



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

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Subject: PIAC Comments on *Canada Gazette*, Part I, July 24, 2021, Notice No. TIPB-002-2021 — Petitions to the Governor-in-Council concerning Telecom Decision CRTC 2021-181

Dear Ms. Charette,

These are the Public Interest Advocacy Centre's (PIAC) comments on the Petitions to the Governor-in-Council from TekSavvy Solutions Inc. (TekSavvy) and Competitive Network Operators of Canada (CNOOC), filed pursuant to section 12(1) of the *Telecommunications Act*, regarding Telecom Decision CRTC 2021-181,¹ issued by the Canadian Radio-television and Telecommunications Commission (the "CRTC" or the "Commission").² We write to indicate our support for rescinding Telecom Decision CRTC 2021-181 and reinstating the wholesale high-

¹ Telecom Decision CRTC 2021-181, Requests to review and vary Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services, (27 May 2021) online: <https://crtc.gc.ca/eng/archive/2021/2021-181.htm>.

² Petitions to the Governor in Council concerning Telecom Decision CRTC 2021-181, online: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11720.html>. Also see: Canada Gazette Part I (July 24, 2021), Notice No. TIPB-002-2021 — Petitions to the Governor in Council concerning Telecom Decision CRTC 2021-181, online: <https://canadagazette.gc.ca/rp-pr/p1/2021/2021-07-24/pdf/g1-15530.pdf>.

speed access service rates set out in Telecom Order CRTC 2019-288,³ in order to promote competition, consumer choice, lower prices and affordability in retail Internet access markets.

Should you have any questions or concerns, please do not hesitate to contact the undersigned.

Sincerely,

John Lawford
Executive Director and General Counsel

³ Telecom Order CRTC 2019-288, Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services, (15 August 2019), online: <<https://crtc.gc.ca/eng/archive/2019/2019-288.htm>>.

Introduction and Position

1. The Public Interest Advocacy Centre (“PIAC”) is a national non-for-profit organization and registered charity that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services. PIAC has been extremely active in telecommunications regulation for over 40 years.
2. PIAC supports TekSavvy’s and CNOC’s petitions requesting the Governor in Council (GIC) to rescind Telecom Decision CRTC 2021-181 (TD 2021-181) and to reinstate Telecom Order CRTC 2019-288 (TO 2019-288). We support some but not all of the other relief requested in these petitions for the reasons given below. We are filing one submission in relation to the two referred petitions, due to the commonality of the main issues raised in them.
3. Should the GIC decide to refer the matter back to the Commission for reconsideration of wholesale Internet rates set in TO 2019-288 rather than simply ordering them as final rates, we submit that the GIC should order the 2019 rates be made the interim rates which shall apply during the CRTC’s deliberations on a final rate.

Overview

4. The final rates set by the CRTC in TD 2021-181 completely undermine the 2019 Policy Direction and run counter to Cabinet’s intention for Internet rates, as expressed in its 2020 dismissal of petitions questioning TO 2019-288.⁴ PIAC agrees with the petitioners that the CRTC’s decision in TD 2021-181 both completely reversed, without evidence or sufficient rationale, its former position on wholesale access rates from 2019-288, and also did so without appreciating the advice in Cabinet’s 2020 rejection of the 2019 petitions.
5. We are not oblivious to Cabinet’s suggestion to the Commission in its rejection of the 2019 petitions to consider the impact of its wholesale high speed access (HSA) tariff on the investment incentives of the major wholesale providers (largely Bell Canada, Rogers Communications, TELUS and regional dominant telcos and cablecos, hereafter “the incumbents”). It was both clear and notable, however, that Cabinet took pains to indicate that this concern be balanced with the Government’s new stated approach to telecommunications policy expressed in the “2019 Policy Direction”.⁵ This policy clearly re-oriented telecommunications towards a user-centric universe where method of delivery of services,

⁴ See PCO, “Order to decline to vary, rescind or refer back for reconsideration Telecom Order CRTC 2019-288” PC Number 2020-0553 (13 August 2020). Online: <https://orders-in-council.canada.ca/attachment.php?attach=39521&lang=en>

⁵ Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation, (2019), online: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11524.html>. Hereafter “2019 Policy Direction”; released 27 February 2019; registered 18 June 2019.

where feasible, was agnostic (that is, virtual [software]- or “facilities” [hardware]-based) as to network technology. Other aspects of the 2019 Policy Direction confirm this user-centric (as opposed to telecom provider-centric) bias; notably, the Commission was instructed to consider “affordability” and “consumer interests” on a par with competition and innovation.

