



Submission to the Governor in Council and the Cabinet

Re: Notice No. DGTP-002-2015

**Comments of OpenMedia on the
Petition by Bell Canada to Governor in Council Concerning
Telecom Policy Decision CRTC 2015-326**

December 21, 2015

OpenMedia is a community-based organization that safeguards the possibilities of the open Internet.

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A. Executive Summary

- ES1. OpenMedia is a community-based organization that works to keep the Internet open, affordable, and surveillance free. We work toward informed and participatory digital policy by engaging hundreds of thousands of people in protecting our online rights. Since our founding in 2008, well over half-a-million Canadians have spoken out through our campaigns around mobile and wireline Internet choice and affordability. In our crowdsourced “Casting an Open Net” report on Canada’s Internet market,¹ we specifically called for fair open access rules that would allow a wide range of innovative Internet providers to sell affordable, world-class services to Canadian households and businesses.
- ES2. Canadians pay some of the highest prices in the industrialized world for what are widely recognized as sub-par wired and mobile Internet services. Report after report confirms that we are falling behind our international counterparts on the key metrics of speed, affordability, and adoption.
- ES3. These shortcomings have arisen in large part because Canada’s telecommunications market is one of the most concentrated in the world. According to the federal government’s own reports, our large incumbent ISPs control 91% of the residential Internet market, while the Big Three wireless providers—Bell, Rogers, and Telus—control 90% of the mobile phone and Internet market. These figures underscore the urgent need to diversify the options available, so all Canadians can access the world-class, affordable services they deserve.

¹ See: OpenMedia. Casting and Open Net: A Leading Edge Approach to Canada's Digital Future" URL: <https://castinganopennet.ca>



- ES4. It is against this industry backdrop that we today submit comments on Bell Canada’s request to Cabinet² to overturn a landmark Canadian Radio-Television and Telecommunications Commission (CRTC) ruling setting out fair open access rules that would allow smaller, more affordable Internet providers to access ultra-high speed fibre infrastructure (Telecom Regulatory Policy CRTC 2015-326). This pro-investment, pro-innovation policy was celebrated by telecommunications experts, civil society organizations including OpenMedia, and, most importantly, by the over 25,000 Canadians who put their views on the public record in favour of these rules through an online campaign led by OpenMedia during the CRTC’s lengthy and comprehensive consultation over 2013 and 2014.
- ES5. Over 50,000 Canadians have already endorsed OpenMedia’s Internet Emergency petition asking your government to reject Bell’s petition at <https://act.openmedia.org/emergency> – and the number continues to climb. With a request to overturn the ruling coming within 48 hours of the federal election results, Bell’s efforts amount to little more than playing politics with the Internet bills of individual Canadians and small businesses.
- ES6. Given that your government is committed to a policy agenda that will “increase high-speed broadband coverage and work to support competition, choice and availability of services,” then we believe you cannot responsibly overturn this CRTC ruling. Doing so would be extremely harmful to the range of ISP choices available; would be unfair to the 25,000+ individual Canadians who spoke out in the CRTC’s consultation process; would upset the 50,000+ individual Canadians asking you to reject Bell’s petition; and would undercut your government’s own mandate.

² Canada Gazette November 21, Part 1, Notice No. DGTP-002-2015. Petition by Bell Canada to Governor in Council Concerning Telecom Policy Decision CRTC 2015-326



- ES7. OpenMedia believes our best shot at encouraging investment in high-speed Internet services is to ensure fair open access rules, like the very ones Bell is currently appealing. Granting Bell's appeal at this point will spell the death of affordable, innovative Internet access for Canadian households and businesses.
- ES8. In the pages that follow, we outline the following arguments:
- ES9. Bell claims that Canada already has a world class broadband infrastructure and, therefore, there was no need for the CRTC to do anything. Bell's assertions have little basis in fact as international data on broadband affordability, speeds, and access to fibre-to-the-premises (FTTP) show that Canada has been falling behind under the previous policies.
- ES10. Bell claims the CRTC ruling was unfair to its interests, when in fact the Commission did grant Bell many of its requests. Bell's petition disregards the interests of other service providers, and more importantly the interests of everyday Canadians and businesses, to affordable and reliable access of high-quality services, as mandated under Section 7 of the *Telecommunications Act*.
- ES11. Bell claims that fair and open access rules will lead to a reduction in investments, which contradicts actions by Bell and other large providers right after the decision to announce new FTTP projects.
- ES12. As Canada continues to fall behind our international counterparts on key broadband metrics, a clear, common-sense path has presented itself: fair open access rules that have demonstrated success in a number of countries in East Asia and Europe. Right now, Cabinet faces a choice: we can drive forward innovation with these fair rules, or allow the incumbents to effectively regulate our market with high prices, under-provisioned networks, and slow speeds. Bell's claims in this petition do not take into account that, as



detailed in Figure 2 in this submission, the decision by the Commission in 2008 to exclude fibre access and transport facilities from the scope of wholesale access obligations has been an abject failure in promoting investments by Bell, Telus, and other incumbents into deploying FTTP networks.

ES13. As we argued convincingly throughout the initial consultation (CRTC TRP 2013-551), fair open access rules increase innovation and investment in Canada’s key digital infrastructure. Again, the choice before Cabinet is whether they wish to uphold the fair rules that allow us to invest in the key digital infrastructure that will fuel our economy going forward, or let incumbent telecom players effectively regulate and control the market with high prices and middle-of-the-road speeds. If this government truly wishes to promote innovation in Canada’s digital economy, then fair, open access to crucial networks assets – in this case, fibre-to-the-premises (FTTP) – is essential to ensure a wide range of providers can sell world-class, affordable Internet services to Canadian households and businesses.

ES14. Given (i) all reasons we have detailed herein, and (ii) the fact that a request to overturn CRTC 2015-326 came within 48 hours of the federal election results, Bell’s efforts amount to little more than playing politics with the Internet bills of individual Canadians and small businesses. In closing, OpenMedia, along with more than **50,000 Canadians** that have joined our Internet Emergency campaign, therefore request **“the new government to reject Bell’s underhanded, price-gouging scheme. Enough is enough.”**

B. Comments on Bell's Petition

1. Over the past eight years, we have been on the front lines listening to comments by individual Canadians and the business community about access to reliable and affordable Internet services. To help address concerns about discriminatory traffic management practices, sub-standard service, and the high price of accessing the Internet, OpenMedia has worked to increase awareness among policymakers and the public-at-large about these realities. Our overall goal is the adoption of public policies that support the development of open, affordable and high quality Internet access infrastructure in Canada.

2. To achieve this goal, OpenMedia has participated actively in a number of regulatory proceedings before the CRTC (the "Commission"), including the wholesale Internet access consultation (CRTC 2013-551) – the consultation process that resulted in the Telecom Regulatory Policy CRTC 2015-326 that Bell has petitioned the Governor in Council to vary.

3. OpenMedia submits that changes to the CRTC's new wholesale regulatory framework as requested by Bell, will fundamentally undermine its intent and effect. Varying the decision according to Bell's demands will further discourage other operators from building the advanced fibre networks they have been promising to build for a number of years. Even if the petitioner or other investors were willing to build fiber-to-the-premises (FTTP) without mandated third-party access and interconnection obligations, overriding the Commission's new policy framework as requested by Bell will enable Canada's vertically integrated ISPs to create an Internet market of digital "haves" and "have-nots": the former with higher quality, more expensive services unfairly restricted to incumbents own retail services; the latter a much slower, outdated legacy network



restricted to incumbents' competitors. Not only does this fly in the face of the objectives set out by CRTC 2015-326, it also would also be extremely harmful to the range of competitive ISP choices available to present and future Internet customers in Canada.

4. Since Canadian service providers already charge some of the highest fixed and mobile Internet access services in world, the change to the Commission's decision requested by Bell in its petition is fundamentally anti-competitive. Contrary to what Bell claims, accepting its petition is not likely to reduce incentives to invest in advanced fibre networks. On the other hand, such an acceptance will certainly have a negative impact on both affordability and service quality for millions of Canadians, as it would clearly reduce competitive discipline in the markets for broadband access and over-the-top (OTT) services.
5. Consequently, OpenMedia, along with more than 50,000 Canadians who have signed OpenMedia's Internet Emergency campaign regarding Bell's petition, urge you to reject this petition in its entirety. Submitting to requests by Bell in the petition will not be in the interest of Canadian Internet customers, who increasingly consider reliable and affordable broadband Internet access to be an essential service.³
6. In a clear indication of how much Canadians care about these issues, more than 25,000 people made submissions to the CRTC 2013-551 wholesale consultation process through OpenMedia, arguing that *"it's past time and common sense to split Internet infrastructure off from big telecom companies to ensure digital networks are open for a range of providers to service residents of Canada unencumbered"* (see: Exhibit 1). OpenMedia elaborated in this proceeding on the pro-investment and pro-competition effects of adopting structural, functional or, at the very least, an accounting separation

³ Please note that the legal question about the classification of fixed and mobile broadband access as a basic communications service that is essential and must therefore be provided at a minimum standard of service and price is currently before the Commission in the CRTC 2015-134 proceeding. OpenMedia is participating in this process in order to convince the Commission to recognize that Internet access is now the most basic form of telecommunications service and should be legally defined as such under the basic service provisions of the *Telecommunications Act*.



between network provisioning and the retail arms of Canada's vertically integrated operators. Although the Commission set aside this policy option, OpenMedia maintains it is likely to be the most robust way of ensuring that returns from ISP subscriptions are channeled into building FTTP networks and keeping them open to service-based competition.⁴ In the absence of some form of structural separation mandate, OpenMedia submits that dominant operators will continue to redirect profits from high-margin broadband subscriptions into the financing of business ventures unrelated to FTTP. In the context of this petition by Bell, it is important to note that prominent Liberal leaders, such as the Honourable Minister of Transport Marc Garneau, have previously supported functional separation⁵ and OpenMedia hopes to restart the dialogue about long term benefits for Canadian consumers and the digital economy of functional separation as soon as possible.

7. In CRTC 2015-326, the Commission also chose to overlook a wide range of other recommendations for a new wholesale regime that would help ensure all Canadians have access to advanced broadband technologies at affordable prices. Given what we believe to be unequivocal evidence by numerous parties (e.g. Cybera, BC Broadband Association, various educational institutions, and experts), OpenMedia was particularly disappointed that in CRTC 2015-326, the Commission failed to extend essential facilities obligations to transport facilities, confining their scope to access facilities. This issue is particularly important to Canadians who live in rural communities where transport access is controlled by one, or at most two, operators. In many such communities, incumbents have little incentive to invest in broadband infrastructure without substantial subsidies. Without mandated access, communities that want to adopt innovative policies to improve broadband networks (such as by deploying municipal fibre and encouraging third-party entry) will continue to face significant challenges

⁴ See e.g., pp. 69-74 in *Casting and Open Net: A Leading Edge Approach to Canada's Digital Future*: <https://castinganopennet.ca>

⁵ See: <http://www.michaelgeist.ca/2011/04/ndp-and-lib-on-ubb/>

connecting local networks to the broader Internet at a reasonable price. The fact that the Commission has moved to a “disaggregated” wholesale model in CRTC 2015-326 without mandating wholesale access to transport facilities will have a negative impact on service-based competition in the entire country, particularly in Canada’s rural and remote communities. OpenMedia submits that any future subsidies for access and transport network improvements in rural Canada should impose open access rules on operators that receive any public funds that are stronger than CRTC’s general mandated wholesale obligations.

8. Evidence from the record of CRTC 2013-551 proceeding shows that there were other policy options before the Commission that would have been more effective in promoting competitive discipline, lower prices and increased choice. Out of the available options, the CRTC 2015-326 delivers on many of the demands by incumbent operators such as Bell and Telus. Given that dominant broadband service providers received much of what they demanded (beside not extending the rules to FTTP) and that many of them have come to support the decision, we submit that Bell’s repeated statements that the Commission has been “unfair” in the CRTC 2015-326 decision is highly misleading.⁶

9. In this context the petition by Bell to vary the original CRTC decision can be interpreted as a cynical attempt to obtain even more concessions from federal policymakers. OpenMedia submits that varying the decision according to Bell’s demands will make a travesty of Canada’s tradition of consultative policy development that accounts for the interests of all stakeholders. Submitting to Bell’s demands in the petition will further confirm the impression by some market analysts that the new Liberal government “could be a fresh and positive change for the incumbents”.⁷

⁶ Bell petition, paragraphs E3, E7, E17, 6, 58.

⁷ Jeff Fan, Scotia Capital. As reported in The Globe & Mail. Oct. 19, 2015.
<http://www.theglobeandmail.com/report-on-business/how-todays-election-may-affect-the-telecom-sector/article26868311/>

10. Although there is little evidence to support the contention by Bell that the CRTC decision will reduce investment or harm the range of affordable choices that are available to consumers, there is a more fundamental source of risk in the CRTC 2015-326 decision to phase out over the next three years existing aggregated wholesale obligations, local loop unbundling (ULL), and voice services. This phase-out provision represents a clear victory for Bell and the other incumbents, particularly if they can derail the implementation of the new disaggregated wholesale framework. The CRTC's decision to phase out existing obligations before there is evidence that the new wholesale framework is working represents a fundamental flaw in CRTC 2015-326. This aspect of the decision has raised serious concerns for various parties and is currently being reviewed by the Commission through a Part 1 request to review and vary, submitted by Allstream.

