BEFORE THE CANADIAN RADIO-TELEVISION
AND TELECOMMUNICATIONS COMMISSION

IN THE MATTER OF

AN APPLICATION BY CANADIAN NETWORK OPERATORS CONSORTIUM INC.

(APPLICANT)

PURSUANT TO PART I OF THE *CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RULES OF PRACTICE AND PROCEDURE* AND SECTIONS 24, 25, 27, 32, 39, 47, 54, 55 AND 62 OF THE *TELECOMMUNICATIONS ACT* DIRECTED TO

BELL ALIANT REGIONAL COMMUNICATIONS, LIMITED PARTNERSHIP,
BELL CANADA, COGECO CABLE CANADA INC., ROGERS COMMUNICATIONS PARTNERSHIP, SHAW CABLESYSTEMS GP,
TELUS COMMUNICATIONS COMPANY AND VIDEOTRON LTD.

(RESPONDENTS)

TO REVIEW AND VARY *BILLING PRACTICES FOR WHOLESALE RESIDENTIAL HIGH-SPEED ACCESS SERVICES*, TELECOM REGULATORY POLICY CRTC 2011-703, 15 NOVEMBER 2011 AND *BILLING PRACTICES FOR WHOLESALE BUSINESS HIGH-SPEED ACCESS SERVICES*, TELECOM REGULATORY POLICY CRTC 2011-704. 15 NOVEMBER 2011 AND RELATED FOLLOW-UP MATTERS

2 MARCH 2012

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1.0 INTRODUCTION

1.1 Executive Summary (The Nature of the Application)

1. Canadian Network Operators Consortium Inc. (“CNOC”) is bringing this application (“Application”) pursuant to part I of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*[1] (“*Rules*”) and sections 24, 25, 27, 32, 39, 47, 54, 55 and 62 of the *Telecommunications Act*[2] (“*Act*”).

2. In the Application, CNOC seeks a review and variance of certain aspects of *Billing practices for wholesale residential high-speed access services*, Telecom Regulatory Policy CRTC 2011-703, 15 November 2011 (“TRP 2011-703”) and *Billing practices for wholesale business high-speed access services*, Telecom Regulatory Policy CRTC 2011-704, 15 November 2011 (“TRP 2011-704”), in which the Commission approved new rates for incumbent residential wholesale high-speed access services (“RWHSAS”) and business wholesale high-speed access services (“BWHSAS”) (RWHSAS and BWHSAS collectively called “WHSAS”). In addition, CNOC seeks some related relief as a follow up to TRP 2011-703 and TRP 2011-704 (collectively “WHSAS Rate Decisions” or “Decisions”).

3. The Application is directed against Bell Aliant Regional Communications, Limited Partnership (“Bell Aliant), Bell Canada (Bell Aliant and Bell Canada hereinafter collectively called “Bell”), Cogeco Cable Canada Inc. (“Cogeco”), Rogers Communications Partnership (“Rogers”), Shaw Cablesystems G.P. (“Shaw”), Telus Communications Company (“Telus”) and Videotron Ltd. (“Videotron”). In the balance of this Application, these parties are identified as “Incumbents” or “Respondents”. Incumbent local exchange carriers (“ILECs”) and cable carriers are more generally called “incumbents”.

4. In both of the WHSAS Rate Decisions the Commission stated that, in order to foster competition, it regulates the WHSAS offered by ILECs and cable carriers required by independents Internet service providers (“ISPs”) to provide their own retail Internet and other services.[3] The Commission went on to stress in each case that “[s]ervices provided by the

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1 SOR/2010-277, 30 November 2010.
2 S.C. 1993, c. 38, as amended.
3 See TRP 2011-703 at paragraph 2 and TRP 2011-704 at paragraph 2.

independent service providers bring pricing discipline, innovation, and consumer choice to the retail Internet service market"[4] and that "[f]or the Commission it has been important to ensure that retail Internet service competition is sufficient to protect consumers' interests".[5]

5. CNOC is concerned that this public policy has actually been inadvertently undermined in the Decisions. More specifically, the Commission committed a number of errors, including the following errors in law:

(1) The Commission failed to conduct a sufficiently transparent tariffing process for the determination of the monthly 100 Mbps capacity charges ("Capacity Rates") for Bell, Cogeco, Rogers and Videotron and for the monthly rates for BWHSAS accesses ("BWHSAS Access Rates") for Bell Aliant in the Atlantic Provinces Ontario and Quebec, Bell Canada in Ontario and Quebec, and Telus in Alberta, British Columbia and Quebec (collectively "TRP 2011-704 BWHSAS Access Rates") thereby effectively depriving CNOC and other interested parties of the procedural fairness (i.e., the right to be heard in a proceeding and test the evidence of parties adverse in interest);

(2) The Commission failed to set Capacity Rates for Bell, Cogeco, Rogers and Videotron that are just and reasonable by:

(a) Allowing Bell, Cogeco, Rogers and Videotron to develop cost estimates underlying the rates using traffic measured by volume in GB over the course of a month instead of applying monthly peak traffic measurements in kbps directly as MTSA had done;

(b) Allowing Bell, Cogeco, Rogers and Videotron to inflate their unit costs by basing their service demand on Internet services only instead of all services sharing network capacity as MTSA had done;

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4 TRP 2011-703 at paragraph 3 and TRP 2011-704 at paragraph 3.
5 *Ibid.*

(c) Ignoring the inflation in the Capacity Rates caused by the statistical characteristics associated with peak usage of independent ISPs and related excess capacity when the peaks of multiple independent ISPs are mathematically summed together without regard for the fact that such peaks do not coincide; and

(d) Failing to mandate annual reviews of the Capacity Rates despite their sensitivity to rapidly increasing peak traffic demand and rapidly declining telecommunications facilities costs;

(3) The Commission failed to set TRP 2011-704 BWHSAS Access Rates for Bell and Telus that are just and reasonable by:

(a) Including a mark-up in those rates that is greater than the mark-up employed by the Commission to set the rates for corresponding monthly rates for RWHSAS accesses ("RWHSAS Access Rates"); and

(b) Allowing Bell and Telus to base their service demand on Internet services only instead of all services sharing network usage;

(4) The period for the transition to aggregated points of interconnection ("POIs") for third party Internet access ("TPIA") of two years is unreasonably short and does not allow for reasonably priced transport solutions to be available for independent ISPs to augment capacity between their networks and the disaggregated POIs of Cogeco, Rogers, Shaw and Videotron during the transition period;

6. In addition, CNOC has identified the following additional issues flowing directly from the WHSAS Rate Decisions that need to be addressed to ensure that rates for WHSAS are just and reasonable:

(1) The $3.75 monthly rate for a 7 Mbps upload speed associated with Bell Residence GAS-FTTN 10, 12 and 16 Mbps speed download services is not authorized by the Commission and Bell should not be charging that rate;

(2) There may be usage costs in Bell's monthly Aggregated High Speed Service Provider Interface ("AHSSPI") rates that are also being recovered through the new Capacity Rates and BWHSAS Access Rates and the Bell AHSSPI rates are much higher than similar interface rates of MTSA and Saskatchewan Telecommunications ("SaskTel");

(3) The only VDSL modem authorized for the Bell network in conjunction with WHSAS is the ALU 7130 VDSL modem which can only be obtained from Bell on a monopoly basis as a rental at the very high rate of $8.00 per month.

7. To that end, in this Application, CNOC will prove that that the variances that CNOC is seeking to the WHSAS Rate Decisions are necessary to prevent an undue lessening of competition in the provision of retail high-speed Internet and other related services ("HSIS"). In order to ensure sustainable competition, adjustments to the WHSAS Rate Decisions and other relief are required in the following areas:

(1) The Capacity Rates for Bell, Cogeco, Rogers and Videotron, and the TRP 2011-704 BWHSAS Access Rates which are all inflated, must be reduced following a more transparent tariff review process in which counsel and experts for parties have full access to the information filed in confidence by these Incumbents in support of their filings;

(2) The revised tariff process for setting Capacity Rates for Bell, Cogeco, Rogers and Videotron must also employ an improved methodology that:

(a) Relies on peak demand traffic measurements and not monthly traffic volume to peak demand measurements;

(b) Is based upon all services sharing network capacity (i.e., "all services demand");

(c) Ensures that these four incumbents are not overcompensated due to the statistical characteristics associated with peak usage of independent ISPs and related excess capacity when the peaks of multiple independent ISPs are mathematically summed together without regard for the fact that such peaks do not coincide; and

(d) Includes an annual review of Capacity Rates in light of the dynamic environment in which retail HSIS are provided, where peak usage is increasing rapidly while the cost of telecommunications facilities continues to fall rapidly;

(3) The TRP 2011-704 BWHSAS Access Rates for Bell and Telus must be set using a methodology that:

(a) Includes a mark-up in these rates that is no greater than the mark-up employed by the Commission to set the rates for corresponding RWHSAS Access Rates; and

(b) is based on “all services demand”;

(4) The period for the transition to aggregated points of interconnection (“POIs”) for third party Internet access (“TPIA”) must be increased to three years in order to provide independent ISPs with economic alternatives for obtaining the transport services that they need to augment transport capacity between their networks and the disaggregated POIs of Cogeco, Rogers, Shaw and Videotron during the transition period;

8. Additionally, CNOC seeks the following relief with respect to a number of rate issues that flow directly from the WHSAS Rate Decisions:

(1) The $3.75 monthly rate for a 7 Mbps upload speed associated with Bell Residence GAS-FTTN 10, 12 and 16 Mbps speed download services must be eliminated immediately as that rate is not approved by the Commission and all upload usage costs are already recovered through the Bell Capacity Rate;

(2) Usage costs should be removed from Bell's AHSSPI rates to ensure that there is no double charging for usage in light of the new Capacity Rates and BWHSAS Access Rates and the Bell AHSSPI rates should be brought into line with similar interface rates of MTSA and SaskTel; and

(3) Bell should be required to make available the ALU 7130 VDSL modem to WHSAS customers for use in conjunction with GAS-FTTN and HSA-FTTN services at reasonable market-based regulated rental and purchase prices so long as alternate sources are not available for a VDSL modem that is compatible with the Bell network.