6. We agree with CNOC’s assessment, however, that the CRTC clearly went too far in favouring the incumbents in TD 2021-181. The Commission did this by restoring as final rates, higher interim 2016 rates, in place of the rates stipulated in TO 2019-288:

“Despite the GIC’s hope that the CRTC would strike a calibrated balancing of policy objectives with greater emphasis on investment, TD 2021-181 does not deliver.”⁶

7. The Commission in TO 2019-288 lowered the wholesale HSA service rates from much higher interim rates the Commission had previously ordered in 2016 (the “2016 rates”).⁷ These rates were made “interim” in that they were tentative, pending final adjustment by the CRTC after a proceeding to determine “final” costs-based rates. TO 2019-288 was the “final” rate decision after these three years of CRTC deliberation on a wholesale rate – with the 2016 rates applying in the meantime.
8. Smaller providers (competitors) pay for connecting their networks to the incumbents’ networks through this CRTC-mandated tariffed rate to provide their own retail internet services for serving their own end-users. The 2019 Order in effect meant lower wholesale costs for the competitors, which these companies actually translated into increased consumer choices and lower prices for consumers.⁸ In addition, as the TO 2019-288 adjusted rates considerably downward, the incumbents in effect were “overpaid” during the period 2016-2019 and, in accordance with normal regulatory practice before the CRTC, this adjustment meant the CRTC ordered incumbents to refund the overpayment to their wholesale customers.
9. However, in TD 2021-181, the Commission completely changed course and reverted to interim 2016 rates, which preceded the lower rates set in the 2019 rates Order. TD 2021-181 also cancelled the rate rebates to these wholesale customers (competitors) that were contingent on the result of TO 2019-288. This cancellation of rebates continued the refusal

⁶ CNOC Petition, para. 203.

⁷ See: Telecom Order CRTC 2016-396, *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates* (6 October 2016) [wholesale HSA rates for most incumbent telcos and cablecos]; online: <https://crtc.gc.ca/eng/archive/2016/2016-396.htm> and Telecom Order CRTC 2016-448, *Bragg Communications Incorporated, operating as Eastlink – Revised interim rates for aggregated wholesale high-speed access service* (10 November 2016) [[wholesale HSA rates for Eastlink {incumbent cableco}]; online: <https://crtc.gc.ca/eng/archive/2016/2016-448.htm>

⁸ See: Teksavvy, “Intervention of TekSavvy Solutions, Inc., In the matter of Part 1 Review and Vary Applications By Bell Canada, TELUS Communications Inc., and the Cable Carriers concerning Telecom Order CRTC 2019-288, Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services” (17 February 2020) at para. 17, citing a Globe and Mail article on the price decreases and service improvements and Teksavvy’s own press release. Online: <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=3811171>

to date of any repayment to competitors based on the lowered 2019 rates. Notable is that the incumbents' appeals of TD 2019-288 included a request for a stay of the imposition of the CRTC's 2019 rates.

