



Telecom Decision CRTC 2018-44

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Canadian Network Operators Consortium Inc. – Application for transitional access to incumbent carriers’ fibre-to-the-premises facilities through aggregated wholesale high-speed access services

*The Commission **denies** an application by the Canadian Network Operators Consortium Inc. for transitional access to the incumbent local exchange carriers’ and incumbent cable carriers’ fibre-to-the-premises facilities through aggregated wholesale high-speed access services. The Commission considers that maintaining the current approach to wholesale wireline services will better support retail competition and encourage continued investments in fibre-to-the-premises facilities.*

Application

1. The Commission received an application from the Canadian Network Operators Consortium Inc. (CNOC), dated 30 March 2017, in which CNOC requested transitional access over the large incumbent local exchange carriers’ (ILECs)¹ and the large incumbent cable carriers’² (collectively, the incumbents) fibre-to-the-premises (FTTP)³ facilities through aggregated wholesale high-speed access (HSA) services (aggregated HSA).
2. CNOC submitted that it was making this request to address what it referred to as “wholesale HSA service gaps” (service gaps). It argued that service gaps prevent competitors from offering their own retail Internet access services and will impede their transition to disaggregated wholesale HSA services (disaggregated HSA).

¹ CNOC identified the large ILECs as Bell Canada (including Bell Aliant Regional Communications, Limited Partnership and Bell MTS), Saskatchewan Telecommunications, and TELUS Communications Company (TCC). In this proceeding, submissions were received from TCC. However, effective 1 October 2017, TCC’s assets were legally transferred to TELUS Communications Inc. and TCC ceased to exist.

² CNOC identified the large incumbent cable carriers as Bragg Communications Incorporated, carrying on business as Eastlink; Cogeco Communications Inc.; Quebecor Media Inc., on behalf of Videotron G.P.; Rogers Communications Canada Inc.; and Shaw Cablesystems G.P. In this proceeding, submissions were received from Videotron G.P. However, effective 29 December 2017, all of Videotron G.P.’s assets and operations were transferred to its affiliate, Videotron Ltd., and Videotron G.P. was subsequently dissolved.

³ “FTTP” refers to fibre access facilities that extend from a cable carrier’s head-end or an ILEC’s central office to an end-user’s premises.

3. The Commission received interventions regarding CNOC's application from Bell Canada; Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); the British Columbia Broadband Association (BCBA); Cogeco Communications Inc. (Cogeco); the Public Interest Advocacy Centre (PIAC); Quebecor Media Inc., on behalf of Videotron G.P. (Videotron); Rogers Communications Canada Inc. (RCCI); Shaw Cablesystems G.P. (Shaw); TELUS Communications Company (TCC); and several hundred individual Canadians.

Background

4. Through various decisions, the Commission has mandated the incumbents to provide wholesale access to certain network facilities to increase competition in the retail telecommunications services market. The Commission's recent measures include improving competition in the retail Internet access services market by mandating the incumbents to provide wholesale HSA services.
5. Currently, aggregated HSA is the primary Commission-mandated wholesale service through which competitor Internet service providers (ISPs) [competitors] offer services such as retail Internet access, voice over Internet Protocol (VoIP), and Internet Protocol television (IPTV) services. Aggregated HSA provides competitors with (i) an access component (i.e. service access to end-users) through a large incumbent cable carrier's "last-mile" hybrid-fibre coaxial (HFC) cable or through a large ILEC's last-mile digital subscriber line (DSL) over copper or a combination of fibre-to-the-node (FTTN) and DSL, and (ii) a backhaul transport component, which transmits end-user data to a regional or provincial interconnection point (the interface component).

The wholesale wireline decision

6. In Telecom Regulatory Policy 2015-326 (the wholesale wireline decision), the Commission determined that the incumbents' wholesale HSA access facilities, including FTTP facilities, met the criteria of the Essentiality Test.⁴ The Commission therefore determined that, to safeguard and enhance competition in the retail Internet access services market, the incumbents should provide competitors with access to these facilities. However, the Commission also determined that the transport facilities that the incumbents use to provide aggregated HSA were duplicable and, therefore, did not satisfy the Essentiality Test.

