8 of the Telecommunications Act – Policy Direction to the Canadian Radio-television and Telecommunications Commission”*, Canada Gazette Part I, 17 June 2006, at page 1606.

⁷ *Ibid.*, at page 1607.

⁸ *Ibid.*

⁹ *Shelby County v. Holder*, 570 U.S. 529 (2013), Dissent (Ginsburg).

¹⁰ *Government of Canada launches review of Telecommunications and Broadcasting Acts*, news release, 5 June 2018, <<https://www.canada.ca/en/canadian-heritage/news/2018/06/government-of-canada-launches-review-of-telecommunications-and-broadcasting-acts.html>>.

note that these are mandatory services: to buy access to a given carrier's last mile access service, we are required to also pay to use that carrier's technician.¹¹

19. The CRTC is required to set wholesale rates that are just and reasonable to wholesale-based competitors, and the rates we pay guarantee incumbents' investments with guaranteed profits. Despite this, incumbents have thoroughly abused the Commission's costing and decision-making processes, denying and delaying necessary building blocks for competition:
20. While the CRTC is required to set wholesale rates that are just and reasonable to wholesale-based competitors, that compensate incumbents for their investments, and guarantee them a reasonable profit, incumbents have thoroughly abused the Commission's costing and decision-making processes, denying and delaying necessary building blocks for competition:
 - Incumbents have been able to inflate wholesale rates set through the overly complex regulatory costing process;
 - Incumbents, often using their flanker brands, frequently sell their retail offerings at a lower price than their own wholesale rates;
 - By inflating rates and drawing out regulatory processes, incumbents have been able to delay wholesale access to new services, where consumer demand is shifting.

Incumbents gamed 'minimally intrusive' tariff approval mechanisms, hugely inflating wholesale rates set through the regulatory costing process

21. The following synopsis of CRTC wholesale rate-setting over the past eight years demonstrates how, under the 2006 Policy Direction to promote facilities-based investment and minimally intrusive tariff mechanisms, the incumbent carriers have been able to abuse the wholesale costing system, drawing out the costing process, perennially overcharging competitors (thereby keeping prices high for consumers), and ultimately reducing competition.
22. Many of the problems we face today stem from fundamentally flawed wholesale rate-setting proceedings that took place in the aftermath of the 2006 Policy Direction. Not only did the CRTC reduce unnecessary regulatory burdens, but it also reduced the efficacy of regulatory frameworks and the degree of regulatory oversight, including transparency and scrutiny. Instead, the CRTC relied on incumbent costing data, leading to rates that were inflated by over 1300% and resulted in numerous downstream problems.

¹¹ For more details about how regulated wholesale network access works and the many barriers facing new and smaller service providers, please see TekSavvy's public abridged submission to the Competition Bureau's Broadband Market Study, available at <https://bit.ly/TekSavvyCompBureauSubmission>.

23. For example, consider the CBB rate setting proceeding. In 2011, the CRTC was in the midst of four major proceedings¹² dealing with disparate issues, namely: speed-matching on fibre-to-the-node (“FTTN”), the level of aggregation on cable carrier networks, various tariff notices for wholesale services, and Bell’s proposal to replace its Usage Based Billing (UBB) proposals with a new billing model. Ultimately, in a very unusual and complex process, the CRTC merged the four proceedings, decided upon “Capacity Based Billing” (CBB) as the structure of the new billing model and, following a complex and opaque costing process, set astronomically high rates for CBB, the capacity of bandwidth purchased by wholesale-based competitors:¹³

Carrier	CBB Rate (\$/100 Mbps/month)
Bell companies	\$2,213
Cogeco Cable Inc.	\$2,695
MTS Allstream Inc.	\$281
Rogers Communications Partnership	\$1,251
Videotron G.P.	\$1,890

24. These CBB rates were set pursuant to tariff notices and cost studies that had been filed under the pre-existing, overturned UBB rate structure. The CRTC’s preoccupation—directly flowing from the 2006 Policy Direction to rely on market forces and to make the tariff approval process as minimally intrusive to incumbents as possible—with promoting investment by incumbents and narrow focus on facilities-based competition, combined with the high degree of confidentiality surrounding the information that had been filed in confidence in support of the incumbents’ UBB/CBB rate proposals, prevented wholesale-based competitors from effectively challenging the incumbents’ costing assumptions, despite our best efforts and the clearly inflated final CBB rates.
25. Having set those inflated CBB rates, the CRTC over the next several years repeatedly rejected competitors’ objections and requests to review those rates. In 2011, the CRTC rejected CNOC’s request for annual reviews of CBB rates, citing the 2006 Policy Direction that such a rate review would not be efficient, minimally intrusive, or proportionate to its purpose.¹⁴
26. In 2013, the CRTC rejected CNOC’s request to reduce CBB rates to a range between \$100 and \$400 (per 100 Mbps), on the basis that such rates would not allow incumbents to fully recover the costs of providing wholesale transport services.¹⁵
27. In an accompanying decision in 2013, the Commission then rejected CNOC’s argument that the lack of transparency in CBB rate-setting had been procedurally unfair and denied CNOC’s request to conduct a full review of CBB rates using the more transparent

