



## Telecom Decision CRTC 2014-42

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### **Bell Canada – Request for access to Plaza Corporation’s York Harbour Club multi-dwelling unit building project**

File number: 8622-B2-201312917

*In this decision, the Commission finds that access to the York Harbour Club multi-dwelling unit (MDU) for Bell Canada under reasonable terms and conditions would, at a minimum, consist of (i) immediate access to the York Harbour Club’s main terminal room (MTR) and to a vertical conduit connecting the MTR to each communications closet, and (ii) access to each unit, upon request, after the occupancy date for that unit. Effective 31 March 2014, RCI will not be permitted to provide telecommunications services at York Harbour Club unless Bell Canada is given access to the MDU, consistent with this decision.*

#### **Introduction**

1. The Commission received an application from Bell Canada, dated 20 September 2013, in which the company requested that the Commission issue, on an expedited basis, an order directing Plaza Corporation (Plaza Corp.) to provide Bell Canada access to the 21-floor, 502-unit York Harbour Club residential multi-dwelling unit (MDU) in Toronto. On 31 October 2013, Bell Canada requested that Plazacorp Investments Limited (PIL) and West Harbour City (III) Residences Corp. (the Owner) be added as respondents.
2. Bell Canada stated that it had become aware of the MDU project in June 2013 and has been trying to negotiate access to install fibre to each individual unit since that time. The company further stated that, in July 2013, it was permitted to bring its wiring from the street to the main terminal room (MTR), but was not permitted access to install its facilities beyond the MTR.
3. Bell Canada requested that the Commission issue an access order, pursuant to the MDU access framework set out in Telecom Decision 2003-45, to allow it to connect each individual unit to its network. More specifically, the company proposed that the connections be made by running, through one of two vertical conduits already present, its fibre optic cables from the MTR to the communications closet located on every third floor. Once in the communications closet, Bell Canada would run a fibre optic cable through one of two horizontal conduits to each of the individual units.
4. The Commission received interventions from MTS Inc. and Allstream Inc. (collectively, MTS Allstream); PIL, on behalf of itself and the Owner; Rogers Communications Partnership (RCP); and Saskatchewan Telecommunications

(SaskTel); as well as separate interventions from Amacon Construction Ltd., Creccal Investments Ltd., Corey Libfeld, O'Shanter Development Company Ltd., and Park Property Management Inc. (collectively, the property developers). The public record of this proceeding, which closed on 16 December 2013, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings" or by using the file number provided above.

## **Positions of parties**

### **PIL**

5. In response to the application, PIL submitted that the Condominium Board, representing the unit owners, should make all decisions with respect to further access for telecommunications service providers (TSPs) other than Rogers Communications Inc. (RCI), which already has a marketing agreement and a non-exclusive access agreement with the Owner. According to PIL, Bell Canada, which has already been granted access to bring its wiring from the street to the MTR, is not being denied access. PIL submitted that such access is simply being delayed until the individual unit owners can make a decision through the Condominium Board, which is to be established approximately five months after the mid-March 2014 start of occupancy.
6. With regard to telecommunications infrastructure in the MDU, PIL indicated that (i) there are currently two sets of conduits installed throughout the building: a vertical set going from the MTR to the communications closets located on every third floor of the MDU, and a horizontal set going from the communications closets to each unit; (ii) RCI already has its wiring in one of the two vertical conduits as well as in one of the two horizontal conduits, and the second conduit in each set is empty; and (iii) the agreement between the Owner and RCI further provides that RCI is to install and operate the initial communications network in the MDU.
7. PIL submitted that the York Harbour Club MDU was designed to enable TSPs to gain post-construction entry to the MDU's common elements and the individual units. Such entry could be achieved by either using the telecommunications network infrastructure currently in place or by installing additional wiring through the unused second conduit in each set.
8. PIL noted that in the present case, and in the past, it and the Owner have designed and pre-installed facilities for the simple and cost-effective entrance of competitive service providers on a post-construction basis, and left the decision as to which TSPs are allowed into the building to the individual unit owners and/or their elected representatives on the Condominium Board.
9. PIL further submitted that since the available space in the MDU's vertical and horizontal conduits is limited, permitting Bell Canada to access the MDU now would enable Bell Canada to install its facilities before any other TSP, effectively precluding future individual unit owners from making decisions as to which competitive carriers

could provision services. PIL indicated that there is not enough space available in the MDU's conduits for every TSP to install its own facilities.

