

ATTACHMENT 2

REPLY OF CANADIAN NETWORK OPERATORS CONSORTIUM INC.

TO ATTACHMENT 5

TO

**BELL CANADA PETITION TO THE GOVERNOR IN COUNCIL TO VARY
TELECOM REGULATORY POLICY CRTC 2015-326, *REVIEW OF
WHOLESALE WIRELINE SERVICES AND ASSOCIATED POLICIES***

21 DECEMBER 2015

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
EXECUTIVE SUMMARY	3
1.0 THE BROADBAND MARKET SITUATION IN THE EU AND THE IMPACT OF REGULATION	4
2.0 SERIOUS MATERIAL ERRORS REGARDING THE CURRENT EU FRAMEWORK..	8
2.1 Alleged jurisdictional reliance on the concept of ‘essential facility’	8
2.2 Characterization of the concept of Significant Market Power in the EU framework.....	10
2.3 Alleged European Commission ‘announcement’ in 2003	12
2.4 Risk premium and alleged removal of direct regulation of wholesale prices where one alternative infrastructure of comparable reach is in place	13
3.0 APPLICATION OF THE EU FRAMEWORK TO THE CANADIAN CONTEXT	15
4.0 UNDULY SELECTIVE CITATIONS ON THE 2016-2018 REVIEW OF THE EU FRAMEWORK	16
5.0 CONCLUSION	18

EXECUTIVE SUMMARY

1. These reply comments of Canadian Network Operators Consortium Inc. (“CNOOC”) address Attachment 5 to the Petition of Bell Canada (“Bell”) to vary Telecom Regulatory Policy CRTC 2015-326¹ (“**TRP 2015-326**”), which is a paper authored by Dr. Andrea Renda, entitled: “Regulating Broadband: Lessons From the European Union, and Implications for Canada”² (“**Renda paper**”).

2. The Renda paper presents the broadband market situation of the European Union (“EU”) in an inaccurate manner by claiming that the EU is in the midst of a broadband crisis through lack of investment. In fact, many EU countries are world leaders on key broadband metrics.

3. The Renda paper also contains serious material errors regarding the currently applicable EU regulatory framework for electronic communications (“**EU framework**”), notably with regard to: (i) the concept of ‘essential facility’, (ii) the method used for market analysis, including the concept of Significant Market Power, and (iii) the substance of the EU framework and its implementing measures, notably the EU Framework Directive,³ the 2010 European Commission (“EC”) Recommendation,⁴ and the 2013 EC Recommendation.⁵

4. The Renda paper’s assertion regarding the possible application of the EU framework to the Canadian situation, in which the Renda paper suggests that, given the presence of cable companies, under the EU framework Canadian ILECs would not be subject to mandated wholesale access, is also highly questionable. This is especially so given the example of The Netherlands, which has

¹ *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015 (“**TRP 2015-326**”).

² Andrea Renda, “Regulating Broadband: Lessons From the European Union, and Implications for Canada”, Attachment 5 to Bell Canada’s Petition to Vary TRP 2015-326 (“**Renda Paper**”).

³ “Regulatory framework for electronic communications in the European Union: Situation in December 2009”, <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Copy%20of%20Regulatory%20Framework%20for%20Electronic%20Communications%202013%20NO%20CROPS.pdf> (“**EU Framework Directive 2002/21/EC**”).

⁴ 2010/572/EU: Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) (Text with EEA relevance), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010H0572> (“**2010 EC Recommendation**”).

⁵ 2013/466/EU: Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, <http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32013H0466>, (“**2013 EC Recommendation**”).

near ubiquitous cable company and ILEC coverage, but where the ILEC is subject to mandated wholesale access provisions for its copper and fibre networks.

5. The Renda paper also makes inappropriate, speculative forward-looking statements about the possible future evolution of the EU framework, which cannot and should not be relied upon.

