Federal Court of Appeal | Cour d'appel fédérale

Date: 20200910

Dockets: A-456-19 (lead file)
A-457-19

Citation: 2020 FCA 140

CORAM: **DAWSON J.A.**
STRATAS J.A.
WOODS J.A.

BETWEEN:

BELL CANADA, BELL MTS, MTS INC., BRAGG COMMUNICATIONS INCORPORATED (c.o.b. EASTLINK), COGECO COMMUNICATIONS INC., ROGERS COMMUNICATIONS CANADA INC., SHAW CABLESYSTEMS G.P., and VIDEOTRON LIMITED

Appellants

and

BRITISH COLUMBIA BROADBAND ASSOCIATION, CANADIAN NETWORK OPERATORS CONSORTIUM INC., DISTRIBUTEL COMMUNICATIONS LIMITED, ICE WIRELESS INC., PUBLIC INTEREST ADVOCACY CENTRE, VAXINATION INFORMATIQUE and TEKSAVVY SOLUTIONS INC.

Respondents

Heard by online video conference hosted by the Registry on June 25 - 26, 2020.

Judgment delivered at Ottawa, Ontario, on September 10, 2020.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: STRATAS J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

1. Introduction

[1] High-speed Internet is a resource vital to modern communications and participation in the digital economy.

[2] In Canada, Internet services are provided to retail customers by large telephone and cable companies or by independent Internet service providers. Small and medium sized independent Internet service providers that do not own their own wireless networks do not possess the required infrastructure to provide high-speed Internet access (HSA) directly to end-users. Therefore, to foster competition, large cable and telephone companies are required to make

available parts of their respective networks to independent Internet service providers. These leased parts are referred to as wholesale services and are used by the independent Internet service providers, sometimes referred to as “competitors”, to provide high-speed Internet services to their retail customers.

[3] The Canadian Radio-television and Telecommunications Commission does not regulate the provision of Internet services to retail customers because the number of service providers is sufficient to bring competition, pricing discipline, innovation and consumer choice to the retail Internet services market. However, the CRTC does regulate the provision of wholesale high-speed access services by large telephone and cable companies to the competitors. In particular, the CRTC sets the rates that the large telephone and cable companies are permitted to charge competitors for wholesale high-speed access services.

[4] On August 15, 2019, the CRTC issued *Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services* (15 August 2019), Telecom Order CRTC 2019-288 (TO 2019-288) which set final rates that the large telephone and cable companies may charge for aggregated wholesale high-speed access services provided to competitors. The order provided that the final rates would be applied retroactively.

[5] Bell Canada, MTS Inc., and Bell MTS, large telephone companies sometimes referred to as incumbent local exchange carriers or ILECs, sought and obtained leave to appeal TO 2019-288 to this Court. Bragg Communications Incorporated , carrying on business as Eastlink, Cogeco Communications Inc., Rogers Communications Canada Inc., Shaw

Cablesystems G.P. and Videotron Limited, large cable carriers referred to in these reasons as the Cable Carriers, also sought and obtained leave to appeal the order to this Court.

[6] Here, a brief procedural comment is warranted. On September 27, 2019, orders issued staying TO 2019-288 pending this Court's determination of the motions for leave to appeal. On November 22, 2019, the leave applications were granted and orders issued staying TO 2019-288 until the issuance of the Court's final judgments on the appeals. TO 2019-288 therefore remains stayed until the issuance of the judgments that accompany these reasons. Subsequently, the appeals were consolidated, case managed and set for an early hearing which took place by videoconference. In accordance with the consolidation order, a copy of these reasons shall be placed on each Court file.

[7] On this consolidated appeal the telephone companies argue that the CRTC "erred in law or jurisdiction" by:

i. failing to exercise its powers with a view to implementing the Canadian telecommunications policy objectives set out in section 7 of the *Telecommunications Act*, S.C. 1993, c. 38 (Act) and in accordance with a direction given to the CRTC by the Governor in Council, all as required by section 47 of the Act. Particular emphasis is placed on what is asserted to be a statutory reasons requirement imposed by paragraph 1(*b*)(i) of the direction issued by the Governor in Council;

ii. failing to exercise its powers with a view to ensuring that the telephone companies charge "just and reasonable" rates in accordance with section 27 of the Act, and as required by section 47 of the Act; and

iii. imposing an unconstitutional tax, contrary to section 53 of the *Constitution Act, 1867*.

[8] For their part, the Cable Carriers argue the CRTC committed "one or more legal or jurisdictional errors, either in issuing TO 2019-288 or during the rate-setting proceeding that culminated in the issuance of that Order". More particularly, the Cable Carriers argue that the CRTC:

(a) failed to consider relevant and cogent evidence submitted by the Cable Carriers;

(b) made decisions on the basis of no evidence, irrelevant evidence or irrelevant considerations, including by preferring its own unsubstantiated "expectations" over the Cable Carriers' evidence, even though that evidence directly contradicted such "expectations";

(c) acted arbitrarily by treating the available evidence in an inconsistent and *ad hoc* fashion, including by (i) endorsing and applying outdated third-party data (from 2011 or earlier) in lieu of company-specific information, while (ii) rejecting without explanation more up-to-date data (from 2016 and 2017) provided by the same third party, and then (iii) criticizing the Cable Carriers for not submitting the very types of company-specific information that the CRTC had previously rejected;

(d) breached core principles of natural justice and procedural fairness by adopting unorthodox and unexpected methodologies that changed the "rules of the game" in a manner that defeated the Cable Carriers' reasonable expectations, without giving the Cable Carriers either timely notice of its intention to do so or an adequate opportunity to meaningfully respond;

(e) disregarded established principles and rate-setting decisions on which the Cable Carriers had reasonably relied on a number of issues, while

> simultaneously fettering improperly its discretion by adhering to outdated or inapplicable assumptions and guidelines on other issues; and
>
> (f) disregarded a binding Direction issued by Cabinet in 2006 … and ignored impermissibly the mandatory requirements imposed by sections 7, 27 and 47 of the *Telecommunications Act*.

(memorandum of fact and law, paragraph 4, footnotes and emphasis deleted)

[9] The respondents represent, or are, independent Internet service providers that purchase wholesale high-speed access services. They submit that all of the asserted grounds of appeal should be dismissed on their merits. Additionally, they submit that the appellants:

i. rely on post-decision evidence that is inadmissible;

ii. raise grounds of appeal that are not questions of law or jurisdiction and so are outside the scope of the limited right of appeal conferred by subsection 64(1) of the Act; and,

iii. advance a new, unconstitutional tax argument that should not be heard by this Court at first instance.

[10] Before turning to consider the issues raised on this appeal it is necessary to situate the impugned order in its proper context. Situating the order in its context requires consideration of the legislative framework in which the decision was made and the prior decisions of the Commission that led to and informed TO 2019-288—what has been referred to as its policy pedigree.

2. The context in which TO 2019-288 was made and is to be considered by this Court

i. The legislative framework

[11] The *Telecommunications Act* sets out the legislative framework that governs the telecommunications industry in Canada. The provisions described immediately below are central to the appellants' argument that the CRTC impermissibly ignored mandatory requirements imposed upon it by the Act.

[12] The Act's guiding objectives are enumerated in section 7. Pursuant to subsection 47(*a*), the CRTC must perform its duties with a view to implementing these objectives. Additionally, section 8 of the Act authorizes the Governor in Council "by order" to "issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives." An order made under section 8 is binding on the Commission (subsection 11(1); see also subsection 47(*b*)).

[13] The Governor in Council has given directions to the CRTC that were binding upon it at the time it issued the decision under appeal: *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, S.O.R./2006-355 (Cabinet Direction). Section 1 of the direction requires the CRTC, when exercising its powers and performing its duties under the Act, to "implement the Canadian telecommunications policy objectives set out in section 7" of the Act in accordance with a number of enumerated criteria. Of particular relevance to this appeal are three obligations:

(i) the obligation when relying on regulation to "use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives" (paragraph 1(*a*)(ii));

(ii) the obligation when relying on regulation to use measures that "if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry" (paragraph 1(*b*)(ii)); and,

(iii) the obligation when relying on regulation relating to regimes for access to networks to use measures that "ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers" (paragraph 1(*b*)(iv)).

[14] Paragraph 1(*b*)(i) of the Cabinet Direction requires the Commission, when relying on regulation, to "specify the telecommunications policy objective that is advanced by those measures and demonstrate their compliance with" the Cabinet Direction. The appellants assert this provision creates a reasons requirement.

[15] Subsection 47(*a*) of the Act also requires the Commission to perform its duties with a view to ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27 of the Act. Section 27 requires every rate charged by Canadian

carriers to be “just and reasonable”. The power to determine and approve just and reasonable rates is a central responsibility of the Commission.

[16] To ensure that rates are just and reasonable the Act grants the Commission broad powers to, amongst other things, set and regulate rates for telecommunications services (sections 24 and 25). The Commission may also “determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers” (subsection 32(*g*)).

[17] Subsection 27(3) empowers the Commission to “determine in any case, as a question of fact, whether a Canadian carrier has complied with” specific provisions of the Act including sections 24, 25, and 27. Subsection 27(5) permits the Commission to “adopt any method or technique that it considers appropriate, whether based on a carrier’s return on its rate base or otherwise” when determining whether a rate is just and reasonable. The Commission also has the authority under subsection 37(1) to require a Canadian carrier “to adopt any method of identifying the costs of providing telecommunications services and to adopt any accounting method or system of accounts for the purposes of the administration” of the Act.

[18] The Commission’s decisions may be challenged in a number of ways. The following provisions are of particular relevance to the respondents’ argument that the appellants raise grounds of appeal that are outside the scope of the limited right of appeal conferred by subsection 64(1) of the Act.

[19] Subsection 64(1) of the Act permits, with leave of the Court, an appeal to this Court on "any question of law or of jurisdiction". The Commission may determine any question of law or fact, and "its determination on a question of fact is binding and conclusive" (subsection 52(1)). On an appeal to this Court, the Court "may draw any inference that is not inconsistent with the findings of fact made by the Commission and that is necessary for determining a question of law or jurisdiction" (subsection 64(5)).

[20] Other avenues of redress exist.

[21] The Commission "may, on application or on its own motion, review and rescind or vary any decision made by it" (section 62).

[22] Within one year of a decision being made by the Commission, "the Governor in Council may, on petition in writing … or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it." (subsection 12(1)).

[23] Significantly, neither section 62 nor subsection 12(1) circumscribe the types of questions that may be raised before the CRTC or the Governor in Council. This stands in contradistinction to the prescription in subsection 64(1) that limits this Court to reviewing questions of law or jurisdiction.

[24] In addition to bringing these appeals, the appellants have filed applications with the CRTC asking that the Commission review and vary the order under appeal. The appellants have also filed separate petitions to the Governor in Council seeking the rescission of TO 2019-288. During the hearing, counsel advised that decisions on these requests are outstanding.

[25] While this decision was under reserve, counsel for the appellants advised that the Governor in Council had rendered a decision with respect to the petitions filed by the appellants. We were directed to *Order to decline to vary, rescind or refer back for reconsideration Telecom Order CRTC 2019-288*, P.C. 2020-0553. Counsel sought and received permission to file brief, written submissions on Order in Council P.C. 2020-0553. The Order in Council is discussed below when considering the appellants' submissions that the Commission failed to exercise its powers with a view to implementing telecommunications policy objectives and the Cabinet Direction, and this failure was an error in law or jurisdiction.

ii. TO 2019-288's policy pedigree

[26] TO 2019-288 did not spring into existence in a factual vacuum; it had antecedents. As this Court has noted, CRTC decisions fit into a "continuum" (*Société Radio-Canada v. Métromédia Cmr Montréal Inc.*, 1999 CanLII 8947, 254 N.R. 266 (F.C.A.), at paragraph 14). Indeed, TO 2019-288 is entitled *Follow-up to Telecom Orders 2016-396 and 2016-448 – Final rates for aggregated wholesale high-speed access services*.

[27] The decision expressly incorporates as "Related documents" a number of prior decisions of the CRTC including Telecom Regulatory Policies CRTC 2010-632, 2011-703 and 2015-326, Telecom Decisions CRTC 2013-73, 2013-76 and 2016-117 and Telecom Orders CRTC 2016-396 and 2016-448, discussed and fully cited below. As counsel for the Cable Carriers acknowledged in oral argument, the reasons of the Commission in TO 2019-288 are not to be read in isolation. A reader, and a reviewing court, ought to go beyond the Commission's reasons and read the related documents in order to fairly understand the reasoning of the Commission. Put another way, the related documents are inextricably linked to the decision under appeal.

[28] The decision does not reference as a related document *Disposition of review and vary applications with respect to wholesale high-speed access services: Introductory statement* (21 February 2013), Telecom Regulatory Policy CRTC 2013-70 (TRP 2013-70). In this introductory statement, the Commission frames a series of decisions on wholesale high-speed access services issued contemporaneously with it, including Telecom Decisions CRTC 2013-73 and 2013-76. These decisions, specifically listed by the Commission as related documents in TO 2019-288, should be read in the light of TRP 2013-70.

