



Telecom Decision CRTC 2023-54

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Competitive Network Operators of Canada – Request for temporary access to fibre-to-the-premises facilities

Summary

The Commission **denies** the Competitive Network Operators of Canada's (CNOOC) application for an order requiring the large incumbent local exchange carriers and the large incumbent cable carriers to provide for the resale of all the retail Internet services they provide over their fibre-to-the-premises (FTTP) facilities on a wholesale basis.

The Commission considers that the record associated with this proceeding is wanting and is further concerned that CNOOC's request suffers from a number of drawbacks. The Commission nevertheless recognizes that since it received the application there have been developments in both the marketplace and the regulatory environment which are cause for concern. These concerns are such that the Commission is initiating, by way of Telecom Notice of Consultation 2023-56, a proceeding to review the Commission's wholesale HSA framework. As part of that consultation, the Commission has established an expedited process to assess whether temporary wholesale access to FTTP facilities on an aggregated high-speed access platform should be mandated, pending the outcome of the broader proceeding. The Commission considers this the most expeditious means of ensuring that the wholesale framework is responsive to the needs of consumers.

Application

1. The Commission received an application from the Competitive Network Operators of Canada (CNOOC), dated 8 January 2021. In that application, CNOOC sought an order requiring the large incumbent local exchange carriers (ILECs)¹ and the large incumbent cable carriers² (collectively, the incumbent carriers) to provide for the

¹ CNOOC identified Bell Canada (including Bell Aliant Regional Communications, Limited Partnership and Bell MTS), Saskatchewan Telecommunications, and TELUS Communications Inc. as being large ILECs.

² CNOOC identified 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. as being the large incumbent cable carriers. 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. Submissions were received in this proceeding from Quebecor Media Inc., on behalf of Videotron Ltd.

resale of all the retail Internet services they provide over their fibre-to-the-premises (FTTP) facilities at regulated rates. It requested that this order remain in effect until the Commission makes its determinations in the proceeding initiated by Telecom Notice of Consultation 2020-187, in subsequent tariff proceedings, and in various other proceedings related to the wholesale high-speed access (HSA) service regulatory framework.

2. CNOC submitted that various open proceedings related to FTTP facilities demonstrate that there are no workable disaggregated wholesale HSA service configurations available anywhere in Canada. It added that if such configurations were to become available, it could take years to finalize the rates, terms, and conditions for the provision of viable disaggregated wholesale HSA services. CNOC argued that the ILECs are rapidly rolling out their FTTP facilities and that as this occurs, greater portions of the retail broadband Internet service market are not accessible by competitors due to the lack of a corresponding wholesale HSA service market.
3. The Commission received interventions regarding CNOC's application from Allstream Business Inc. (Allstream); Bell Canada; Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); Cogeco Communications Inc., on behalf of its subsidiary Cogeco Connexion Inc. (Cogeco); the Community Fibre Company; Distributel Communications Ltd.; Frontier Networks Inc. (Frontier); Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron); Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications (SaskTel); Shaw Cablesystems G.P. (Shaw); SSI Micro Ltd., doing business as SSI Canada (SSI); TekSavvy Solutions Inc. (TekSavvy); and TELUS Communications Inc. (TCI); as well as from the Internet Society – Canada Chapter (ISCC); the Open Media Engagement Network; the Public Interest Advocacy Centre (PIAC); and the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC).

Background

4. In Telecom Regulatory Policy 2015-326, the Commission reviewed its wholesale services framework. It determined, among other things, that the FTTP facilities of the incumbent carriers are essential and would be made available on a wholesale basis via disaggregated wholesale HSA services. It also determined that the provision of aggregated wholesale HSA services would no longer be mandated and would be phased out in conjunction with the implementation and adoption of disaggregated wholesale HSA services.
5. In Telecom Decision 2016-379, the Commission approved the configurations for disaggregated wholesale HSA services of Bell Canada, Cogeco, RCCI, and Videotron in Ontario and Quebec.
6. In Telecom Order 2017-312, the Commission made disaggregated wholesale HSA services available in Ontario and Quebec, and set out interim rates, terms, and conditions for these services.