6. This document is organized as follows: Section 1.0 discusses the facts of the market situation in the EU, in connection with regulation. Section 2.0 addresses serious material factual errors in the Renda paper regarding the current legal basis of the EU framework. Section 3.0 addresses the Renda paper's assertion regarding the possible application of the EU framework to the Canadian context. Section 4.0 challenges inappropriately selective citations in the Renda paper on the ongoing review of the EU framework. In Section 5.0 a brief conclusion is provided

1.0 THE BROADBAND MARKET SITUATION IN THE EU AND THE IMPACT OF REGULATION

7. The Renda paper alleges that Europe “lags behind the US, Canada, Japan and South Korea in terms of investment, speed, and penetration of fast and ultra-fast broadband” and attributes these alleged weaknesses to EU regulation.⁶ The Renda paper further argues that “[t]oday, Europe still performs rather poorly in terms of ultrafast broadband networks” and that “[o]verall, the situation is close to disastrous.”⁷

8. However, these dramatic statements do not hold up to an examination of the facts. The EU is a broadband leader on many key metrics.

9. For example, the EU has high broadband availability: 100% basic broadband, 68% next generation access (up from 62% in 2013), including fibre-to-the-premises (“**FTTP**”) availability up from 11% to 19% from 2011 to 2014. This is demonstrated by the connectivity section of the EC's 2015 Digital Agenda Scoreboard.⁸

⁶ Renda paper, *supra* note 2, at pg 2.

⁷ *Id.* at pg 3.

⁸ European Commission, “2015 Digital Agenda Scoreboard”, http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=9929.

10. In addition, looking at the EU as a whole when making comparisons with Canada can be misleading, because many EU countries have a GDP⁹ which is far lower than that of Canada and purchasing power varies greatly as well.¹⁰ In fact, according to data from the Organisation for Economic Co-Operation and Development (“OECD”) Canada’s GDP per capita in 2014 was \$44,057.00 USD whereas the GDP for the EU was only \$36,237.00 USD.¹¹ Similarly, the existence of factors such as lower GDP and purchasing power is one of the many reasons why, when it comes to international comparisons on the impact of regulation on broadband investment, one must be particularly cautious.

11. However, for the sake of argument, one could make a specific comparison with the EU nation of Sweden, which has a low population density and a high GDP, and which performs strongly on all relevant broadband metrics. Sweden has 74% of homes passed with fibre-to-the-building/home (“FTTB/H”), 40% FTTB/H take-up (more than there is take-up for xDSL connections) while also having widespread cable networks. 61% of the Swedish population has access to speeds greater than 100 Mbps downstream. Furthermore, Sweden applies the EU regulatory framework, mandates cost-oriented copper and fibre unbundling on an *ex ante* basis, mandates dark fibre backhaul (50km) as an ancillary remedy, and is in the process of implementing Equivalence of Input for fibre unbundling. Sweden also has a high level of investment in fixed and mobile networks and is a world leader on all relevant broadband metrics. For further details, refer to pages 301-312 of the EC’s Connectivity Report 2015 which discusses Sweden.¹²

12. In addition, data from the OECD indicates that Swedish retail prices are generally lower than Canadian retail prices for the equivalent product. The OECD indicates that as of 2014 monthly subscriptions to broadband services in Sweden range from \$32.30 to \$102.50 USD whereas in Canada the range is from \$36.97 to \$173.70 USD.¹³ The OECD data also indicates that when

⁹ Organisation for Economic Co-Operation and Development (“OECD”), “Domestic Product”, <https://data.oecd.org/gdp/gross-domestic-product-gdp.htm>.

¹⁰ OECD, “Purchasing Power Parities for GDP and related indicators”, <http://stats.oecd.org/Index.aspx?DataSetCode=PPPGDP>

¹¹ OECD, “Domestic Product”, *supra*, note 9.

¹² European Commission, “Commission Staff Working Document: Implementation of the EU regulatory framework for electronic communication -2015” at pgs 301-312, http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=9990.

