



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

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11 February 2021

Mr. Claude Doucet  
Secretary General  
Canadian Radio-television and  
Telecommunications Commission  
Ottawa, ON K1A 0N2

VIA GC KEY

**Re: CRTC file: 8622-C347-202100080**  
**Re: Application by CNOC for expedited and temporary resale remedy**  
**for competitive access to Incumbent fibre-to-the-premises facilities**

**Intervention of the Public Interest Advocacy Centre (PIAC)**

Dear Mr. Doucet:

**Introduction and Background to the Application**

1. The Public Interest Advocacy Centre (PIAC) is in receipt of an application dated 8 January 2021 (posted on the Commission's website on 12 January 2021) pursuant to Part 1 of the Canadian Radio-Television and Telecommunications Commission *Rules of Practice and Procedure* ("Rules") and sections 24, 27, 47 and 57, subsection 61(1) and paragraph 32(g) of the *Telecommunications Act* ("Act"), seeking "expedited relief to end the undue preference that ILECs and/or Cable Carriers (individually, each an "Incumbent"; collectively, "Incumbents") are conferring upon themselves with respect to the provision of retail Internet services ("IS") over fibre-to-the premises ("FTTP") access facilities when no workable corresponding wholesale high-speed ("HSA") service exists by which services-based competitors, such as CNOC members, can provide their own retail IS and other services that require broadband connectivity over those facilities."
2. CNOC's proposed relief is, in effect, an order for an immediate interim rate for aggregated HAS access to incumbent FTTP facilities at a retail minus 30% rate, with certain other conditions, such as a requirement to offer this rate over the entirety of the incumbent's own FTTP footprint and any future footprint in their "serving territories". CNOC's own term for this at para. 4 of their Application is: "retail IS resale ("RISR") of all retail IS [that incumbents] provide over their FTTP access facilities on a wholesale basis".

3. First, we note that PIAC supports the Application, in substance. In other words, just as PIAC argued in the recent Part 1 Application by SSI for FTTP access in Northwestel territory, there is reason to order the relief that CNOC demands, in order to provide greater competition to the benefit of consumers. We shall describe that view further below.

**Unjust discrimination (subs. 27(2)) cannot ground the Application without facts**

4. However, just as we questioned the primary proposed legal basis for the relief in the SSI Application, we must make the same point here: Relying upon subs. 27(2) in an attempt to ground the Application in unjust discrimination is unsupported in law, at least without a factual basis to establish discrimination. To support a claim under subs. 27(2), CNOC would have had to argue that the incumbents were taking intentional steps to impede negotiations or similar conduct that without justification was interfering with their right to access FTTP. That could, depending on the evidence, constitute a preference or discrimination, which the Commission could in turn decide was undue or unjust.
5. The Commission decisions cited by CNOC for the principle that unjust discrimination can ground an order for interim wholesale access at a specified interim (usually retail-minus) rate simply because those incumbents began offering their own service (as tariffed, or forborne)<sup>1</sup> all had evidence on the record that intentional actions (or at the least, wilful inactions) were indeed being taken by the relevant incumbents, or were cases decided only on policy grounds with a condition under s. 24 being used as the means to a remedy.
6. For example, in the proceeding leading to TD CRT 2003-87, Cybersurf led evidence in its Application that Shaw openly represented it was willing and able to provide TPIA access and was open to negotiating rates. Cybersurf also alleged that when discussions were finally had after many delays, that Shaw revealed for the first time a network upgrade issue with TPIA that would delay access by at least 6 months, which Cybersurf labelled discrimination. Likewise, in the proceeding leading to TD CRTC 99-11, at para. 5, the Commission summarized the pleadings: "CAIP alleged in its application that CCTA members are deliberately delaying the implementation of access." Finally, in the Cybersurf v. Shaw follow-up (TD 2004-24), Mr. Tacit then at Nelligan's, argued for Cybersurf that Shaw intentionally delayed or obstructed the implementation of TD 2003-87, based on allegations of facts in the initial application (for example: "Based on these facts, it is clear that Shaw is unwilling to comply with the wording or spirit of Decision 2003-87" and "Given Shaw's conduct with regard to the provision of TPIA and resale arrangements to date, the Commission and Cybersurf can have no confidence that Shaw will actually provide TPIA service to Cybersurf in a prompt and efficient manner." The factual basis, therefore, was laid for the Commission to find incumbent parties were discriminating against a competitor.