⁴ The Essentiality Test consists of three components that are used to determine whether a facility is essential: (i) the facility is required as an input by competitors to provide telecommunications services in a relevant downstream market (the input component), (ii) the facility is controlled by a firm that possesses upstream market power such that denying (or withdrawing) access to the facility would likely result in a substantial lessening or prevention of competition in the relevant downstream market (the competition component), and (iii) it is not practical or feasible for competitors to duplicate the functionality of the facility (the duplicability component).

7. As a result of these findings, the Commission established a framework to migrate from the mandated provisioning of aggregated HSA to the mandated provisioning of disaggregated HSA, which does not provide the transport component. The Commission's intent was to promote facilities-based competition by requiring competitors to self-supply or lease transport facilities, which would enable them to offer more competitive and innovative services because they would have more control over their cost structures.
8. To accomplish this transition, the Commission established a number of regulatory measures by way of a transition and implementation plan. These measures included (i) limiting mandated access to FTTP facilities through the new disaggregated HSA services, and (ii) adopting a maximum download speed threshold of 100 megabits per second (Mbps) with respect to the existing aggregated HSA services once final rates for disaggregated HSA have been approved.
9. As part of the first stage of the implementation plan, the Commission mandated Bell Canada, Cogeco, RCCI, and Videotron to introduce disaggregated HSA in their Ontario and Quebec incumbent operating territories, with the rollout of disaggregated HSA in other markets to be determined at a later stage. The Commission later issued Telecom Order [2017-312](#), in which it established interim rates, terms, and conditions for disaggregated HSA in Ontario and Quebec.

The Bayview Mills decision

10. In Telecom Decision 2016-446 (the Bayview Mills decision), the Commission directed RCCI to provide competitors with access to its FTTP access facilities through its aggregated HSA, at FTTN rates, in the Bayview Mills Condominium Townhouse community (the Bayview Mills complex). After deploying FTTP facilities in the Bayview Mills complex, RCCI removed its existing coaxial cable facilities, which were being accessed by TekSavvy Solutions Inc. (TekSavvy) through aggregated HSA. The Commission found that, by removing its coaxial access facilities in the complex and preventing competitors from accessing new end-users through aggregated HSA provisioned over FTTP, RCCI would be conferring upon itself an undue preference and subjecting competitors to an undue disadvantage until RCCI had an approved disaggregated HSA service. The Commission also noted that this would undermine competitors' ability to attain sufficient end-user demand to migrate to disaggregated HSA.
11. In the Bayview Mills decision, the Commission found that the wholesale wireline decision did not address situations in which an incumbent removes existing copper or coaxial cable access facilities when it upgrades to FTTP facilities, because the incumbents generally assured the Commission during the associated proceeding that they did not intend to do so. However, the Bayview Mills decision did not set out general regulatory obligations to be applied in situations where an incumbent removed copper or coaxial facilities. Instead, the Commission stated that these situations would be addressed on a case-by-case basis.

Issues

12. The Commission has identified the following issues to be addressed in this decision:

- Should CNOC's application be treated as a review and vary application or as a new application?
- Does the record of this proceeding provide evidence of harm? If so, what is the extent of the harm?
- Is the requested relief appropriate?

Should CNOC's application be treated as a review and vary application or as a new application?

Positions of parties

13. Bell Canada, Cogeco, and RCCI argued that CNOC's application constituted a review and vary application rather than a new application, given that CNOC was seeking to reverse the determination that FTTP would be accessible only through disaggregated HSA. RCCI argued that CNOC's application should be dismissed since it was submitted after the deadline for filing a review and vary application.⁵ Bell Canada and RCCI argued that even if CNOC had filed a review and vary application in accordance with the applicable procedures, the application would still not meet the criteria for the Commission to review and vary a decision⁶ because CNOC did not demonstrate that there is substantial doubt as to the correctness of the wholesale wireline decision.