[29] A brief review of these policies and orders and Telecom Decision CRTC 2016-117 (TD 2016-117) will situate TO 2019-288.

[30] *Wholesale high-speed access services proceeding* (30 August 2010), Telecom Regulatory Policy CRTC 2010-632 (TRP 2010-632) is an early policy statement issued by the CRTC on wholesale high-speed access services. The decision followed what the Commission described to

be “a comprehensive public proceeding” commenced in May 2009, to consider whether incumbent local exchange carriers and Cable Carriers should be required to offer certain high-speed access facilities as wholesale services to competitors for resale. The Commission reviewed the evolution of Internet services from low-speed dial-up services to higher speed Internet services facilitated by the construction of more fibre facilities in access networks. The Commission “indicated its intention to apply its essential services framework for wholesale services in this proceeding on a forward-looking basis to provide appropriate incentives for continued investment in broadband infrastructure, encourage competition and innovation, and expand consumer choices.”

[31] The Commission went on to describe its determinations to be in accordance with the Act, including subsection 27(2), and to be made with a view to implementing the policy objectives found in subsections 7(*a*), (*b*), (*c*), (*f*), and (*h*) of the Act. The Commission also stated that its determinations were in accordance with the Cabinet Direction (TRP 2010-632, paragraphs 26 and 27). The Commission returned to a discussion of the policy objectives advanced by its decision at paragraphs 143 to 149 of its reasons (as quoted later in these reasons at paragraph 193). The Commission ended its decision by directing the major incumbent local exchange carriers and the Cable Carriers to file proposed tariffs with supporting Phase II cost studies, and by reciting the policy objectives advanced by its determinations.

[32] Here, it is helpful to provide a brief explanation about Phase II costing principles. Phase II costing principles, or simply Phase II costing, is the costing methodology used by the CRTC when conducting rate-setting proceedings. This methodology has been used, with various

modifications, since 1979 for a variety of rate-setting functions performed by the CRTC. In brief, regulated Carriers are required to file Phase II costing manuals which are used to prepare cost studies that are submitted to the CRTC. The CRTC then uses these cost studies, as well as other information and considerations, to set rates. Rates developed pursuant to this methodology are based on the projected, actual costs that a regulated carrier will incur when providing a telecommunications service over a defined future study period, plus a reasonable markup. The markup recognizes overhead and other fixed costs and the need to provide an incentive for continued investment in new network infrastructure (see, for example, TRP 2011-703, paragraph 82 and footnote 30).

[33] TRP 2010-632 was followed a few months later by *Billing practices for wholesale residential high-speed access services* (15 November 2011), Telecom Regulatory Policy CRTC 2011-703 (TRP 2011-703) where the Commission reconsidered how large telephone and cable companies should charge competitors for access to, and use of, their HSA wholesale services. The Commission found two billing models to be acceptable: a capacity-based billing model and a flat rate model. The Commission decided that rates for either model should be based on each of the individual, large cable and telephone companies' costs to provide the service plus a reasonable markup; further, the markups should be comparable for all cable and telephone companies. The Commission also addressed other important policy issues: the rate principles to be applied to the selected billing models and the reasonableness of the costs submitted by the network providers. When considering the reasonableness of the costs submitted by the network providers the Commission examined various issues associated with the Phase II cost studies that had been filed, including such things as annual capital unit cost changes (which will be discussed

in more detail below). After discussing the implementation of the tariffs set by it establishing final wholesale rates, the Commission reviewed the extent to which its decision complied with the Cabinet Direction. Portions of this analysis are set out at paragraph 194 below.

[34] TRP 2011-703 essentially settled the basic form and structure of the wholesale rates at issue in this appeal. The Commission noted that it was important to "ensure that retail Internet service competition is sufficient to protect consumers' interests" and that the services "provided by the independent service providers bring pricing discipline, innovation, and consumer choice to the retail Internet service market."

[35] The Commission further clarified billing models and costing issues in TRP 2013-70. The Commission affirmed that it "sought to ensure that there is a competitive wholesale market that accurately compensates each incumbent for the costs incurred to make those wholesale services available to the independent service providers and, at the same time, to allow for effective and efficient competition to the benefit of Canadians." (TRP 2013-703, paragraph 14).

[36] In the eight decisions issued with TRP 2013-70, the Commission sought to simplify the implementation of the new wholesale high-speed access service billing models, make adjustments to the wholesale high-speed access service rates to reflect cost adjustments and create a uniform pricing approach for business and residential wholesale high-speed access services. In associated orders, the Commission found errors in the service costs upon which rates set in TRP 2011-703 and TRP 2011-704 were based, and adjusted the 2011 rate accordingly. In some cases it was necessary to apply the rate adjustments retroactively "to ensure that the rates

are at all times just and reasonable and in furtherance of the policy objectives set out in the Act." (TD 2013-73, paragraphs 106 to 110, TD 2013-76, paragraph 46).

[37] TRP 2013-70 was followed by *Review of wholesale wireline services and associated policies* (22 July 2015), Telecom Regulatory Policy CRTC 2015-326 (TRP 2015-326). This policy is the most recent decision mandating access to the high-speed access services of the large telephone and cable companies. The decision followed a public proceeding conducted to review wholesale wireline services and associated policies. The Commission stated that as part of this proceeding it had "reviewed the existing wholesale services framework, various wholesale wireline services, and the approach it uses to set the rates for wholesale services to determine whether changes to the existing regulatory landscape are appropriate" (TRP 2015-326, preamble, paragraph 2). The Commission adjusted its mandating criteria for wholesale services and set out the rationale behind its determination to mandate the provision of certain wholesale high-speed access services, stating at paragraph 3:

> Over the years, the Commission has established various policies, rules, and regulations to govern the provision of wholesale services. These regulatory measures are necessary because incumbent carriers have had considerable advantages over competitors. Without wholesale regulation, fewer competitive service options would be available to Canadians.

The Commission also determined the costing methodology to be applied to wholesale services. Rates for wholesale services would continue to be based upon the use of incremental costing supplemented by an approved markup (*i.e.* Phase II costing principles). Alternative costing approaches were rejected because, among other reasons, no evidence suggested that alternative approaches would improve regulatory efficiency (TRP 2015-326, paragraphs 233 to 241).

[38] Before leaving TRP 2015-326 I will deal with the Cable Carriers' submission, made in reply argument, that this decision is irrelevant to TO 2019-288 because TRP 2015-326 phased out the mandated provision of aggregated HSA services and TO 2019-288 set final rates for those services.

[39] TRP 2015-326 is not irrelevant to the decision at issue. In TRP 2015-326 the Commission determined that aggregated wholesale HSA services would "no longer be mandated for the incumbent carriers under certain conditions and subject to an appropriate transition plan." (TRP 2015-326, paragraph 143). "Incumbent carriers are expected to continue to file tariffs regarding the introduction of or modifications to the provision of aggregated wholesale HSA services until such services have been phased out within their respective serving territories." (TRP 2015-326, paragraph 155). The final rates for aggregated wholesale HSA services set in TO 2019-288 are integral to the transition plan.

[40] In *Review of costing inputs and the application process for wholesale high-speed access services* (31 March 2016), Telecom Decision CRTC 2016-117 (TD 2016-117) the Commission made its determinations with two particular objectives in mind: i) to establish a streamlined tariff application process, and ii) to ensure that the inputs to wholesale high-speed access service providers' cost models remained appropriate. To meet the first objective, the Commission adopted a simplified cost-based approach for rate-setting referred to as "speed-banding". More will be said about speed-banding below. To meet the second objective, the Commission made determinations with respect to some components of cost studies. Of relevance to this appeal are determinations made with respect to the annual traffic growth assumption (necessary because the

annual growth of Internet traffic had increased significantly since TRPs 2011-703 and 2011-704) and the annual capital unit cost change assumption. More will also be said below about these cost components.

[41] The Commission also changed the study period from the then current ten-year period to a shorter five-year study period. This reflected the fact that wholesale HSA service speeds were rapidly changing; many service speed offerings might not have a life span of more than five years. Finally, the Commission converted the then current wholesale rates paid by competitors into interim rates. The Commission's determination that changes were necessary to certain costing assumptions demonstrated to it that "current wholesale HSA service rates are likely not just and reasonable." The HSA service providers were required to submit new cost studies. The Commission stated it would assess whether rates should be set retroactively when the new cost studies were submitted (TD 2016-117, paragraph 105).

[42] Generally, Telecom Orders apply established policies to the facts found in the proceeding. They are the practical application of the policy framework set out in TRPs to specific fact situations. Two orders are of particular relevance. After the issuance of TD 2016-117, the Commission considered the new cost studies submitted by the parties and issued TO 2016-396 and TO 2016-448. These orders established new interim rates. These interim rates were lower than the rates previously paid by competitors.

[43] In *Tariff notice applications concerning aggregated wholesale high-speed access services – Revised interim rates* (6 October 2016), Telecom Order CRTC 2016-396 (TO

2016-396) the Commission observed, at paragraph 19, that some of the proposed costs submitted by wholesale HSA service providers were "not reasonable due to deviations from Phase II costing principles, the lack of pertinent costing details, including descriptions of input data variables, and modelling assumptions without supporting rationale. Accordingly, the Commission concludes that the proposed monthly rates for certain wholesale HSA service providers are, on a *prima facie* basis, not based on reasonable costs." Therefore, the Commission set revised, lowered interim rates for aggregated wholesale HSA.

[44] In *Bragg Communications Incorporated, operating as Eastlink – Revised interim rates for aggregated wholesale high-speed access service* (10 November 2016), Telecom Order CRTC 2016-448 (TO 2016-448) the Commission concluded, for similar reasons, that "Eastlink's proposed monthly rates are, on a *prima facie* basis, not reasonable" (paragraph 13).

[45] In response, new proposed wholesale rates based on updated cost studies were submitted by the telephone and cable companies. This culminated in the issuance of the order under appeal that established final wholesale rates that were lower than the interim rates set in 2016. The rates applied retroactively to March 31, 2016 for Bell Canada, Bell MTS, Cogeco, Eastlink, Sasktel, TCI and Videotron, and to January 31, 2017 for Shaw (TO 2019-288, paragraphs 331 and 332).

[46] It is relevant to end this portion of the reasons with the observation that aside from the present appeal none of the policies, decisions and orders described above were appealed.

[47] Having situated the appeal in its statutory and historical context, I turn to consider the proper scope of the appeal.

3. Do the appellants raise grounds of appeal that are not questions of law or jurisdiction properly before this Court?

[48] In *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573, this Court considered the scope of the statutory appeal authorized under subsection 41(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (CTA). Subsection 41(1), like subsection 64(1) of the *Telecommunications Act*, permits an appeal to this Court, with leave, on questions of law or jurisdiction. There are other important similarities between the Acts and the limited right of appeal each grants:

i. Both Acts deal with highly specialized, expert regulatory bodies.

ii. Findings of the Canada Transportation Agency on questions of fact, like those of the CRTC, are binding and conclusive (CTA, section 31).

iii. The Agency, like the CRTC, may review, rescind or vary any decision or order made by it (CTA, section 32).

iv. The Governor in Council may also vary or rescind any decision, order, rule or regulation of the Agency (CTA, section 40), in the same manner as it may review decisions of the CRTC.

[49] Looking at the text, context and purpose of subsection 41(1) of the CTA, this Court concluded in *Emerson Milling* that a question of jurisdiction "includes at least issues of procedural fairness, even if those issues are factually suffused" (*Emerson Milling*, paragraph 19). As to what constitutes a question of law, this Court found that the standard of "extricable questions of law or legal principle" is the applicable standard for determining whether a question of mixed fact and law is a "question of law" appealable under subsection 41(1) of the CTA (*Emerson Milling*, paragraph 26).

[50] In my view, the Court's analysis and conclusion in *Emerson Milling* are equally apposite to appeals under subsection 64(1) of the *Telecommunications Act*.

[51] In *Emerson Milling* this Court also recognized that the mere say-so of a party that a "legal test" is implicated is insufficient to found an appeal. Grounds of appeal may be expressed in an artful way to make them appear to raise legal questions when they do not. Accordingly, what is required is to look at the substance of what is raised, not the form. The true subject-matter of an appeal may be identified by construing the notice of appeal. As well, an appellant's memorandum of fact and law may be useful in providing a realistic appreciation of the appeal's essential character (*Emerson Milling*, paragraphs 29 and 30).

[52] With this background, I turn to the grounds of appeal presented by the appellants in this case. To summarize briefly, these grounds of appeal are: i) the Commission breached the principles of procedural fairness and engaged in arbitrary decision-making; ii) the Commission failed to comply with a statutory reasons requirement; iii) the Commission imposed an

unconstitutional tax; iv) the Commission failed to exercise its powers with a view to ensuring that the appellants' rates are "just and reasonable"; and, v) the Commission failed to exercise its powers with a view to implementing the Canadian telecommunications policy objectives set out in section 7 of the Act and the Cabinet Direction.

i. Proper grounds of appeal

[53] I am satisfied the first three of the profferred grounds of appeal at least on the surface raise questions of law or jurisdiction.