11. Premature phase-out of existing obligations can have particularly negative consequences in the business market for Internet access services, where there is currently more service-based competition than in the residential market.⁸ Loss of third-party access to wholesale services due to the disaggregated nature of the new policy framework can also be particularly detrimental to the availability of competitive services in rural communities where the incumbent controls existing middle-mile and transport facilities. As documented in the submission by the Canadian Federation of Independent Business (CFIB) to the deliberations that led to the CRTC 2015-326 decision, Canadian businesses have become increasingly dissatisfied with the competitive options for Internet access available to them in the market. This is particularly the case for businesses in smaller rural communities. Phasing out the old wholesale regime before advanced FTTP networks are deployed will exacerbate these problems. OpenMedia has therefore submitted an intervention in support of the Allstream Part 1 application and

⁸ According to CRTC Communications Monitoring Report (CMR), more than 90% of revenues in the residential broadband market go to incumbents, while they control around 70% of the business market for Internet access services.

has requested that the Commission not remove any existing wholesale access obligations until there is substantive evidence that its new disaggregated wholesale framework is working to deliver better services than those available today.⁹

12. The phase-out component of the CRTC 2015-326 further highlights the cynical and misleading nature of the petition Bell has submitted, especially in its claim that the Commission was somehow “unfair” to Bell’s interests by adopting a more technologically and competitively neutral policy regime in CRTC 2015-326. Although in the long term the decision may help promote competition and consumer choice, it is actually intended to promote investment in next-generation FTTP networks that operators such as Bell have failed to build since 2008, when the Commission declined to extend wholesale obligations to fibre access and transport facilities in the CRTC 2008-17 policy framework. Bell has no factual basis for claiming “the CRTC placed an inordinate emphasis on resale competition, rather than taking a longer term approach that would ensure ongoing investment by facilities-based providers.”¹⁰
13. Bell argues that by invoking the rarely-used and obscure petition procedures to the Governor in Council to override the CRTC, an independent regulatory agency, because that agency “disregarded” some of the evidence Bell presented.¹¹ Bell goes on to argue that the evidence the Commission allegedly disregarded proves that mandating essential facilities access obligations to fibre will be a disaster in terms of investment in fibre networks and will not be in the economic interests of Canadian consumers. The record of the CRTC 2013-551 proceeding shows clearly that the evidence Bell argues was ignored by the Commission was most definitely discussed in detail at the hearings – and debunked by OpenMedia, other consumer advocacy groups, and independent experts that contributed to the proceeding that led to CRTC 2015-326.

⁹ See Appendix 2 to this submission.

¹⁰ Bell petition, para. E7, 20, 24

¹¹ Bell petition, para. 21

14. The argument made by Bell regarding the negative impact of the decision flies in the face of actions taken by Bell and other dominant operators following publication of the decision. Announcements by Bell and other large service providers that they would finally start building fibre networks in certain urban centres were only made *after* the Commission's decision.¹² These announcements thus contradict Bell's claim that CRTC 2015-326 will cause a reduction in investment in next-generation fibre networks. On the contrary, as was shown by the international evidence discussed extensively during the CRTC 2013-551 proceeding, countries with policies that are more effective in promoting open access rules and service-based competition have enjoyed higher quality networks and higher rates of fibre deployment.¹³

15. As we argued during CRTC 2013-551, open access rules, such as mandated FTTP access, lead to greater investment and innovation in our telecommunications system. Even if Bell does carry out its threat to stop investing in fibre if the Governor in Council does not vary CRTC 2015-326 along the lines Bell finds appropriate, we believe that cable broadband providers, smaller entrants, and even municipalities will start to fill in the gaps in FTTP infrastructure. That is because the new regulatory framework is likely to provide them with an attractive rate of return on investments in FTTP. CRTC 2015-326 provides for the very types of rules that will ensure network operators receive more than a fair return on their investment through the Phase II costing and the regulated cost plus markup. In this scenario, Bell and other incumbent operators may not enjoy losing out from increased innovation, investment, and competition by more efficient firms. But Bell's potential losses in the marketplace are not a good reason for

¹² See regarding Bell: <http://www.theglobeandmail.com/technology/tech-news/super-fast-internet-is-coming---along-with-super-high-pricing/article25911938/>, Telus: <http://www.theglobeandmail.com/news/british-columbia/telus-to-spend-1-billion-in-fibre-optic-internet-expansion-in-vancouver/article26640003/>, Rogers/Cogeco: <http://www.theglobeandmail.com/technology/tech-news/cogeco-says-high-speed-internet-upgrade-not-necessary/article27038152/>

¹³ Benkler, Y. *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from around the World*, (Cambridge, MA: Berkman Center for Internet and Society, Harvard University, 2010). Rajabiun, R., & Middleton, C. (2015). Regulation, investment and efficiency in the transition to next generation broadband networks: Evidence from the European Union. *Telematics and Informatics*, 32(2), 230-244.



overturning a set of fair rules arrived at through an open and lengthy public consultation process.

16. More than seven years has passed since the Commission decided to forbear from mandating third party access to FTTP. Under CRTC regulatory forbearance, Bell and other incumbents allowed us to fall completely behind on fibre deployment by OECD standards. Even if threats of reduced investment on certain regional projects seem credible to policymakers, Bell's suggested path is not the regulatory solution Canadians need. As we argued earlier, and contrary to Bell's claims, the previous regulatory strategy of forbearance on FTTP under CRTC 2008-17 has proven ineffective in promoting investment and innovation in advanced FTTP networks across the country.
17. OpenMedia submits that Bell's proposed project in Toronto, which serves as the centrepiece of Bell's petition, represents a cynical attempt to derail the implementation of a technologically and competitively neutral wholesale policy framework – CRTC 2015-326 – because Bell fears that this policy will encourage new entry, as well as investment by other large providers.
18. For further evidence of this underlying rationale, one need look no further than Bell's concurrent Part 1 Application to the Commission to review and vary CRTC 2015-326. In its Application, Bell has requested that any entities with more than \$500 million in revenues should be excluded from the scope of wholesale access obligations under the new regime. Bell has also proposed a number of further anti-competitive changes to CRTC 2015-326 in its Part 1 Application to the Commission.
19. OpenMedia has submitted a separate intervention to the CRTC in response to Bell's Part 1 Application requesting it to reject all anti-competitive changes requested by Bell.¹⁴ If Bell is successful in its attempts to convince the Commission to adopt these arbitrary exclusions to essential facilities access, CRTC 2015-326 may have the effect of

¹⁴ See Appendix 1 to this submission.

significantly reducing both competition and investment in the market. We urge this government to keep a close eye on how the Commission handles Bell's multi-pronged strategy to ensure the new regulatory regime maximizes returns to its investors by restricting the range of affordable, competitive Internet services available to Canadians. Canada's decline as a broadband leader started almost a decade ago, and is likely to continue if essential facilities access obligations are not applied to advanced fibre and DOCSIS cable technologies.

20. In reviewing this petition, it is important to recall that CRTC 2015-326 has not yet been implemented. Implementation of the ruling, with a focus on technical configurations and the wholesale pricing model, are currently the subject of a follow-up consultation at the CRTC. For reasons that remain unclear to OpenMedia, the Commission has decided to start yet another multistage process for the CRTC 2015-326 decision, and it initially tried to exclude all parties beside the operators from participating in these proceedings (a decision it has since reversed). As Bell and its expert consultants are well aware, the impact of the new wholesale policy on investment and competition incentives in the market cannot be ascertained until technical configurations and the pricing model are determined. Thus, any action taken by government at this point would be premature, and could easily be construed as putting the proverbial cart before the horse.
21. Any concessions to Bell on the basis of its petition will compromise a continuing process on these important issues at the CRTC, and undermine the interests of the many other parties that participated in the relevant proceedings over the last several years. Contrary to the claims by Bell, the CRTC's open access rules are already encouraging investment and innovation, and any such concessions will also foreclose service-based competitors from the market. Less investment in fibre means Canadians will be stuck with the slow and asymmetric speeds currently available on legacy DSL and cable connections, while less competition will mean higher prices for both households and businesses. OpenMedia therefore urges Cabinet to reject Bell's petition in order to show

Canadians that this government will not sacrifice the interests of consumers and SMEs in favour of a vertically integrated conglomerate seeking to enhance its competitive edge by convincing Cabinet to support a technologically and competitively asymmetric regulatory regime.

22. In the meantime, OpenMedia is actively monitoring the implementation process and has submitted interventions regarding the requests to review and vary made by Bell and other parties (for example, Allstream's appeal on phasing out existing unbundling obligations). We have also been informing Canadians via social and traditional media about what is at stake, initiating an Internet Emergency campaign to enable them to inform policymakers about their views in this matter. At the time of writing more than 50,000 Canadians have signed our Internet Emergency petition, telling the new government to reject Bell's underhanded scheme to *"...control the Internet market, and ensure we have no choice but their outdated services."*
23. Since the CRTC decision last July, Bell has been actively engaged in lobbying against the ruling. Given Bell's unequivocal rejection of a regulatory bargain that appears to be acceptable to most operators, service providers, and independent advocacy groups, we suspect the misinformation campaign, such as the one reflected in Bell's petition, will continue if the petition is rejected. Furthermore, we fully expect Bell to appeal to the Federal Court if it does not get what it wants, and to continue engaging in evasive strategies during the ongoing CRTC 2015-326 implementation process.
24. OpenMedia is confident that Canadians have provided the new government with a sufficiently strong mandate for promoting economic development by diversifying our economy and transitioning into the so-called information or digital economy of the 21st century. Policies that promote increased choice and affordability in the development of Canada's broadband infrastructure will be critical to this government's success in achieving these broader objectives. Some public interest policies such as CRTC 2015-326 may not sit well with the incumbents, and a backlash from them should be expected

(e.g. withdrawal of political support, biased editorial and reporting in media controlled by petitioner, etc.). OpenMedia commits to supporting the government in deflecting this type of backlash to the extent the government signals its commitment to policies that promote development of an open, affordable Internet.

25. For reasons that remain unclear to OpenMedia, in CRTC 2015-326 the Commission decided to apply its new rules only to large operators in Ontario and Quebec. Bell exploits this error by the Commission in paragraph 58 of its petition, stating *“there is a fundamental unfairness in allowing established providers based in other areas of the country (such as MTS Allstream and Telus) to have forced access to Bell’s fibre-to-the-home networks in Ontario and Quebec without having to reciprocate in their home provinces. To be clear, we are not seeking mandated access to their fibre-to-the-home networks; like us, they should be able to reap the benefits (and bear the risks) of their own fibre-to-the-home deployment.”* Given that Bell and Telus have extensive network sharing arrangements that allow them to reduce the costs of providing certain services nationally without investing in separate infrastructure (in both fixed and mobile markets), saying that it is not seeking mandated access to Telus infrastructure is simply misleading. CRTC 2015-326 continues to allow operators such as Bell and Telus to engage in off-tariff, privately negotiated wholesale arrangements with each other, and with smaller competitors, at prices that are lower than the regulated wholesale prices determined by the Commission at the end of the CRTC 2015-326 implementation process. This feature of the Commission’s regulatory policy should minimize the extent to which it will interfere with efficient private transactions between operators such as Bell and Telus who want to cooperate with each other. It will also allow operators of the future to negotiate wholesale prices with smaller service providers that are below the regulated price set by the CRTC, as it happens today due to the high cost and markup levels the CRTC applies in arriving at wholesale rates in order to encourage investment.



26. The fact that the Commission has only applied its ruling to large operators in Ontario and Quebec raises significant concerns for present and future Internet customers in Canada. In addition to providing the dominant operators in Ontario and Quebec with further excuses to claim that the new rules are unfair, the Commission's approach will mean that other regions of Canada are not likely to benefit from the adoption of open access rules and increased FTTP deployment incentives. Regional differentiation in the implementation of rules is unfair to Canadian consumers that reside in areas where incumbent operators managed to convince the Commission to grant them an exemption to the new rules.

27. A complex regulatory regime with arbitrary exemptions can further reduce market transparency and therefore private sector investment and innovation incentives in advanced fibre networks. In contrast to Bell, which claims revising CRCT 2015-326 by adding more anti-competitive exemptions is the solution to regional imbalances in the decision, OpenMedia submits that a predictable and non-discriminatory wholesale access regime at the national level is required for encouraging operators in all regions of Canada to invest in network assets and compete in improving the quality and affordability of services they deliver to Canadians. To ensure that retail market users across the country benefit from the positive supply-side effects that clear and predictable wholesale rules can have on private sector investment and innovation, OpenMedia urges the government to direct the Commission to extend the scope of its rules to the entire country under Section 8 of the *Telecommunications Act*. As it stands, the regional approach by the Commission is inconsistent with statutory objectives of Canadian telecommunications policy provided in s.7(a) regarding "orderly development throughout Canada"; s.7(b) regarding the provision of "reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada"; and s.7(f) whereby "regulation, where required, is efficient and effective." Regional differences and complex rules that include exemptions



requested by incumbents may be beneficial to narrow commercial interests, but will not serve the interests of the industry as a whole or Canadian Internet users.



