



Telecom Decision CRTC 2015-148

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

The Commission determines that, effective 24 April 2015, Beanfield Technologies Inc. and RCP will not be permitted to provide telecommunications services in the Chaz Yorkville (CY) multi-dwelling unit (MDU) unless Edenshaw Homes Limited has notified Bell Canada that it agrees to give Bell Canada timely access to CY under reasonable terms and conditions.

The Commission finds that access to CY for Bell Canada under reasonable terms and conditions would consist of, at a minimum, (i) immediate access to CY for the purpose of extending Bell Canada’s network from the street to the main terminal room (MTR), and (ii) once Bell Canada’s network is inside the MTR, access to CY for the purpose of extending the network from the MTR to individual units upon request by unit owners for services from Bell Canada.

In making these determinations, the Commission considered the governing principles of Telecom Decision 2003-45, which include maximizing choice of telecommunications service provider for end-users in MDUs.

A concurring opinion from Commissioner Raj Shoan is attached to this decision.

Background

1. For several months, Bell Canada was negotiating with Edenshaw Homes Limited (Edenshaw) for access to a multi-dwelling unit (MDU) in Toronto, Ontario, known as Chaz Yorkville (CY) for the purpose of installing communications facilities. On 5 September 2014, Edenshaw provided Bell Canada with a proposed Building Access Licence (BAL) for discussion purposes. Bell Canada provided comments and revisions on the proposed BAL. On 26 September 2014, Edenshaw indicated that it was no longer prepared to discuss Bell Canada’s comments and revisions until parties had finalized and agreed upon the recoverable costs that Edenshaw would incur as a result of Bell Canada’s access to CY.
2. On 29 September 2014, Edenshaw proposed to Bell Canada financial terms for the recoverable costs. On that same day, Bell Canada agreed to the proposed financial terms, conditional on (i) receiving and reviewing a current site plan for CY, and (ii) conducting a site inspection.

3. On 31 October 2014, Edenshaw advised Bell Canada that it had secured an access agreement with Beanfield Technologies Inc. (Beanfield), and no longer wished to continue negotiations with Bell Canada. Rogers Communications Partnership (RCP) already had communications facilities installed in CY.

Application

4. On 3 November 2014, Bell Canada filed an application with the Commission requesting interim and final relief regarding access to CY. The interim relief request was addressed and denied in Telecom Decision 2014-669.
5. Regarding final relief, Bell Canada requested a Commission determination that the MDU access condition¹ will be satisfied if Edenshaw makes the capacity in the equipment spaces, as defined in the 5 September 2014 proposed BAL,² available to Bell Canada immediately at the rates that Edenshaw had proposed on 29 September 2014 or, alternatively, at the rates set out in the negotiated BAL between Beanfield and Edenshaw.
6. Bell Canada further submitted that if the MDU access condition remains unsatisfied, it was seeking the following additional relief
 - (a) an order requiring that it be granted immediate access to the main terminal room (MTR), sufficient capacity in vertical conduits connecting the MTR to each communications closet, and access to each end-user suite for the purposes of installing, operating, maintaining, and replacing its communications facilities;
 - (b) a determination that Beanfield and RCP not be permitted to provide their respective telecommunications services in CY unless and until Bell Canada has been given timely access under reasonable terms and conditions, as defined above;
 - (c) negotiation of all other terms and conditions of a formal BAL under commercially reasonable terms, with further recourse to the Commission as may be required; and
 - (d) any other relief as the Commission considers just and reasonable in the circumstances.

¹ The MDU access condition, which is set out in Telecom Decision 2003-45 and applied to all local exchange carriers (LECs), provides that the provision of telecommunications services in an MDU is subject to the condition that all LECs that wish to serve end-users in an 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.

² Under the terms of the 5 September 2014 proposed BAL, the equipment spaces to be made available to Bell Canada consisted of an entrance conduit, up to 50 square feet of space in the main terminal room, as well as vertical and horizontal risers.

7. The Commission received interventions regarding Bell Canada's application from Edenshaw, MTS Inc. and Allstream Inc. (collectively, MTS Allstream), and the Public Interest Advocacy Centre (PIAC). The public record of this proceeding, which closed on 6 February 2015, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Issues

8. The Commission has identified the following issues to be addressed in this decision:
 - Is Bell Canada being denied access to CY on reasonable terms and conditions?
 - What form of access by Bell Canada would constitute access under reasonable terms and conditions on a timely basis to CY?

Is Bell Canada being denied access to CY on reasonable terms and conditions?

