Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2003-45

Ottawa, 30 June 2003

Provision of telecommunications services to customers in multi-dwelling units

Reference: 8644-C12-03/00

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Summary

Further to Seeking public input on access to multi-dwelling units, in-building wiring and riser space*, Public Notice CRTC 2000-124, 25 August 2000, as amended by Public Notices 2000-124-1 and 2000-124-2, the Commission establishes the conditions and principles for the provision of telecommunications services to customers located in multi-dwelling units (MDUs), including guidelines that will assist building owners and local exchange carriers (LECs) in negotiating just and expedient conditions of access to MDUs. This decision also addresses a number of related matters, including the terms and conditions of access to MDUs via the LECs' facilities.*

I Background

A. Background to Decision 97-8

1. In 1993, Parliament enacted the *Telecommunications Act* (the Act), replacing the telecommunications-related provisions of the *Railway Act*. The Act affirmed many of the policy objectives that the Commission had been giving effect to under the *Railway Act* since the 1970's, including the introduction of competition in various telecommunications markets. Section 7 of the Act declares that Canadian telecommunications policy has among its objectives to facilitate the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions, to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada, to enhance the efficiency and competitiveness of Canadian telecommunications at the national and international levels, to foster increased reliance on market forces for the provision of telecommunications services, to encourage innovation in the provision of telecommunications services, and to respond to the economic and social requirements of users of telecommunications services. The Act provides the Commission with new powers to impose conditions of service on Canadian carriers under section 24, and to forbear from regulating services or classes of services under section 34(1), when such forbearance is found to be consistent with the Canadian telecommunications policy objectives. The Act also requires the Commission, under section 34(2), to forbear from regulating services or classes of services where these are found to be subject to competition sufficient to protect the interests of users. Section 47 of the Act requires that the Commission exercise its powers and perform its duties with a view to implementing the Canadian telecommunications policy objectives set out in section 7.

2. In *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19), the Commission established a comprehensive regulatory framework for the telecommunications industry, in light of the policy objectives of the Act and the evolution of the telecommunications environment. The Commission stated that market forces would generally be preferable for governing the behaviour of telecommunications service providers in markets that were sufficiently competitive. The Commission also stated that greater reliance on market forces would allow for greater choice and supplier responsiveness and would ensure that user applications, not regulators, drove supply considerations. The Commission determined that, with the ever-increasing range of telecommunications services made available through new technology, users should have the opportunity to choose

whatever package of services and whichever suppliers best fit their particular needs. The Commission further determined that the public interest would be best served if all telecommunications services were provided competitively and made accessible to all sectors of the public. The regulatory framework was therefore established with a view to assisting in the development of a telecommunications infrastructure that would allow all Canadians, not just a select few, ubiquitous and affordable access to an increasing range of competitively provided basic and advanced information and communications products and services to serve increasingly diverse user requirements.

3. The Decision 94-19 framework encompassed a wide range of regulatory issues, as well as a framework for the introduction of competition into the local telephone market. In particular, the Commission found that, while the local telephone market was already open to competitive entry by cellular and other wireless suppliers, the potential existed for meaningful competition in the local wireline market. The Commission considered that encouraging this potential would lead to benefits, such as productivity improvements and service innovation, and found that in order to achieve these objectives, there was a need to remove barriers to entry and adopt conditions to safeguard competition. The Commission concluded that principles of open access, unbundling, co-location and interoperability among networks had to be promoted to ensure that the right economic and technical conditions were in place to facilitate entry into the local wireline market. The Commission subsequently initiated a number of proceedings to establish the necessary frameworks to give effect to its conclusions.

4. In *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997 (Decision 97-8), the Commission established a framework for the implementation of local competition, in accordance with the principles enunciated in Decision 94-19. The Commission found that efficient and effective competition would be best achieved through facilities-based competitive service providers. The Commission considered that, without facilities-based competition, competition would only develop at the retail level, with the incumbent local exchange carriers (ILECs) retaining monopoly control of wholesale level distribution. The Commission adopted the principle that competitive local exchange carriers (CLECs) were not simply customers of ILECs but were carriers of equal stature to the ILECs in the local exchange market.

5. In Decision 97-8, the Commission found that there were several barriers to entry into the local exchange market arising from technical restrictions, tariff restrictions designed for regulation in a monopoly environment, and subsidized pricing policies implemented in respect of residential service rates. The Commission adopted a number of measures to facilitate the entry of CLECs into the local exchange market, while ensuring that they had sufficient incentives to invest in their own facilities. The Commission mandated interconnection arrangements between local exchange carriers (LECs) and directed that associated technical modifications be made to the ILECs' networks. The Commission also ordered the unbundling of essential facilities that CLECs would require, but would not generally be able to provide themselves. It also established a transitional regime for the unbundling of other ILEC facilities (near-essential facilities) for a period of five years, pending the development of facilities-based competition.

6. In order to facilitate end-user choice, the Commission determined in Decision 97-8 that it was in the public interest that end-users have the right and the means to access the LEC of their choice in all situations. The Commission noted that the nature of the local exchange network allowed LECs to use another LEC's existing facilities to access end-users served by that LEC. In order to ensure that these principles were observed, the Commission required, as a condition of providing service, that all LECs ensure that the end-users that they served were able to have direct access, under reasonable terms and conditions, to services provided by any other LEC operating in the same area. The Commission also considered that, in order to promote competitive entry and foster consumer choice, it was reasonable to mandate that customers be permitted to connect the wire located in their premises to the network of any LEC in whose serving area they were situated.

7. The Commission recognized in Decision 97-8 that additional technical and operational modifications would be needed to allow CLECs to interconnect their network facilities to the ubiquitous networks of the ILECs in a manner that would allow them to offer local exchange services to end-users, and that such modifications would require further investigation and negotiation on the part of those affected. The Commission therefore requested the CRTC Interconnection Steering Committee (CISC), established pursuant to *Implementation of Regulatory Framework - Development of Carrier Interfaces and Other Procedures*, Telecom Public Notice CRTC 96-28, 1 August 1996, to identify issues and propose solutions for consideration by the Commission.

8. Following Decision 97-8, the Commission conducted a number of proceedings to implement local competition, including proceedings relating to co-location[1], unbundling[2] as well as access to support structures[3] and rights-of-way.[4] The Commission also established a Building Access and Inside Wire Sub-Working Group of the CISC (the SWG) to deal with issues relating to the provision of competitive telecommunications services in multi-tenant buildings, commonly referred to as multi-dwelling units (MDUs).

B. Proceedings relating to access to MDUs

9. While the SWG resolved a number of issues that had been referred to it by the Commission, it requested that the Commission address several matters in dispute. In *Location of Demarcation Point for Inside Wire in Multi-tenant Buildings and Associated Issues*, Telecom Public Notice CRTC 98-35, 2 December 1998, the Commission initiated a proceeding to address matters related to whether or not responsibility and control of in-building wire extending from the main terminal room (MTR) in an MDU to the customer's suite, together with other related telecommunications facilities located in the MDU (collectively, the in-building wire) should be transferred from LECs to building owners.

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[1] See for example, *Co-location*, Telecom Decision CRTC 97-15, 16 June 1997.
[2] See for example, *Final Rates for Unbundled Local Network Components*, Telecom Decision CRTC 98-22, 30 November 1998, and *Local competition: Sunset clause for near-essential facilities*, Order CRTC 2001-184, 1 March 2001 (Order 2001-184).
[3] See for example, *Rates set for access to telephone companies' support structures*, Order CRTC 2000-13, 18 January 2000.
[4] See for example, *Ledcor/Vancouver - Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001.

