



Telecom Decision CRTC 2007-69

Broadcasting Decision CRTC 2007-288

Ottawa, 10 August 2007

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.

Reference: 8644-S9-200615388

In this Decision the Commission concludes that Novus Entertainment Inc. (Novus) conferred an undue preference on itself, contrary to section 9 of the Broadcasting Distribution Regulations and section 27 of the Telecommunications Act, and contravened section 10 of the Broadcasting Distribution Regulations. The Commission does not consider it appropriate to issue a blanket order under section 42 of the Telecommunications Act against Concord Pacific Group Inc. (Concord) as this would be inconsistent with the case-by-case regulatory framework and there appears to be no current access issue for Shaw with respect to Concord buildings. The Commission also considers that it is not appropriate to issue a prohibition order against Novus.

The application

1. On 24 November 2006, Shaw Communications Inc. (Shaw) filed an application requesting that the Commission issue orders against Concord Pacific Group Inc. (Concord) and Novus Entertainment Inc. (Novus) regarding the provision of telecommunications and broadcasting services in multi-dwelling units (MDUs).
2. The Commission received submissions and/or responses to interrogatories from TELUS Communications Company (TCC), Shaw, and Novus on behalf of itself and Concord (referred to in the positions of parties collectively as Novus/Concord). The record of this proceeding closed with Shaw's reply comments dated 16 February 2007.
3. The parties also addressed the direction by the Governor in Council to the Commission, *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, dated 14 December 2006 (the Policy Direction), with respect to implementing the Canadian telecommunications policy objectives as set out in the *Telecommunications Act*.
4. While the positions of parties have necessarily been summarized in this Decision, the Commission has carefully reviewed and considered the submissions of all parties.

5. In this Decision the Commission considers the following issues:

I - Request for relief under section 42 of the *Telecommunications Act*

II - Undue preference

III - Breach of inside wire obligations

IV - Prohibition request

V - Compliance with the Policy Direction

I – Request for relief under section 42 of the *Telecommunications Act*

Positions of parties

Shaw

6. Shaw requested that the Commission order Concord to comply with the MDU access requirements set out in Telecom Decision 2003-45, and specifically, to provide access to its properties during and after construction on reasonable and non-discriminatory terms and conditions. Shaw also requested that Concord cease and desist from interfering with the provision of access by the strata or condo corporations or their agent(s) at Concord-developed properties and with the provision of service by Shaw at these properties.
7. Shaw stated that it competed directly with TCC in the provision of local exchange services, with Novus in the provision of cable television services, and with Novus and TCC in the provision of Internet services.
8. Shaw stated that to date, it had been denied access during the construction of about 50 buildings that Concord had developed in the Lower Mainland of British Columbia (B.C.), while Concord granted access to TCC and Novus to lay entrance cabling.¹
9. Shaw stated that during the early stage of construction in 2005, it had installed some facilities in five buildings but was subsequently directed by Concord to remove these facilities with the exception of facilities on properties located at 583 and 455 Beach Crescent.
10. Shaw stated that at another building located at 638 Beach Crescent, Concord and Novus had not only prohibited Shaw's access during construction, but further continued to interfere with Shaw's access after construction. Shaw submitted that absent the threat of a court injunction, it had every reason to believe that Concord, and/or the property manager acting at the instruction of Concord, would have interfered with Shaw's equipment in the property at 638 Beach Crescent, so as to terminate Shaw services to its existing customers located at the property.
11. Shaw stated that in addition to the harm it suffered, unit occupants were either denied choice or restrained in their ability to exercise choice, thereby hindering the Commission's objective of ensuring end-user choice.

¹ Shaw did not provide any further information on 44 of these 50 buildings.

12. Shaw submitted that Concord's actions provided Novus and TCC with exclusive access to these Concord properties, placing Shaw at a very significant competitive disadvantage and giving Novus and TCC an undue and anti-competitive advantage.