9. Finally, in order to preserve the rights of independent ISPs while this proceeding is in progress, CNOC is seeking an order from the Commission making interim the Bell, Cogeco, Rogers and Videotron Capacity Rates and the TRP 2011-704 BWHSAS Access Rates, and adjusting all of those rates retroactively to the date that they are made interim once the Commission issues its final decision in this proceeding.

10. In support of the Application, CNOC is filing two studies that it has commissioned which address the unreasonableness and unaffordability of the Capacity Rates for Bell, Cogeco, Rogers and Videotron.

11. The first study was prepared by Nordicity and is entitled "Analysis of Incumbent Costs Underlying Capacity-based Billing of Independent ISPs".[6] This study demonstrates that the costs that the Commission accepted in order to establish capacity charges for the Respondents in TRP 2011-703 are highly inflated and lead to excessively high Capacity Rates for Bell, and by extension to Cogeco, Rogers and Videotron, under the capacity-based regime approved ("Approved Capacity Model") in that decision. The study also concludes that this outcome is a result of the lack of transparency associated with the rate-setting process due to the amount of information filed in confidence by the Respondents that interested parties were not able to review.

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[6] Nordicity Report.

12. The second study was prepared by Analysis Group, Inc. ("AGI") and is entitled "Report on the Impact of Capacity-based Wholesale Tariffs on Independent ISPs".[7] In it AGI demonstrates that the levels at which the Commission set the Capacity Rates for Bell, Cogeco, Rogers and Videotron in TRP 2011-703 will not lead to sustainable competition.

1.2 Order Sought

13. In this Application, CNOC is seeking an order from the Commission:

(a) Reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron and the TRP 2011-704 BWHSAS Access Rates for Bell and Telus following a more transparent tariff review process in which counsel and experts for parties have full access to the information filed in confidence by these Incumbents in support of their filings;

(b) Reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron following an adjustment to the method used for calculating those rates, such that the method is based on the peak traffic capacity used on those Incumbents' networks in a given month, rather than on monthly traffic volume to traffic peak conversions;

(c) Reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron following an adjustment to the method used for calculating those rates, such that the method is based on costs calculated using peak usage for all services sharing the network of each of those Incumbents;

(d) Reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron to take into account the statistical effects of aggregating the peak usage of all independent ISPs and the related excess capacity never used by independent ISPs so that these Incumbents are not overcompensated for carrying the traffic of independent ISPs;

(e) Mandating annual reviews of the Bell, Cogeco, Rogers and Videotron Capacity Rates that will take into account the yearly declines in the costs of telecommunications facilities and increases in peak traffic demand – such reviews to be conducted under the framework established pursuant to parts (a) through (d) of the order sought;

(f) Reducing the TRP 2011-704 BWHSAS Access Rates such that the mark-up over Phase II costs employed in deriving those rates is no higher than the mark-up

7 AGI Report.

employed by the Commission in establishing the corresponding monthly RWHSAS Access Rates in TRP 2011-703;

(g) Reducing the TRP 2011-704 BWHSAS Access Rates following an adjustment to the method used for calculating those rates, such that the method is based on costs calculated using usage for all services sharing the network of each of those Incumbents;

(h) Extending the transition period to TPIA aggregated POIs for Cogeco, Rogers, Shaw and Videotron from two to three years; and

(i) Directing Bell to delete the monthly $3.75 charge for upload speeds of 7 Mbps from the FTTN 10, FTTN 12 and FTTN 16 residential services that form part of Residence GAS-FTTN;

(j) Reducing the monthly Bell AHHSPI rates to remove any usage costs contained therein to ensure that there is no double charging for usage as a result of usage costs now being recovered through the Capacity Rates and BWHSAS Access Rates and to bring the AHSSPI rates in line with the interface rates of other incumbents;

(k) Requiring Bell to make available the ALU 7130 VDSL modem to WHSAS customers for use in conjunction with GAS-FTTN and HSA-FTTN services at reasonable regulated rental and purchase prices that are typical in market for VDSL modems, so long as alternate sources are not available for VDSL modems that are compatible with the Bell network;

(l) Making interim the Bell, Cogeco, Rogers and Videotron Capacity Rates and the TRP 2011-704 BWHSAS Access Rates and adjusting all of those rates retroactively to the date that they are made interim once the Commission issues its final decision in this proceeding.

1.3 Structure of the Application

14. Part 2.0 of this Application addresses the test for review and variance of a Commission decision.

15. Part 3.0 deals with the need for a transparent tariff review process for the setting of Bell, Cogeco, Rogers and Videotron Capacity Rates and the TRP 2011-704 BWHSAS Access Rates.

16. Part 4.0 deals with the specific changes requested to the methodology used to develop the Bell, Cogeco, Rogers and Videotron Capacity Rates.

17. Part 5.0 deals with the changes that CNOC seeks to the methodology used to establish TRP 2011-704 BWHSAS Access Rates.

18. Part 6.0 addresses CNOC's request to extend the transition period to TPIA aggregated POIs.

19. Part 7.0 deals with the elimination of the Bell $3.75 monthly charge for the 7 Mbps upload speed in connection with Residence GAS-FTTN.

20. Part 8.0 addresses the changes sought to Bell's monthly AHHSPI rates.

21. Part 9.0 explains the need for regulated rates for the rental and purchase of a VDSL modem from Bell.

22. Part 10.0 deals with CNOC's request to have Bell, Cogeco, Rogers and Videotron Capacity Rates and TRP 2011-704 BWHSAS Access Rates made interim and then retroactively adjusted.

23. Part 11.0 contains CNOC's conclusions.

24. Part 12.0 contains the list of parties served.

25. Finally, Part 13.0 provides notice of the application to the Respondents.

2.0 THE TEST FOR REVIEW AND VARIANCE

26. In *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011 ("TIB 2011-214"), the Commission affirmed the conditions under which it would exercise its jurisdiction under section 62 of the *Act*, as follows:

> "In order for the Commission to exercise its discretion pursuant to section 62 of the Act, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to:
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> (i) an error in law or in fact;
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> (ii) a fundamental change in circumstances or facts since the decision;
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> (iii) a failure to consider a basic principle which had been raised in the original proceeding; or
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> (iv) a new principle which has arisen as a result of the decision.
>
> The Commission notes that there may be instances where it will first decide whether a review is warranted - for example, where it considers there was a procedural error - and only then conduct a proceeding to determine whether to vary the decision."

27. As discussed below, the Commission has made a number of errors in fact and law in TRP 2011-703 and TRP 2011-704. These errors are discussed in Parts 3.0 through 6.0 of this Application.

3.0 THE NEED FOR TRANSPARENCY IN THE REGULATORY PROCESS

3.1 Errors in TRP 2011-703 caused by lack of transparency of the regulatory process

28. One error that the Commission made was that it failed to conduct a sufficiently transparent proceeding leading up to TRP 2011-703 to enable interested parties to assess fully the information filed in confidence by these Incumbents with the result that the Capacity Rates among these Incumbents varied significantly from each other and from the more reasonable Capacity Rate approved by the Commission for MTS Allstream Inc. ("MTSA"). As a result, participants in the proceeding leading to TRP 201-703 were effectively denied the right to be heard with respect to an analysis of the information filed in confidence by Bell, Cogeco, Rogers and Videotron on which the Capacity Rates approved by the Commission were based.

29. The fact that the Commission made adjustments to the costs and methods presented by the Incumbents to arrive at the approved Capacity Rates (which is a different method of measuring usage than Bell, Cogeco, Rogers and Videotron proposed) does not diminish the fact that interested parties to the proceeding leading to TRP 2011-703 were effectively denied procedural fairness when it came to data and other important information filed in confidence by the Incumbents that underpinned the rates ultimately approved by the Commission. The inability of interested parties to scrutinize the data and methodologies proposed by Incumbents for setting WHSAS rates led to unreasonable and competitively unsustainable outcomes.