10. In *Location of Demarcation Point for Inside Wire in Multi-Dwelling Units and Associated Issues,* Telecom Decision CRTC 99-10, 6 August 1999 (Decision 99-10), the Commission determined that the ability of CLECs to have access to the in-building wiring in an MDU was central to the implementation of its policy of end-user choice, and therefore found it appropriate that LECs use in-building wire under the building owner's responsibility and control where the building owner made such facilities available on reasonable, non-discriminatory terms and conditions.

11. The Commission determined further in Decision 99-10 that building owners would be required to have responsibility and control of in-building wire in all newly constructed MDUs, and in existing MDUs where the building owner accepted such responsibility and control in writing. Building owners that had responsibility and control of in-building wire would be responsible for managing those facilities.

12. The Commission also determined that the service provider demarcation point, designating the point at which a LEC's responsibility and control over wires and other telecommunications facilities would end, should be located at the MTR, in cases where the building owner had responsibility and control of in-building wire. The Commission considered that having a common point of connection to in-building wire would permit building owners to better respond to requests for access.

13. Where the building owner was not willing to accept responsibility and control of the in-building wire, but was willing to permit a LEC to install facilities in the MDU, the Commission determined that each LEC would have responsibility and control for the in-building wire it installed. The Commission also noted that a LEC that did not wish to install its own in-building wire could use another LEC's unbundled loop to serve end-users in an MDU.

14. The Commission noted in Decision 99-10 that many parties had raised issues regarding the role building owners could play as "gatekeepers" in relation to the LECs' ability to access end-users in MDUs, including issues relating to the terms and conditions for such access, and particularly fees. The Commission stated that it would initiate a proceeding to consider such matters.

15. Following the issuance of Decision 99-10, the Commission initiated a number of proceedings in response to complaints and disputes relating to the LECs' ability to access end-users in MDUs.

16. In a letter-decision *Re: Eastlink/Norigen Part VII Applications – Access to In-building Wire,* 5 June 2000 (the 5 June 2000 ruling), the Commission addressed access issues raised by CLECs that were using their own facilities to access MDUs where the in-building wire was under the responsibility and control of an ILEC. The Commission found that these CLECs were being prevented from serving their customers in MDUs where Bell Canada or Maritime Tel & Tel Limited (MTT) retained control of the in-building wire, and the building owner, while allowing access to the MTR, would not allow the CLECs to install their own in-building wire.

17. In the circumstances of the 5 June 2000 ruling, the Commission determined that it was appropriate to require Bell Canada and MTT to permit CLECs to connect to the in-building wire. The Commission set an interim rate for the connection of the CLECs' facilities to ILEC-controlled in-building wire at $1 per month. The Commission confirmed that the price of unbundled loops would continue to include the in-building wire, as these costs had already been included in the price of unbundled loops. The Commission directed other LECs to show cause why the same regime should not apply to them.

18. In *Seeking public input on access to multi-dwelling units, in-building wiring and riser space*, Public Notice CRTC 2000-124, 25 August 2000 (Public Notice 2000-124), the Commission initiated a proceeding (the Public Notice 2000-124 proceeding) calling for comments on the regulatory approach that should be used to facilitate non-discriminatory access and consumer choice in MDUs. In particular, the Commission sought comments on the terms and conditions, including fees, under which LECs could access the MTR or other areas of the building, access building riser space to install their own wiring, and connect to in-building wire controlled by building owners or other LECs. The Commission also sought comments on whether it should impose specific terms and conditions pursuant to section 24 of the Act or other means, or whether as an alternative to Commission-specified terms and conditions, it should issue guidelines that could be used by LECs and building owners in negotiating access agreements. In addition, the Commission invited parties to comment on the scope and nature of the Commission's jurisdiction to set the terms and conditions of access to MDUs.

19. In Public Notice CRTC 2000-124-1, 21 September 2000, the Commission announced a revised schedule for filing comments in the Public Notice 2000-124 proceeding, following requests from a number of parties to the proceeding.

20. In *Re: The Commission extends the determination on the EastLink/Norigen application (access to in-building wire) to all local exchange carriers*, Decision CRTC 2001-362, 19 June 2001 (Decision 2001-362), the Commission applied the determination made in the 5 June 2000 ruling to all LECs, such that all LECs controlling in-building wire were required to accommodate the connection of facilities of other LECs to the in-building wire under their control. The Commission also applied, on an interim basis, the rate of $1 per month for such connections.

21. In *Re: Clarifications concerning access to in-building wire: Call-Net Part VII applications of 30 June and 4 August 2000*, Decision CRTC 2001-364, 19 June 2001 (Decision 2001-364), the Commission acknowledged that it might not have fully considered the operational and cost implications of ending local loops at the MTR, in cases where the building owner had accepted responsibility and control of the in-building wire pursuant to Decision 99-10. The Commission was of the view that, while Decision 99-10 was intended to support the development of facilities-based competition, the termination of loops in the MTR could reduce end-user choice or affect the viability of services offered by CLECs that used unbundled loops. In light of these concerns, the Commission directed all ILECs to show cause why they should not be directed, on an interim basis, to prevent further transfer of responsibility and control of ILEC-owned in-building wire to building owners, pending a final determination on this matter in the Public Notice 2000-124 proceeding.

22. In *Subject: Direction, on an interim basis, that local exchange carriers must retain responsibility and control of their in-building wire pending the final determination in the PN 2000-124 proceeding,* Decision CRTC 2001-572, 10 September 2001 (Decision 2001-572), the Commission directed, on an interim basis, as a condition to the offering and provision of local service, that all LECs retain responsibility and control of their in-building wire, pending a final determination in the Public Notice 2000-124 proceeding.

23. In Public Notice CRTC 2000-124-2, 15 October 2001 (Public Notice 2000-124-2), the Commission reopened the Public Notice 2000-124 proceeding to seek comments on additional issues relating to access to MDUs, including certain aspects of Decision 99-10.

II The Public Notice 2000-124 proceeding

24. The Commission received submissions in response to Public Notice 2000-124 from the following ILECs: Bell Canada on behalf of itself, Island Telecom Inc., MTT, MTS Communications Inc., NBTel Inc., NewTel Communications Inc. and Saskatchewan Telecommunications (SaskTel) (collectively, Bell Canada et al.); and TELUS Communications (B.C.) Inc. on behalf of itself, TCI Communications Inc. and Québec-Téléphone (collectively, TCI). SaskTel also filed comments independently.

25. The CLECs that filed submissions were: MaxLink Communications Inc. on behalf of itself, AT&T Canada Telecom Services Company (AT&T Canada), AXXENT Corp., C1.com Inc., Call-Net Enterprises Inc. (Call-Net), Combined Telecom Inc., and Wispra Networks Inc. (collectively, MaxLink et al.); Futureway Communications Inc. (Futureway); GT Group Telecom Services Corp. (Group Telecom); Norigen Communications Inc. (Norigen); and Novus Telecom Group Inc. (Novus).

26. Submissions were filed by the following building owners and associations representing building owners: Boardwalk Equities Inc. on behalf of itself and Suite Systems Inc. (Boardwalk); the Canadian Institute of Public and Private Real Estate Companies and the Building Owners and Managers Association - Canada (CIPPREC/BOMA); and the Canadian Federation of Apartment Associations (CFAA).