Novus/Concord

13. Novus/Concord submitted that although Shaw was a competitive local exchange carrier (CLEC), Shaw's application was about its cable television services and not about its telephone service.
14. Novus/Concord stated that it wished to transfer the property to the residents with as few obligations and contracts as possible, so as to allow the residents to choose their own service providers.
15. Novus/Concord submitted that at 638 Beach Crescent Shaw's access was not prevented, but only postponed for a period of less than three months. Novus/Concord stated that in that period, all of the residents had not moved into the property and that, accordingly, Shaw had lost very little in terms of time or the number of residents to whom it could market and provide its services.
16. Novus/Concord stated that Concord had ensured that proper pathways and infrastructure were put in place during the construction period at 638 Beach Crescent to enable other service providers to access the property at no additional cost should the owner/residents choose to provide access when they took occupancy.
17. Novus/Concord submitted that Shaw was advised shortly after obtaining a post-construction binding access agreement between itself and the strata corporation with respect to 638 Beach Crescent that the agreement was improperly granted by a person who did not have the authority to sign on behalf of the strata corporation and that, as a consequence, Shaw was trespassing. Novus/Concord stated that Shaw's injunction proceedings, which were ultimately not taken to court, were commenced to try and enforce an improperly obtained agreement. Novus/Concord argued that this was not a binding post-construction access agreement between the strata corporation and Shaw, a fact that was further evidenced when Shaw sought and received the consent of the residents' council on 15 November 2006 for access, the course which the developer (i.e. Concord) had advocated.

Shaw's reply

18. Shaw submitted that it was more difficult and expensive to pull wires through a building after construction was completed.
19. Shaw submitted that Concord's actions were illegal as it had been granted access to the property at 638 Beach Crescent pursuant to a legally binding access agreement. Shaw stated that the fact that the strata council had quickly entered into a new agreement confirmed the desire of the owners to permit access.

Commission's analysis and determination

20. In Telecom Decision 2003-45, the Commission established the conditions and principles for the provision of telecommunications services to MDU customers. Specifically, the Commission imposed as a condition on the provision of telecommunications services by any local exchange carrier (LEC) in an MDU, that all other LECs wishing to serve end-users in that MDU be able to access those MDU end-users on a timely basis, under reasonable terms and conditions (the MDU access condition).
21. The Commission included guidelines that would assist parties in negotiating access arrangements on the basis of just and expedient conditions. These guidelines included among other things, the right of entry during construction to install telecommunications facilities.
22. The Commission also stated that in cases where negotiations on access could not be concluded on a timely basis and where, following a process, it determined that access to an MDU had not been, or was not likely to be, provided on a reasonable basis, it would take appropriate action including issuing an order under section 42 of the *Telecommunications Act* to ensure that all LECs were able to provide telecommunications services in an MDU, in accordance with the MDU access condition.
23. Regarding Novus/Concord's position that Shaw's application was about its cable television services and not its telephone services, the Commission notes that Shaw is a registered CLEC that offers its local exchange services to residents in MDUs in Vancouver. The Commission notes that Telecom Decision 2003-45 deals with LECs and that Shaw as a registered CLEC, or a LEC, has all the rights and obligations that are set out in Telecom Decision 2003-45.
24. The Commission notes the position taken by Novus/Concord that Shaw's access was not prevented, but only postponed for a period less than three months, as Concord, the owner-developer under the *Strata Property Act*, wished to transfer as few obligations and contracts as possible to the residents of the building at 638 Beach Crescent. The Commission is not persuaded by this argument. The Commission considers that by not allowing access to some service providers during construction, some residents were denied the choice of those service providers for their telecommunications services at the time they moved into this building.
25. As stated in Telecom Decision 2003-45, the Commission considers that LECs should have the ability to access and enter into MDUs during and after construction in order to connect and/or install their facilities, as well as to repair and maintain them to provide reliable, high-quality service to end-users. As further stated in Telecom Decision 2003-45, building owners are expected to cooperate with LECs to enable them to access end-users in their MDUs, in accordance with the MDU access condition.
26. In Telecom Decision 2003-45, the Commission established an MDU access framework which provided for a case-by-case dispute resolution approach. The Commission explicitly declined to create mandated access agreements, broad Commission-mandated terms and conditions of access, or blanket access orders. The Commission stated that each situation would need to be looked at based on its own particular circumstances.

