



Telecom Decision CRTC 2014-669

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Ottawa, 19 December 2014

File number: 8622-B2-201411256

Bell Canada – Application for interim relief to ensure timely access on reasonable terms to Edenshaw Homes Limited’s Chaz Yorkville multi-dwelling unit project

*The Commission **denies** Bell Canada’s application for interim relief seeking (i) an order requiring that it be provided with an updated site plan and a site inspection of the Chaz Yorkville (CY) multi-dwelling unit project, and (ii) an order prohibiting any other service providers from installing equipment in CY. In rendering its decision on final relief, to be made at a later date, the Commission will consider the governing principles of Telecom Decision 2003-45, which include the promotion of competition and end-user choice. In the meantime, parties are strongly encouraged to continue negotiations with a view to reaching a Building Access Agreement.*

Background

1. For several months, Bell Canada and Edenshaw Homes Limited (Edenshaw) have been discussing the terms and conditions of an access agreement that would allow Bell Canada to install its communications facilities in a 526-unit multi-dwelling unit (MDU) project, known as Chaz Yorkville (CY), which Edenshaw is currently building in Toronto.
2. On 5 September 2014, Edenshaw provided Bell Canada with a draft Building Access Agreement (BAA), for discussion purposes.
3. On 29 September 2014, Edenshaw proposed how it would recover costs from Bell Canada resulting from the latter’s access to CY. On that same day, Bell Canada agreed to Edenshaw’s proposal, conditional on (i) receiving and reviewing a current site plan for CY, and (ii) conducting a site inspection.
4. On 31 October 2014, Edenshaw advised Bell Canada that it had secured a BAA with a second service provider¹ and no longer wished to continue negotiations with Bell Canada. Bell Canada did not know the identity of the second service provider at the time.

¹ Rogers Communications Company is already a service provider for CY.

Application

5. On 3 November 2014, Bell Canada filed an application with the Commission requesting the following expedited interim relief:
 - an order requiring Edenshaw to disclose the identity of the second service provider so that it can be made a party to this proceeding;
 - an expedited order requiring Edenshaw to provide Bell Canada with the updated site plan for the CY building and the opportunity for Bell Canada technicians to conduct a one-hour site inspection, both within seven days of the Commission's determination on the interim relief, in accordance with the financial terms that Bell Canada offered in its conditional acceptance on 29 September 2014; and
 - an expedited interim order prohibiting the second service provider or any other person from installing any equipment in, occupying, or otherwise interfering with any of the equipment spaces that Edenshaw offered for Bell Canada's use in its 29 September 2014 offer until Bell Canada has been provided with the updated site plan to the CY building and the opportunity to conduct a site inspection.²
6. On 14 November 2014, Edenshaw disclosed the identity of the second service provider, Beanfield Technologies Inc. (Beanfield), which was then made a party to the proceeding.
7. The Commission has identified the following issues to be addressed in this decision:
 - Should the Commission require Edenshaw to provide Bell Canada with the updated site plan to the CY building and allow a site inspection?
 - Should the Commission issue an interim order prohibiting Beanfield or any other person from installing equipment in, occupying, or otherwise interfering with equipment spaces offered for Bell Canada's use in Edenshaw's 29 September 2014 offer?

Should the Commission require Edenshaw to provide Bell Canada with the updated site plan to the CY building and allow a site inspection?

8. Bell Canada submitted that it requires current plans and a site inspection to prepare a wiring plan. It submitted that in Edenshaw's proposed BAA of 5 September 2014, there was an obligation for Edenshaw to provide such information to Bell Canada so that it could prepare a wiring plan for Edenshaw's approval.

² Bell Canada also requested, as a final relief, a Commission determination granting the company access to CY to install its communications facilities.

9. Bell Canada submitted that this information was also required for a municipal permit application to bring its wires from the street into the building.
10. Edenshaw argued that the interim relief requested by Bell Canada should be denied because Bell Canada had failed to meet the three criteria that must be met when a party is requesting such relief. When assessing applications for interim relief, the Commission's practice is to apply the criteria set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, as modified by the Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 (the RJR-MacDonald criteria). These criteria are that (i) there is a serious issue to be determined; (ii) the party seeking the stay will incur irreparable harm if the stay is not granted; and (iii) the balance of convenience, taking into account the public interest, favours granting the stay.
11. Edenshaw submitted that the first criterion had not been met, and argued that Bell Canada had failed to meet the second criterion by not providing evidence that it would suffer irreparable harm if it did not get the updated site plan to the CY building and permission to conduct a site inspection.
12. Bell Canada acknowledged that the information it would get from the updated site plan and a site inspection, which is information the Commission may need to make its determination on the final relief, could be obtained by the Commission at a later date and outside of the interim relief procedure.

Commission's analysis and determinations

13. In past negotiations with Edenshaw, Bell Canada indicated that it would require only a few weeks to complete the installation of its facilities in CY. Given that occupancy of CY is scheduled for the second quarter of 2015, the Commission does not consider that Bell Canada would be prejudiced if it had to wait to obtain the updated site plan and permission to conduct the site inspection until after the Commission issues its findings on the final relief.
14. The Commission also considers that Bell Canada's statement that the Commission could obtain this information, if necessary, at a later date, effectively acknowledges that the company would not be prejudiced if it had to wait to obtain the updated site plan and permission to conduct the site inspection.
15. In light of the above, Commission **denies** Bell Canada's request for the updated site plan and permission to conduct a site inspection of CY at this time.