¹² *Review of billing practices for wholesale residential high-speed access services*, Telecom Notice of Consultation CRTC 2011-77-2, 8 April 2011 [“TNC 2011-77-2”].

¹³ *Billing practices for wholesale residential high-speed access services*, Telecom Regulatory Policy CRTC 2011-703, 15 November 2011 [“TRP 2011-703”].

¹⁴ TRP 2011-703, at para 169.

¹⁵ *Canadian Network Operators Consortium Inc. – Application requesting relief to address implementation of the capacity model approved in Telecom Regulatory Policy 2011-703*, Telecom Decision CRTC 2013-72, 21 February 2013, at para 36.

costing guidelines that the CRTC had adopted in 2012¹⁶, and which had never been applied to the opaque costing process used to set CBB rates in 2011. In rejecting CNOC's application, the CRTC determined "that it would be neither necessary nor appropriate to initiate another proceeding to reconsider the rates for the wholesale HSA ["high-speed access"] services using a different process for the disclosure of confidential information, as requested by CNOC."¹⁷

28. Finally, in a pivotal 2015 decision, the CRTC acknowledged that CBB costs were extremely high but, rather than adjust them, the CRTC implemented radical changes to the wholesale regulatory framework:¹⁸

[M]oving to a disaggregated wholesale HSA service model will better support the sustainability of competition and can be expected to provide benefits, such as reasonable prices and innovative services, to consumers. One of the main drawbacks of the current aggregated HSA service is the high cost incurred by competitors when transporting large amounts of traffic over incumbent carriers' facilities.¹⁹

29. Extremely inflated CBB rates were already severely limiting the ability of wholesale-based competitors to compete with incumbents, and the CRTC expected that CBB costs will continue to increase in the future. On the basis of that assumption, the CRTC concluded that the aggregated regime threatened sustainable competition and would be replaced by a disaggregated regime:

[T]hese [CBB] costs are expected to exacerbate as consumption increases over time, given that a competitor must pay for all of its data traffic to be routed back to a central point of aggregation, no matter how far away a subscriber is located. The result is an expensive and often inefficient use of the network that will challenge the sustainability of competitors in the years ahead.²⁰

30. The disaggregated HSA service was mandated in TRP 2015-326 and configured in TD 2016-379²¹. However, less than three weeks later, the CRTC found that the CBB rates were in fact unreasonable.²² This decision revealed that the main economic theory upon which the service was mandated and configured—the very fact that the high cost of aggregated transport posed a dire threat to competition and that such costs would

¹⁶ *Confidentiality of information used to establish wholesale service rates*, Telecom Regulatory Policy CRTC 2012-592, 26 October 2012.

¹⁷ *Canadian Network Operators Consortium Inc. – Application to review and vary Telecom Regulatory Policies 2011-703 and 2011-704*, Telecom Decision CRTC 2013-73, 21 February 2013 ["TD 2013-73"], at para 18.

¹⁸ *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015 ["TRP 2015-326"].

¹⁹ *Ibid.*, at para 145 [emphasis added].

²⁰ *Id.*

²¹ *Follow-up to Telecom Regulatory Policy 2015-326 – Implementation of a disaggregated wholesale high-speed access service, including over fibre-to-the premises access facilities*, Telecom Decision CRTC 2016-379, 20 September 2016 ["TD 2016-379"].