27. Submissions were filed by the following broadcasting distribution undertakings (BDUs) and associations representing BDUs: Bell ExpressVu Limited Partnership (Bell ExpressVu); Look Communications Inc. (Look); Regional Cablesystems Inc. (Regional); Whistler Cable Television Ltd. (Whistler Cable); and the Canadian Cable Television Association (CCTA).

28. Submissions were also received from the University of Manitoba, the Federation of Canadian Municipalities (FCM), and Stream Intelligent Networks Corp. (Stream).

29. On 14 November 2000, the Commission and other parties sent interrogatories to parties. Responses were filed on 12 December 2000.

30. On 5 February 2001, comments were filed by the following parties: Action Réseau Consommateur on behalf of itself, the Consumers' Association of Canada, the Fédération des associations coopératives d'économie familiale du Québec, and the National Anti-Poverty Organization (collectively, ARC et al.); Boardwalk; CCTA; CIPPREC/BOMA; Bell Canada et al.; MaxLink et al.; Futureway; Group Telecom; Norigen; Sheila Kimmel; Stream; and TCI.

31. On 14 February 2001, ARC et al., Boardwalk, CIPPREC/BOMA, Bell Canada et al., MaxLink et al., Futureway, Group Telecom, Norigen, and TCI filed reply comments.

32. MaxLink Communications Inc. advised the Commission that, as of June 2001, it no longer represented the parties identified above as MaxLink et al. A number of these parties subsequently participated individually.

33. On 14 November 2001, ARC et al., AT&T Canada, Call-Net, CIPPREC/BOMA, Bell Canada et al., Group Telecom, Futureway, TCI, Stream, and The Western Canadian Universities Computing Directors representing universities in Manitoba, Saskatchewan, Alberta and British Columbia filed comments in response to Public Notice 2000-124-2.

34. On 29 November 2001, AT&T Canada, CIPPREC/BOMA, Bell Canada et al., Futureway, and TCI filed reply comments.

III Access to MDUs: Positions of the parties

A. The question of regulatory intervention

35. The parties to this proceeding representing ILECs and CLECs, with the exception of Futureway, argued that regulatory intervention was necessary to ensure that end-users in MDUs had a reasonable opportunity to obtain service from the LEC of their choice. These parties submitted that the Commission had to adopt measures to remove barriers to entry and ensure that LECs had access to end-users in MDUs on reasonable terms and conditions. The parties representing CLECs, with the exception of Futureway, also argued that barriers to entry placed them at a competitive disadvantage relative to ILECs, and that regulatory intervention was necessary to ensure that access to MDUs was available on an equitable basis.

36. Bell Canada et al., Group Telecom, MaxLink et al., Norigen, Novus, and TCI submitted that building owners were, by virtue of their bargaining power, compromising end-user choice by imposing unreasonable terms and conditions of access that effectively prevented LECs from serving customers in MDUs. These parties argued that regulatory intervention was required to preclude building owners from extracting excessive concessions as a result of their role as gatekeepers.

37. Bell Canada et al. argued that it was necessary for the Commission to intervene in order to ensure that end-users in MDUs had the means to obtain services from the LEC of their choice, and that LECs were able to serve those end-users by means of their own facilities, on reasonable and non-discriminatory terms and conditions. Bell Canada et al. submitted that local competition had created economic incentives for building owners to impose terms and

conditions of access and argued that in the absence of Commission action, building owners would have a virtually unfettered ability to impose the charges, terms and conditions they chose. Bell Canada et al. submitted that access agreements should not be permitted to create obstacles to end-user choice through exclusive arrangements, the creation of monopoly fees, terms and conditions, or the establishment of anti-competitive terms and conditions. SaskTel also submitted that building owners should not be permitted to create obstacles to end-user choice by imposing unreasonable and anti-competitive terms and conditions, including excessive fees.

38. MaxLink et al. submitted that the establishment of a regulatory framework that enshrined not only the principles of fair and non-discriminatory access to MDUs but also established an open entry model for access was crucial to the successful attainment of the Commission's policies of end-user choice and the establishment of facilities-based local competition.

39. MaxLink et al. stated that CLECs were facing obstacles created by building owners that prevented them from obtaining access to MDUs on reasonable terms and conditions. They described situations where the terms, conditions and fees sought by building owners were so onerous that they had refused to serve the MDU in question. They also described situations where, in order to be able to serve their customers, they had signed access agreements under circumstances that, in their view, amounted to duress. CLECs, with the exception of Futureway, estimated that they had faced obstacles to entry in 60% to over 95% of the MDUs that they had attempted to serve.

40. The CLECs submitted that there were numerous barriers to entry to MDUs affecting their ability to serve customers using their own facilities. They further submitted that they often faced difficulties serving customers in MDUs with leased unbundled loops, as they had been unable to negotiate reasonable terms and conditions of access with building owners to allow them to connect unbundled loops to in-building wire under the responsibility and control of building owners. AT&T Canada submitted that it often depended on unbundled loops as a means of accessing customers in MDUs pending the building of its own facilities. AT&T Canada and Call-Net also submitted that unbundled loops often represented the only option available to reach customers in cases where it was either uneconomical or impossible to access an MDU through their own facilities.

41. Group Telecom submitted that it had incurred significant delays in attempting to negotiate acceptable access agreements with building owners in almost all MDUs that it had attempted to serve. Group Telecom submitted that these delays effectively amounted to a denial of access for CLECs. In this regard, Group Telecom noted that a CLEC might be able to interest customers in its services, but if access could not be negotiated within a reasonable period of time, the potential customers would generally cancel their orders.

42. Group Telecom, MaxLink et al., Norigen and Novus argued that it was unjustly discriminatory for CLECs to be required to enter into access agreements, incur delays in negotiating agreements and be subject to unreasonable terms and conditions of access while most ILECs were able to continue to serve customers in MDUs without written access agreements. They further submitted that it was unjustly discriminatory for them to be charged excessive fees to serve an MDU when ILECs could serve the same MDU without paying any

fees. The CLECs submitted that ILECs also gained an advantage in MDUs where there were no competitive service providers in that they were able to earn all of the telecommunications revenues while paying no fees. Group Telecom added that CLECs were at a disadvantage since the building owner would not expel an ILEC that refused to accept the terms of an access agreement.

43. TCI submitted that, in many cases, LECs were capitulating to building owners' demands in order to serve customers. TCI noted that there were access difficulties in almost all cases where it attempted to negotiate access to MDUs as a CLEC operating outside its ILEC serving territory. TCI noted that the terms, conditions and fees were often so onerous that it either did not provide service to the MDUs in question, or it signed agreements on condition that these could be changed to comply with any future Commission rulings. TCI noted that it was also experiencing difficulties in gaining access to MDUs in areas where it operated as an ILEC. In this regard, TCI noted that there were a number of buildings in its serving territory where it had been limited to supplying basic services to existing customers as it had been denied access to install and replace equipment to serve new customers and to provide additional services to existing customers. TCI also submitted that ILECs were, in some cases, faced with expulsion from MDUs if they did not match the excessive fees demanded from CLECs.

44. Bell Canada et al. noted that they were experiencing increasing difficulties in gaining access to MDUs. They noted instances where the ILECs had found themselves unable to gain access or had simply been advised that a building owner had entered into arrangements with a LEC whereby the building owner and the LEC were not willing to permit other LECs to gain access to serve customers in the MDU.