[54] This is so because the allegation of breach of procedural fairness was characterized to be a question of jurisdiction in *Emerson Milling*; the related issue described by the Cable Carriers to be "arbitrary decision-making" (discussed in more detail below) may, as a matter of law, rise to the level of an extricable question of law if, for example, a decision-maker renders a decision in the absence of any evidence (see, for example, *Telus Communications Inc. v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 2004 FCA 365, [2005] 2 F.C.R. 388, at paragraphs 40 to 43). The remaining two issues of a statutory reasons requirement and an unconstitutional tax also raise extricable questions of law.

ii. Improper grounds of appeal

[55] The remaining two profferred grounds of appeal are more problematic: the ground that the CRTC failed to exercise its powers with a view to ensuring that the appellants' rates are "just

and reasonable" and the ground that it failed to exercise its powers with a view to implementing the Canadian telecommunications policy objectives set out in section 7 of the Act and the Cabinet Direction. Each will be considered in turn.

a) Whether the rates are just and reasonable is not a question of law or jurisdiction

[56] As explained above, subsection 47(*a*) of the Act requires the Commission to exercise its powers and perform its duties with a view to ensuring that the rates it sets are "just and reasonable". The appellants argue that:

- A just and reasonable rate must allow a carrier to recover its costs, and the final rates set in the decision do not allow the carriers to recover their costs.
- Nowhere in the reasons does the CRTC advert to the importance of setting rates that ensure a return on investment.
- This error is an error of jurisdiction.

[57] I begin consideration of this point by noting that the Cable Carriers do not cite any evidence in support of their submission that the final rates are insufficient to cover their costs (memorandum of fact and law, paragraph 91). The evidence Bell relies upon to argue that the actual cost of providing wholesale HSA services is substantially higher than the CRTC rate is

new evidence, found in the affidavit of its Vice-President Regulatory Law. In his affidavit, the officer swore that:

> 28. In short, the process we employed closely mirrors the approach used by the CRTC in reaching the Decision, except that we used Bell's actual capital costs, from Bell's financial records, rather than the theoretical assumed capital costs used in Phase II Costing. Using this methodology, we determined that the per-subscriber per-month cost of FTTN access is **substantially higher** than the $14.78 rate ordered by the CRTC in the Decision.
>
> 29. The Decision thus orders Bell to provide wholesale FTTN Access at **below cost**.
>
> (emphasis in original)

[58] The respondents object that this evidence was not before the Commission, and is improperly placed before this Court.

[59] I agree.

[60] In *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123, 17 Admin. L.R. (6th) 175, this Court discussed the purpose of the general rule against allowing new evidence on a statutory appeal:

> [11] The purpose of the general rule is two-fold:
>
> • *To respect the role of the administrative decision-maker*. The administrative decision-maker is the merits decider. It decides what evidence or information it should rely upon, it considers that evidence and information, and it makes findings of fact. That is not the role of the reviewing court. See *Bernard*, *Access Copyright* and *Delios*, all above.
>
> • *To further the role of the reviewing court*. The reviewing court must assess the administrative decision-maker's decision against the evidence and information

> the administrative decision-maker took into account. If certain of that evidence and information is withheld from the reviewing court, the review may be artificial and lead to inaccurate outcomes. See the discussion in *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 at paras. 13-14.

[61] I am satisfied that admitting Bell's new evidence about its asserted cost of providing service would violate the CRTC's role as the fact finder and decider of the merits. The cost of providing service was an issue squarely before the Commission.

[62] Further, accepting the evidence would not facilitate this Court's review of the CRTC's decision against the evidence before it. As will be seen below when considering the allegations of breach of procedural fairness and arbitrary decision-making, there were instances when the appellants declined to put company-specific evidence before the Commission. It would be particularly inappropriate in this circumstance for this Court to now rely upon evidence that Bell did not put before the Commission.

[63] Contrary to the submissions of the Cable Carriers, the affidavit evidence provided by the appellants is generally not profferred to provide general background information to assist the Court or to shed light on the factors identified in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193. The evidence I have rejected about Bell's asserted costs is intended to add new evidence directly relevant to the merits of the appeal.

[64] The result is that the appellants' argument that the Commission committed a jurisdictional error by setting rates that are not just and reasonable is unsupported by an evidentiary basis. However, in any event, I am satisfied that the question of whether the rates in

question are just and reasonable is a question of fact—not a question of law or jurisdiction. I reach this conclusion for the following reasons.

[65] For ease of reference I set out subsections 27(1), (3) and (5) of the Act:

27.(1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.	**27.**(1) Tous les tarifs doivent être justes et raisonnables.
…	[…]
(3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with this section or section 25 or 29, or with any decision made under section 24, 25, 29, 34 or 40.	(3) Le Conseil peut déterminer, comme question de fait, si l'entreprise canadienne s'est ou non conformée aux dispositions du présent article ou des articles 25 ou 29 ou à toute décision prise au titre des articles 24, 25, 29, 34 ou 40.
…	[…]
(5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.	(5) Pour déterminer si les tarifs de l'entreprise canadienne sont justes et raisonnables, le Conseil peut utiliser la méthode ou la technique qu'il estime appropriée, qu'elle soit ou non fondée sur le taux de rendement par rapport à la base tarifaire de l'entreprise.
(underlining added)	(soulignements ajoutés)

[66] Reading subsection 27(1) in conjunction with subsection (3) demonstrates that whether rates are "just and reasonable" under the statute is a factually suffused question of mixed law and fact. This type of question cannot be entertained under subsection 64(1) of the Act.

[67] This view is reinforced by subsection 27(5). The Commission may adopt any method or technique that it considers appropriate to determine whether a rate is just and reasonable. The Commission enjoys considerable deference in determining the factors to be considered and the methodology that may be adopted for assessing whether rates are just and reasonable (*Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R 764, at paragraphs 40 and 41). As the CRTC is empowered to choose the method for setting rates, the appellants' arguments are necessarily an assault on the methods selected by the CRTC and its assessment of the evidence. The chosen methods of calculating rates and the CRTC's findings of fact are not subject to appeal under subsection 64(1).

[68] This conclusion is demonstrated in the grounds of appeal set out in the notice of appeal filed on behalf of the large telephone companies. At paragraph 17 it is asserted that:

> The CRTC's reasoning process contains several fundamental legal errors that are hallmarks of an irrational decision. The CRTC considered irrelevant factors like outdated data, ignored relevant factors like current data, and adopted methodologies that are contrary to its own earlier decisions. It greatly underestimated the costs of Bell's services. It thus erred in law by unreasonably applying its statutory rate-setting power to these facts.
>
> (underlining added)

[69] Challenges to the Commission's choice of methodologies and its assessment of evidence relevant to the selected methodologies are not matters of law or jurisdiction properly before this Court. The appellants' avenues for redress on these points lies with the Commission itself and the Governor in Council.

b) The Commission's consideration of policy objectives is not a question of law or jurisdiction

[70] I reach a similar conclusion with respect to the appellants' argument that the Commission failed to implement or even consider the policy objectives enumerated in section 7 of the Act, thus committing a jurisdictional error.

[71] The appellants argue that:

- Section 47 requires the Commission to exercise its powers with a view to implementing the Act's policy objectives and the Cabinet Direction.
- The Commission failed to do so. The decision not only fails to implement the policy objectives but is directly contrary to the geographic and competitive goals of the policy.
- This error deprived the Commission of jurisdiction.

[72] I begin consideration of these submissions by observing that the appellants again point to inadmissible, new evidence to support their submissions. Such inadmissible evidence includes adverse commentary on the decision at issue (for example, the TD Securities Equity Research report, appeal book, tab 136T) and the appellants' own post-decision statements (for example, Cogeco's, Eastlink's, Rogers', Shaw's, Videotron's and Bell's parent company's post-decision announcements). As discussed above beginning at paragraph 60, this new evidence is

inadmissible in this proceeding. Receiving this evidence would not respect the differing roles of this reviewing Court and the CRTC.

[73] This said, I am satisfied that the appellants' argument that the Commission failed to implement or consider the policy objectives enumerated in section 7 of the Act again is not a question of law or jurisdiction properly before the Court.

[74] In *Bell Aliant*, at paragraph 43, the Supreme Court quoted with approval the following passage from the reasons of Justice Sharlow, writing for this Court in the decision then under appeal:

> Because of the combined operation of section 47 and section 7 of the *Telecommunications Act* . . ., the CRTC's rating jurisdiction is not limited to considerations that have traditionally been considered relevant to ensuring a fair price for consumers and a fair rate of return to the provider of telecommunication services. Section 47 of the *Telecommunications Act* expressly requires the CRTC to consider, as well, the policy objectives listed in section 7 of the *Telecommunications Act*. What that means, in my view, is that in rating decisions under the *Telecommunications Act*, the CRTC is entitled to consider any or all of the policy objectives listed in section 7.
>
> (underlining added)

[75] During oral argument, counsel for the telephone companies conceded that the Commission:

- was not obliged to advance all of the policy objectives enumerated in section 7 of the Act;

- did advance some of the objectives articulated in section 7; and,

- the manner in which the Commission chose to balance policy objectives is not a question of law or jurisdiction.

[76] In my view, these proper concessions, coupled with the broad authority of the Commission to consider any or all policy objectives, is fatal to the appellants' assertion that the Commission's treatment of the policy objectives raises questions of law or jurisdiction. Again, any disagreement with the Commission's policy choices is a matter to be pursued with the Commission or the Governor in Council—not this Court.

[77] Indeed, in Order in Council P.C. 2020-0553 the Governor in Council considered "that the final rates set by [TO 2019-288] do not, in all instances, appropriately balance the objectives of the wholesale services framework recognized in Order in Council P.C. 2016-332 … and that they will, in some instances, undermine investment in high-quality networks". This said, the Governor in Council found it premature to vary or refer TO 2019-288 back to the Commission because the Commission has already launched a public proceeding to consider the appellants' applications asking that it review and vary the decision.

[78] As the issue of the CRTC's treatment of policy objectives is not properly before this Court it is unnecessary to consider the supplementary written submissions filed by the parties.

4. The issues to be decided

[79] Having found the two grounds of appeal discussed above are not questions of law or jurisdiction, and therefore fall outside the scope of subsection 64(1), the remaining issues to be determined are:

i. Did the CRTC breach the principles of procedural fairness or engage in arbitrary decision-making?

ii. Do the reasons of the CRTC fail to comply with a statutory reasons requirement?

iii. Did the CRTC impose an unconstitutional tax?

5. The standards of review to be applied to the issues

[80] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, the Supreme Court held that where Parliament has provided for an appeal from an administrative decision-maker to a court, the reviewing court is to apply appellate standards of review. Thus, questions of law, including questions concerning the scope of a decision-maker's authority, are reviewable on the standard of correctness (*Vavilov*, paragraph 37).

[81] In light of this, the parties all agree that the standard of review for questions of law and jurisdiction is correctness. It follows that the issues of whether the CRTC failed to comply with a

statutory reasons requirement and imposed an unconstitutional tax are reviewable on the standard of correctness.

[82] The Cable Carriers acknowledge some divergence in the jurisprudence as to how allegations of procedural fairness are to be reviewed (memorandum of fact and law, footnote 94). In my view, in this case it is unnecessary to resolve any uncertainty in the law. For the reasons articulated below, even on the non-deferential standard of correctness the appellants have failed to demonstrate procedural unfairness.

[83] I now turn to the application of these standards to the three issues properly before the Court.

6. Did the CRTC breach the principles of procedural fairness or err in law or jurisdiction by engaging in arbitrary decision-making?

i. The nature of the asserted errors of law and jurisdiction

[84] As explained at the outset of these reasons, in their notice of appeal and memorandum of fact and law the Cable Carriers assert that the CRTC breached the principles of procedural fairness, impermissibly fettered its discretion, or acted arbitrarily with respect to the following costing factors: the productivity factor, upstream traffic growth rates, the attribution of segmentation fibre costs to Internet services, speed-banding, unrecovered costs, working fill factors, segmentation fibre facilities, coaxial cable facilities and annual development costs.

[85] The telephone companies also argue briefly in their memorandum of fact and law that the CRTC ignored relevant factors, relied on irrelevant factors and made findings with no evidence. They allege the same error with respect to the productivity factor as the Cable Carriers assert. Other examples of alleged breaches of procedural fairness were briefly listed but were not well-developed by the telephone companies (memorandum of fact and law, paragraphs 87 to 92).

[86] In oral argument the Cable Carriers characterized the asserted errors to be errors of law or jurisdiction falling within two categories: breaches of the duty of fairness and arbitrary decision-making.

[87] Three elements of the duty of fairness were said to be breached by the CRTC: i) the right to have the rates determined by a fair, impartial and open-minded decision-maker; ii) the right to know the case the Cable Carriers had to meet and to put forward their case fully and fairly; and, iii) the right to receive reasons that met the requirements of the Act and the Cabinet Direction. The appellants also claim the Commission acted arbitrarily by making findings which were not supported by any evidence or which were made without regard to the relevant evidence actually adduced by the Cable Carriers.