14. CNOC did not agree that its application constituted a review and vary application. CNOC referred to service gaps, arguing that they are contrary to the Commission's intentions set out in paragraph 143 of the wholesale wireline decision, which states that the plan to transition to disaggregated HSA "will serve to ensure that wholesale access to the access facilities required to provision downstream retail services is always provided for." CNOC argued that the Commission's intent was not to allow for widespread service gaps to proliferate for years, which undermines competitors' ability to develop the number of retail service subscribers necessary to justify the investment required to migrate to disaggregated HSA.

⁵ According to section 71 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, the time frame to submit a review and vary application is 90 days from the date of a decision, although the Commission may extend the deadline if it is of the opinion that it is just and equitable to do so.

⁶ According to these criteria, which are set out in Telecom Information Bulletin 2011-214, the applicant must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances of facts since the decision, (iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision.

15. Bell Canada, RCCI, and TCC submitted that CNOC misunderstood paragraph 143 of the wholesale wireline decision or took the paragraph out of context. Bell Canada submitted that the uninterrupted access that CNOC referred to was to be provided as part of the transition from aggregated to disaggregated HSA in a given location. More specifically, where aggregated HSA was available, it would not be phased out before the disaggregated HSA was made available.
16. CNOC submitted that, in the alternative, if the Commission does consider its application as a review and vary request, the application would still meet the criteria because there has been a fundamental change in circumstances since the issuance of the wholesale wireline decision due to a combination of (i) the development of increasingly large and prevalent service gaps; (ii) the economic harm to competition, competitors, and consumers flowing from these service gaps; and (iii) the procedural delays related to the implementation of disaggregated HSA. CNOC further submitted that, even if the Commission considers its application to be a review and vary application, the fundamental change in circumstances could not have arisen within the 90-day limit to file a review and vary application.

Commission's analysis and determinations

Paragraph 143 of the wholesale wireline decision

17. The Commission considers CNOC's interpretation of the meaning and effects of paragraph 143 of the wholesale wireline decision to be erroneous. The plan discussed therein deals with the transition from an aggregated HSA model to a disaggregated HSA model. The transition and implementation plan was meant to accomplish a number of goals:
- mitigate investment and innovation concerns associated with the change in service model by providing competitors with sufficient time to make the necessary investments or commercial arrangements to obtain transport facilities;
 - ensure that concerned parties have sufficient time to make informed submissions with respect to the proper configuration of the services in a given incumbent's network and to the rates that apply to the services;
 - ensure that the Commission has sufficient time to properly assess the submissions and establish appropriate rates, terms, and conditions for the services;
 - enable the market for disaggregated HSA to develop by establishing a demand-based implementation regime; and
 - establish regulatory measures to encourage competitors to migrate to disaggregated HSA.

18. In other words, rather than mandating access to aggregated HSA in perpetuity or ensuring that all access facilities would be subject to wholesale access while disaggregated HSA is being implemented, the Commission's intent was to limit disruption in the wholesale services market and provide time for competitors to build or lease transport facilities to gradually expand the network facilities available over disaggregated HSA.⁷
19. The Commission considered service gaps over aggregated HSA when it made its determinations, and expected these gaps to continue during the transition phase.⁸
20. By stating that "wholesale access to the access facilities required to provision downstream retail services is always provided for," the Commission was stating that where access within a given market was to be provided by way of mandated aggregated HSA, aggregated HSA would remain available in that market until disaggregated HSA (with rates approved on a final basis) was established and subscribed to. Even then, aggregated HSA would continue to be made available during the course of a determined phase-out period.
21. Furthermore, a delay in access to FTTP facilities was inevitable given that the wholesale wireline decision called for a follow-up implementation proceeding to consider configurations, costs, and demand for disaggregated HSA, and to consider how FTTP access would be integrated into the services. However, disaggregated HSA is now available pursuant to interim tariffs, and a review of final tariffs is in progress.

Classification of CNOC's application

22. Having regard to the time that has elapsed since the issuance of the wholesale wireline decision, and considering that any remedial measures provided would be prospective in nature, the Commission considers that it would be appropriate to consider whether the decision not to mandate access to FTTP facilities through aggregated HSA remains correct on an ongoing basis.
23. In light of the above, the Commission determines that it will treat CNOC's application as a new application.