45. In support of their position for regulatory intervention, LECs, with the exception of Futureway, provided illustrations of the difficulties they faced as a result of the bargaining power of building owners. Bell Canada et al., Group Telecom, MaxLink et al., Norigen, Novus and TCI also filed copies of executed access agreements that included terms and conditions that, in their opinion, were onerous or unreasonable. These terms and conditions included:

- provisions allowing a building owner to assume ownership of in-building wire without compensation to the LEC, upon 30 days notice;

- provisions allowing the building owner to determine, at its discretion, the size, type, configuration and location of telecommunications equipment in the MDU;

- provisions prohibiting the sharing of a LEC's telecommunications equipment with other LECs;

- provisions prohibiting the cross-connection of telecommunications equipment between LECs, without the permission of the building owner;

- requirements that the LEC use a common in-building wiring infrastructure and pay connection and usage fees determined by the building owner;

- requirements that the LEC indemnify the building owner from liability in all situations, including situations where the building owner might be found negligent;

- provisions prohibiting changes to any telecommunications service provided to customers in the MDU, without the written approval of the building owner; and

- provisions to the effect that the access agreement would override any rulings made by the Commission.

46. The LECs, with the exception of Futureway, further argued that regulatory intervention was necessary in light of the ability of certain building owners to extract excessive profits from the provision of access to MDUs. The LECs submitted that, with the fees demanded by certain building owners, they could not make viable business cases for serving some MDUs. In support of their position, the LECs provided examples of fee provisions that they considered excessive. These included:

- fees based on a percentage of the LEC's revenue ranging from 5% to 15%;

- annual fees amounting to several hundred thousand dollars based on all of the buildings in the building owner's portfolio rather than the specific building to which access was required;

- fees based on the total square footage of the building rather than the actual space used by the LEC;

- no reduction in fees for the use of equipment space if equipment space was shared with another LEC;

- entry fees that had no relationship to any services offered or required by the LEC;

- excessive fees for the maintenance, installation and repair of in-building wiring, including fees for wiring management services that did not abide by quality of service standards; and

- fees for the building owner's costs of negotiating access.

47. The LECs submitted that access to MDUs on reasonable terms and conditions was crucial to achieving sustainable competition. MaxLink et al. argued that access to MDUs located in urban centres was particularly critical. Bell Canada et al. observed that many MDUs were prime commercial properties where LECs needed access. TCI added that, in many cases, a customer's location in an MDU represented only one part of a customer's network and that access to MDUs was often critical to meet the customer's total communications needs.

48. In response to interrogatories on the estimated size of the MDU market, CIPPREC/BOMA estimated that the Canadian residential MDU market included approximately 42% of all residential telephone lines. TCI was of the view that it was probably closer to 22% while Novus submitted an estimate of 32%. CIPPREC/BOMA estimated that there were 550 million square feet of commercial office space in Canada. Bell Canada et al. estimated that, in commercial MDUs, it provided an average of one line per 10 square metres of floor space.

49. The parties representing building owners, the FCM, and Futureway argued that regulatory intervention was not required and that market forces would, over time, serve to ensure end-user choice.

50. CIPPREC/BOMA argued that LECs had been successful in negotiating access, and that there were no access problems in any MDUs. In support of their position, CIPPREC/BOMA noted that the results of a survey entitled "Critical Connections" indicated that 98% of tenants in the United States and Canada were served by the telecommunications providers of their choice. In response, MaxLink at al. and TCI submitted that the survey did not apply to the Canadian market since no Canadian tenants had participated in the survey. They further submitted that the survey was of limited value since the wording of the particular question upon which CIPPREC/BOMA had based their conclusion did not allow for the interpretation it had presented.

51. Boardwalk, CIPPREC/BOMA and Futureway objected to any mandated access to MDUs. CIPPREC/BOMA submitted that, while they supported competition and the objective of end-user choice, they did not support or accept the end-users' right to have access to the facilities-based carrier of their choice in all situations. CIPPREC/BOMA submitted that the right to choice in all situations might only be accomplished through leased unbundled loops. In CIPPREC/BOMA's view, there was no reason why the leasing of unbundled loops should not satisfy end-user choice if access to the MDU was not otherwise available.

52. AT&T Canada stated that, although the availability of unbundled loops was an important component of the local competition regime, it would not, in and of itself, satisfy the Commission's policies of end-user choice and facilities-based competition. Bell Canada et al. added that, while the use of unbundled loops represented an acceptable means of providing service to customers, the objective of end-user choice had to be pursued in conjunction with the development of facilities-based competition. AT&T Canada and Futureway raised a number of issues with respect to the technical suitability of unbundled loops for the provision of services beyond conventional voice services, such as broadband and high-speed Internet services. Group Telecom noted that it required fibre-optic cable extending directly to its customers because it was not technically feasible with unbundled loops to provide the full suite of services it had to offer.

53. ARC et al. argued that some form of regulation, whether direct or indirect, was necessary in order to ensure reasonable access by CLECs to serve end-users in MDUs. ARC et al. submitted that it was clear from the evidence to date that residential building owners could not be relied upon to facilitate competitive access. ARC et al. argued that tenants could not exert sufficient influence on building owners since the length and the terms of leases, as well

as the cost and inconvenience of relocating, made it impractical for tenants to relocate as a means of getting telecommunications services from the service providers of their choice. ARC et al. also submitted that it expected that building owners would favour service providers with which they were affiliated, to the detriment of end-user choice. In ARC et al.'s view, this further highlighted the need for Commission intervention.

54. Norigen submitted that market forces alone would not be sufficient to ensure that access arrangements promoted what it regarded as the over-riding objective of end-user choice. In Norigen's view, some regulatory oversight of access arrangements was necessary to guide it in its negotiations with building owners. Norigen submitted that an appropriate regulatory framework would be one that ensured open access to serve end-users in MDUs with a minimal amount of regulatory burden.

B. Nature and extent of proposed regulatory intervention

55. Parties to this proceeding provided their views on the appropriateness of various means by which the Commission could ensure access to MDUs on equitable and reasonable terms and conditions, including Commission-specified terms and conditions, model access agreements, and guidelines to assist LECs and building owners in their negotiations.

56. CLECs, with the exception of Futureway, argued that all LECs had to be subject to non-discriminatory access agreements in order to promote equity in the industry. In this regard, Group Telecom submitted that an ILEC should not be exempted from paying fees even if it were the only telecommunications provider in an MDU.

57. ILECs submitted that agreements should only be required in MDUs where more than one service provider was present. TCI submitted that a LEC should be able to adopt another LEC's access terms when these were more favourable.

58. CIPPREC/BOMA argued that building owners should be able to require that access agreements be entered into by all LECs, and that all LECs should pay a fee for occupying space and utilizing resources.

59. Boardwalk and CIPPREC/BOMA submitted that ILECs and CLECs should have similar access agreements. CIPPREC/BOMA submitted that ILECs should pay fees, even when they were the sole telecommunications provider in an MDU. CIPPREC/BOMA argued that the ILECs' dominant market position allowed them to refuse to sign access agreements with building owners and that building owners had little leverage and no recourse against ILECs since they could not be forced out of the building given their obligation to provide telephone service and the tenants' need for service. They suggested that there should be a transition period for ILECs to enter into access agreements.