²² *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, Telecom Order CRTC 2016-396, 6 October 2016 ["TO 2016-396"].

continue to rise in the future—was profoundly false. In reality, the Commission determined, CBB rates had been vastly inflated all along because most incumbents simply “chose to disregard” the Commission’s costing regulations.²³ As stated by the then-Chairman and CEO of the CRTC, “The fact that these large companies did not respect accepted costing principles and methodologies is very disturbing. What’s even more concerning is the fact that Canadians’ access to a choice of broadband Internet services would have been at stake had [the Commission] not revised these rates.”²⁴

31. Likewise, these rates, which were themselves not just and reasonable, served to unjustly enrich the incumbents. One need only look at the rates themselves, and how they changed over time as further information came forward revealing them to be inflated. For example, over a five year period while competitors were overcharged, Bell’s rates were gradually reduced by nearly 95%:
 - In 2011, the CRTC set the cost of Bell CBB at \$2,213 per 100 Mbps/month.²⁵
 - In 2013, the CRTC corrected the cost of Bell CBB to \$1,030 per 100 Mbps/month.²⁶
 - In 2016, the CRTC further corrected the cost of Bell CBB to \$130 per 100 Mbps/month.²⁷
32. Altogether, as noted by CNOC²⁸, competitors were overbilled over \$300 million between 2011 when CBB rates were first implemented, and 2016 when they were last corrected.
33. That it took so many years to adjust those rates downward, all despite the efforts of competitors to challenge those rates, and all while competitors were forced to pay those inflated rates, is not just and reasonable. Beyond the surface issue of competitors paying more than we ought to have, those inflated input costs led to a universe of downstream issues including input cost uncertainty and investment paralysis or risk aversion for competitors’ own investments and innovations, all in the face of competing against the retail arm of the same incumbents who have market power. Ultimately, this has led to reduced choice and inflated prices for consumers.
34. This is important to highlight: Because of the 2006 Policy Direction and the resulting way in which rates for wholesale services have been set, wholesale-based competitors have not had reliable, bankable cost certainty for our major input costs for many years. To the extent that incumbents were enriched by those inflated rates, wholesale-based competitors were accordingly unable to commit to investment in facilities to the extent

²³ Ibid., at para 22.

²⁴ CRTC News Release, “CRTC finds proposed wholesale high-speed access rates unreasonable”, 6 October 2016.

²⁵ TRP 2011-703.

²⁶ TD 2013-73.

²⁷ TO 2016-396.

²⁸ *Canadian Networks Operators Consortium Inc. Part 1 Application to Review and Vary Telecom Regulatory Policy CRTC 2015-326 and Telecom Decision CRTC 2016-379*, CRTC Reference 8662-C182-201809534 [“CNOC’s Part 1 Application”].

they otherwise may have, in particular where sources of financing and evaluations of risk are concerned—ironic given the emphasis of the 2006 Policy Direction on facilities-based investment.

35. Similarly, inflated wholesale rates lead to inflated retail rates. The incumbents' regulatory gaming and the CRTC's rate setting failures undermined the ability of competitors to bring price discipline to the market, ultimately harming consumers. This was most clearly demonstrated when, following the CRTC's reduction of CBB rates in TO 2016-396, TekSavvy increased investment in facilities and dropped its retail prices, reducing prices for 98% of TekSavvy's existing customers and offering reduced prices for new customers.

Incumbents gamed the regulatory system to delay competitors' access and deny consumers choice for higher speed broadband services

36. Speed matching is the long-standing regulatory requirement that ILECs (traditional incumbent phone companies) and cable carriers provide wholesale services that enable competitors to offer Internet services to their retail customers at speeds that match the Internet speeds provided by those incumbents to their own retail customers.²⁹
37. In TRP 2015-326, the Commission mandated wholesale access to all last-mile access facilities for precisely the same reason that it consistently upheld speed matching in earlier decisions: If competitors cannot match incumbent retail speeds, "there would be a substantial lessening or prevention of competition in the downstream retail Internet services market, in all incumbent carrier serving regions".³⁰
38. Specifically, the Commission determined that if competitors were unable to match incumbent retail speeds using higher speed access facilities, most of the competitors' existing customers would "migrate to incumbent carrier retail Internet service"³¹ to obtain higher speeds. The Commission found that competitors would also be unduly impaired from obtaining new customers, as their legacy speed offerings would be irrelevant to "more and more consumers desiring higher-speed Internet services".³²
39. The Commission recognized that the anticompetitive impact of a decision to deny wholesale access to higher speeds would be "felt most strongly and immediately in Ontario and Quebec",³³ but ultimately, "most retail customers in Canada would eventually be left with a very limited choice of Internet service providers".³⁴
40. Nonetheless, TRP 2015-326 imposed parallel speed cap restrictions on wholesale wireline frameworks: The CRTC capped competitors at 50 Mbps on DSL providers as

²⁹ *Wholesale high-speed access services proceeding*, Telecom Regulatory Policy CRTC 2010-632, 30 August 2010 ["TRP 2010-632"], at para 29.