Exhibit 1: CRTC 2013-551 Petition Signed and Submitted to the Commission by 25,000 Canadians

Dear Commissioners,

Do not allow Big Telecom companies to block access to affordable independent Internet services. All Canadians deserve access to all speeds of Internet (including fibre) independent of Big Telecom's oligopoly.

It's past time and common sense to split Internet infrastructure off from big telecom companies to ensure digital networks are open for a range of providers to service residents of Canada unencumbered.

We depend on you to put the interests of all Canadians ahead of a small group of Big Telecom conglomerates. My metrics of success are deconcentration of the market, improved speeds, and pricing that better compares with our global counterparts.

I acknowledge that my comments and information will form part of the public record for this proceeding including on the CRTC website. I do not wish to appear at the hearing in relation to this submission.

I ask that this submission be granted the same weight as that of any other party.



C. Rebutting Bell's Claims Point by Point

a. Overview: Bell's claims versus the evidence

28. Bell has provided a mass of data and studies in support of this petition. As detailed in the last section, there is little new in the evidence outlined by Bell in this petition that was not submitted and discussed in detail at the CRTC 2015-314 proceedings. The exception being the new proposal for an FTTP project in Toronto and the purported economic benefits that it will have for the city and the province. On the Toronto project, OpenMedia agrees that deploying FTTP would have significant benefits in terms of employment and economic growth, but remains puzzled by the manner in which Bell is trying to use the project as leverage to force elected federal leaders to overturn regulatory reforms that appear to have caused it to make the announcement in the first place.
29. Due to the short thirty-day deadline for responding to Bell's petition OpenMedia is unable to provide a thorough analysis of underlying data and documents Bell provides in attachment to this submission. As noted, issues relating to the impact of regulation and investment, including international evidence provided by Bell have all been presented and discredited during the original proceeding and discussed under questioning from the Commission during the oral hearing. OpenMedia submits that repeating the views of the same selected set of evidence and experts with an unequivocal voice does not improve their accuracy, credibility, or relevance as a basis for making public policies that effect all Canadians, not just investors, management, and employees at Bell and other incumbents that continue to oppose the Commission's authority. To help better understand the evidence that has been brought before you, the rest of this section provides a detailed analysis and rebuttal to Bell's main arguments as outlined in the executive summary of its petition. While OpenMedia would be happy to elaborate on any issues per your request, we recommend if you have any doubts about the baseless

nature of Bell's claim that the Commission ignored or disregarded crucial evidence, we refer you to submissions by consumer advocacy groups and independent Canadian experts to the CRTC 2015-551 consultation process and the transcripts of the hearings.

30. Before digging into the evidence and arguments by Bell, it is important to note that during the proceedings a number of incumbents started to move on their strong initial opposition to a technologically neutral regulatory framework that includes fibre access networks of the future. One reason for this shift is the fact that cable operators that can deliver substantially higher speeds and charge a premium compared to Bell, Telus, and other DSL operators recognize that the current asymmetric regulatory regime puts them at a competitive disadvantage. As a result, cable operators appear to be more reasonable in accepting the Commission's regulatory bargain, which Bell (and we expect Telus and other incumbent copper/DSL network operators) claims does not exist. In fact, the position of Bell in this petition appears to contradict the one its representatives stated under inquisitive questioning by the Commission during the CRTC 2015-551 hearings:¹⁵

3167 **COMMISSIONER MENZIES:** *Can you just hang on for a second because I just want to follow up there before we go.*

3168 *If you had commercial deals, given -- and I would like to hear from you on this anyway -- commercially negotiated deals, given the imbalance of power between the one with the service and the one seeking the service, how do we assure ourselves that the rates that come out of a commercially negotiated agreement are just and reasonable?*

3169 *How would we be able to be assured of that, that we didn't run into a situation where people said, "Well, I got a commercially negotiated rate, but I got to tell you, there wasn't much negotiation". So Bell came to me and said, "This is your rate. Buy it or*

¹⁵ See transcript of CRTC 2013-551, Volume 3, 26 November 2014.

don't", right, and how do we ensure that there is anything just and reasonable about that?

3170 MR. BIBIC: *So I'm going to break the question up into -- to answer your very specific initial question, assuming that access to FTTP is regulated and mandated, so in that context because there is a different answer for a service like CDN and Ethernet which is forborne.*

3171 COMMISSIONER MENZIES: *Yes, assuming under a mandated structure.*

3172 MR. BIBIC: *Okay. So our position -- just to clarify, our position on the mandated structure is that the rates should be cost-based Phase II with the continued ability to negotiate off-tariff deals.*

3173 *So today with GAS we have a Commission-set tariff and we also have the ability to do off-tariff deals with our ISP customers and we would ask for Phase II costing methodology for FTTP as well with the suggestions or the modifications that Michelle (Bourque) mentioned, plus the continued ability to do off-tariff deals.*

31. In CRTC 2015-326 the Commission did indeed accept the position of Bell regarding continuation of the highly controversial so-called Phase II costing methodology over alternative costing models such as those proposed by cable companies and smaller service providers through the Canadian Network Operators Consortium (CNOc).
32. The continuation of the non-transparent Phase II costing methodology which almost everybody agrees allows operators to overestimate the baseline costs for calculating the wholesale price (i.e. Phase II cost plus a mark-up or risk premium that is now at 15%), contradicts Bell's claims that the Commissioner somehow ignored its interests and evidence it provided to justify its stated position at the time. The fact that the Commission retained the incumbents' preferred costing methodology indicates that operators would be able to recover attractive returns on their investments in FTTP

networks of the future. Even if the Commission did not set a mark-up rate that is higher than the current rates on aggregated wholesale access services, Phase II costing by itself will continue to ensure investment incentives in Canada’s telecom infrastructure remain strong. Despite Bell’s claims, nobody will be getting a “free ride” under the new pro-FTTP investment regulatory strategy the Commission adopted after substantive deliberation.

33. Royal Bank of Canada, the largest institutional investor and an investment banker for Bell, appears to recognize the regulatory victory for incumbent in keeping the Phase II costing methodology which allows for significant overestimation of costs by essential facilities operators relative to marginal costs of service, by stating:

“While mandated access to FTTH could act as a dis-incentive for FTTH deployment, we expect the incumbents to largely proceed with current FTTH plans as the impact of this decision should be manageable for three reasons: (i) the use of Phase II costing, which should prevent an “unfair” tariff regime from being implemented; (ii) the requirement under the disaggregated wholesale HSA services model for competitors to invest in interconnection (which requires scale and is consistent with facilities-based competition); and (iii) the ability for incumbents to more aggressively push the quadplay as well as other services in the bundle should Internet re-sellers gain greater traction over time.”¹⁶

34. In addition to the above noted victories from the perspective of a large investor that benefits significantly from profits Bell is able to make on copper assets that continue to serve the vast majority of Bell’s broadband customers (in the so-called “last mile” to the premise), in CRTC 2015-326 the Commission did provide substantial flexibility in the new

¹⁶ RBC Capital Markets, Telecom Scenario Report, 19 August 2015.



framework by allowing for off-tariff negotiated agreements that Mr. Bibic from Bell requested during the hearing. This decision by the Commission allows Bell to continue to sell wholesale access to legacy or new technologies at prices that are below the relatively high regulated prices associated with CRTC's costing methodology and plan in CRTC 2015-326 to provide a higher mark-up on top of costs for higher speed services. The fact that Bell received what it asked for in terms continuing to allow for off-tariff agreements further undermines the argument in this petition that the Commission disregarded its evidence or arguments.

35. Having achieved most of its objectives for Bell's investors, its management now appear to be trying to derail the entire regulatory bargain the Commission adopted with input from a variety of stakeholders from across Canada. OpenMedia submits that Bell are going so far to demand changes to the order that will essentially quash the entire regulatory bargain the Commission managed to put together after two years of intensive consultations, multiple stages of interrogatories, and a public hearing. The fact the Commission chose to continue to allow for off-tariff negotiated agreements will ensure that the new regulatory framework will minimize interference with market forces. OpenMedia therefore submits that contrary to assertions by Bell that the new regulatory regime will inhibit market forces and investment, incumbents' victories in the design of CRTC 2015-326 policy framework will ensure that Bell's management can deliver on the world leading dividend payouts they have been providing their Canadian investors based on publically subsidized copper assets inherited a long time ago. Perhaps Bell management would have preferred receiving an exemption from the new regulatory regimes such as the one Telus and smaller incumbents manage to obtain for themselves from the CRTC, but for some reason the Commission determined that Ontario and Quebec are a starting priority. As outlined in Section B of this comment, what is unfair in the ruling is that Canadian consumers that reside outside of Ontario and Quebec will not benefit from its pro-FTTP investment and competition effects until the Commission chooses at a future date to do so. The solution, as we've submitted, is



not to vary the decision as requested by Bell, but to adopt a standard set of rules that promote FTTP investment with a reasonable return to investors in all parts of the country, both urban and rural.

36. As the report by Royal Bank published after the CRTC 2015-326 decision was made public and referenced above clearly indicates, Bell pays back somewhere between 80 and 90% of its earnings and free cash flows directly to its investors as dividends.¹⁷ **If a financial institution—that benefits from the high payout Bell and other large telecom operators deliver based on their existing copper and cable assets—is supportive of CRTC 2015-326, then it is unclear to OpenMedia why Bell has filed this petition alongside a number of other unreasonable appeals regarding the regulatory bargain the Commission managed to achieve, pursuant to a detailed and lengthy consultation process that included various parties, including Bell, Telus, Rogers, etc.**

b. Bell claims: There is no problem to solve

Bell petition, E2 - As a result of competition between companies that invest in their own broadband networks (facilities-based competition), Canada is among the broadband world leaders today – and now we are poised to do more.

OpenMedia response:

37. While Canada continues to fall behind our international counterparts on key broadband metrics, a clear, common-sense path has presented itself: fair open access rules that have demonstrated success in a number of countries in East Asia and Europe. Right now, Cabinet faces a choice: we can drive forward these fair rules, or allow the incumbents to

¹⁷ RBC Capital Markets, Telecom Scenario Report, 19 August 2015. Page 14.



effectively regulate our market with high prices, under-provisioned networks, and slow speeds.

38. Compared to our international counterparts, Canadians suffer from middle-of-the-road quality of service for the relatively high prices they pay. In fact, Bell's claim in the petition that Canada is a world leader contradicts evidence that Bell expert Dr. Eisenach of NERA provides in Attachment 4. For example, Figure 9 of Bell Attachment 4 provides data on connectivity speeds that shows advertised speeds in the Canadian market are higher than average for OECD countries. However, Table 4 in Dr. Eisenach's report summarizes data on actual connectivity speeds from Akamai technologies documenting that Canadian speeds are about average compared to other high income countries. OpenMedia disagrees with Bell's interpretation of its own evidence because Bell appears to be assuming that "average" and "leading" are the same thing. This is a big leap in logic and a misleading interpretation of a critical metric in this debate, presented by Bell itself.
39. The fact that connection quality in terms of speeds in Canada is about average was extensively discussed during the CRTC 2013-551 hearings based on the results of various speed testing methodologies. In fact, as detailed in the record of the CRTC proceedings, the magnitude of the gap in connection speeds between Canada and leading countries in Europe and East Asia that are further along in deploying FTTP networks is substantial (average Canadian speeds around 3 times for download and to 5 times in terms of upload).¹⁸ Consequently, being average is far away from leading in terms of the quality of Internet access Canadian operators deliver to their end users compared to their counterparts in many other countries, which have been more active in decommissioning copper and deploying fibre to homes and businesses. It is precisely because of this evidence that the Commission had little choice but to adopt open access rules and

¹⁸ <http://www.ookla.com>



maintain Phase II costing in order to encourage more investment into FTTP deployments in Canada.

40. It is worth pointing out here that where increased ISP choice in the marketplace exists, it is the result of fair open access rules across (now) legacy DSL and cable networks (i.e., the 9% residential market share and 25% business market share). An example worth adding is one OpenMedia provided to the Commission during the original CRTC 2013-551 consultation process that resulted in the adoption of the CRTC 2015-326 decision: A recent report by the Open Technology Institute examined 24 major cities for the “best deals” possible under \$40 a month. Canada’s incumbent providers were nowhere to be seen. But TekSavvy, an independent ISP, was the only Canadian ISP to make the cut.¹⁹ Nevertheless, service-based competition remain limited even on legacy platforms where the Commission already imposes third party access obligations. As detailed below, this is partly because of the controversial Phase II costing methodology and the 15% regulated wholesale markup the Commission has provided incumbents so they can earn a more than reasonable rate of return on their investments.
41. The fact that Canada has failed to keep up with other countries in terms of average connectivity speeds can be partly attributed to technological limits of slower copper networks Bell and other DSL incumbents have inherited relative to higher speeds possible on cable networks of Rogers and other large cable operators. However, failures of Bell and other large operators of copper/DSL networks such as Telus to make sufficient investments in FTTP networks are also to blame for the sizable gap in terms of actual speeds the two types of operators deliver Canadians (Figure 1). In the small number of communities (relative to its geographic footprint) where Bell has made investments in FTTP networks (i.e., Bell Aliant in Atlantic Canada), Bell customers are receiving speeds that are just about competitive with higher performing cable operators. Outside of Atlantic Canada, Bell, Telus, and other incumbents have made

¹⁹ http://www.davidellis.ca/wp-content/uploads/2012/08/OTI_The_Cost_of_Connectivity_2014.pdf

little investment in FTTP. Canada’s relatively high per capita and per path telecom investment levels documented in Section D of the report for Bell by Dr. Eisenach (Bell Attachment 4) hide the fact that not many of these investments have gone into deploying advanced FTTP networks and have generally been allocated to upgrading legacy copper and cable networks.