Does the record of this proceeding provide evidence of harm? If so, what is the extent of this harm?

Positions of parties

24. CNOC submitted that it was requesting transitional access to the incumbents' FTTP facilities through aggregated HSA to mitigate the harm resulting from service gaps. CNOC submitted that service gaps exist throughout Canada wherever an incumbent

⁷ See paragraph 150 of the wholesale wireline decision.

⁸ In paragraph 99 of the wholesale wireline decision, the Commission noted that CNOC had raised the issue of service gaps.

has deployed FTTP facilities, but does not have any other wireline facilities capable of providing retail high-speed Internet access service.⁹

25. CNOC described three conditions under which such service gaps occur:

- brownfield¹⁰ FTTP deployments by an incumbent where the only wireline facilities available from the incumbent to provide wholesale HSA services are incapable of providing Internet access service download speeds in excess of 6 to 7 Mbps,
- brownfield FTTP deployments by an incumbent in areas where the incumbent has removed all of its previously existing wireline facilities over which wholesale HSA services could be provided, and
- greenfield¹¹ FTTP deployments by an incumbent in areas where the incumbent has deployed only FTTP access facilities over which wholesale HSA services cannot be provided.

26. CNOC argued that these gaps are caused by a combination of changing market circumstances and the length of the ongoing and delayed process to implement disaggregated HSA. More broadly, CNOC asserted that these gaps are rooted in the Commission's determination in the wholesale wireline decision to limit mandated competitor access to incumbent FTTP facilities to access that is provided through disaggregated HSA.

27. CNOC argued that service gaps are becoming increasingly large and prevalent. As a result, both urban and suburban residential and business consumers located where these service gaps exist are deprived of benefits resulting from competition and suffer the greatest harm. CNOC submitted that there has been a disproportionate increase in FTTP residential lines relative to FTTN and non-fibre access facilities, noting that the Commission's 2014 *Communications Monitoring Report* (CMR) stated that 2.9% of residential lines used FTTP, while the 2016 CMR reported this number at 8.9%. CNOC also provided a lists of several hundred "fibre-only" locations that its members alleged constitute service gaps.

28. CNOC also provided examples of locations where it believed that Bell Canada and TCC had removed their copper facilities during the deployment of their FTTP facilities.

29. The BCBA submitted that it was also concerned with the service gaps occurring throughout Canada. It argued that without expedited relief, there would be irreparable

⁹ CNOC submitted that high-speed Internet access service would include a combination of copper and fibre facilities, and that access services that can reach speeds of 6 to 7 Mbps at the most would not qualify as high speed.

¹⁰ "Brownfield" refers to already constructed or established residential, business, or industrial locations that have existing wireline telecommunications facilities.

¹¹ "Greenfield" refers to newly constructed locations, such as a new housing development.

harm to competitors, competition, and consumers. Furthermore, because the implementation of disaggregated HSA in western Canada will lag the implementation in eastern Canada, the resulting harm will be more severe in western Canada.

30. The BCBA also submitted that its members had reported significant customer attrition in the months prior to the submission of its intervention due to their inability to access incumbent FTTP facilities, and that competitors may not be able to overcome the adverse demand conditions created when incumbents acquire and lock in customers for years with fixed-term service agreements.
31. OpenMedia was concerned with the current situation with respect to wholesale HSA services. It argued that incumbents continue to have a head start as exclusive providers of services over FTTP, thereby preventing competition.
32. Bell Canada, Cogeco, and TCC questioned CNOC's allegation of competitive harm. Bell Canada cited the 2016 CMR, noting that alternative service providers were responsible for 51% of all new Internet subscribers in 2015 and that their subscriber growth was significantly higher than that of the incumbents between 2011 and 2015.