10. PIL also argued that while access to the MDU during the very early construction phase might provide some modest efficiency for a TSP, Bell Canada's request to access the MDU during the later stages of construction<sup>1</sup> could result in disrupting the progress of construction and threaten the occupancy timelines.
11. PIL submitted that if the Owner cannot adhere to its occupancy schedule, penalties of up to \$7,500 per individual unit will be payable to the purchasers. It also indicated that the construction management company could claim foregone incentive payments due to delays for occupancy permits should Bell Canada's proposed work result in delays.
12. PIL also submitted that Bell Canada's 25 July 2013 request for access under the terms of its standard access agreement was unfair. For example, Bell Canada had proposed that the Owner (i) install junction boxes supplied by Bell Canada in each of the individual units, (ii) ensure that the framing in each unit was sized to the dimension of the junction boxes, and (iii) supply a conduit for Bell Canada's exclusive use from each communications closet to each of its junction boxes. PIL noted that at the time of Bell Canada's initial request, junction boxes had already been installed and the Owner did not wish to install a third set of conduits for Bell Canada's exclusive use.
13. Although Bell Canada later indicated that it would be agreeable to access terms and conditions that were symmetrical to those that the Owner had provided to RCI, PIL submitted that this was not reasonable since RCI had contributed a communications network to the building.
14. Finally, PIL argued that the Commission does not have the statutory authority under section 42 of the *Telecommunications Act* (the Act) to order a developer or building owner to provide access and to mandate terms and conditions of access. PIL also argued that the legal effect of an order under section 42 of the Act would be to directly regulate property and civil rights of building owners, which is a matter of exclusive provincial legislative authority under the *Constitution Act, 1867*.

## **RCP**

15. RCP commented on the agreement between RCI and the Owner. It submitted that the arrangement ensured that commercially reasonable access could be provided to other TSPs chosen by the Condominium Board.
16. RCP indicated that RCI had installed wiring for the exclusive benefit of each individual unit that consisted of a bundle of four "wires" (the inside wire): two fibre strands, one twisted pair wire, and one coaxial cable.

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<sup>1</sup> PIL stated that it had received Bell Canada's first written request for immediate access on 25 July 2013, more than 21 months after construction began on the project.

17. RCP further indicated that while it retains ownership of certain signal distribution and processing equipment, the ownership of the inside wire and the horizontal conduits are to be transferred directly to each future individual unit owner. RCI will retain a right to use the wires that make up the inside wire bundle for as long as the unit owner subscribes to one or more of the communications services provided by RCI.

**Bell Canada's reply**

18. Bell Canada clarified that it was not seeking exclusive access rights to any part of the MDU, including the building's vertical and horizontal conduits.
19. Bell Canada submitted that having access to the MDU before the first occupancy date, and therefore prior to the election of a Condominium Board, is necessary to allow it to gain new customers as well as to retain current customers who will be moving into the MDU. Bell Canada indicated that it was reasonable to assume that some of the unit purchasers will be existing Bell Canada customers who will request that their services be migrated to the MDU, and that such a migration would not be possible without access to the MDU prior to the occupancy date. Further, it would not be possible for Bell Canada, without such access, to migrate competitors' clients who request services from Bell Canada when they move into the building.
20. With respect to PIL's submission that there is not enough space available in the MDU's conduits for every TSP to install its own facilities, Bell Canada submitted that the existing conduits provide sufficient capacity for up to three communications networks, including those of RCI, Bell Canada, and a third TSP, should such a provider also wish to install its own separate network facilities. Bell Canada submitted that there is no evidence that the Owner has received any other requests for access.
21. Further, Bell Canada stated that it wants to install its own facilities, and not to interconnect with RCI's pre-existing wiring, since service quality is best achieved through maximum reliance on end-to-end company facilities. Bell Canada indicated that interconnecting its network at RCI's installed junction boxes avoids the use of facilities from other service providers over which it has no quality control responsibility, and serves to avoid the service quality degradation that would result from fibre splicing with RCI's facilities each time a customer in a particular unit switches services between Bell Canada and RCI. Bell Canada argued that, in light of this, it continues to be appropriate for local exchange carriers (LECs) to have the right to choose to provide services using its own facilities, as set out in the Commission's MDU access condition.
22. Bell Canada indicated that it would like to use one of the two existing conduits to bring its fibre optic cable from the MTR to the communications closets, and from the communications closets into the individual units. Following a visit of the MDU on 25 October 2013, Bell Canada provided the Owner with a revised access proposal. As part of that proposal, Bell Canada indicated that once in the individual unit, it could