60. CIPPREC/BOMA indicated that it could work with telecommunications service providers to develop a model access agreement as long as the agreement allowed for payment of fees and limitations of liability. Futureway submitted that model access agreements were not required and that the terms of access agreements should be negotiated with building owners on a case-by-case basis.

61. CIPPREC/BOMA submitted that guidelines could assist both LECs and trade associations in developing and communicating best practices to building owners. CIPPREC/BOMA submitted that the guidelines could include:

- a general prohibition on exclusive agreements;
- guidance on good housekeeping and required LEC conduct while on the MDU property;
- guidelines on process considerations to ensure that LECs were aware of the necessary steps to enable access;
- guidelines on joint real estate industry/LEC communications that could be developed and disseminated; and
- a voluntary process to facilitate discussion and negotiation of model agreements.

62. Bell Canada et al., Group Telecom and Norigen submitted that voluntary guidelines were not an appropriate alternative to Commission-specified terms and conditions of access, since compliance with voluntary guidelines could vary between parties. In particular, they submitted that the Voluntary Code of Conduct developed by the SWG to facilitate access to MDUs and resolve access disputes, had not succeeded in preventing building owners from demanding unreasonable terms and conditions of access. Norigen submitted that the Voluntary Code of Conduct had not been effective in that the obligations were vague, there was no enforcement mechanism, and the dispute resolution process was too cumbersome for a competitive market. Bell Canada et al. added that their experience to date had shown that even though CIPPREC/BOMA had agreed in principle to provide access to MDUs in accordance with the Voluntary Code of Conduct, in practice, many building owners had totally disregarded these guidelines.

63. Bell Canada et al. submitted that the issuance of guidelines might be a viable approach in a marketplace where information was available to all parties and the bargaining situation between LECs and gatekeepers was more nearly equal. In Bell Canada et al.'s view, the marketplace for building access was not conducive to voluntary guidelines as a result of the imbalance in negotiating power between LECs and building owners, and the fact that competing LECs could not reasonably be expected to voluntarily share information on the terms and conditions under which they provided service.

64. Bell Canada et al. argued that the Commission had to provide LECs clear direction in order to meet the objective of end-user choice, and submitted that the Commission should mandate consistent terms and conditions of access, including fees, in the form of standard access agreements. Bell Canada et al. further submitted that the Commission could require that any agreement that differed in any material manner from the standard agreements be filed for Commission approval. Bell Canada et al. also submitted that the Commission could make such agreements publicly available for comment by interested parties prior to approval.

65. TCI submitted that it did not have any objections to executed access agreements being made public, excluding those portions that contained end-user-specific information. In TCI's view, publication of executed access agreements would serve as a compliance mechanism, to ensure that Commission-prescribed terms and conditions were adhered to.

66. CIPPREC/BOMA submitted that confidentiality agreements in tenant leases were rare and that brokers often required the financial details of tenant leases in order to publish market data. CIPPREC/BOMA further submitted that some building owners would be quite concerned, for safety and security reasons, if building plans, wiring maps or other building "system" information were disclosed. Boardwalk submitted that it would not be appropriate to require public disclosure of executed access agreements, given the competitive nature of access to MDUs and the risk of material financial harm from disclosure of competitively sensitive information.

67. TCI submitted that the Commission should issue a comprehensive decision providing clear direction to all of the stakeholders. TCI argued that leaving significant access issues to be negotiated between LECs and building owners would not advance the Commission's public policy objectives. TCI submitted that there was a material risk that the market power of building owners would result in the terms and conditions of access becoming entrenched, beyond the reach of the Commission. In TCI's view, such an approach would cause unnecessary expenses for consumers, a reduction in choice of service providers, and a reduced ability to meet the quality of service standards for telecommunications services.

68. MaxLink et al. submitted that the Commission should develop a set of mandatory principles that would serve as the basis for all access agreements negotiated between building owners and LECs. MaxLink et al. submitted that these principles should be binding on building owners as well as on any agent or third party that had control over access to the MDU.

69. MaxLink et al. submitted that all access agreements should be subject to the following set of principles:

- a building owner shall not interfere with the installation, maintenance, and operation of telecommunications apparatus and facilities located on its property or premises except where it is reasonably necessary to protect the safety, security, appearance and condition of the property and the safety and convenience of other persons;

- a building owner may require a Canadian carrier to indemnify the proper for damage caused in installing, operating, or removing telecommunications apparatus and facilities;

- a building owner may require that the Canadian carrier or the tenant, or a combination thereof, bear the entire cost of the installation, operation or removal of telecommunications apparatus and facilities; and

- a Canadian carrier and a building owner are prohibited from entering into any exclusive or preferred access arrangement of any kind and a building owner shall not discriminate in favour of, or against, a Canadian carrier regarding access in any manner.

70. MaxLink et al. submitted that these principles would serve to achieve an appropriate balance between the attainment of the Commission's policies and the building owner's right to manage its property. In particular, they submitted that building owners would, under these principles, be allowed to set reasonable terms required for the proper functioning and operation of their property, without unreasonably interfering with the business operations of Canadian carriers.

C. Proposed terms and conditions of access

71. Parties provided their views on specific terms and conditions of access agreements, including those related to exclusive and preferred access arrangements, preferred marketing arrangements, fees for access and for the use of space, in-building wire and other facilities within an MDU, access to install in-building wire and other telecommunications facilities, and access during construction of MDUs.

i) Exclusive and preferred access arrangements and preferred marketing arrangements

72. All LECs, with the exception of Futureway, submitted that exclusive and preferred access agreements limiting access to an MDU to one or a few selected LECs should be prohibited.

73. Bell Canada et al. submitted that exclusive and preferred access agreements caused end-user choice to be replaced by building owner choice. Bell Canada et al. submitted that mandated access agreements would not serve to ensure that all LECs gained access to MDUs under consistent terms and conditions, unless all exclusive and preferred access arrangements were prohibited. ARC et al. added that preferred access agreements were common for LECs affiliated with building owners.

74. CIPPREC/BOMA and Futureway submitted that building owners had the right to determine which LECs occupied space in their building as well as the terms and conditions of such access. CIPPREC/BOMA submitted that, while they supported a restriction on exclusive agreements, they would not provide access to CLECs if fees were inadequate. CIPPREC/BOMA suggested that, where a building owner was having difficulty attracting a CLEC to provide a competitive alternative in its MDU, the building owner should be able to offer the CLEC, for a finite period of time, an assurance that no other CLEC would have access to the MDU. CIPPREC/BOMA further submitted that preferred marketing arrangements providing for the coordinated promotion of a LEC's services by the LEC and the building owner should be permitted.

75. Group Telecom, MaxLink et al., Norigen and Novus were of the view that any arrangement, including preferred marketing arrangements, that directly or indirectly discriminated against competing providers should be prohibited. Group Telecom submitted that preferred marketing arrangements limited to the advertising and promotion of a LEC's services in

a building might, however, be permissible. In Bell Canada et al.'s view, preferred marketing arrangements should be permitted so long as they did not compromise end-user choice by limiting access by other LECs to serve customers in the MDU.

ii) Fees

76. Bell Canada et al. argued that the Commission should prohibit LECs from making any payments or giving any kind of financial advantage to building owners in consideration for the use of space, facilities or other services needed by the LEC for the provision of telecommunications services in MDUs, since tenants already paid for telecommunications facilities and any costs associated with the provision of telecommunications services as part of their rent. Bell Canada et al. submitted, however, that it would be appropriate for LECs to compensate building owners for the wire management services provided by a riser management company (RMC), if the RMC provided a service that a LEC would otherwise have to provide itself and if the fees were not simply a substitute for charging for the right of access to the building or the in-building facilities.

