



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

TekSavvy Solutions Inc

800 Richmond Street  
Chatham ON N2M 5J5

TELEPHONE +1 519 360-1575 FAX 519.360.1716  
TOLL FREE 877-779-1575 [teksavvy.com](http://teksavvy.com)

Andy Kaplan-Myrth

Legal & Regulatory

Direct Line +1 819-484-1205 [akaplanmyrth@teksavvy.ca](mailto:akaplanmyrth@teksavvy.ca)

The Broadcasting and Telecommunications Legislative Review Panel  
c/o Innovation, Science and Economic Development Canada  
235 Queen Street, 1st Floor  
Ottawa, Ontario K1A 0H5

SUBMITTED BY EMAIL to [ic.btlr-elmrt.ic@canada.ca](mailto:ic.btlr-elmrt.ic@canada.ca)

11 January 2019

**RE: Submission from TekSavvy Solutions Inc. ("TekSavvy") for the Broadcasting and Telecommunications Legislative Review Panel's review of the Canadian communications legislative framework: "Responding to the New Environment: A Call for Comments"**

Dear members of the Broadcasting and Telecommunications Legislative Review Panel :

1. In June, 2018, the Government of Canada established the Broadcasting and Telecommunications Legislative Review Panel (the "Panel")<sup>1</sup>, an expert panel with a mandate to review the telecommunications and broadcasting framework in Canada<sup>2</sup>. In September, 2018, the Panel initiated a consultation process, inviting written submissions broadly concerning the questions and issues outlined in its Terms of Reference.<sup>3</sup>
2. TekSavvy submits these comments in response to the Call for Comments. TekSavvy has had the opportunity to review the extensive comments that the Canadian Network Operators Consortium Inc. ("CNOc") has prepared to submit to the Panel, and TekSavvy supports CNOc's comments.
3. While TekSavvy has interests in many areas within the Panel's Terms of Reference including network neutrality, site blocking, privacy, and consumer rights in the telecommunications and broadcasting markets, we are focusing our comments on the single issue that has had the most significant negative impact on wholesale-based competitors: The rate setting process, based on bad policy, that leads to uncertainty; sets unjust, unreasonable wholesale rates; enriches incumbents; distorts the regulatory framework; inflates retail rates; and reduces consumer choice. We would welcome the

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<sup>1</sup> *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>>.

<sup>2</sup> Terms of reference – Broadcasting and Telecommunications Legislative Review, 5 June 2018, <<https://www.ic.gc.ca/eic/site/110.nsf/eng/00001.html>>.

<sup>3</sup> Responding to the New Environment: A Call for Comments, 24 September 2018, <<https://www.ic.gc.ca/eic/site/110.nsf/eng/00003.html>>.

opportunity to meet with the Panel to expand on these written comments and to provide our input on other issues.

## A. About TekSavvy

4. 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 experience and for its commitment to fighting for and upholding consumers’ rights online.
5. TekSavvy provides Internet and voices services to over 300,000 residential and business customers in every Canadian province. TekSavvy offers Internet over its own network facilities and through wholesale access network services provided by seven incumbent carriers across Canada. Currently, TekSavvy’s network uses wholesale access via three DSL networks and four cable networks. TekSavvy also offers its own facilities-based fixed-wireless network access within a growing number of underserved communities in southwestern Ontario, currently expanding to include 4G LTE technology. Recently, TekSavvy announced that it would be building a high-speed fibre broadband network in Chatham-Kent to connect more than 38,000 residences and businesses in the region.<sup>4</sup>
6. TekSavvy is not merely a reseller of Internet services, as we do not resell the wholesale services of incumbent carriers or even their Internet services. In this submission, we refer to service providers like TekSavvy as wholesale-based competitors. TekSavvy requires access to carrier networks at the network layer.<sup>5</sup> TekSavvy provides services directly to end-users and has a direct customer relationship with those end-users; its wholesale access network providers do not have any relationship with TekSavvy’s end-users. Rather, we use the incumbents’ access network as one input for our own broadband services.