10. The 2016 rates therefore were substituted for the 2019 rates Order as the final rates in TD 2021-181. The Commission justified this reversal of its 2019 rate on the basis that there was "substantial doubt as to the correctness" of the wholesale HSA rates set in TO 2019-288, while expressing concern that completing a fulsome revision of all the cost studies previously filed in the proceeding leading to 2019, would prolong the period of regulatory and market uncertainty and allocating considerable resources to this would impede the transition to disaggregated wholesale HSA service.⁹ As the CRTC yoked these two rationales together throughout its decision in TD 2021-181, it is difficult to parse the reasons for such a revision upward of the rates.
11. It is the view of the petitioners and PIAC that the CRTC's reluctance to reconsider the rates afresh is a dereliction of its duty to decide and therefore that legally it may remove the Commission's jurisdiction. One cannot claim to be regulating and not regulate.
12. TekSavvy's petition calls for varying TD 2021-181, in effect quashing it, so that the final rates set in TO 2019-288 are set as the final rates for wholesale access service.¹⁰ Its specific requests also include:
 - correcting the bias (reference is made to CRTC's Chairperson having preference for one type of competition and market structure, with a request for his removal);
 - reinstating the 2019 Rates Order;
 - directing incumbents to immediately remit retroactive payments that are owed under the TO 2019-288;
 - reaffirming phase II costing as the appropriate means for determining wholesale rates;
 - and directing the Commissioner of Competition to address the incumbents' anti-competitive activity.¹¹
13. Similarly, CNOC's petition calls for rescinding the TD 2021-181 and restoring the lower final rates approved in TO 2019-288.¹² Presumably, CNOC's application contemplates restoring the rates rebate portion of TO 2019-288.

⁹ Telecom Decision CRTC 2021-181

¹⁰ TekSavvy, "Petition of TekSavvy Solutions Inc. to the Governor in Council to vary Telecom Decision CRTC 2021-181, Requests to review and vary Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services," (28 May 2021).

¹¹ *Ibid.*

¹² CNOC, Petition to the Governor in Council concerning Requests to review and vary Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services, Telecom Decision CRTC 2021-181 (July 15, 2021)

14. PIAC supports the petitioners' requested relief of rescinding or revoking (that is, completely nullifying) TD 2021-181 (Teksavvy's relief b. and c.). PIAC understands that in that event, the terms of TO 2019-288 would be restored, including the order to rebate over-payments to competitors from 2016-2019, based on the 2019 rate.
15. PIAC does not, however, believe it is appropriate nor perhaps even possible for the Governor in Council to grant the balance of Teksavvy's relief (a. removal of CRTC Chair for alleged bias or appearance of bias; d. directing the method of CRTC's costing method; e. directing the Commissioner of Competition to investigate allegations of anti-competitive behaviour). Those grievances should be pursued through other avenues and processes, if necessary.
16. CNOC further requests that the GIC grant their requested relief within no more than six months from the date of the TD 2021-181.¹³ CNOC notes how the CRTC's rates reversal has already led to scaling back of investments by the competitors and price increases, and importantly how it hurts consumer choice, competition, affordability and innovation.¹⁴
17. Without being privy to the private finances of CNOC members or other competitors such as Teksavvy, nor the necessity of the timing of potential remedies, PIAC is nonetheless inclined to believe that there is major financial distress at CNOC members due to TD 2021-181 and that the prior stays of rebates flowing from TO 2019-288, to say nothing of the higher, 2016 rates continuing to be charged from the earliest stages of judicial and administrative appeals of TO 2019-288, are threatening the continued existence of smaller competitors – and that this risk increases with each passing day.
18. In PIAC's experience, but admittedly without doing empirical studies, smaller competitive internet service providers offer to consumers, on a consistent basis, less expensive retail internet access services than incumbents. However, it is our understanding and our concern that these lower prices are not maintainable by competitors given the CRTC's reversal of its previous 2019 rates order in TD 2021-288. Consumers therefore would lose competitive options and pricing should the disappearance or weakening of CNOC members or other competitive ISPs occur due to TD 2021-181.
19. It is for these reasons that PIAC supports the petitioners calls to rescind TD 2021-181 and for TO 2019-288 to be declared the "final" wholesale HSA rates. Such a rescission should also ensure that, pursuant to TO 2019-288, rebates to competitors are paid by incumbents forthwith after Cabinet's disposition of these petitions.

¹³ *Ibid.*

¹⁴ *Ibid.*

Main Submissions

20. PIAC has three main submissions in support of TekSavvy and CNOOC's petitions, which are as follows:

- TD 2021-181 completely undermines the goals of the 2019 Policy Direction;
- The CRTC misapprehended the direction in the GIC's previous determination on wholesale rates in 2020; and
- The CRTC's decision in TD 2021-181 is arbitrary and capricious and risks further chaos.