77. TCI submitted that LECs should only be required to pay fees that were based on incremental costs. TCI further submitted that no fees should be levied for buildings forming part of a building owner's portfolio where no service was provided, and that no fees should be paid where only one LEC served the building.

78. ARC et al. submitted that it was not appropriate to apply new charges for services that were already being provided to other LECs and that access fees should only apply where building owners incurred additional costs in providing access.

79. MaxLink et al. submitted that fees for the use of wiring and facilities provided by building owners should generally recover incremental costs while fees for the use of building space, including any utility services, should be based on the charges that would apply for similar facilities used by tenants and other service providers in the MDU. MaxLink et al. further submitted that the Commission should ensure that no competitive advantages would arise in circumstances where a LEC was not required to pay fees under a cost-based approach.

80. AT&T Canada and Bell Canada et al. submitted that LECs serving an MDU should be able to make use of any copper in-building wire available in an MDU at no charge. TCI submitted that any fees established for the use of in-building wire should be no higher than the rates that ILECs receive for the use of their wiring. MaxLink et al. argued that such fees should only recover direct incremental costs associated with the provision of in-building wire.

81. To assist in the valuation of copper in-building wire, a number of parties provided evidence on the cost of installing new copper in-building wire in MDUs. AT&T Canada estimated that a 50 pair cable could be installed in an MDU for $43.65 per pair. Bell Canada et al., Futureway and TCI provided evidence in confidence that ranged above and below this estimate.

82. Bell Canada et al. and TCI provided evidence, based on the records available, on the estimated useful life and age of copper in-building wire under their control. They estimated the useful life of in-building wire to be approximately 18 years. TCI submitted, however, that

barring obsolescence, there should be no end to the useful life of copper in-building wire when it was properly installed. Bell Canada et al. and TCI also noted that, based on the average age of the copper in-building wire under their control, most of the initial investment for the installation of such wiring had been recovered. They also noted that in-building wire required infrequent maintenance and, that once connected, it rarely failed.

83. CIPPREC/BOMA argued that for-profit telecommunications service providers should negotiate access on a commercial basis. In CIPPREC/BOMA's view, negotiated, market-based fees were required to maximize building value and any limitation restricting fees to a cost-based level would constitute expropriation. In CIPPREC/BOMA's view, the rates for leasing unbundled loops provided an appropriate mechanism to limit negotiated fees since CLECs could always lease loops as an alternative to using their own facilities to serve their customers.

84. CIPPREC/BOMA submitted that fees based on proxy rates for similar services, such as storage space, were not appropriate since such rates would fail to take into account the fact that telecommunications equipment might require additional services, such as ventilation, and other improvements. Boardwalk, CIPPREC/BOMA and Futureway also submitted that it was appropriate for building owners to designate an RMC to manage and supervise in-building wire and that LECs should pay for such services at negotiated rates.

85. Futureway submitted that fees for access and building services should be market-based, subject to Commission guidelines on causal costs and mark-ups.

iii) Access to install in-building wire in MDUs

86. AT&T Canada, Bell Canada et al. and Group Telecom submitted that they needed access to install fibre-optic cable and other types of wiring, in addition to copper wiring, to meet their customers' needs. They submitted that such access was necessary to allow them to control costs, the timeliness of installation, the choice of technology and the quality of services they provided. Bell Canada et al., Group Telecom, MaxLink et al. and Norigen submitted that there was sufficient space in risers to install in-building wiring in the majority of MDUs.

87. LECs submitted that it was reasonable for them to make their own arrangements for the installation of their own in-building wiring, subject to acceptance of a wiring plan by the building owner. They also noted that, generally, they assumed the costs related to the installation of in-building wiring for their own use, including any costs for approvals, materials and supervision.

88. Norigen and TCI submitted that LECs should have the option of installing their own in-building wire where a fibre-based system was made available by an RMC, rather than being required to adapt to the technology and pay the fees established by an RMC. Boardwalk, in contrast, submitted that an RMC serving an MDU should be responsible for the installation and supervision of all in-building wiring.

89. ARC et al. submitted that building owners should only be required to provide access to install new in-building wiring where there was insufficient capacity.

90. Boardwalk and Futureway submitted that building owners had the right to choose which carriers were permitted to install in-building wiring in MDUs, as well as the terms and conditions of such access, and that these rights should be respected. CIPPREC/BOMA submitted that access to install in-building wiring should be authorized by the building owner and that access agreements between LECs and building owners were needed for the installation of any wiring or equipment in an MDU. CIPPREC/BOMA noted that there were cases where in-building wiring in MDUs was not properly managed, leading to inefficient use of space, damage to buildings and unsightly wiring installation.

91. CIPPREC/BOMA noted that they had experienced very few, if any, circumstances where risers had to be modified to accommodate additional in-building wire, since existing copper in-building wire was generally sufficient. CIPPREC/BOMA noted that there were cases where the in-building wire in some older, congested MDUs was utilized to maximum capacity. CIPPREC/BOMA further submitted that the amount of space in the building core areas available to accommodate additional riser space was often limited. LECs submitted that copper in-building wire was generally available in MDUs.

iv) Access during construction of MDUs

92. Bell Canada et al., Group Telecom, MaxLink et al., Norigen and TCI submitted that they required access to MDUs under construction in order to install entrance facilities to reach new MDUs. Bell Canada et al., Norigen and Novus noted that the most economical time to install such facilities, with the minimum of disruption to building owners, was during the construction stage. Bell Canada et al. added that it was important to have access to MDUs during construction in order to have service available upon occupancy. Group Telecom submitted that all LECs should be given notice of MDU construction plans in order to allow them to plan for the installation of telecommunications facilities.

93. Bell Canada et al. submitted that only a small number of LECs were likely to require access to new MDUs, given the limited number of LECs serving in any given location, and the limited demand for telecommunications services in any given MDU. Bell Canada et al. further submitted that LECs were unlikely to incur the costs of installing facilities to reach an MDU in which they did not anticipate any market share.

94. CIPPREC/BOMA and Futureway opposed any mandated access during construction. Futureway noted that potential tenants in new commercial buildings in which it was providing service had been able to demand that the building owner provide access to the LEC of their choice prior to occupying the building. CIPPREC/BOMA submitted that building owners plan MTR and riser space to meet the future needs of tenants, and that building owners should be responsible for the installation of wiring and related facilities in new buildings.

D. Jurisdiction

95. LECs and the parties representing building owners that commented on the Commission's jurisdiction were in general agreement that the Commission had the jurisdiction, through conditions imposed under section 24 of the Act, to directly regulate Canadian carriers in respect

of access to, and interconnection with, telecommunications facilities and services in MDUs. The parties, however, disagreed over whether such conditions could be enforced by the Commission against building owners.

96. Bell Canada et al., Group Telecom, MaxLink et al. and TCI took the position that the Commission could use its powers under section 24 of the Act to require LECs to enter into access agreements with required terms and conditions. They submitted that section 24 could also be used to regulate the terms and conditions of access to in-building wire. TCI argued that such regulation could apply to in-building wire controlled by building owners. TCI submitted that if the Commission's order did not require a property owner to enter into an agreement, there could be no "taking" or "expropriation" of the owner's property rights.