Should the Commission issue an interim order prohibiting Beanfield or any other person from installing equipment in, occupying, or otherwise interfering with equipment spaces offered for Bell Canada's use in Edenshaw's 29 September 2014 offer?

16. Bell Canada submitted that interim relief is required to preserve the status quo situation in the CY building, so that sufficient vacant equipment space is kept

available to Bell Canada in the event that the Commission determines that there has been non-compliance with the MDU Access Condition³ in this case.

17. Bell Canada further submitted that interim relief was required to obviate any unnecessary expenditures or installation work, which may ultimately need to be removed or relocated, by any service provider.
18. Bell Canada argued that its request satisfies the RJR-MacDonald criteria for interim relief as follows:
 - **Serious issue to be determined:** The issue to be determined in this case deals with compliance with the MDU Access Condition, which is itself intended to better ensure end-user choice and competition in MDUs. Bell Canada submitted that the issue is very serious because it promotes a number of the Canadian telecommunications policy objectives set out in section 7 of the *Telecommunications Act*.
 - **Irreparable harm:** There may be no other way for Bell Canada to offer its services in CY if there is insufficient capacity elsewhere in the building to accommodate its equipment. Bell Canada submitted that in such a case, there will be no way to quantify the harm to consumers and to Bell Canada, meaning that the harm would indeed be irreparable.
 - **Balance of convenience:** The public interest weighs strongly in favour of maintaining the status quo because this is by far the least intrusive means of promoting the Commission's objective of ensuring that the maximum number of service providers possible can serve MDUs and maximize choice for residents.
19. Edenshaw submitted that Bell Canada had failed to meet the three RJR-MacDonald criteria, arguing that not only is there no serious issue to be determined, but that there is no evidence that Bell Canada would suffer irreparable harm if it were not granted an order prohibiting any service provider from installing equipment in CY.
20. Edenshaw confirmed that there is, in fact, sufficient space available for other telecommunication service providers, including Bell Canada, to access and provide services in CY if the Commission finds in favour of Bell Canada. Edenshaw submitted that CY was designed with sufficient facilities to accommodate multiple telecommunications service providers. In support of that claim, Edenshaw filed on the record a report from an engineering firm.

³ In Telecom Decision 2003-45, the Commission established the MDU Access Condition by which the Commission required, pursuant to its powers under section 24 of the *Telecommunications Act*, that the provision of telecommunications services by a local exchange carrier (LEC) in an MDU be subject to the condition that all LECs wishing to serve end-users in that MDU are able to access the end-users on a timely basis, by means of resale, leased facilities, or their own facilities, at their choice, under reasonable terms and conditions.

21. Edenshaw further submitted that there is, at this time, no likelihood and no plan for other telecommunications service providers to occupy all the utilities risers, closets, and common equipment spaces in CY.
22. Bell Canada argued that Edenshaw's claim that there is sufficient space in CY to accommodate Bell Canada if it obtains access at a future date is premature, since it is not known how many sets of risers and conduits have been filled or are available in CY, nor are the dimensions of any of this equipment known.

Commission's analysis and determinations

23. The Commission notes that the threshold for the first RJR-MacDonald criterion (a serious issue to be determined) is low, and considers that Bell Canada has met it given that its application is neither frivolous nor vexatious. With respect to the second criterion, the Commission finds that Bell Canada has failed to demonstrate that it would incur harm, let alone irreparable harm, if it were not granted an order prohibiting any service provider from installing equipment in CY pending its ability to review updated site plans and the opportunity to conduct a site inspection.
24. The Commission notes Edenshaw's statement on the record of this proceeding that there is sufficient space in CY. The Commission further notes that even if there were insufficient space, based on Telecom Decision 2003-45, the building owner may, among other things,
 - permit the local exchange carrier (LEC) to construct additional riser space in the MDU, or
 - allow the LEC to upgrade or replace the existing in-building wire and related facilities to make more efficient use of the riser space available.
25. The Commission therefore finds that there are options available to Bell Canada without having to prevent Beanfield, or any other person, from installing its equipment in CY.
26. Having found that Bell Canada has failed to satisfy the second RJR-MacDonald criterion, the Commission determines that there is no need to address the third criterion regarding the balance of convenience.

Conclusion

27. In light of all the above, the Commission **denies** Bell Canada's request for an order (i) requiring Edenshaw to provide it with the updated site plan and for permission to conduct a site inspection, and (ii) granting interim relief prohibiting Beanfield, or any other person, from installing equipment in, occupying, or otherwise interfering with equipment spaces offered for use by Bell Canada in Edenshaw's 29 September 2014 offer.

28. The Commission notes that the above determinations are with respect to Bell Canada's request for interim relief only. In rendering its decision on final relief, to be made at a later date, the Commission will consider the governing principles of Telecom Decision 2003-45, which include the promotion of competition and the right of end-users to access the service providers of their choice.
29. In keeping with the above-mentioned governing principles, parties are strongly encouraged to continue negotiations with a view to reaching a BAA.

Secretary General

Related document

- *Provision of telecommunications services to customers in multi-dwelling units*, Telecom Decision CRTC 2003-45, 30 June 2003