27. The Commission notes that Shaw did not seek Commission assistance at the time at which its disputes with Novus/Concord were ongoing. Instead, Shaw waited until after all of those disputes had been resolved. In the Commission's view, Shaw is seeking the very kind of forward looking blanket order which the Commission found to be inappropriate in Telecom Decision 2003-45.
28. In light of the above and the fact that there appears to be no current access issue for Shaw at the Concord buildings, the Commission **denies** Shaw's request for relief under section 42 against Concord.
29. As stated in Telecom Decision 2003-45, in cases where negotiations on access cannot be concluded on a timely basis and where, following a process the Commission determines that access to an MDU is not likely to be provided on a reasonable basis, the Commission will take appropriate action. Such action may include issuing an order under section 42 of the *Telecommunications Act*, 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.

II – Undue preference

Positions of parties

Shaw

30. Shaw requested that the Commission declare that Novus had conferred on itself an undue preference contrary to section 9 of the *Broadcasting Distribution Regulations* (the Regulations) and subsection 27(2) of the *Telecommunications Act*.
31. Shaw argued that since Novus had been granted exclusive access to Concord MDU properties in Vancouver during the construction stage to install facilities for broadcasting distribution services, Novus has conferred an undue preference on itself.
32. Shaw stated that in buildings where it was able to compete from the onset for customers, it was typically able to sign up 60 to 70 percent of residents to its services. Shaw stated that in Concord-developed buildings, its penetration rate was typically closer to 10 percent.
33. Shaw stated that the process of installing its distribution equipment after construction was more labour intensive since it had to work around the equipment that was already installed by Novus. As a result, Shaw argued that its time and labour costs for construction of its dedicated plant after completion were considerably higher. Shaw estimated that installing its facilities after construction cost \$50 more per suite. Shaw estimated construction costs of \$150 per suite during construction and of \$200 per suite after the completion of construction.

Novus/Concord

34. Novus/Concord submitted that in determining whether or not Novus has been granted an undue preference, the Commission should review the issue in the context of the building practices of developers generally. Novus/Concord argued that the Commission should also review the issue

in the context of the entire marketplace, where Shaw, as the incumbent, was the initial service provider in 95 percent of the MDUs in the Greater Vancouver Regional District (GVRD) and thus has entrenched the right to be the initial cable television service provider with many developers.

35. Novus noted that while its prior services agreement contained a clause providing Novus with exclusive access,² it had not enforced any exclusive access agreements since 26 July 2000³ and its present services agreements did not give Novus any exclusive rights.
36. Novus/Concord stated that, as the owner-developer, Concord tried to transfer the legal title to the new residents with as few agreements as possible to allow the residents to choose for themselves their own service providers. Novus/Concord stated that Concord, in granting access to only a limited number of service providers, mirrored the practice of all developers who could not possibly grant access to every company capable of providing service to the residents once they took possession of their units. Novus/Concord noted that allowing for residents' strata councils to negotiate agreements with additional service providers often allowed them to negotiate additional benefits for the residents (such as free cable and Internet services to common areas in consideration of access).
37. Novus/Concord noted that Shaw's access to the property was not prevented, but only postponed for a period of less than three months. It stated that, in that period, all the residents had not yet moved into the property, so that even if Shaw was not granted access during the development phase, it had lost very little in terms of time, costs, or the number of residents to whom it could market and provide its services. Novus/Concord argued that Shaw was simply put in the same position as Novus in relation to other MDUs, specifically, Shaw must negotiate an access agreement with the residents' strata council in order to provide its services to the residents.
38. Regarding the lower penetration rates that Shaw indicated it experienced in Concord buildings where it was not allowed access during construction, Novus/Concord maintained that Novus' own average penetration rate was about 50 percent. Novus/Concord noted that Shaw was the only other provider in most buildings and suggested that Shaw's penetration rate was close to that as well.