TD 2021-181 completely undermines the 2019 Policy Direction

21. The 2019 Policy Direction from the Government radically alters the underlying approach and priorities for making telecommunications decisions at the CRTC. This was a major and much needed step to prioritize consumer protection. It was introduced by the Governor in Council in order to better respond to the telecommunications market and the evolution of the regulatory landscape since 2006. The 2019 Policy Direction requires the Commission to consider how its decisions can promote competition, affordability, consumer interests and innovation in making decisions, which amidst other principles, includes fostering affordability and lower prices, reducing barriers to entry into the market for new, regional and smaller service providers and enabling innovation.¹⁵ It specifically states:

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

- a. the Commission should consider how its decisions can promote competition, affordability, consumer interests and innovation, in particular the extent to which they
 - i. encourage all forms of competition and investment,
 - ii. foster affordability and lower prices, particularly when telecommunications service providers exercise market power,
 - iii. ensure that affordable access to high-quality telecommunications services is available in all regions of Canada, including rural areas,
 - iv. enhance and protect the rights of consumers in their relationships with telecommunications service providers, including rights related to accessibility,
 - v. reduce barriers to entry into the market and to competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers,
 - vi. enable innovation in telecommunications services, including new technologies and differentiated service offerings, and
 - vii. stimulate investment in research and development and in other intangible assets that support the offer and provision of telecommunications services; and

¹⁵ Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation, (2019), online: <<https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11524.html>>.

- b. the Commission, in its decisions, should demonstrate its compliance with this Order and should specify how those decisions can, as applicable, promote competition, affordability, consumer interests and innovation.¹⁶
22. The Commission in TD 2021-181 failed in justifying how its determinations are in line with the 2019 Policy Direction and its various principles. The reasoning provided by the Commission in effect appears to merely emphasize on investment.¹⁷ The Commission is required to demonstrate that its decision complies with the 2019 Policy Direction and show how it can promote competition, affordability, consumer interests and innovation. These are important considerations that need detailed explanation and analysis, they cannot be left for one to infer.
23. TD 2021-181 completely undermines these principles. This rate reversal will, as demonstrated in the petitions, lead to an increase in prices and reduced affordability, with some price increases already happening.¹⁸ Moreover, the increase in wholesale rates accelerates retail pricing inflation. As competitors are forced to raise prices to accommodate the CRTC's decision to re-impose much higher 2016 rates, this permits incumbents more "headroom" to raise prices to their customers in turn (since incumbents typically price their services at higher rates than competitors). Since there are far more customers of incumbents than of competitors, the consumer loss (paying more for retail internet service) is a large transfer of consumer surplus to the incumbents, and, possibly, a deadweight loss to the Canadian economy, as retail consumers may have to forgo or reduce internet spending and use to afford the new pricing.
24. Instead of lowering barriers to entry into the market and increasing competition for telecommunications service providers that are new, regional or smaller than the incumbent national service providers, TD 2021-181 reduces the chances of having innovative services, all in contravention to the 2019 Policy Direction. This rate reversal has in fact led many competitors to scale back their operations¹⁹ and potentially discouraged new entrants from venturing into this market.
25. We submit that the Commission's reasoning fails to show due consideration of the 2019 Policy Direction, contrary to what the Government intended. Competition, affordability, consumer interests and innovation are integral components of the 2019 Policy Direction; without a meaningful consideration of these aspects, any rationale purporting to be in line

¹⁶ *Ibid.*

¹⁷ Telecom Decision CRTC 2021-181 at paras 388-389.

¹⁸ TekSavvy blog post, TekSavvy Forced to Raise Prices as CRTC Pads Big Telecom Profits (August 24, 2021), online: <<https://blogs.teksavvy.com/teksavvy-forced-to-raise-prices-as-crtc-pads-big-telecom-profits>>. Also see: David Paddon, The Canadian Press, "Small internet providers preparing to raise prices, cut services amid CRTC decision," *Global News* (28 May 2021), online: <<https://globalnews.ca/news/7904273/crtc-independent-internet-providers/>>.