9. Bell Canada submitted that it has been prevented from installing its facilities due to Edenshaw's decision to cease all access negotiations with it, contrary to the Commission's framework regarding the provision of telecommunications services to customers in MDUs set out in Telecom Decision 2003-45 (the MDU policy). Bell Canada submitted that end-users in MDUs should be able to select their telecommunications service provider without interference by third parties, as determined in Telecom Decision 2003-45.
10. Bell Canada argued that in the present case, there is non-compliance with the MDU access condition because two telecommunications service providers (TSPs) have been granted access to CY while Bell Canada is being denied access, even though its access request appears to have been communicated prior to that made by Beanfield.
11. Bell Canada submitted that Edenshaw's abrupt termination of negotiations directly contradicts the MDU policy's requirement that TSPs be able to access MDUs during the construction phase.
12. Bell Canada submitted that its request for a copy of the site plan and for a site visit did not justify terminating the negotiations, and that this termination was unreasonable. Bell Canada indicated that its request was in line with the proposed BAL that Edenshaw had provided to Bell Canada for discussions in September 2014. Furthermore, Bell Canada had indicated to Edenshaw that it would reimburse any costs that Edenshaw would incur as a result of meeting these two requests.
13. Edenshaw submitted that residents will still have the option to obtain services from Bell Canada at a later date if they choose to do so through their condominium corporation, and that such access would constitute timely access for Bell Canada under reasonable terms and conditions, in accordance with the Commission's decisions and guidelines.

14. Edenshaw also submitted that it had entered into negotiations with all TSPs that expressed an interest in accessing CY, and was successful in reaching agreements with all of them with little difficulty, except Bell Canada. Edenshaw submitted that it did provide Bell Canada with a reasonable and fair opportunity to reach a formal access agreement for CY. Edenshaw submitted that the decision to stop negotiations with Bell Canada was made after it had completed, with relative ease, an agreement with Beanfield, therefore ensuring effective choice and competition in CY upon occupancy.
15. Edenshaw also argued that the requirement under the MDU policy to provide timely access implies that a developer should be prepared to negotiate access on reasonable terms and conditions with TSPs at an appropriate time in the construction phase of a project. If the TSP is not willing to accept reasonable access terms during that phase, then the developer will have satisfied its obligation to provide timely access at that time. Edenshaw noted that any TSP is free to continue to seek access to a project after the construction phase is complete.
16. Edenshaw submitted that the Commission should take into account that developers have limited resources and personnel to negotiate access terms with TSPs, which represent only one of dozens – perhaps more than a hundred – different types of entities and service providers that are involved in a construction project. Therefore, a requirement to provide timely access to TSPs should be framed as a requirement to ensure that TSPs are present in a project at the time of occupancy, as is the case in CY, and that all TSPs that express an interest in gaining access are provided with the opportunity to negotiate access terms at a suitable time in the construction phase. Such opportunity, Edenshaw submitted, was provided to Bell Canada in the present case.

Commission's analysis and determinations

17. The Commission notes that while end-users in CY would already have, even without the presence of Bell Canada, the choice of two TSPs, one of the guiding principles of the MDU policy is that end-users in MDUs should have direct access to the TSP of their choice. This principle reflects the importance that the Commission has placed on facilitating competition and maximizing end-user choice.
18. The Commission considers that Edenshaw's decision to terminate negotiations with Bell Canada is contrary to the principles of the MDU policy. Having regard to Bell Canada's conditional acceptance of Edenshaw's proposed financial terms for recoverable costs, the absence of financial burden imposed on Edenshaw with respect to the satisfaction of Bell Canada's conditions, and the fact that the record of this proceeding indicates that there is room available in both the MTR and the conduits of CY, Edenshaw's decision has resulted in Bell Canada being denied access to CY on reasonable terms and conditions.

19. In Telecom Decision 2014-42, the Commission noted that obliging a carrier to wait several months for a condominium board to be elected before potentially being granted access to the MDU denies residents a choice with respect to the TSP they wish to retain for their telecommunications services at the time they take possession of their units.
20. Furthermore, the Commission does not consider that the requirement to provide local exchange carriers (LECs) with timely access is satisfied simply by providing them with the opportunity to negotiate access terms at a suitable time in the construction phase. The Commission considers that timely access involves physical access to the MDU in a timely fashion.
21. In light of the above, the Commission finds that Bell Canada is being denied access to CY on reasonable terms and conditions.

What form of access by Bell Canada would constitute access under reasonable terms and conditions on a timely basis to CY?