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<sup>4</sup> *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>>.

<sup>5</sup> See <[https://en.wikipedia.org/wiki/Network\\_layer](https://en.wikipedia.org/wiki/Network_layer)>. See also McTaggart, Craig, *Governance of the Internet’s Infrastructure: Network Policy for the Global Public Network*, 1999, University of Toronto, LLM dissertation, at footnote 219 <<https://tspace.library.utoronto.ca/bitstream/1807/13585/1/MQ46034.pdf>> :

“...Layer 4, the transport layer, controls the movement of data between systems, defines protocols for structuring messages, and supervises the validity of transmissions by performing error checking; Layer 3, the network layer, defines protocols for routing data by opening and maintaining a path on the network between systems to ensure that data arrives at the correct destination node; Layer 2, the data-link layer, defines the rules for sending and receiving information from one node to another between systems: Layer 1, the physical layer, governs hardware connections and byte-stream encoding for transmission. It is the only layer that involves a physical transfer of information between network nodes.”

**B. Arbitrary rates and costing errors have devastated competitors and unjustly enriched incumbents**

7. TekSavvy and other wholesale-based competitors buy wholesale services 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.
8. The tariff also sets out any fees for service installation and end-user hardware requirements.
9. While the Canadian Radio-television and Telecommunications Commission (“CRTC”) is required to set wholesale rates that are just and reasonable to wholesale-based competitors and compensatory to incumbents, incumbents have thoroughly abused the Commission’s costing processes:
- Incumbents have been able to inflate wholesale rates set through the baroque 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.
10. The following synopsis of CRTC wholesale rate-setting over the past eight years demonstrates these abuses.
11. In 2011, following a complex and opaque costing process, the CRTC set astronomically high rates for the capacity of bandwidth purchased by wholesale-based competitors (known as CBB, for the billing model currently in place, Capacity Based Billing)<sup>6</sup>:

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

12. The CBB rates were set in very unusual and complex process: the CRTC merged four major proceedings<sup>7</sup> dealing with disparate issues, namely: speed-matching on fibre-to-

<sup>6</sup> *Billing practices for wholesale residential high-speed access services*, Telecom Regulatory Policy CRTC 2011-703, 15 November 2011 [“TRP 2011-703”].

<sup>7</sup> *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”].

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.

13. Ultimately, the CRTC decided upon the structure of the new billing model, “Capacity Based Billing”, or CBB. At the same time, it set specific CBB rates pursuant to tariff notices and cost studies that had been filed under the pre-existing, overturned UBB rate structure. The CRTC’s preoccupation—directly following from the 2006 Policy Direction<sup>8</sup> 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 challenge the incumbent’s costing assumptions, despite our best efforts and the clearly inflated final CBB rates.
14. Upon setting the CBB rates, the CRTC rejected competitors’ objections and requests to review those rates. In TRP 2011-703, the CRTC rejected CNOC’s request for annual reviews of CBB rates, citing the Policy Direction that such a rate review would not be efficient, minimally intrusive, or proportionate to its purpose.<sup>9</sup>
15. 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.<sup>10</sup>
16. 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 costing guidelines that the CRTC had adopted in 2012<sup>11</sup>, 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 services using a different process for the disclosure of confidential information, as requested by CNOC.”<sup>12</sup>

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<sup>8</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 [“2006 Policy Direction”].

<sup>9</sup> TRP 2011-703, at para 169.

<sup>10</sup> *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.

<sup>11</sup> *Confidentiality of information used to establish wholesale service rates*, Telecom Regulatory Policy CRTC 2012-592, 26 October 2012.

<sup>12</sup> *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, at para 18.