Service gaps in specific incumbent networks

33. The incumbents generally submitted that (i) CNOC provided insufficient evidence to demonstrate that service gaps were occurring to any significant extent, and (ii) the Commission had already considered service gaps in making its determinations in the wholesale wireline decision, and there has not been any unexpected growth in service gaps due to FTTP deployment.
34. Bell Canada submitted that there has been no unexpected growth in service gaps on its network in its incumbent operating territories, noting that the number of homes it passed with FTTP at the end of 2016 was in line with the forecasts it submitted during the Commission's wholesale wireline proceeding. Furthermore, it submitted that households in FTTP greenfields account for only about 4% of households in its incumbent operating territories.
35. Bell Canada also submitted that it does not have plans to remove copper facilities when it deploys FTTP facilities, so this type of service gap does not apply to it. With respect to CNOC's examples, Bell Canada submitted that it had not removed copper at those locations, and provided evidence demonstrating that CNOC's information was erroneous. In addition, in nearly 98% of cases where Bell Canada deploys FTTP facilities, it does so where there are existing cable facilities, which offer wholesale HSA services with speeds exceeding 100 Mbps to competitors.
36. Eastlink and Videotron submitted that they have not deployed FTTP facilities in any of their serving areas. Therefore, service gaps would not apply to them.
37. RCCI submitted that the increase in FTTP households is due only to new housing construction and the associated need to expand its network. RCCI also submitted that it rarely replaces coaxial cable with FTTP facilities.

38. TCC submitted that it has never deployed or removed access facilities at the locations that CNOC identified in Alberta and British Columbia. Regarding its incumbent operating territory in Quebec where it has deployed FTTP but does not have FTTN speeds available for wholesale use, TCC noted that aggregated HSA was made available through legacy speeds in 2006, but that no competitors have leased it.
39. Bell Canada and RCCI submitted that CNOC's application ignores the presence of corresponding cable carrier coaxial facilities, which RCCI indicated can attain the same speeds as an ILEC's FTTP facilities and are accessible to competitors. As such, service gaps only potentially exist in limited locations where cable carrier facilities are unavailable.
40. In response to the incumbents' submissions indicating that there was a lack of evidence to demonstrate the existence of widespread service gaps, CNOC argued that competitors face obstacles in identifying and tracking service gaps, since incumbents usually do not provide reasons why specific addresses do not qualify for wholesale HSA services.
41. In reply to Bell Canada's submission about the small number of households in FTTP greenfield areas, CNOC submitted that although greenfield areas make up a small proportion of an incumbent's operating territory, the number of end-users is not insignificant; based on the submission, 116,000 households in Atlantic Canada, Ontario, and Quebec are in a Bell Canada FTTP greenfield area.
42. Regarding Bell Canada's and RCCI's submissions about corresponding cable carrier coaxial facilities, CNOC replied that most of its members do not make simultaneous use of both ILEC and cable carrier wholesale HSA services. It submitted that there are barriers to switching between wholesale service providers. CNOC also cited Bell Canada's offering of Point-to-Point Protocol over Ethernet with its wholesale HSA service as an example of an advantage for competitors' business customers that would not be available over a cable carrier's wholesale HSA service.

Commission's analysis and determinations

43. The evidence on the record of this proceeding is limited to several hundred locations that may or may not be served exclusively by FTTP. Some of the alleged service gap locations contained incomplete addresses, rendering it difficult or impossible for the incumbents to substantiate their serviceability. Based on the incumbents' responses, the majority of these locations were greenfield FTTP deployments where the corresponding incumbent did not provide other facilities available for aggregated HSA. A smaller proportion were brownfield FTTP deployments where the corresponding incumbent was alleged to have removed its copper or coaxial facilities or offered aggregated HSA over access facilities incapable of providing high-speed Internet access, as defined by CNOC.
44. Below, the Commission has divided its analysis of service gaps into the three types of gaps identified by CNOC.

Service gaps in brownfield locations where copper or coaxial facilities have been removed

45. The record does not provide clear evidence to show that there are service gaps in brownfield locations where copper or coaxial facilities have been removed following the deployment of FTTP facilities. First, no incumbent has a policy of removing copper or coaxial facilities once FTTP facilities have been deployed. Second, as the incumbents' submissions indicate, apart from the Bayview Mills example, there is no clear evidence that any incumbent has removed copper or coaxial facilities after deploying FTTP facilities. The incumbents' submissions generally confirm that the examples in which CNOC alleged instances of access facility removal where FTTP has been deployed correspond with one of the following situations:

- existing copper or coaxial facilities are available through aggregated HSA from the relevant incumbent,
- copper or coaxial facilities were never deployed in the first place (greenfield location),
- the location cannot be served by the cited incumbent,
- the location was misidentified by an incumbent's qualifying tool, or
- an existing building was rebuilt (greenfield location).