³⁰ TRP 2015-326 para 130.

³¹ TRP 2015-326, para 127.

³² TRP 2015-326, para 128.

³³ TRP 2015-326, para 129.

³⁴ *Ibid.*

long as they do not have access to FTTP facilities, and prepared to impose a 100 Mbps speed cap on all aggregated services.

41. The Commission grounded both speed cap restrictions in the same policy rationale, driven largely by the 2006 Policy Direction's focus on facilities and market forces: Retail Internet speed restrictions would be required to encourage competitors to migrate from the existing speed aggregated HSA framework to an as-yet-unknown disaggregated HSA framework that would be configured, costed and operationalized at a later date.³⁵

42. Despite the significant uncertainty around the disaggregated HSA service, competitors were assured that the Transition Plan would "serve to ensure that wholesale access to the access facilities required to provision downstream retail services is always provided for."³⁶ The Commission clarified that its "ultimate goal is to have a smooth transition, over time"³⁷, predicated upon the availability of a disaggregated HSA service:

With respect to aggregated wholesale HSA services, a decision to no longer mandate the provision of such services would not impact investment in high-speed access facilities by incumbent carriers or competitors, nor would it significantly affect consumer adoption of Internet access services, so long as a disaggregated service is made available.³⁸

43. Yet in the 3½ years since TRP 2015-326 was issued, a workable disaggregated HSA service has not been made available, despite the above cited intention of TRP 2015-326 and the Commission's prior projection that final rates for both aggregated and disaggregated HSA services would be set in 2017 or 2018 at the latest.³⁹

44. Moreover, it is now known that the disaggregated HSA services proposed by the incumbents are completely unworkable and will remain so for the foreseeable future:

a. Incorrect economic assumptions.⁴⁰ The disaggregated HSA service was mandated in TRP 2015-326 and configured in TRP 2016-379. Less than three weeks later, TO 2016-396⁴¹ revealed that the main economic theory upon which the service was mandated and configured (i.e. that the high cost of aggregated transport posed a dire threat to competition and that such costs would continue to rise in the future)⁴² was profoundly incorrect. In reality, CBB rates were vastly

³⁵ TRP CRTC 2015-326, at para 154.

³⁶ TRP CRTC 2015-326, at para 143.

³⁷ *Ibid.*

³⁸ TRP CRTC 2015-326, at para 138.

³⁹ Canadian Radio-television and Telecommunications Commission, Three Year Plan 2016-2019, at pages 19 and 20.

⁴⁰ CNOC's Part 1 Application, at paras ES6-ES15, 17, 35-37, and 44-54.

⁴¹ TO 2016-396.

⁴² "One of the main drawbacks of the current aggregated HSA service is the high cost incurred by competitors when transporting large amounts of traffic over incumbent carriers' facilities. ...these costs are expected to exacerbate as consumption increases over time, given that a competitor must pay for all of its data traffic to be routed back to a central point of aggregation, no matter how far away a subscriber is located. The result is an expensive and often inefficient use of the

inflated⁴³ because most incumbents simply “chose to disregard”⁴⁴ the Commission’s costing regulations. Hence, the disaggregated HSA service must be reconfigured as requested by CNOC, further delaying an already severely delayed deployment.

- b. Geologic deployment timelines.⁴⁵ According to the interim tariffs filed by Bell, it would take a single competitor centuries to interconnect to Bell’s proposed disaggregated HSA service at every POI in Ontario and Quebec.
- c. Prohibitive costs.⁴⁶ The proposed disaggregated HSA services are cost prohibitive, not only due to the current inflated interim access and capacity rates but also due to the unreasonable costs of interconnection and the lack of port and fibre sharing, all of which would lead to much higher costs than competitors could ever recover from reductions in aggregated CBB costs.
- d. Transport supply.⁴⁷ A full-scale migration to the disaggregated HSA service is impossible given the lack of transport supply across the Incumbents serving territories, and the inability of competitors to duplicate such facilities on the scale required by a full-scale migration.
- e. Financial Uncertainty.⁴⁸ Even if a workable disaggregated HSA service existed, competitors could not effectively plan, let alone complete, a full-scale deployment due to the utter lack of cost certainty arising from interim rates on both the existing aggregated HSA service and proposed disaggregated HSA services, as well the unknown extent of retroactivity for the material amounts Incumbents overbilled competitors, “due to deviations from Phase II costing principles”.⁴⁹

45. In short, guided by the 2006 Policy Direction, the CRTC has implemented a new interconnection regime that builds on past systemically inflated wholesale rates and ultimately fails to create a competitive market for services over FTTP facilities, all while taking long enough for incumbents to scoop up much of the available consumer base, further entrenching their dominant positions. Not only do elements of the new regime

network that will challenge the sustainability of competitors in the years ahead”, TRP 2015-326, at para 145.