30. Table 1 shows the wide range of Capacity Rates approved by the Commission:

Table 1: Variation in Capacity Rates approved by the Commission

Incumbent	Monthly Capacity Rate per 100 Mbps
MTSA	$281.00
Rogers	$1,251.00
Videotron	$1,890.00
Bell Aliant and Bell Canada	$2,213.00
Cogeco	$2,695.00

31. The Capacity Rates approved for Rogers, Videotron, Bell and Cogeco are approximately 4.5, 6.7, 7.9 and 9.6 times the corresponding rate approved for MTSA. Part 4.0 of this Application further demonstrates how the Rogers, Videotron, Bell and Cogeco are significantly inflated. The wide variation in those rates among these network providers does not make sense. Indeed, as noted by Nordicity:

> "While a number of factors - coverage area, current technology in use, available capacity, local traffic growth patterns, purchasing power etc. - may result in some level of disparity between competing service providers, on a prima facie basis, a difference in costs of almost 10 times (MTSA vs. Cogeco) appears to be questionable and merit further exploration."[8]

32. The Nordicity Study confirms that the Capacity Rates for Bell are approximately four times larger than they should be:

> "Canadian Network Operators Consortium Inc. (CNOC) has serious doubts regarding the validity of the wholesale rates charged to independent ISPs by various DSL and cable network carriers for incremental 100Mbps capacity as approved by the Canadian Radio-television and Telecommunications Commission (CRTC) its decision - *Telecom Regulatory Policy CRTC 2011-703* (CRTC Decision 2011-703). As a result, CNOC retained Nordicity to develop a methodology in order to test the reasonableness of incumbents' filings that underpin these CRTC-approved wholesale capacity rates.
>
> A key challenge in developing our methodology was the lack of public filing of incumbents' costing data underpinning their proposed wholesale fees. In the absence of incumbent wholesale fee costing data, Nordicity used Bell Canada's (Bell's) 2010 deferral cost filing to derive a capacity charge for Bell Aliant/Bell Canada (Bell)- based on a reasonable assumption that Bell's costing methodology would be similar in both cases. We re-created Bell's network architecture - based on an efficient, least-cost approach and correspondingly, the costs per 100Mbps capacity generated by that approach.
>
> In order to validate the Bell Digital Subscriber Line (DSL) costing, we surveyed CNOC members – some of whom are facility-based ISPs. Given that the demarcation line between ISPs' and carriers' networks is at a hub central office (CO), in order to obtain validation for key network core costs, we needed to supplement our costing validation exercise with data from equipment suppliers.
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> Based on our analysis of Bell's costing, we found that Bell's approved capacity-based wholesale rates are approximately four times the level of costs that would be incurred by an efficient, least cost network in providing 100 Mbps wholesale

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[8] Nordicity Report, paragraph 9.

> capacity. The CRTC has not directed the incumbent ISPs on the type of technology that they should use to provide broadband Internet services. However, the difference in cost obtained from our study – which takes into consideration least-cost technology - versus the costs claimed by incumbent ISPs is so significant that it cannot be attributed to differences in technology used. Our estimate of the capacity-based rate is $493/100Mbps/month (including 26% markup). This estimate is in the same range as the rate of $281/100Mbps/month approved by the CRTC for MTS Allstream Inc. (MTSA). Even if we were to double the upfront capital expenditure, we estimate that the wholesale rate to provide 100Mbps capacity per month would not exceed $880 (including 26% markup). This would appear to provide prima facie evidence that the wholesale capacity-rates approved by the CRTC for Bell, Cogeco Cable Inc. (Cogeco), Rogers Communications Partnership (Rogers) and Videotron Ltd (Videotron) are unreasonable and should be examined more closely."[9] (Emphasis added.)

33. Nordicity concluded that the Capacity Rates for Cogeco, Rogers and Videotron should be lower that the corresponding Bell rate:

> "While we were not able to determine an actual cost for a cable network operator, we have noted that it is generally accepted that network deployment cost for cable networks are generally lower than for DSL-based networks. As such it is reasonable to infer that the capacity-based rates calculated by Nordicity for DSL companies is a higher-end estimate of what it would cost an incumbent cable company to provide 100 Mbps capacity on a wholesale basis."[10]

34. Based on these considerations, Nordicity made the following recommendations:

> "We conclude that there is a need for the CRTC to review the capacity-based charges approved for Bell, Cogeco, Rogers and Videotron and reduce them to levels that are more reflective of true costs. We are also of the view that incumbents should be required to provide detailed costing information to interested parties in support of regulatory filings in order to avoid the kind of inflated capacity charges approved by the Commission for Bell, Cogeco, Rogers and Videotron. Under the current CRTC procedures, it is very difficult for interested parties to evaluate the reasonableness of incumbents' costs or the assumptions underpinning incumbent costing models. There is also a lack of transparency in incumbents' filing regarding attribution of capacity e.g. between internal IPTV and other needs and ISPs' and other third party customers' needs."[11]

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[9] *Id.*, at paragraphs 1 through 4.
[10] *Id.*, at paragraph 5.
[11] *Id.*, at paragraph 6.

35. It is important to note that WHSAS traffic is carried on the same Incumbent core networks as Incumbent retail HSIS/video traffic. If inflated Capacity Rates are allowed to stand, they will disadvantage independent ISPs in two significant ways.

36. First, the inflated rates will blunt the incentive and ability of independent ISPs to compete in the provision of HSIS, and second, such rates will serve to subsidize the retail HSIS and IPTV/video services of the Incumbents, as well as shelter those services from competition by independent ISPs.

37. Both ILECs and cable carriers use shared infrastructure to carry both video services (for which they typically charge their end users on a flat-rate basis) and the Internet traffic over which other independent ISPs carry various types of traffic, including video (to which the new capacity charges apply). As a result, the IPTV services offered by other ISPs and Internet video will not be able to compete with the video services of the telephone and cable incumbents. If incumbents can afford to provide video over their networks, the cost of wholesale high-speed services riding on the same type of infrastructure cannot justifiably be so high as to prevent other ISPs from being able to deliver video to consumers.

38. As an example, consider a household that has an Internet service with a maximum download speed of 25 Mbps. It is logical to assume that this maximum speed will be reached given the collective activities of the family members who will be watching videos, gaming, and having video chats. If that speed is achieved at some point during the month, the ISP providing the service in Bell's Ontario or Quebec territory will have to buy capacity that costs a total of \$553.25 (25 Mbps x \$22.13 per Mbps) to accommodate the family's usage. This does not make economic sense. On the other hand, in Manitoba where MTSA is the incumbent, this usage would cost a total of \$70.25 (25 Mbps x \$2.81 per Mbps). This amount is far more reasonable.

39. Even if this peak usage is only reached by one of every five households in a given month, the comparable average Bell rate would be \$110.05, compared to the more reasonable MTSA rate of \$14.05.

40. Another way to look at this is that each sustained peak 3 Mbps high-definition video stream would cost an independent ISP $66.39 per month under the Bell Capacity Rate compared to $8.43 per month under the MTSA Capacity Rate. The Bell Capacity Rate prevents meaningful IPTV competition, whereas the corresponding MTSA rate does not.

41. If the existing Capacity Rates are not changed, the large service providers can effectively shelter their video services from competition via video services provided over the Internet or ISP IPTV platforms. Incumbents should not hold Canadian consumers hostage by constructing artificial economic moats around their video services. Such an anticompetitive situation cannot be allowed to persist.

3.2 Errors in TRP 2011-704 caused by lack of transparency of the regulatory process

42. The structure of the TRP 2011-704 BWHSAS Access Rates is such that the cost of both access and usage are recovered through flat access rates. As discussed in Part 5.0 below, the TRP 2011-704 BWHSAS Access Rates are also inflated. Much of this has occurred because of a lack of transparency in the regulatory process. TRP 2011-704 BWHSAS Access Rates will cause the same two main competitive issues identified in section 3.2 above in the case of capacity Rates.

43. First, inflated TRP 2011-704 BWHSAS Access Rates will blunt the incentive and ability of independent ISPs to compete in the provision of HSIS, and second, such rates will serve to subsidize the retail HSIS and IPTV/video services of Bell and Telus, as well as shelter those services from competition by independent ISPs. While business customers do not use IPTV/video services for entertainment, such services are increasingly useful for videoconferencing and related applications. Therefore, these competitive issues are also very important for the business user community.

3.3 Transparency is required in the regulatory process

44. Inflated Capacity Rates and BWHSAS Access Rates set by the Commission discussed above demonstrate the need to have these rates reviewed in a more transparent regulatory process.

45. The inflated Capacity Rates and BWHSAS Access Rates approved by the Commission highlight an ever increasing dilemma faced by interested parties participating in proceedings where the Commission is asked to set incumbent wholesale services rates, based on costing and other information filed in confidence by incumbents that is never accessible to interested parties. In these situations, an interested party must intervene while blindfolded and with one hand tied behind its back.

46. The efficacy of a regulatory process, such as a Commission proceeding, depends on the ability of interested parties who represent various elements of the public interest to test the evidence provided by a party seeking a particular regulatory outcome. If that evidence is not made available to interested parties, they cannot know the case they have to meet and participate fully in the regulatory process by responding to evidence and submissions that may be adverse in interest to them. The net result is that interested parties are essentially deprived of their procedural right to be heard fully in a proceeding that affects their interests. This constitutes an error of law. In addition, a disproportionate burden falls on the Commission itself to take a more inquisitorial, rather than adjudicative role, when rendering its decisions. Such an outcome is not consistent with Canadian legal tradition and is not in the public interest.

47. CNOC understands that an applicant filing information in confidence is doing so, at least in part, in order to protect the commercial value of such information. However, the pendulum has swung too far in favour of incumbents in this situation. The filing of information in confidence has become not only a means of protecting the economic interests of the owners of such information, it has also become a means by which incumbents can shelter information from public scrutiny, greatly diminishing the effectiveness of what is supposed to be a public and transparent regulatory process.

48. The adverse consequences are particularly acute when the Commission is required to set Capacity Rates and BWHSAS Access Rates the levels of which are extremely sensitive to the rapidly declining costs of telecommunications facilities and rapidly increasing peak usage and ever-changing HSIS usage patterns.

49. A better way must be found to balance the interests of incumbents and interested parties in such situations. A process must be devised whereby interested parties can obtain access to such information for the purpose of participating fully in regulatory proceedings.

3.4 The CITT process for handling confidential information as a way of moving forward

50. CNOC believes that the fairest approach for addressing the transparency issue is for the Commission to adopt the same procedures that have been in place for many years at the Canadian International Trade Tribunal ("CITT") to deal with similar concerns, tailored to the Commission's circumstances. The CITT frequently adjudicates international trade disputes based on significant amounts of information filed in confidence by participants to its proceedings. In these situations, counsel and experts for parties are provided access to confidential information filed by other parties so that all parties can participate fully in the regulatory process.