Shaw's reply

39. Shaw noted that Novus/Concord admitted that Concord had adopted a policy of granting exclusive access to Novus and TCC during the construction and post construction phases of the Concord developments and that this policy was critical to Novus' competitive position in the Concord MDUs.

² Article 3.1 of Schedule "D" of the Services Agreement states that "The Strata Corporation hereby grants to Novus the exclusive right to provide the cable television services to the Premises during the Initial Term, subject to all applicable orders or rulings of the Canadian Radio-television and Telecommunications Commission."

³ This is the date of Decision CRTC 2000-273, in which the Commission approved Novus' application to change the licensed service area for this broadcasting distribution undertaking serving part of Vancouver (Concord Pacific Place) to include the GVRD.

40. Shaw submitted that, while Concord/Novus suggested that the preference conferred on Novus was not anti-competitive because it resulted only in delay of access, the policy in fact denied competitive access during and post construction.
41. Shaw submitted that at no time had it sought or obtained preferential access arrangements with affiliated building owners. Shaw stated that all of its access arrangements were arm's length agreements and none granted to Shaw exclusive access for any period of time.
42. Shaw noted that Concord/Novus asserted that the services agreement did not provide Novus with exclusive access to Concord developments. Shaw submitted that if this was correct, then the restrictions on access were the result of Concord's policy – and not the services agreement. In Shaw's view, Concord's policy conferred on Novus an anti-competitive preference.
43. Shaw submitted that the fact that service providers had been granted access prior to formation of the strata council did not limit in any way the subsequent ability of the strata corporation to negotiate bulk service arrangements with service providers. Shaw submitted that the alleged benefits to the strata corporations were belied by the actions of the property manager and the strata council in this case. Shaw stated that the strata council's immediate execution of a second access agreement with Shaw, following its election, also clearly demonstrated the council's desire to permit access.
44. Regarding Novus/Concord's statement that Shaw's penetration in buildings was similar to that of Novus, Shaw reiterated that its penetration rate was 60-70 percent where the company had been able to compete from the onset.

Commission's analysis and determinations

45. The Commission notes that Concord and Novus are related entities. Specifically, 503161 British Columbia Inc., a company wholly-owned by Mr. Terence Hui (Mr. Hui), is the sole shareholder of Novus. Further, Mr. Hui is the President and chief executive officer of Concord. Through a series of wholly-owned entities, Concord is controlled by The City Place Trust. The beneficiaries of The City Place Trust are the members of Mr. Hui's family. As a result of this corporate structure between Novus and Concord, Novus and Concord are not at arm's length.
46. The Commission will examine the issue of undue preference separately under the Regulations and the *Telecommunications Act*.

(a) The Regulations

47. In analyzing a complaint of undue preference under the Regulations, the Commission must first determine whether there is a preference or a disadvantage. Where it determines that there is a preference or a disadvantage, the Commission must then decide whether it is undue.
48. The Commission notes that this case does not involve Novus executing contracts that expressly provide it with exclusive access to a building. However, as noted earlier, Novus and Concord are related, rather than arm's length, entities. Based on the record of this proceeding, the Commission finds that, as a result of its relationship with Concord, Novus was able to secure

the exclusive ability to access the Concord property at 638 Beach Crescent for the purposes of providing broadcasting distribution services during the construction phase. The Commission also finds that, in so doing, Novus conferred a preference on itself. Further, given that Shaw did not have the same opportunity to access the building, as a result of Novus' arrangement with Concord, Shaw was subjected to a disadvantage.