⁴³ The Commission reduced the proposed transport component rate for a number of companies by up to 89%. Additionally, proposed access component rates of certain companies were reduced by up to 39%.

⁴⁴ TO 2016-396, at para 22.

⁴⁵ CNOC Reply, “Comments in support of interim relief to remove the 100 Mbps cap”, 3 December 2018, [CNOC’s “Speed Cap Comments”], at paras 94-100; CNOC’s Part 1 Application, at paras 175-180.

⁴⁶ CNOC’s Speed Cap Comments, at paras 40-86; The Application, at paras 124-174.

⁴⁷ CNOC’s Speed Cap Comments, at paras 30-38; The Application, paras 111-121.

⁴⁸ CNOC’s Speed Cap Comments, at paras 81 and 87-90; The Application, at paras 36, 69-73, 169-172.

⁴⁹ TO 2016-396, at para 19.

constitute insurmountable barriers to competition, but so does the unavailability of critical inputs for the duration of the proceeding.

46. Since the proposed disaggregated HSA service is unworkable and a full-scale migration is impossible, the disaggregated framework and the speed caps imposed by TRP 2015-326 clearly serve not to fulfill their stated objective of bringing more competition but, rather, to kneecap competitors. This is the predictable consequence of decisions being guided not by competition and affordability but by the policy approach dictated in the 2006 Policy Direction.

Incumbents continue to expand market power, introducing flanker brands and abusing their dominant positions to undercut competitors in the retail market

47. With competition already under threat due to years of inflated capacity rates and the lack of access to FTTP facilities, the incumbents further attacked competition by introducing flanker brands into the broadband wireline market, selling below wholesale rates that they themselves inflated. This is a predatory action by the incumbents that has clearly emerged from the climate created by the 2006 Policy Direction to rely on market forces for competition and to encourage facilities-based competition to the exclusion of competition at the service layer.
48. Most egregiously, Bell is using its flanker brand, Virgin, to methodically exploit the 50 Mbps speed cap and to target the stranded DSL base of its wholesale competitors, in two respects:
 - a. First, Bell/Virgin offers retail service speeds of 100 Mbps, provided on Bell's FTTP facilities, at nearly half of the price of Bell's wholesale rates⁵⁰ to target customers that wholesale competitors cannot upgrade on Bell's aggregated HSA service as a result of the speed cap on their FTTN facilities.
 - b. Second, Bell/Virgin undercuts wholesale competitors' 50 Mbps retail speed offerings—the maximum retail speed which competitors can offer in Ontario and Quebec using Bell's aggregated HSA service—due to the still-inflated interim wholesale rates on Bell's aggregated HSA service, by perpetually promoting predatory offers at retail rates that are lower than competitors' wholesale costs.
49. These twin pressures—Bell's retail monopoly on higher speeds and predatory pricing on lower speeds subject to inflated aggregated HSA tariffs—squeeze competitors' margins and drive churn on Bell wholesale DSL subscriber bases left stranded by the aggregated speed cap. In addition to lost revenue from increased churn, competitors face higher costs of acquisition, as they must dramatically lower retail rates to add or retain customers at 50 Mbps in order to compete with predatory flanker offers and general consumer preferences for higher speeds.
50. As such, Bell has systematically and deliberately used its flanker brand to attack wholesale competition, not only by undercutting its own wholesale rates but also by casting it as a competitive offering while enjoying the benefits of being a house brand.

⁵⁰ 100 Mbps Retail Pricing (Virgin) January 6, 2019. \$70/mo (first month free) with \$59.95 activation. Wholesale rates: \$121.79/mo with \$247.90 activation.

Those benefits include having access to their fibre footprint, offering 100 Mbps service on fibre, and not being subject to the progressive erosion of Bell's copper footprint.