42. By including fibre networks of the future into the regulatory framework, the Commission is trying to counteract this trend by adopting wholesale regulations that induce operators to reduce their addiction to cash flows from legacy platforms and generate a reasonable rate of return by directing investments to deploying more fibre for Canadians. The regulatory reforms might cause some short term pain for incumbents that would have to raise their capital intensity and adjust certain elements of their business models, but in the long term OpenMedia submits that fair and investment friendly open access rules for the governance of the wholesale Internet access market will be in the benefit of both the operators and Canadian Internet customers.

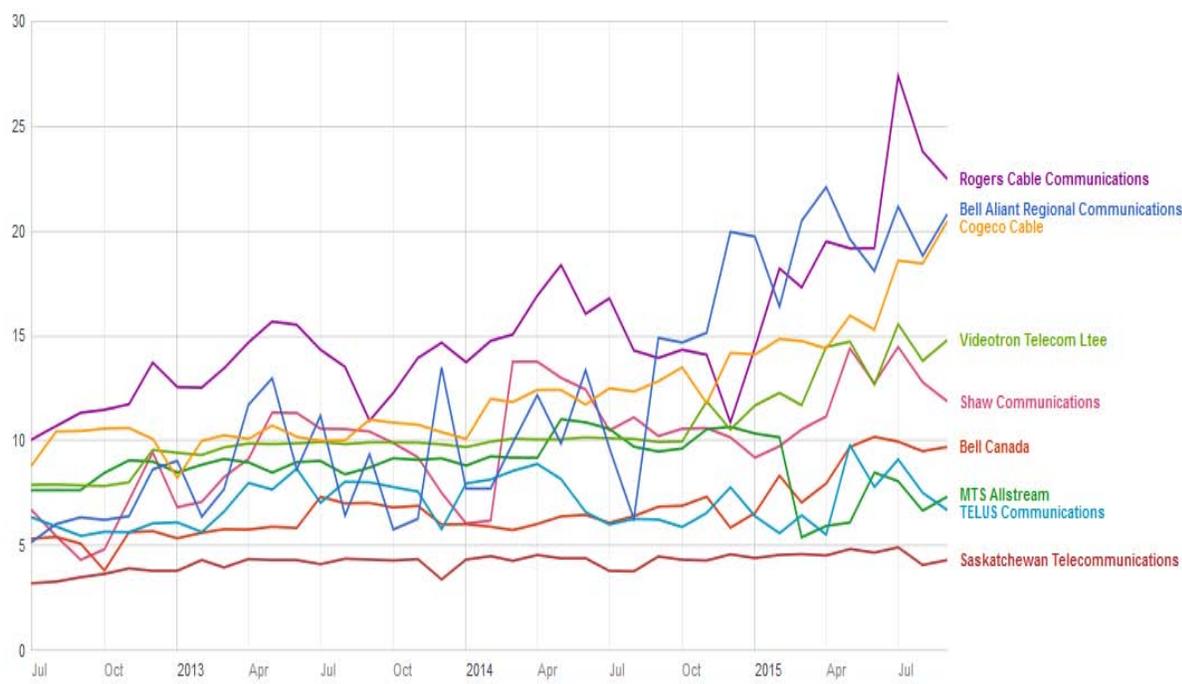


Figure 1: Broadband download speeds of Canadian operators (Source: M-Lab; Google public data explorer).

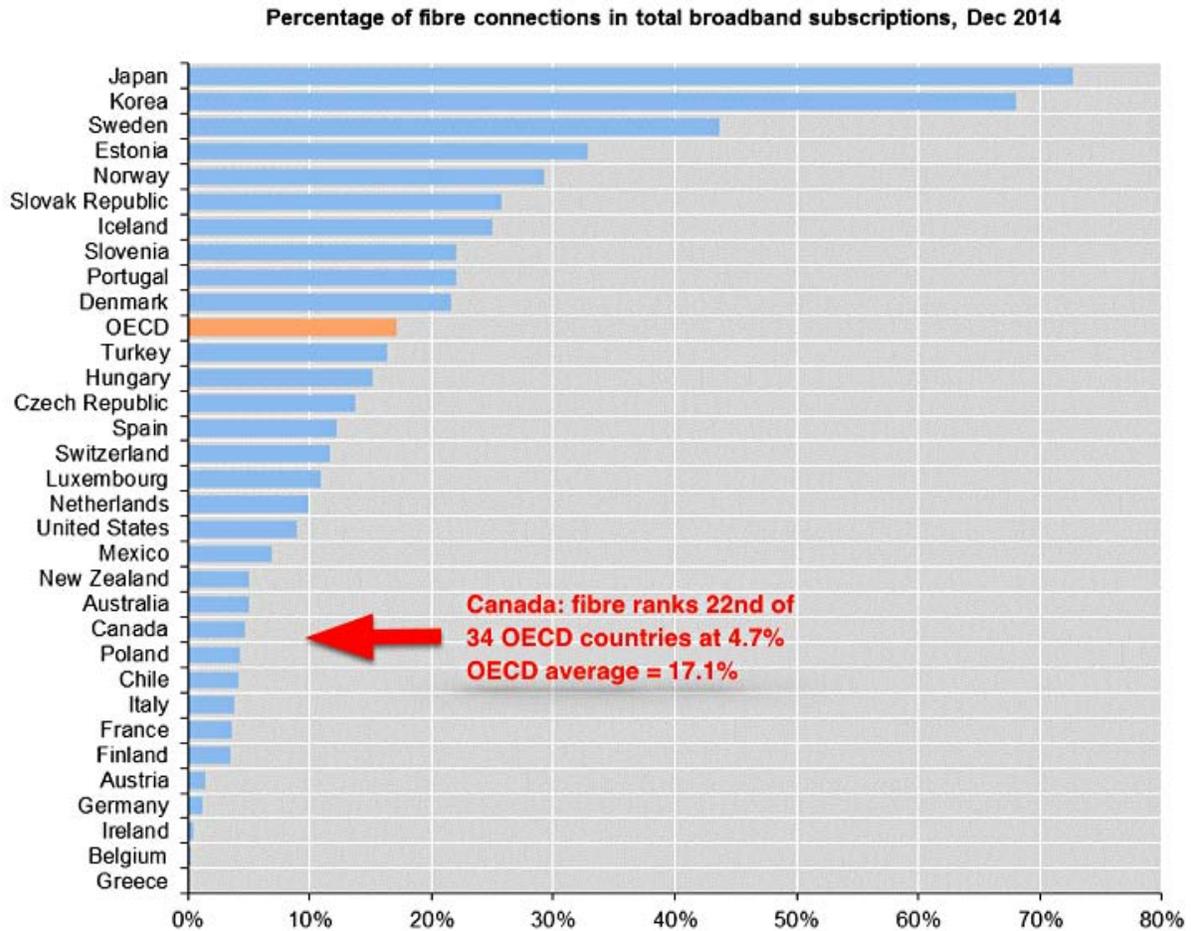


Figure 2: Percentage of fiber connection in total broadband subscriptions. (Source OECD, 2014).

43. The FTTP penetration rate in Canada of around 5% noted above is primarily driven by FTTP deployed in Atlantic Canada by Bell Aliant, which hides the fact that elsewhere in the country FTTP deployment rates are close to zero. Paragraphs E2 and E17 of Bell’s petition claim that “Bell has already built fibre-to-the-home to more than two million homes”, which translates to around 15% of households in the country. Bell’s claim that

it has built FTTP to this many homes does not appear to be supported by latest evidence compiled by the CRTC (Communications Monitoring Report, 2014-2015, Table 5.1.5). According to CRTC data there were around 2 million homes “passed” by FTTP technology, which increased to 2.8 this year. This “pass through” metric does not capture how many FTTP last mile connections have actually been built into the homes, which is an important distinction because the costs of FTTP pass through accounts for only 1/3 of the total costs of deploying FTTP last mile connection into the homes (\$400-\$600 for FTTP pass through versus \$1000 for the final “drop” into the home according to cost estimates from Bell Aliant.²⁰ Bell’s petition therefore overestimates the extent to which FTTP last mile links have actually replaced legacy copper last mile connections, and overall capital commitments to decommissioning copper in favour of fibre. FTTP penetration data from OECD has been vetted for differences in the manner in which different national regulators estimate fibre diffusion, and therefore represent a better metric for documenting the extent of Canadians’ lack of access to fibre networks capable of delivering ultra-high speed symmetric connections needed for using network intensive Internet applications in a reliable manner (e.g. multimedia, IPTV, Internet of Things, cloud computing for business, telehealth, online education, working form home, etc.).

44. It is also noteworthy to point out that Bell Attachments 1(footnote 21), 2(footnote 1), and 3(footnote 1) discussed refer to Table 5.1.5 of the CRTC Communications Monitoring Report (CMR, 2014), which suggest FTTP networks pass by nearly 2 million Canadian homes (around 15% of a total of just over 13 mil. homes). For the reasons noted above, this pass through number does not mean that all 2 mil. homes have been actually connected with last mile fibre connections, the costlier part of replacing copper with FTTP networks. Consequently, the CRTC CMR data point referenced in Bell’s petition and its attachments does not represent full FTTP deployments or diffusion to 2 million homes. While the quality of data on FTTP deployments in Canada is poor, it is

²⁰ RBC Telecom Scenario Report, RBC Capital Markets. August 19, 2015. Page 17.



evident that the petitioner is emphasizing available data in a manner that overestimates the extent of FTTP diffusion in the country.

c. Bell claims: The Commission deviated from tradition

Bell petition, E3 - In July 2015 the CRTC made the surprising decision, contrary to Canada's longstanding policy of facilities-based competition, to unfairly change the existing rules applicable to fibre-to-the-home broadband networks by mandating reseller access to these networks while they are still in the process of being built.

OpenMedia response:

45. This claim does not take into account that, as detailed in Figure 2 above, the decision by the Commission in 2008 to exclude fibre access and transport facilities from the scope of wholesale access obligations has been an abject failure in promoting investments by Bell, Telus, and other incumbents into deploying FTTP networks. The Commission has the right, and indeed the obligation, to adjust its own policies if there is sufficient evidence that they are not achieving objectives of Canadian telecommunications policy as specified under Section 7 of the *Telecommunications Act*.
46. Bell is incorrect to claim that Canada's longstanding policy for broadband competition is based on facilities-based competition alone. On the contrary, since the CRTC 2008-17 decision the Commission has applied mandated open access to all larger operators to promote service-based competition in order to counteract concerns about high prices and affordability of access. In fact, if requests by Bell in this petition are granted, wholesale access obligations will continue to apply to cable operators that currently offer substantially higher speeds than Bell, Telus, and other incumbent regional copper last mile operators. This will mean the continuation of what cable companies see as an

asymmetric, unfair regulatory regime that provides Bell and other legacy network operators with a competitive advantage.

47. It is noteworthy that in CRTC 2015-326 the Commission did not apply the new rules to any existing fibre assets of the petitioner in Atlantic Canada, which will limit the scope for service-based competition and allow Bell to continue to charge the exorbitant prices it is charging residents and businesses in Atlantic Canada (around 2 times cable companies for similar connection speeds; see Figure 1).
48. The fibre provisions in the CRTC 2015-326 regulatory framework are neither surprising nor unfair. The Commission changes rules regularly, as it must, in response to the inevitable changes that take place in the telecom marketplace.
49. The fact that Bell's fibre networks are still being built is not material. Bell and the other Canadian incumbents lag far behind their counterparts in both the US and EU in fibre deployment, because there has not been sufficient competitive or other incentive in Canada to build out fibre faster (Figure 2). Bell did not take advantage of regulatory forbearance under the previous regulatory framework, giving the Commission little choice but to revise its policy because it was apparently not achieving its objective of stimulating FTTP deployment across Canada.
50. Bell's threat to reduce investments in FTTP is not credible, because if it did so it would fall even further behind its main competitor, Rogers. The inherent advantages of DOCSIS over DSL means a) DSL is fading as a legacy platform; and b) Rogers and the other cable incumbents continue to dominate the retail broadband market over the telcos by a wide margin - as they have for many years. Of just over 10.1 million broadband households in 2014, cable held about 58% and the telcos 43% - i.e. 35% more. It is because of the failures by Bell management in keeping up with their main competitors by investing more in FTTP networks. For this reason, OpenMedia submits that the new pro-



investment CRTC open access rules are likely to benefit investors in Bell, Telus, and other lagging incumbents by motivating their management to innovate in order to compete more fiercely with cable operators.

d. Bell claim: The Commission chose resale over investment

Bell petition, E4 - The CRTC's decision to favour resale over investment will inevitably result in Canada losing its broadband leadership position. Indeed that is exactly what has happened to Europe, which fell far behind other developed countries when it aggressively mandated access to next-generation networks and where policy-makers are now searching for ways to recover.