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<sup>1</sup> Telecom Decision CRTC 99-11 ("TD 99-11"), Telecom Decision CRTC 2003-87 ("TD 2003-87"), Telecom Decision CRTC 2004-24 ("TD 2004-24") and Telecom Decision CRTC 2016-67 ("TD 2016-67") (collectively, the "Cable Carrier RISR Decisions").

7. In CNOC's present Application, no such evidence of intentional discrimination against competitors access is provided.
8. At para. 55, CNOC states that "a workable disaggregated HSA framework does not exist. The Transition Plan has failed." CNOC then implies the Commission has admitted that the disaggregated regime does not work (at para. 14 of TNC CRTC 2020-187).
9. PIAC does not read TNC CRTC 2020-187 that way. To our reading, the Commission was careful to question, in para. 22(i):

Provide your view, with supporting rationale and evidence, on ***whether or not the existing disaggregated wholesale HSA service regime supports an orderly, cost-effective transition from aggregated to disaggregated wholesale HSA services. If not***, provide your view on how disaggregated wholesale HSA services should be modified to facilitate the deployment of the services. [Emphasis added.]

10. CNOC goes on in the Application to quote wholesale-based competitors, and even PIAC, to the effect that these parties agree the disaggregated wholesale regime is "unworkable". While this may be competitors' and indeed PIAC's position, it does not prove the fact of discrimination by incumbents against CNOC, rather than the incumbents simply acting under present CRTC wholesale rules.
11. The problem for CNOC is that Bell, TELUS, Rogers and the other incumbents all have access tariffs set by the Commission for FTTP wholesale access (see Telecom Order CRTC 2017-312, for Bell, for example, at "Table 1(c): Interim approved monthly FTTP access rates" and for various other tariffed access charges at disaggregated access points (in COs) (Bell Access Services Tariff, CRTC 7516, Item 151, 4.(d).(1)).
12. Adding all of these tariffed (that is, Commission-approved) charges to CNOC member's costs for transport to these disaggregation points led CNOC, in an earlier Part 1 application,<sup>2</sup> to argue that it was these high costs that were the cause of their problem.<sup>3</sup> In short, CNOC in this Part 1, is seeking to use subs. 27(2) with no factual basis of discrimination other than the high tariffed rates and costs attendant to the regulatory structure chosen by the Commission in TRP 2015-326. In PIAC's view, the incumbents cannot be said to discriminate by simply offering approved tariffs, even if they are, frankly,

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<sup>2</sup> CNOC Part 1 Application dated 7 November 2018 to Review and Vary Review of Wholesale Wireline Services and Associated Policies, Telecom Regulatory Policy CRTC 2015-326 and Follow-up to Telecom Regulatory Policy CRTC 2015-326 – Implementation of a Disaggregated Wholesale High-Speed Access Service, Including over Fibre-to-the-Premises Access Facilities, Telecom Decision CRTC 2016-379 ["CNOC HSA Remedial Application"].

<sup>3</sup> *Ibid.*, at para. 128: "In particular, the costs of the Bell configurations are exorbitant. Comparatively, the lesser level of disaggregation inherent in the Cable Carrier configurations results in lower albeit still prohibitive costs." Note: CNOC did not rely upon subs. 27(2) in this application.

taking advantage of the regulatory delay and high tariffs to roll-out FTTP to their own territories on accelerated schedules.<sup>4</sup>

13. The Commission then closed CNOC's earlier application and instituted TNC CRTC 2020-187 to set final disaggregated rates, terms and conditions. That was the proffered "remedy" for CNOC's concerns.