7. In two previous instances, CNOC claimed that an ongoing lack of viable access to the incumbent carriers' FTTP facilities harms its members' ability to compete, and sought access to those facilities through the incumbent carriers' aggregated HSA services. In Telecom Decision 2018-44, the Commission denied an application from CNOC that, among other things, sought transitional wholesale access to the incumbent carriers' FTTP facilities via aggregated wholesale HSA services until disaggregated wholesale HSA services are finalized and made available in a given area. In 2018, CNOC filed another application seeking access to FTTP facilities via aggregated wholesale HSA services. That file, however, was closed upon publication of Telecom Notice of Consultation 2020-187, and the Commission indicated that the issue of access to FTTP facilities via aggregated wholesale HSA services would be deferred to a future proceeding.
8. In Telecom Notice of Consultation 2020-187, the Commission noted that in several proceedings, parties had raised concerns about the disaggregated wholesale HSA service framework and, in particular, the decision to only mandate the provision of access to FTTP facilities on a wholesale basis as part of such disaggregated HSA services. In response to those concerns, the Commission sought comments in that proceeding on what would be a more appropriate level of disaggregation and the associated configurations for disaggregated wholesale HSA services.

Issue

9. The Commission has identified the following issue to be addressed in this decision:
 - Should the Commission approve CNOC's request seeking an order requiring the incumbent carriers to provide for the temporary resale of all the retail Internet services they provide over their FTTP facilities at regulated rates?

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Positions of parties

10. CNOC submitted that the Commission has a duty to ensure the incumbent carriers do not confer undue preference upon themselves by offering retail Internet services at speeds only FTTP can support while denying competitors the same capability. It submitted that wholesale access to incumbent FTTP facilities at just and reasonable rates is required to prevent incumbents from breaching subsections 27(1) and 27(2) of the *Telecommunications Act* (the Act) and argued that its proposed resale remedy is an appropriate means to stop such breaches.
11. CNOC submitted that in several decisions in the late 1990s and early 2000s (Telecom Decisions 99-11, 2003-87, and 2016-67) as well as in Telecom Order 2004-331, the Commission required both Eastlink and Shaw to make resale services available on a

temporary basis until those companies made their third-party Internet access (TPIA)³ services available. CNOC argued that the same approach should be used with respect to access to the incumbent carriers' FTTP facilities, pending the resolution of structural issues relating to the wholesale HSA service regime.

12. CNOC submitted that resale of the incumbent carriers' retail Internet services provisioned over FTTP facilities should be made available on a temporary basis until all the issues surrounding wholesale HSA services are resolved. It proposed that the incumbent carriers use a retail-minus methodology to set rates, where the service would be available at a 25% discount from the lowest non-zero retail rate charged during any one-month period, including any discounts or credits.
13. Parties supporting the application (Allstream, CIPPIC, the Community Fibre Company, Distributel, Frontier, the ISCC, PIAC, SSI, and TekSavvy) generally argued that the record of the proceeding initiated by Telecom Notice of Consultation 2020-187 suggests that there are many policy and costing issues with respect to a disaggregated wholesale HSA service that remain unresolved. They argued that an effective wholesale HSA service regime will likely not be in place for many years and that, in the meantime, competitors may be limited to legacy aggregated wholesale HSA services. They argued that the speed limitations of these services make it difficult for competitors to compete in retail markets where consumers increasingly prefer the higher speeds that are provided over fibre facilities. These parties argued that, while not a perfect solution, the fibre services resale model proposed by CNOC is a reasonable stopgap measure until access to aggregated FTTP services is available.
14. TekSavvy submitted that its preference is for disaggregated HSA services but argued that uncertainty relating to disaggregated wholesale HSA service configurations and rates make it difficult for it to make use of the service. It argued that, as a last resort, it supported the resale model proposed by CNOC.
15. Allstream and PIAC submitted that if the Commission were to approve CNOC's application, the incumbent carriers would likely not be deterred from investing in fibre facilities. PIAC added that the resale model is, at present, the best way to incentivize efficient market entry by competitors.
16. Parties opposed to the application (Bell Canada, Cogeco, Eastlink, RCCI, SaskTel, Shaw, TCI, and Videotron) generally submitted that CNOC's proposal would undermine the Commission's wholesale HSA service framework. They argued that the framework takes a facilities-based approach that requires competitors to invest in their own network facilities or lease them from others, and that mandating resale would remove any incentive to invest in or transition to disaggregated wholesale HSA services.

³ Third-party Internet access is an aggregated wholesale service that provides competitors access to cable networks to enable retail Internet competition.