49. In order to determine if a preference or a disadvantage is undue, the Commission must examine whether Novus' conduct had or is likely to have had a material adverse impact on Shaw, the residents of the MDU(s) in question, or any other person, as well as the impact its 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.
50. The Commission remains of the view, as noted in several previous determinations, that competition among distributors, along with end-user choice for consumers, can contribute to the achievement of a number of objectives of the *Broadcasting Act*. Among other things, competition can contribute to the affordability of service by encouraging distributors to reduce subscription rates for end-users in their attempts to obtain subscribers. Further, it can spur distributors to offer greater choice in programming services and service packages, in order to enhance the appeal of their services to consumers. In the process, competition also provides incentives for distributors to pursue more efficient delivery methods and other technological innovations.
51. The Commission considers that Novus' conduct with regard to the property at 638 Beach Crescent, during the construction phase and immediately thereafter, had a material and adverse effect on competition among broadcasting distribution undertakings (BDUs) in the following respects.
52. In the first instance, the Commission notes Shaw's estimate that installing its facilities after construction cost \$50 more per suite, by increasing that cost from \$150 to \$200 per suite, representing a cost increase per suite of about one third. Extended over a range of suites in a building, a cost increase of this magnitude could have a material adverse impact on the ability of Shaw or other BDUs to compete in that building. For some BDUs, a cost difference of this magnitude could constitute a deterrent to entering the building at all. Further, should behaviour such as Novus' be legitimized and, as a result, become more commonplace in the market, it could result in barriers to BDUs offering services in MDUs and/or upward pressure on the cost structures of BDUs more generally.
53. In this regard, the Commission considers that such increases in the costs of providing service would detract from the objective of the efficient delivery of programming. Further, the Commission considers it likely that such cost increases would be passed on to end-users. Thus, conduct such as Novus' also has a significant potential to detract from the attainment of one of the key objectives that the Commission seeks to attain by encouraging competition, i.e., affordable rates.
54. In light of the above, the Commission considers that Novus' actions were inconsistent with the Commission's objectives of fair and sustainable competition and end-user choice, and thus damaging to the attainment of objectives of the *Broadcasting Act*.

55. Regarding Novus' argument that Concord wished to transfer title with as few agreements as possible in order to allow the residents to choose for themselves the services and service providers they would prefer, the Commission does not see how the installation of Shaw or other BDU facilities during the construction phase would have discouraged choice for residents or otherwise encumbered them. In fact, because access was restricted, residents' choice of service providers was limited. The Commission notes that some residents had occupied their units by the time Shaw could obtain an access agreement with the newly-formed residents' strata council. Assuming that this access could be obtained expeditiously upon formation of the council, the Commission is of the view that Shaw would likely experience further delay since it would still have to perform the necessary engineering work and install its equipment. This type of delay could limit the ability of a BDU, such as Shaw, to obtain subscribers in a building, since it would not be in a position to supply its service at the time when residents began occupying their units. Lacking other options, these new residents would likely subscribe to Novus' service.
56. The Commission considers that the argument that Shaw's inability to access the building during the construction phase is comparable to Novus' situation in other buildings is irrelevant, as is Novus' submission that its behaviour was justified by the fact that Shaw was the initial service provider in 95 percent of BDUs in the GVRD. In buildings developed by companies that are at arm's length from a BDU, the Commission would presume that both Shaw and Novus would be provided with access in similar timeframes, should they seek such access. Should this prove not to be the case due to any action on the part of Shaw, it is open to Novus to seek relief from the Commission.
57. With regard to the argument that Concord might have experienced difficulties in providing access to a range of suppliers, the Commission notes that it was not necessary for Concord to provide access to every conceivable BDU. Rather, it would have been sufficient for it to provide access to those BDUs that requested it and that were able to install their facilities on a timely basis.
58. Finally, the Commission notes Novus' argument that strata councils may in fact benefit from the fact that builders may preclude access during construction to certain service providers, so that those councils might "negotiate benefits for the residents in consideration for access." The Commission does not consider this sufficient justification for Novus' conduct in this case, particularly since Novus itself would not be called upon to provide such benefits "in consideration for access."
59. In light of the above, the Commission finds that, in securing exclusive access to the property at 638 Beach Crescent, Novus conferred an undue preference on itself and subjected Shaw to an undue disadvantage in contravention of section 9 of the Regulations. Novus is therefore directed, within 30 days of the date of this Decision, to notify the Commission of the steps it intends to take to ensure that, in future, it does not obtain access under terms that constitute an undue preference for itself or an undue disadvantage for any other person.
60. With regard to the above finding, the Commission notes that, in its view, the information provided on the record of this proceeding regarding penetration rates has not been well-developed by either Shaw or Novus/Concord. Accordingly, the Commission has regarded the information as inconclusive, neither supporting nor damaging either party's case.

