



## Telecom Decision CRTC 2008-69 Broadcasting Decision CRTC 2008-166

Ottawa, 8 August 2008

### **Shaw Communications Inc. seeking access to Concord Pacific Group Inc.'s Coopers Quay development**

Reference: 8622-S9-200800111

*In this Decision the Commission concludes that Novus Entertainment Inc. (Novus) has not conferred an undue preference on itself or subjected Shaw to an undue or unreasonable disadvantage, contrary to section 9 of the Broadcasting Distribution Regulations and section 27 of the Telecommunications Act. The Commission denies Shaw's request to prohibit Novus from providing service or to issue an order against Concord Pacific Group Inc. requiring that Shaw be provided immediate access to the Coopers Quay development buildings.*

### **Introduction**

1. On 7 January 2008, Shaw Communications Inc. (Shaw) filed an application pursuant to section 9 of the *Broadcasting Distribution Regulations* (the Regulations), subsection 27(2) and section 42 of the *Telecommunications Act* (the Act), and related procedural provisions. In its application, Shaw requested that the Commission direct Concord Pacific Group Inc. (Concord) to provide to Shaw immediate access to the Coopers Quay development buildings, including the Coopers Lookout, Coopers Pointe, Flagship, and Mariner buildings located in Vancouver, British Columbia. Shaw also requested that the Commission prohibit Novus Entertainment Inc. (Novus) from offering or providing service to customers at Coopers Quay until such time as Shaw has been provided a reasonable opportunity to install its facilities in the development.
2. The Commission received submissions from Concord and TELUS Communications Company (TCC). The public record of this proceeding, which closed with Shaw's letter dated 14 April 2008, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings."

### **Issues**

3. The Commission identified the following three issues to be addressed in its determinations:
  1. Has an undue preference been conferred or has Shaw been subjected to an undue or unreasonable disadvantage in violation of subsection 27(2) of the Act?
  2. Has an undue preference been conferred or has Shaw been subjected to an undue or unreasonable disadvantage in violation of section 9 of the Regulations?

3. Should the Commission prohibit Novus from providing service to buildings until Shaw has obtained access to install facilities or direct Concord to provide Shaw immediate access?

### **Positions of parties**

4. Shaw submitted that Concord has refused to permit Shaw to access its Coopers Quay development in Vancouver while permitting its related company Novus to access the development during and after construction. Shaw submitted that Concord has conferred an undue preference on Novus by providing Novus with exclusive access to the Coopers Quay development during construction for the purposes of offering broadcast distribution services and preferential access to the development during construction for the purposes of providing telecommunications services. Shaw submitted that Concord's behaviour was precluding Shaw from accessing end-users in Coopers Quay. Shaw argued that the evidence unequivocally established that customer choice was undermined and Shaw's costs of providing service were substantially increased when it was not permitted to install its facilities during construction. Shaw submitted that Novus has benefited and continues to benefit from an undue preference, contrary to the Act and the Regulations. Shaw submitted that this situation was identical, in all material respects, to the situation that was addressed by the Commission in Telecom Decision 2007-69.
5. Concord replied that its conduct had been reasonable and did not constitute an undue preference under the Act or the Regulations. Concord submitted that the current situation was distinct from that which existed in support of the Commission's determination in Telecom Decision 2007-69.

#### **1. Has an undue preference been conferred or has Shaw been subjected to an undue or unreasonable disadvantage in violation of subsection 27(2) of the Act?**

6. The Commission notes that Novus submitted that it is offering digital and analog television services, Internet services, and intends to offer digital telephone services which will be provided using the facilities and equipment installed, or which Novus intends to install, in the Coopers Quay development. TCC stated that it is offering telephony and Internet services in the Coopers Quay development by connecting to the owner's in-building wire to reach end-customers and that it intends to offer digital television services in the future.
7. The Commission notes that Concord stated that its affiliate (which it indirectly controls) is the developer of Coopers Lookout and that Coopers Park Corporation (CPC), through its subsidiaries, is the developer of the Coopers Pointe, Mariner and Flagship buildings. CPC has engaged Centreville Construction Ltd., a wholly-owned subsidiary of Concord, as the project manager.
8. The Commission notes that subsection 27(2) of the Act applies in respect of the provision of telecommunications services by Canadian carriers, and does not apply to building owners or developers. Therefore, Concord's refusal to permit Shaw to access its development could not, by itself, constitute a violation of subsection 27(2) of the Act.