**CNOC Application is also based upon the Essential Facilities Test and policy considerations and should be granted**

14. While this Application should have stated more clearly that the true basis for its request is that which underlies all wholesale access, namely, the Essential Facilities test, it has recited the requirements of the test from TRP 2015-326, in the Application, at paras. 5 and 64 and fn. 112, and has discussed in detail the policy considerations that modify a straight application of the Essentiality test in paras. 63 et seq. Therefore the Commission can grant CNOC's requested relief if it is satisfied that the present retail market is not competitive and it considers that the policy objectives favour relief (as in the cable cases cited by CNOC).
15. In this part of the Application, CNOC structures its policy argument for its requested relief around the provisions of the "new" 2019 Policy Direction.
16. In PIAC's view, the 2019 Policy Direction does strengthen CNOC's policy arguments that form part of the Commission's proper basis for consideration of whether to mandate the provision of wholesale FTTP on the basis requested by CNOC. However, what is most important are CNOC's policy arguments as to why the Commission's present extended wholesale proceedings, high HSA tariffs, incumbent access tariffs, and numerous wholesale proceedings (which are myriad and continuing) are conspiring to deprive consumers of competitive options and therefore choice, affordability and lower prices and innovation.<sup>5</sup>
17. PIAC agrees with all of the points CNOC relies upon. However, we wish to add that we are generally not concerned that incumbents will now reduce investment if the Commission grants interim FTTP resale until final rates for disaggregated access is set and proceedings finalizing network structure and wholesale rate-setting methodology are finished, which PIAC anticipates will be more in years than in months. In short, given the capital announcements of Bell and other incumbents, PIAC believes that the "headstart" that incumbents have been permitted to leverage as the Commission works out wholesale HSA, has been more than long enough, has provided them more than enough market share, and enough profit, to ensure continued consumer access to fibre. Allowing competition in the fastest internet speeds at this point will provide a "public good" in the

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<sup>4</sup> See, for example, BCE (Bell), "Q4 2020 Results & 2021 Financial Guidance Call", online at: <https://www.bce.ca/investors/financial-reporting/2020-Q4/2020-q4-presentation.pdf> at pp. 3, 4.

<sup>5</sup> CNOC Application, at para. 63.

form of benefitting consumers (finally) with more choice and lower prices for FTTP-based retail IS and is unlikely to materially retard incumbent fibre investment.

18. Granting the Application would also allow many more Canadians, presently with CNOC and other competitors, to immediately transition to fibre-based speeds of up to 1.5 Gbps, without the hassle of switching providers (and likely paying much more for retail IS than with competitors) during a time of pandemic, when faster speeds, due to home learning and working remotely are most acute. Adding these customers' traffic to the incumbent wholesale providers' networks also would add efficiency to the market, as their systems were carrying more traffic rather than running (partly) empty.
19. CNOC also argues that granting the Application will advance many of the policy objectives in s. 7 of the Act. We agree.
20. As noted above, PIAC submits that having more Canadians on higher speed access is critical in the time of COVID-19. Nothing could add more Canadians faster to higher speed access than allowing competitors a retail-minus resale right immediately. This will "safeguard, enrich and strengthen the social and economic fabric of Canada and its regions" at a time when Canada needs that connectivity most (subs. 7(a)).
21. Likewise, and crucially, we agree that subs. 7(b) will be served by granting CNOC's application for the reasons given in the Application, namely:

CNOC's requested relief will introduce consumer choice in areas where any Incumbent currently enjoys monopolistic or duopolistic market conditions in the provision of retail broadband services and applications. Competitive choice of providers, services features and price will translate into the availability of more reliable and affordable services throughout the country.<sup>6</sup>

22. PIAC would add that in our submission, the Application would also "respond to the economic and social requirements of users of telecommunications services" (subs. 7(h)) in time of pandemic, as social, educational and labour needs for higher speed broadband that only fibre can deliver are now endemic and acute. For example, only fibre can ensure a household of 4 persons can simultaneously telework, use video-based education software and provide essential communications and enjoy entertainment during confinement.
23. Regarding the Policy Directions, we believe that CNOC has rightly emphasized that its Application tracks nearly point for point to the priorities of the 2019 Policy Direction.
24. We note that once again, CNOC has, however, relied upon the erroneous reference to "unjust preference" in discussing the key 2006 Policy Direction requirement that any regulation "neither deters competitive entry, nor promotes economically inefficient entry".

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<sup>6</sup> CNOC Application, at para. 124.

25. Since there is no unjust discrimination involved, this argument cannot address subpara. 1(b)(ii). Fortunately, this subparagraph can be satisfied by reference to the policy considerations above instead. Reaching the many hundreds of thousands of present competitive ISP customers instantly with higher speed options without switching providers is in fact the only way, and therefore the “most economically efficient “way to incent entry into the FTTP wholesale market in the present by competitors but more importantly, is the most efficient way to improve the retail IS market in a time of dire need for affordable, high-speed IS.

### **Conclusion**

26. For the reasons given in this Intervention, PIAC submits that this Application should be granted in its entirety.

Sincerely,

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Counsel to PIAC

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