BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

IN THE MATTER OF

AN APPLICATION BY COMPETITIVE NETWORK OPERATORS OF CANADA

(APPLICANT)

PURSUANT TO SECTION 71 AND PART 1 OF THE *CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RULES OF PRACTICE AND PROCEDURE* AND SECTION 62 OF THE *TELECOMMUNICATIONS ACT*

TO REVIEW AND VARY *ACCESS TO IN-BUILDING WIRE IN MULTI-DWELLING UNITS*, TELECOM REGULATORY POLICY CRTC 2021-239, 27 JULY 2021.

25 OCTOBER 2021

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EXECUTIVE SUMMARY[1]

ES-1. CNOC is hereby submitting an application requesting that the Commission review and vary certain aspects of TRP 2021-239. CNOC's application will demonstrate that the Commission made substantial errors of fact and law in TRP 2021-239 that raise substantial doubt as to the correctness of the decision.

ES-2. CNOC is requesting that the Commission vary TRP 2021-239 as follows:

1) Mandate wholesale access to fibre IBW for any entity to which the MDU Access Condition, as expanded in TRP 2021-239, applies;

2) Determine that mandated wholesale access to fibre IBW will be provided pursuant to a single, nationwide wholesale rate, and that this wholesale rate should be established in a follow-up costing proceeding.

ES-3. The Commission should have mandated wholesale access to fibre IBW based upon the public good and innovation and investment policy considerations established in TRP 2015-326. The Commission made numerous errors of fact and law in TRP 2021-239 in its analysis of these policy considerations. Moreover, these errors of fact and law permeated the Commission's analysis of the impact of TRP 2021-239 on the advancement of Canada's telecommunications policy objectives as articulated in section 7 of the *Telecommunications Act* and promoted by the 2006 Policy Direction and the 2019 Policy Direction.

<u>Wholesale access to fibre IBW should be mandated based on public good policy considerations</u>

ES-4. There was substantial argument on the record of the proceeding leading to TRP 2021-239 as to how mandated wholesale access to fibre IBW would advance consumer welfare and public convenience. However, the Commission dismissed these extensive arguments in a single, two-sentence paragraph.

[1] Capitalized terms that are not defined in the Executive Summary are defined in the body of the submission.

ES-5. Based on this extremely cursory analysis, the Commission decided that the public good policy consideration did not apply to mandated wholesale access to fibre IBW. The reasons provided by the Commission are so brief and cursory that they fail to meet the standard established by the Supreme Court of Canada that reasons must be justified, intelligible, and transparent. Despite the challenges caused by the Commission's insufficient reasons, CNOC can make some arguments regarding how the Commission erred in fact and law in concluding that the public good policy consideration would not support a decision to mandate wholesale access to fibre IBW.

ES-6. The Commission erred in fact and law when it chose not to mandate wholesale access to fibre IBW based on the significant benefits to public convenience.

ES-7. Multiple installations of fibre IBW in an MDU will be highly disruptive to both the owners and occupants of MDUs and may require make-ready work such as the installation of new risers or the modification of existing risers. All of this will generate, noise, dust, and require entry into the units of occupants of the MDU.

ES-8. The significant inconvenience caused by fibre IBW installations is the main reason that the record of the proceeding demonstrated that MDU owners resist multiple fibre IBW installations and deny access to competitors seeking to install fibre IBW.

ES-9. CNOC acknowledges that the Commission has the jurisdiction under the *Telecommunications Act* to intervene in disputes between building owners and TSPs, and grant access to TSPs seeking to install fibre IBW in an MDU. However, there is no valid policy reason to compel TSPs to resort to an adversarial regulatory process that will unnecessarily tie up resources, poison business relationships between MDU owners and TSPs, and take months if not years to resolve when the Commission could instead just grant mandated wholesale access to fibre IBW.

ES-10. Moreover, mandating wholesale access to fibre IBW based on public convenience grounds would be consistent with the Commission's reasoning for mandating wholesale access to support

structures, which was described by the Commission in TD 2008-17. In that case,, the Commission concluded that there was no reason to inefficiently duplicate support structures and that doing so would be inconvenient to the public.

ES-11. The Commission therefore erred in fact and law when it dismissed the public inconvenience caused by multiple fibre IBW installations and failed to mandate wholesale access to fibre IBW based upon the public convenience policy ground.

ES-12. The Commission also erred in law when it concluded that competition and consumer choice do not qualify as public good policy considerations.

ES-13. The Supreme Court of Canada has ruled that validly enacted laws must be presumed to be directed to the public good. Therefore, by including the promotion of competition and consumer choice as telecommunications policy objectives in section 7 of the *Telecommunications Act*, as reinforced by the 2006 Policy Direction and the 2019 Policy Direction, the Government of Canada elevated competition and consumer choice to public good policy considerations.

ES-14. According to the framework established in TRP 2015-326 the Commission will mandate a wholesale service if there is a need for the service for reasons of social or consumer welfare. The conclusion that competition and consumer choice qualify as public good policy considerations is bolstered by a consideration of the dictionary definition of "welfare". That definition establishes that welfare includes economic well-being, which is advanced by competition and consumer choice.

ES-15. Moreover, the Commission mandated access to copper IBW through a series of decisions in the 1990s based solely upon its policy of end-user choice. This affirms that end-user choice constitutes a free-standing ground on which a wholesale service can be mandated.

ES-16. The Commission therefore erred in law in TRP 2021-239 when it stated that competition and consumer choice did not qualify as public good policy considerations.

ES-17. The Commission made serious errors of fact and law when conducting its analysis of the impact of mandated wholesale access to fibre IBW on competition. The Commission started by correctly defining the product market as consisting of "technologies and facilities that provide high-speed symmetrical connectivity between a service provider's demarcation point and customers' suites in a MDU in order to support the provision of services such as high-speed broadband Internet". The Commission also correctly noted that there were several unique characteristics of fibre IBW that distinguished it from an end-user perspective, namely its ability to deliver very fast speeds and symmetrical upload and download speeds.

ES-18. The Commission subsequently stated, during its analysis of the impact of mandated wholesale access to fibre IBW on competition, that competition in MDUs would not be impacted by a failure to mandate wholesale access to fibre IBW as end-users are often not aware of the underlying facilities used to access retail services and that mobile wireless, copper IBW, coaxial cable IBW, and aggregated HSA service would continue to be available in MDUs.

ES-19. The Commission contradicers are often not aware of the underlying facilities that are used to provide their retail services as the Commission already concluded during its product market analysis that consumers are in fact aware of the differences between fibre IBW and other technologies. This contradiction renders the Commission's reasons unintelligible, thereby constituting an error of law. Moreover, none of the other technologies listed by the Commission are substitutes for fibre IBW as they are not capable of delivering the same speeds or symmetrical upload and download speeds. These errors of fact and law render the Commission's conclusions with respect to the impact of mandated wholesale access to fibre IBW on competition unintelligible.

<u>Wholesale access to fibre IBW should be mandated based on the innovation and investment policy consideration</u>

ES-20. The Commission also should have mandated wholesale access to fibre IBW based on the innovation and investment policy consideration and it erred in fact and law when it failed to do so. Moreover, a consideration of the innovation and investment policy consideration further demonstrates how mandated wholesale access to fibre IBW will positively impact competition.

ES-21. The investment and innovation policy consideration states that the Commission should mandate wholesale access to a service if doing so will improve the overall level of investment in advanced or emerging networks and services. Mandated wholesale access for fibre IBW will clearly stimulate the level of investment in fibre IBW and thus the deployment of competing fibre networks, which CNOC emphasizes in respect of the competition component of the public good analysis discussed above. This positive outcome would occur because mandated access to fibre IBW will lower the costs for competitors to deploy their fibre networks in MDUs more broadly. The capital saved through mandated wholesale access to fibre IBW will be redeployed to other network deployment activities. It is a basic economic fact that lowering the costs of network deployment will stimulate greater investment in fibre networks and thus competition among those networks. The Commission erred in fact in ignoring the positive impact that mandated wholesale access to fibre IBW would have on the level of investment in fibre networks.