¹³ OECD, “OECD Broadband Portal—4.1 Fixed Broadband subscription prices ranges,” <http://dx.doi.org/10.1787/888933224706>.

examining different packages and speed tiers, and the OECD examined 18 different ‘baskets’ of broadband usage, Sweden consistently ranks ahead of Canada in terms of retail prices.¹⁴ For example, using USD and purchasing power parity, the OECD calculated that as of September 2014 Shaw’s Broadband 100 package with a 100 Mbps download speed and 400 GB of monthly data cost \$79.31 USD per month whereas the equivalent package in Sweden only cost \$36.50 per month.¹⁵ This pattern of Swedish retail prices being lower was repeated throughout all the different packages and speed tiers examined.¹⁶

13. On another key metric, fixed broadband penetration, European countries are the world leaders both in fixed broadband penetration and actual Internet usage.¹⁷ Currently, all of the countries in the top 10 for fixed broadband penetration are European except for Korea.¹⁸ Canada ranks 14th, Japan ranks 23rd, and the United States (“US”) only ranks 24th.¹⁹ Indeed, all of the countries in the top 20 for fixed broadband penetration are European, except for Korea, Canada and Hong Kong.²⁰ All of the countries in the top 10 for actual Internet usage are also European, Canada ranks 16th.²¹

14. Specifically with regard to speeds, the quarterly Akamai State of the Internet Report Q3 2015²² shows that Canada’s global rank is 21st with an average speed of 11.9 Mbps downstream and the US, is 16th with 12.6 Mbps downstream. 11 European countries currently outperform Canada on this metric, and 10 outperform the US.²³ Many other European countries, including

¹⁴ OECD, “OECD Broadband Portal—4.0 Prices,” <http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm>.

¹⁵ OECD, “OECD Broadband Portal—4.19 Fixed broadband basket high 5: 400 GB / month. 102.400 Mb/s and above (Sept 2014),” http://www.oecd.org/sti/ieconomy/deo2015data/2.87.%20FBB_High5.xls.

¹⁶ OECD, “OECD Broadband Portal—4.0 Prices,” <http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm>.

¹⁷ The Broadband Commission, “The State of Broadband 2014: broadband for all” Pages 96 (penetration) and 102 (usage) of: <http://www.broadbandcommission.org/Documents/reports/bb-annualreport2014.pdf>.

¹⁸ *Id.* at pg 96.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Id.* at pg 102.

²² Akamai, “2015 Q3 State of the Internet Report”, 16 December 2015, <https://www.stateoftheinternet.com/resources-connectivity-2015-q3-state-of-the-internet-report.html> (“Q3 2015 State of the Internet Report”) at pg 26.

²³ *Id.* at pg 38.

some outside the EU²⁴, appear in the top 30, with speeds very near those in Canada.²⁵ For example, Spain ranks 30th with a speed of 10.4 Mbps downstream.

15. On another key metric of broadband performance, retail prices, a study published by the EC, which includes open data spreadsheets²⁶, enables comparisons between offers in the EU and in Canada, for stand-alone and bundled broadband services, at all speed points²⁷. Canada does not fare well in these comparisons.²⁸

16. Overall, there is no evidence to support the Renda paper's claim that "[r]eliance on access regulation has had an even more negative impact on investment in new, high-speed broadband networks."²⁹

17. AnalysysMason's report entitled "What Rules for Europe's Digital Highways"³⁰ dated 22 September 2015, addresses the EU model's performance, including on a comparative basis (USA, Japan, New Zealand, Singapore). It also addresses the policy discussion in which some (seemingly including Renda) suggest that there would be an opposition between fibre-to-the-node ("FTTN") and FTTP investment and ex-ante wholesale access regulation. The report comprehensively dismisses any such opposition. In addition, contrary to Renda's suggestion, Japan does mandate fibre unbundling; in fact it was the first country to do so as long ago as 2001.³¹

²⁴ *Ibid.* In this regard note that Norway, which ranks 3rd overall with an average download speed of 16.4 Mbps, is subject to the EU framework despite not being a member of the EU on account of its membership in the European Economic Area.

²⁵ *Ibid.*

²⁶ http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=11184.

²⁷ European Commission, "Study on retail broadband access prices (as of February 2015)", 22 October 2015, <https://ec.europa.eu/digital-agenda/en/news/study-retail-broadband-access-prices-february-2015>.

²⁸ *Ibid.*

²⁹ Renda paper, *supra* note 2, at pg 2.

³⁰ <http://www.ectaportal.com/en/POLICY-PUBLICATIONS/Reports/Reports-Studies/What-rules-for-Europe-s-digital-highways/>.