97. Bell Canada et al. referred to *Resale To Provide Primary Exchange Voice Services*, Telecom Decision CRTC 87-1, 12 February 1987 (Decision 87-1), and subsequent related decisions, regarding shared tenant services as examples of the Commission exercising its powers to ensure end-user choice. According to Bell Canada et al., in those decisions, the Commission imposed conditions on the resale of a carrier's service to ensure that the carrier retained direct access to tenants to provide services.

98. The parties representing building owners argued that conditions imposed pursuant to section 24 of the Act could not be enforced against them as building owners did not fall within the Commission's jurisdiction under the Act. CIPPREC/BOMA argued that the Act did not give the Commission the jurisdiction to permit a carrier to occupy private property without the owner's authorization, absent expropriation.

99. Parties also discussed the ability of the Commission to use its powers under sections 40 and 42 of the Act to enforce access to MDUs.

100. TCI, Group Telecom and MaxLink et al. argued that if a building owner refused to provide a LEC with access to an MDU, the Commission could use its powers under section 40 of the Act to require the LEC to interconnect to the in-building wire owned or controlled by the building owner or another LEC, and to impose terms and conditions on such interconnection.

101. CIPPREC/BOMA questioned whether a court would interpret the language in section 40 of the Act as permitting the Commission to make orders requiring connection to telecommunications facilities regardless of whether the facilities were owned by another currently regulated entity or not, and regardless of who owned the property on which the facilities were located. CIPPREC/BOMA submitted that the Commission only had authority to order connection to existing wire, and that it did not have the authority to permit access to any other part of a building, or even access after the "connection" was made.

102. Bell Canada et al., Group Telecom, MaxLink et al. and TCI submitted that the Commission could use section 42 of the Act to mandate access to and use of the MTR, conduits and in-building wire. These parties took the position that the Commission could, under section 42, require a building owner to provide, construct, install, alter, move, operate, use, repair or maintain any telecommunications facilities, subject to such conditions as to compensation, or otherwise, as determined by the Commission. These parties submitted that, in light of these

powers, the Commission could therefore require that a building owner permit a carrier to install and interconnect to another carrier's existing in-building wire, equipment, facilities and apparatus. MaxLink et al. and TCI argued that the definition of "telecommunications facilities" included not only the in-building wire, but also the MTR, conduits, risers, and equipment space necessary for a carrier to provide telecommunications services.

103. CIPPREC/BOMA and Boardwalk submitted that section 42 of the Act did not explicitly provide jurisdiction over private property owners and that, in light of the provincial authority over property and civil rights, it could not be interpreted to give the Commission direct regulatory control over building owners. Boardwalk argued that had Parliament intended to confer upon the Commission the jurisdiction to regulate directly or indirectly the provision of access by carriers to MDUs, it would have done so expressly and within defined limits, as in the case of municipalities and support structures. CIPPREC/BOMA further argued that section 42 dealt only with "telecommunications facilities" and was not broad enough to deal with the myriad of issues relating to access to buildings, such as engineering, management and security.

104. Boardwalk argued that, while section 42 of the Act permitted the Commission to issue an order that "any property be acquired", such an order would have to relate specifically to the telecommunications facilities of carriers. In Boardwalk's view, building risers, MTRs, rooftops, and related areas in MDUs did not meet this precondition.

105. Boardwalk, CIPPREC/BOMA, the FCM and Futureway further submitted that issues of access to MDUs and the terms and conditions of such access fell within exclusive provincial legislative authority under the *Constitution Act, 1867* and hence, outside of the Commission's jurisdiction. In Futureway's view, objects such as in-building wire, and areas such as MTRs, formed part of the private property owned by the building owner, over which the Commission did not have jurisdiction. They further submitted that private property owners could exclude others, including LECs, from entering their private property or installing facilities and had the exclusive right to manage occupancy within their private property.

106. MaxLink et al. argued that acceptance of the arguments made by Boardwalk, CIPPREC/ BOMA, the FCM and Futureway would mean that the Commission's jurisdiction over the telecommunications network would terminate at the building entrance. In MaxLink et al.'s view, this argument failed to recognize the end-to-end nature of a telecommunications network. MaxLink et al. argued that the Commission's jurisdiction over telecommunications encompasses all components of the network, from the provider of a telecommunications service to the ultimate end-users.

107. MaxLink et al. argued that the telecommunications facilities and apparatus located on both sides of the MDU entrance together made up the telecommunications network. MaxLink et al. submitted that interconnection to these facilities was an essential matter of Commission jurisdiction and a vital part of a Canadian carrier's operations.

108. In the view of Bell Canada et al., any Commission orders that constrained the rights of gatekeepers, such as building owners, to establish rents, terms and conditions on carriers would only incidentally affect property or civil rights.

109. MaxLink et al. and TCI argued that a regulatory framework for access to MDUs was a matter that related in pith and substance to telecommunications and was, therefore, within federal legislative jurisdiction. They further argued that it was trite law that once federal constitutional jurisdiction was established, the fact that its exercise would have incidental effects on property rights would not detract in any way from federal authority.

IV Access to MDUs: Commission analysis and determination

A. Policy objectives: competition and end-user choice

110. The Commission has, over the years, developed regulatory frameworks to promote the development of competition in telecommunications markets, with a view to implementing the Canadian telecommunications policy objectives set out in section 7 of the Act. Among the Canadian telecommunications policy objectives are the following:

> a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
>
> 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;
>
> g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
>
> h) to respond to the economic and social requirements of users of telecommunications services; …

111. As noted earlier, in Decision 94-19 the Commission established a comprehensive framework for promoting competition as a basic means of achieving the telecommunications policy objectives. Since that time (indeed since the 1970's) the introduction of telecommunications competition has led to a greater choice of products, services and suppliers in both business and residential markets, and to significant price decreases for most services, including long distance, Internet, data, mobile and international services.

112. The Commission has recognized that competition means giving end-users choice and in Decision 94-19 it determined that end-users should have the opportunity to choose whatever package of services and whichever suppliers best fit their particular needs. In order for service providers to be able to compete for the business of end-users and be able to provide service to them, LECs must be able to connect to the telecommunications facilities at the end-user's premises.

113. In fostering the development of competition, the Commission has sought to ensure that service providers can access and serve subscribers in a number of ways including through reselling services, leasing facilities, and installing and operating their own facilities. In numerous decisions, it has sought to remove obstacles limiting the ability of service providers to serve end-users by any of these means.[5]

114. At the same time, the Commission has determined that the full benefits of local competition, including high quality, affordable service, innovation and service differentiation, would best be realized through facilities-based competition, and that facilities-based competition would, in the long run, be the most effective and sustainable form of competition to achieve the policy objectives set out in section 7 of the Act.[6] In the Commission's view, facilities-based competition and end-user choice go hand in hand.

115. In Decision 97-8, the Commission affirmed the rights of end-users, including tenants in MDUs, to access the service providers of their choice in all situations. In order to maximize end-user choice, the Commission required that all LECs, as a condition of providing service, ensure that the end-users they served are able to have direct access, under reasonable terms and conditions, to services provided by any other LEC serving in the same area. The Commission also determined that, in order to promote competitive entry and foster consumer choice, it was reasonable to mandate that end-users be permitted to connect the wire within their premises to the network of any LEC in whose serving area they were situated.