9. As a Canadian carrier<sup>1</sup> offering Internet services, Novus is subject to subsections 27(2) and (4) of the Act. While the Commission has refrained from regulating the rates for retail Internet services, it has retained its powers under subsections 27(2) and (4) of the Act. A similar regulatory framework would apply to the digital telephone service that Novus intends to provide in the Coopers Quay development.
10. With regard to Shaw's argument that Novus has benefited from an undue preference, contrary to subsection 27(2) of the Act, the Commission notes that subsection 27(2) of the Act prohibits giving an undue or unreasonable preference or subjecting another person to an undue or unreasonable disadvantage. Based on the record of this proceeding, the Commission finds that even if Novus has benefited from an undue preference given to it by Concord, Novus did not act in violation of subsection 27(2) of the Act by merely receiving such benefit.
11. The Commission finds, based on the record of this proceeding, that Novus has not given itself an undue or unreasonable preference and has not subjected Shaw to an undue or unreasonable disadvantage in violation of subsection 27(2) of the Act.

**2. Has an undue preference been conferred or has Shaw been subjected to an undue or unreasonable disadvantage in violation of section 9 of the Regulations?**

12. In order to determine whether there has been an undue preference or disadvantage under the Regulations, the Commission has examined whether there has been or is likely to be a material adverse impact on Shaw, the residents of the multi-dwelling units (MDUs) in question, or any other person, as well as the impact Novus' conduct had or is likely to have had on the achievement of the objectives of the *Broadcasting Act*, which constitute the broadcasting policy for Canada.
13. Novus stated that it obtained access for the installation of facilities for the purpose of providing telecommunications and broadcasting services during construction of the Coopers Quay buildings pursuant to an agreement, dated 3 May 2000, as amended on 1 November 2004, between itself, Concord Pacific Group Inc. (formerly Pacific Place Holdings Ltd) and 503161 British Columbia Ltd. (formerly Multiactive Communications Inc.) (the Agreement). The Commission notes that pursuant to that Agreement, Novus conferred upon itself the designation as exclusive supplier of cable television services to the buildings in question, other than as may be required by Commission regulations.
14. Novus and TCC were able to secure access to properties during construction. Novus is providing, and TCC intends to provide, broadcasting services in the buildings. Shaw has obtained access to Coopers Pointe (through the strata council, post-construction) and it is reasonable to expect that Shaw will similarly obtain access to the other buildings.

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<sup>1</sup> The Commission notes that Novus is licensed to carry on a broadcasting distribution undertaking (BDU) that is subject to the *Broadcasting Act* and the Regulations. The Commission further notes that Novus owns its transmission facilities and uses its network to provide telecommunications services to the public for compensation. Novus thus also operates as a Canadian carrier and to that extent is subject to the Act.

15. Based on the record of this proceeding, the Commission is unable to conclude that there has been or is likely to be a material adverse impact on Shaw or subscribers or that the policy goal of end-user choice is not being achieved, as customers will have choice amongst competing service providers.
  16. In light of the above, the Commission finds that Novus has not conferred an undue preference on itself and has not subjected Shaw to an undue disadvantage in contravention of section 9 of the Regulations.
- 3. Should the Commission prohibit Novus from providing service to buildings until Shaw has obtained access to install facilities or direct Concord to provide Shaw immediate access?**
17. Shaw requested that the Commission take immediate action to enforce the MDU access condition established in Telecom Decision 2003-45, the Regulations, and the Act by issuing an order directing Concord to provide Shaw immediate access to Coopers Quay buildings and prohibiting Novus from offering or providing service to the buildings in question until Shaw was in a position to provide services at Coopers Quay.
  18. The Commission notes that the MDU access guidelines and the MDU access condition established in Telecom Decision 2003-45 apply to local exchange carriers (LECs) and were extended to Canadian carriers who are members of the Coalition of Hydro Telecom Service Providers (the Coalition) in Telecom Decision 2005-33. The Commission notes that Novus is not a LEC and not a member of the Coalition. Accordingly, the MDU access guidelines and the MDU access condition do not apply to Novus.
  19. In light of the foregoing, and given the Commission's findings above that there has been no violation of subsection 27(2) of the Act or of section 9 of the Regulations, the Commission **denies** Shaw's requests for an order prohibiting Novus from providing service to buildings until Shaw has obtained access to install facilities and for an order directing Concord to provide Shaw immediate access to the buildings in question.

Secretary General

### **Related documents**

- *Shaw Communications Inc. seeking non-discriminatory access to multi-dwelling units developed by Concord Pacific Group Inc. and enforcement of the undue preference and inside wire obligations on Novus Entertainment Inc.*, Telecom Decision CRTC 2007-69, 10 August 2007

- *Application of Decision 2003-45 to the Coalition of Hydro Telecom Service Providers*, Telecom Decision CRTC 2005-33, 10 June 2005
- *Provision of telecommunications services to customers in multi-dwelling units*, Telecom Decision CRTC 2003-45, 30 June 2003

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*