51. The key features of the CITT procedures for the granting of access to confidential information to counsel and experts are set out in the CITT document entitled "Guideline – Designation, Protection, Use and Transmission of Confidential Information" ("CITT Confidentiality Guidelines")[12] as follows:[13]

> "**Access by Counsel**
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> According to the *Canadian International Trade Tribunal Rules* (*Rules*), "counsel" includes any person who acts in a proceeding on behalf of a party. Before giving a counsel access to confidential information, the Tribunal must receive a Notice of Representation and a Declaration and Undertaking (of confidentiality) signed by that counsel. In essence, the Declaration and Undertaking is a binding commitment by counsel not to disclose any confidential information received, except to a person granted access by the Tribunal to such information. Counsel cannot obtain such access if they are a director, servant or employee of a party. Counsel are not allowed to make copies of any confidential information without the express permission of the Tribunal.
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> Before accepting the undertakings of counsel who have not previously appeared before the Tribunal, the Secretary will circulate their résumés to other counsel

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[12] http://www.citt-tcce.gc.ca/publicat/index3_e.asp.

[13] At pp. 2-3.

participating in the case and ask for their comments. Parties may object to a request by counsel for access to confidential information. The Tribunal will deal with the request, on such terms as it considers appropriate. In cases where counsel requesting access to confidential information are not residents of Canada and the Tribunal is persuaded that it is warranted, the Tribunal may grant such access on condition that it take place under the direction and control of Canadian counsel and that the information remain in Canada at all times.

Access by Experts

The *CITT Act* provides for the disclosure of confidential information to experts who are acting under the control or direction of counsel, or who are retained by the Tribunal. Experts cannot obtain access to confidential information if they are a director, servant or employee of a party. Any information disclosed to experts would be made available only for use in proceedings before the Tribunal. It would also be subject to any conditions that the Tribunal considers reasonably necessary or desirable to protect the confidential information.

The designation of a person as an expert is determined in each instance by the Tribunal. Also, section 45 of the *CITT Act* recognizes as experts “persons whose duties involve the carrying out of responsibilities under the *Competition Act* and who are referred to in section 25 of that Act” and “in respect of the determination of damages and costs in procurement review proceedings, persons employed in the government institution involved in the procurement under review”. Experts who testify before the Tribunal or provide submissions often have a specialized knowledge in specific areas. In order to perform their expert analysis and give evidence, experts may not need access to the entire confidential record. When parties submit the notice of an expert witness and make a request for access to confidential information, they should specify what areas of the record their expert will need to access. If a counsel considers that an expert does not need access to the entire confidential record, counsel may request that the Tribunal give directions on what confidential information should be made available to that expert. Counsel may also request that experts be permitted to view confidential information only at the offices of the counsel who have retained them and from whom they receive direction. These procedures are outlined in the *Rules* (rule 16).”

52. The CITT Confidentiality Guidelines go on to deal with such matters as: (1) the conduct of in camera proceedings where the use of confidential information is required; (2) disposition of confidential information following a proceeding; (3) when email and facsimile transmission of information is and is not allowed.

53. The Commission has all of the necessary statutory authority to apply a similar set of procedures, tailored to the Commission's circumstances either generally or for the purpose of this proceeding.[14]

54. The absence of such procedures in the proceedings leading to the WHSAS Rate Decisions has led to a denial of procedural fairness to parties to that proceeding (i.e., an error of law) and to inflated and unsustainable Capacity Rates and BWHSAS Access Rates that are not just and reasonable (i.e., a mixed error of fact and law).

55. For all of these reasons, CNOC is seeking an order from the Commission reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron and the TRP 2011-704 BWHSAS Access Rates for Bell and Telus <u>following a more transparent tariff review process in which counsel and experts for parties have full access to the information filed in confidence by these Incumbents in support of their filings.</u>

[14] Section 54 of the Act, which provides the Commission the ability to hold *in camera* hearings, coupled with section 39 which deals with the handling of confidential information, and the other general powers of the Commission under sections 32 and 55, collectively provide the Commission the authority necessary to employ such a regime either generally or for the purpose of a specific proceeding such as this one.

4.0 REVIEW AND VARIANCE OF BELL, COGECO, ROGERS AND VIDEOTRON CAPACITY RATES

4.1 Introduction and the adverse impact of inflated Capacity Rates on competition

56. In this Part of the Application, CNOC describes some specific errors that it has been able to identify with respect to the setting of the Bell, Cogeco, Rogers and Videotron Capacity rates despite the lack of full transparency of this process. The descriptions in the balance of Part 4.0 of this Application are without prejudice to CNOC's right to bring additional grounds for a review and variance of TRP 2011-703 forward if and when the Commission conducts a more transparent follow-up process pursuant to section 2.3 of this Application.

57. The AGI Study analyzed the impact of the Capacity Rates approved in TRP 2011-703 on competition by looking at the impact of those rates on CNOC members. AGI applied the following methodology in conducting its analysis:

> "… To project the eventual impact of the approved capacity model, we designed a survey that collected data from various members of CNOC. Specifically, we obtained information on the number of subscribers, speeds and peak utilization rates for a number of residential plans. In addition, we obtained information on the wholesale provider, current last mile access costs and retail plan pricing. In a small number of cases we were provided access to internal cost estimates under the new tariff model in order to verify our cost calculations.
>
> It is important to note that this study relies upon actual peak use rates obtained directly from CNOC members, expressed in either average peak Mbps per subscriber or average peak Mbps. These figures directly represent the amount of capacity that an independent ISP would be required to purchase in a given month, as of the introduction of the capacity based billing model." (Footnotes omitted.)

58. Using this methodology, which included data from CNOC members representative of various usage profiles, AGI reached the following conclusions:

> "... Using data obtained from various CNOC members and the rates approved in CRTC 2011-703, the report reaches the following conclusions:
>
> > a. The capacity rates struck under the revised tariff model are not supportive of sustainable competition from independent ISPs since the rates do not incent independent ISPs to expand their services or expand their consumer bases, nor accommodate the expected growth in peak utilization.

> b. The capacity rates struck under the revised tariff model harm those independent ISPs that attempt to provide higher volume usage to their consumers.
>
> c. The capacity rates struck under the revised tariff model harm those independent ISPs with larger consumer bases and independent ISPs with medium to high average peak utilization by subscriber.
>
> d. The one exception to the above conclusion is the capacity rate approved for MTS Allstream; it is substantially lower and is found to be sufficiently supportive of sustainable competition.
>
> The results we present below are independent of any comparison of Canada against its international peers. If the current capacity rates approved for Bell Aliant/Bell Canada, Cogeco, Rogers and Videotron are upheld, the Canadian consumer will be harmed. Ultimately, there will be no pro-competitive outcome if these capacity charges (approved for Bell Aliant/Bell Canada, Cogeco, Rogers and Videotron) are allowed to stand."[15]

59. CNOC is not arguing that Capacity Rates should be set at levels that guarantee margins for competitors. However, when there are a number of reasons (described in this Part of the Application) to believe that existing Capacity Rates for Bell, Cogeco, Rogers and Videotron are too high <u>and</u> the impact of those rate levels is to suppress competition, the Commission needs to act and rectify the situation. Otherwise, those rates cannot be said to be just and reasonable.

60. It is clear from the discussion above that the Capacity Rates struck for these four Incumbents will lead to an undue lessening of competition in the provision of HSIS. Incumbents will be able to continue providing HSIS, while independent ISPs will be marginalized; some right away, and others over time.

61. Such an anti-competitive outcome is contrary to the policy objectives contained in the *Act*, such as fostering <u>increased reliance on market forces for the provision of telecommunications services</u> and <u>ensuring that regulation</u>, where required, <u>is</u> efficient and <u>effective</u>,[16] as well as rendering reliable and <u>affordable</u> telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada.[17] This

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15 AGI Report at paragraph 1.
16 Subsection 7(f).
17 Subsection 7(b).

outcome is also contrary to the Policy Direction[18] requirements for the Commission to use economic regulatory measures that do not deter economically efficient entry (in this case by independent ISPs)[19] and network access regimes that are competitively neutral.[20] Finally, such an anti-competitive outcome would contravene the Commission's own stated regulatory policies discussed in section 1.1 above.

4.2 Correcting the error caused by the conversion of monthly traffic volumes passing through Incumbent networks into peak traffic, instead of reliance on peak traffic measurements

62. One important error especially wrapped up in the debate regarding the treatment of confidential information is the manner in which the Commission estimated peak traffic for the purpose of setting Capacity Rates for Bell, Cogeco, Rogers and Videotron.

63. This procedure was explained by Rogers in a recent regulatory filing as follows:[21]

> "3. The following paragraphs explain how the CRTC derived the capacity charge. As a first step in applying its capacity model, the CRTC divided Rogers' total usage costs (as adjusted by the CRTC) by the total number of upstream and downstream gigabytes to obtain a cost per gigabyte (a "volume cost/rate"). Applying the volume rate to every up and downstream gigabyte recovers the total adjusted costs of carrying the aggregate volume of Internet traffic presented.
>
> 4. The second step in the derivation of the capacity charge was to multiply the volume rate per gigabyte as calculated above by a conversion factor of kbps/gigabyte at the peak period (95th percentile) to obtain a capacity rate/kbps that is then scaled up to a 100 Mbps rate."

64. AGI noted the significant shortcomings of this method as follows:[22]

> "20. The peak capacity utilization that is derived within this costing model is potentially inconsistent with the actual peak utilization faced by independent ISPs. Independent ISPs are charged, under the capacity based model, at the

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[18] *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006, SOR/2006-355, Canada Gazette Part II, Vol. 140. No. 26, 27 December 2006.