(b) The Telecommunications Act

61. In Telecom Decision 96-1, the Commission addressed, among other things, the issue of the circumstances, if any, under which the carriage of non-programming services by a broadcasting distribution undertaking would result in that undertaking operating as a Canadian carrier as defined in the *Telecommunications Act*. The Commission concluded that cable distribution undertakings, and other BDUs that owned or operated a transmission facility as defined in the *Telecommunications Act*, were telecommunications common carriers when they used their distribution networks to provide non-programming services to the public for compensation. The Commission determined that the provision of access to the Internet through an Internet service provider was a non-programming service.
62. The Commission notes that Novus is a BDU that owns and operates transmission facilities. The Commission further notes that Novus also uses its network to provide Internet service to the public for compensation.
63. Therefore, consistent with Telecom Decision 96-1, the Commission finds that Novus is a telecommunications common carrier that is also a BDU under the *Broadcasting Act* which is subject to the legislative authority of Parliament and is therefore a Canadian carrier.
64. In Telecom Decision 98-9, the Commission addressed issues related to the regulation of certain telecommunications services offered by broadcast carriers. The Commission refrained from regulating the rates at which broadcast carriers offered retail Internet services but retained its powers with respect to section 24 of the *Telecommunications Act* in order to maintain and impose certain conditions on the offering and provision of underlying telecommunications services to competitive service providers. The Commission also retained its powers with respect to subsections 27(2) and 27(4) of the *Telecommunications Act*. Among other things, the Commission was of the view that retaining these subsections would provide an additional safeguard against broadcast carriers granting any undue preference to their own services.
65. Therefore, based on the above, the Commission finds that subsections 27(2) and 27(4) of the *Telecommunications Act* apply to Novus.
66. The Commission's analysis of alleged contraventions of subsection 27(2) of the *Telecommunications Act* is conducted in two phases. The Commission must first determine whether there is a preference. Where it determines that there is, the Commission must then decide whether the preference is undue or unreasonable.
67. The Commission notes that Shaw was denied access during construction to Concord MDUs, other than the two buildings at 583 and 455 Beach Crescent, while Novus and TCC were permitted access. The Commission notes that there was continued interference with Shaw's access at 638 Beach Crescent after construction. As noted earlier, Novus and Concord are related entities. Based on the record of this proceeding, the Commission finds that, as a result of its relationship with Concord, Novus was able to secure a preferred arrangement for access to Concord properties. The Commission considers that based on the evidence, the preferred access arrangement during construction, and the fact that Novus/Concord have not refuted that Shaw was denied access, Novus acted in a way that conferred a preference on itself within the meaning of section 27 of the *Telecommunications Act*.