46. There could be isolated cases where competition has been impeded due to an incumbent removing existing copper or coaxial facilities. This could occur for a number of reasons, such as capacity limitations at a particular location or requests for removal of copper or coaxial facilities from buildings or communities where FTTP facilities have been deployed.

47. Nonetheless, even without clear evidence, the Commission considers that the Bayview Mills decision provides guidance. However, the Commission clarifies that depriving competitors of access to FTTP facilities in situations involving the removal of existing facilities to which mandated access on an aggregated basis was provided for may constitute a violation of subsection 27(2) of the *Telecommunications Act*. While there is no evidence to substantiate this finding with the examples provided, the Commission intends to address such situations on a case-by-case basis, as required.

Service gaps in brownfield locations where high-speed Internet access facilities are unavailable

48. A service gap in this type of situation, as described by CNOC, would exist in areas where an ILEC did not upgrade its copper facilities to FTTN facilities prior to deploying FTTP facilities, leaving the competitor with only copper facilities from the central office to the customer premises that are not capable of offering retail Internet access service at speeds of up to 6 to 7 Mbps.

49. Cable carriers, however, rarely upgrade from existing coaxial to FTTP facilities since coaxial facilities can provide speeds in excess of 1 gigabit per second (Gbps).

Therefore, a service gap resulting from a brownfield FTTP deployment where access facilities capable of offering retail Internet access speeds of up to 6 to 7 Mbps are available through aggregated HSA would most likely only occur with respect to ILECs. This is because competing with existing and near-ubiquitous cable carrier coaxial facilities remains a primary motivation for ILECs to deploy FTTP facilities. Consequently, the competitive harm from this type of service gap would generally be reduced because the places where ILECs have already deployed, or are most likely to deploy, FTTP facilities in brownfield locations are those most likely to be served by coaxial facilities capable of supporting aggregated HSA at much higher speeds.

50. However, as CNOC submitted, most of its members do not purchase aggregated HSA from both the ILEC and incumbent cable carrier in a given territory, and there would be costs to switching to or adding another wholesale service provider. This means that competitors' end-users may also have to bear the costs of switching modems or subscribing to a service that does not meet their usage preferences if they are obligated to migrate to services provisioned over another type of access facility. Nonetheless, many of the largest competitors purchase wholesale services from both cable carriers and ILECs in a given territory.¹² Therefore, in locations where this type of service gap exists, end-users will generally have access to a variety of substitutable competitor services with comparable speeds using cable carriers' coaxial facilities.
51. The Commission also considers that the approval of interim tariffs for disaggregated HSA in Ontario and Quebec ensures that competitors will be able to access the incumbents' FTTP facilities in brownfield locations,¹³ and expects the next stage of disaggregated HSA implementation to be initiated shortly.

Greenfield locations

52. Given that the Commission chose not to mandate incumbents to provide wholesale access to their FTTP facilities through aggregated HSA in greenfield locations (a matter that was discussed and considered during the Commission's review of wholesale wireline services), there has been no lessening of competition arising from these types of service gaps. In these locations, there was never any wholesale-based retail competition to begin with, although competitive alternatives over FTTP would generally be limited to one or two incumbents. The Commission understood that not mandating access to incumbent FTTP facilities through aggregated HSA would prolong service gaps in various greenfield locations during the transition to disaggregated HSA.
53. Network deployment trends also suggest that, in many greenfield locations, end-users will still be able to access competitor services through cable carriers' coaxial facilities. As of the end of 2016, the cable carriers had passed over 13 million homes

¹² For example, Distributel Communications Limited, Execulink Telecom Inc., and TekSavvy.

