

Petition of
TekSavvy Solutions Inc.
to the Governor in Council
to vary

**Telecom Decision CRTC 2021-181, Requests to
review and vary Telecom Order 2019-288 regarding
final rates for aggregated wholesale high-speed
access services**

28 May 2021



TABLE OF CONTENTS

- a. *A Complete Reversal of the CRTC’s Own Years-Long, Evidenced-Based Review* _____ 2
- b. *Threat to Ongoing and Planned Investments* _____ 2
- c. *The Decision Openly Disregards Cabinet’s Direction* _____ 3
- d. *Far-Reaching Consequences Beyond Simply Internet Prices* _____ 4
- e. *The CRTC Chairman has Expressed his Own Unacceptable Bias for Certain Participants*
_____ 5
- f. *Meanwhile, the Incumbents Continue to Boldly Flout Competition Laws* _____ 5
- g. *The Government Must Take Action* _____ 6
- h. *Conclusion and Orders Sought* _____ 6



1. TekSavvy Solutions Inc. (TekSavvy) expresses our dismay at the Canadian Radio-television and Telecommunications Commission's (CRTC) [arbitrary decision regarding wholesale internet rates](#), and sends this petition to the Governor in Council pursuant to section 12(1) of the *Telecommunications Act*, to request your review of the recent Telecom Decision CRTC 2021-181¹ and to issue the 'Order in Council' to remedy the issue.
2. We ask that you give effect to the Minister of Innovation, Science and Industry's [mandate](#) from the Prime Minister to support consumer choice and competition and ensure quality, affordable internet and mobile access by taking the following steps:
 - a. **Correct the bias.** A CRTC chairperson should not participate in proceedings about which they have a clear bias. In this case, CRTC Chairman Scott expressed a clear bias for one type of competition and market structure. We ask that Chairman Scott be removed from his position with immediate effect or, at the very least, be required to recuse himself from decisions involving wholesale- and facilities-based competitors.
 - b. **Reinstate the 2019 Rates Order.** The 2019 Rates Order² has already been reviewed and upheld by the Federal Court of Appeal. The Supreme Court of Canada and the Cabinet similarly opted not to modify it. Yesterday's decision to completely reverse the conclusions of its comprehensive rates study is clearly not within the range of reasonable decisions. Cabinet must immediately vary 2021 Rates Decision and reinstate the CRTC's 2019 Rates Order.
 - c. **Direct incumbents to immediately remit retroactive payments.** Bell Canada, Bell MTS, Cogeco, Eastlink, Rogers, Sasktel, Shaw, TELUS and, Videotron should be required to immediately remit all retroactive payments owed under Telecom Decision CRTC 2019-288 to competitors.
 - d. **Reaffirm Phase II costing.** We ask that you reaffirm that Phase II costing is the appropriate means for determining wholesale rates.
 - e. **Direct the Commissioner of Competition to address the incumbents' anti-competitive activity.** The CRTC's decision underscores that the affordability of internet services for Canadians cannot be solved by solely relying on the CRTC to address the incumbents' actions. We ask you to direct the Commissioner of Competition to conclude its investigation into the incumbents' abuses of dominance and enforce its governing statute.
3. Due to the precarious state of the communications industry in light of this years-long process and the substantial uncertainty created by the 2021 Rates Decision, TekSavvy requests that this Petition be addressed on an expedited basis.

¹ Telecom Decision CRTC 2021-181 (the "2021 Rates Decision").