68. Pursuant to subsection 27(4) of the *Telecommunications Act*, the burden of establishing before the Commission that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier. The arguments provided by Novus to refute this burden are those set out in the previous section.
69. In the Commission's view, based on the reasons set out below, Novus has not refuted the burden that the preference was undue or unreasonable, pursuant to subsection 27(4).
70. In regard to wanting to transfer title with as few agreements as possible in order to allow the residents to choose for themselves the services and service providers they would prefer, as noted in the previous section, the Commission does not see how the installation of Shaw's or any other service provider's facilities during the construction phase would have discouraged choice for residents or otherwise encumbered them. In fact, because access was restricted, residents' choice of service providers was limited as not all service providers had facilities in the building at the time that some of the residents moved into the building.
71. In the Commission's view, it is not necessary that access be provided to every company. Rather, it would be reasonable to limit access to those companies that request it and are able to install their facilities on a timely basis. Moreover, this is not a situation where Concord was incapable of providing access to Shaw, rather it chose to limit access to only TCC and Novus. Further, the argument that granting access to only a limited number of service providers mirrors the practice of all developers is not consistent with the Commission's finding in Telecom Decision 2003-45 that the most efficient and economical time for the installation of telecommunications facilities, including entrance facilities to access an MDU, was during the construction stage.
72. The argument that Shaw's entry was delayed as it had to negotiate with the residents' strata council detracts from the fact that during construction, Novus and TCC were permitted access to the Concord MDUs while Shaw was denied access. In particular, the choice for residents at the property located at 638 Beach Crescent was limited because the property management did not have the ability to sign an access agreement on behalf of the strata corporation after construction, and Shaw was directed to remove its equipment. Novus' argument that Shaw's entry was delayed in order to allow the residents' strata council to negotiate for favourable terms for providing access goes against Telecom Decision 2003-45. In that Decision, the Commission did not consider that permitting exclusive or preferred access arrangements was consistent with the policy objectives of the *Telecommunications Act* or with the access condition.
73. The argument that Shaw, similar to Novus in other buildings, must negotiate an access agreement with the residents' strata council is irrelevant and again detracts from the fact that during construction, Novus and TCC were permitted access to the Concord MDUs while Shaw was denied access.
74. The argument that Shaw was the initial service provider in 95 percent of the MDUs in the GVRD does not justify denying timely access to Shaw to the Concord MDUs.

75. In light of the foregoing, the Commission finds that during and after construction, Novus conferred an unjust and undue preference on itself within the meaning of subsection 27(2) of the *Telecommunications Act*.
76. Accordingly, the Commission directs Novus to file within 30 days of the date of this Decision, the steps it intends to take to ensure that the future access is not unduly preferential.

III – Breach of inside wire obligations

Positions of parties

77. Shaw requested that the Commission declare that Novus had contravened section 10 of the Regulations by refusing to process requests to transfer inside wire at the Concord-developed MDU located at 638 Beach Crescent.
78. In its reply, Novus/Concord stated that the only instance in which Novus had refused to allow use of its inside wire was at 638 Beach Crescent when it was advised by Concord that Shaw was trespassing on the property until such time as it had concluded a legally binding access agreement with the residents' strata council. Novus indicated that once Shaw had concluded such an agreement in November of 2006, Novus continued to honour the inside wire transfer procedures that the companies had put in place.

Commission's analysis and determination

79. The Commission points out that section 10 of the Regulations is not conditional upon the licensee making the request to use the inside wire having a valid access agreement with the building owner.
80. In light of the above, the Commission finds that Novus contravened section 10 of the Regulations when it did not permit Shaw to use the inside wire at 638 Beach Crescent following Shaw's request. As a result, Novus is directed, within 30 days of the date of this Decision, to notify the Commission of the steps it intends to take to ensure that this situation is not repeated.

IV – Prohibition request

Positions of parties

81. Shaw requested that the Commission prohibit Novus from providing telecommunications and broadcasting services to new customers located in a Concord-developed property until Shaw had the same ability as Novus to access and serve end-users at the property.
82. Novus/Concord asked that it be given the reciprocal right in other properties where Shaw had a long-standing arrangement or an agreement with the developer to be the initial service provider.
83. Novus/Concord submitted that should the Commission grant Shaw's request, all other service providers should be given the ability to offer their services to end-users simultaneously on completion of a development, whether it was a Concord development or another MDU

development. Novus argued that otherwise, the order would confer an undue preference on Novus and Shaw only.