OpenMedia response:

51. First, Bell has the argument on resale exactly backwards: without long-term access for new entrants to fibre – the universal platform of the future for all retail broadband and the single pipe for all Canadians fixed telecommunications needs – Canada’s mediocre position will become even worse. The fact that even investors in Bell recognize that Phase II costing and other victories for Bell will mean there will be little impact in FTTP investment (as documented above) contradicts claims by Bell that the decision will lead to a reduction in fibre investments. Second, the argument regarding the EU is based on misleading average overall results. The policy lessons are very different on a country-by-country basis because wholesale access rules continue to be under the authority of each EU member.

Bell petition, E6 - ... to now implement legacy resale regulation for brand new fibre-to-the-home networks that are still being built is fundamentally at odds with the country's goal of being a world broadband leader, with 21st century digital infrastructure in communities



of every size supporting the creation of tens of thousands of new jobs and stimulating a thriving modern economy.

OpenMedia response:

52. It is disingenuous and highly misleading of Bell to suggest that resale regulation somehow belongs to a “legacy” framework simply because it was created to address access to legacy platforms. The concept of resale regulation is not tied to the attributes of any particular platform, but is a policy framework intended to address much broader investment, competition and consumer welfare issues. Moreover, the principle of technological neutrality dictates that it would be a violation of federal policy for the Commission to attach resale conditions to some platforms but not others simply because of technical differences. Finally, Bell is absolutely right to characterize fibre as key “21st century digital infrastructure,” which means that it would be especially irresponsible for the Governor in Council to make an exception to fibre and exclude it from the open access framework simply on the grounds that it’s new and capital-intensive.

Bell petition, E7 - The decision to favour resale over investment was surprising, as it is inconsistent with Canada's long-standing policy of facilities-based competition and with the Policy Direction issued to the CRTC in 2006 based on the recommendations in a report commissioned from the Telecom Policy Review Panel by the Liberal government in 2005. It is also unfair, as it contradicts the CRTC's 2008 decision (reaffirmed as recently as 2011) to refuse to implement mandated reseller access for fibre-to-the-home networks ...

OpenMedia response:



53. The Commission’s decision is not inconsistent with long-standing policy (see discussion above). It is certainly not inconsistent with the 2006 Policy Direction adopted by the previous government, since the PD directs the Commission to “rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives.” As we have argued above in our comments and discuss further below, open access rules that incentivise FTTP deployment can actually stimulate market forces in building the fibre infrastructure Canadian households and businesses require in order to deploy advanced content and application services on the Internet such as multimedia, cloud computing, Internet of Things (IoT), IPTV, etc. Concomitant acceptance by the Governor in Council of Bell’s petition if the GiC accepts Bell’s flawed argument about the negative impact of CRTC 2015-326 on investment will ensure that the policy objectives of the *Act* will *not* be achieved as FTTP deployment incentives will in fact be reduced if the Cabinet adopts changes to the decision Bell has requested in this petition.
54. Moreover, the Commission’s approach in 2015-326 clearly satisfies the four criteria for reliance on regulation enumerated in s.1(b) of the 2006 Policy Direction – the one Bell is so adamant the said decision violates. Whereas Bell asserts that the Direction developed from recommendations of the Task Force appointed by the then Liberal government, Bell does not add that the Direction was eventually issued under the Conservative government by then Minister Bernier. It is also important to note that Bell does not justify why the Commission’s decisions violates any of the specific objectives of Canadian telecommunications policy mandate under Section 7 of the *Telecommunications Act*, which is the primary legal basis upon which this and other regulatory decisions should be interpreted.

Bell petition, E7 (cont’d) - This Petition seeks to reverse the CRTC's decision, which effectively expropriates new fibre-to-the-home networks for the benefit of other companies (Reseller Internet Service Providers (ISPs)) that are not investing in infrastructure.



OpenMedia response:

55. It is absurd for Bell to suggest that this decision “expropriates” its FTTP networks, since the decision simply continues the Commission’s well established open access policy – which has been in place for nearly 20 years – by removing the exception that it provided regarding fibre in 2008 in the hope of promoting investment in FTTP. Bell’s FTTP networks are not being expropriated by this decision, any more than previous decisions “expropriated” Bell’s DSL networks. Bell’s claim that the alleged expropriation is for the benefit of service-based commercial rivals conveniently overlooks three important facts. First, the open access policy is designed to benefit millions of Canadian broadband subscribers by promoting sustainable competition, thereby disciplining prices and encouraging service differentiation. Second, the suggestion that these other companies are not investing in infrastructure themselves is simply disingenuous, since smaller competitors cannot begin to entertain the costs involved in building out fibre networks. More resourceful network operators such as Bell and Telus clearly have a competitive advantage in leading FTTP builds across the country, but the problem has been that the incumbents have failed to direct investments into fibre at a rate that is sufficient to deliver “world class” broadband infrastructure for Canadians. Third, the incumbent’s success in convincing the Commission to retain Phase II pricing, and the decision by the Commission to provide a higher markup on higher speed services that can only be delivered by the FTTP networks of the future, will ensure that any operator that invest in such facilities can earn a more than reasonable return on its fixed capital expenditures. It is precisely for these reasons that allegation by Bell that the Commission erred on the side of resellers over investors is baseless and misleading.
56. More broadly, the Commission’s overarching policy in the broadband market – to promote FTTP deployment and enable service-based competition - is designed precisely to make up for the capital-intensive nature of new FTTP facilities. Bell implies that companies wishing to compete in the emerging FTTP market should all be investing in

infrastructure, ignoring the very strong public interest and business arguments against the duplication of FTTP facilities.

57. As argued in clear and simple terms by the City of Coquitlam, a leading municipality in terms of proactive fibre deployment, in paragraph 14 of their first submission to the proceeding that led to CRTC 2015-326:

“Having two ILECs (i.e. the traditional telephone and cable companies) build out separate fibre networks to almost every Canadian premises in order to maintain the current duopoly status quo is a tremendous waste of time and money with little benefit for Canadian consumers. This would also have significant impacts on municipal rights-of-way and private properties. Ensuring only one fibre connection for each detached home or one shareable fibre optic entrance cable for each multi-unit complex should be a mandatory outcome of any new regulatory model.”

Bell petition, E9 - Since at least 1992 the Government, CRTC, and the Competition Bureau have all reiterated many times that the only way to sustainably deliver the price, quality, and innovation benefits of competition to consumers is through facilities-based competition. This policy has been incredibly successful, yet the CRTC's decision is in direct opposition to it.

OpenMedia response:

58. As detailed above, this assertion is patently false in how it characterizes the history of Canadian telecom policy and the results as “incredibly successful”. The reason CRTC changed the CRTC 2008-17 frameworks with the CRTC 2015-326 was mounting evidence of Canada’s decline as a broadband leader, which the Commission has every right and obligation to do under the *Telecommunications Act*.



59. The reference by Bell to the position of the Competition Bureau in this matter is particularly interesting. As the transcripts of the CRTC 2015-551 hearings clearly demonstrate, the Competition Bureau neither has the expertise nor a strategy for addressing issues raised by the Commission in this matter. The only solution that the Competition Bureau offered the Commission, after intensive questioning on the public record, was a “wait and see” strategy with respect to extending wholesale access obligations to fibre in order for Competition Bureau staff to have enough data to evaluate the problem. In the meantime, Canadians have waited and we have seen: the result of forbearance by the Commission from mandated access has been poor fibre deployment. Evidence suggests that incumbents do not invest in and upgrade networks to maximum efficiency unless pushed to do so by meaningful competition—which can only be achieved at this point through mandated FTTP and fair open access rules for the operation of the wholesale market for Internet access services and interconnection among service providers.

Bell petition, E10 - Figures E1 and E2 below demonstrate that Canada has led the way in broadband deployment. This world leadership position has been made possible through the willingness of facilities-based providers like Bell to invest.

OpenMedia response:

60. Bell has relied on highly selective and misleading data to prop up the claim that Canadian broadband is in a world leadership position. It is very telling that Bell’s case depends here on two sets of data that have little to do with the affordability and quality of broadband as it is actually delivered to Canadian subscribers. Fig E1 shows “investment per data path,” while Fig E2 shows broadband penetration as a proportion of the adult population. As for investment, Bell’s whole case in this petition rests on the unsupported assumption that, for federal policymakers, the most important goal is

ensuring the highest possible degree of capital investment. Nowhere in this petition, however, does Bell demonstrate how its much touted investments will lead to the most desirable outcomes that are fundamental to both the enabling legislation and the Commission's framework for CRTC 2015-326 - including "reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada" (s.7.b of *Telecom Act*).

61. Furthermore, Bell does not recognize that a technologically neutral essential facilities access regime will actually help promote facilities based competition by inducing large operators such as Bell, Telus, and Rogers to increase how much they invest in better networks. Announcements by all of the so-called big three after the CRTC 2015-326 ruling confirms that the regulatory reforms adopted by the Commission are in fact intended to promote facilities based investment and competition among large operators.

62. As for the penetration data shown in Fig E2, Bell has once again cherry-picked data that suggests Canada is a world leader, with rates ahead of both the US and OECD. What this graph fails to show is that (based on similar OECD data published July 2015) Canada's penetration rate (per 100 inhabitants) is in fact trailing behind 10 of the other 33 OECD member countries. And if Bell had chosen to isolate fibre penetration, we would see that Canada lags far behind both the US and OECD (Figure 2 above). Over the last decade, when FTTP was being built out in other jurisdictions, Bell Canada chose to refrain from making any appreciable investments in fibre as its management made an explicit choice to continue to rely on copper last mile connections (in contrast Bell Aliant management or Verizon in the U.S., which chose to limit reliance on copper and accelerate FTTP deployments over the same period) – despite the opportunity it might have had to do so without mandated open access or other regulations. It is clear that Bell had neither the market nor the policy incentive to build out FTTP when it was

profiting so handsomely from its legacy DSL infrastructure and delivering “world leading” dividends to its shareholders by charging Canadians “world leading” prices.

Bell petition, E11 - Figures E3 and E4 below show that Canadians have benefited from the build out of broadband infrastructure by facilities-based providers. Figure E3 shows that Canada is a world leader in terms of bandwidth consumption across its broadband networks, and Figure E4 shows that Canadians enjoy some of the fastest broadband connection speeds available in developed countries ...

OpenMedia response:

63. Bell has the economic logic between supply and demand exactly backwards in this case. It is ironic that Bell should be boasting about how the investments in infrastructure made by itself and the other incumbents have encouraged high levels of consumption among Canadian end-users. Bell was one of the early pioneers in the use of data caps, which are designed not to cover economic costs (they are not cost-based) but rather to discourage “excessive” use of the Internet through Bell facilities. Data caps also bring in large incremental revenues in terms of over-charges. For example, Bell’s entry-level DSL service (15 Mbps) is priced at \$55 a month. But in the fine print, Bell explains that a customer exceeding the 50 GB cap will owe \$3 for each gigabyte, to a maximum of \$100 - meaning that a potential total bill that is three times higher (\$155) than the nominal monthly fee. Furthermore, the consumption figures for Canada cited by Bell in Fig E3 could be much higher - if Bell itself and the other incumbents did away with data caps altogether, especially given the clear evidence that caps discourage consumption among millions of mainstream end-users.²¹

²¹ Danielle Kehl and Patrick Lucey, OTI, Artificial Scarcity: How Data Caps Harm Consumers and Innovation, June 2015, New America Foundation.



64. As for broadband speeds, Bell is once again being selective in the data presented in its petition. The fact that Canada boasts high *advertised* broadband speeds does nothing to prove that Canadians are getting the actual speeds they might expect from what is advertised by their ISPs - especially since advertised speeds are always qualified by Bell and others in its marketing as “up to” the speed in question. The gap between actual and advertised speeds is an important policy issue that the Commission is grappling with right now during the ongoing basic services proceeding (CRTC 2015-134), which will determine if broadband should be defined as a basic telecom service and subject to verifiable minimum service standards and universal access obligations.

65. No residential service in Canada includes quality of service guarantees, and no policy framework has yet addressed the need for such guarantees, an issue OpenMedia is working to resolve by participating in the CRTC 2015-134 basic services proceeding. It is noteworthy that as part of the basic services proceedings, OpenMedia in fact requested that operators provide the Commission with data on the percentage of connections with speeds that are below the 5 Mbps down and 1 Mbps minimum actual speed targets the Commission adopted back in 2011. Bell, Telus, and others have refused to answer our interrogatories in that proceeding regarding actual speeds they deliver to end users according to their internal data. Therefore, advertised speeds as offered by Bell and other Canadian ISPs remain a poor indicator of real broadband performance in the country.