[19] Subsection 1(b)(ii).

[20] Subsection 1(b)(iv).

[21] Letter filed by Rogers with the Commission on 10 February 2012 re: "Follow-up to Telecom Regulatory Policy CRTC 2011-703 – Revised Tariff Page 97A".

[22] AGI Report, at paragraphs 20 to 21.

> peak Mbps they require in a given month. This peak Mbps figure is not calculated by extrapolating from overall monthly usage – but is calculated as the highest average Mbps transmission rate in a given month. Usage of monthly gigabyte consumption and conversion rates to project costs may lead to incorrect conclusions about the affordability and reasonableness of rates set under CRTC 2011-703.
>
> 21. It is not possible to calculate a GB/month to Mbps conversion in any forward looking way with the expectation of it enduring over time. The only way this could be achieved would be with many years of historical and consistent data. Such data does not exist for Internet usage. This is because Internet usage patterns have changed significantly over time. According to CNOC members, there has never been a stretch of time on the Internet of consistent usage patterns that could be used to build such a historical model."

65. Using peak traffic measurements, rather than converted estimates based on monthly traffic volumes to derive Capacity Rates and ensuring that the peak traffic measurements used in the derivation of these rates are accurate is extremely important as Capacity Rates are very sensitive to peak traffic.[23]

66. Nothing in TRP 2011-703 suggests that the Commission tested the reasonableness of using conversion factors or the levels of the factors provided by Bell, Cogeco, Rogers and Videotron, despite the Commission's acknowledgment that a lack of proper correlation between monthly volume and peak usage can lead to incorrect cost assessments.[24] On the other hand, MTSA provided peak data to the Commission directly and its Capacity Rate is much lower than the others.

67. An additional problem may exist with the GB to kbps conversion methodology specifically applied by Bell.[25] According to that methodology, Bell determined that for every 1 GB used per month, the average end user required a specific amount in kbps (filed in confidence) of bandwidth during the peak period. This was based upon a study of a certain

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[23] Rogers filed an application to review and vary TRP 2011-703 on 10 February 2012. Although CNOC opposes that application, at paragraph 19 of that document, Rogers does demonstrate that Capacity Rate levels are very sensitive to peak traffic inputs.

[24] TRP 2011-703 at paragraph 47.

[25] That methodology is described in The Companies(CRTC)15Sep10-104 b).

number of retail DSL customers per month (filed in confidence) spread across 24 different switches in Ontario and 15 switches in Quebec.

68. There is potentially a significant problem with this methodology. Unless the sample size of retail DSL customers included offline users as well as those that are online, the calculation of Bell's Installed First Cost ("IFC") (which is calculated as the product of the annual incremental kbps peak usage for all end users by the IFC per kbps of peak usage) for each equipment component would be significantly overstated in the busy period, since the kbps peak figure would not be based on all end users.

69. Whether this error occurred is unknown. Any such error should not be allowed to persist in any modified calculation that Bell may be required to make as a result of a determination in this proceeding.

70. As just discussed, a method of calculating Capacity Rates that is based on the conversion of monthly traffic volumes to peak traffic estimates raises serious questions about the reasonableness and affordability of the Capacity Rates approved for Bell, Cogeco, Rogers and Videotron.

71. As time goes by and traffic patterns change, the disconnect between directly measured and reasonably estimated peak traffic numbers and the peak usage data derived using volume to peak traffic conversions will only increase, leading to Capacity Rates that are less and less economically appropriate for promoting competitive neutrality.

72. It is for these reasons that CNOC is seeking an order from the Commission reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron following an adjustment to the method used for calculating those rates, such that the method is based on the peak traffic capacity used on those Incumbents' networks in a given month, rather than on monthly traffic volume to traffic peak conversions.

4.3 Correcting the error caused by the lack of use of "all services demand" in the calculation of Capacity Rates

73. Another significant reason that the Capacity Rates of Bell, Cogeco, Rogers and Videotron are inflated is that, unlike the Capacity Rate for MTSA, they were not based on all services demand, but only on the demand for WHSAS and retail Internet services, yet under the MTSA method, capacity is reserved for all services using the network.

74. In TRP 2011-703, the Commission made it clear that it had adopted the MTSA model for determining Capacity Rates.[26] The MTSA model relies on developing usage costs on the basis of the overall peak traffic of <u>all services</u> using network.[27] As explained by MTSA:[28]

> "First, we estimate overall peak period demand on our shared transport network (between points B and C on the diagram). In order to do so, we take into account current and future demand on each link generated from all services that share the transport network. These include:
>
> (a) Internet traffic generated by our own retail Internet customers;
>
> (b) Traffic generated by customers of other MTS Allstream retail services;
>
> (c) Internet access traffic generated by end-users of competitor ISPs; and
>
> (d) Traffic generated by the retail voice and data services delivered by competitors using other MTS Allstream wholesale services.
>
> Second, taking into account the overall peak period demand <u>from all services that use our shared transport network</u> (between B and C in the diagram), we come up with a per unit cost for this peak period demand, including adjustments to reflect the fact that the shared network is not intended to and does not operate at 100 per cent capacity. All of these assumptions – overall traffic growth over time, increases in peak period demand over time, fill factors and various other loading factors – are built into forward-looking Phase II costing and are reflected in the resulting capacity costs.
>
> Third, we then estimate the proportion of overall peak period demand on the shared transport network for the wholesale aggregated DSL access service." (Emphasis added.)

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[26] TRP 2011-703 at paragraph 55.

[27] Paragraphs 13 through17 of Opening Presentation of MTS Allstream Inc. dated 14 July 2011 in the proceeding initiated by *Review of billing practices for wholesale residential high-speed access services*, Telecom Notice of Consultation CRTC 2011-77, 8 February 2011.

[28] *Id.*, at paragraph 15.

75. MTSA further clarified that the MTSA retail services described in the preceding paragraph include IPTV, retail Internet, voice and business services.[29]

76. Accordingly, the MTSA Capacity Rate would have been calculated on this basis and it is much lower than the others.

77. On the other hand, the Capacity Rates of Bell,[30] Cogeco,[31] Rogers[32] and Videotron[33] were calculated taking into account Internet traffic <u>only</u>. This may account for a portion of the order of magnitude difference between the Capacity Rate approved for MTSA and the Capacity rates approved for the other four Incumbents for which such rates were adopted.

78. Since the Commission does not appear to have obtained the <u>peak usage costs</u> <u>**for all services**</u> sharing the networks of Bell, Cogeco, Rogers or Videotron, any adjustments to the unit costs that it did employ to deal with capacity costing and peak traffic issues in TRP 2011-703 would have started from a faulty starting point.[34]

79. In other words, while the Commission, in the WHSAS Rate Decisions, appears to have accepted the arguments made by CNOC[35] with regard to the need for the Commission to consider the decline of Incumbent unit costs over time, it did so through annual adjustments to the ILECs' and cable carriers' capital unit costs,[36] rather than actually seeking the actual unit cost data from those incumbents and verifying how those costs will be affected by the demand placed on shared facilities by all services sharing those facilities over time. This is extremely problematic as other services (such as video) are expected to swamp any Internet demand over time leading to very large unit cost declines in the case of facilities sharing both types of services

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[29] Paragraph 6 of Oral Rebuttal Statement of MTS Allstream Inc. dated 19 July 2011 in the proceeding initiated by *Review of billing practices for wholesale residential high-speed access services*, Telecom Notice of Consultation CRTC 2011-77, 8 February 2011.

[30] The Companies(CRTC)4Feb11-110 e).

[31] Cogeco(CRTC)15Sep10-107.

[32] Rogers(CRTC)15Sep10-107.

[33] QMI(CRTC)15Sep10-107.

[34] These adjustments are described in paragraphs 98, 106, 108 and 112 of TRP 2011-703.

[35] At paragraphs 110 through 115 and 191 through 195 of CNOC's Final Argument dated 29 July 2011 in the proceedings leading to the WHSAS Rate Decisions.

[36] At paragraphs 106 and 108 of TRP 2011-703.

(as well as others). It was an error of law for the Commission not to consider actual “all services” data for incumbents other than MTSA, when MTSA did provide such data and its Capacity Rate is so much lower than the Capacity Rates of Bell, Cogeco, Rogers and Videotron.

80. Since the unit costs for shared facilities are greatly affected by the services sharing the facilities both now and in the future, Capacity Rates must be based on “all services” demand associated with such facilities both now and in the future.

81. It is clear that the Capacity Rates for Bell, Cogeco, Rogers and Videotron need to be recalculated using the peak usage costs for all services sharing the network of each of those Incumbents.

82. For this reason, CNOC is requesting an order from the Commission reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron following an adjustment to the method used for calculating those rates, such that the method is based on costs calculated using peak usage for **all services** sharing the network of each of those Incumbents.

4.4 Correcting the error caused by the Commission not ensuring that certain Incumbents will not be overcompensated due to the statistical characteristics of peak usage

83. Peak usage has a statistical characteristic that can lead to inflated Capacity Rates absent appropriate adjustments.

84. This characteristic is due to the fact that the peak usage of individual independent ISPs occurs at different times and so their combined peak usage will be less than the mathematical sum of their individual peak usage.[37] Accordingly, a reduction is required to the network capacity costs incurred by incumbents to serve independent ISPs to reflect this reality, and Capacity Rates need to be reduced accordingly as well. Without such an adjustment, the incumbents will over-recover the costs of providing network capacity to independent ISPs, because they will be charging each ISP based on its own hypothetical peak, when the incumbent

[37] CNOC demonstrated this in response to CNOC(The Companies)20Apr11-7 TNC 2011-77.

will only face the aggregate peak of all ISPs which is lower than the mathematical sum of the individual ISP peaks. In other words, ISPs will be paying for excess capacity that they never use. This must be remedied.