² Telecom Order CRTC 2019-288 (the "2019 Rates Order").

a. A Complete Reversal of the CRTC's Own Years-Long, Evidenced-Based Review

4. TekSavvy is Canada's largest independent internet service provider, with over 300,000 customers across Canada. We are primarily a wholesale-based competitor, meaning that the wholesale internet rates affected by this decision are the primary (and by far the largest) cost input to our business. As a result, we rely on a regulatory environment that is fair, predictable, and transparent. Unfortunately, the CRTC's recent decision is anything but fair, predictable, or transparent.
5. As you know, the CRTC's recent decision is a complete reversal of its [2019 Rates Order](#) which confirmed that the incumbent carriers systemically disregarded the CRTC's rate-setting rules and instead charged wholesale-based competitors overinflated rates – resulting in higher prices for Canadians. The 2019 Rates Order was an evidence-based rate-setting exercise—it came as the result of four years of comprehensive investigation and analysis by the CRTC. The CRTC's rigorous analysis withstood the incumbents' challenges to various bodies—the Federal Court of Appeal³, the Supreme Court of Canada⁴, and the Governor in Council⁵. The Federal Court of Appeal went so far as to characterize some of the incumbents' grounds of appeal as “dubious”⁶.
6. Despite this comprehensive analysis, including requiring market participants to provide extensive and detailed information regarding their businesses, the CRTC has now effectively said, never mind, those four years of work, all our requests for information, and the courts' work in reviewing and confirming our decision was futile.⁷ Instead, without any further assessment of the reasonableness of the rates, the CRTC would allow the incumbents to charge rates that it concluded were “not just and reasonable” just two years prior.

b. Threat to Ongoing and Planned Investments

7. Contrary to the seemingly accepted wisdom that only the large incumbents make and are making investments to build Canada's telecom infrastructure, TekSavvy has to date made substantial investments despite the anticompetitive headwinds, risk and uncertainty it faces.
8. While we are primarily a wholesale-based competitor, we do not just compete in wholesale. We have invested in fixed-wireless network access in several communities in southwestern Ontario, and were in the process of building and investing in wireless Long-Term Evolution in southwestern Ontario and a high-speed fibre broadband network in Chatham-Kent which

³ *Bell Canada v British Columbia Broadband Association*, 2020 FCA 140.

⁴ Judgment on *Bell Canada, et al. v. British Columbia Broadband Association, et al.*, SCC Court File No. 39423, issued February 25, 2021.

⁵ PC 2020-0553, Order in Council responding to petitions to the Governor in Council concerning Telecom Order CRTC 2019-288.

⁶ 2020 FCA 140, p.85.

⁷ 2021 Rates Decision, at paras 289-305.

plans to connect to over 38,000 residence and businesses in the area. In July 2020, TekSavvy was awarded a contract by the Southwestern Integrated Fibre Technology (SWIFT), a regional broadband expansion project delivered in partnership with member municipalities and the government of Ontario and Canada, to construct a FTTH network to bring high-speed internet to Delaware Nation Moravian of the Thames (Delaware Nation), a First Nation community located in Chatham-Kent. TekSavvy was also recently selected by SWIFT to construct two FTTH projects to deploy 52 kilometres of fibre-optic line to in the communities of Stoney Point and Lakeview, within the Town of Lakeshore. Representing a collective total investment of \$5.8 million, this new project will provide high-speed internet service to 1,486 households by late 2021. An additional three SWIFT projects in Chatham-Kent represent a collective total investment of over \$9.1 million, providing high-speed internet service to 1,732 households by mid-2022.

9. We also had high hopes to enter the mobile space to offer a competitive and affordable option to consumers. We had qualified for ISED's upcoming spectrum auction and were eager to participate in a competitive mobile market following the Commission's recently released regulatory policy,⁸ which required prospective new mobile entrants like TekSavvy to purchase spectrum licenses at the Tier 4 level or higher. Just as the Commission imposed substantial investment requirements for MVNOs to enter the mobile market, its complete and arbitrary reversal of the 2019 Rates Order denied prospective new entrants like TekSavvy access to capital required to undertake substantial investments in spectrum.
10. The unprecedented reversal by the CRTC forced TekSavvy to withdraw from the upcoming spectrum auction and jeopardizes TekSavvy's ongoing and previously planned \$250 million in investments in both wireline and wireless network facilities.