66. As documented in Figure 3 with data from three different tests for measuring actual network speeds (versus advertised rates Bell emphasizes), world leading services with very high speeds that are available for households and businesses in other countries are simply not available in the Canadian market due to the lack of FTTP penetration and under-investment in network capacity. As illustrated in Figure 3, the situation in Canada is not as bad as much lower income countries such as Mexico, Turkey, and Italy, but there is clear room for improvement if Canada’s broadband infrastructure quality is to

remain internationally competitive. In particular, as documented in Figure 3 average speeds in Canada are about average for high income countries, but access to higher speed services that operators in many other countries are succeeding in delivering are certainly not available to Canadians.

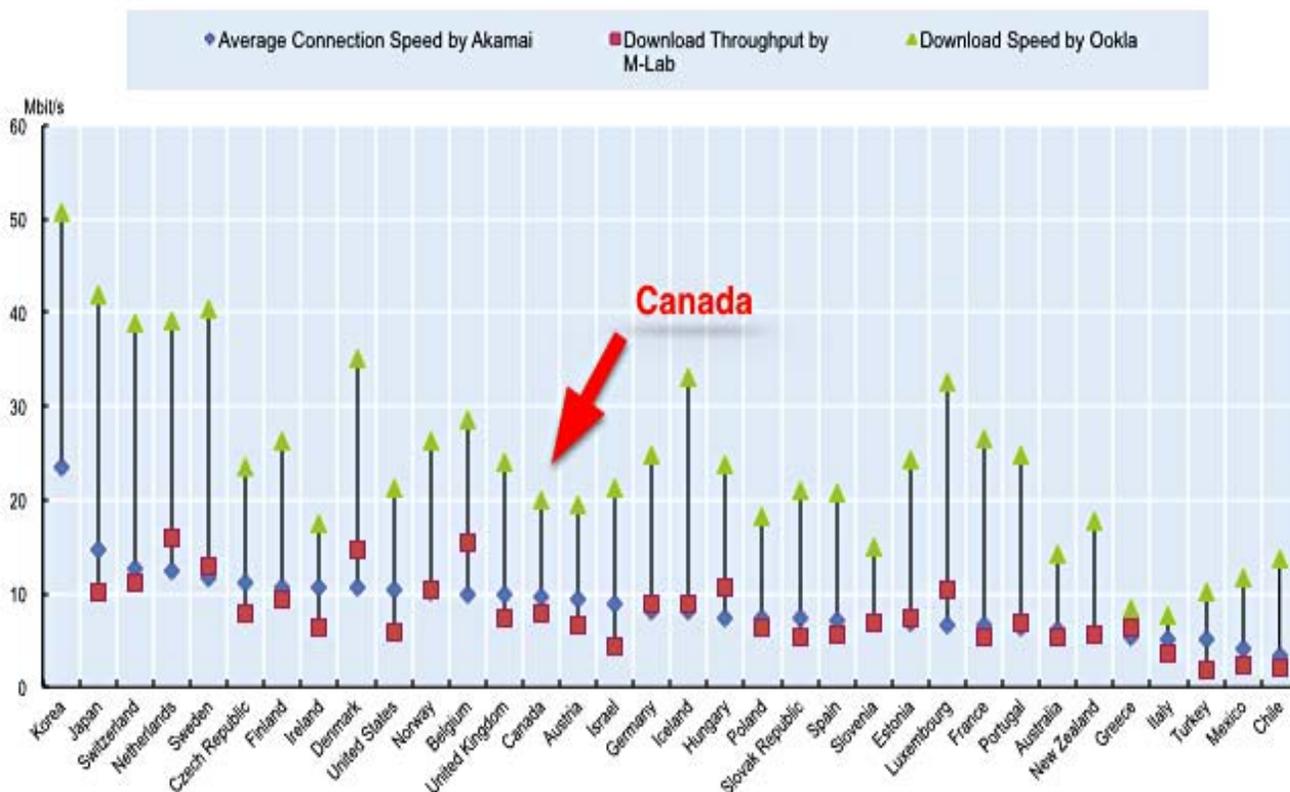


Figure 3. Range of measured broadband speeds

(Source: OECD, 2015. Each shape represents results from one the three testbeds for measuring connectivity speeds often used in policy debates, namely Akamai, M-Lab, and Ookla/Speedtest).

Bell petition, E13 - The impact that regulatory policy can have on broadband deployment is readily evident from the United States experience. Figure E5 demonstrates that when mandated access regulations applied to large facilities-based carriers in the United States, investment in next- generation broadband networks slowed to a crawl. But when these restrictions were lifted by the regulator, broadband investment by these same



facilities-based providers exploded. Why? Because the removal of mandated access restored the business case for investing capital in broadband.

OpenMedia response:

67. This argument about regulation and investment in the U.S. is completely spurious. U.S. evidence on regulation and investment in the U.S. does not support Bell's contentions (see Figure 4).²² The decision by Verizon to rapidly increase its fibre footprint in the mid 2000s was a strategic one as it was losing market share to higher speed cable companies. Verizon's management also recognized that by reducing their dependence on legacy copper actually they can reduce operational and the cost of capital, while delivering competitive services. The problem in Canada that CRTC 2015-326 is trying to address is that Bell, Telus, and others failed to make the same choice as Verizon and instead determined that it would be more profitable, at least in the short term, to continue to deliver broadband services over last mile copper networks, which cannot deliver the type of world class Internet access services Bell purports Canadians can access.

²² See Derek Turner: Fighting the Zombie Lies. The Free Press, 2014; and comments to the FCC. <http://www.freepress.net/blog/2014/05/14/fighting-zombie-lies-sorry-isps-title-ii-good-economy>

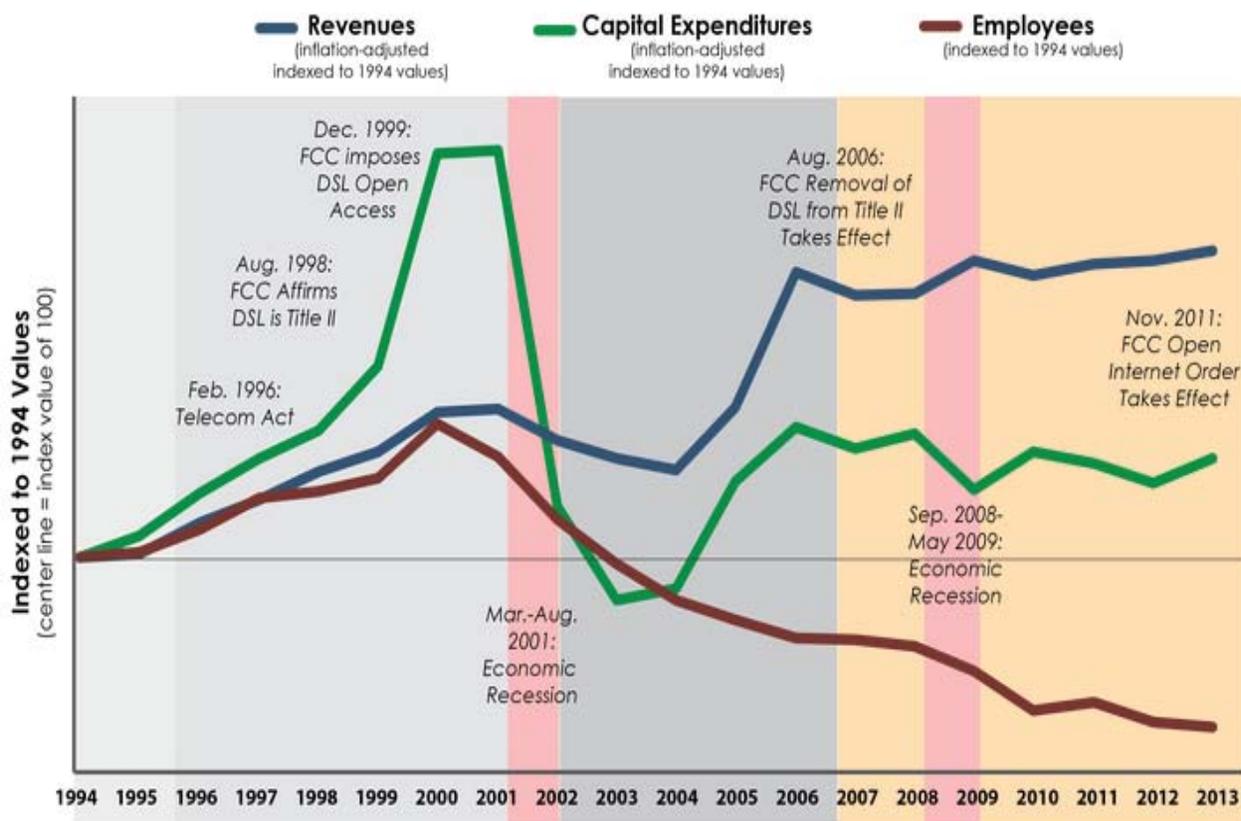


Figure 4. Bell Company revenues, capital expenditures, and employees in the U.S. (Source: Free Press, 2014.)
 Note that the large drop in capex levels in 2001 and 2002 is associated with the collapse of the financial bubble at the time and not the preceding decision by the FCC to impose open access rules on DSL. Removal of open access obligation on DSL by the FCC in 2006 is not associated with increased investment, even after the risk free rate was reduced to near zero following the 2008 financial crisis).

68. It is however important to note that although forbearance in the U.S. may have worked out a bit better than in Canada in promoting investment in fibre by certain operators of legacy copper networks (i.e. Verizon), U.S. FTTP diffusion rates remain substantially below OECD average (Figure 2). The U.S. market is also very different than Canada's much smaller and regionalized market, which makes comparisons highly problematic. Even if we accepted Bell's argument that forbearance has been successful in the U.S., which we don't because there is no evidence to support the claim, simply imitating the U.S. regulatory approach in Canada will not necessarily meet the needs and conditions of the Canadian market and Canadian consumers.



Bell petition, E15-16 - fibre-to-the-home requires a brand new build using no legacy components. In fact, for Bell, the build out of fibre-to-the-home is a completely new build to replace our 135 year old legacy copper plant. ... Nevertheless, in July the CRTC decided to apply the old regulatory rules applicable to legacy networks to these brand new fibre-to-the-home networks.

OpenMedia response:

69. Bell is again attempting to tie mandated open access to legacy platforms, thereby seeming to make open access a policy framework that was intended to live and die with the legacy platforms for which it was first created. The principle of technological neutrality does not, however, admit of any such arbitrary distinctions based on the age, cost or engineering attributes of fibre or any other platform. The fact that Bell admits that it is still using copper networks that are over a century old contradicts its claims that there is no problem to solve and open access regulations intended to increase the incentives of legacy operators to become more innovative and invest more in new technologies should not be adopted.

70. With CRTC 2015-326, Bell and other less efficient incumbents will be forced to become more innovative because if they don't the new rules provide strong incentives for others to do so. It is precisely because of this fear of competition, investment, and innovation that Bell is fighting so hard with this petition and various requests at the CRTC to derail the development of fair open access rules that provide attractive returns to investors in in FTTP networks of the future. Nevertheless, attractive regulated wholesale prices for higher speed services will ensure that investors in operators that choose to innovate and deploy FTTP will make an attractive long term return on their investments in Ontario and Quebec. It is precisely for this reason that OpenMedia submits it is not fair to Canadians outside of the two provinces that the Commission adopted a regional



strategy for implementing the open access rules that we hope will help enhance market forces in providing *all* Canadians with FTTP networks that meet their growing needs for connectivity.

Bell petition, E19 - As Figure E6 below demonstrates, facilities-based providers like Bell have always led the way in terms of wireline investments in fixed broadband. The CRTC's decision is premised on the assumption that mandated access will encourage Reseller ISPs to invest in their own facilities. But this has not happened in Canada, even after the CRTC mandated access to earlier generation fibre-to-the-node (FTTN) networks in 2010.

OpenMedia response:

71. The main aim of the decision at issue is not to stimulate large-scale investment in infrastructure by “reseller” ISPs, but to a) Enhance dominant operators’ incentives to invest in FTTP, and b) to provide third party access to bottleneck facilities to promote competition and discipline prices. And Fig E6 in Bell’s petition proves the very opposite of what Bell seeks to prove: not that only Bell and the other incumbents can be relied on to build new networks, but that the lack of reseller facilities makes it necessary for the Commission to intervene and continue its policy of open access. That is why the new entrant (or reseller) ISPs are referred to as “non-facilities-based.” With the exception of fibre transport facilities to which the Commission did not mandate third party access, the new regulatory framework will enable larger operators to leverage advantages incumbency provides them in deploying FTTP networks while continuing to earn attractive returns on any investment they make in advanced broadband technologies.

Bell petition, E20 - We would still have the obligation to provide Reseller ISPs access to our legacy broadband technology, where it exists (i.e., DSL and FTTN).