ES-22. Mandated wholesale access to fibre IBW will also accelerate the deployment of fibre networks by reducing unnecessary and lengthy conflicts between MDU owners and TSPs with respect to access to the MDU for the purpose of installing additional fibre IBW. In its analysis of the innovation and investment policy consideration the Commission erred in fact by ignoring the positive impact of mandated wholesale access to fibre IBW on the accelerated deployment of competing fibre networks in Canada.

ES-23. The Commission also erred in law when it concluded that the record did not provide sufficient evidence that mandated access to fibre IBW would facilitate the adoption of advanced services by end-users as it is impossible to demonstrate this until such time as the service is in fact mandated. It was not reasonable, or a transparent, justifiable, and intelligible exercise of public power, for the Commission to require proponents of mandated wholesale access to fibre IBW to demonstrate that end-users will migrate to advanced services if access is mandated as competitors have not yet been able to access fibre IBW, and thus it is impossible to collect evidence with respect to the impact on end-users' uptake of advanced services.

ES-24. The most critical point is that nowhere in TRP 2021-239 did the Commission make any findings of fact that mandated wholesale access to fibre IBW would have any negative effects, on

competition, investment, or innovation. In this scenario and faced with a clear directive from subsection 1(a)(i) of the 2019 Policy Direction to foster all forms of competition and investment, the Commission should have, as a matter of law, erred on the side of mandating wholesale access for fibre IBW.

ES-25. The Commission therefore erred in fact and in law by choosing not to mandate wholesale access to fibre IBW pursuant to the innovation and investment policy consideration and there is substantial doubt as to the correctness of TRP 2021-239 as a result of these errors.

The Commission's analysis of the impact of TRP 2021-239 on Canada's telecommunications policy objectives and the 2006 and 2019 Policy Directions is flawed

ES-26. The Commission's analysis of the impact of TRP 2021-239 on the advancement of Canada's telecommunications policy objectives and the 2006 and 2018 Policy Directions is deeply flawed.

ES-27. The Commission argued that providing carrier ISPs access to copper IBW will advance Canada's telecommunications objectives. Copper IBW is a legacy technology and no carrier ISPs are investing in building out copper wire networks. Thus, providing carrier ISPs with access to copper IBW will do nothing to advance Canada's telecommunications policy objectives. The Commission erred in fact, and because it made this statement in the absence of any evidence, in law, when it concluded that Canada's telecommunications policy objectives would be advanced by providing carrier ISPs with access to copper IBW.

ES-28. The Commission's analysis of the impact of the decision on competitive neutrality is contradictory. The Commission started its analysis by acknowledging that it was engaging in differential treatment of fibre IBW and then concluded by asserting that it was in fact maintaining competitive neutrality between fibre IBW and other forms of IBW. Differential treatment is not consistent with competitive neutrality. This contradiction renders the reasons at this point of the decision unjustified, unintelligible, and opaque, thereby giving rise to another an error of law.

ES-29. The Commission also claimed that competitors can enter into commercial agreements with fibre IBW owners if they wish to access fibre IBW. However, the Commission made this statement in the complete absence of any evidence to suggest that fibre IBW owners are willing to enter into such agreements. This conclusion by the Commission is thus both an error of fact and law.

ES-30. The Commission made several other contradictory statements and statements that are unsupported by any evidence whatsoever as part of its analysis of the impact of TRP 2021-239 on Canada's telecommunications policy objectives and the 2006 and 2019 Policy Direction. These errors of fact and law raise substantial doubt as to the correctness of TRP 2021-239.

Setting a wholesale rate for access to fibre IBW

ES-31. While the Commission did not establish a wholesale rate for access to fibre IBW in TRP 2021-239 as it chose not to mandate wholesale access to fibre IBW, it is necessary for CNOC to comment upon the appropriate rate-setting methodology.

ES-32. Given the vast number of MDUs across Canada and the many different types of fibre IBW owners, as a matter of administrative efficiency the Commission should establish a single, nationwide, wholesale rate for access to fibre IBW using the same methodology used in BPN 2002-51 to establish a wholesale rate for access to coaxial cable inside wire.

1.0 INTRODUCTION

1. Competitive Network Operators of Canada ("CNOC") is hereby submitting an application ("Application") pursuant to section 62 of the *Telecommunications Act*[2], as well as section 71 and Part 1 of the *Rules of Practice and Procedure*[3] requesting that the Commission review and vary certain aspects of Telecom Regulatory Policy CRTC 2021-239[4] ("TRP 2021-239").

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2 S.C. 1993, c 38 ["*Telecommunications Act*"].

3 *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277 ["Rules of Practice and Procedure"].

4 *Access to in-building wire in multi-dwelling units*, Telecom Regulatory Policy CRTC 2021-239, 27 July 2021 ["TRP 2021-239"].

2. In TRP 2021-239 the Commission decided to depart from its long-standing technologically and competitively neutral policy of mandating wholesale access to all types of in-building wire ("IBW").[5] The Commission concluded that while it would continue to mandate wholesale access to copper and coaxial cable IBW, wholesale access to fibre IBW would not be mandated.[6] The Commission reached this conclusion after finding that wholesale access to fibre IBW failed to satisfy the Essentiality Test, and that none of the three policy considerations established in Telecom Regulatory Policy 2015-326[7] ("TRP 2015-326") justified mandating wholesale access to fibre IBW.[8]

3. The Commission's failure to mandate wholesale access to fibre IBW was an error of fact and law that will have deleterious effects on competition, the deployment of fibre networks in Canada, and the adoption by Canadians of next generation telecommunications services. Regardless of the Commission's findings with respect to the Essentiality Test, wholesale access to fibre IBW should have been mandated based upon the public good and innovation and investment policy considerations. In this Application, CNOC demonstrates that the Commission made serious errors of fact and law when it conducted its analysis of the public good and innovation and investment policy considerations with respect to mandated wholesale access to fibre IBW. These errors of fact and law also permeated the Commission's analysis of the impact of TRP 2021-239 on the advancement of Canada's telecommunications policy objectives, as articulated in section 7 of the *Telecommunications Act*, and promoted by the 2006 Policy Direction[9], and the 2019 Policy Direction[10].

4. For these reasons, CNOC is requesting that the Commission exercise its power under section 62 of the *Telecommunications Act* to review and vary TRP 2021-239 as follows:

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5 *Id*., at para 213.
6 *Ibid*.
7 *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015; as amended by Telecom Regulatory Policy CRTC 2015-326-1, 9 October 2015 ["TRP 2015-326"].
8 TRP 2021-239, at para 127.
9 *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355 ["2006 Policy Direction"].
10 *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227 ["2019 Policy Direction"].

1) Mandate wholesale access to fibre IBW for any entity to which the MDU Access Condition, as expanded in TRP 2021-239, applies;

2) Determine that mandated wholesale access to fibre IBW will be provided pursuant to a single, nationwide wholesale rate, and that this wholesale rate should be established in a follow-up costing proceeding.

5. As a consequence of mandating wholesale access to fibre IBW, it will also be necessary for the Commission to modify the updated MDU Access Condition established in TRP 2021-239 to affirm that a competitor has the choice to access end-users in an MDU by means of wholesale access to fibre IBW.[11]

6. CNOC does applaud the Commission for making some positive determinations in TRP 2021-239 that are beneficial for competition and that advance Canada's telecommunications policy objectives. For example, the Commission affirmed that the MDU Access Condition provides competitors with the ability to access MDUs for the purpose of installing their own fibre IBW.[12] In addition, the Commission decided to extend the MDU Access Condition, and associated obligations, to all carrier ISPs.[13] Both of these determinations are positive outcomes and for greater certainty CNOC is not seeking to modify these aspects of TRP 2021-239.

1.1 The Commission's guidelines for review and vary applications

7. The Commission established its guidelines for review and vary applications in Telecom Information Bulletin CRTC 2011-214[14] ("TIB 2011-214"):

> In order for the Commission to exercise its discretion pursuant to section 62 of the Act, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to

[11] TRP 2021-239, at para 213.
[12] *Id*., at para 213.
[13] *Id*., at para 186.
[14] *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011 ["TIB 2011-214"].