¹³ With the interim rates released, competitors can now request disaggregated HSA from Bell Canada, Cogeco, RCCI, and Videotron in Ontario and Quebec. Upon receiving a request, incumbents will have three months to implement disaggregated HSA.

with coaxial cable facilities, but only 150,000 homes with FTTP facilities, compared to almost 3.5 million homes passed by ILECs' FTTP facilities. Therefore, competitors will have near-ubiquitous access to a cable carrier's aggregated HSA in greenfield locations where ILECs have deployed only FTTP facilities, and a cable carrier has deployed coaxial facilities.

54. With respect to competitive impacts, as with brownfield service gaps, the approval of interim tariffs for disaggregated HSA in Ontario and Quebec enables competitors to have access to incumbents' greenfield FTTP facilities.

Conclusion

55. In light of all the above, the Commission finds that the evidence on the record of this proceeding does not demonstrate significant harm to competitors or competition.

Is CNOC's requested relief appropriate?

Positions of parties

CNOC's proposal

56. To eliminate service gaps and ensure that the transition to disaggregated HSA unfolds in accordance with the Commission's intentions, CNOC requested that the Commission grant competitors transitional access to the incumbents' FTTP facilities through aggregated HSA.
57. CNOC indicated that its request would apply to end-user locations where an incumbent offers retail Internet access services over FTTP but not wholesale HSA services to competitors capable of providing Internet speeds greater than 6 to 7 Mbps. Under CNOC's proposal, competitors would have access to the incumbents' FTTP facilities at speeds and rates available through aggregated HSA, including download speeds in excess of the 100-Mbps threshold currently set to apply to aggregated HSA once the final rates for disaggregated HSA are in effect for a given incumbent's territory.¹⁴ Lastly, this transitional regime would apply until (i) disaggregated HSA is available at an ILEC central office or a cable carrier head-end capable of serving a service gap, and (ii) a three-year phase-out period has elapsed.
58. CNOC argued that its proposal is necessary because disaggregated HSA is far from being implemented in Ontario and Quebec, and the process for implementing it elsewhere in Canada has yet to begin.

¹⁴ Competitors with end-users who subscribe to packages with speeds that exceed the 100-Mbps threshold when final rates are approved will be grandfathered. End-users will be allowed to maintain their plans above the threshold until the three-year phase-out period has elapsed upon the release of final disaggregated HSA rates in a given region.

59. Further, CNOC submitted that rather than dealing with specific service gaps on an ad hoc basis via Part 1 applications, it would be more appropriate to have a general rule to avoid lengthy delays and the use of limited resources.
60. OpenMedia submitted that CNOC's proposed relief would ensure that Canadians do not bear the cost of delays associated with the implementation of disaggregated HSA.
61. PIAC generally supported CNOC's requested relief, submitting that transitional access would lower the cost of retail Internet access services and promote consumer choice.
62. The incumbents submitted that CNOC's proposal should be rejected, generally citing one or more of the following reasons:
- access to FTTP facilities at rates applicable to FTTN would not be just and reasonable;
 - implementing the services would be costly and complex;
 - transitional access would remove the incentive to obtain access to FTTP facilities by migrating to disaggregated HSA;
 - the Bayview Mills decision indicates how service gaps will be addressed in cases where access facilities have been removed;
 - disaggregated HSA will soon be available in Ontario and Quebec, thereby ensuring that competitors can access FTTP facilities; and
 - transitional access would be inconsistent with the Policy Direction.¹⁵
63. RCCI submitted that CNOC's request for wholesale access to FTTP facilities at FTTN rates does not properly account for the additional cost and risk of deploying FTTP. Bell Canada submitted that applying its current rates for aggregated wholesale HSA services to FTTP access would result in rates that may not be compensatory, nor just and reasonable, due to the differences in the costs between FTTN and FTTP facilities, as well as the cost to implement CNOC's proposal.
64. Some incumbents submitted that allowing competitors to access FTTP facilities through aggregated HSA would discourage them from transitioning to disaggregated HSA, a key consideration informing the wholesale HSA regime adopted in the wholesale wireline decision.
65. Some incumbents questioned the timing of CNOC's request. RCCI submitted that the incumbents, competitors, and Commission were well aware that it would take considerable time to transition to disaggregated HSA, and that the timelines are on track, as demonstrated by the timelines set out in the Commission's three-year plans released in 2016 and 2017. Shaw submitted that it would be inappropriate to grant the

¹⁵ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

relief requested by CNOC when a Commission determination on disaggregated HSA tariffs is in its final stages. Shaw also noted that the Commission is currently assessing the expansion of disaggregated HSA outside Ontario and Quebec.