¹⁹ CNOC, Petition to the Governor in Council at para 75.

with the 2019 Policy Direction is pointless as it misses the underlying purposes of the 2019 Policy Direction.

26. Likewise, CNOC's petition argues that TD 2021-181 runs afoul of nearly every principle stated in the 2019 Policy Direction and notes many inconsistencies.²⁰ It notes TD 2021-181 violates nearly all substantive paragraphs of the 2019 Policy Direction, such as:

- it does not encourage competition and investment from competitors [1.a.i];
- it undermines affordability and increases prices [1.a.ii];
- it does not ensure that affordable access to high-quality telecommunications is available in all regions of Canada, rather it approves relative rate increases in all areas of Canada [1.a.iii];
- it does not reduce barriers for new, regional or smaller providers, rather greatly exacerbates barriers to entry and competition [1.a.v]; and
- it does not enable innovation in telecommunications services including new technologies and differentiated service offerings [1.a.vi].²¹

27. TekSavvy's petition makes similar observations and points to the Commission's open disregard of the Cabinet's 2019 Order concerning the principles to consider in applying the policy objectives.²² More specifically, it notes that the CRTC does not even list subparagraph 1.a.ii concerning affordability and lower prices as the part of the specific subparagraphs it considers in TD 2021-181.²³

28. PIAC would add that neither petitioner has noted a major violation of the 2019 Policy Direction from consumers' perspective, namely the direction in para. 1.a.iv to: "enhance and protect the rights of consumers in their relationships with telecommunications service providers, including rights related to accessibility". Consumers are generally not privy to the tariff deliberations between the incumbents and competitors before the CRTC. The CRTC's inconsistent treatment of input prices to competitors through the reduction in TO 2019-288 and the complete reversal of those rates in TD 2021-181 means that consumers had, for Teksavvy customers for example, rate decreases and sudden reversal of those decreases followed by price increases. Such "whiplashing" harms consumer confidence in the offerings of competitors and confidence in the Internet access market in general as a fair and orderly market. Consumers are reliant on Internet access, which the Commission has declared is an essential service; they cannot manage expenses of this essential service in household budgets when there are unpredictable and wild price swings. Such volatility again risks decreased consumer and citizen Internet use, which is an economic and societal deadweight loss.

²⁰ CNOC, Petition to the Governor in Council, at para 128, and sources and arguments at paras. 130, *et seq.*

²¹ *Ibid.*

²² TekSavvy, Petition of TekSavvy Solutions Inc. to the Governor in Council at p.3-4.

²³ *Ibid.*

29. The Commission's decision-making process in TD 2021-181 is so removed from the 2019 Policy Direction that it justifies rescission of TD 2021-181 in order to discipline the Commission. The Commission's total disregard of the Government's intention for telecommunications policy invites speculation as to how the CRTC could possibly have gotten it so wrong: PIAC submits that the answer lies in Cabinet's previous consideration of the rates set in TO 2019-288.

The CRTC misapprehended the direction in the GIC's previous determination on wholesale rates in 2020

30. When TO 2019-288 was issued, on 15 August 2019, the 2019 Policy Direction had been officially registered only a few months before, on 18 June 2019.
31. By this time, the record for the proceedings leading to TO 2019-288 had been closed for some months (November 2018).
32. Nonetheless, the CRTC, in TO 2019-288, effectively listened to, understood the import of, and implemented the Government's new stated telecommunications policy, which no longer favoured facilities-based networks, but now included new network technologies, user-centric goals such as affordability and consumer protection and innovation. The rates announced as final in TO 2019-288 were hailed by competitors as finally providing an input cost structure that would permit them to introduce new service offerings and crucially, to lower retail prices. Even though the Commission did not cite the relatively new 2019 Policy Direction as grounding their rates decision, it was abundantly clear that TO 2019-288 was working in harmony with the Government's new telecommunications policy.
33. Despite the clear congruence of government policy and CRTC rate-setting, the incumbents did not agree: in September 2019, a group of telco incumbents and a group of cableco incumbents filed applications for leave to appeal TO 2019-288 to the Federal Court of Appeal. In addition, Bell and TELUS also separately filed, as well as a group of cablecos, petitions to the Governor in Council in November 2019.²⁴ Finally, these groups also filed applications to Review and Vary TO 2019-288 in the CRTC – which ultimately led to TD CRTC 2021-181 – but filed late and so had to seek special permission from the CRTC to proceeding, which CRTC granted over objections from PIAC and competitors.
34. The Governor in Council delivered its assessment of the 2019 petitions on 15 August 2020. At that time, the Federal Court of Appeal already had dismissed the court appeals. The CRTC's review and vary proceeding was largely on hold at this time but still active.