(i) an error in law or in fact;
(ii) a fundamental change in circumstances or facts since the decision;
(iii) a failure to consider a basic principle which had been raised in the original proceeding; or
(iv) a new principle which has arisen as a result of the decision.[15]

8. In this Application, CNOC demonstrates that there is substantial doubt as to the correctness of TRP 2021-239 due to errors of law and fact made by the Commission.

1.2 The structure of CNOC's Application

9. The remainder of CNOC's Application is structured as set out below.

10. Part 2.0 demonstrates why the Commission should mandate access to fibre IBW based on public good policy considerations.

11. Part 3.0 demonstrates why the Commission should mandate access to fibre IBW based on innovation and investment policy considerations.

12. Part 4.0 demonstrates that the Commission's analysis of the impact of TRP 2021-239 on Canada's telecommunications policy objectives contains several errors of fact and law that raise substantial doubt as to the correctness of the original decision.

13. Part 5.0 demonstrates why the Commission should use the methodology established in Broadcasting and Public Notice CRTC 2002-51[16] ("BPN 2002-51") to establish a wholesale rate for access to fibre IBW.

14. Part 6.0 is the conclusion.

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[15] *Id.*, at para 5.
[16] *Cable inside wire fee*, Broadcasting and Public Notice CRTC 2002-51, 3 September 2002 at paras 17-19 ["BPN 2002-51"].

2.0 WHOLESALE ACCESS TO FIBRE IBW SHOULD BE MANDATED BASED ON PUBLIC GOOD POLICY CONSIDERATIONS

15. The Commission erred in both fact and law when it determined that public good policy considerations did not justify mandating wholesale access to fibre IBW.[17] In order for the Commission to mandate a wholesale service based on public good policy considerations it must find that there "is a need to mandate the service for reasons of social or consumer welfare, public safety, or public convenience."[18]

16. There was substantial argument on the record of the proceeding leading to TRP 2021-239 as to how mandated wholesale access to fibre IBW would advance consumer welfare and public convenience. The Commission recapitulated these arguments in TRP 2021-239 as follows:

> … Cloudwifi, Shaw, and TekSavvy submitted that the Commission should consider mandating access to fibre IBW based on the public good consideration because, for example, (i) requiring duplication of access to fibre IBW would be an inefficient use of resources and might inconvenience MDU residents where construction is required to accommodate additional IBW; (ii) it would enhance competition in MDUs, thereby increasing innovative and affordable telecommunications services for end-users; and (iii) it is a public good in the same way that telephone poles are considered by the Commission to be a public good.[19]

17. The Commission conducted its analysis of the public good policy consideration in a single, brief, paragraph as follows:

> The Commission considers that the public good policy consideration does not apply to access to fibre IBW because such access does not have a strong connection to social or consumer welfare, public safety, or public convenience. In addition, the Commission does not consider that competition and consumer choice qualify as public good considerations.[20] [Emphasis added]

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[17] TRP 2021-239, at para 113.
[18] *Id*., at para 111.
[19] *Id*., at para 112.
[20] *Id*., at para 113.

18. Based on this cursory analysis, the Commission then proceeded to find that the public good policy consideration does not apply to mandated wholesale access to fibre IBW.[21]

19. The reasons provided by the Commission in its dismissal of the public good policy consideration are so cursory and lacking in explanation that they fail to meet the standard for the exercise of public power of justification, intelligibility, and transparency that was recently affirmed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[22] ("*Vavilov*"). There is simply no explanation as to why the Commission reached the conclusion that it did in the face of significant arguments to the contrary. In effect, the Commission simply stated "We do not agree" and left it at that. The Commission's analysis in paragraph 113 of TRP 2021-239 is not justified, intelligible, or transparent and therefore constitutes an error of law that raises a serious doubt as to the correctness of the decision.

20. The Commission's analysis of the public good policy consideration is so cursory that it is impossible for any reader of the reasons to understand the Commission's reasoning and where in that process the Commission went wrong and reached erroneous conclusions. Thus, the Commission's insufficient reasons have actually prejudiced CNOC's ability to make effective argument on appeal, which is further indicative that these insufficient reasons constitute an error of law pursuant to the standards of justification, intelligibility, and transparency affirmed in *Vavilov*.[23] Nonetheless, despite the challenges caused by the Commission's insufficient reasons, CNOC is able to make some arguments regarding how the Commission erred in fact and law in concluding that the public good policy consideration would not support a decision to mandate wholesale access to fibre IBW.

2.1 Wholesale access to fibre IBW should be mandated based on public convenience

21. The Commission erred in fact and law when it dismissed, out of hand, the significant benefits to public convenience that would accrue from mandated wholesale access to fibre IBW. The installation of fibre IBW in a MDU post-construction can be a highly disruptive experience

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[21] *Id*., at para 114.
[22] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), at para 95 ["*Vavilov*"].
[23] *Ibid*.

for the owners and occupants of the MDU. Installations of fibre IBW post-construction generally require technicians to enter the suites of all of the occupants of the MDU to bring the fibre IBW to the suite. Without mandated access to fibre IBW. this process would need to be repeated for every single TSP seeking to install their own fibre in an MDU. The Commission has vastly underestimated the inconvenience inflicted on MDU owners and occupants of granting access to suites for the purpose of fibre IBW.

22. In addition, the inconveniences inflicted on the owners and occupants of MDUs are substantially aggravated in situations where it is necessary to conduct additional make-ready work, such as installing new risers or modifying existing risers. In these scenarios, it may be necessary to open walls of the MDU and for the technicians to attend at the building over the course of an extended period of time. All of this work could involve noise, dust, entry into units, and other inconveniences to building owners and occupants.

23. Requiring every TSP to install its own fibre IBW is going to result in significant inconvenience to the owners and occupants of MDUs. This inconvenience is the primary reason why MDU owners are often reluctant to allow more than one TSP to install fibre IBW. The Commission acknowledged this problem when it stated "several companies indicated that they have experienced difficulty installing fibre IBW due to uncooperative building owners or riser management companies […]"[24].

24. The Commission then stated that it "considers that its current rules are sufficient to deal with any such instances."[25] In particular, the Commission referred to the MDU Access condition established pursuant to section 24 of the *Telecommunications Act* as well as its powers under section 42 of the *Telecommunications Act*.[26] CNOC acknowledges that the Commission certainly has the jurisdiction to grant access to TSPs seeking to install fibre IBW.

[24] TRP 2021-239, at para 95.
[25] *Ibid*.
[26] TRP 2021-239, at paras 95-96.

25. However, there is no valid policy reason to compel TSPs to resort to an adversarial regulatory process that will unnecessarily tie up the resources of TSPs, the Commission, and MDU owners, and most likely result in poisoned business relationships between TSPs and MDU owners, when the Commission could instead just mandate wholesale access to fibre IBW. The evidence on the record of the proceeding leading to TRP 2021-239 from parties such as TekSavvy Solutions Inc. ("TekSavvy") affirmed that MDU owners will resist multiple fibre IBW installations due to the disruptions to tenants, but that MDU owners do not object to TSPs connecting to pre-existing fibre IBW.[27] Simply mandating wholesale access to fibre IBW is clearly more convenient than subjecting MDU owners and TSPs to expensive regulatory disputes that will need to be sorted out by the Commission at the expense of the taxpayer. The Commission itself noted in TRP 2021-239 that there were ongoing regulatory disputes about access to MDUs before it as of the date that TRP 2021-239 was issued.[28]

26. The Commission also acknowledged in TRP 2021-239 that parties had argued that mandated wholesale access to fibre IBW "is a public good in the same way that telephone poles are considered by the Commission to be a public good."[29] In its cursory analysis of the public good policy consideration, the Commission did not address this argument whatsoever, which renders its reasons unintelligible and thus constitutes an error of law. The Commission's failure to address this argument is inexplicable as the similarities between mandated wholesale access to fibre IBW and to wholesale access to support structures are significant.