22. Bell Canada submitted that for it to have access to CY under reasonable terms and conditions, Edenshaw should immediately make available to it an entrance conduit to enter CY, up to 50 square feet of space in the MTR, sufficient capacity in vertical conduits connecting the MTR to each communications closet, and access to each end-user suite for the purposes of installing, operating, maintaining, and replacing its communications facilities.
23. Bell Canada further submitted that the Commission could either issue an access order on Edenshaw pursuant to section 42 of the *Telecommunications Act* (the Act), or directly enforce the MDU access condition under section 24 of the Act, as was done in Telecom Decision 2014-42. Bell Canada submitted that such an order could be directed against Beanfield and RCP to preclude them from serving CY unless and until Bell Canada is granted reasonable, timely access.
24. Edenshaw submitted that it was appropriate for it to have ensured effective competition between two TSPs (Beanfield and RCP) at the outset, while leaving opportunities for the future residents of CY, through their condominium corporation, to make decisions regarding access to building facilities by other TSPs, including Bell Canada.
25. Edenshaw also argued that should the Commission require that existing TSPs in CY not provide their services while Bell Canada negotiates an agreement with Edenshaw, this would essentially give all of the negotiating power to Bell Canada, which would be the last TSP of the three to enter CY. Edenshaw submitted that such an approach creates a real disincentive for TSPs to negotiate flexible and dynamic access terms, which, in turn, would undermine the potential benefits of competition between TSPs.
26. Edenshaw also submitted that it had serious concerns regarding the Commission's jurisdiction to make an order directed against private developers requiring them to provide access on and through private property to TSPs. It argued that by making a

direct order against a private property owner or developer to provide access to a TSP, the Commission will be purporting to dictate a question that is squarely within exclusive provincial jurisdiction under the *Constitution Act, 1867*: rights pertaining to property and civil rights within a province. Furthermore, it argued that the Act does not purport to extend authority to the Commission to make orders permitting the expropriation and use of private property by federally regulated TSPs.

27. Edenshaw submitted that section 42 of the Act expressly relates to orders made by the Commission in the exercise of its powers under the Act or any special Act, and does not provide the Commission with an independent authority to issue orders relating to the construction and installation of telecommunications facilities against building owners or developers.
28. Edenshaw also argued that an order issued by the Commission under section 24 of the Act would amount to the Commission indirectly imposing obligations on developers and other private property owners, which it is not authorized to do.
29. MTS Allstream and PIAC argued that the Commission has the authority to order the final relief requested by Bell Canada, pursuant to either section 24 or section 42 of the Act.

Commission's analysis and determinations

30. As discussed in the previous section, the MDU policy emphasizes the importance of facilitating competition and maximizing end-user choice. It is this principle that informs the MDU access condition imposed on all LECs.
31. The Commission notes that unit owners of CY have been provided with firm occupancy dates by Edenshaw, which will commence on 24 April 2015 and continue until 9 July 2015. The Commission further notes that in the present case, Bell Canada is not yet present in CY's MTR. The Commission considers that having Bell Canada bring its wire into each communications closet may not be necessary at this point, since it is conceivable that Bell Canada may never need to access a specific communications closet. Indeed, having some floors with no Bell Canada customers is a realistic possibility since residents already have access to two other TSPs in CY.
32. In light of the above, 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 to CY for the purpose of extending Bell Canada's network from the street to the MTR; and
 - once Bell Canada's network is inside the MTR, access to CY for the purpose of extending Bell Canada's network from the MTR to individual units (via the communications closets, if required) upon request by unit owners for services from Bell Canada.

33. As the Commission does not consider that all parties involved in the present dispute have exhausted all reasonable avenues of negotiation and, in order to incent all parties involved to reach a negotiated settlement, the Commission will directly enforce the MDU access condition pursuant to section 24 of the Act. The Commission also has the power to issue an order pursuant to section 42 of the Act should this prove to be necessary.
34. Regarding Bell Canada's suggestion that the immediate access and space it is requesting should be at the rates discussed during negotiations in September 2014, the Commission notes that Edenshaw made this offer before it signed an agreement with Beanfield. The Commission considers that these rates may no longer be relevant since the situation in CY has changed since September 2014, i.e. a second TSP (Beanfield) is now present in CY, which was not the case when the original offer was made to Bell Canada.
35. With regard to Bell Canada's suggestion that access and space could, alternatively, be made available at the rates set out in the negotiated BAL between Beanfield and Edenshaw, the Commission considers that this would be inappropriate since those rates are the result of negotiations between two parties and never involved Bell Canada. The Commission does not consider that Bell Canada should benefit from negotiations in which it did not participate.
36. With respect to the issue of jurisdiction, the Commission considers that the MDU access condition to which all LECs are subject to is one that, in pith and substance, relates to telecommunications, a matter that falls squarely within clear federal jurisdiction. The Commission considers that any effects that this access condition or its enforcement may have on property owners are incidental only and do not affect the characterization of the matter for constitutional purposes. The Commission further considers that it has the clear statutory authority to order a Canadian carrier to cease providing service when a condition of service, adopted pursuant to section 24 of the Act and which applies to that carrier, is not satisfied. In light of the fact that the Commission is not, at this time, issuing an order under section 42 of the Act, it considers it unnecessary to address Edenshaw's submissions with respect to the Commission's jurisdiction under that statutory provision.
37. In light of the above, the Commission determines that starting 24 April 2015, Beanfield and RCP will not be permitted to provide telecommunications services in CY unless Bell Canada has been notified by Edenshaw that it agrees to give Bell Canada timely access under reasonable terms and conditions, as defined above.
38. The Commission also 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.