³¹ OECD (2013), "Broadband Networks and Open Access", *OECD Digital Economy Papers*, No. 218, OECD Publishing. <http://dx.doi.org/10.1787/5k49qgz7crrm-en>, at pg 13.

18. In summary:

(1) Contrary to the Renda paper's assertions that the EU is in the midst of a broadband crisis, many EU countries are world leaders, ahead of Canada, on key broadband metrics; many other EU countries are broadly on par with Canada, or are near Canada, on several of these same metrics; and

(2) Some of the EU countries with the most long-standing and most developed ex-ante wholesale access regulation (e.g. The Netherlands and Sweden, which are discussed in these reply comments) are among the best performers.

2.0 SERIOUS MATERIAL ERRORS REGARDING THE CURRENT EU FRAMEWORK

2.1 Alleged jurisdictional reliance on the concept of 'essential facility'

19. The Renda paper starts from the premise that "both jurisdictions rely on the concept of 'essential facility'", and draws conclusions from this.³² With regard to the EU, this is factually incorrect. The concept of 'essential facility' is neither the basis of the EU framework, nor is the concept used to formulate policy, legislation, or regulation in any relevant EU instrument addressing telecommunications.

20. As a matter of fact, the concept of 'essential facility' was considered as a potential legal underpinning in the run-up to local loop unbundling Regulation (EC) No 2887/2000³³ and was specifically not retained in the final text of the Regulation. This is attributable to the judgment of the European Court of Justice in *Oscar Bronner v. Mediaprint*³⁴, and the Opinion of the Advocate General which preceded it,³⁵ which set a very high legal burden of proof for the concept of 'essential facility'.

³² Renda paper, *supra* note 2, at pg 2.

³³ Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000R2887>.

³⁴ Court of Justice of the European Union, "Judgment of the Court (Sixth Chamber)" 26 November 1998, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-7/97?>.

³⁵ Court of Justice of the European Union, "Opinion of Mr Jacobs – Case C-7/97" 28 May 1998, <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30dd7f1bb9a6444c40bea25fc29836df13a9.e34KaxiLc3qMb40Rch0SaxuSahf0?text=&docid=43901&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=364066>.

21. The only reference to ‘essential facilities’ that exists in the EU framework furthermore contradicts the Renda paper, as is evidenced by points 81 and 82 of the EC’s Guidelines 2002/C 165/03 on the concept of Significant Market Power³⁶:

81. As regards the relevance of the notion of ‘essential facilities’ for the purposes of applying the new definition of SMP, there is for the moment no jurisprudence in relation to the electronic communications sector.

However, this notion, which is mainly relevant with regard to the existence of an abuse of a dominant position under Article 82 of the EC Treaty, is less relevant with regard to the ex-ante assessment of SMP within the meaning of Article 14 of the framework Directive. In particular, the doctrine of ‘essential facilities’ is complementary to existing general obligations imposed on dominant undertaking, such as the obligation not to discriminate among customers and has been applied in cases under Article 82 in exceptional circumstances, such as where the refusal to supply or to grant access to third parties would limit or prevent the emergence of new markets, or new products, contrary to Article 82(b) of the Treaty. It has thus primarily been associated with access issues or cases involving a refusal to supply or to deal under Article 82 of the Treaty, without the presence of any discriminatory treatment. Under existing case-law, a product or service cannot be considered ‘necessary’ or ‘essential’ unless there is no real or potential substitute.

Whilst it is true that an undertaking which is in possession of an ‘essential facility’ is by definition in a dominant position on any market for that facility, the contrary is not always true. The fact that a given facility is not ‘essential’ or ‘indispensable’ for an economic activity on some distinct market, within the meaning of the existing case-law (86) does not mean that the owner of this facility might not be in a dominant position. For instance, a network operator can be in a dominant position despite the existence of alternative competing networks if the size or importance of its network affords him the possibility to behave independently from other network operators (87). In other words, what matters is to establish whether a given facility affords its owner significant market power in the market without thus being necessary to further establish that the said facility can also be considered ‘essential’ or ‘indispensable’ within the meaning of existing case-law.