85. Capacity Rates that are not reduced to not adjust for this statistical impact are not just and reasonable. There is nothing in TRP 2011-703 to suggest that the Commission made this type of adjustment, but this is a new principle that has arisen from TRP 2011-703, where the Commission adopted the Approved Capacity Model. Accordingly, this issue must now be addressed as a matter of law.

86. In order to remedy this matter, for the purpose of setting a Capacity rate, the Commission should take the carrier's marked-up cost of providing network capacity per unit of peak demand and multiply it by the following ratio: [actual peak WHSAS demand from all WHSAS customers during the carrier's peak period] divided by [the sum of subscribed demand across all WHSAS customers]. Otherwise independent ISPs will collectively be paying for much more capacity than they are actually using.

87. It is for this reason that CNOC is seeking an order from the Commission reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron to take into account the statistical effects of aggregating the peak usage of all independent ISPs and the related excess capacity never used by independent ISPs so that these Incumbents are not overcompensated for carrying the traffic of independent ISPs.

4.5 Annual reviews of Capacity Rates are required

88. Capacity Rates are very sensitive to changes in peak traffic patterns and the costs that Incumbents incur for telecommunications facilities. Peak traffic continues to grow quickly, but it is very difficult to predict what those growth patterns will be beyond a year or two. Similarly, the costs of telecommunications facilities continue to fall rapidly, but a reliable forecast of the rate at which the costs will fall is not available beyond one or two years. For these reasons, it was an error in fact for the Commission not to incorporate an automatic annual review of Capacity Rates based on the latest cost and peak traffic trends and forecasts.

89. In the proceeding leading to TRP 2011-703, Cogeco, Rogers, Videotron and CNOC all requested annual reviews to ensure that RWHSAS rates remain appropriate.[38] The Commission refused to mandate an annual rate review.[39]

90. The Commission explained its reasoning as follows:[40]

> The Commission notes that rates are generally fixed over a multi-year study period and are based on average economic costs over that study period. The Commission notes that this is the traditional approach used to determine wholesale service rates. The Commission considers that it is reasonable to set wholesale high-speed access rates using this approach.
>
> The Commission also considers that reviewing usage rates annually would create uncertainty regarding the ongoing rates. This uncertainty would interfere with the independent service providers' ability to establish long-term business and marketing plans, and their ability to sign retail customers to long-term contracts.
>
> Further, the Commission considers that annual reviews would result in significant additional administrative effort and costs for both the network providers and the independent service providers.
>
> Consistent with the Policy Direction, the Commission therefore considers that an annual rate review would not be efficient, minimally intrusive, or proportionate to its purpose. Consequently, the Commission decides that, at this time, it would be inappropriate to mandate an annual review of the wholesale high-speed access rates.

91. With regard to the Commission's first reason, CNOC is not asking the Commission to change its "traditional approach" of fixing rates over a multi-year study period based on average economic costs over that study period. However, periodic reviews are required when it comes to WHSAS which are employed to provide services in the extremely dynamic retail markets for the provision of HSIS, particularly given the pricing sensitivity that exists in relation to rapidly declining network costs and rapidly increasing peak usage patterns.

92. As a representative of the independent ISP industry, CNOC also disagrees with the Commission's conclusion that reviewing usage rates annually would create uncertainty regarding the ongoing rates that would interfere with the independent ISPs' ability to establish

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38 TRP 2011-703 at paragraph 164.
39 *Id.*, at paragraph 169.
40 At paragraphs 166 through 169 of TRP 2011-703.

long-term business and marketing plans, and their ability to sign retail customers to long-term contracts. Annual reviews can and should be used to ensure that Capacity Rates are and remain competitively neutral over time. This will ensure that independent ISPs can actually respond to market conditions on an ongoing basis. Any uncertainty associated with annual rate reviews is a small price for independent ISPs to pay so they can actually stay in business and continue providing competitive alternatives to consumers.

93. Given the significance of Capacity Rates to independent ISPs, reviews of these rates will be triggered frequently. The real question is not if, but how, should such reviews proceed. It will be much less efficient for independent ISPs to have to bring a Part I application every year to deal with rate reviews, than for the Commission to mandate such reviews from the outset.

94. While it would certainly be open to interested parties to bring a Part I application every year to seek a review of Capacity Rates based on the latest trends in peak traffic patterns and current costs of telecommunications facilities, such an approach is very cumbersome and adds significant regulatory lag in an environment that is very dynamic.

95. Automatic annual reviews to address such quantitative issues (but not any structural issues relating to Capacity Rates) would constitute a much more efficient and effective form of regulation, by significantly reducing regulatory lag and the overhead associated with a formal Part I process. Accordingly, automatic annual reviews of Capacity Rates are desirable and highly consistent with the policy objectives of the *Act*,[41] and Policy Direction.[42]

96. It is for these reasons that CNOC is seeking an order from the Commission mandating annual reviews of the Bell, Cogeco, Rogers and Videotron Capacity Rates that will take into account the yearly declines in the costs of telecommunications facilities and increases in peak traffic demand – such reviews to be conducted under the framework established pursuant to section 3.4 and 4.2 through 4.4 of this Application.

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[41] Specifically, subsection 7(f) already discussed herein.
[42] Specifically, subsection 1(a)(ii), which requires the Commission to use measures that are efficient and proportionate to their purpose, etc. when relying on regulation, and subsection 1(b)(iv) already discussed herein.

5.0 REVIEW AND VARIANCE OF TRP 2011-704 BWHSAS ACCESS RATES

5.1 The mark-ups contained in TRP 2011-704 BWHSAS Access Rates should be no higher than the mark-ups in corresponding RWHSAS rates

97. In TRP 2011-704, the Commission applied a higher markup in setting the TRP 2011-704 BWHSAS Access Rates than it did in setting corresponding RWHSAS Access Rates in TRP 2011-703.[43]

98. The Commission provided the following reasons for taking this approach: (1) "compared to retail residential Internet services, retail business Internet services typically include a number of additional features, such as multiple addresses, business websites, customized email addresses, and technical support, and are typically priced higher for comparable speeds";[44] (2) "where wholesale business and residential high-speed access services have been provided separately by the ILEC, the rates for wholesale business services have generally been set using a higher markup compared to residential service";[45] and (3) "the existing approach to setting rates for wholesale business high-speed access services has not hindered the independent service providers' growth, as there is competition in the business Internet market and independent service providers currently have a 25 percent market share of the $1.1 billion retail business Internet market".[46]

99. By pricing wholesale services according to a perceived value of the retail services that can be provided using wholesale services, the Commission has adopted "value-of-service" pricing that is more appropriate for retail services. This is an error in law and in fact.

100. BWHSAS pricing should not be based on retail notions of "value-of-service" that have their origin in the monopoly era of telephone rate regulation. The more appropriate course is for the Commission to set the markup for WHSAS uniformly at a level no higher than what it has adopted when WHSAS are used by ISPs to provide services to residential consumers. That is the mark-up level that the Commission has found to be sufficient to allow ILECs to make a

[43] TRP 2011-704 at paragraph 31.
[44] *Id.*, at paragraph 28.
[45] *Id.*, at paragraph 29.
[46] *Id.*, at paragraph 30.

contribution toward their fixed and common costs and earn a profit margin.[47] The only difference in BWHSAS and RWHSAS prices should result from any underlying cost differences to provide the various services. Where there are no cost differences, the rates should be the same.

101. The second reason provided by the Commission for differential margins for BWHSAS Access Rates and RWHSAS Access Rates is historical, but in fact, that past approach is an anomaly that is narrow in scope. Separate BWHSAS and RWHSAS Access Rates have only been applied in the case of Bell Aliant and Bell Canada in the past. All other incumbents have historically had a single WHSAS rate schedule, regardless of whether the WHSAS were used for residential or business purposes. There is no reason for that to change now.

102. Finally, the Commission attempted to justify applying a higher markup to TRP 2011-704 BWHSAS Access Rates by indicating that this level of markup has not hindered competition in the retail markets for business Internet services, given that independent ISPs have a 25% market share of those markets. This rationale is not appropriate for two reasons.

103. First, the number of competitors accounting for the bulk of that 25% market share are quite limited and consist of Bell, Telus, MTSA and to some extent Rogers operating out of territory. The true independent ISP industry only accounts for a fraction of this market share, yet it is that segment that is often responsible for service innovation and downward price pressure at the retail level. In addition, it is also widely known that the retail markets for services geared to small and medium sized businesses is not well served by incumbents operating in or out of territory.[48] The level of competition that exists in these markets is provided predominantly by independent ISPs.

104. More importantly, even if the 25% market share was due to vibrant competition in the provision of retail business services, there is no reason for the Commission to limit the degree of

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47 The Commission's definition of "markup" for a given service rate includes a contribution to the incumbent's fixed and common costs and a profit margin. See footnote 14 in TRP 2011-704.

48 Final Submissions of TekSavvy Solutions Inc. dated 21 June 2009 in the matter of *Proceeding to consider the appropriateness of mandating certain wholesale high-speed access services*, Telecom Notice CRTC 2009-261-7, at paragraph 157.

competition in the marketplace to this level by approving markups for BWHSAS that are higher than those levels found sufficient by the Commission to compensate Incumbents adequately when the Commission established corresponding RWHSAS rates.