51. To understand the methodical and deliberate nature of this damage to competitors and wholesale-based competition, one need only refer to statements made to investors by Bell's CEO George Cope:

"So, on our churn rates on broadband, wholesale is by far our highest churn rate..."⁵¹

"[W]e had negative wholesale loading, or subscriber additions, which of course we would be very comfortable with...Of course, part of that is our strategy with the roll-out of the Virgin Internet brand."⁵²

"[O]ur wholesale additions declined year-over-year and is not a focus of our business..."⁵³

"[W]e can see that we know we captured more than 50% of the growth in the quarter. So, maybe it gets a little bit away from just subscriber growth now and now more mix of subscribers or wholesale versus retail that will drive it, and our focus is 100% on retail. The wholesale is a regulatory obligation, not a business strategy for us."⁵⁴

52. Since that time, Videotron has joined Bell and Rogers with a flanker brand in the broadband wireline market⁵⁵, called "Fizz", launched in order to be a "weapon to fight the resellers".⁵⁶
53. Flanker brands weaponize incumbents' accrued privileges against competitors and strengthen the incumbents' dominance in the market, all in the guise of increased competition and, as such, they now strongly influence pricing in the broader market. Flanker brands substantially drive retail pricing, and they benefit from the advantages of the incumbents, using newer facilities and enjoying a head-start advantage for new service speeds. In short, flanker brands serve to entrench incumbents' dominant positions in the market while cultivating the erroneous impression that they are competitors. On the contrary, they are not competitors, and they do not create competition.

⁵¹ BCE Q3 2018 Results Conference Call Transcript, 1 November 2018, at page 19, <<http://www.bce.ca/investors/financial-reporting/2018-Q3/2018-q3-transcript.pdf>>.

⁵² *Id.*, at page 8.

⁵³ BCE Q2 2018 Results Conference Call Transcript, 2 August 2018, at page 8, <<http://www.bce.ca/investors/financial-reporting/2018-Q2/2018-q2-transcript.pdf>>.

⁵⁴ *Supra* note 51, at page 17.

⁵⁵ Rogers launched its Fido brand's wireline service in November, 2015. Bell launched its Virgin brand's wireline service in July, 2016. Videotron launched its Fizz brand's wireline service in March, 2019.

⁵⁶ Greg O'Brien, "Fizz Internet the 'right weapon' to beat back resellers, says Vidéotron", CARTT.ca, 27 March 2019.

D. The CRTC refused to introduce competition to mobile sector because of the 2006 Policy Direction's focus on facilities-based investment

54. While most of TekSavvy's experience concerns wireline services, our experience with the 2006 Policy Direction is also instructive for the development of other regulatory frameworks that seek to promote competition and consumer choice. In particular, the frustrated efforts to correct inflated wholesale rates and the protracted proceedings to open up FTTP facilities to wholesale-based competition bear lessons for the coming review of mobile wireless services.
55. In the context of the wholesale wireline proceeding that was ostensibly intended to promote competition, incumbents leveraged their existing privileged positions vis-à-vis the market and the regulatory process itself to ultimately erode the competitive market and to further entrench their systemic advantages at the expense of competitors and to the detriment of consumers.
56. To the extent the 2006 Policy Direction was intended to foster competition, it did so through the proxy of the incumbents' success in the market, their ability to invest in facilities, and the returns for their shareholders. As described in the 2019 RIAS, that proxy did not work to promote competition, affordability, and consumer interests. In contrast, the proposed Order directly addresses the intended policy outcomes without relying on a proxy. In our submission, that is the correct approach: Unless the Government recognizes the incumbents' proclivity for systemic regulatory gamesmanship and establishes a bold vision for the CRTC's approach to competition, affordability, and consumer interests, the same pattern is likely to play out in the coming review of mobile wireless services⁵⁷.
57. TekSavvy looks forward to the CRTC's coming review of mobile wireless services, and is excited about the possibility of a competitive mobile market developing at the service-layer in Canada under a new Policy Direction that is focused on competition and affordability.

E. The 2006 Policy Direction must be repealed

58. In order for the proposed Policy Direction to achieve its intended objectives, the Governor in Council must repeal the existing 2006 Policy Direction. Rather than being complementary, the two orders approach the market with different premises and have entirely different goals and, as such, are mutually contradictory.
59. As described in its RIAS, the 2006 Policy Direction was based on the premise that "competition in telecommunications markets has evolved to the point where market forces can be relied upon to achieve many telecommunications policy objectives and the need for regulation should no longer be presumed."⁵⁸ It was intended to "direct [the

⁵⁷ Telecom Notice of Consultation CRTC 2019-57, *Review of mobile wireless services*, 28 February 2019.

⁵⁸ 2019 RIAS, at page 1606.