c. The Decision Openly Disregards Cabinet's Direction

11. The Cabinet's [2019 Order](#) to the CRTC compels it to implement the Policy Objectives of the *Telecommunications Act*—namely, promoting competition, affordability, consumer interests and innovation. The Order specifically directs the Commission to consider how its decisions can “foster affordability and lower prices, particularly when telecommunications service providers exercise market power” under subparagraph 1(a)(ii).
12. Market power is the ability to set prices above competitive levels. There is no doubt that the incumbent carriers hold and exercise market power—the CRTC itself found as much in its [2015-326 Regulatory Policy](#) and, in the mobile context, in TRP 2021-130. Their market power remains unchecked: in the [2020 price study](#) commissioned by Innovation, Science and Economic Development Canada, Wall Communications found that internet prices increased in 2020 over 2019 across all service baskets:

“The measured prices for the European countries included in the study (U.K., France, Italy and Germany) have consistently been lower than those in Canada—in some cases, by a wide margin. Relative to last year, all countries

⁸ Telecom Regulatory Policy CRTC 2021-130 (“TRP 2021-130”).

(except for Canada and Japan) have lower prices in a majority of baskets.
Canadian prices were higher in every basket.”

13. The CRTC’s 2021 Rates Decision yesterday is a linchpin in entrenching that market power. By accepting the incumbents’ rates at face value (despite previously finding them to be overinflated), it effectively allowed incumbents to determine their own prices to their competitors with little regard for the CRTC’s rate setting rules, and without any oversight from the CRTC.
14. The internet is an essential service for Canadians—now more than ever as Canadians are required to work, learn and socialize through the internet as a result of the covid-19 pandemic. Affordability of this essential service is similarly even more critical, with many Canadians experiencing job losses or wage reductions in the face of the pandemic. The CRTC’s decision to simply freeze existing wholesale rates without any attempt to follow established process to arrive at just and reasonable rates, disregarding its own years of study, will undoubtedly result in even higher internet prices for consumers. The decision openly disregards Cabinet’s direction to foster affordability and lower prices – in fact, the CRTC does not even list subparagraph 1(a)(ii), which addresses affordability and lower prices, as the part of specific subparagraphs it considers in the 2021 Rates Decision.⁹

d. Far-Reaching Consequences Beyond Simply Internet Prices

15. The CRTC’s complete reversal of its own decision has far-reaching and irreversible consequences for consumers outside of just the internet service market it directly addresses.
16. Importantly, as you will have seen in our letter to ISED withdrawing from the spectrum auction, and our [statement from yesterday](#), we have been forced to drop out of the upcoming spectrum auction and cancel our plans to enter the mobile market. This decision is not taken lightly—TekSavvy had plans to enter the mobile market and compete vigorously to provide consumers with a new competitive and affordable mobile option. TekSavvy hired staff and consultants to achieve this goal. With the unexpected decision from the CRTC to completely abandon its own rate setting role and allow unreasonable wholesale rates to continue, however, we have no other choice.
17. The CRTC’s recent decision on interim market entry for mobile carriers¹⁰ has created a system where spectrum serves a gatekeeping role to mobile entry. Spectrum auctions are infrequent and spectrum licenses are costly, meaning there are only a few viable companies who would be able to feasibly enter the new MVNO market. As a result, TekSavvy cannot possibly enter the mobile market at this time. The CRTC’s decision therefore deprives consumers not only of affordable internet prices they deserve, but of a

⁹ See 2021 Rates Decision at para 388.

¹⁰ TRP 2021-130.

new viable competitive alternative to the incumbents in the mobile market—another market in which the CRTC has [found](#) they are dominant and exercise market power.¹¹

18. The CRTC’s decision therefore blatantly undermines Minister Champagne’s [mandate](#) from the Prime Minister to “work with telecom companies and expand mobile virtual network operators (MVNO) in the market.”

e. The CRTC Chairman has Expressed his Own Unacceptable Bias for Certain Participants