17. Parties opposed to the application submitted that the Commission previously considered whether fibre access should be provided by means other than through disaggregated wholesale HSA services. They added that the Commission denied CNOC's related application in Telecom Decision 2018-44 on the basis that there was no demonstrated significant gap in the number of end users to whom high-speed retail Internet services can be provisioned by way of cable carrier facilities. They argued that CNOC similarly failed to provide sufficient evidence to support its requested remedy in this proceeding.
18. Bell Canada and TCI argued that since the incumbent carriers are offering wholesale access to their FTTP facilities in accordance with Commission policy and Commission-approved tariffs, there is no unjust discrimination. Although it generally supported CNOC's application, PIAC submitted that the incumbent carriers cannot be said to be discriminating by offering wholesale services in accordance with a tariff.
19. Parties opposed to the application also generally submitted that CNOC is prematurely judging other ongoing proceedings, in particular the reconfiguration proceeding, or that CNOC improperly translated concerns expressed by the Commission in Telecom Notice of Consultation 2020-187 as firm conclusions of fact.
20. Bell Canada argued that CNOC incorrectly assumed that disaggregated wholesale HSA services are unworkable when the question of whether the services are workable is being debated in the proceeding initiated by Telecom Notice of Consultation 2020-187. It argued that many industry participants believe the services will work and submitted that the principal barriers to the uptake of the services have been related to rates and uncertainty due to the tariffs still not being finalized.
21. Bell Canada, Eastlink, RCCI, Shaw, and TCI argued that since gigabit-speed service is available via cable carriers' aggregated wholesale HSA services, there is no urgent need to make FTTP access available using a resale model.
22. Bell Canada and TCI argued that although the Commission has implemented a temporary resale model in the past for cable TPIA services, these rulings cannot be applied to FTTP services. Bell Canada argued that there are many differences between the proposed resale model and what the Commission required of cable carriers in the past. For example, Bell Canada and TCI submitted that the resale of cable retail Internet services was only made available for a short period of time and to a limited number of companies, and that the transition path from resale to wholesale was clear. Bell Canada argued that, in contrast, there are more than 100 wholesale customers that could seek temporary resale services, and there is no clear path to transition these customers to disaggregated wholesale HSA services.
23. Parties opposed to CNOC's application also argued that there are many drawbacks to using a retail-minus methodology to set rates. They argued that using that methodology would prematurely judge the outcome of the ongoing proceeding on costing methodology (see Telecom Notice of Consultation 2020-131), in which many parties submitted that the retail-minus methodology is an inappropriate approach.

24. Parties opposed to CNOC's application also argued that it would be difficult to determine a benchmark retail rate and the discount that would apply, and submitted that (i) if the lowest non-zero rate was the benchmark used it would very likely be a promotional rate, which is a targeted competitive response rate that is not reflective of average prices across broad markets, and (ii) CNOC has not filed an avoidable cost study to support its proposed 25% discount, and absent such a study the proposed discount is arbitrary. Finally, parties that opposed the application argued that a retail-minus methodology would distort the market by removing any incentive for the incumbent carriers to offer promotional rates.
25. Bell Canada submitted that there are also practical obstacles to implementing the proposed resale model. It noted that in 2016 it began developing a resale service for its Virgin Internet flanker brand and that, as of 2021, it had still not finalized the service. It noted that there were significant costs associated with creating a scalable resale product, improving processes, and integrating Virgin Internet to its ordering and corporate systems. It argued that creating a resale service for other providers would have significant implications for ordering, network provisioning, end-user premises hardware, service assurance, and billing, all of which would take time and cost millions of dollars to resolve.

Commission's analysis

26. The Commission notes that CNOC has submitted that wholesale access to the incumbent carriers' FTTP facilities at just and reasonable rates is required to prevent the incumbent carriers from breaching subsections 27(1) and 27(2) of the Act. The Commission notes that FTTP facilities have been found to be essential since 2015 and that, currently, the incumbent carriers make them available via disaggregated wholesale HSA services accessible in Ontario and Quebec in accordance with Commission tariffs. The Commission also notes that, under the current regulatory regime, the incumbent carriers are not mandated to provide wholesale access to FTTP facilities via aggregated HSA services. However, the Commission considers that it is possible for the regulatory framework to be revised, if the Commission deems it necessary, to ensure continued compliance with the Act, including subsection 27(2).
27. The Commission has concerns around CNOC's proposed FTTP resale remedy. The Commission considers that the proposed remedy is unlikely to provide timely access to FTTP facilities given the numerous policy and implementation issues identified.
28. One such concern is that a resale model does not allow for any competitive differentiation or added value by competitors. Since resellers are not required to own any facilities, they can only offer the exact same products as the underlying competitor, which limits their ability to effectively compete.
29. Additionally, the Commission considers that while little evidence was provided to indicate the length of time that would be required to make a resale service available, it could likely take years to resolve the various operational and implementation issues that have been identified by parties.