[88] After setting out in oral argument the applicable legal frameworks in which breaches of the duty of fairness and arbitrary decision-making are to be considered, the Cable Carriers orally argued that unfairness and arbitrariness were generally present in five cost factors addressed by the CRTC: the productivity factor, upstream traffic growth rates, the attribution of segmentation costs to Internet services, speed-banding and unrecovered costs. The Cable Carriers relied upon

their memorandum of fact and law with respect to the remaining cost factors (listed in paragraph 84 above) which were also characterized to be additional examples of breaches of the duty of fairness or arbitrary decision-making. The Bell appellants made no oral submissions on this issue but adopted the submissions of the Cable Carriers.

[89] In the oral argument of the five cost factors, the Cable Carriers did not maintain a clear distinction between their "fairness" arguments and their "arbitrariness" arguments. Their submissions delved deeply into the technical record and the CRTC's findings, often only loosely tethered to a legally protected right that could be asserted on these appeals.

[90] In my view, nothing turns on the failure to maintain a clear distinction. I have reviewed in detail the submissions made orally and in writing with respect to the nine errors asserted by the Cable Carriers. For the reasons set out below I see no breach of procedural fairness, arbitrary decision-making or disregard of any legitimate expectation as to the conduct of the rate-setting process. The parties knew the issues that were in play and were afforded the opportunity to adduce evidence and make submissions on those issues. The parties' real complaint is that the Commission rejected their submissions.

[91] I begin my analysis with the five specific errors that were argued orally and will then conclude with the four remaining asserted errors described in the Cable Carrier's memorandum of fact and law. The issue of the adequacy of the Commission's reasons is dealt with separately below.

ii. The productivity factor

[92] The productivity factor, or the annual unit cost change assumption, is used to estimate reductions in per-unit equipment costs due to increases in equipment capacity over the study period (TO 2019-288, paragraph 9; TD 2016-117, paragraph 41). This costing factor is meant to reflect ongoing improvements in productivity that carriers can expect to realize in providing service as a result of communications technology becoming more productive over time (affidavit Lee Bragg, appeal book, tab 137, paragraph 70). The higher the absolute value of the productivity factor, the lower the associated wholesale rates.

[93] In TD 2016-117, the CRTC established an annual productivity factor of minus 26.4%. The Cable Carriers assert that this was based on data "from a comprehensive Report published in 2011 by the Dell'Oro Group, an independent market analysis and research firm for the telecommunications industry." (memorandum of fact and law, paragraph 22). At that time, the CRTC is said to have described the Dell'Oro Group as a "reliable source of data from which to determine a revised annual unit cost" (TD 2016-117, paragraph 58 referring to a report which relied upon the Dell'Oro Group data). Subsequent to TD 2016-117, the Dell'Oro Group published updated productivity factors in reports issued in 2016 and 2017. During the rate-setting process that led to the decision at issue, Rogers proposed a productivity factor of minus 9% based on the Dell'Oro Group's 2017 report; four other Cable Carriers proposed a productivity factor of minus 17% based on the Group's 2016 report.

a) The appellants' submissions

[94] The Cable Carriers argue that in TO 2019-288 the CRTC refused to consider this updated information. Instead, they submit that the CRTC "adhered rigidly to the minus 26.4% productivity factor that it had established previously … based on data from the now-seriously outdated 2011 Dell'Oro Group Report." The Cable Carriers submit that the CRTC provided no meaningful explanation "for preferring obsolete data" and unjustifiably criticized the Cable Carriers for relying on the updated data, stating that the Cable Carriers had "selectively chosen data from third-party reports … instead of relying on company-specific information." (memorandum of fact and law, paragraphs 24 to 25; TO 2019-288, paragraph 21).

b) Context

[95] I begin by providing some important context, particularly the Commission's earlier decision in TD 2016-117. In this decision the Commission cited the argument advanced by the Canadian Network Operators Consortium Inc. (CNOC) that unit costs had been declining more rapidly than accounted for by the Commission's then current assumed productivity rate of minus 10%, and that a rate of minus 26.4 % was appropriate. CNOC relied upon two reports to demonstrate this point. One of the reports was a report prepared by J. Scott Marcus, referred to as the Scott Report (TD 2016-117, paragraph 48). The Commission determined that the Scott Report constituted a reliable source of data from which to determine a revised productivity factor (TD 2016-117, paragraph 58). The Commission determined that the productivity factor should be changed to minus 26.4% (TD 2016-117, paragraph 63). While the Scott Report was prepared

using data from the Dell'Oro Group, it is not accurate to state that the Commission's determination of the productivity factor was based on the report of the Dell'Oro Group.

[96] As explained above, the Commission concluded its reasons in TD 2016-117 by reiterating that it had modified the rate-setting approach, adopted new assumptions for annual traffic growth and annual unit cost change, and changed the length of the study period for cost studies. The nature and scope of these changes indicated to the Commission that current wholesale HSA service rates were likely not just and reasonable (TD 2016-117, paragraph 104). Therefore, the Commission made interim all wholesale HSA service rates that were then approved on a final basis. All wholesale HSA service providers were directed to file new tariff applications reflecting the Commission's determinations (TD 2016-117, paragraphs 105 and 106).

[97] On March 31, 2016 (the same day TD 2016-117 was issued) the Commission wrote to wholesale HSA service providers advising that the cost studies to be filed pursuant to TD 2016-117 were "to contain the detailed cost information outlined in the Commission staff letter dated 13 September 2013." Both the September 13, 2013 letter and the detailed cost information requirements were attached to the Commission's letter of March 31, 2016.

[98] The cost studies submitted in response to TD 2016-117 were considered by the Commission in TO 2016-396 and TO 2016-448. At paragraphs 21 and 22 of TO 2016-396 the Commission referred to its letter of March 31, 2016 and expressed "significant concern that most wholesale HSA service providers chose to disregard Commission staff's guidance, the

[Regulatory Economic Studies] Manual, and relevant past Commission determinations." To ensure that the interim rates were based on proper costing principles and reasonable costs the Commission made adjustments to the proposed costs before it, including adjustments to the annual unit cost change assumption for two carriers. The adjustments applied an annual unit cost change assumption of minus 26.4% (TO 2016-396, paragraph 23 and Appendix 2). The Commission approved monthly rates on an interim basis. The establishment of final rates was to be based on a full review and assessment of the relevant cost inputs and costing methodologies (TO 2016-396, paragraph 26).

[99] Parenthetically, I note that the reference to a "Manual" is a reference to regulatory manuals prepared by telecommunications service providers and approved by the CRTC. The various manuals describe the basic framework for conducting regulatory economic studies and contain general and company-specific information and procedures to be used in calculating the incumbents' service costs. While originally developed for use by the ILECs, the manuals have been consistently applied to the Cable Carriers (see, for example, *Regulatory Economic Studies Manuals – Follow-up proceeding to Telecom Decision 2008-14* (25 August 2008), Telecom Order CRTC 2008-237, (TO 2008-237), paragraph 1, footnote 1).

[100] In respect of "Productivity Improvement Factors", the Manual notes that a regulatory economic study must reflect the impact of productivity changes over the study period in recognition of anticipated operational process improvements. When a company has information about the productivity associated with a particular cost element, this specific level of productivity is to be used and identified in a regulatory economic study. When a company has insufficient

information about the productivity associated with a particular cost element, the company may use its corporate average productivity improvement factors.

[101] On December 16, 2016, after the issuance of TO 2016-396, the Commission again wrote wholesale HSA service providers advising that in "order for the Commission to approve the wholesale HSA service tariff applications on a final basis, it is necessary for the companies to refile cost studies in the context of their related tariff applications." Such cost studies were to abide by the principles and methodologies outlined in the Manual, abide by previous applicable Commission determinations and include all of the information in the prescribed format as identified in the Commission's letter of March 31, 2016. Any request for deviation from a past Commission determination contained in those items was to be accompanied by a detailed rationale for the request, with supporting evidence. In the absence of supporting rationale and evidence, "Commission staff will be guided by the Commission's adjustments identified in Telecom Order CRTC 2016-396."

[102] On March 2, 2018, the Commission wrote wholesale HSA service providers requesting responses to attached requests for information. For example, Rogers was contacted with respect to its proposed annual capital unit cost change assumption which differed from the minus 26.4% annual capital unit cost change assumption approved by the Commission. Rogers was requested to explain "with supporting rationale why the company has not relied on company-specific information to estimate and propose the annual capital unit cost change assumption". If Rogers intended to propose a company-specific annual capital cost unit change assumption, it was to provide actual company-specific information.

[103] Rogers responded that its opposition to the annual capital unit cost change assumption of minus 26.4% was based upon "the very data used to inform the Commission's original decision". Rogers advised that it had purchased a recent version of what it referred to as the data set entitled the "2017 Dell'Oro" Report. Rogers restated its opinion that an assumption that the annual capital unit cost change of minus 26.4% was inappropriate. Rogers did not respond to the request that it provide company-specific information to support a proposed company-specific annual capital unit cost change assumption. It simply repeated why it proposed an annual capital cost change assumption which differed from minus 26.4% and insisted that the CRTC accept the information it had provided.

c) The Commission's reasons

[104] With this extensive background I now turn to the Commission's reasons; the material parts are found at paragraphs 21 and 24:

> 21. The Commission notes that the ILECs (with the exception of SaskTel and TCI) and cable carriers have selectively chosen data from third-party reports (i.e. the Dell'Oro Router Reports) to estimate company-specific annual capital unit cost change assumptions for use in their cost studies, instead of relying on company-specific information. Given that the wholesale HSA service providers are sophisticated network operators, it is reasonable to expect that they have detailed company-specific equipment prices and capacities for traffic-driven equipment that they acquire on an annual basis. Accordingly, the Commission determines that the approach adopted by these ILECs and cable carriers is not appropriate since it is not consistent with the general use of company-specific data in regulatory cost studies.
>
> …
>
> 24. In light of the above, the Commission determines that the previously approved annual capital unit cost change assumption of minus 26.4% continues to be a reasonable estimate for the annual capital unit cost change assumption for all

traffic-driven equipment and should be applied accordingly to all wholesale HSA service providers' cost studies.

d) Analysis

[105] As stated previously in these reasons, the issue before this Court is not the correctness or reasonableness of a productivity factor of minus 26.4%. The sole issues are whether the Cable Carriers' right to procedural fairness was breached when the Commission selected this productivity factor or whether the Commission arbitrarily, without explanation, preferred obsolete data.

[106] The Cable Carriers have not demonstrated any procedural unfairness or arbitrariness. In circumstances where:

i. in TD 2016-117 the Commission commented on the lack of evidence supporting proposed productivity factors (TD 2016-117, paragraph 53);

ii. the Commission then sought detailed cost information in the cost studies to be filed in response to TD 2016-117;

iii. the Commission expressed significant concern in TO 2016-396 at the lack of proper costing information, notwithstanding staff guidance and the provisions of the Manual, and continued to apply a productivity factor of minus 26.4%;

iv. the Manual requires company-specific information about the impact of productivity changes;

v. the Commission provided further guidance in its letter of December 16, 2016 as to the specific information required in the cost studies and stated that any request for a deviation from a past Commission determination was to include a detailed rationale for the deviation and supporting evidence; and

vi. the Commission again requested company-specific information in its information request of March 2, 2018;

there is no procedural unfairness or arbitrariness.

[107] The Commission sought company-specific information, and gave clear and fair warning of the consequence that would follow from a failure to provide such information or a rationale for a deviation that was accompanied by supporting evidence. Reading the reasons in the light of the record, the explanation for the Commission's use of a productivity factor of minus 26.4% is clear. It wished company-specific information, not third-party data.

[108] As the record shows, the Cable Carriers had the opportunity to submit the requested information. The choice to require company-specific information may not have been what the Cable Carriers wanted, but the CRTC may select any method it considers appropriate when setting rates (Act, subsection 27(5)).

[109] The Cable Carriers chose not to provide the requested information and now complain that they were not accorded fair process. This argument has no merit; the Cable Carriers were given a fair process, which they chose not to follow. In substance, the Cable Carriers object to the reasonableness of the productivity factor determined by the Commission. This is not a question of law or jurisdiction properly before the Court.

iii. Upstream traffic growth rates

[110] Growth rates in peak period Internet traffic are used to forecast peak period traffic; in turn, peak period traffic is used to estimate the facilities that will be required to provide service over a study period (TO 2019-288, paragraph 162). Lower growth traffic rates produce lower wholesale rates.

a) The appellants' submissions

[111] The Cable Carriers submit that in TD 2016-117, the CRTC directed them to use: i) a growth rate for the first two years of the study period that reflected historical levels of Internet traffic; and, ii) a growth rate of 32% for the remainder of the study period. They say that both Rogers and Cogeco followed "this mandated approach in preparing their cost studies." However, they submit that in that the decision under appeal the CRTC "declined to follow the approach that it had previously and specifically prescribed." (memorandum of fact and law, paragraphs 54 and 55). Instead, the CRTC selected the growth rate from the most recent year in which historical data was available and applied that rate over the entirety of the study period.