CRTC] to take a more market-based approach to implementing the Act.”⁵⁹ Finally, the 2006 RIAS described the goals of that Policy Direction as follows:

The proposed policy direction would formally and transparently lay out the Government’s vision for the telecommunications regulatory regime, a regime where market forces are relied on to the maximum extent feasible; regulation is minimally intrusive and clearly identifies the policy objectives which regulatory measures are intended to advance; and reduction or streamlining of regulation is continuously pursued.

The policy direction will guide the CRTC toward reduced and more targeted regulation and therefore, will reduce regulatory cost and burden. Expected benefits include fewer regulatory proceedings; more streamlined tariff approval processes; and more competitive markets.⁶⁰

60. In contrast, as described in its own RIAS, the proposed 2019 Policy Direction is based on the opposite premise, that there is not sufficient competition to serve Canadians. It is informative to quote the RIAS at length on this point:

Despite progress in the advancement of consumer outcomes, significant issues remain. Canada’s incumbent carriers possess and have exercised market power. Prices are high relative to those in peer countries for comparable plans. The affordability of telecommunications services challenges Canadians, and in particular low-income Canadian families, with financial constraints. The Competition Bureau has concluded that the national mobile wireless incumbents coordinate their behaviour, resulting in higher prices for Canadians. Further, Canadians have expressed substantial concern regarding the sales practices used by large telecommunications carriers, and reports have alleged that those carriers have used misleading and aggressive sales practices and abuse information asymmetries to their benefit and at the cost and harm of Canadian consumers. A decreasing but still significant number of Canadian households remain without access to high-quality services, particularly in areas that are underserved by competition.⁶¹

61. The Government’s priorities for telecommunications policy as described in the 2019 RIAS stand in stark contrast to the vision of 2006: The 2006 Policy Direction was intended to bring to life the vision of a regime that relied on market forces and reduced regulation, and has failed to bring about more competition. In contrast, the 2019 Policy Direction aims to require the CRTC to consider promotion of competition, affordability, consumer interests, and innovation.⁶²
62. In short, the two Policy Directions are premised on contradictory findings, and their stated purposes are entirely at odds with one another. If both orders were to stand, the CRTC would interpret the legislative text of each Policy Direction in light of its motivating vision and its intended objectives. Leaving the 2006 Policy Direction in place would risk creating a regulatory policy free-for-all, in which there would be a policy rationale for any

⁵⁹ Ibid.

⁶⁰ Ibid., at page 1607 [emphasis added].

⁶¹ *Supra* note 1, RIAS accompanying the proposed Order, at pages 854-855.

⁶² Ibid., at page 856.

possible decision. As such, in practice the two Policy Directions cannot be implemented together.

63. Instead, the Order should stand alone, giving the CRTC direction on broad policy matters with respect to the Canadian telecommunications objectives, based on an internally consistent premise, policy vision, and objectives.

F. The Policy Direction should apply to all actions and duties of the CRTC, not just when relying on regulation

64. TekSavvy notes that the 2006 Policy Direction applied to the CRTC “In exercising its powers and performing its duties under the *Telecommunications Act*”⁶³, but in contrast the proposed Policy Direction would apply to the CRTC only “when relying on regulation”⁶⁴.
65. From the language of the proposed Policy Direction, it is not clear when the Commission would be required to consider the principles enumerated in it. It could be interpreted to apply only when the Commission is issuing regulations, or it could be interpreted to apply when the Commission itself performs work within an existing regulatory framework.
66. Above, we described the incumbents’ proclivity for systemic regulatory gamesmanship. From our past experience with the incumbents and the CRTC, TekSavvy is concerned that, either on its own interpretation or adopting the interpretations likely to be put forward by the incumbents, the CRTC may read the language of the proposed Policy Direction so narrowly that it only considers the enumerated principles when making regulations, and not in other decision-making processes in which the CRTC is engaged.
67. As former CRTC Chair Konrad W. von Finckenstein has pointed out, “The CRTC affects the market in many of its decisions that are not regulations.”⁶⁵ In fact, the stated objective of the proposed Policy Direction does not reference regulations at all, but rather says that “Providing this general policy direction will guide the CRTC in making decisions.”
68. Some important activities of the CRTC are neither decisions nor regulations. For example, the annual Communications Monitoring Report (CMR) provides Canadians with comprehensive data and analysis about Canada’s communications sector. The CMR is a vital public resource. Each year’s edition serves the public interest as a benchmark for Canadians to gauge the impact of CRTC policies and as a primary source of evidence to inform their participation in CRTC proceedings. However, the 2018 CMR did not follow methodological standards and practices of past CMR reports. In particular, the 2018 CMR excluded data and analysis that was included in past reports and, more concerning, the specific data that was excluded from the 2018 report is timely and relevant to ongoing

⁶³ 2006 Policy Direction, section 1.