²⁴ See Government of Canada, Gazette Notices and Petitions: "Petitions to the Governor in Council concerning Telecom Order CRTC 2019-288" (13 November). Online: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11568.html>

The GIC dismissed the incumbents' petitions, noting that the CRTC review and vary process was already "underway" but provided additional direction to the CRTC that Cabinet: "considers that the rates do not, in all instances, appropriately balance the policy objectives of the wholesale services framework and is concerned that these rates may undermine investment in high-quality networks, particularly in rural and remote areas."²⁵

35. What is not emphasized in this "dismissal with a message" rendition of the document is the GIC's parallel insistence on the primacy and importance of the 2019 Policy Direction to the CRTC's deliberation in addition to a reconsideration of effects on incumbent investment incentives. The GIC dismissal also stated: "In June 2019, our government directed the Canadian Radio-television and Telecommunications Commission (CRTC) to consider how its decisions can promote competition, affordability, consumer interests and innovation. In particular, the CRTC was asked to consider the extent to which these decisions can encourage all forms of competition and investment. Balancing these objectives and improving consumer choice, while furthering investment in high-quality networks, have been the long-standing goals of the regulatory framework for access to wholesale Internet services." This is a statement of the 2019 Policy Direction and just as clear an indication to the CRTC to consider the new policy together with incumbents' concerns.
36. Whatever Cabinet's exact intention, the CRTC took this "dismissal with a message" much too far. In the incumbents' direction.
37. PIAC compares the CRTC's reaction to the GIC's disposition of the TO 2019-288 petitions to that of the four knights of Henry II, who, upon hearing the King's exasperation at the actions of Archbishop Thomas a Becket, overreacted and took this as an order to cut off the saint's head in an apparent misinterpretation of the monarch's wishes – and creating a much larger problem for the King.
38. In plain English, the CRTC freaked out. TD 2021-181 was a rushed, ill-considered gallop to judgment that defied facts and law in its overzealous attempt to implement what the CRTC wrongly and partially understood to be Cabinet's "instructions" to utterly reverse the wholesale rates. It is now up to Cabinet to attempt to clean up the mess that the Commission has made.

The CRTC's Rate Reversal is Arbitrary and Capricious and Risks Further Chaos

39. The Commission in TD 2021-181 determined that there was substantial doubt as to the correctness of the final rates determined in TO 2019-288, and acknowledged that a

²⁵ Innovation, Science and Economic Development Canada, "Response by the Government of Canada to petitions concerning CRTC wholesale Internet rates," (August 15, 2020), online: <https://www.canada.ca/en/innovation-science-economic-development/news/2020/08/response-by-the-government-of-canada-to-petitions-concerning-crtc-wholesale-internet-rates.html>.

fulsome revision to the cost studies would provide just and reasonable rates.²⁶ However, it found this approach to be problematic; broadly speaking, it noted that further information would be required, it would prolong the process, require significant resources and impede the process of ultimately transitioning to disaggregated wholesale HSA service, amidst other specifics.²⁷

40. The Commission therefore found that within its jurisdiction to set rates by any method, that if the rate-setting it now had to undertake given its finding that there were errors in TO 2019-288 were in effect “hard” or “going to take a while” that they could avoid the established regulatory practices of Phase II costing and in-depth consideration of an appropriate rate.

41. The Commission acknowledges in para. 300 that it should follow detailed costing:

300. In Telecom Regulatory Policy 2015-326, the Commission stated that the existing company-specific incremental costing approach remains the appropriate approach for rate-setting for mandated wholesale services.