30. Moreover, the Commission is concerned with the application of retail-minus pricing for FTTP resale. The Commission considers that there is a large number of competitors that could potentially be interested in resale, and that the incumbent carriers offer a large number of service plans with differing rates, some of which are not advertised. In these circumstances, it would be challenging to adopt an appropriate retail benchmark price. In this regard, the Commission notes that incumbent carriers generally promote province-wide pricing; however, pricing can vary from region to region within an incumbent carrier's territory. With this in mind, CNOC's proposed benchmark of the lowest non-zero retail rate charged during any one-month period could distort the market by discouraging the offering of promotions leading to less competitive pricing.
31. In addition to the issues linked to establishing proper retail benchmarks, there is also no evidence to support the 25% reduction of retail rates in the proposed model.
32. The Commission is concerned that requiring the industry and the Commission itself to put more effort into establishing a temporary resale model that would also require significant additional processes and resources would not be in the long-term interest, when a more sustainable and workable wholesale model appears to be urgently needed.
33. The Commission notes that the record of this proceeding is limited, with very little evidence filed by any party to support the creation of an expedited FTTP resale service. Nevertheless, it is the Commission's view that there are considerations with respect to the provision of wholesale HSA services that were not discussed on the record of this proceeding, but which give the Commission cause for concern.
34. One such consideration is that, while the existing configurations for disaggregated wholesale HSA services theoretically provide competitive access to incumbent carriers' FTTP facilities, in practice the uptake of the services has been very limited given the concerns and uncertainty surrounding them. The proceeding initiated by Telecom Notice of Consultation 2020-187 was intended to address these concerns by revisiting potential configuration issues that may have discouraged competitors from using disaggregated wholesale HSA services, thereby improving FTTP access.
35. As indicated in Telecom Decision 2023-53, however, the path forward for disaggregated wholesale HSA services is limited. There are currently no acceptable reconfigurations that would effectively ensure the services' adoption and the serious concerns that exist with the services remain, including a lack of practical FTTP access. As a result, it will take a significant amount of time for competitors to have practical and effective competitive access to incumbent carriers' fibre facilities under the current wholesale HSA service framework. In the meantime, competitors are effectively left with aggregated wholesale HSA services as their primary option for accessing incumbent carriers' networks.
36. The Commission considers that there are concerns with respect to the aggregated wholesale HSA services offered by the incumbent carriers. With respect to ILECs'

aggregated wholesale HSA services, under the existing regime the services are available at speeds of no more than 150 megabits per second (Mbps), while in many cases the services are available at no more than 50 Mbps. The Commission considers that this is an increasingly uncompetitive speed tier since consumer preference is clearly trending toward higher speeds. At the same time, while gigabit-speed cable HSA services are generally available, there appear to be barriers toward the adoption of the services at higher speeds. This is reflected in market data collected by the Commission, which indicates that a large majority of wholesale-based Internet service providers purchase wholesale aggregated HSA services at less than 100 Mbps, even though at the retail level more than 50% of all households subscribe to speeds that exceed 100 Mbps and 30% of incumbent carriers' customers subscribe to services at the highest-speed tiers, which include gigabit-speed services.⁴

37. The Commission considers that the extended period during which wholesale access to FTTP services was not made available or was only available under a disaggregated service configuration has increasingly pushed competitors toward cable wholesale HSA service providers. The Commission notes that recent market data shows that ILECs are rolling out fibre at a rapid pace while simultaneously decommissioning the legacy copper facilities over which aggregated wholesale HSA services are provided. The Commission also notes that in 2021 Bell Canada's FTTP footprint reached 6.2 million homes and businesses, and was expected to reach 8.1 million in 2022,⁵ while TCI's FTTP footprint reached 2.7 million premises in 2021.⁶
38. The Commission considers that as the reach of the ILECs' fibre footprint grows, and as copper networks are decommissioned, the addressable market for aggregated wholesale HSA services offered by ILECs is reduced. The Commission considers that this has created a situation of regulatory asymmetry where the wholesale obligations of the ILECs have lessened over time, while cable carriers must increasingly serve a disproportionate share of wholesale customers.
39. The Commission notes that Canadians are increasingly turning toward FTTP access services, either because they desire the higher speeds afforded by the services, or because their premises are served exclusively by fibre. In 2021, over 20% of total subscribers were served through a fibre access connection, compared to over 50% served over cable and under 20% served over copper.
40. In summary, the Commission acknowledges that the limited access to FTTP facilities through the existing wholesale HSA service framework represents a significant issue for competitors, impacting their ability to grow their customer base and to compete

⁴ Unless otherwise cited, the data presented in this decision has been sourced from various surveys, including the joint [Commission-Statistics Canada Quarterly Survey of Telecommunications](#) and the Commission's [Annual Telecommunications Survey](#). The Commission collects data directly from the industry and via both government and private sector data partners, and data is filed via the Commission Data Collection System.