⁶⁴ Proposed Order, section 1(a) and 1(b).

⁶⁵ von Finckenstein, Konrad W., *Memo Re: Direction to CRTC Re: Competition*, C.D.Howe Intelligence Memos, 6 March 2019.

proceedings.⁶⁶ The Policy Direction should extend beyond regulatory and decision-making to include the reporting activities of the CRTC as well, ensuring that CMR reports are transparent and objective in the future, starting with a revised 2018 report.

69. In addition, there are extensive non-regulatory CRTC processes that have a substantial impact on competition and to which the new Policy Direction should apply. For example, carriers currently enjoy a head-start advantage where they launch new services on the retail side before making the service available on the wholesale side, creating service exclusivity for as long as the process lasts, sometimes being drawn out by the incumbents themselves as in the FTTP case described above. Another example is continued use of arcane CISC committees to determine critical issues for competition despite being ripe for regulatory gaming.
70. Finally, the head of section 1 of the proposed Policy Direction already clearly states that the enumerated principles are to apply to the CRTC “in exercising its powers and performing its duties under the *Telecommunications Act*”.⁶⁷ There is concern that the phrase “when relying on regulation” that appear in sections 1(a) and 1(b) are therefore unnecessary unless they are intended, contrary to the stated objective, to narrow the application of the Policy Direction only to those activities of the CRTC that concern regulations.
71. In order to give effect to the objectives of the Policy Direction, TekSavvy therefore proposes that the head paragraph and subsection 1(a) and 1(b) of the proposed Direction be amended to read as follows:

1 In exercising its powers and performing its duties under the *Telecommunications Act*, the Commission must implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:

(a) The Commission, ~~when relying on regulation,~~ should consider how the measures used can promote competition, affordability, consumer interests, and innovation, namely the extent to which they

....

(b) The Commission, ~~when relying on regulation,~~ should demonstrate its compliance with this Order and should specify how the measures used can, as applicable, promote competition, affordability, consumer interests, and innovation.

⁶⁶ For more information, see TekSavvy’s letter to the CRTC concerning the report, February 13, 2019, <<https://teksavvy.com/Media/Default/Regulatory/TekSavvy-Letter-CRTC-CMR2018.pdf>>.

⁶⁷ Proposed Policy Direction, section 1.

72. In closing, TekSavvy strongly supports the proposed Policy Direction. It would represent a bold step toward ensuring the CRTC puts consumers first in its decisions concerning telecom in Canada. However, for it to fulfil its stated objectives, we recommend that the 2006 Policy Direction be repealed, and the new Policy Direction be made to apply to all activities of the CRTC, and not just to regulatory work.

Yours truly,

[transmitted electronically]

Andy Kaplan-Myrth
VP, Regulatory and Carrier Affairs

Encl.

cc: Kyle Mitchell, TekSavvy (KMitchell@teksavvy.ca)
Janet Lo, TekSavvy (JLo@teksavvy.ca)
Navdeep Bains, Minister of Innovation, Science, and Economic Development

Attachment: Sample email from paylesstoconnect.ca

To: Member of Parliament

CC: Pam Miller, Director General, Telecommunications and Internet Policy Branch,
ISED
Hon. Minister Navdeep Bains;
Ian Scott, Chairperson and Chief Executive Officer, CRTC

Subject: It's time for lower Internet and cell phone bills!

Dear [Member of Parliament's name],

RE: It's time for lower Internet and cell phone bills!

As a constituent in your riding, I am writing to express my frustration with the high price of internet and cell phone services, and to voice my support for the government's new Policy Direction to improve the affordability of these services for Canadians.

Canadians simply require these services to stay connected at work and at home. Yet we pay too much and have very little choice. The market is controlled by a few large companies who take advantage of us and keep prices high. The Government of Canada and the CRTC have a responsibility to protect consumers by ensuring we have real choice and affordable options. It's in the best interests of all Canadians.

The current system isn't working. The CRTC needs to better serve Canadians, and put our interests first - ahead of the large telecom companies. I want and expect the CRTC to promote competition and affordability and to be held accountable for its actions. Otherwise, we won't have any real choice and my bills will continue to eat up more and more of my household budget.

As your constituent, I am respectfully asking that you act to support the new Policy Direction and to protect consumer interests.

Thank you for hearing my concerns, I look forward to your response.

Sincerely,

[sender]