[112] The Cable Carriers say that by relying on what they assert is the lowest annual growth rate experienced by these companies over the past five years, the CRTC artificially depressed the wholesale rates payable by resellers to Rogers and Cogeco. They submit that the CRTC provided no notice to the Cable Carriers of its intention to abandon the approach it had "mandated" only three years earlier. In their submission, the CRTC ignored the evidence it had directed would be determinative while at the same time denying Rogers and Cogeco the opportunity to file additional evidence or make submissions on the issue (memorandum of fact and law, paragraphs 55 and 56). They say that they had a legitimate expectation that the Commission would follow its previous methodology.

b) Context

[113] Again, I begin my analysis with TD 2016-117. In this decision the Commission:

i. described its approach, set out in TD 2006-77 and in TRPs 2011-703 and 2011-704, in which it applied to the first two years of a study period traffic growth rates per retail end-user consistent with historical levels, followed by a constant annual growth rate assumption for the remaining period of the cost study. Most recently, a constant growth rate of 20% had been applied by the Commission (TD 2016-117, paragraphs 27, 28 and 39);

ii. explained that both wholesale HSA service providers and the Internet service providers agreed that annual Internet traffic had been growing at a rate greater then the Commission's then current annual traffic growth assumption of 20%. However,

the Internet traffic growth rate estimates submitted to the CRTC varied considerably, with the highest estimate being more than double the lowest estimate (TD 2016-117, paragraph 29);

iii. noted that both Shaw and CNOC referred to the Cisco Systems, Inc. Visual Networking Index White Paper which provided a growth forecast for Internet traffic in Canada, and which indicated that peak period Internet traffic would grow, from 2014 to 2019, at a compound annual growth rate of 32% (TD 2016-117, paragraphs 30 and 31);

iv. noted that no intervener refuted the validity of the Cisco White Paper (TD 2016-117, paragraph 37);

v. found that the Cisco White Paper used sound methodology and provided a proper and principled basis for determining a Canada-wide Internet traffic growth forecast (TD 2016-117, paragraph 38); and,

vi. determined that in the cost studies to be submitted in support of proposed new wholesale HSA service rates, all wholesale HSA service providers were to include, in the first two years of the study period, annual traffic growth rates per retail end-user consistent with historical levels, followed by a constant growth rate of 32% for each of the remaining years of the study period (TD 2016-117, paragraph 40).

[114] I pause here to make two observations. First, the parties' submissions and the Commission's determination was premised on the view that the annual growth rate of Internet traffic had increased significantly (see, particularly, the fourth paragraph of the preamble to TD 2016-117) so that the assumption of 20% annual traffic growth was no longer appropriate. Based on the evidence, the CRTC updated the assumed rate of growth but did not revisit the structure of its formula. Second, contrary to the submissions of the Cable Carriers, in this decision the CRTC neither set rates nor mandated any particular rate outcome.

[115] Rogers and Cogeco state that they followed the Commission's direction when preparing and submitting their cost studies in support of proposed new wholesale HSA service rates.

[116] However, contrary to the Commission's understanding at the time of TD 2016-117, Rogers' and Cogeco's historical annual peak period upstream traffic growth rates had been declining, not increasing.

c) The Commission's reasons

[117] Faced with that fact, in TO 2019-288 the Commission concluded that it was not reasonable to expect that annual peak period upstream traffic would increase over the cost study period to the levels proposed by Rogers and Cogeco. In light of the actual declining growth rates, "and having regard to the record before it", the Commission applied the most recent year's values from Rogers' and Cogeco's respective historical annual peak period upstream traffic

growth rates as the growth rate to be applied in each year of their cost studies (TO 2019-288, paragraph 168).

d) Analysis

[118] Again, I see no procedural unfairness. The 32% growth rate set in TD 2016-117 was a substantive finding of the CRTC, which was revised in TO 2019-288 in the face of new evidence. As the doctrine of legitimate expectation protects procedural, not substantive expectations (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraph 97), neither Rogers nor Cogeco could have any enforceable reasonable expectation that rates would be set on the basis of an assumed 32% annual growth rate.

[119] Further, both Rogers and Cogeco must be assumed to have understood the express premise of TD 2016-117 and to have known that their historical annual peak period upstream traffic growth rates had been declining. Armed with that knowledge they were able to make informed submissions to the Commission on an appropriate rate. The fact that the Commission rejected those submissions does not amount to a breach of procedural fairness.

iv. Attribution of segmentation costs

[120] Segmentation facilities include segmentation fibre and optical nodes. These facilities transport various services such as Internet and television (TO 2019-288, paragraph 119) and

voice calling. In *Cogeco, Rogers, Shaw and Videotron – Third party internet access service rates* (21 December 2006), Telecom Decision CRTC 2006-77 (TD 2006-77), the Commission determined that 75% of the proposed all-carrier node segmentation capital costs would be attributed to wholesale HSA and retail Internet services. This recognized that these facilities were used for other Cable Carrier services, not just Internet services (TO 2019-288, paragraph 136; TD 2006-77, paragraphs 92 and 93). The Commission reached this decision notwithstanding the submissions of the Cable Carriers that high-speed Internet access was the sole driver of node segmentation (TD 2006-77, paragraphs 84 to 88, 90 to 91).

[121] In the rate-setting hearing under review, the Cable Carriers again argued that incremental segmentation costs are dedicated exclusively to managing peak Internet traffic volumes. Therefore, they proposed that 100% of the cost associated with segmentation fibre facilities be attributed to Internet services. The CRTC rejected this argument:

> 136. In Telecom Decision 2006-77, the Commission determined that 75% of the proposed all-carrier node segmentation capital costs would be causal to the wholesale HSA and retail Internet services, in recognition of the use of these investments for other cable carrier services such as television and voice.
>
> 137. The Commission remains of the view that these facilities are used to provision a variety of services; therefore, it would not be appropriate to attribute 100% of the costs of these facilities to retail Internet and wholesale HSA services.
>
> 138. In the absence of any evidence, and given that future services are expected to benefit from segmentation facility investments over the cost study period, the Commission determines that an attribution factor of 75% continues to be appropriate.

a) The appellants' submissions

[122] The Cable Carriers argue that the Commission reached this conclusion in the absence of any evidence supporting its stated "expectation", and without support in the Manual for the application of such an approach. They submit the Commission had no basis for this 75% attribution of segmentation costs as segmentation facilities are deployed to satisfy demand for new services or increasing demand for existing services and there was no evidence of increasing demand for non-Internet services. The Cable Carriers also argue that in stating that it adopted this approach "in the absence of any evidence" the Commission demonstrated that it disregarded the evidence of the Cable Carriers.

[123] In oral argument the Cable Carriers referred only to the submissions to the Commission by Shaw and Rogers.

b) Context

[124] In response to an information request from the Commission, Shaw confirmed that its video and voice services also use the facilities associated with optical nodes. It submitted, however, that peak Internet traffic is the cost driver for the major network components, including node segmentation related costs. It submitted that no other traffic on its network reached a level that required Shaw to undertake node splits to alleviate traffic congestion. As a result, Shaw only included in its cost study the incremental causal costs related to Internet service for node segmentation related costs.

[125] In response to a similar request for information, Rogers confirmed that its optical node carries radio frequency signals for Internet, television and Rogers home phone services. Plans to add other services were said to be underway. In the submission of Rogers, even if other services benefit from the facilities, costs should not be attributed to these other services unless they cause advancement of the facilities.

[126] Thus, both Shaw and Rogers acknowledged that their segmentation equipment and facilities were used by services other than Internet services. Notwithstanding, they argued that no other traffic had reached a level that required them to undertake node splits to alleviate traffic congestion so all segmentation costs should be attributed to Internet services. They elected not to provide evidence of any incremental cost for other services.

c) The Commission's reasons

[127] Having received the Cable Carriers' evidence and submissions, the Commission remained of the view that because the facilities were used to provide a variety of services it would not be appropriate to attribute 100% of the cost of these facilities to retail Internet and wholesale HSA services. In the absence of any evidence about any incremental cost for other services the Commission determined that the attribution factor of 75% continued to be appropriate.

d) Analysis

[128] I see no procedural unfairness. The Cable Carriers were aware of the issue, filed their evidence, offered their submissions and replied to requests for information. Their complaint is with the Commission's decision not to attribute 100% of the cost of segmentation facilities to Internet services, not with the fairness of the Commission's process.

v. Speed-Banding

[129] To understand the speed-banding issue one must understand that the cost model for wholesale HSA services is based upon two broad categories of costs: access costs and usage costs. Access costs consist of costs associated with end users' access to the network. These costs do not vary with changes in usage levels. Usage costs consist of costs incurred to move data through a wholesale HSA service provider's network. These costs do vary with changes in usage levels. Coaxial cable costs are an example of access costs; optical node costs are an example of usage costs (TO 2019-288, paragraph 139; TD 2016-117, paragraph 77).

[130] In TD 2016-117 the Commission considered whether usage-sensitive equipment should be assigned to the traffic-driven portion of cost models. The Commission determined:

> 85. The large cable companies have some costs for usage-sensitive equipment in the access portion of their cost models (e.g. the CMTS chassis) that are traffic-driven. These usage-sensitive costs can be identified and removed from the access portion of cost models and assigned to the traffic-driven portion, whether the wholesale HSA service provider is using the CBB model or the flat rate model. This reassignment of costs would aid in the creation of speed-bands by reducing

> variability in the access costs between the various service speeds within a speed-band.
>
> 86. In light of the above, the Commission determines that wholesale HSA service providers must ensure that all equipment costs accounted for in the access portion of their cost models include costs only for non-usage-sensitive equipment.
>
> (underlining added)

[131] To understand the speed-banding issue one must also understand that in the decision at issue the Commission was considering whether segmentation fibre facilities should be accounted for in the access or usage portion of the cost model (*Review of costing inputs and application process for wholesale high-speed access services* (28 May 2015), Telecom Notice of Consultation CRTC 2015-225, paragraph 19; TD 2016-117, paragraph 77). It was this determination that gave rise to what is referred to as the speed-banding issue. With this background, I turn to speed-banding.

[132] In TD 2016-117 one of the Commission's key determinations was whether to adopt either the "fixed access" approach or the "speed-banding" approach to rate-setting. The Commission described the "fixed access" approach to involve the creation of a fixed access rate that would apply to all service speeds. The fixed access rate would recover both speed-dependent and speed-independent access costs for all service speeds. The Commission described the "speed-banding" approach to further break down access costs into two access rate components. The first component would consist of a speed-independent, fixed, weighted-average access rate that would apply to all service speed offerings. The second rate component would consist of a speed-dependent access rate per speed-band uniformly applied to all service speeds falling within

a given speed-band. Each speed-band would be determined based on service speeds that have similar costs (TD 2016-117, paragraph 12).

[133] In TD 2016-117, the Commission determined that rate-setting for all wholesale HSA services would be done in accordance with the speed-banding approach. It did not establish how the various costs would be allocated to different rate components.

a) The appellants' submissions

[134] The Cable Carriers say that they relied on this determination and proposed wholesale rates based on the speed-banding approach.

[135] The Cable Carriers acknowledge that during the course of the rate-setting proceeding the Commission asked the Cable Carriers to comment on the appropriateness of moving segmentation costs from the "access" rate component of wholesale rates to the "capacity" (or usage) rate component. They responded that this adjustment would be a "radical change in the pricing approach of access services" that would be impossible to reconcile with speed-banding (memorandum of fact and law, paragraph 37). Moreover, they asserted that such a change would require new costing models based on the discredited "fixed access approach". They identified the connection between segmentation fibre facilities and speed-banding, however they did not provide revised proposed rates associated with segmentation fibre costs in the traffic-driven portion of the cost model.

[136] Notwithstanding their submissions, the Cable Carriers assert that the CRTC gave them no notice of its intention to abandon speed-banding and gave them no opportunity to file such new costing models based on a fixed access approach. Instead, the Cable Carriers say that the Commission simply imposed a single access rate to be applied across all speeds offered by each Cable Carrier. The Cable Carriers assert that in doing so the Commission: i) ignored their evidence establishing the greater cost of providing higher-speed Internet service independent of the usage; ii) disregarded its own explicit direction to use the speed-banding approach and thereby disregarded the legitimate expectation of the Cable Carriers as to how the rate-setting process would be conducted; and, iii) gave no consideration to the fact that the entirety of the Cable Carriers' cost studies had been premised on the Commission's previous direction to apply speed-banding.

[137] Again, I see no error of law or jurisdiction.

b) Context

[138] In paragraph 85 of TD 2016-117, quoted above, the CRTC foreshadowed its requirement that usage-sensitive costs be identified and removed from the access portion of the cost models and assigned to the usage-driven portion. The speed-banding approach was premised on the adoption of two access rate components—one consisting of speed-independent costs, the other consisting of speed-dependent costs. In the decision at issue the Commission did not reverse its previous policy. Instead, with the benefit of a full record, it found that most speed-dependent costs were better characterized as usage costs (TO 2019-288, paragraphs 156 to 161). Applying

its previous policy to the finding, the Commission reassigned those costs to the usage portion of the model. The impact on speed-banding was a foreseeable consequence of that determination.