105. In TRP 2011-704 the Commission also applied a higher markup to Bell's HSA-FTTN service on the basis that this service "provides a higher quality of service than the other wholesale business high-speed access services".[49] For these reasons just discussed, the price for HSA-FTTN service should only be higher than the price of other Bell WHSAS to the extent that the costs to provide HSA-FTTN service are higher. The markups should not differ among the various Bell WHSAS.

106. If the Commission does not change the aspects of TRP 2011-704 as proposed by CNOC, Bell and Telus will be allowed to overcharge ISPs for WHSAS they provide to independent ISPs and those ISPs will be forced to recover those costs from their business customers. This policy will only hurt Canadian businesses, which will have to cope with higher expenditures which will make them less productive and competitive in an increasingly global marketplace. Ultimately Canadian consumers will pay the price of this regulatory policy choice as well.

107. For all of these reasons, CNOC seeks an order from the Commission reducing the TRP 2011-704 BWHSAS Access Rates such that the mark-up over Phase II costs employed in deriving those rates is no higher than the mark-up employed by the Commission in establishing the corresponding monthly RWHSAS Access Rates in TRP 2011-703.

5.2 The TRP 2011-704 BWHSAS Access Rates should be based on "all services demand"

108. The BWHSAS Access Rates of Bell[50] and Telus[51] were calculated taking into account Internet traffic only.

[49] TRP 2011-704 at paragraph 33.
[50] The Companies(CRTC)4Feb11-110 e).
[51] Telus(CNOC)4Feb11-4.

109. Since the Commission does not appear to have obtained the <u>usage costs **for all services**</u> sharing the networks of Bell and Telus any adjustments to the unit costs that it did employ to deal with capacity costing issues in TRP 2011-704 would have started from a faulty starting point.[52]

110. In other words, while the Commission, in the WHSAS Rate Decisions, appears to have accepted the arguments made by CNOC[53] with regard to the need for the Commission to consider the decline of Incumbent unit costs over time, it did so through annual adjustments to the ILECs' and cable carriers' capital unit costs,[54] rather than actually seeking the actual unit cost data from those incumbents and verifying how those costs will be affected by the demand placed on shared facilities by all services sharing those facilities over time. This is extremely problematic as other services may grow quickly as well over time leading to very large unit cost declines in the case of facilities sharing various types of services. It was an error of law for the Commission not to consider actual "all services" data for Bell and Telus.

111. Since the unit costs for shared facilities are greatly affected by the services sharing the facilities both now and in the future, BWHSAS Access Rates must be based on "all services" demand associated with such facilities both now and in the future.

112. It is clear that the TRP 2011-704 BWHSAS Access Rates for Bell and Telus need to be recalculated using the usage costs for all services sharing the network of each of those Incumbents.

113. For this reason, CNOC is requesting an order from the Commission reducing the TRP 2011-704 BWHSAS Access Rates following an adjustment to the method used for calculating those rates, such that the method is based on costs calculated using usage for all services sharing the network of each of those Incumbents.

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52 These adjustments are described in paragraphs 46 and 53, of TRP 2011-704.

53 At paragraphs 110 through 115 and 191 through 195 of CNOC's Final Argument dated 29 July 2011 in the proceedings leading to the WHSAS Rate Decisions.

54 At paragraphs 53 of TRP 2011-704.

6.0 EXTENDING THE TRANSITION PERIOD TO TPIA AGGREGATED POIS

6.1 The transition period for aggregated POIs must be extended from two to three years

114. In TRP 2011-703 the Commission made the following rulings:[55]

> “The Commission considers that a transition period is necessary to give independent service providers the time necessary to fulfill or modify their existing term contracts and to modify their business and marketing plans in order to take advantage of the new aggregated POIs. The Commission also considers that implementing a transition period that is too long would result in cable carriers having to make investments to maintain disaggregated POIs.
>
> The Commission decides that the transition period for the migration of customers from disaggregated POIs to aggregated POIs will be two years, beginning the date of this decision. Independent service providers that currently interconnect at an existing disaggregated POI will be allowed to add retail customers and POI capacity at that POI during the transition period. After the transition period, the cable carriers will only be required to provide service at aggregated POIs.”

115. In order for independent ISPs to be able to add POI capacity to disaggregated POIs during the transition period, they must also be able to make arrangements for transport facilities between the POIs and their own networks. These transport facilities are often obtained from third party carriers, where available, in order to minimize the costs borne by independent ISPs.

116. These third party carriers are often reluctant to make the investments necessary to provide transport facilities to independent ISPs for this purpose unless the independent ISPs are willing to enter into a three year term contract so that the carriers can recover their investments fully.

117. Since the Commission determined that the transition period to aggregated POIs would be two years, it is becoming increasingly difficult for some independent ISPs to obtain transport facilities from third party carriers. This is a new situation that has arisen directly as a result of TRP 2011-703.

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55 At paragraphs 152 and 153.

118. In such a situation an independent ISP will either be forced to forgo growing its customer base at POIs that are becoming saturated pending a transition to aggregated POIs or will be forced to incur unusually high (and non-competitive) costs for transport facilities between saturating POIs and its network, despite the fact that the provision of such transport facilities has been forborne from regulation.

119. The only manner of mitigating the harm suffered by independent ISPs in this situation is for the Commission to extend the transition period to aggregated POIs for Cogeco, Rogers, Shaw and Videotron by an additional year. This will provide independent ISPs with the opportunity to acquire transport between cable carrier POIs and the ISPs' networks at more reasonable prices that are consistent with a competitive market during the transition to aggregated POIs.

120. It must be stressed that this is not a perfect solution for independent ISPs as it still requires them to overbuy capacity at the front end in order to provide for sufficient growth for up to a three year period. In addition, time has already been passing since TRP 2011-703 was issued and will continue to pass until the Commission makes a decision in this proceeding. Therefore, independent ISPs will not get the full benefit of three year contracts for transport services, but they will still see a significant improvement if the relief requested with respect to this matter is granted, and for this reason the relief sought is very important.

121. Based on these considerations, CNOC is requesting an order from the Commission extending the transition period to TPIA aggregated POIs for Cogeco, Rogers, Shaw and Videotron from two to three years.

7.0 REMOVAL OF BELL $3.75 RATE FOR 7 MBPS UPLOAD SPEED FOR GAS-FTTN

7.1 The Bell $3.75 rate for 7 Mbps Upload Speed for GAS-FTTN is not approved

122. Bell is charging $3.75 per month per end-user for an optional upstream speed of 7 Mbps in conjunction with FTTN 10, FTTN 12 and FTTN 16 Residence GAS-FTTN. This rate was proposed by Bell in the filings that eventually led to TRP 2011-703.

123. The purpose of this rate was described at paragraph 8 of the "Bell Canada Report on the Economic Evaluation for The Introduction of Gateway Access Service and High Speed Access Service-Fibre to the Node" dated 29 November 2010 and in paragraph 9 of their 21 April 2011 "Report on the Economic Evaluation for the Introduction of Gateway Access Service-Fibre to the Node (Residential Access)" to "match the allowances and charges already established for the Companies' corresponding retail services offered in Ontario and Quebec". (Emphasis added.)[56] However, this allowance, i.e., usage based-billing rate was not ultimately approved by the Commission.

124. Bell's tariff pages for GAS_FTTN[57] cite Telecom Order CRTC 2011-377 ("TO 2011-377") as the authority for this charge, since TO 2011-377 was the first Commission determination to deal with these tariffs. In TO 2011-377, the Commission approved interim rates for Bell's Residence FTTN-GAS that were set at a 35 % discount relative to the Bell's residential Internet services of corresponding speeds without any usage charge.[58] Thus, to the extent that the $3.75 rate was for usage, it does not appear to have been approved in TO 2011-377.

125. Moreover, at paragraph 22 of TO 201-377, the Commission made it clear that the determination in that order did "not reflect a final determination by the Commission". Thus, even if the $3.75 rate had been implicitly approved in TO 2011-377, that approval did not carry

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56 See The Companies(CRTC)14Feb12-1 TNs 400/7345.

57 More specifically, page 741.9.1 of Bell Aliant tariff CRTC 21560 and page 741.9.1 of Bell Canada Tariff CRTC 6717.

58 TO 2011-377, at paragraph 21.

over into TRP 2011-703, in which the Commission set final rates for Bell's Residence GAS-FTTN service.

126. In setting final rates in TRP 2011-703 for Residence GAS-FTTN, the Commission adopted the Approved Capacity Model, under which usage was stripped out of the access rate and was charged as a separate monthly capacity charge of $2,213 per 100 Mbps. Nowhere in TRP 2011-703 did the Commission approve a $3.75 charge for usage based on a particular upload speed or otherwise.

127. Based on this history it appears that the Bell Companies have been charging independent ISPs a rate since at least 1 February 2012 that has not been approved pursuant to section 25 of *Act* or forborne from regulation pursuant to 34 of the *Act*!

128. Moreover, CNOC notes that Bell is charging a monthly rate of $24.98 for FTTN 16 Residence service which has a maximum download speed of 16 Mbps and an upload speed of 1 Mbps. At the same time, Bell is charging a monthly rate of $25.00 for FTTN 25 Residence service which has a maximum download speed of 25 Mbps and an upload speed of 7 Mbps. This means that the combined cost plus markup of the difference between a 16/1 Mbps and 25/7 Mbps service is $0.02 per month. On this basis it is clear that the actual cost to Bell of providing 7 Mbps upload speed compared to a 1 Mbps is virtually nothing.

129. For this reason, CNOC is requesting an order from the Commission directing Bell to delete the monthly $3.75 charge for upload speeds of 7 Mbps from the FTTN 10, FTTN 12 and FTTN 16 residential services that form part of Residence GAS-FTTN.