Commission's analysis and determination

84. The Commission considers that it would be inappropriate to make a broad order directing Novus to cease providing service to new customers at Concord-developed MDUs until Novus has ensured that Shaw has the same ability as Novus to serve end-users at the MDU. In the Commission's view, doing so would cause customers to suffer the loss of cable television and Internet services. The Commission is of the view that customers should not be made to suffer because of the behaviour of Novus.
85. Accordingly, the Commission **denies** Shaw's request for a prohibition order.

V – Compliance With the Policy Direction

Positions of parties

86. Shaw stated that the Policy Direction adopted recommendations of the Telecommunications Policy Review Panel (the TPR Panel). Shaw noted that in its Report, the TPR Panel specifically found that access to MDUs was critical to competitive markets thereby making it clear that access must be both non-selective and timely.
87. Shaw submitted that the Concord access policy and its effects fell squarely within the TPR Panel's description of access practices that restricted consumer choice and thwarted competition. Moreover, by endorsing the recommendations of the TPR Panel, the Policy Direction added urgency to the need for the Commission to enforce its building access and inside wire regimes.
88. Novus submitted that any action by the Commission to grant Shaw's request would be a departure from the Policy Direction which requires that the Commission take a more market-based approach to implementing the *Telecommunications Act*. Novus submitted that the relief sought by Shaw would interfere with developers' rights to contract with specific service providers in the course of development, a result which was not only contrary to the Policy Direction, but also one which would create an impractical and unmanageable constraint on developers.

Commission's analysis and determination

89. The Commission established the MDU framework in Telecom Decision 2003-45 in part because market forces had proven unsuccessful in allowing timely access by telecommunications service providers to MDUs to install telecommunications facilities. While competition among telecommunications service providers has increased significantly since 2003 in both nature and amount, access to MDUs has remained a barrier to entry since access is still controlled by building owners who exercise a gate-keeping function.
90. The Commission chose to address this situation, in a minimally intrusive fashion, by providing non-binding guidelines to assist building owners and Canadian carriers in their negotiations and only intervening, on a case-by-case basis, where necessary.

91. At the same time that the Commission provided this case-by-case dispute resolution mechanism to Canadian carriers, the Commission ordered LECs to make unbundled loops and in-building wire under their control available under reasonable terms and conditions thereby ensuring that, to the greatest extent possible, other telecommunications service providers could access MDUs using LEC facilities. In the Commission's view, these orders are consistent with the Policy Direction in that they ensure that, to the extent possible, the Commission's regime for MDU access does not artificially favour either Canadian carriers or resellers.
92. The Commission notes that its conclusions with respect to subsection 27(2) of the *Telecommunications Act* are also consistent with the Policy Direction in that the Commission's conclusions are intended to further the ability of consumers to have access to telecommunications services and to allow market forces to operate in the provision of telecommunications services to customers in the MDUs in question without any one telecommunications service provider having artificially enhanced access to an MDU and its occupants.
93. In the circumstances of this case, the Commission is of the view that its conclusions reaffirm the minimally intrusive approach taken in Telecom Decision 2003-45 and hence are in accordance with the requirements of the Policy Direction.

Related documents

- *Provision of telecommunications services to customers in multi-dwelling units*, Telecom Decision CRTC 2003-45, 30 June 2003
- *Novus Entertainment (B.C.) Inc. - Change to licensed service area*, Decision CRTC 2000-273, 26 July 2000
- *Regulation under the Telecommunications Act of certain telecommunications services offered by "broadcast carriers,"* Telecom Decision CRTC 98-9, 9 July 1998
- *Regulation of broadcasting distribution undertakings that provide non-programming services*, Telecom Decision CRTC 96-1, 30 January 1996

Secretary General

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