42. However, it concludes that given its ‘timing’ and ‘effort’ concerns: “the Commission may adopt other costing approaches, where appropriate and on a case-by-case basis, to improve regulatory efficiency or to further certain policy objectives. The Commission notes that proxies or alternative methods are often used to establish just and reasonable rates, such as by allowing companies to use the cost studies and resulting rates approved for another company for the same service.” (para. 300).

43. However, the Commission did not then establish a “proxy” or outline an “alternative method” for estimating these costs. It in fact just ‘winged it’ – accepting the 2016 rates as a ‘good enough’ approximation of what the Commission might determine on proper analysis. The rationale for this conclusion? That the competitors were still in business, therefore proving that the interim rates had “worked” (see para. 303).

44. None of this tortured reasoning, however, demonstrates what the Commission implies. The fact that competitors are still ‘hanging on’ does not imply or prove in any way that the interim 2016 rates were just and reasonable. It does not account for the fact put forth in many of the competitors’ arguments that their companies were and still are losing money but gambling on lower rates and the potential for return of overpayments when a final HSA access rate was set lower than the 2016 rate. Many now face financial ruin without lower rates and a return of the overcharged rates from 2016-2019.

45. The CRTC’s conclusion is stunning: ‘we are too lazy,’ the CRTC says, ‘to do our job. It might not matter even if we did the work, so why bother? And we have been so slow in

²⁶ Telecom Decision CRTC 2021-181 at para 292.

²⁷ See Telecom Decision CRTC 2021-181 at paras 292-299.

doing our job until now that you don't want us to take more time to actually fix it, do you? We will just eyeball it and say the present situation is fine.' (see paras. 292-299).

46. If the CRTC were a contractor, the GIC should fire them. They have avoided their duty; their only purpose in this situation is to set rates and they have said that not bothering to set a rate is a new method of rate-setting.²⁸ It is not. It only creates a bigger headache for consumers, competitors and now, the government.
47. In fairness, outside of laziness, the CRTC also put forth three further excuses for this decision:
1. addressing and correcting the concerns and errors identified in the review and vary applications will result in final rates that will serve only to compound asymmetrical rate-offering issues between the cable carriers and the ILECs, which likely will materially affect competition between wholesale HSA service providers; (para. 298)
 2. aggregated wholesale HSA service rates that are set too low would discourage the migration to disaggregated wholesale HSA service; (para. 298) and
 3. "aggregated wholesale HSA services are no longer mandated" (para. 301)
48. Point 1 refers to the fact that at the exact time of this decision, certain cablecos offered speed tiers faster than some telco-based systems (typically, a 1.5 Gbps service as opposed to a maximum of 1 Gbps or less) due to technical differences in cableco vs. telco technology covered by the HSA tariffs at issue in the proceedings. The "asymmetrical rate issues" between types of incumbents (cablecos vs. telcos) was therefore the presumption that competitors would flock to cablecos' HSA offerings disproportionately and "burden" them with wholesale customers. PIAC does not believe that this concern, even if possible, comes even close to the consumer economic interest in lower rates for higher speeds, whether delivered via cableco or telco. The CRTC did not even consider this consumer economic interest, which is likely considerable, despite the 2019 Policy Direction.
49. Point 2 refers to the CRTC stated goal of migrating competitors to a type of HSA access, called "disaggregated" that the Commission believes would be advantageous for the industry. Many smaller competitors, in numerous CRTC filings in proceedings on disaggregated wholesale access and rates, and in one extant Petition to the GIC, however have argued that forced transition to disaggregated access would greatly increase their

²⁸ PIAC is well-aware of the Commission's invocation of subs. 27(5) of the *Telecommunications Act*, which states that in "determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise". We also are aware of the Supreme Court of Canada's expansive reading of this power in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764. However, it is our considered legal opinion, and we note that it also grounds Teksavvy's present application for leave to appeal of TD CRTC 2021-181 to the Federal Court of Appeal, that not deciding a matter in this manner is not exercising one's discretion but rather refusing to do so, and an error of fettering that discretion by inaction.

rates or cause them to reduce or remove services.²⁹ Again, this will affect consumers, and the Commission did not even mention consumer concerns or price effects in its acceptance of this goal (transition to disaggregated HSA) as a reason to simply re-institute the 2016 wholesale rates.