66. Cogeco, SaskTel, and TCC submitted that the Commission already established a general rule for instances where an incumbent has removed access facilities through its determinations in the Bayview Mills decision. Cogeco submitted that its current practice is to provide aggregated wholesale HSA services over both DOCSIS [Data Over Cable Service Interface Specification]-HFC and over DOCSIS-RFoG [radio frequency over glass]/FTTP facilities at the same speeds and rates approved in its third-party Internet access tariff until the Commission approves the disaggregated HSA tariff on a final basis.
67. With respect to assertions that the proposed relief would remove incentives for competitors to migrate to disaggregated HSA, CNOC submitted that incentives would remain, such as greater control of costs and the ability of early adopters to sell excess transport capacity to other competitors.
68. CNOC also submitted that if the Commission determines that the Bayview Mills decision rate-setting precedent (wholesale FTTP access provided at FTTN rates) is not appropriate, a retail-minus approach¹⁶ to rate setting is the only appropriate alternative.

Commission's analysis and determinations

69. Given the evidence of harm already considered, the Commission does not find CNOC's proposal to be appropriate.
70. Moreover, the Commission considers that implementation of CNOC's proposal, regardless of the rate-setting approach adopted, would undermine the determinations set out in the wholesale wireline decision by removing a key incentive for competitors to migrate to disaggregated HSA.
71. The Commission is of the view that, alongside having more control over the costs of backhaul transport, access to new end-users in FTTP-only locations helps justify the risks for competitors to invest in transport facilities and interconnection at central offices and head-ends. The Commission considers that, if it were to adopt CNOC's proposal, many competitors would opt to remain on aggregated HSA as long as possible, thereby limiting investment in transport networks and discouraging facilities-based competition. Therefore, implementing CNOC's request – even if a speed cap or a different rate model were imposed – would undermine the transition to disaggregated HSA before it has begun.

¹⁶ CNOC submitted that under this approach, rates for transitional FTTP access would be calculated based on at least a 35% discount from an incumbent's lowest retail FTTP Internet service rates.

72. The Commission notes that, by establishing interim rates for disaggregated HSA in Ontario and Quebec in Telecom Order 2017-312, the Commission has partially addressed CNOC's concern that the tariff process was delayed. More importantly, competitors are provided with a path to accessing incumbent FTTP facilities in applicable markets, which will lessen much of the potential long-term competitive harm that could otherwise occur.
73. Accordingly, the Commission considers that adopting CNOC's proposal is not necessary because there have been limited impacts on competitors' ability to compete in the retail market, and adoption would undermine the transition to disaggregated HSA.

Conclusion

74. In light of the above, the Commission **denies** CNOC's application.

Secretary General

Related documents

- *Interim rates for disaggregated wholesale high-speed access services in Ontario and Quebec*, Telecom Order CRTC 2017-312, 29 August 2017; as amended by Telecom Order CRTC 2017-312-1, 12 September 2017
- *TekSavvy Solutions Inc. – Application regarding transitional access to aggregated wholesale high-speed access service*, Telecom Decision CRTC 2016-446, 9 November 2016
- *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
- *The Canadian Network Operators Consortium Inc. – Application for relief regarding the pricing and availability of Eastlink's higher-speed retail Internet service for resale*, Telecom Decision CRTC 2016-67, 24 February 2016
- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015; as amended by Telecom Regulatory Policy CRTC 2015-326-1, 9 October 2015
- *Interim rates for wholesale residential and business high-speed access services*, Telecom Order CRTC 2011-377, 15 June 2011
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011