82. It follows from the foregoing that the doctrine of the ‘essential facilities’ is less relevant for the purposes of applying ex ante Article 14 of the framework Directive than applying ex-post Article 82 of the EC Treaty.

³⁶ European Commission, “Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services”, in Official Journal of the European Communities C 165/6, 11.7.2002, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0711\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0711(02)&from=EN) (“EC Guidelines 2002/C 165/03”).

22. It is also worth noting that in all judicial appeals of its competition law decisions regarding abuse of dominant position in telecommunications, the EC has systematically repudiated the concept of ‘essential facility’ as an underpinning to its decisions. Furthermore, the Court of Justice of the European Union has clearly set a test which is less stringent than an ‘essential facility’ test in its judgment in the competition law (margin-squeeze) case *Konkurrensverket v TeliaSonera*.³⁷

23. In summary:

(1) The EU regulatory framework for telecommunications does not rely on an ‘essential facility’ test for *ex ante* economic regulation; it relies on a Significant Market Power test, which is explicitly a different test; and

(2) The EU behavioral antitrust decisions do not rely on an ‘essential facility’ test, but on an abuse of dominant position test, which is explicitly different as well.

2.2 Characterization of the concept of Significant Market Power in the EU framework

24. The Renda paper suggests that the concept of Significant Market Power (“SMP”) in the EU framework would be equivalent to the concept of ‘essential facility’, and draws various conclusions from this alleged equivalence.³⁸ This is a factually incorrect statement as to how SMP is determined in the EU, given that the EU framework is not based on the concept of ‘essential facility’ and explicitly rejects the latter as a basis for regulatory decisions, as explained above.

25. The Renda paper then goes on to state that the concept of SMP in the EU framework would require a market share of 40% or greater, and refers in this context to the market share of Canadian ILECs.³⁹ While market share is one of the criteria used to establish SMP, and is evidently an important criterion, it is just one amongst a broad set of criteria, which all need to be considered when conducting the SMP analysis. Furthermore, the Renda paper ignores the fact that the EU framework covers both single SMP and joint SMP, which is equivalent to individual dominance and collective dominance.

³⁷ Court of Justice of the European Union, “Judgment of the Court (First Chamber) of 17 February 2011”, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-52/09>.

³⁸ Renda paper, *supra* note 2, at pg 2.

³⁹ *Ibid.*

26. Article 14 of the EU Framework Directive⁴⁰ introduces the SMP concept, as follows:

An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. In particular, national regulatory authorities shall, when assessing whether two or more undertakings are in a joint dominant position in a market, act in accordance with Community law and take into the utmost account the guidelines on market analysis and the assessment of significant market power published by the Commission pursuant to Article 15. Criteria to be used in making such an assessment are set out in Annex II. [Emphasis added]

27. The European Commission's Guidelines 2002/C 165/03 on the concept of Significant Market Power further define the corresponding applicable criteria⁴¹:

78. It is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power.

In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others:

- overall size of the undertaking,
- control of infrastructure not easily duplicated,
- technological advantages or superiority,
- absence of or low countervailing buying power,
- easy or privileged access to capital markets/financial resources,
- product/services diversification (e.g. bundled products or services),
- economies of scale,
- economies of scope,
- vertical integration,

⁴⁰ EU Framework Directive, at pg 41.

⁴¹ EC Guidelines 2002/C 165/03, *supra* note 26.

- a highly developed distribution and sales network,
- absence of potential competition,
- barriers to expansion.

79. A dominant position can derive from a combination of the above criteria, which taken separately may not necessarily be determinative.

28. In summary:

- (1) The concept of SMP in the EU framework for telecommunications involves much more than just the 40% market threshold; and
- (2) The Renda paper omits to mention the concept of joint SMP which is enshrined in the EU framework.

2.3 Alleged European Commission ‘announcement’ in 2003

29. The Renda paper states that: “[...] when the European Commission announced, in 2003, that they [new high speed broadband networks] would be regulated exactly like legacy networks. [...]”⁴² No such 2003 ‘announcement’ exists.