50. Point 3 refers to the phase out of mandated aggregated wholesale access (as opposed to “disaggregated”). Recall that smaller, cheaper competitors rely heavily on aggregated HSA access service to deliver reasonably priced services to consumers. Again, in contravention of the 2019 Policy Direction, the CRTC in relation to this “well, those services are being phased out” excuse to just use the 2016 interim wholesale rates as final, did not consider consumer interests in their analysis of this point. This is an error.
51. Finally we note that the Commission finalized the interim rates from 2016 as final rates in TD 2021-181 despite the fact that only one party, Bell Canada, asked for this remedy in its review and vary application. TELUS asked for “determinations related to the application of the attribution factor, the timing of CAPEX adjustments and requirement for retroactive application of rates, specifically the markup.” The Cablecos asked for: “Review and variance of the Methodology and the resulting rates approved for the Cable Carriers’ aggregated wholesale high-speed access” and that this be aligned with other proceedings pending on the Commission’s review of costing methodologies, along with a reversal of the rate rebates and injunctive relief.³⁰
52. We agree with CNOC’s argument that while the CRTC may legitimately determine that it has ‘run out of time’ for further costs reviews, that Canadians should not fall victim to the consequences of wholesale rates that are incapable of advancing competition and affordability of retail services.³¹
53. Again, outside of the absurdity of the decision challenged in these petitions, which is arbitrary and capricious, we argue that the CRTC has failed to do its job in TD 2021-181. This failure is a separate concern that the GIC should address. Our concern is that the Commission will be derelict in its duties in relation to other matters that gravely affect consumers going forward if this tendency is not correct by a reversal of their decision here.
54. We support the remedy suggested by CNOC and Teksavvy of rescinding TD 2021-181 in its entirety and leaving TO 2019-288 undisturbed and in effect, including the order as to

²⁹ See, for example, competitor submissions in CRTC proceedings TNC 2020-187 and “Petition of National Capital FreeNet Inc. to the Governor in Council to vary Telecom Decision CRTC 2021-181, *Requests to review and vary Telecom Order 2019-288 regarding final rates for aggregated wholesale high-speed access services*”, August 25, 2021; [not yet Gazetted] online: https://www.ncf.ca/en/documents/69/Petition_of_National_Capital_FreeNet_Inc-TDCRTC2021181-Aug2521.pdf

³⁰ See the various applications to review and vary TO 2019-288 at: <https://services.crtc.gc.ca/pub/TransferToWeb/2019/8662-C12-201912502.zip>

³¹ CNOC, Petition to the Governor in Council at para 54.

rebates. Unlike the Commission's own disposition in TD 2021-181, this would not be an unjustified "reversal" as the 2019-288 decision was itself the result of a thorough reconsideration. However, if the GIC were to prefer to simply quash TD 2021-181 with a direction to the CRTC to reconsider the review and vary applications, we would urge Cabinet to make understood to the Commission that it must do its job and consider the evidence with the rigour it did in the earlier proceeding leading to TO 2019-288. In addition, we would request that the GIC stipulate that the interim rate during any reconsideration must be that established in TO 2019-288.

CONCLUSION AND REQUESTED DISPOSITION

55. Based on the above, we urge the GIC to wholly rescind TD 2021-181. PIAC is of the opinion that only this remedy can rescue competitors and provide consumers with additional choice and lower pricing in the retail Internet access market. Without reasonable wholesale rates, competitors cannot compete and will either shut down, consolidate and be acquired by incumbents, or simply mirror the high pricing of incumbents. This runs counter to the government states policy, as most clearly expressed in the 2019 Policy Direction, to orient telecommunications towards users and to make services affordable.
56. This is the Government's chance to regain Canadians' trust in a time of continuing hyper-reliance on the essential service of Internet access by granting these petitions (the major relief requested by both) and sending a clear message to the regulator to perform its duties in accordance with the stated policy of the Government of Canada.

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