Policy Direction

39. The Policy Direction³ 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.
40. The Commission considers that its findings in this decision advance the policy objectives set out in paragraphs 7(b), (c), (f), and (h)⁴ of the Act. The Commission also considers that its determinations will allow end-users 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 exercising its powers under section 24 of the Act, timely access by Bell Canada to the CY MDU under reasonable terms and conditions, in order to provide end-users with the ability to subscribe to Bell Canada-offered services, would be denied in the short to medium term. 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.

Secretary General

Related documents

- *Bell Canada – Application for interim relief to ensure timely access on reasonable terms to Edenshaw Homes Limited’s Chaz Yorkville multi-dwelling unit project*, Telecom Decision CRTC 2014-669, 19 December 2014
- *Bell Canada – Request for access to Plaza Corporation’s York Harbour Club multi-dwelling unit building project*, Telecom Decision CRTC 2014-42, 5 February 2014
- *Provision of telecommunications services to customers in multi-dwelling units*, Telecom Decision CRTC 2003-45, 30 June 2003

³ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

⁴ 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; (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; (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 (h) to respond to the economic and social requirements of users of telecommunications services.

The publication of this opinion, after the publication of the principal decision, was done with the consent of Commissioner Shoan. It was posted on 5 May 2015.

Concurring opinion of Commissioner Raj Shoan

I agree with the decision of my colleagues to grant Bell Canada timely access on reasonable terms to Edenshaw Homes Limited's (Edenshaw) Chaz Yorkville multi-dwelling unit (MDU) project. I do not agree with their decision to enforce such access through the use of section 24 of the *Telecommunications Act* (the Act). In my view, section 42⁵ of the Act was the better legal option to implement the Commission's determinations in this proceeding.

This matter involves two disputes: there is a disagreement between Edenshaw and Bell Canada with respect to what constitutes reasonable access, and there is a disagreement between Edenshaw and the Commission with respect to the ability of the Commission to mandate that access. By choosing to invoke section 24 of the Act in order to indirectly mandate access, the majority decision does not meet the Policy Direction's⁶ "minimum extent necessary"⁷ requirement as it unfairly and unreasonably impacts the residents of Chaz Yorkville, as well as Rogers Communications Partnership (RCP) and Beanfield Technologies Inc. (Beanfield), and draws them into these disputes to an unnecessary extent.

Through the application of section 24, the residents of Chaz Yorkville will be potentially impacted by their inability to access the services of *any* telecommunications service provider (TSP) pending the granting of access to Bell Canada by Edenshaw. In effect, the Commission's approach holds the residents of Chaz Yorkville hostage until such time that Edenshaw grants reasonable access to Bell Canada. These residents have waited, in some cases, several years to access their condominiums and committed hundreds of thousands of dollars. In my view, it is unreasonable and unfair to potentially deny them access to telephony and Internet services due to a dispute involving the builder and a TSP. In the case of Beanfield, residents will also be denied access to television programming, as the provision of programming services by this TSP is tied to its retail Internet service offering. It is particularly troublesome that the majority decision may be denying residents access to emergency services pending the resolution of these disputes.

Furthermore, the decision of the majority unfairly and unreasonably impacts RCP and Beanfield. RCP and Beanfield have, in good faith, negotiated and finalized agreements with Edenshaw to provide services to the residents of Chaz Yorkville. Both TSPs are prepared to provide service to the residents of Chaz Yorkville as of their dates of occupancy. Neither RCP nor Beanfield are directly involved in the dispute between Bell Canada and Edenshaw. In my view, it is unreasonable and unfair to prohibit them

⁵ While specifically supportive of the use of section 42, I am of the view that the Commission has the jurisdiction and authority to use any of the enforcement tools discussed in this proceeding.

⁶ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

⁷ See subparagraph 1(a)(ii) of the Policy Direction.

from offering services to the residents of Chaz Yorkville when they are not directly involved in the dispute, particularly when the Commission has another remedial tool at its disposal – section 42 of the Act – that would not run the risk of preventing service to these residents.

By selecting an enforcement tool that unnecessarily impacts the residents of Chaz Yorkville, RCP, and Beanfield, the Commission has acted in an anti-consumer manner that is not in accordance with the Policy Direction. Section 42 of the Act would have allowed the Commission to defend its MDU framework without impacting the residents of Chaz Yorkville, RCP, or Beanfield.