30. If the alleged ‘announcement’ refers to the entry into force of the 2002 revisions to the EU framework⁴³ in mid-2003 which confirmed the EU’s model enabling *ex ante* economic regulation, it must be noted that the EU framework does not declare up front that *ex ante* economic regulation will apply, and is technology-neutral. What the EU framework does is to require an objective assessment. In fact, the EU framework is binary in prohibiting *ex ante* economic regulation when it is not justified on account of no SMP being found, and requiring *ex ante* economic regulation when SMP is found. Article 16 of the EU Framework Directive makes this very clear⁴⁴:

3. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings

⁴² Renda paper, *supra* note 2, at pg 2.

⁴³ EU Framework Directive, *supra* note 3.

⁴⁴ *Id.* at Article 16.

in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings which individually or jointly have a significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

31. The EU framework only requires national regulatory authorities to conduct an objective assessment, i.e.: (i) to define markets susceptible to *ex ante* regulation (national regulatory authorities can also decide not to define particular markets as susceptible to *ex ante* regulation, in which case no *ex ante* regulation can be applied); (ii) proceed to SMP assessment for the markets they defined (they can find that there is no SMP, in which case no *ex ante* regulation can be applied), and (iii) even where SMP is found, they must decide on the appropriate set of regulatory obligations (e.g., they can choose not to impose stringent obligations on the SMP operator(s) for certain markets).

32. In summary:

(1) The EU framework sets out a process of examination of market conditions, on a technology neutral basis – i.e., it requires that the process of examination is applied to legacy networks and to other networks equally, including FTTN and FTTP, but does not prejudge the outcome; and

(2) Therefore, it does not, as the Renda paper incorrectly indicates, require, with regard to new networks, that: “they would be regulated exactly like legacy networks” - the legally established method of analysis is the same, but there is no predetermination made with regard to the outcome of the analysis.

2.4 Risk premium and alleged removal of direct regulation of wholesale prices where one alternative infrastructure of comparable reach is in place

33. The Renda paper states that: “[a]lready in 2009, the European Commission proposed to include in wholesale access charges a “premium” (normally 10-15%) that would reflect the higher risk associated with investment in fibre networks”.⁴⁵

⁴⁵ Renda paper, *supra* note 2, at pg 3.

34. No citation is provided to support this claim; and the reference is actually to a proposal, not to any instrument adopted on a final basis.
35. The EU regulatory instrument in which reference is made to a risk premium is the 20 September 2010 EC Recommendation.⁴⁶
36. The risk premium is specifically only recommended for FTTP (access to the fibre terminating segment access and access to fibre at the Metropolitan Point of Presence⁴⁷ (“MPoP”)), and no mention is made of a specific percentage - and certainly not 10-15%.
37. The Renda paper also states that: “[i]n 2013, the European Commission has thus proposed removing direct regulation of prices for wholesale access to NGNs where one alternative infrastructure of comparable reach is in place.”⁴⁸
38. The EU regulatory instrument in which reference is made to the non-application of cost-orientation to wholesale access charges for next generation access is the 2013 EC Recommendation.⁴⁹
39. No criterion of presence of an alternative infrastructure of comparable reach is contained in this EC Recommendation. Furthermore, the Renda paper omits to mention that the 2013 EC Recommendation contains strong preconditions, including Equivalence of Input, a technical replicability test, and an economic replicability test for the non-application of cost-orientation, and recommends the re-introduction of cost-orientation if the preconditions are not fulfilled.

⁴⁶ 2010 EC Recommendation, *supra*, note 3.

⁴⁷ Paragraph 11 of the 2010 EC Recommendation provides: “The ‘Metropolitan Point of Presence’ (MPoP) means the point of inter-connection between the access and core networks of an NGA operator. It is equivalent to the Main Distribution Frame (MDF) in the case of the copper access network. All NGA subscribers' connections in a given area (usually a town or part of a town) are centralised to the MPoP on an Optical Distribution Frame (ODF). From the ODF, NGA loops are connected to the core network equipment of the NGA operator or of other operators, possibly via intermediate backhaul links where equipment is not co-located in the MPoP.”

⁴⁸ Renda paper, *supra* note 2, at pg 3.

⁴⁹ 2013 EC Recommendation, *supra*, note 5.