⁵ See the [BCE 2021 Annual Report](#).

⁶ See the [TCI 2021 Annual Report](#).

effectively for various customer segments. As a result, changes to the existing regime are needed in order to counter the recent market trends discussed above, and to ensure that proper competitive dynamics are in place to discipline the retail market.

Conclusion

41. In light of all of the above, the Commission considers that the resale-based remedy proposed by CNOC is not an appropriate means of addressing concerns with regard to wholesale access to FTTP facilities or with the Commission's existing framework more broadly. For this reason, the Commission **denies** CNOC's application.
42. To that end, the Commission notes that in Telecom Notice of Consultation 2023-56, published concurrently with this decision, it is initiating a full review of its wholesale HSA service framework, including consideration of whether the provision of aggregated HSA services from the incumbent carriers should be mandated and whether these services should provide for access to FTTP facilities. As part of that notice, the Commission included the preliminary view that competitor access to aggregated HSA services using FTTP facilities should be mandated on a temporary and expedited basis, at least until its broader review is completed. The Commission is prepared to mandate aggregated HSA services using FTTP facilities on a final basis in the event that the record of the broader proceeding supports this finding.

Policy Direction

43. The Commission considers that implementing CNOC's request for a temporary resale model would not fulfill the principle of effective regulation set out in section 4 of the 2023 Policy Direction,⁷ which specifies that the Commission should ensure that the measures it imposes through its decisions are efficient and proportionate to their purpose, since CNOC's request would be both time-consuming and costly to implement. In addition, CNOC's requested remedy would have the detrimental effect of distorting the market by shielding consumers from the competitive service offerings of the incumbent carriers that would be subject to the resale model, given the proposal to use a retail-minus methodology to set rates.
44. The Commission considers that issues relating to the competitive dynamics in the retail marketplace for Internet access services are best addressed by initiating a proceeding to review its wholesale HSA service framework, including an expedited process to assess the merits of mandating FTTP access over an aggregated HSA service platform, since such access, should it be found to be appropriate, would better

⁷ *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, SOR/2023-23, 13 February 2023

promote the realization of the objectives set out in section 2 of the Policy Direction, namely:

- encouraging all forms of competition and investment [subsection 2(a)];
- fostering affordability and lower prices, particularly when telecommunications service providers exercise market power [subsection 2(b)];
- ensuring that affordable access to high-quality, reliable and resilient telecommunications services is available in all regions of Canada, including rural areas, remote areas and Indigenous communities [subsection 2(c)];
- reducing barriers to entry in the market and to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers [subsection 2(e)]; and
- enabling innovation in telecommunications services, including new technologies and differentiated service offerings [subsection 2(f)].

Secretary General

Related documents

- *Network configuration for disaggregated wholesale high-speed access services*, Telecom Decision 2023-53, DATE
- *Notice of hearing – Review of the wholesale high-speed access service framework*, Telecom Notice of Consultation 2023-56, 8 March 2023
- *Call for comments – Appropriate network configuration for disaggregated wholesale high-speed access services*, Telecom Notice of Consultation CRTC 2020-187, 11 June 2020; as amended by Telecom Notice of Consultation CRTC 2020-187-1, 22 July 2020
- *Call for comments – Review of the approach to rate setting for wholesale telecommunications services*, Telecom Notice of Consultation CRTC 2020-131, 24 April 2020; as amended by Telecom Notices of Consultation CRTC 2020-131-1, 7 July 2020 and 2020-131-2, 19 October 2020
- *Canadian Network Operators Consortium Inc. – Application for transitional access to incumbent carriers’ fibre-to-the-premises facilities through aggregated wholesale high-speed access services*, Telecom Decision CRTC 2018-44, 2 February 2018
- *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

- *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
- *Cybersurf Corp. v. Shaw Cablesystems G.P. – Reseller agreement*, Telecom Order CRTC 2004-331, 1 October 2004
- *Application by Cybersurf seeking resale of Shaw higher-speed retail Internet service*, Telecom Decision CRTC 2003-87, 23 December 2003
- *Application concerning access by Internet service providers to incumbent cable carriers’ telecommunications facilities*, Telecom Decision CRTC 99-11, 14 September 1999