27. In Telecom Decision 2008-17[30] ("TD 2008-17") the Commission described the policy rationale behind mandating wholesale access to support structures as a public good as follows:

> The Commission considers that engaging in the construction of duplicate support structure facilities would result in an inefficient use of public and private resources and would be an inconvenience to the public. Accordingly, the Commission

[27] TekSavvy(CRTC)21Oct2020-103, 20 November 2020, CRTC File 1011-NOC2019-0420, at pp. 2-3.
[28] TRP 2021-239, at Footnote 12.
[29] *Id*., at para 112.
[30] *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008 ["TD 2008-17"].

> determines that support structure services are to be classified as public good services.[31]

28. There is no rational explanation for why the Commission believes that the construction of duplicate support structure facilities is an inefficient use of public and private resources, but the construction of duplicate fibre IBW is not an inefficient use of public and private resources. Moreover, as detailed above, the installation of duplicate fibre IBW is just as much of a public inconvenience, if not more so, as the construction of duplicate support structures. The inconsistency in the Commission's reasoning with respect to these two wholesale services is unintelligible and lacks justification and thus constitutes an error of law.

29. Overall, a consideration of the public convenience, including the convenience of MDU owners and tenants, clearly supports mandated wholesale access to fibre IBW. This conclusion is bolstered when one considers that it is Canadian taxpayers who will ultimately have to pay for the use of the Commission's resources in sorting out the inevitable disputes between MDU owners and TSPs that will arise because of a lack of mandated wholesale access to fibre IBW.

2.2 Competition and consumer choice qualify as public good considerations

30. The following statement by the Commission constitutes an error of law that raises substantial doubt as to the correctness of TRP 2021-239: "the Commission does not consider that competition and consumer choice qualify as public good considerations."[32] The fact that competition and consumer choice qualify as public good considerations is reinforced by the fact that the Government of Canada has elevated the promotion of competition, and by extension consumer choice, to telecommunications policy objectives that the Commission must pursue through section 7 of the *Telecommunications Act*, and as promoted by the 2006 Policy Direction, and the 2019 Policy Direction. Moreover, once competition and consumer choice are properly viewed as public good policy considerations, it becomes clear that the Commission should have mandated wholesale access to fibre IBW.

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[31] *Id*., at para 93.
[32] TRP 2021-239, at para 113.

31. In TRP 2015-326 the Commission stated that it would mandate a wholesale service based upon the public good if "there is a need to mandate the service for reasons of social or consumer welfare, public safety, or public convenience."[33] [Emphasis added]. Competition and consumer choice are clearly matters of social and consumer welfare. There is nothing in TRP 2015-326 or TRP 2021-239 to suggest that competition and consumer choice cannot be considered matters of social and consumer welfare. The Commission did not elaborate in either of these two decisions what constituted the "welfare" of consumers or society at large.

32. "Welfare" is defined by Oxford Languages, the publisher of the *Oxford English Dictionary*, as "the health, happiness, and fortunes of a person or group."[34] The benefits that flow from competition and consumer choice, including the increased affordability of telecommunications services, are clearly linked to the "fortunes" of Canadian consumers and society, which CNOC interprets as referring to economic well-being. Moreover, it is obvious that individuals are happier when they have choices and are not compelled to accept a single option. Therefore, competition and consumer choice contribute to consumer and social welfare.

33. The interpretation that competition and consumer choice qualify as a public good consideration is bolstered by the fact that the Government of Canada has elevated the promotion of competition to a telecommunications policy objective that the Commission must pursue in the *Telecommunications Act*, and in accordance with the 2006 Policy Direction, and the 2019 Policy Direction.[35]

34. Subsection 7(c) of the *Telecommunications Act* states that one of Canada's telecommunications policy objectives is to:

> to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications.

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[33] TRP 2015-326, at para 51.

[34] Definition of "welfare" from Oxford Languages retrieved on October 19, 2021 from Google's online search function.

[35] *Telecommunications Act*, at s 7(c); 2019 Policy Direction at s 1(a)(i).

35. Subsection 1(b)(iv) of the 2006 Policy Direction states that the Commission, when relying on regulation, should use measures that satisfy the following criteria:

> if they relate to network interconnection arrangements or regimes for access to networks, buildings, in-building wiring or support structures, ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers […]. [Emphasis added]

36. Subsection 1(a)(i) of the 2019 Policy Direction states that:

> (a) the Commission should consider how its decisions can promote competition, affordability, consumer interests and innovation, in particular the extent to which they
>
> (i) encourage all forms of competition and investment, [Emphasis added]

37. The Supreme Court of Canada has affirmed that validly enacted laws must be presumed to be "directed to the public good […]".[36] Consequently, by including the promotion of competition as a telecommunications policy objective in the *Telecommunications Act*, the 2006 Policy Direction, and the 2019 Policy Direction, the Government of Canada elevated the promotion of competition, and by extension consumer choice, to public good considerations. Subsection 1(b)(iv) specifically directs the Commission to promote competition over new technologies when developing access regimes for in-building wire. The Commission therefore made an error of law when it stated that competition and consumer choice did not qualify as public good policy considerations.

38. In addition, the direction to the Commission in the 2006 Policy Direction not to artificially favour either Canadian carriers or resellers is informative. By analogy, surely the Commission must also not artificially favour fibre IBW owners by denying Canadian carriers wholesale access to fibre IBW.

[36] *Harper v. Canada (Attorney General)*, 2000 SCC 57 (CanLII), [2000] 2 SCR 764, at para 9.

39. Moreover, as the Commission stated in TRP 2021-239, it has never made an essentiality determination for any type of IBW.[37] Nonetheless, as the Commission describes, it chose to mandate access to IBW, which was a decision that was only ever operationalised for copper IBW, through a series of decisions starting in the late 1990s because "the ability of CLECs to have access to the IBW in an MDU was central to the implementation of its policy of end-user choice."[38] [Emphasis added] This admission by the Commission is significant because it affirms that end-user choice, on its own, constitutes a free-standing ground on which a wholesale service can be mandated, despite not satisfying an essentiality test. CNOC acknowledges that the Commission made the decision to mandate access to IBW prior to its clarification of the Essentiality Test and the three policy considerations in TRP 2015-326. However, in TRP 2015-326 the Commission did not state it was eliminating any policy considerations that had previously been used to decide to mandate a wholesale service.[39] Consumer choice therefore remains a valid reason to mandate a wholesale service and that it has been subsumed into the public good category of policy considerations.

40. Consequently, for all of the above-cited reasons the Commission erred in law when it stated that it did not consider that competition and consumer choice qualified as public good considerations.

2.3 Considerations with respect to mandated wholesale access for fibre IBW and competition

41. Having established that competition and consumer choice qualify as public good considerations, it is necessary to emphasize that mandated wholesale access to fibre IBW will advance competition and consumer choice.[40]

42. CNOC is aware that when the Commission is assessing the competition component of the Essentiality Test, it must make a finding that there is "the potential for a substantial lessening or

[37] TRP 2021-239, at para 8.
[38] *Id*., at para 5. See generally paras 1-8.
[39] TRP 2015-326, at paras 47-53.
[40] The advancement of competition and consumer choice if further bolstered by the greater incentive to invest causes by mandated access to fibre IBW, which is discussed in Part 3.0 of this Application.

prevention of competition in the corresponding downstream retail market(s) should access to the upstream input be denied."[41] [Emphasis added] However, there is no basis for such a high threshold when the Commission is choosing to mandate access to a wholesale facility based on the public good policy considerations, and in particular the benefits to consumer and social welfare derived from greater levels of competition and consumer choice.

43. In this circumstance, and based on the direction to the Commission in subsection 1(a)(i) of the 2019 Policy Direction that it should seek to encourage all forms of competition and investment, so long as the benefits to competition and consumer choice from mandating a given wholesale service are not outweighed by any negative policy outcomes that result from mandating the wholesale service, the Commission should proceed to mandate the wholesale service based on public good policy considerations.

44. The Commission did not make any findings of fact in TRP 2021-239 of negative outcomes that would result from mandating access to fibre IBW. Accordingly, it should have proceeded to mandate wholesale access to fibre IBW based on the public good policy consideration, and in particular, the positive impacts that it will have on consumer and social welfare.