connect its facilities by using the junction boxes already installed by RCI. By no longer seeking to install its own junction boxes in each unit, Bell Canada indicated that the connection of the individual units could be done rapidly, with minimal disruption, and without any structural redesign.

23. Regarding the possibility of not being given the opportunity to connect each unit of the MDU to its network all at once, Bell Canada argued that the additional incremental costs of installing the network one customer at a time would make wiring the building uneconomical. Bell Canada stated that under these circumstances, the splicing technician would have to make a separate trip for each fibre fusion once an order is placed, which involves added labour, fuel, and processing costs, rather than performing multiple fusions while one specialized technician is on site.

### **Other interventions**

24. MTS Allstream and SaskTel supported Bell Canada's application, while the property developers opposed it.

### **Commission's analysis and determinations**

#### **a) Is Bell Canada being denied access to the MDU on reasonable terms and conditions?**

25. The Commission notes that, in Telecom Decision 2003-45, it set out the MDU access framework, in which it emphasized the importance of facilitating competition and end-user choice, more specifically that end-users should have the right to access the TSP of their choice regardless of the type of dwelling they are in.
26. Also in that decision, in paragraph 141, the Commission established the MDU access condition, as set out below:

Accordingly, pursuant to its powers under section 24 of the Act, the Commission requires that the provision of telecommunications services by a LEC in an MDU be subject to the condition that all LECs wishing to serve end-users in that MDU are able to access end-users in that MDU on a timely basis, by means of resale, leased facilities or their own facilities, at their choice, under reasonable terms and conditions.
27. The Commission also indicated that it would take such further action as was appropriate, depending on the circumstances of each case, to ensure that all LECs are able to provide telecommunications services in an MDU in accordance with the MDU access condition. In particular, the Commission indicated that it would be prepared to issue an order under section 42 of the Act, subject to such conditions as to compensation or otherwise as the Commission determines to be just and expedient.
28. Further, the Commission set out guidelines to assist building owners and LECs in negotiating just and expedient conditions of access to MDUs.

29. The Commission notes that the guidelines set out in Telecom Decision 2003-45 indicate that LECs should be able to access an MDU during the construction stage. Further, in Telecom Decision 2007-69/Broadcasting Decision 2007-288, the Commission considered that by not allowing access to some TSPs during construction, some residents were denied the choice of those TSPs for their telecommunications services at the time they moved into the building.
30. By waiting several months for the Condominium Board to be elected before potentially granting Bell Canada access to the MDU, PIL would not only be denying the company current access to the MDU, but would also be denying residents the choice of which TSP they will retain for their telecommunications services at the time they take possession of their units. The Commission considers that PIL's refusal to grant Bell Canada access to the MDU on reasonable terms and conditions during construction is contrary to the MDU access framework's core principles of competition and, most importantly, end-user choice.
31. In light of the above, the Commission finds that Bell Canada is being denied access to the York Harbour Club MDU on reasonable terms and conditions.

**b) What form of access by Bell Canada would constitute access under reasonable terms and conditions on a timely basis?**

32. The Commission notes that the first scheduled occupancy date is in mid-March 2014, and that all construction, including finishing work, must be completed at least four weeks prior to that time so that the Owner and purchasers may conduct inspections.
33. The Commission also notes that Bell Canada waited until 21 months after the beginning of construction before requesting access from Plaza Corp. in 2013. Furthermore, Bell Canada's initial request contained terms and conditions that could be viewed as unreasonable considering the late timing of the request.
34. The Commission recognizes that granting Bell Canada access to the individual units in the MDU would fulfill several of the MDU framework's policy objectives, most importantly, ensuring that end-users in a new MDU have direct access to more than one TSP upon occupancy. However, the Commission considers that immediate access to each and every unit, as requested by Bell Canada, may not be appropriate in this specific case due to the timing of its application.
35. The Commission considers that allowing Bell Canada access to the individual units at this time could disrupt the progress of the remaining construction that must be completed prior to the mid-February pre-delivery inspections. Had Bell Canada requested access to the units earlier in the building process, such access would have been less disruptive, with likely minimal, if any, negative impacts on the completion of the MDU construction.
36. In light of the above, and taking into account the presence of conduits in the MDU that would provide Bell Canada ready access for the installation of its facilities beyond the MTR, the Commission determines that timely access under reasonable

terms and conditions, such that the MDU access condition is satisfied in this case, consists of, at a minimum:

- immediate access by Bell Canada to the MTR and a vertical conduit connecting the MTR to each communications closet for the purpose of installing, operating, maintaining, and replacing Bell Canada's communications facilities, as described in the company's application; and
- after the occupancy date for each unit, access to the MDU for the purpose of extending Bell Canada's network from the communications closets to individual units upon request by a unit owner for services from Bell Canada.

37. In arriving at the above-noted determination, the Commission has considered the objectives of the MDU access framework, including the principle of end-user choice of service providers, balanced against the possible delays to the construction schedule for the MDU and subsequent occupancy.
38. Under the circumstances of this case, the Commission is not satisfied that all parties involved (i.e. Bell Canada, PIL, and RCI) have exhausted all reasonable avenues of negotiation. In view of this, and in order to incent all parties involved to reach a negotiated settlement, the Commission considers that it is more appropriate to proceed in this case by directly enforcing the MDU access condition under section 24 of the Act rather than by means of a section 42 order. However, the Commission retains the discretion to issue an order pursuant to section 42 of the Act.
39. The Commission therefore determines that, effective 31 March 2014, RCI will not be permitted to provide telecommunications services in the York Harbour Club MDU unless Bell Canada has been given timely access under reasonable terms and conditions, as defined above.
40. Although the minimum level of access in this case is defined above, the Commission encourages all parties involved to negotiate access terms that will give end-users the maximum opportunity to select the TSP of their choice on a timely basis.
41. Given that it is not issuing a section 42 order at this time, the Commission considers it unnecessary to address PIL's submissions with respect to the Commission's jurisdiction under section 42 of the Act.
42. As discussed above, the Commission has chosen to apply the MDU access framework in the circumstances of this case by issuing an order that addresses the consequences resulting from the fact that a condition applicable to a Canadian carrier's provision of service, in this case RCI, is not satisfied. The Commission considers that it has the clear statutory authority to order a Canadian carrier to cease providing service when a section 24 condition that applies to that carrier is not satisfied.

43. With respect to arguments raised regarding exclusive provincial legislative authority over property and civil rights, the Commission considers that Parliament's jurisdiction over telecommunications extends to the entire telecommunications network. Parliament has the legislative authority to determine the telecommunications policy of Canada, including the terms and conditions with respect to competition in the provision of telecommunications services to end-users located in MDUs.

### **Policy Direction**

44. The Policy Direction<sup>2</sup> states that the Commission, in exercising its powers and performing its duties under the Act, shall implement the policy objectives set out in section 7 of the Act, in accordance with paragraphs 1(a), (b), and (c) of the Policy Direction.

45. The Commission considers that its findings in this decision advance the policy objectives set out in paragraphs 7(b), (c), (f), and (h)<sup>3</sup> of the Act. The Commission also considers that its determinations will allow end-users located in MDUs to choose their TSPs and will foster greater competition in the offering of telecommunications services in MDUs. The Commission further considers that absent its section 24 current order, timely access by Bell Canada to the York Harbour Club MDU under reasonable terms and conditions, in order to provide end-users with a choice of TSPs, would be denied. The Commission therefore considers that, in accordance with subparagraphs 1(a)(ii) and 1(b)(iv) of the Policy Direction, its determinations in this decision (i) are efficient and proportionate to their purpose and interfere with competitive market forces to the minimum extent necessary to meet the policy objectives noted above, and (ii) ensure technological and competitive neutrality and do not artificially favour a Canadian carrier.

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 and Broadcasting Decision CRTC 2007-288, 10 August 2007

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<sup>2</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

<sup>3</sup> The cited policy objectives of the Act are  
7(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;  
7(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;  
7(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and  
7(h) to respond to the economic and social requirements of users of telecommunications services.

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