[139] Further, the Commission specifically solicited submissions from the parties on this issue. In a request for information issued on March 2, 2018 the Commission referenced TD 2016-117 and observed that the addition of fibre facilities to support node segmentation generally occurs as additional facilities are required to meet rising Internet demand. The Commission went on to ask that the parties comment "on the appropriateness of including the costs associated with segmentation fibre in the access portion of the cost model as opposed to the traffic [or usage] driven portion" and were asked to "provide revised proposed rates and cost information using the baseline cost study that includes the costs associated with segmentation fibre and any other usage-sensitive equipment in the traffic driven portion of the cost model", using a specified format.

[140] Accordingly, contrary to the submission of the Cable Carriers, new costing models were solicited.

c) Analysis

[141] We were not taken to any evidence to suggest that the Cable Carriers provided such cost studies. Indeed, in its Aggregated Final Comments, Rogers simply argued extensively that its method of including certain node segmentation costs in the access portion of the cost model remained appropriate. In response to the information request Cogeco similarly replied that it remained of the view that "it is appropriate to include the costs associated with segmentation

fibre in the access portion rather than in the traffic driven portion of Cogeco's proposed cost model." (appeal book, tab 112C.1(I), question 6).

[142] The Cable Carriers knew this issue was in play and were given the opportunity to file new costing models. There was no procedural unfairness. The doctrine of legitimate expectations does not protect a substantive expectation that the CRTC would continue to set access rates that vary across speed-bands.

vi. Unrecovered costs

[143] As explained above, in TD 2016-117 the CRTC changed the study period from the then current ten year term to a shorter period of five years. The Commission wrote:

> 76. These changes to the study period are to take place immediately, and not after the expiration of the current ten-year study period. When service rates are revisited prior to the end of an original study period, service providers may be unable to recover certain costs that they would have otherwise expected to recover. It is appropriate for service providers to be able to recover these costs. Unrecovered costs that are causal to a service can be recovered according to the methodology outlined in Appendix E-1 of the large telephone companies' Regulatory Economic Studies Manuals, which were approved in Telecom Order 2008-237. For all other unrecovered costs, the Commission requests wholesale HSA service providers to identify and justify the amount, with supporting rationale, and to propose a way to recover these costs.

[144] During the rate-setting hearing at issue, Rogers submitted evidence of two categories of unrecovered costs, totalling $52.3 million. The first category of unrecovered costs reflected costs that had not been recovered due to the Commission's decision to update wholesale HSA rates prior to the end of the original study period (Changed Study Period Unrecovered Costs). The

Commission had originally approved final rates based on a ten-year cost study that Rogers asserted would have had to run its course in order for cable companies to fully recover their costs. The Commission's decision to truncate that period was said to result in unrecovered costs. Rogers quantified these costs in the amount of $30.1 million. The second category of unrecovered costs were costs that were not recovered due to the difference between interim rates in place since 2012 and what Rogers submitted were the true costs of providing the services (Interim Rates Unrecovered Costs). These costs were quantified in the amount of $22.2 million.

[145] At paragraph 38 of its reasons in TO 2019-288, the Commission acknowledged that revisiting wholesale HSA rates prior to the end of the period captured by the original cost study might result in unrecovered costs. This said, the Commission rejected Rogers' claim for unrecovered costs stating:

> 45. RCCI's proposed unrecovered costs were estimated based on interim rates. Given that the rates for the speed tiers for which the company has proposed unrecovered costs were (i) approved on an interim basis, (ii) under review, and (iii) not approved on a final basis, the question of unrecovered costs does not arise. The difference between the interim rates and final rates is resolved through retroactivity. In view of the above, the Commission determines that RCCI's proposed unrecovered costs are not appropriate.

[146] On this basis, the Commission excluded Rogers' proposed unrecovered costs from its cost studies.

a) The appellants' submissions

[147] Rogers submits that these reasons addressed only the Interim Rates Unrecovered Costs and that no reasons were provided for rejecting the Changed Study Period Unrecovered Costs. It further submits that the Commission's reasons for rejecting the Interim Rates Unrecovered Costs ignored the fact that these costs related to interim rates in place between 2012 and 2016 so that retroactive rates for the period from 2016 to the present cannot address those earlier unrecovered costs.

b) Analysis

[148] I see no error of law or jurisdiction.

[149] In the rate-setting process at issue, Rogers submitted proposed rates for consideration by the Commission based upon its revised cost study. Included in its proposed rates was Rogers' claim for unrecovered costs. Rogers' proposed rates were higher than the interim rates set in 2016. In TO 2019-288 the CRTC not only rejected the higher rates proposed by Rogers, but found that the interim rates set in 2016 were not just and reasonable; the Commission set rates that were lower than the then existing interim rates and made such rates retroactive in order to ensure that wholesale HSA service providers applied just and reasonable rates.

[150] Read in this light, the Commission's reasons disposed of both parts of Rogers' unrecovered costs claim. Rogers' cost study was rejected because the CRTC found it overestimated how much it actually cost Rogers to provide wholesale HSA services. The

embedded claim for unrecovered costs failed when the Commission approved a lower rate than that proposed.

[151] There is no valid claim for breach of procedural fairness or arbitrariness. Rogers' real complaint is with the quantum of the tariff approved by the Commission; a complaint that is outside the scope of this Court's reviewing function.

vii. Working fill factors (WFF)

[152] As the CRTC explained in TO 2019-288:

> 47. The working fill factor (WFF) is a measure of the utilization of a shared facility and is used to recognize the non-working capacity and to apportion the cost of non-working capacity to the per-unit cost of the working capacity.
>
> 48. Working capacity is the capacity that is available to provide service to customers making use of the relevant facility. This includes all units that are potentially revenue generating, while non-working unit capacity is all other remaining units (e.g. units required for maintenance).

[153] The WFF represents the point at which network equipment must be upgraded to handle increased usage. As a "higher WFF implies that a carrier can operate at a much higher capacity before additional costs" must be incurred to upgrade network capacity, a higher WFF produces lower wholesale rates (affidavit Lee Bragg, appeal book, tab 137, paragraph 59).

[154] In *Review of the use of company-specific working fill factors and the recovery of past introduction costs not fully recovered* (14 May 2009), Telecom Regulatory Policy CRTC 2009-274 (TRP 2009-274) the Commission determined that companies could propose a company-specific WFF for a particular facility for use in a cost study so long as the company met five enumerated conditions. The Commission also determined that when a company-specific proposed WFF did not meet the enumerated conditions, the Commission-mandated WFFs are to be used (TRP 2009-274; TO 2019-288, paragraphs 49 and 50). For the purpose of this appeal, the relevant condition is the first enumerated condition: the company must satisfy a common definition of the WFF.

[155] Throughout the rate-setting proceedings now under review by this Court, the appellants proposed company-specific WFFs. The CRTC found these proposals did not satisfy the relevant conditions and so it rejected them (TO 2019-288, paragraphs 66 to 67, 97).

a) The appellants' submissions

[156] The Cable Carriers allege two errors of law with respect to the WFF. First, they allege the CRTC improperly fettered its discretion by following outdated Manuals when the Cable Carriers provided "superior" information. Second, they allege that the CRTC made decisions without evidence based on irrelevant considerations while ignoring relevant evidence. In addition to these errors of law the Cable Carriers also assert that the CRTC breached an explicit undertaking that it would rely on a report from a third-party research and development group (CableLabs Report).

b) Analysis

[157] I begin by rejecting the notion that the Commission fettered its discretion. An administrative decision-maker fetters the exercise of their discretion by relying exclusively on an administrative policy without regard to the law (*Stemijon Investments Limited v. Canada (Attorney General)*, 2011 FCA 299, 475 N.R. 341, at paragraphs 24 and 60). This is not what the Commission did in this case. The Commission did not treat its former determinations as being legally binding; rather, it asked the parties to explain and support their proposed departure from the determination established in TRP 2009-274 (see, for example, CRTC Request for Information, appeal book, tab 109D, pages 7, 12 to 13, 18, 31, 37 to 38 and 50).

[158] I next reject the notion that the CTRC in effect closed its eyes to the evidence. In their responses to a request for information, the appellants asked the CRTC to make a departure from the manner in which it calculated WFF.

[159] The appellants submitted that WFF should be based on the "average operational utilization level of the entire access network at steady state". In TRP 2009-274 the Commission defined the company-specific measured WFF to be a function of "working units" and defined "working units" to be those units that are expected to provide service to an end-user (TRP 2009-274, paragraph 22). Instead, in the present case the appellants defined "working units" to be those units used at the moment of measurement. In the view of the Commission, this approach resulted in an underestimation of working units because it did not take into account all working units that could provide service to a customer (TO 2019-288, paragraph 67). It follows that the Commission found the proposed company-specific measured WWFs were not appropriate for

use in cost studies. Those WWFs did not satisfy the first enumerated condition for the use of a company-specific WFF. This was a determination open to the Commission. The CRTC did not close its eyes to the evidence.

[160] To the extent that the Cable Carriers now complain that it was inappropriate for the CRTC to impose the conditions set in TRP 2009-274 because that policy was designed for ILECs, this is an argument they ought to have advanced before the CRTC. It is too late to raise it on this appeal (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 22 to 26).

[161] Finally, I reject the submission that the CRTC breached an explicit undertaking that it would rely upon the CableLabs Report. This undertaking is said to have been made by the CRTC in *Bragg Communications Incorporated, operating as Eastlink – Application to review and vary or stay Telecom Order 2016-448 regarding wholesale high-speed access service interim rates* (25 May 2017), Telecom Decision CRTC 2017-167 (TD 2017-167) where it wrote:

> 18. With respect to the CableLabs report filed by Eastlink in support of the application, this report was filed with the Commission after Telecom Order 2016-448 was issued, and thus could not have been considered in the proceeding that led to that order. However, the Commission will consider it in determining the final rates for Eastlink's TPIA service.

[162] Context is important. As described above when dealing with the policy pedigree of the decision at issue, after finding that existing wholesale HSA service rates were not just and reasonable in TD 2016-117, the CRTC set revised interim rates for Eastlink in TO 2016-448. The interim rates were lower than the previous rates. The Commission expressed concern that

Eastlink had deviated from the established Phase II capacity costing methodology and specifically expressed concern with the working fill factor (TD 2016-117, paragraph 12).

[163] Eastlink then applied for a stay, review and variation of the interim rates under section 62 of the Act. In its application, Eastlink made a similar argument to the one raised in this appeal and presented the CableLabs Report as evidence. The CableLabs Report was new evidence that had not been before the CRTC when it set the interim rates under review.

[164] In TD 2017-167 the CRTC dismissed Eastlink's application for reconsideration. It commented, at paragraph 17, that Eastlink had the opportunity to submit evidence supporting its proposal before interim rates were set but failed to do so. In this circumstance, it would have been improper for the CRTC to consider the CableLabs Report at that time. It was in this context that the Commission stated that it would consider the report when determining final rates.

[165] The Commission's meaning was clear. Eastlink had failed to provide evidence to support its company-specific WFFs during the interim rate-setting process and filing such evidence as part of its application to review and vary did not remedy that failure. This said, the report could be filed as part of the final rate-setting process. In saying this the CRTC made no comment on the contents of the report. The CRTC did not make a binding commitment or undertaking to adopt the CableLabs Report in the final rate-setting order.

[166] In its report, CableLabs used the definition of WFF proposed by the appellants but rejected by the Commission (see Report, appeal book, tab 119A(I), paragraph 52). The Commission rejected the CableLabs Report because it relied on an improper definition of WFF.

viii. Segmentation fibre facilities

[167] Segmentation facilities transport various services, such as television and Internet, to end-users.

[168] The Cable Carriers submitted that the Commission should abandon the technology cost factor methodology set out in the Regulatory Studies Manual at section 3-43 to be used to estimate segmentation fibre facility costs. Instead, the Cable Carriers advocated use of the replacement cost approach (TO 2019-288, paragraphs 120 and 124).

[169] The Commission rejected the request of the Cable Carriers:

> 130. The Commission considers that the use of this approach, as proposed, is not appropriate, given that fibre facilities are shared among different services. As per the Manual, a cost factor approach is an appropriate method to use to estimate the costs for such facilities.
>
> 131. With respect to the capacity of segmentation fibre facilities, the Commission is of the view that once they are deployed to a given node, no further augmentation of the deployed fibre facilities is required since the fibre's capacity to serve a given node is, in practice, not subject to exhaustion. Accordingly, the capacity of a given segmentation fibre facility to provision an optical node cannot be said to be limited.

[170] During the course of the rate-setting proceeding the CRTC sought submissions about the appropriateness of estimating the costs for segmentation fibre facilities using the technology cost factor in place of the Cable Carriers' proposed approach (March 2, 2018 Request for Information, appeal book, tab 109D, pages 24, 33, 43-44, and 54). The Commission received and considered the submissions it received in response.