45. While the Commission does not need to find that the failure to mandate wholesale access to fibre IBW will result in a substantial lessening or prevention of competition to mandate wholesale access upon public good policy considerations, the Commission made errors of fact and law in its analysis of the competition component of the Essentiality Test that must be addressed.

46. In particular, the Commission made errors of fact, and contradicted itself, when it established the relevant product market for conducting the Essentiality Test and when it considered product substitutes available to end-users in MDUs. The Commission defined the relevant product market for considering whether mandated wholesale access to fibre IBW satisfies the Essentiality Test as follows:

[41] TRP 2021-239, at para 70.

> The Commission considers that there are several characteristics of fibre IBW that differentiate it from potential substitutes. From an end-user perspective, the primary characteristics of fibre IBW that distinguish it from other technologies are high download and upload speeds, and symmetrical (bi-directional) download and upload speeds. Other technologies that offer high bandwidth and symmetrical download and upload speeds could also be included in the product market, including, for example, coaxial cable operating with DOCSIS 3.1 full duplex mode.[42] [Emphasis added, footnote omitted]
>
> …
>
> Accordingly, the Commission determines the relevant product market to be technologies and facilities that provide high-speed symmetrical connectivity between a service provider's demarcation point and customers' suites in a MDU in order to support the provision of services such as high-speed broadband Internet.[43] [Emphasis added]

47. CNOC supports this definition of the relevant product market as well as the fact that there are unique characteristics to fibre IBW that distinguish it from other forms of IBW from an end-user perspective. However, when it was assessing the competition component of the Essentiality Test, the Commission suddenly contradicted itself and stated:

> Typically, end-users in MDUs are able to access telecommunications services via a multitude of services and may not even be aware what underlying facilities or wholesale services are being used to provide their retail services. For example, end-users in MDUs may be able to access telecommunication services by mobile wireless, copper IBW, coaxial cable IBW, fibre IBW, and aggregated HSA service (over copper or coaxial cable). The availability of those services should preclude a substantial lessening or prevention of competition in the corresponding downstream retail markets, if access to the upstream input is denied. Consequently, the Commission considers that the withdrawal of access to fibre IBW would not generally result in a substantial lessening or prevention of competition.[44] [Emphasis added]

48. This conclusion by the Commission constitutes an error of fact. Firstly, the Commission states that mobile wireless, copper IBW, coaxial cable IBW, and aggregated HSA service are

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[42] *Id*., at para 43.
[43] *Id*., at para 45.
[44] *Id*., at para 74.

substitutes for access to fibre IBW.[45] However, this is not the case as the Commission itself affirmed when it defined the relevant product market. In order to be a substitute, the product must provide high bandwidth and symmetrical upload and download speeds, which none of these other products cited by the Commission do in a manner that is anywhere near comparable to the capabilities of fibre IBW.[46] Moreover, because the Commission is contradicting its own conclusions about the appropriate product market, the reasons in the paragraph just cited are not justifiable, transparent, or intelligible as required by *Vavilov* and thus constitute an error of law.[47]

49. The Commission also clearly stated when it established the product market that there were unique characteristics of fibre IBW that were capable of being discerned "from an end-user perspective".[48] However, when it considered product substitutes, it proceeded to make the completely unsubstantiated claim that end-users "may not even be aware what underlying facilities or wholesale services are being used to provide their retail services."[49] There is no evidence to support the proposition that end-users are unaware of when they are receiving telecommunications services over fibre IBW versus other products and this is thus an error of fact. Moreover, as the Commission is contradicting itself with respect to the perspective of end-users, the reasons here are not justifiable, transparent, or intelligible as required by *Vavilov* and thus constitute an error of law.[50]

50. The preceding discussion in Part 2.0 of this Application demonstrates that when assessing the impact of mandated wholesale access to fibre IBW the Commission does not need to establish a substantial lessening or prevention of competition and that the Commission made serious errors of law and fact in TRP 2021-239 when it conducted its analysis of the impact of mandated wholesale access to fibre IBW on competition.

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45 *Ibid*.
46 *Ibid*.
47 *Vavilov*, at para 95.
48 TRP 2021-239, at para 43.
49 *Id*., at para 74.
50 *Vavilov*, at para 95.

51. In Part 3.0, CNOC expands upon the positive impacts that mandated wholesale access for fibre IBW will have for competition and consumer choice further below in its discussion of the innovation and investment policy consideration.

3.0 WHOLESALE ACCESS TO FIBRE IBW SHOULD BE MANDATED BASED ON INNOVATION AND INVESTMENT POLICY CONSIDERATIONS

52. The Commission erred in both fact and law when it determined that innovation and investment policy considerations did not justify mandating wholesale access to fibre IBW.[51] In order for the Commission to mandate a wholesale service based on innovation and investment policy considerations, it must find that:

> Mandating or not mandating the facility or wholesale service could (i) affect the level of innovation/investment in advanced or emerging networks or services for incumbents, competitors, or both; or (ii) affect the associated level of adoption of advanced or emerging services by users of telecommunications services.[52]

53. It is worth reproducing the Commission's conclusions with respect to the innovation and investment policy consideration from TRP 2021-239 in full:

> 123. With respect to the level of innovation and investment in advanced or emerging networks or services for incumbents or competitors, the Commission notes that due to the characteristics of fibre, companies have been installing fibre IBW in many brownfield MDUs and are installing only fibre IBW in newer MDUs. The Commission considers that this investment is likely to continue regardless of whether access to fibre IBW is mandated, given the increasing demand for high-speed Internet services.
>
> 124.With respect to the impact of the associated level of adoption of advanced or emerging services by end-users, it is unclear the extent to which end-users would increasingly adopt such services if access to fibre IBW were mandated. For example, if fibre IBW were mandated and more competitive options were available in a building, end-users may be increasingly encouraged to adopt higher-speed services than they otherwise would. However, the record of this proceeding does not provide enough evidence for the Commission to determine whether mandated access to fibre IBW would affect the associated level of adoption of advanced or emerging services by users of telecommunications services to a substantial degree.

[51] TRP 2021-239, at paras 123-124.
[52] *Id*., at para 111.

> Therefore, the Commission considers that there is insufficient evidence to conclude that mandating the service would affect the adoption of advanced or emerging services by end-users to a substantial degree.
>
> 125. In light of the above, the Commission considers that the innovation and investment policy consideration would not materially impact the decision to mandate (or not) access to fibre IBW.[53] [Emphasis added]

54. The Commission made several errors of fact and law in its analysis of the impact of mandated wholesale access to fibre IBW on innovation and investment that raise substantial doubt as to the correctness of TRP 2021-239.

55. CNOC does not dispute the Commission's conclusion that investment in fibre IBW will continue regardless of whether wholesale access to fibre IBW is mandated.[54] However, this conclusion on its own misses the point of the innovation/investment policy consideration. The policy consideration states that the Commission will examine whether "[m]andating or not mandating the facility or wholesale service could (i) affect the level of innovation/investment in advanced or emerging networks or services for incumbents, competitors, or both."[55] [Emphasis added] The key here is that so long as mandating a wholesale service will have an overall positive impact on investment in advanced or emerging networks or services, thus increasing the level of investment, it should be mandated pursuant to the innovation and investment policy consideration. It was an error of law for the Commission to consider that, since investment in fibre IBW will continue regardless of whether it mandated wholesale access to fibre IBW or not, mandated wholesale access to fibre IBW does not satisfy the investment portion of the investment and innovation policy consideration. All that is required is an increase in the overall level of investment if the wholesale service is mandated, not a complete cessation of investment if the wholesale service is not mandated.