19. The Cabinet’s [2019 Order](#) to the CRTC expressly directs it to “encourage all forms of competition and investment”¹². In Minister’ Champagne’s [statement](#) of yesterday, he also specifically acknowledged that wholesale broadband is a proven regulatory tool for enabling retail competition in the internet service market.
20. The statements of the current CRTC Chairman Ian Scott imply that he does not support encouraging wholesale-based competition. Instead, he has openly expressed his own personal preference for facilities-based competition. Speaking at a Canadian Club Toronto event last week, Scott that he has a “personal preference or a stronger belief in reliance on facilities-based competition” than wholesale-based competition, and specifically linked this view in part to “some of my experience in the private sector.”¹³ His experience at the private sector is of course at facilities-based companies, including as a Vice-President at TELUS (one of the parties in the wholesale rates proceeding). Scott then openly stated that there is less certainty about whether service-based competition will always be sustainable. Certainly, it will not be sustainable if the chair of the regulatory body charged with setting the rates for this type of competition is openly biased against it.
21. Canadians expect decision-makers of any bodies to remain impartial. The need to avoid giving a reasonable apprehension of bias is a long-standing legal standard for decision-makers in our legal system. Meanwhile, Ian Scott has expressed his bias for facilities-based competitors. Service-based competitors cannot have any confidence in our regulatory system where the chair of their regulatory body openly expresses a preference for their competitors.

f. Meanwhile, the Incumbents Continue to Boldly Flout Competition Laws

22. TekSavvy’s [February 2020 complaint to the Commissioner of Competition](#) (“Complaint”) details how the Incumbents’ wholesale rate manipulation results in higher retail prices for internet services in Canada’s largest markets—costing millions of Canadians hundreds of millions of dollars. In particular, the Complaint spells out in clear and unambiguous terms

¹¹ TRP 2021-130.

¹² *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227, 17 June 2019 [“GIC Order”].

¹³ See Canadian Club Toronto, “[Times of Change: More Competition, More Choice and More Affordable Communications Services](#)”, at 18:08.

how Bell and Rogers' wholesale divisions drove up competitors' costs, while Bell and Rogers' retail divisions target those competitors with "fighting brand" retail prices below their wholesale costs—which Bell and Rogers wrongfully inflated.

23. That Complaint is substantiated by ample, uncontradicted evidence establishing the clear relationship between incumbents' anti-competitive conduct and the impact of that conduct on TekSavvy. It is further substantiated by "very disturbing" findings of fact by the CRTC itself, which determined that Bell and Rogers together deviated from its wholesale rate-setting rules 56 times between 2016 and 2019, systematically inflating rates for retail competitors of Bell and Rogers.
24. As you know, margin squeezing behaviour is a specific example of abuse of dominance provided in the *Competition Act*. We have called for the Competition Bureau to investigate this anti-competitive behaviour, but it has so far made no definitive findings.

g. The Government Must Take Action

25. The CRTC's disregard for both its own direction from Cabinet, as well as Minister Champagne's mandate from the Prime Minister, makes it clear that the CRTC actively undermined your government's agenda and your promises to Canadians. It has ignored Cabinet's directions to it and has placed the interests of large incumbent telecommunications providers above the interests of Canadians.

h. Conclusion and Orders Sought

26. In light of the urgent considerations noted above, we request that the Governor in Council:
- a. Vary Telecom Decision CRTC 2021-81, so that the final rates set out in Telecom Order CRTC 2019-288 are set as the final rates for wholesale access rates.
 - b. Direct Bell Canada, Bell MTS, Cogeco, Eastlink, Rogers, Sasktel, Shaw, TELUS and, Videotron to immediately remit all retroactive payments required as a result of Telecom Decision CRTC 2019-288 to competitors.
 - c. Reaffirm Phase II costing as the appropriate means to determine wholesale rates.
 - d. Remove Chairman Mr. Ian Scott as chair of the CRTC, or, at the very least, amend Mr. Ian Scott's appointment by the GIC to prevent Mr. Ian Scott from participating in any Telecom proceedings involving wholesale services, as a result of his own stated bias.
 - e. Direct the Commissioner of Competition to address the incumbents' anti-competitive activity.

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