[171] The Cable Carriers' assertion that the Commission ignored evidence is unfounded. Their real complaint is with how the CRTC interpreted and applied the facts before it.

ix. Coaxial cable facilities

[172] In *Terms and rates approved for large cable carriers' high speed access service* (21 August 2000), Order CRTC 2000-789 (Order 2000-789), the Commission determined that it is appropriate to use a proxy monthly cost of $0.152 per channel, per subscriber, to estimate the cost associated with coaxial cable facilities. This rate was meant to reflect the relevant cost categories of depreciation, operating expenses and rate of return. In the rate-setting proceeding at issue, the Cable Carriers submitted that the use of this proxy was no longer appropriate because the information and data used to calculate the proxy was outdated.

[173] The Commission's analysis and conclusions are set out in paragraphs 112 through 116 of its reasons:

> 112. The capacity costing approach is generally used when the use of existing shared facilities results in the advancement of future relief of facilities.

> 113. With respect to existing coaxial facilities, there is no cost of advancement. This is due to the fact that when wholesale HSA and retail Internet services make use of the facilities, relief is provided by segmenting the facilities. Accordingly, the Commission considers that it is not appropriate to use the capacity costing approach to estimate the costs of existing coaxial facilities.
>
> 114. With regard to the cable carriers' concerns regarding the use of outdated cost information in the proxy approach, the Commission considers that updated cost information should be used to reflect the forward-looking, company-specific costs for existing coaxial facilities.
>
> 115. With respect to estimating existing coaxial facility costs, the Commission determines that, subject to what follows, it is reasonable to include forward-looking coaxial facility costs associated with the same cost categories as before. The cable carriers provided the depreciation and operating expenses for coaxial facility costs, and the Commission has used these amounts to estimate the coaxial facility costs. The Commission determines, however, that it is not appropriate to include a specific category to account for a rate of return given that the after-tax weighted average cost of capital (AT-WACC) takes into consideration the rate of return.
>
> 116. With respect to estimating new coaxial facility costs, the Commission determines that it is appropriate to do so based on an average cost for provisioning coaxial facilities per new home passed during the cost study period.

a) The appellants' submissions

[174] The Cable Carriers state that the relevant Manuals mandate the use of the "capacity costing" methodology to estimate costs associated with shared facilities such as coaxial cable facilities. They complain, however, that the CRTC rejected the use of the capacity costing approach for determining the cost associated with their coaxial cable facilities. Instead, they submit that the Commission "applied a novel and unwarranted methodology that involved estimating these costs based on depreciation and operating expenses." (memorandum of fact and law, paragraph 42). Moreover, the CRTC did not request submissions concerning the

appropriateness of using the information solicited from them to estimate the costs associated with their coaxial cable facilities.

[175] This submission fails to distinguish between the Commission's determinations with respect to existing and new coaxial facilities.

b) Context

[176] At paragraph 112 of its reasons the CRTC confirmed that capacity costing is generally used when the use of existing shared facilities results in the advancement of future relief of facilities. However, in the case of existing coaxial facilities the Commission determined that there was no cost advancement because while segmentation requires the addition of an optical node along with fibre facilities, no additional coaxial facilities are required.

[177] The Commission did not reject the application of capacity costing to new coaxial facilities (TO 2019-288, paragraph 113 and footnote 20).

c) Analysis

[178] As to the assertion that the Commission applied a "novel and unwarranted methodology", the Commission confirmed that it included depreciation and operating expense amounts provided by the Cable Carriers to estimate coaxial facility costs. The Commission did not include an allowance for a rate of return because, in its view, another calculation takes into account the rate

of return (TO 2019-288, paragraph 115). This does not constitute a “novel and unwarranted methodology”. The duplicative element of rate of return was simply removed from the relevant cost categories considered when estimating the cost associated with coaxial cable facilities.

[179] The Cable Carriers have not demonstrated any breach of procedural fairness.

x. Annual development costs

[180] In the rate-setting proceeding below, Rogers sought annual development costs associated with its aggregated wholesale HSA service and annual development costs associated with its wholesale HSA and retail Internet services (TO 2019-288, paragraph 181). At paragraphs 182 and 183 of its decision, the CRTC disallowed most of these costs for the following reasons:

> 182. With respect to annual development costs causal to aggregated wholesale HSA service, development costs are normally incurred only at the beginning of the study period. The Commission considers that RCCI did not provide sufficient evidence to support ongoing development costs. Accordingly, the Commission has excluded RCCI’s development costs from year two and beyond in its cost studies.
>
> 183. With respect to the separate annual development costs associated with its wholesale HSA and retail Internet services, RCCI did not provide evidence that these initiatives are causal to the provisioning of wholesale HSA service. Therefore, the Commission has excluded these development costs from RCCI’s cost studies.

a) The appellants' submissions

[181] Rogers now argues that the relevant Manual only requires the provision of detailed supporting evidence in respect of items that account for 20% or more of the total cost sought to be recovered through a proposed rate and the proposed annual development costs represented less than 5% of its total estimated costs. Rogers further complains that the CRTC did not give notice that it required additional evidence supporting Rogers' proposal to recover annual development costs.

b) Context

[182] The applicable Regulatory Economic Studies Manual does state that detailed cost information is required for key reporting cost categories only. One exemplar of a key reporting cost category is expressed to be cost categories whose cost is equal to or greater than 20% of the total service cost. However, in *Regulatory Policy – Review of certain Phase II costing issues* (21 February 2008), Telecom Decision CRTC 2008-14 (TD 2008-14) the Commission determined that expenses associated with development activities that are not causal to a service are fixed common expenses and are to be excluded from regulatory economic studies (Appendix 1, paragraph 13). Rogers has not established that the quantum of the development costs relieves it from the initial burden of proving that the costs were causal to the provision of services and not a fixed common expense.

c) Analysis

[183] I see no breach of procedural fairness in requiring Rogers to demonstrate that claimed costs were causal to the provision of a service.

xi. Conclusion on procedural fairness and arbitrary decision-making

[184] The appellants have not demonstrated any error of law or jurisdiction arising out of any breach of procedural fairness or arbitrary decision-making. Their concerns center in largest part on the methods chosen by the Commission and the Commission's conclusions when it applied those methods to the evidence before it. The Commission may adopt and apply any method it considers appropriate for determining rates (Act, subsection 27(5); *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, 2009 SCC 40, [2009] 2 S.C.R. 764, at paragraph 40; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147, at paragraph 81). The proper avenue of recourse lies with the Commission itself by way of a request for reconsideration or by way of an appeal to the Governor in Council.

7. Do the reasons of the CRTC fail to comply with a legislative reasons requirement?

[185] Paragraph 1(*b*)(i) of the Cabinet Direction provides:

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

…

> (b) the Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that
>
> > (i) specify the telecommunications policy objective that is advanced by those measures and demonstrate their compliance with this Order, …

(underlining added)

[186] The appellants assert that:

- This provision imposes a further jurisdictional limit on the Commission. It is an independent jurisdictional error for the CRTC to give reasons that do not comply with the mandatory obligation to specify the objectives advanced by regulatory measures and demonstrate compliance with the Cabinet Direction.

- The Commission's reasons are noncompliant in that they: i) devote only a single sentence to the telecommunications policy objectives the decision purports to advance; ii) fail to explain how the decision will advance these objectives; iii) make no effort to explain how the decision can be reconciled with the numerous policy objectives it will undermine; and, iv) do not demonstrate how or why the asserted policy objectives will be advanced.

- In order to demonstrate that the regulatory measures imposed by it complied with the Cabinet Direction, the Commission was obliged to explain how the measures: i) were efficient and proportionate to their purpose and interfered with the operation of competitive market forces only to the minimum extent necessary; ii) neither

> deterred economically efficient competitive entry into the market nor promoted economically inefficient entry; and, iii) ensured the technological and competitive neutrality of the wholesale network access regime, to the greatest extent possible, so as to enable competition from new technologies and not artificially favour either Canadian carriers or their competitors.

[187] The respondents argue that:

- Neither the Cabinet Direction nor the Act requires the Commission to enumerate policy objectives in every decision—the use of the word "should" in paragraph 1(*b*)(i) of the Cabinet Direction simply encourages the Commission to specify the objective and demonstrate compliance but does not require it.

- In any event, the Commission's decision properly advances telecommunications policy objectives.

[188] The Court received competing submissions as to whether the Cabinet Direction imposed a mandatory, as opposed to a directory or permissive requirement. In my view, it is unnecessary to resolve this question. Assuming, without deciding, that the Commission was subject to a mandatory requirement to give reasons explaining its implementation of the telecommunications policy objectives set out in section 7 of the Act and show compliance with the Cabinet Direction, it did so. The reasons of the Commission properly read in light of its policy pedigree, the substantial record before the Commission and the submissions of the parties fulfilled any

mandatory requirement. The reasons satisfactorily address the policy objectives and the arguments and issues raised by the parties. I reach this conclusion for the following reasons.

[189] To begin, I accept that the exercise of rate-setting consists of two distinct steps.

[190] First, the Commission must determine if there is a need to deviate from market forces and, if so, what regulatory measures are necessary. This step is consistent with the direction set out in paragraph 1(*a*)(i) of the Cabinet Direction that when implementing Canadian telecommunications policy objectives the Commission "should … rely on market forces to the maximum extent feasible". This step primarily involves a policy function.

[191] The second step in the process is to determine the rates to be set. This is primarily a fact-finding function.

[192] I reviewed TO 2019-288's policy pedigree in some detail above. The decisions that make up the pedigree show that the Commission was mindful throughout of its obligation to perform its duties with a view to implementing the policy objectives enumerated in section 7 of the Act and in accordance with the Cabinet Direction. Two of the Commission's TRPs are particularly relevant to the appellants' submissions.

[193] In TRP 2010-632 the CRTC required ILECs and Cable Carriers to offer certain high-speed access facilities as new wholesale services to competitors. The decision shows a focus on the use of market forces when possible and a focus on the three Cabinet obligations of

proportionality, efficiency and neutrality. This is particularly evident at paragraphs 143 to 149 of the decision:

> 143. The Commission's determinations in this decision are based on the requirements of the Act, the Order in Council, and the Governor in Council's Policy Direction.
>
> 144. The regulatory measures under consideration in this decision are of an economic nature and deal with network access regimes. Therefore, subparagraphs 1(*b*)(ii) and (iv), paragraph 1(*a*), and subparagraph 1(*b*)(i) of the Policy Direction apply to the Commission's determinations.
>
> 145. Consistent with paragraph 1(*a*) of the Policy Direction, in all cases where the Commission has imposed regulatory requirements on the incumbents, it has done so because market forces cannot be relied upon to achieve the telecommunications policy objectives set out in section 7 of the Act, and it has adopted measures that are efficient and proportionate to their purpose.
>
> 146. The Commission considers that the policy objectives set out in paragraphs 7(*a*), (*b*), (*c*), (*f*), and (*h*) of the Act are advanced by the regulatory measures established in this decision. The Commission considers that the objective in paragraph 7(*f*) of the Act – to foster increased reliance on market forces and ensure that regulation, where required, is efficient and effective – is of particular relevance. The determinations in this decision aim to ensure that retail Internet service markets will remain competitive and continue to deliver high-quality services and respond to users' economic and social requirements.
>
> 147. To ensure that competition in retail Internet service markets, notably in the residential market, remains sufficient to protect the interests of users as service speeds increase, the Commission has modified the basis upon which ILECs may charge wholesale customers for the provision of new higher speed options for aggregated ADSL access services. It has also concluded that a speed-matching requirement is necessary for the ILECs' existing aggregated ADSL access services. The Commission has further concluded that changes to the cable carriers' TPIA services are required. Consistent with its finding in the essential services decision, the Commission considers that the provision of these wholesale services, as modified by this decision, neither deter economically efficient competitive entry into retail Internet service markets nor promote economically inefficient entry.
>
> 148. The Commission has also addressed the matter of equity for the incumbents' relevant wholesale obligations. It considers that its determinations in this decision ensure the technological and competitive neutrality of these

> obligations to the greatest extent possible, consistent with subparagraph 1(*b*)(iv) of the Policy Direction.
>
> 149. In applying the essential services framework on a forward-looking basis in this decision, the Commission has adopted a cohesive, forward-looking regulatory approach that provides appropriate incentives for continued investment in broadband infrastructure, promotes retail service competition, ensures equity for the incumbents' respective wholesale obligations, and does not unduly impair the ILECs' abilities to offer new converged services.
>
> (underlining added, footnotes omitted)

[194] Thereafter, the Commission issued TRP 2011-703. As explained above, in this decision the Commission considered how large telephone and cable companies should charge competitors for access to, and use of, their HSA wholesale services. The Commission explained how rate-setting policy furthers the obligations set out in the Act and the Cabinet Direction:

> 194. The regulatory measures under consideration in this decision are of an economic nature and deal with network access regimes. Therefore, subparagraph 1(*a*)(ii) and subparagraphs 1(*b*)(i), (ii), and (iv) of the Policy Direction apply to the Commission's decisions. Consistent with subparagraph 1(*a*)(ii) of the Policy Direction, in all cases where the Commission has imposed regulatory requirements on the incumbents, it has adopted measures that are efficient and proportionate to their purpose. In this regard, the Commission has approved billing models that are consistent with how the network providers plan and build their own networks and thus can be implemented with limited billing system changes.
>
> 195. Consistent with subparagraph 1(*b*)(i) of the Policy Direction, the Commission considers that the policy objectives set out in paragraphs 7(*a*), (*b*), (*c*), (*f*), and (*h*) of the Act are advanced by the regulatory measures established in this decision. The Commission also considers that the objective in paragraph 7(*c*) of the Act – to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications – is of particular relevance. This decision ensures that the retail Internet service market will remain competitive, thus allowing the delivery of high-quality services and responding to retail customers' economic and social requirements.
>
> 196. To ensure that competition in retail residential Internet service markets remains sufficient to protect the interests of retail customers as service speeds

> increase, the Commission has approved billing models that significantly increase flexibility as compared to a per-customer wholesale UBB model. These approved models enable independent service providers to design and price their retail services in the manner they find most appropriate for their retail customers. Consistent with its findings in the essential services decision (Telecom Decision 2008-17), the Commission considers that the provision of wholesale high-speed access services, according to the billing models and at the rates established in this decision, neither deters economically efficient competitive entry into retail Internet service markets nor promotes economically inefficient entry.
>
> (underlining added, footnotes omitted)

[195] In light of these TRPs, and the other decisions reviewed above, it is understandable that the Commission did not see the need to further elaborate upon its application of the policy objectives that apply generally to the provision of wholesale HSA services.