56. Mandated wholesale access for fibre IBW will also clearly stimulate the level of investment in fibre IBW and thus the deployment of competing fibre networks, which CNOC emphasizes in respect of the competition component of the public good analysis discussed above. This positive

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53 *Id*., at paras 123-125.
54 *Id*., at para 123.
55 *Id*., at para 111.

outcome would occur because mandated access to fibre IBW will lower the costs for competitors to deploy their fibre networks in MDUs more broadly. More specifically, the capital saved through mandated access will be redeployed to other network deployment activities. It is a basic economic fact that lowering the costs of network deployment will stimulate greater investment in fibre networks and thus competition among those networks. This argument with respect to the positive benefits of mandated wholesale access to fibre IBW on investment in competing networks was advanced by parties such as TekSavvy and Cloudwifi in the proceeding leading to TRP 2021-239.[56]

57. Moreover, as discussed above, the record of the proceeding leading to TRP 2021-239 clearly demonstrated that that MDU owners were often reluctant to allow, and actively resisted, multiple fibre IBW installations. While the Commission affirmed that it was prepared to intervene in these cases, simply mandating wholesale access to fibre IBW would avoid the need for competitors to seek recourse to the Commission to compel access to the MDU, which is a process that could take months or even years. Avoiding such delays will greatly accelerate the deployment of competing fibre networks in Canada. Accordingly, the accelerated deployment of fibre networks by competitors will bring greater levels of competition to Canadians faster than would otherwise be the case. The Commission erred in fact by ignoring the positive impact of mandated wholesale access to fibre IBW on the accelerated deployment of competing fibre networks in Canada, and instead just focusing on whether the networks would be deployed at all without consideration of timeliness of deployment.

58. The Commission did find that "if fibre IBW were mandated and more competitive options were available in a building, end-users may be increasingly encouraged to adopt higher-speed services than they otherwise would."[57] However , the Commission went onto state that the record of the proceeding did not provide it with sufficient evidence to conclude that the impact on the adoption of advanced services would be substantial.[58] The Commission erred in law when it concluded that the record did not provide sufficient evidence that mandated access to fibre IBW

[56] *Id*., at paras 120-121.
[57] *Id*., at para 124.
[58] *Ibid*.

would facilitate the adoption of advanced services by end-users as it is impossible to demonstrate this until such time as the service is in fact mandated. It was not reasonable, or a transparent, justifiable, and intelligible exercise of public power, for the Commission to require proponents of mandated wholesale access to fibre IBW to demonstrate that end-users will migrate to advanced services if access is mandated as competitors have not yet been able to access fibre IBW, and thus it is impossible to collect evidence with respect to the impact on end-users' uptake of advanced services.[59]

59. While proponents of mandated wholesale access to fibre IBW were put in an impossible situation to satisfy the Commission's demands for evidence of competitive, investment, and innovation impacts prior to the wholesale service being available in any form, basic economics suggests that all of these objectives would be furthered by mandated wholesale access to fibre IBW by lowering the costs of network deployment thus facilitating the roll-out of competing fibre networks. Indeed, the Commission acknowledged that such deployment may increase the uptake by end-users of advanced telecommunications services, but that it could not determine of such adoption would be "substantial".[60]

60. However, the critical point here is that nowhere in TRP 2021-239 did the Commission make any findings of fact that mandated wholesale access to fibre IBW would have any negative effects, on competition, investment, or innovation. Thus, the Commission was faced with a situation where basic economic logic suggests that lowering the costs of fibre network deployment by mandating wholesale access to fibre IBW would have at least a moderate, and possibly much greater, impact on the deployment of competing fibre networks and the uptake of advanced telecommunications services compared to no findings of fact by the Commission of any negative impacts whatsoever stemming from mandated wholesale access to fibre IBW. In this scenario, and faced with a clear directive from subsection 1(a)(i) of the 2019 Policy Direction to foster all forms of competition and investment, the Commission should have, as a matter of law, erred on the side of mandating wholesale access for fibre IBW. The Commission had absolutely no reason not to mandate wholesale access to fibre IBW and erred in law when it chose not to do so.

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[59] *Vavilov*, at para 95.
[60] TRP 2021-239, at para 125.

61. For all of these reasons, the Commission erred in fact in law by choosing not to mandate wholesale access to fibre IBW pursuant to the innovation and investment policy consideration and there is substantial doubt as to the correctness of TRP 2021-239 as a result of these errors. Mandated wholesale access to fibre IBW will enhance competition, innovation, and investment in competing fibre networks.

4.0 THE COMMISSION'S ANALYSIS OF THE IMPACT OF TRP 2021-239 ON THE ADVANCEMENT OF CANADA'S TELECOMMUNICATIONS POLICY OBJECTIVES AND THE 2006 AND 2019 POLICY DIRECTIONS IS DEEPLY FLAWED

62. During the proceeding leading to TRP 2021-239, several parties demonstrated how mandated access to fibre IBW would advance Canada's telecommunications policy objectives as set out in section 7 of the *Telecommunications Act*, the 2006 Policy Direction, and the 2019 Policy Direction. For example, TekSavvy demonstrated extensively in its intervention how mandated access to fibre IBW would advance Canada's telecommunications policy objectives.[61] CNOC agrees with the arguments put forth by TekSavvy as to why mandated access for fibre IBW advances Canada's telecommunications policy objectives and will not repeat those arguments here. However, CNOC will highlight the numerous errors of fact and law made by the Commission in TRP 2021-239 in concluding that Canada's telecommunications policy objectives were best served by not mandating wholesale access to fibre IBW.

63. To begin with, the Commission commenced its analysis of the impact of its determinations in TRP 2021-239 by stating:

> The Commission considers that forbearing from the regulation of access to fibre IBW in MDUs is consistent with subparagraphs 1(a)(i), (vi), and (vii) of the 2019 Policy Direction. In particular, forbearance will provide the requested regulatory relief for TSPs, which will support and encourage ongoing investments and the deployment of fibre IBW in MDUs across the country.[62]

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[61] Intervention of TekSavvy Solutions Inc., CRTC File 1011-NOC2019-0420, 7 May 2020, at paras 75-79.
[62] TRP 2021-239, at para 220.

64. CNOC objects to the statement that "forbearance will provide the requested regulatory relief for TSPs".[63] [Emphasis added] This statement implies that all of the TSPs that participated in the proceeding leading to TRP 2021-239 were seeking forbearance from the regulation of access to fibre IBW in MDUs. In fact, a variety of TSPs of all different sizes and from across the country requested regulatory relief from the Commission in the form of mandated wholesale access to fibre IBW. As just some examples, Quebecor Media Inc., on behalf of Videotron ("Videotron"), Shaw Cablesystems G.P. ("Shaw"), TekSavvy, and Cloudwifi Inc. ("Cloudwifi") all argued that the Commission should mandate wholesale access to fibre IBW.[64] Therefore, the Commission's statement in TRP 2021-239 that forbearance is consistent with the 2019 Policy Direction because it provides "the requested regulatory relief for TSPs" is a blatant error of fact.

65. CNOC also objects to the statement that forbearance "will support and encourage ongoing investments and the deployment of fibre IBW in MDUs across the country."[65] As discussed in Part 3.0 of this Application the Commission made errors of fact and law when it concluded that it should not mandate wholesale access to fibre IBW based upon the innovation and investment policy considerations. In fact, mandating wholesale access to fibre IBW will support and encourage ongoing investments in the deployment of fibre IBW in MDUs across the country. Forbearance, on the other hand, will do nothing to promote investment in fibre IBW and the Commission did not provide any explanation in TRP 2021-239 as to why it believes that forbearance will support and encourage ongoing investments in the deployment of fibre IBW in MDUs across the country. The lack of any findings of fact by the Commission in TRP 2021-239 to support the Commission's statement that forbearance will support and encourage ongoing investments and the deployment of fibre IBW in MDUs across the country means that this statement is both an error of fact, and because it was made in an absence of evidence, an error of law.

66. The Commission continued its analysis of the impact of its determinations on Canada's telecommunications policy objectives by stating:

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63 *Ibid*.
64 See, for example, TRP 2021-239, at paras 112, 122.
65 *Id*., at para 220.