17. Finally, in a pivotal 2015 decision, citing extremely high CBB costs, the CRTC implemented radical changes to the wholesale regulatory framework:<sup>13</sup>

[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.<sup>14</sup>

18. 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 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.<sup>15</sup>

19. The disaggregated HSA service was mandated in TRP 2015-326 and configured in TD 2016-379<sup>16</sup>. However, less than three weeks later, the CRTC found that the proposed wholesale rates proposed by the incumbents to be unreasonable.<sup>17</sup> 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 continue to rise in the future—was profoundly false. In reality, as the CRTC determined, CBB rates had been vastly inflated all along because most incumbents simply “chose to disregard” the Commission’s costing regulations.<sup>18</sup> Hence, the new disaggregated framework had to be reconfigured as using accurate costing data, further delaying an already severely drawn out process, to the detriment of competition and consumers. As stated by the then-Chairman and CEO of the CRTC, what was even more concerning was the fact that “Canadians’ access to a choice of broadband Internet services would have been at stake had [the CRTC] not revised these rates.”<sup>19</sup>

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<sup>13</sup> *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015 [“TRP 2015-326”].

<sup>14</sup> *Ibid.*, at para 145 [emphasis added].

<sup>15</sup> *Id.*

<sup>16</sup> *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”].

<sup>17</sup> *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates*, Telecom Order CRTC 2016-396, 6 October 2016 [“TO 2016-396”].

<sup>18</sup> *Ibid.*, at para 22.

<sup>19</sup> CRTC News Release, “CRTC finds proposed wholesale high-speed access rates unreasonable” (6 October 2016), <<https://www.canada.ca/en/radio-television->

20. Likewise, these rates, which were prima facie 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.<sup>20</sup>
  - In 2013, the CRTC corrected the cost of Bell CBB to \$1,030 per 100 Mbps/month.<sup>21</sup>
  - In 2016, the CRTC further corrected the cost of Bell CBB to \$130 per 100 Mbps/month.<sup>22</sup>
21. Altogether, as noted by CNOC, competitors were overbilled over \$300 million between 2011 when CBB rates were first implemented, and 2016 when they were last corrected.
22. 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.
23. 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 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.

**C. Urgent reforms to CRTC wholesale rate-setting processes are required:  
A new Policy Direction is required**

24. Broadly speaking, throughout the 1990s and the early 2000s, telecommunications legislation served to enable the gradual introduction of competition to the telecommunications sector, which had previously been substantially a monopoly and duopoly industry.

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[telecommunications/news/2016/10/crtc-finds-proposed-wholesale-high-speed-access-rates-unreasonable.html](https://www.crtc.gc.ca/eng/news/2016/10/crtc-finds-proposed-wholesale-high-speed-access-rates-unreasonable.html).

<sup>20</sup> TRP 2011-703.

<sup>21</sup> TD 2013-73.

<sup>22</sup> TO 2016-396.

25. With competition, although still in a nascent state, having been at least introduced throughout much of the telecommunications sector, the Government of Canada in 2006 gave the CRTC a Policy Direction 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.<sup>23</sup>
26. 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 objectives and the need for regulation should no longer be presumed.”<sup>24</sup>
27. In so doing, the 2006 Policy Direction undermined the very regulatory framework that was starting to allow a competitive market to develop and, as a result, the regulatory approach has since largely focused 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.<sup>25</sup>
28. 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 rather than solely focusing on enabling the incumbents to invest in facilities. To that end, telecommunications legislation needs to have clear policy objectives that promote sustainable competition to ultimately better serve consumer needs.
29. Recognizing that legislative change takes time and the competitive industry is at serious risk today, interim action is required to restore the balance and fundamentally to refocus the CRTC’s policy approach on competition, whether facilities-based or service-based.
30. As such, until the legislative framework can be changed, a new policy direction should be sent from the Governor in Council to the CRTC that enables the CRTC to regulate where required to promote competition, rather than relying on market forces.

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<sup>23</sup> The 2006 Policy Direction.

<sup>24</sup> *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.

<sup>25</sup> *Shelby County v. Holder*, 570 U.S. \_\_\_ (2013), Dissent (Ginsburg).

Thank you for the opportunity to provide these comments.

Yours truly,

*[transmitted electronically]*

Andy Kaplan-Myrth  
VP, Regulatory and Carrier Affairs

cc: Marc Gaudrault  
Janet Lo  
Kyle Mitchell