[196] This said, I accept that at the second step of the rate-setting process more is involved than simple math. Issues touching upon telecommunications policy objectives must also be decided at the second step of the process. However, again I am satisfied that the Commission's reasons are adequate. The Commission was plainly alive to the policy objectives the appellants sought to advance and it responded to those submissions.

[197] To illustrate, the appellants, including Bell, made submissions expressly referencing the Cabinet Direction and the potential for the rate-setting decision to undermine the policy objectives set out in section 7 of the Act. Bell argued that substantial rate cuts, and any retroactive adjustment, would undermine its network and infrastructure investments. In its May 18, 2018 response to a request for information Bell submitted to the CRTC that:

> … [T]o have the Commission change the rates, especially the wholesale rates, part way through the 10-year period that the related costs were based on, will deprive us of the opportunity to recover our up-front costs. It is a departure from the basic arrangement, under which we invest and the Commission gives as a reasonable opportunity to recover that investment.
>
> This is especially the case with a risk of retroactivity. We estimate that the cumulative financial impact of the adjustments based on the RF1s the Commission is asking just on GAS-FTTN access and GAS-CBB from April 2016 until the end of this year would be over #, let alone the impact on a going forward basis. To put the estimated impact of retroactivity into perspective, we recently-announced our investment of more than $100 million to fully fund deployment of our all-fibre optic network to approximately 60,000 homes and business locations throughout the city of Oshawa, Ontario (one of many important FTTP deployments that we are currently moving forward with). There can be no doubt that even a one-time # retroactive adjustment would prevent us from funding, regardless of the strength of the business case, the next Oshawa.
>
> (underlining added)

[198] Bell argues that, notwithstanding its submissions, the Commission chose to reduce wholesale HSA rates retroactively and dramatically without any explanation as to why doing so would "promote innovation, competitiveness or access to high speed networks for rural Canadians." (memorandum of fact and law, paragraph 68).

[199] Contrary to Bell's submission, the Commission understood and directed its mind to the policy arguments advanced by Bell. At paragraph 316 of TO 2019-288 the Commission summarized the arguments in the following terms:

> Bell Canada submitted that the rates will have been interim for approximately two years by the time the Commission issues a decision on the final rates, and that during that time, industry participants were making investment and marketing decisions based on the interim rates and their individual expectations of how rates may evolve over time.

[200] However, on its appreciation of the evidentiary record the Commission rejected Bell's submission for the following reasons:

> 327. In Telecom Decision 2016-117, the Commission adopted a simplified cost-based approach to setting wholesale HSA service rates and made determinations that affected certain components of the cost studies used in setting those rates. In recognition of these changes, the Commission (i) directed the wholesale HSA service providers to file revised cost studies for their wholesale HSA services that incorporated these changes, and (ii) made interim, as of the date of that decision, all wholesale HSA service rates that had previously been approved on a final basis.
>
> 328. In addition, the Commission stated, in both Telecom Decision 2016-117 and Telecom Order 2016-396, that it would assess the extent to which, if at all, retroactive rates would apply when it set wholesale HSA service rates on a final basis.
>
> 329. The Commission considers that to the extent that the interim rates for aggregated wholesale HSA services were based on inappropriate costs and assumptions, those rates are not just and reasonable. Consequently, retroactive application of the final rates is necessary to ensure that wholesale HSA service providers use just and reasonable rates.
>
> 330. The Commission considers, however, that it would not be appropriate to apply rates for the aggregated wholesale HSA services resulting from this proceeding retroactively to a date that is earlier than those captured by the study periods that have informed this proceeding. This is due to the fact that the cost studies submitted in support of the proposed rates, and upon which the Commission is establishing tariffed rates, are based on assumptions that reflect the technologies, costs, and demand for the services over the study period.
>
> 331. In light of the above, the Commission determines that the final rates for aggregated wholesale HSA services should apply retroactively as of 31 March 2016 for Bell Canada, Bell MTS, Cogeco, Eastlink, SaskTel, TCI, and Videotron.
>
> (underlining added)

[201] The reasons of the Commission were adequate. Bell's submission that the reasons did not address policy objectives could not succeed in light of the Commission's conclusion that the

existing, interim rates were based upon “inappropriate costs and assumptions” that had resulted in rates that were not just and reasonable.

[202] A second illustration relates to the Commission’s determination about whether a supplementary markup should be maintained. By way of background, as previously explained, when the Commission establishes a rate for a wholesale service it typically adds a percentage markup to the cost of the service. The markup is intended to contribute to the recovery of the carrier’s fixed and common costs. In TRP 2010-632, the Commission recognized that significant up-front investment was required to construct the facilities that the ILECs used to provide new higher-speed wholesale service options over fibre facilities (referred to as FTTN facilities). Therefore, the rate for those services included, in addition to the markup that would otherwise be applied, a supplementary markup of 10%.

[203] In the present case, Bell advanced policy-based arguments as to why the supplementary markup should be maintained. In TO 2019-288, the Commission summarized the arguments as follows:

> 288. Bell Canada and SaskTel submitted that eliminating the supplementary markup for aggregated FTTN services would be contrary to the Commission’s determination in Telecom Regulatory Policy 2015-326. They added that reducing the rates for aggregated FTTN services would discourage the migration from those services to next-generation technologies, to the detriment of investment in those technologies.
>
> 289. Bell Canada added that the rollout of retail and wholesale FTTN services was predicated on the rates approved by the Commission in Telecom Regulatory Policy 2010-632. Investments in plant and equipment were based on a 10-year period, and the terms and conditions approved by the Commission to be in effect during that period. In granting the supplementary 10% markup on the wholesale use of Bell Canada’s FTTN plant and facilities, the Commission noted that the

> cost of capital used in the company's cost studies for aggregated FTTN services was significantly lower than the cost of capital used by the cable carriers in their cost studies. The supplementary markup of 10% applied to Bell Canada's services was also intended to equalize these costs of capital.
>
> 290. Bell Canada submitted that, given that (i) the above considerations apply to both the transport and the access components, and (ii) these components are tightly integrated, the supplementary markup of 10% should continue to apply to both the transport and the access components.
>
> (underlining added)

[204] The Commission rejected these arguments for the following reasons:

> 306. In Telecom Regulatory Policy 2010-632, the Commission recognized that significant upfront investment was required to construct the facilities that ILECs use to provision new higher-speed wholesale service options over fibre facilities (i.e. FTTN facilities). Therefore, the rates for these service options include, in addition to the markup on costs that would otherwise be used, a supplementary markup of 10%.
>
> 307. The Commission considers that the ILECs' focus has shifted from expanding their FTTN networks to growing their FTTP footprints as much as possible, given the important benefits associated with higher speeds and long-term service reliability. In this regard, the Commission notes that the ILECs' volume of new FTTN builds has become minimal and is dropping significantly each year, particularly when compared to new FTTP builds.
>
> 308. In light of this, the Commission considers that the rationale set out in Telecom Regulatory Policy 2010-632, in which the Commission considered that the investment risk associated with the construction of FTTN facilities is greater than the risk associated with other ILEC facilities, is no longer supported. Consequently, the Commission considers that the 10% supplementary markup that has applied to both the access and the transport components of aggregated wholesale HSA services should not be maintained.
>
> (underlining added)

[205] Again, the reasons of the Commission are adequate. The reasons explain and demonstrate that Bell's policy argument was not supported by the evidentiary record.

[206] To conclude on this point, the Commission was aware of the policy concerns identified by the appellants. I am satisfied that it engaged with those concerns and addressed them adequately in its reasons.

[207] I would add, however, that in the event some genuine doubt exists as to whether some policy concern was adequately addressed by the Commission, the appellants may seek further clarification from the Commission in the Commission's pending, public proceeding to review TO 2019-288. The Commission's decision will be informed by Order in Council P.C. 2020-0553.

8. Did the CRTC impose an unconstitutional tax?

[208] The Bell appellants rely upon their written submissions to argue that the retroactive payments constitute a tax, which the CRTC is not empowered to levy. In their submission, the retroactive payments that they are required to pay to the competitors are an unconstitutional and *ultra vires* tax because the payments meet all of the four criteria applied in *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131, at paragraph 22, to determine whether a levy is a tax as opposed to a regulatory charge.

[209] The respondents submit that Bell is precluded from raising this issue on this appeal because it did not raise the issue before the Commission. In the alternative, and in any event, the respondents submit that the retroactive payments are not a tax. Rather, the retroactive payments

effect a correction for an unjust enrichment that accrued to the appellants as a consequence of the application of rates that were not just and reasonable.

[210] I begin my analysis by noting that Parliament authorized the Commission "to determine any question of law" (subsection 52(1) of the Act). This includes constitutional issues. The appellants well-knew that an issue before the Commission was whether final rates should be set retroactively; they have provided no explanation as to why the unconstitutional tax issue was not raised before the Commission.

[211] In *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75 this Court considered whether a constitutional issue not raised before the National Energy Board could be raised for the first time on judicial review. The Court found it could not, for the following reasons:

> 43. The approach of placing the constitutional issues before the Board at first instance respects the fundamental difference between an administrative decision-maker and a reviewing court: here, the Board and this Court. Parliament has assigned the responsibility of determining the merits of factual and legal issues – including the merits of constitutional issues – to the Board, not this Court. Evidentiary records are built before the Board, not this Court. As a general rule, this Court is restricted to reviewing the Board's decisions through the lens of the standard of review using the evidentiary record developed before the Board and passed to it. See generally *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297.
>
> 44. Were it otherwise, if administrative decision-makers could be bypassed on issues such as this, they would never be able to weigh in. On a judicial review, administrative decision-makers do not have full participatory rights as parties or interveners. They cannot make submissions to the reviewing court with a view to bolstering or supplementing their reasons. They face real restrictions on the submissions they can make. See generally *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3 at paragraphs 16-17. As a result,

> often their only opportunity to supply relevant information bearing upon the issue – such as factual appreciations, insights from specialization and policy understandings – is in their reasons.
>
> 45. If administrative decision-makers could be bypassed on issues such as this, those appreciations, insights and understandings would never be placed before the reviewing court. In constitutional matters, this is most serious. Constitutional issues should only be decided on the basis of a full, rich factual record: *Mackay v. Manitoba*, [1989] 2 S.C.R. 357 at pages 361-363. Within an important regulatory sector such as this, a record is neither full nor rich if the insights of the regulator are missing.
>
> 46. The Supreme Court has strongly endorsed the need for constitutional issues to be placed first before an administrative decision-maker who can hear them: *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 at paragraphs 38-40. Where, as here, an administrative decision-maker can hear and decide constitutional issues, that jurisdiction should not be bypassed by raising the constitutional issues for the first time on judicial review. Parliament's grant of jurisdiction to the Board to decide such issues must be respected.
>
> (underlining added)

[212] In my view, these considerations are equally apposite to this statutory appeal, based as it is on the record before the Commission. The Bell appellants ought not to be permitted to raise this issue for the first time on appeal.

9. Conclusion and costs

[213] For the above reasons, I would dismiss the appeals and order the appellants to pay the costs of the appeals to each of the Canadian Network Operators Consortium Inc. and Teksavvy Solutions Inc.

[214] As for the quantum of the costs, if not agreed I would direct that the costs be assessed at the mid-point of Column V of the table to Tariff B. While Rule 407 provides that unless otherwise ordered, costs are to be assessed in accordance with Column III, this award reflects the number and complexity of the issues, a good number of dubious merit, which the appellants chose to put in play. The award also reflects the fact that the appellants succeeded on none of these issues.

"Eleanor R. Dawson"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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