72. This undertaking is an empty gesture, since DSL subscriptions are dropping in favour of high-speed cable and newer telco platforms. It is also highly misleading because under CRTC 2015-326 the Commission has not only extended the scope of the obligations to include all technologies, but has adopted a disaggregated approach to wholesale market design that is fundamentally different than the aggregated interconnection model currently in place. The fact that Bell and others have succeeded in convincing the Commission to phase out existing wholesale obligations, including local loop unbundling (ULL) and aggregated services in CRTC 2015-326 further highlights the misleading nature of this empty gesture by the petitioner (see Appendix 2 for further details on OpenMedia's concern about premature phase-out of access obligation to local loops and existing aggregated services).
73. This claim highlights the problem that is caused by Bell's decision to use this obscure and rarely used petition procedure, while having received most of what it wants already in the decision and requesting multiple other variances through its Part 1 Application at the CRTC. Precisely because of the potential for these types of inconsistencies that basic tenants of legal procedure prohibit simultaneous appeal and judicial authorities interpret multiple concurrent appeal as an affront to the rule of law. As we have argued to the Commission regarding Bell's Part 1 Application in this matter, the fact that Bell has submitted multiple appeals to multiple authorities should be sufficient reason to dismiss its claims and requests to vary CRTC 2015-326 *prima facie* without a detailed inquiry into the merits of the requests and arguments.

Bell petition, E21-22 - The CRTC's decision ... states that it "expects that the incumbent carriers will generally continue to invest in FTTP access facilities in response to consumer demand, as well as to compete effectively and efficiently with the Cablecos." ... The CRTC's decision means that investment will be stopped or delayed for years in areas where the return on investment can no longer be justified.



OpenMedia response:

74. The Commission is right to suggest that both demand and competition will oblige Bell and the other telcos to keep building FTTP networks. The most obvious driver here is cable competition (see above). Even if it does not motivate some legacy copper network operators to invest and innovate, others will. Fair public interest rules designed to enhance facilities based investment and service-based competition cannot be allowed to be subverted too much by very narrow interests. As detailed above in reaction by RBC to the CRTC decision, even Bell’s major investors are beginning to realize that Bell management has waited long enough to start deploying FTTP actively and the new regulatory framework will not have a negative impact on FTTP deployments

Bell petition, E26 - Today's digital economy requires a different approach to regulation; an approach which stimulates private sector investment and promotes competition among, and not at the expense of, those that are prepared to invest billions in private capital to future proof Canada's Internet infrastructure.

OpenMedia response:

75. Bell’s idea of a “different approach” is surprisingly traditional: competition among the incumbents and their facilities, i.e. intermodal competition between telcos and cablecos. That competition model, which has been in play since the late 1990s in both Canada and the US, has not created enough market discipline to put Canadian broadband in the top ranks of developed countries for either prices or speeds. Nor has it motivated Bell, Telus, and other telcos to decommission their copper and deploy fibre at a rate that meets the rapidly growing demand by Canadian households and businesses for very high speed symmetric connection needed to deploy advanced Internet application in a reliable manner.



E27 - Blair Levin, appointed under the Obama administration to author the United States National Broadband Plan with a view to "achieving affordability and maximizing use of broadband to advance consumer welfare"¹¹ and other social and economic goals, has explained that: "... The lesson here is competition does not arise from the desire for it; it comes from rules that attract investment into competitive networks."

OpenMedia response:

76. By taking this quotation out of context, Bell has misrepresented Blair Levin's broader policy perspective. In the same CNET article, Mr Levin says the following: *"Government's commitment to a deployment agenda cannot be time-limited. It must be open to new understandings about the barriers to competition."* This view runs directly counter to Bell's claim that mandated open access, a policy designed explicitly to stimulate competition in a market with large economies of scale, should in fact be time-limited – (i.e., limited to the legacy broadband platforms that are gradually being eclipsed by new fibre platforms). If the Governor in Council were to grant Bell's petition, then the resulting wholesale regulatory regime (even if the Commission rejects Bell's other anti-competitive requests for changes to the decision, see Appendix 1 to this document) would pose a new and serious barrier to sustainable competition: new entrant ISPs will be confined to the margins of competition by having access only to platforms that are going out of favour and can only deliver low-speed and low-margin retail services, while Bell and the other incumbents will face even less competition under that scenario than they do today. Consequently, they will have even less incentives than before the decision to invest in FTTP networks they have suddenly become committed to after CRTC 2015-326 extended open access rules to both legacy and next generation broadband technologies.



Bell petition: E28-29 - Broadband investment creates jobs both directly, through the workforce required to complete a multibillion dollar infrastructure project, and indirectly by increasing Canada's productivity and competitiveness and creating new economic opportunities. ... Experts estimate that a reduction in annual investment from Bell Canada of up to \$384 million will lead to up to 15,360 lost jobs and a \$1.2 billion annual reduction in gross domestic product (GDP).

OpenMedia response:

77. Aside from the methodological flaws in how these figures were arrived at, Bell's position overlooks one of the basic truths about policymaking: it involves tradeoffs. No policymaker wants to be responsible for lost jobs. By the same token, no regulator wants to see serious harm inflicted on both competition and consumer welfare by giving free rein to a powerful corporation which has failed to innovate and invest in advanced technologies relative to its international counterparts. It is precisely for these reasons that Canada has a *Telecommunications Act* and a CRTC: To help the private and public sectors "co-manage" the industry in order to achieve the policy objectives outlined under Section 7 of the *Telecommunications Act*.²³

*Bell petition, E30 - By granting this Petition, the Government can propel Canada's **continued** broadband leadership by supporting billions of dollars in infrastructure investment, creating thousands of jobs, and including in the broadband economy communities large and small, urban and rural, right across the country (emphasis original).*

OpenMedia response:

78. Bell has politicized the debate over FTTH by expanding the scope of its argument well beyond the mandate of the original proceeding. It has done so by appealing to the

²³ See Liora Salter and Rick Salter. "The New Infrastructure." *Studies in Political Economy* 53 (1997).

sensitivities surrounding job creation and potential job loss - outcomes that are both hard to quantify and hard to push aside without looking politically callous. So significant is this theme to Bell, that it uses the word “jobs” no less than 47 times in its petition (including citations). The problem with that degree of emphasis is that, as with capital investment overall, the number of jobs created (or lost) has little or no bearing on the substance of this policy debate: whether Bell’s plan or the CRTC’s plan will bring about better broadband networks in Canada, with access lines that are affordable, dependable and attractive to all consumers, featuring low latencies, more symmetric configurations, fewer data caps, “excessive” use overcharges, and better customer service. This line of argument also rests on the specious claim of Canada’s broadband leadership, which in para E30, Bell describes as “continued” - and puts in bold, as if to counteract any skepticism on the part of the reader.

Bell petition, E31 - The evidence before the CRTC was that decisions that favour Reseller ISPs do not result in any change in the retail rates paid by consumers and, despite their claims, actually result in Reseller ISPs abandoning any plans for investments in infrastructure like fibre- to-the-home.

OpenMedia response:

79. As detailed throughout this submission by OpenMedia, Bell’s black-and-white characterization of decisions as favouring reseller ISPs as oppose to investments in FTTP is misleading. The rates charged by reseller ISPs are determined by many factors, not the least of which is the tariffed wholesale rates that they must pay to Bell and the other incumbents. Up until now, the wholesale broadband rates approved by the Commission have been based on the Phase II costing methodology, which has allowed Bell in particular to make its recoverable costs far higher than its counterparts in Europe are able to do. Given that Bell managed to convince the commission to retain elements of the regulatory system that benefit its interests as described above, the ruling is going



to make even less attractive for non-incumbent third parties to enter the market and compete directly with retail offerings of dominant operators that control the physical infrastructure.

80. This perspective on the decision further highlights the flawed nature of the claim that the Commission favoured resellers over incumbent investments in moving toward a technologically neutral set of rules for the governance of the wholesale market. Instead, the ruling that offers investors in companies such as Bell with attractive returns on FTTP investments. It is precisely because of the successes of incumbents such as Bell in shaping CRTC regulations in the past that the share of the market by the so-called “resellers” remains low (less than 10% in residential and 30% in business markets for Internet access according to latest CRTC CMR data). In addition to limiting entry, regulated prices that overcompensate investors partly explains high retail prices in Canada compared to many other advanced economies (see Figure 5). As documented in Figure 5, affordability of broadband in Canada is a particular concern because of the limited range of lower price offerings in the Canadian retail markets. This represents a particular problem for the ability of lower income Canadians to access higher speed Internet access services.
81. The high prices Canadians have to pay for relatively low speed Internet subscriptions might explain why Bell claims that Canada is a global broadband leader, and it will continue to be so only if the Cabinet adopts changes to CRTC 2015-326 decision as Bell demands. Neither the facts presented by Bell, nor its characterization of what CRTC 2015-326 is about can be substantiated.

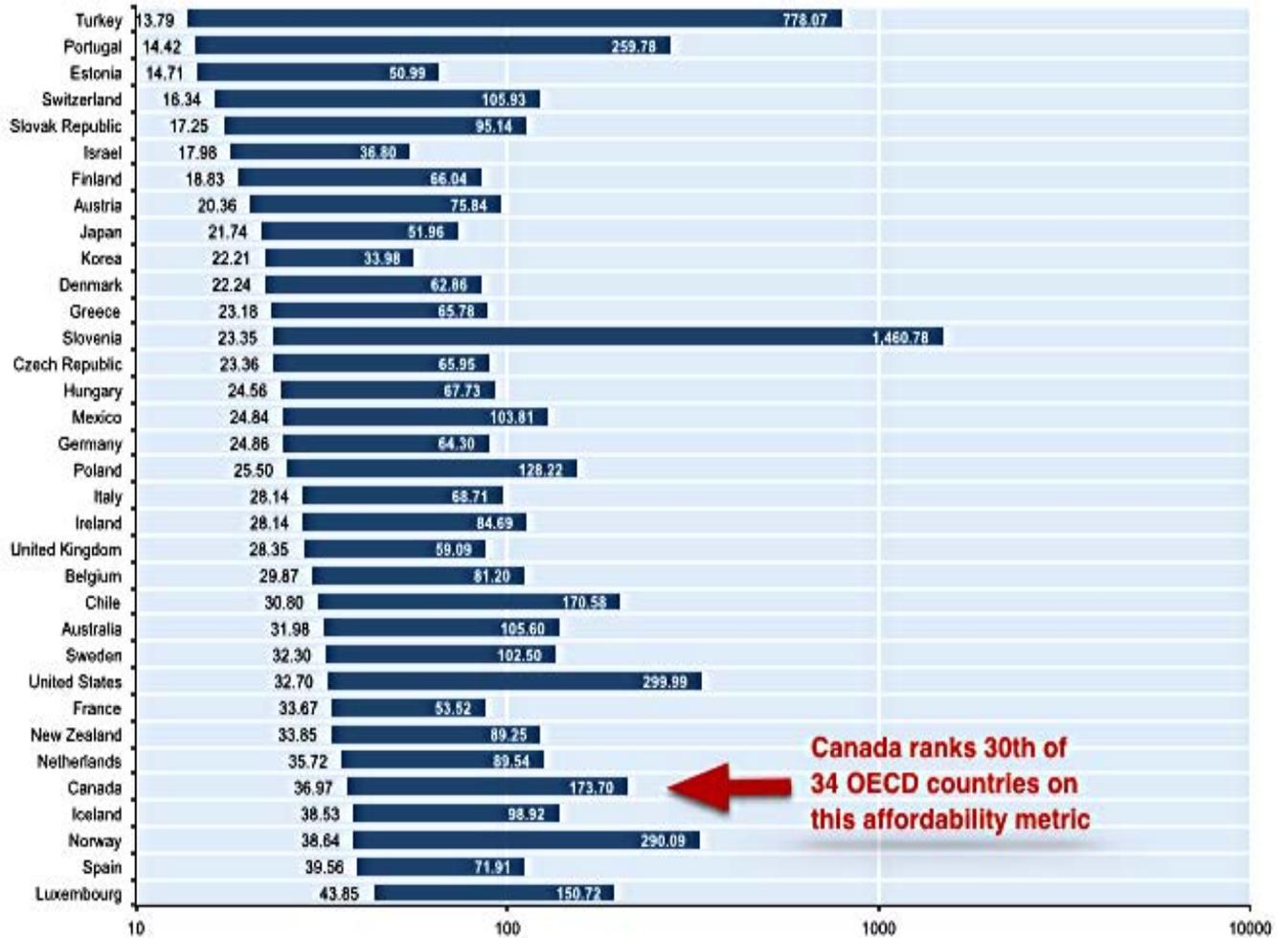


Figure 5. Fixed broadband subscription pricing range (Source: OECD, USD PPP, 2015)

82. Given (i) all reasons we have detailed herein, and (ii) the fact that this request to overturn CRTC 2015-326 came within 48 hours of the federal election results, Bell’s efforts amount to little more than playing politics with the Internet bills of individual Canadians and small businesses. In closing, OpenMedia, along with more than **50,000 Canadians** that have joined our Internet Emergency campaign, therefore request “**the new government to reject Bell’s underhanded, price-gouging scheme. Enough is enough.**”



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Appendix 1: Proposed anti-competitive restrictions. OpenMedia submission to CRTC regarding Part 1 Application by Bell to Review and Vary TRP CRTC 2015-326

Executive summary

1. In its Application to review and vary Telecom Regulatory Policy CRTC 2015-326, Bell has identified a number of perceived errors in fact and law in the Commission's decision. Bell also offers three specific changes to the decision that it purports would remedy these errors.
2. Issues raised in Bell's Part 1 Application are partly related to questions that are currently the subject of the CRTC 2015-326 follow-up implementation process. Furthermore, as the Commission is aware, Bell has also appealed CRTC 2015-326 to the Governor in Council. Simultaneous appeals initiated by Bell have the capacity to create inconsistent or even contradictory results. Some of Bell's proposals in this Part 1 Application essentially restrict the range of options that are before the Commission in the ongoing CRTC 2015-326 implementation proceeding. To avoid contradictory results from Bell's multiplicity of appeals and to enable the Commission to implement CRTC 2015-326 in an effective manner, we submit the Commission has sufficient grounds to dismiss Bell's Part 1 Application *prima facie* without a detailed inquiry into the substantive merits of Bell's arguments.
3. We agree with Bell regarding some of the errors in fact and law that it argues the Commission has made in CRTC 2015-326. However, Bell's interpretation of what these errors mean is incorrect. More important than these logical flaws, the wholesale solutions Bell offers to purportedly remedy the Commission's supposed errors are fundamentally anticompetitive, as they are designed to restrict the set of potential entities that can access facilities the Commission has determined to be essential. These arbitrary restrictions have the potential to make it impossible for the Commission to implement CRTC 2015-326 in a manner that



promotes investment and competition in the provision advanced fibre access and transport facilities needed to meet demand by Canadians for a world class broadband infrastructure in the future. Consequently, they would contravene statutory objectives per Section 7 of the *Telecommunications Act* (specifically, S.7.a re “orderly development, S.7.b re “quality and affordability, S.7.c re “efficiency”, and S.7. re “reliance on market forces”).