> The Commission considers that expanding the MDU access condition to all carrier ISPs and permitting them to have access to copper IBW in MDUs on the same basis as LECs is consistent with subparagraph 1(a)(v) of the 2019 Policy Direction because it would help to reduce barriers to entry into the market and to competition for TSPs that are new, regional, or smaller than the incumbent national service providers. Further, it is consistent with subparagraphs 1(a)(ii), as well as 1(b)(ii) and (iv), of the 2006 Policy Direction.[66] [Emphasis added]

67. At the outset, CNOC emphasizes, as noted above, that it fully endorses the Commission's decision to treat carrier ISPs and LECs equally and that there is no reason to distinguish between these different types of TSPs in relation to access to MDUs and IBW. However, it is absurd for the Commission to state that permitting carrier ISPs to have access to copper IBW is somehow going to "to reduce barriers to entry into the market and to competition for TSPs that are new, regional, or smaller than the incumbent national service providers."[67]

68. These objectives will not be promoted to a significant degree by providing carrier ISPs solely with access to copper IBW and the fact that the Commission seems to believe otherwise is alarming as it is not illustrative of the realities of the markets for modern wireline telecommunications services. No carrier ISP is making significant investments in 2021 in copper IBW or copper wireline networks. Fibre is the future of wireline telecommunications networks and carrier ISPs will extend their networks into MDUs predominantly to connect to fibre IBW, as opposed to older technologies. In the absence of access to fibre IBW the telecommunications policy objectives cited by the Commission will not be advanced to as significant a degree.

69. CNOC is not aware of any evidence in the proceeding leading to TRP 2021-239 or findings of fact in TRP 2021-239 that indicate any significant demand amongst carrier ISPs for access to copper IBW. Therefore, in the absence of any evidence or findings of fact to support the Commission's determination that providing carrier ISPs with access to copper IBW would "reduce barriers to entry into the market and to competition for TSPs that are new, regional, or smaller than the incumbent national service providers"[68] the determination amounts to both errors of fact and law and the conclusion cannot stand.

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66 *Id*., at para 222.
67 *Ibid*.
68 *Ibid*.

70. The Commission continued its flawed analysis of TRP 2021-239's contributions to Canada's telecommunications policy objectives by stating that:

> In compliance with subparagraph 1(b)(i) of the 2006 Policy Direction, the Commission considers that its determination to expand the MDU access condition to include all carrier ISPs, on the same basis as LECs, and to permit them to have access to copper IBW, effectively contributes to the implementation of the policy objectives set out in paragraphs 7(b), (c), (f), and (h) of the Act and to the promotion of competition, affordability, and consumer interests in all regions of the country.[69] [Emphasis added, footnote omitted]

71. In this case, CNOC does not deny that expanding the MDU Access Condition to include all carrier ISPs will advance the telecommunications policy objectives cited by the Commission, albeit not nearly as much if this was coupled with mandated wholesale access to fibre IBW. However, for the reasons just cited above, permitting carrier ISPs to access only copper IBW does very little to advance the telecommunications policy objectives cited by the Commission, and it is an error of both fact and law for the Commission to claim otherwise.

72. The Commission then moves onto attempting to justify its departure from competitive and technological neutrality in TRP 2021-239:

> The Commission has stated in previous decisions that the existing framework for access to IBW in MDUs was intended to be technology neutral and supportive of end-user choice. Although the determinations in this decision result in different regulations for different technologies – that is, for fibre IBW versus other forms of IBW, multiple technologies will still be available in many buildings, and other options, including copper and coaxial cable, may be more affordable solutions for competitors that wish to offer service in those buildings. Further, fibre IBW may be owned by ILECs, cable carriers, ISPs, or building owners, and competitors may enter into commercial agreements with any of these entities. As a result, the determinations in this decision support the competitive neutrality of the service.[70]
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> …
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> The Commission considers that the changes to the MDU framework will continue to promote technological and competitive neutrality to the greatest extent possible. They will also broaden IBW access in MDUs to more types of service providers, in support of competition and choice. However, given the significant differences

[69] TRP 2021-239, at para 223.
[70] *Id*., at para 224.

> between copper and fibre IBW, the two must be treated differently for the purposes of enabling competition from a new technology in MDUs.[71]

73. The Supreme Court of Canada recently stated in *Vavilov* that:

> That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it.[72] [Emphasis added]

74. The above two paragraphs from TRP 2021-239 are so unintelligible that they constitute an error of law that seriously calls into question the correctness of TRP 2021-239.

75. To begin with, the Commission acknowledges that "the determinations in this decision result in different regulations for different technologies."[73] This is true. The Commission then attempts to justify this differential regulation. The Commission bizarrely then concludes the paragraph by stating "the determinations in this decision support the competitive neutrality of the service."[74] This simply does not make any sense. The Commission begins by acknowledging that it is engaging in differential treatment of fibre IBW, that is to say treatment that is not competitively or technologically neutral, but then concludes by stating that in fact it is maintaining the "competitive neutrality of the service."[75] The Commission attempts to justify its differential treatment, with which CNOC clearly disagrees for all the reasons cited throughout this Application, however, these justifications do not demonstrate that the Commission's differential treatment of fibre IBW in TRP 2021-239 is in fact competitively neutral. Neutrality and differential treatment are contradictory concepts that cannot co-exist simultaneously. The contradictions inherent in paragraph 224 of TRP 2021-239 render it unintelligible and constitutes an error of law.

76. The Commission also claims in paragraph 224 that "fibre IBW may be owned by ILECs, cable carriers, ISPs, or building owners, and competitors may enter into commercial agreements with any of these entities."[76] CNOC is not aware of any evidence in the record of the proceeding

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71 *Id*., at para 225.
72 *Vavilov*, at para 95.
73 TRP 2021-239, at para 224.
74 *Ibid*.
75 *Ibid*.
76 *Ibid*.

leading to TRP 2021-239 of a willingness by fibre IBW owners to enter into commercial agreements with their competitors for access to fibre IBW. Therefore, as is common throughout much of TRP 2021-239, the Commission made this finding of fact in an absence of evidence, which constitutes an error of law.

77. As noted above, the fact that copper and coaxial cable IBW is available and "may be more affordable solutions for competitors that wish to offer service in those buildings" is a finding made in the absence of any evidence of demand by competitors seeking to enter MDUs for these increasingly legacy technologies.[77] Therefore, this statement constitutes both an error of fact, and because it was made in the absence of any evidence, it is also an error of law.

78. Paragraph 225 of the Commission's reasons in TRP 2021-239 is equally unintelligible as paragraph 224. In particular, the Commission states that "given the significant differences between copper and fibre IBW, the two must be treated differently for the purposes of enabling competition from a new technology in MDUs."[78] While CNOC acknowledges that there are significant technological differences between copper IBW and fibre IBW, mainly that fibre IBW is capable of delivering vastly more bandwidth as well as near synchronous upload and download speeds, at no point in TRP 2021-239 does the Commission explain why these technological differences must result in differential regulatory treatment between copper IBW and fibre IBW. This finding seemingly materializes out of thin air. The Commission failed to provide intelligible reasons anywhere in TRP 2021-239 for its conclusion that "significant differences" between copper IBW and fibre IBW must result in differential regulation. Accordingly, reaching this conclusion constitutes an error of law.

79. CNOC also finds paragraph 225 confusing in that the Commission has also neglected to make any reference to coaxial cable inside wire. To the extent that the Commission is founding its differential regulatory treatment of fibre IBW upon unspecified differences between fibre IBW and copper IBW, then presumably similar differences must also justify different regulatory treatment between fibre IBW and coaxial cable inside wire, for which access is mandated pursuant

[77] *Ibid*.
[78] *Id*., at para 225.

to broadcasting regulations.[79] While CNOC believes that the technological differences between copper, coaxial cable, and fibre IBW do not justify different regulatory treatment, the failure of the Commission to make any mention of coaxial cable inside wire in paragraph 225 of TRP 2021-239 further renders the Commission's reasons in this paragraph unintelligible.

80. While the entirety of the Commission's analysis of TRP 2021-239's impact on the policy objectives is problematic, CNOC finds paragraphs 224 and 225 of TRP 2021-239 to be particularly unintelligible reasons that contradict themselves and make bald assertions without any supporting findings of fact or even evidence on the record of the proceeding.