40. In summary:

(1) The Renda paper makes references which are not supported by the facts, as follows:

(i) It refers to a 2009 draft without referencing it, rather than to the actual 2010 EC Recommendation,

(ii) By citing a percentage range which is not included in the adopted text; and

(iii) By suggesting a criterion of presence of alternative infrastructure in the 2013 EC Recommendation, which is simply not a criterion in that recommendation (and never was in any drafts of which CNOC is aware); and

(2) The Renda paper twists and omits key facts, notably by failing to mention the preconditions attached to the recommended non-imposition of cost-orientation.

3.0 APPLICATION OF THE EU FRAMEWORK TO THE CANADIAN CONTEXT

41. The Renda paper makes the bold claim that “[l]ooking at the Canadian market, where cable companies most often hold a very significant share of the market, this means that under EU regulation, ILECs in Canada would not be subject to mandatory network sharing”.⁵⁰

42. This claim should not be given any weight given that the Renda paper misapprehends key aspects of the EU framework, including the analysis that national regulatory authorities in the EU would undertake to make such a determination.

43. In any event, the EU itself has instances where national regulatory authorities have mandated access to ILEC networks (including FTTP) despite having near ubiquitous cable company and ILEC coverage in order to create more than two options for consumers. The Netherlands is a perfect example of one such instance. Following a very recent regulatory decision upholding mandated wholesale access to the ILEC’s copper and fibre networks, the accompanying press release from the Dutch telecommunications regulator, Autoriteit Consument & Markt (“ACM”), states:

⁵⁰ Renda paper, *supra* note 2, at pg 2.

Healthy competition requires more than two providers

The Netherlands has two major networks that consumers can use for their broadband, television and telephony needs: the cable network of Ziggo and the copper and fiber-optic networks of KPN. In ACM's opinion, having just two providers on these markets cannot be considered healthy competition. That is why ACM stimulates other companies to give consumers competitive offers. Thanks to ACM's regulation of the market, these competitors are able to use KPN's networks.⁵¹ [Emphasis added; KPN is the ILEC].

44. Consequently, the Renda paper oversimplifies the analysis that is conducted by national regulatory authorities in the EU when deciding to mandate wholesale access. As the recent decision of ACM demonstrates,⁵² the analysis is much more in depth than simply forgoing mandated wholesale access if there are two national facilities-based providers.

45. In summary:

(1) The Renda paper's assertion that under the EU framework, Canadian ILECs would not be subject to mandated wholesale access due to the presence of cable companies is speculative - the *status quo* in The Netherlands demonstrates that this is not necessarily the case; and

(2) A full market analysis would have to be carried out (using all elements required by the EU framework) prior to reaching robust conclusions about the result of the application of the EU framework in Canada.

4.0 UNDULY SELECTIVE CITATIONS ON THE 2016-2018 REVIEW OF THE EU FRAMEWORK

46. In the course of commenting on the state of the EU framework, the Renda paper cites the EC Staff Working Document⁵³, but not the actual European Commission Communication on the Digital Single Market, dated 6 May 2015.⁵⁴ This is unduly selective. In addition, the citations from the EC Staff Working Document itself are also unduly selective.

⁵¹ Autoriteit Consument & Markt, "KPN must grant competitors access to its copper and fiber networks", 17 December 2015 <https://www.acm.nl/en/publications/publication/15093/KPN-must-grant-competitors-access-to-its-copper-and-fiber-networks/>.

⁵² <https://www.acm.nl/nl/download/publicatie/?id=15087>.

⁵³ Renda paper, *supra* note 2, at pg 3.

⁵⁴ European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe" <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0192>.

47. The entirety of the documents published by the EC on 6 May 2015 need to be examined to enable a full understanding of these very preliminary indications of possible future policy direction, and in particular the entirety of Section 3.1 of the EC Communication and the entirety of Section 4.1 of the Staff Working Document⁵⁵. Such an examination reveals the following portions of the EC Communication and the Staff Working Document which are omitted in the Renda paper, and which emphasise the success of the EU framework, and discuss the role of incumbents (ILECs), cable networks and alternative operators:

European Commission Communication

Successive adaptations of the EU's telecoms rules combined with the application of EU competition rules, have been instrumental in ensuring that markets operate more competitively, bringing lower prices and better quality of service to consumers and businesses. Effective competition is a key driver for investment in telecoms networks.