130. CNOC recognizes that this request does not constitute a review and variance of the WHSAS Rate Decisions since this rate was never approved in the Decisions. However, this is a matter that flows directly from Bell's (incorrect) interpretation of TRP 2011-703, and as such, constitutes appropriate subject matter for this Application which is being brought under Part I of the *Rules*.

8.0 MODIFICATION TO BELL AHHSPI RATES

8.1 Bell AHHSPI rates need to be modified to remove any usage that is now captured in the Capacity Rate and BWHSAS Access Rates and to bring the rate in line with the interface rates of other incumbents

131. It is CNOC's understanding that Bell's AHHSPI rates may recover the cost of some usage of the Bell network. Since usage of Bell's network for RWHSAS is now included in the Capacity Rate and usage of Bell's network for BWHSAS is now included in BWHSAS Access Rates, CNOC is concerned that competitors may be paying twice for usage, if usage costs are also being recovered through the AHSSPI rate. CNOC raised this issue in the proceedings culminating in the WHSAS Rate Decisions,[59] but the issue was not addressed by the Commission in those Decisions.[60] If such double counting did occur, AHSSPI rates would not be just and reasonable, contrary to the *Act*.

132. In addition, Bell's monthly 1 Gbps AHSSPI rate is between $1,750 and $1,850 depending on contract terms, whereas the comparable interface rates for MTSA and Saskatchewan Telecommunications are $105.72[61] and $274.99,[62] respectively. Bell's AHSSPI is clearly out of line with the much lower interface charges of other ILECs and needs to be reviewed and reduced.

133. It is for this reason that CNOC is requesting an order from the Commission reducing the monthly Bell AHHSPI rates to remove any usage costs contained therein to ensure that there is no double charging for usage as a result of usage costs now being recovered through the Capacity Rates and BWHSAS Access Rates and to bring the AHSSPI rates in line with the interface rates of other incumbents.

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59 At paragraph 19 of the Final Argument of CNOC dated 29 July 2011 in those proceedings.

60 At footnote 60 of TRP 2011-703, the Commission stated that the existing interface rates of certain ILECs (including Bell) were not under consideration in the proceeding leading to that decision as no changes were proposed to those rates.

61 TRP 2011-703, Appendix 1, section III.

62 *Ibid.*

134. CNOC recognizes that this request does not constitute a review and variance of the WHSAS Rate Decisions since the Bell AHSSPI rate was never considered in the Decisions. However, this is a matter that is closely related to the other rates approved in the Decisions, and as such, constitutes appropriate subject matter for this Application which is being brought under Part I of the *Rules*.

9.0 TARIFFING OF TO BELL VDSL MODEM RATES

9.1 Bell VDSL modems are being provided on a monopoly basis and so rate regulation is required

135. The ALU 7130 VDSL modem is required for use with the Bell network when a service having a 25 Mbps download or 7 Mbps upload speed is selected. No other modem has been certified by Bell for use with these services and the Bell network, and this modem is only available through Bell. Bell charges independent ISPs $8.00 per month per modem.

136. Since this modem is only available on a monopoly basis it should only be made available for rental or sale according to rates contained in the GAS-FTTN and HSA-FTTN tariffs. This is not presently the case. Accordingly, Bell should be required to submit a cost study and rate proposals for the rent or sale of this modem and to include the rates and other terms and conditions under which it is available in its GAS-FTTN and HSA-FTTN tariffs.

137. It is for this reason that CNOC is requesting an order from the Commission requiring Bell to make available the ALU 7130 VDSL modem to WHSAS customers for use in conjunction with GAS-FTTN and HSA-FTTN services at reasonable regulated rental and purchase prices that are typical in market for VDSL modems, so long as alternate sources are not available for VDSL modems that are compatible with the Bell network

138. CNOC recognizes that this request does not constitute a review and variance of the WHSAS Rate Decisions since a Bell VDSL modem rental or purchase rate was never considered in the Decisions. However, this is a matter that is closely related to the other rates approved in the Decisions, and as such, constitutes appropriate subject matter for this Application which is being brought under Part I of the *Rules*.

10.0 INTERIM RATES

10.1 Bell, Cogeco, Rogers and Videotron Capacity Rates and Bell and Telus BWHSAS Access Rates must be made interim pending a determination in this proceeding

139. CNOC is expecting that the outcome of this proceeding will most likely result in significant changes to the Capacity Rates approved in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron and to the BWHSAS Access Rates approved for Bell and Telus in TRP 2011-704. At the same time, it could take several months before the Commission makes its determination in this proceeding.

140. In the meantime, these Capacity Rates and BWHSAS Access Rates are no longer just and reasonable. Accordingly, CNOC is requesting an order from the Commission making interim the Bell, Cogeco, Rogers and Videotron Capacity Rates and the TRP 2011-704 BWHSAS Access Rates and adjusting all of those rates retroactively to the date that they are made interim once the Commission issues its final decision in this proceeding.

11.0 CONCLUSION

141. For all of the reasons set out in this Application CNOC requests an order from the Commission:

(a) Reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron and the TRP 2011-704 BWHSAS Access Rates for Bell and Telus following a more transparent tariff review process in which counsel and experts for parties have full access to the information filed in confidence by these Incumbents in support of their filings;

(b) Reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron following an adjustment to the method used for calculating those rates, such that the method is based on the peak traffic capacity used on those Incumbents' networks in a given month, rather than on monthly traffic volume to traffic peak conversions;

(c) Reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron following an adjustment to the method used for calculating those rates, such that the method is based on costs calculated using peak usage for all services sharing the network of each of those Incumbents;

(d) Reducing the Capacity Rates established in TRP 2011-703 for Bell, Cogeco, Rogers and Videotron to take into account the statistical effects of aggregating the peak usage of all independent ISPs and the related excess capacity never used by independent ISPs so that these Incumbents are not overcompensated for carrying the traffic of independent ISPs;

(e) Mandating annual reviews of the Bell, Cogeco, Rogers and Videotron Capacity Rates that will take into account the yearly declines in the costs of telecommunications facilities and increases in peak traffic demand – such reviews to be conducted under the framework established pursuant to parts (a) through (d) of the order sought;

(f) Reducing the TRP 2011-704 BWHSAS Access Rates such that the mark-up over Phase II costs employed in deriving those rates is no higher than the mark-up employed by the Commission in establishing the corresponding monthly RWHSAS Access Rates in TRP 2011-703;

(g) Reducing the TRP 2011-704 BWHSAS Access Rates following an adjustment to the method used for calculating those rates, such that the method is based on costs calculated using usage for all services sharing the network of each of those Incumbents;

(h) Extending the transition period to TPIA aggregated POIs for Cogeco, Rogers, Shaw and Videotron from two to three years; and

(i) Directing Bell to delete the monthly $3.75 charge for upload speeds of 7 Mbps from the FTTN 10, FTTN 12 and FTTN 16 residential services that form part of Residence GAS-FTTN;

(j) Reducing the monthly Bell AHHSPI rates to remove any usage costs contained therein to ensure that there is no double charging for usage as a result of usage costs now being recovered through the Capacity Rates and BWHSAS Access Rates and to bring the AHSSPI rates in line with the interface rates of other incumbents;

(k) Requiring Bell to make available the ALU 7130 VDSL modem to WHSAS customers for use in conjunction with GAS-FTTN and HSA-FTTN services at reasonable regulated rental and purchase prices that are typical in market for VDSL modems, so long as alternate sources are not available for VDSL modems that are compatible with the Bell network;

(l) Making interim the Bell, Cogeco, Rogers and Videotron Capacity Rates and the TRP 2011-704 BWHSAS Access Rates and adjusting all of those rates retroactively to the date that they are made interim once the Commission issues its final decision in this proceeding.

12.0 LIST OF PARTIES SERVED

1. Bell Aliant Regional Communications, Limited Partnership - Denis Henry [Denis.Henry@bell.ca]

2. Bell Canada – Mirko Bibic [mirko.bibic@bell.ca]

3. Cogeco Cable Canada Inc. – Michel Messier [michel.messier@cogeco.com]

4. Rogers Communications Partnership – Ken Engelhart [ken.engelhart@rci.rogers.com]

5. Shaw Cablesystems GP – Jean Brazeau [jean.brazeau@sjrb.ca]

6. Telus Communications Company – Ted Woodhead [ted.woodhead.telus.com]

7. Videotron Ltd. – Dennis Beland [beland.dennis@quebecor.com]

8. List of Parties – Telecom Public Notice CRTC 2011-77

13.0 NOTICE

This application is made by Canadian Network Operators Consortium Inc., c/o Bill Sandiford, 107-85 Curlew Drive, Toronto, ON, M3A 2P8 [Email: regulatory@cnoc.ca].

A copy of this application may be obtained by sending a request to regulatory@cnoc.ca.

TAKE NOTICE that pursuant to section 25, and, as applicable section 26 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and* Procedure, any respondent or intervener is required to mail or deliver or transmit by electronic mail its answer to this application to the Secretary General of the Canadian Radio-television and Telecommunications Commission (“Commission”), Central Building, 1 Promenade du Portage, Gatineau (Québec) J8X 4B1, and to serve a copy of the answer on the applicant within 30 days of the date that this application is posted on the Commission’s website or by such other date as the Commission may specify.

Service of the copy of the answer on the applicant may be effected by personal delivery, by electronic mail, or by ordinary mail. In the case of service by personal delivery, it may be effected at the address set out above.

If a respondent does not file or serve its answer within the time limit prescribed, the application may be disposed of without further notice to it.

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