81. The Commission concludes its analysis of the impact of TRP 2021-239 on Canada's telecommunications policy objectives with the following two paragraphs:

> The ultimate goal of the Commission, through this proceeding, is to facilitate the orderly development of the Canadian telecommunications system, which includes supporting ongoing investments in growth technologies, such as fibre IBW, and fostering competition through the use of various IBW technologies in MDUs.[80]
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> …
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> Furthermore, implementing the Commission's policy determinations in such a comprehensive and measured manner is an effective way to improve consumer choice in MDUs while encouraging facilities-based competition.[81]

82. The statement in paragraph 226 that the Commission is "fostering competition through the use of various IBW technologies in MDUs" is an error of fact and law. As described above, fibre IBW is the future of wireline telecommunications, and it is meaningless to try and foster facilities-based competition solely over twisted copper or even coaxial cable IBW as TSPs are not making significant investments in these facilities in 2021. CNOC is also at a loss to understand why, as a matter of policy, the Commission is seeking to foster competition using legacy technologies instead of focusing on fibre IBW. This statement about fostering competition using copper and coaxial cable IBW contradicts the Commission's holding in paragraph 220 that its objective is to support and encourage investments in the deployment of fibre IBW in MDUs across the country.

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[79] *Id.*, at para 193.
[80] *Id*., at para 226.
[81] *Id*.,, at para 227.

Once again, the Commission has made a contradictory statement in TRP 2021-239 that renders its reasons unintelligible, thereby constituting an error of law.

83. Finally, while paragraph 227 is easier to understand, it constitutes bad policy. By choosing not to mandate access to fibre IBW, the Commission is needlessly increasing the costs of deploying fibre networks for competitors. While these networks will eventually be built, it is going to take longer and Canadians in MDUs are going to have to have to wait longer, for no good reason, to access advanced telecommunications services delivered over fibre IBW as well as to enjoy the benefits of competition. As CNOC has argued throughout this Application, the Commission made numerous errors of fact and law in TRP 2021-239 and once these are corrected, it is clear that the Commission should mandate wholesale access to fibre IBW as a means of improving consumer choice in MDUs and supporting facilities-based competition, which of course must co-exist with non-facilities-based competition.

84. The Commission makes several assertions throughout its analysis of the impact of its holdings in TRP 2021-239 on Canada's telecommunications policy objectives that are contradictory and not supported by facts or evidence. The overall effect is to render some of the Commission's reasoning simply unintelligible, which is an error of law. Overall, the errors of law and fact made by the Commission throughout its analysis of the impact on TRP 2021-239 on Canada's telecommunications policy objectives, the 2006 Policy Direction, and the 2019 Policy Direction are sufficiently serious enough on their own to demonstrate that there is significant doubt as to the correctness of TRP 2021-239.

5.0 THE WHOLESALE RATE FOR ACCESS TO FIBRE IBW SHOULD BE SET USING THE METHODOLOGY FROM BPN 2002-51

85. The Commission did not consider the appropriate method of setting wholesale rates for access to fibre IBW in TRP 2021-239 as it chose not to mandate wholesale access to fibre IBW. Assuming that the Commission grants the relief requested in the present application, CNOC will hereby provide its comments upon the appropriate methodology for setting a wholesale rate for access to fibre IBW.

86. In its intervention to the proceeding initiated by Telecom Notice of Consultation 2020-131[82] ("TNC 2020-131") CNOC stated:

> The rate-setting methodology for wholesale services that is eventually approved by the Commission pursuant to this proceeding may prove to be overly intrusive when applied to smaller wholesale markets or older legacy services. In these circumstances, a simpler approach is likely warranted.[83]

87. Wholesale access to fibre IBW is one of the instances where a simplified wholesale rate-setting approach is warranted.

88. Given the sheer number of fibre IBW owners, many of which are small TSPs and some of which are building owners, the use of Phase II costing methodology, or indeed any other costing methodology that requires a significant amount of expertise, would prove impractical and likely impossible for many of these fibre IBW owners.

89. Similarly, commercial negotiations with recourse to final offer arbitration would be fruitless and impractical. As described above, there is no evidence of fibre IBW owners being willing to voluntarily provide access to fibre IBW pursuant to commercial negotiations. The parties are therefore unlikely to reach commercial agreement and will often need to resort to final offer arbitration. Given the sheer number of MDUs across the country, the Commission would quickly become deluged by parties seeking final offer arbitration to resolve disputes with respect to appropriate rates for wholesale access to fibre IBW.

90. The most efficient and practical means of establishing a wholesale rate for wholesale access to fibre IBW is to use a single, nationwide monthly rate that wholesale users of fibre IBW pay to the owners of the fibre IBW. The rate for wholesale access to coaxial cable inside wire, which is set at $0.52 per subscriber per month, constitutes a single, nationwide monthly rate and there is no reason that the wholesale rate for fibre IBW should not also be a single, nationwide monthly rate.

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[82] *Call for comments – Review of the approach to rate setting for wholesale telecommunications services*, Telecom Notice of Consultation CRTC 2020-131, 24 April 2020, as amended ["TNC 2020-131"].

[83] Intervention of Competitive Network Operators of Canada, CRTC File 1011-NOC2020-0131, 13 August 2020, at para 120.

91. Fortunately, the Commission has a ready-made template for a simplified method of establishing a single, nationwide monthly rate for wholesale access to fibre IBW in BPN 2002-51 in which the Commission set a monthly wholesale access of $0.52 per subscriber per month for the use of coaxial cable inside wire in MDUs.[84] While the exact methodology and calculations used by the Commission in BPN 2002-51 do not need to be repeated here, the Commission based the wholesale rate for access to coaxial cable inside wire upon the unrecovered costs for MDU inside wire borne by broadcasting distribution undertakings.[85] The Commission should adopt the same methodology for determining a just and reasonable single, nationwide monthly rate for wholesale access to fibre IBW.

6.0 CONCLUSION

92. In this Application, CNOC has demonstrated that the Commission committed errors of law and fact that demonstrate that there is substantial doubt as to the correctness of TRP 2021-239. Once these errors are corrected, it becomes clear that the Commission should have mandated wholesale access to fibre IBW as one of the outcomes of TRP 2021-239 based on considerations of the public good and innovation and investment. Moreover, while the Commission did not discuss the appropriate method of setting wholesale rates for mandated access to fibre IBW, this should be done using the same methodology that was used to establish a wholesale rate for access to coaxial cable IBW in BPN 2002-51.

93. Mandated access to fibre IBW will accelerate the deployment of competing fibre networks throughout Canada. Competitors will enjoy lower costs of deployment in MDUs if mandated access to fibre IBW is provided at just and reasonable wholesale rates. Lower costs of deployment will allow competitors to redeploy the capital that is saved to additional investments in fibre network expansion.

94. Moreover, the record of the proceeding leading to TRP 2021-239 was clear that MDU owners are more likely to voluntarily allow competitors to enter the MDU to install facilities if competitors can connect to pre-existing fibre IBW instead of needing to engage in disruptive

[84] BPN 2002-51, at para 49.
[85] *Id*., at para 4.

installations of additional fibre IBW. While it is true that competitors have the ability to seek redress from the Commission to compel the granting of access to MDUs for the purpose of installing telecommunications facilities, this is a regulatory process that can take many months, if not years, thus significantly delaying the deployment of competing fibre networks by competitors. The disruption to occupants of the MDU caused by the installation of additional fibre IBW, combined with the possibility of the need for an adversarial regulatory process between competitors and MDU owners, also contributes to unnecessarily poisoned business relations between competitors and MDU owners. These issues with respect to access to MDUs by competitors would be eliminated, or substantially ameliorated, if the Commission mandated access to fibre IBW.

95. The deployment of competing fibre networks, in conjunction with effective competition based on wholesale HSA services, will inherently lead to more competition in the markets for next generation telecommunications services delivered over fibre. The accelerated deployment of these networks brought about by mandated access to fibre IBW means that more Canadians will enjoy the benefits of competition sooner than would otherwise be the case and that adoption of these next generation services will increase. These outcomes clearly advance Canada's telecommunications policy objectives and are consistent with the 2006 Policy Direction and the 2019 Policy Direction.

96. It is thus clear that the Commission should mandate wholesale access to fibre IBW based on public good and innovation and investment policy considerations and that TRP 2021-239 was wrongly decided to the extent that it did not mandate such access.

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