There is a need for simpler and more proportionate regulation in those areas where infrastructure competition has emerged at regional or national scale. The deployment of very high capacity networks needs to be encouraged while maintaining effective competition and adequate returns relative to risks.

Staff Working Document

Competition is a key driver for investment in telecoms. The migration from copper-based to high-capacity fibre-based networks has however been slow. Former incumbents appear often to lack incentives to overbuild their own largely depreciated copper network assets; they react to competition from cable operators by upgrading incrementally existing access networks. Alternative operators, however, may not always have the financial capacity to deploy new networks on a large scale (although they have been behind major network upgrades¹³³)

Footnote 133: European Commission, Trends in European broadband markets, presentation for the Digital Agenda Scoreboard, 2014 – alternative operators have proportionately more NGA connections than incumbents; today, incumbents only own 25% of NGA fixed broadband connections although they have, on average, 42% of all fixed broadband connections in the EU.

48. Renda omitted the explicit recognition by the EC that competition is a key driver for investment as well as the comments about alternative operators.

⁵⁵ Commission Staff Working Document, “A Digital Market Strategy for Europe – Analysis and Evidence”, 6 May 2015, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015SC0100&from=EN>.

49. It is also necessary to emphasize that the 6 May 2015 EC Communication and accompanying Staff Working Document represent the first preparatory steps in a complex EU institutional process, which precedes legislative proposals, and in this case public consultation. A public consultation on the specific subject matter of the regulation of telecommunications networks and services was conducted between 11 September 2015 and 7 December 2015 and was very wide-ranging, containing 218 questions.

50. A legislative proposal from the EC is expected in mid-2016. The inter-institutional legislative adoption process (involving the EU Member States and the European Parliament) is expected to last into 2018. The outcome of this process is extremely unpredictable. Note that in this regard the 11 September 2013 EC legislative proposal ended up only having two elements, out of the dozens proposed, actually adopted: net neutrality and international mobile roaming.⁵⁶

51. Therefore, to the extent that the Renda paper makes any predictions about the development of the EU framework, these should be dismissed as being premature.

52. In summary:

(1) When commenting on the EU framework, the Renda paper contains unduly selective citations, and draws unduly wide-ranging inferences from one document (which has no legal standing), which is not even the main document published by the EC on 6 May 2015; and

(2) In addition, the Renda paper's statements regarding the future development of the EU framework are premature given the unpredictable nature of the EU legislative process.

5.0 CONCLUSION

53. In these reply comments, CNOC has demonstrated that the Renda paper is fatally flawed, in terms of:

⁵⁶ Regulation (EU) 2015/2120 of the European Parliament and of the Council, 25 November 2015, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.310.01.0001.01.ENG&toc=OJ:L:2015:310:TOC>.

- a) What it presents as market facts, i.e., it presents the EU broadband market situation as “close to disastrous”, whereas in fact a large number of European countries are broadband leaders across several metrics.
- b) What it presents as legislative/regulatory facts, i.e., it contains serious material errors on the presentation of the currently applicable EU framework. In particular, it inaccurately states that the concept of an ‘essential facility’ is part of the EU framework and oversimplifies the SMP analysis that is part of the EU framework.
- c) Claiming, without any factual basis, that if the EU framework was to be used in Canada that Canadian ILECs would not be subject to mandated wholesale access due to the wide-spread presence of cable companies. This is highly speculative and ignores the case of The Netherlands in which copper and fiber unbundling obligations on the ILEC were reconfirmed in December 2015, in the presence of near-ubiquitous cable competition.
- d) Selectively quoting from EC documents related to the ongoing review of the EU framework and making unsubstantiated predictions about the outcome of that review.

54. Overall, the credibility of the Renda paper is highly suspect given its numerous factual errors and baseless assumptions.

55. CNOC urges the Governor-in-Council to refrain from drawing conclusions from the Renda paper, including from its selective citations, references, and its omission or mischaracterisation of the facts. The Renda paper contains unsubstantiated policy conclusions that should not be relied upon.