4. Incorporating Bell’s wholesale access restrictions (proposals 1A and 1B) in CRTC 2015-326 is likely to have a particularly negative impact on rural Canada (where it is neither feasible nor efficient to deploy duplicate transport and middle mile facilities) and the retail market for business connectivity (where there is currently more service-based competition than in the residential market for broadband).
5. Restricting the range of entities with potential access to Bell’s proposed Disaggregated Broadband Service (DBS) to parties with less than \$500 million in revenues “in Canada and abroad” can be perceived as an enhancement in Canada’s regulatory protections for large incumbents from international competition and risks violating Canada’s international obligations to its trading partners. Current and future Canadian customers will ultimately have to pay for the higher prices and lower quality of service that is usually associated with protecting domestic entities against domestic and international competition.
6. Consequently, OpenMedia submits that it would be in the public interest for the Commission to dismiss Bell’s Part 1 Application to vary CRTC 2015-326.

Intervention

7. In paragraph 5 of its Application, Bell reiterates one of the Commission’s stated objectives to justify its proposals for restricting the range of potential market participants with access to its



proposed Disaggregated Broadband Service (DBS). Bell points to the statement by the Commission that moving to a disaggregated arrangement is intended to “encourage competitor investment in alternate transport”. Bell further asserts, without providing any evidence or detailed analysis, that “the mandated introduction of DBS will trigger virtually no investment in additional transport facilities”. Bell does not consider any of the other stated policy or statutory objectives that justify the Commission’s decision to adopt a more disaggregated and technologically neutral wholesale framework in CRTC 2015-326.

8. We partly agree with Bell that the Commission has thus committed an error in fact by mistakenly linking the introduction of DBS with additional investment in transport. In suburban and rural Canada, even incumbent operators often lack sufficient commercial incentives to extend or upgrade transport facilities, and have received significant public subsidies for doing so in some areas of the country. In urban centres where the costs of deploying duplicate transport facilities are relatively low, non-incumbents’ incentives to invest in transport will depend, at least in part, on the quality and price of wholesale access to last mile networks the Commission has determined to be essential. Since the quality of available wholesale access services (layer 3 vs layer 2 control, “usage sensitive” elements, virtual unbundling) and wholesale mark-up levels under the ruling are currently under consideration in the CRTC 2015-326 follow-up implementation process, Bell’s conjectures on investments in transport facilities by non-incumbents are premature.
9. Notwithstanding the flaw in Bell’s critique of the Commission’s decision before the Commission has decided on the key price and quality of service parameters for the operation of the new wholesale market, Bell proposes two solutions that it claims are intended to “achieve increased investment in transport facilities.”
10. Bell proposal 1.A: *“in any given ILEC Central Office (CO) or cable head-end, DBS is only available to an Internet service provider (ISP) that brings **its own** transport facility to that CO or to the*

head-end's designated point of interconnection" (emphasis added). This proposal is particularly problematic in the context of Bell's argument for increased investment if it implies that Bell will not allow multiple retail service providers to interconnect with a single wholesale transport provider at Bell's CO's (or other points of interconnection as relevant). By using a single transport supplier (either the incumbent or a potential entrant specialized in transport access), multiple competing service providers can share the fixed costs of deploying duplicate transport assets to a larger number of interconnection points outside of the urban centres of Canada. This solution is likely to have significant economies of scale relative to Bell's proposal that each ISP has to bring "its own" lines into Bell's local facilities. Bell's proposal will limit the scope for cooperative arrangements and specialized firms that take advantage of these scale economies. Furthermore, even if Bell's proposal were to succeed in some areas and multiple transport facilities are deployed by ISPs in certain COs, Bell's proposal could lead to inefficient duplication and unnecessary overbuild. Therefore, in practice, proposal 1.A by Bell is likely to lead to under-investment in transport access in higher cost rural and suburban communities, while leading to over-investment and inefficient duplication in low cost urban centres.

11. Bell proposal 1.B: *"the ISP subscribing to DBS must be the provider of the high-speed services delivered to the end-users accessed through DBS."* As above, this proposed restriction on the range of market participants is purported by Bell to be designed to increase incentives to invest in transport facilities by multiple service providers. As noted in paragraph 18 of Bell's Application, this proposal will "ensure that for every ISP offering end-users retail services supported by DBS in a given CO, at least one competitor transport facility to that CO would also be present". In addition to being extremely wasteful in terms of duplication to the point of impracticality, this proposal will also limit the scope for cooperation and cost sharing by service providers who want to continue to serve their customers under the new disaggregated model.
12. Overall, Bell's proposals 1.A & B would limit the scope for the development of a disaggregated wholesale market as the Commission intended with adoption of CRTC 2015-326. Bell's

proposals are also not likely to lead to increased investment in transport facilities outside of a small number of urban centres, and might potentially have the opposite effect of reducing investments in transport facilities elsewhere. Importantly in the context of Bell's assertion that the two proposals are required under the 2006 Policy Direction, OpenMedia submits the proposed restrictions will in fact unduly and unnecessarily limit the scope for relying on market forces to the maximum extent possible and interfere with the operation of a competitive wholesale market unnecessarily, with little chance of generating the compensating benefits that Bell conjectures they will have in terms of increased investment.

13. Bell proposal 2: *"DBS is not available to entities with annual revenues in excess of \$500 million in Canada or abroad"*. Bell justifies this restriction on the range of potential operators by arguing that it would "allow TRP 2015-326 to achieve a better balance between fostering resale competition from the smaller ISPs and facilities-based competition from larger providers"(par. 6). Bell does not discuss the implications of its proposal 2 for investment incentives in transport, which were the primary driver for its proposals 1A and 1B, nor for stimulating investment in the development of next generation fibre access networks. Larger market participants that Bell is trying to exclude from interconnecting with its legacy and FTTP networks it hopes to build in the future are likely to be precisely those with sufficient scale and resources to deploy the duplicate transport facilities Bell is promoting in its proposals 1A and 1B.
14. In addition to potentially reducing investment incentives in alternative transport by Bell and other large providers to each others' disaggregated points of presence, adopting the proposed size threshold can have a particularly large negative effect on competition in the retail business market for Internet access services, which currently exhibits more service-based competition than in the retail residential market.
15. While Bell's proposal 2 is not exactly clear on how this size restriction is going to promote investment and competition in the Canadian market, excluding entities with more than \$500

mil. in revenue “in Canada or abroad” from accessing the wholesale market in Canada can easily be interpreted as a discriminatory barrier to international trade and investment. This kind of barrier would further discourage international investment in the telecom infrastructure and provision of services Canadians demand; be perceived as a form of regulatory protection against foreign competition; and potentially contravene Canada’s obligations to trading partners.

16. Although Bell’s proposal to exclude cable providers from its networks might motivate cable providers to increase their own investments in next generation FTTP networks and platform competition, as noted above it has compensating risks in terms of entry and investment decisions by other large operators at home and from abroad. It would also enhance the potential for inefficient duplication and under-investment in advanced networks in higher cost areas where the business case for deploying multiple networks is simply not there.
17. Bell goes on to argue that the \$500 mil. restriction “also adds the benefit of mitigating the inequity of having DBS first available in Quebec and Ontario, where wholesale ISP market shares are already the highest” (para. 30). We agree with Bell about the noted inequity and continue to be puzzled about the decision by the Commission to restrict the application of its new policy framework only to large providers in Ontario and Quebec. However, we submit that adding another arbitrary restriction on the range of parties that can participate in the wholesale market in Ontario and Quebec is not likely to be an efficient and effective response to this error by the Commission in CRTC 2015-326, as required under Section 7. f of the *Telecommunications Act*.
18. The solution that would minimize interference with market forces - and regulatory uncertainties about the practical scope of wholesale access obligations - would be to apply the same regulatory framework across Canada. OpenMedia submits that the Commission should remedy this error as it is going to create significant distortions to market forces by extending



the scope of the application of CRTC 2015-326 to include ALL large and small operators of essential network facilities around the country. Failure to do this will lead to a patchwork of conflicting rules for the operation of the wholesale market, increasing uncertainties facing investors, and the costs of negotiation between wholesale market participants. By correcting this error according to our proposal, Canadian consumers outside of Ontario and Quebec may also benefit from improved quality and prices in the retail market associated with the new wholesale framework the Commission has determined to represent the appropriate balance between competing policy goals and economic interest in TRP CRTC 2015-326.

Appendix 2: Proposed phase out of existing obligations. OpenMedia submission to CRTC regarding Part 1 Application by Allstream to Review and Vary TRP CRTC 2015-326

Intervention

1. In its Application to review and vary Telecom Regulatory Policy CRTC 2015-326, Allstream argues that *“there is substantial doubt as to the correctness of the decision to phase out ULLs. We believe that the Commission has made an error in fact in its determination that mandated access to ULLs should be phased out in three years”* (para. 3). OpenMedia agrees with the analysis provided by Allstream with respect to unbundled local loops (ULLs) in particular, and more generally inclusion of phase-out provisions in CRTC 2015-326 regarding existing third-party access obligations to legacy platforms in an aggregated manner as is currently the case.
2. By including a discussion of phasing out existing essential facilities obligations in the CRTC 2015-326 decision, OpenMedia submits that the Commission has made a risky decision with potentially adverse consequences for competitive choices available to Canadians. Adverse consequences are a possibility, at least in part, because there remains considerable uncertainty about the manner in which the Commission plans to implement the new disaggregated wholesale access framework it adopted in CRTC 2015-326.
3. If the Commission starts to exercise forbearance on ULLs and other current regulatory obligations to provide third party wholesale access, and the new disaggregated framework under CRTC 2015-326 is not very effective in promoting infrastructure investment in fibre access and transport facilities and service-based competition, then premature phase out of legacy obligations can have a direct and strong negative impact on certain groups of business and residential users that currently rely on third party providers for their services. More generally premature phase out will further reduce the



scope for market forces to impose competitive discipline on incumbent operators, making them less likely to invest in advanced broadband technologies such as FTTP.

4. Consequently, OpenMedia submits that the Commission should give serious consideration to concerns outlined in Allstream's Part 1 application in this appeal and in the ongoing CRTC 2015-326 implementation process. However, given the risks of premature forbearance on competitive choices that are available to Canadian customers, OpenMedia also submits that the Commission should go further than requested by Allstream.
5. OpenMedia submits that to correct the error identified by Allstream, the Commission should make a determination to exclude all discussions of phasing out existing ULL, aggregated Internet access, and other legacy obligations from the scope of ongoing follow up proceeding for the implementation of CRTC 2015-326. Doing so would enable the Commission and the parties to implement a more effective disaggregated wholesale framework. The Commission should only phase out existing obligations when sufficient evidence exists that its new disaggregated wholesale framework is providing competitive choices of superior quality and price than are currently available on the market.
6. By indicating that it will only start to consider applications for forbearance on existing obligations in the next three to five years, the Commission would be able to evaluate if the CRTC 2015-326 disaggregated framework is working in a manner that benefits everyday Canadians and provides the services they require, before making potentially costly errors as a result of premature forbearance from certain services.
7. OpenMedia is aware of the arguments made by various incumbents in response to CRTC 2015-326 that it will not be possible for them to provide simultaneously both the current aggregated and the future disaggregated services the Commission has



mandated. Although some smaller operators may face some technical challenges in doing so, in general there are various technical solutions to providing both aggregated and disaggregated wholesale services at the same time. Virtual unbundling and advanced network policy control systems that enable this type of functionality are readily available and used in the industry for other business applications by network operators. OpenMedia submits that the argument by some operators that they have to phase out aggregated wholesale services as they are today before delivering the kind of disaggregated wholesale market the Commission has mandated represents an attempt to mislead the Commission in how it balances the transition from the CRTC 2008-17 framework to the new CRTC 2015-326 wholesale framework.

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