116. The Commission notes that the parties representing building owners in the present proceeding submitted that, while they supported competition and end-user choice, they did not support or accept the end-users' right to have access to the facilities-based carriers of their choice in all situations and submitted that the right to such choice might only be accomplished through leased unbundled loops.

117. In the Commission's view, however, while access to end-users in MDUs through leased unbundled loops represents an important alternative to facilitate entry and the development of facilities-based competition, such access alone is not sufficient. Reliance on unbundled loops binds LECs to the technology and rate structure of another LEC, to the detriment of service differentiation, service innovation, price competition and, ultimately, end-user choice. LECs must be able to physically connect to end-users through the facilities of their choice in order to be able to respond to the needs of end-users. The ability to connect through their own facilities is essential to the operation of their undertaking.

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[5] See for example, Decision 87-1, Decision 94-19, Decision 97-8 and Order 2001-184.

[6] See for example, Decision 97-8 and *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002.

118. The Commission therefore considers that, while LECs have the right to access end-users via unbundled loops, they should not be obliged to use unbundled loops as a result of being denied access to end-users via their own facilities.[7]

B. Importance of the MDU market

119. The Commission considers that MDUs, which for the purposes of this Decision include buildings with at least two units and at least one unit occupied by a tenant, constitute a significant segment of the local telecommunications market.

120. The Commission notes that the parties to the present proceeding provided estimates of the share of the total local residential service market attributed to customers in MDUs that ranged from 22% to 42%. The Commission considers that, even if it were to accept 22% as a reasonable estimate, the local residential MDU market would still represent a significant market segment. In particular, the Commission notes that, based on the total of 12.9 million local residential lines and the $5.25 billion in local residential revenues reported for the year 2001 in the *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services,* December 2002 (the second GIC report), the total local residential MDU market would account for 2.8 million lines, representing annual revenues of $1.15 billion.

121. The Commission also considers that business customers located in MDUs account for a significant share of the local business service market. Based on the parties' estimates of the average number of lines and the total square footage of commercial office space, the Commission estimates that there are approximately 5 million business lines located in commercial MDUs. Based on the second GIC report's estimated total of 7.6 million business lines and $4.47 billion in total local business revenues for the year 2001, the Commission estimates that local business customers in MDUs account for approximately two-thirds of all business lines, representing some $3 billion in annual revenues.

122. In addition to the millions of customers and the billions of dollars in annual revenues attributed to the MDU market, the Commission notes the cost efficiencies that may be derived from serving a large number of customers in close proximity using a minimal number of facilities. The ability to amortize costs over a larger customer base also provides LECs the opportunity to make use of high-capacity technologies and offer a larger range of new and enhanced services, in a cost effective manner.

123. The Commission considers that the high concentration of MDUs in urban areas also provides LECs the opportunity to acquire a critical mass of geographically concentrated customers, which would allow them to achieve a scale of operations that would not otherwise be feasible with a smaller pool of dispersed customers. As noted in the second GIC report, a primary focus of competitor entry plans has been, and continues to be, the business market in core urban areas, in view of the high density of population and the presence of large sophisticated customers in these areas.

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[7] Later in this Decision, an exception to this principle is discussed where such access cannot be physically accommodated.

124. Given the size of the MDU market and the cost efficiencies that may be derived from serving customers in that market, the Commission concludes that obstacles to access to customers in MDUs can have a significant negative impact on LECs. The Commission considers that the resolution of access issues related to MDUs is of central importance to the development of local competition and in particular facilities-based competition, and the achievement of end-user choice.

C. Barriers to entry into MDUs

125. The record of this proceeding demonstrates a number of significant barriers to entry limiting end-user choice in MDUs. The Commission notes that end-users located in single dwellings are able to exercise their right to select the service provider of their choice, without interference by third parties interposed between service providers and themselves. End-users in MDUs, however, are often not able to exercise this right. In the Commission's view, end-users should have the right to the service provider of their choice regardless of the type of dwelling in which service is provided.

126. In addition to outright bans on their entry into MDUs, CLECs described situations where they were prevented from serving their customers on a timely basis and lost potential customers, as a result of unreasonable delays in attempting to negotiate acceptable agreements with building owners. CLECs also described situations where the terms and conditions, including fees, sought by building owners were so onerous that they were compelled to refuse to serve customers in the MDU. They also noted that there were situations where, in order to serve their customers, they had capitulated to the building owners' demands or had signed access agreements under circumstances that, in their view, amounted to duress.

127. ILECs also reported increasing difficulties in gaining access to MDUs, whether to serve new customers or to provide additional services to existing customers. They also reported situations where they had been advised that a building owner had entered into arrangements that prevented other LECs from gaining access to serve customers in the MDU as well as cases where they were faced with expulsion from MDUs if they did not match what they regarded as excessive fees demanded by building owners from CLECs.

128. The Commission notes that the absence of a rational, non-discriminatory fee structure, providing for reasonable compensation of building owners, represents one of the major areas of concern in this proceeding. LECs submitted a number of examples of the fees imposed by some building owners to illustrate how these fees made it difficult, if not impossible, to have viable business cases for offering service in some MDUs. A review of the access agreements filed in this proceeding indicates that some building owners are charging a wide range of access fees, in addition to fees for the use of facilities and services. In particular, the Commission notes that, among the fees being charged, there are significant entry fees; fees based on factors that are unrelated to the use of facilities in MDUs, such as LEC revenues or the square footage of buildings; and fees that escalate by amounts unrelated to costs incurred or services provided by the building owners. The Commission also notes that there is evidence on the record of this proceeding of instances where the fees charged for comparable access differed between LECs serving the same building. The Commission notes that in many

MDUs ILECs continue to serve their customers under terms and conditions that existed when they were operating under monopoly conditions, without written access agreements and without paying any fees.

129. The Commission finds that many of the fees charged by building owners appear to be more of a function of the building owners' gatekeeping role in an era of competition. Based on the record of this proceeding, the Commission considers that building owners have both the ability and incentive to charge fees that in its view are excessive and that unreasonably restrict LEC access to their buildings. The Commission considers that this represents a major barrier to entry into MDUs.

130. With regard to the use by LECs of in-building wire under the responsibility and control of building owners, the Commission considers that some building owners are imposing unreasonable terms and conditions, including excessive fees. This effectively denies LECs facilities-based access to customers in MDUs and unfairly restricts end-user choice.

131. The Commission notes that the difficulties described by CLECs in gaining access to in-building wire under the building owners' control are not limited to situations where they attempt to serve their customers using their own facilities, but also include situations where they attempt to serve their customers using leased unbundled loops. The Commission notes that several parties raised concerns with respect to the added complexity and cost of having to deal with building owners to extend unbundled loops to their customers' suites and submitted that such situations represent a further barrier to entry and hence, to local competition. As noted earlier, the Commission considers that the ability of CLECs to use leased unbundled loops will continue to be an important option for CLECs. The Commission considers that unreasonable terms and conditions, including fees, as well as the delay and expense of negotiating access to MDUs in such situations, often place CLECs at a competitive disadvantage relative to ILECs.

132. The Commission considers that many of the terms and conditions in the access agreements filed on the record of this proceeding have the effect of limiting the quality and the range of telecommunications services provided to customers in MDUs. For example, provisions allowing a building owner to determine, at its discretion, the size, type and configuration of telecommunications equipment, those preventing the sharing or cross-connection of LECs' telecommunications equipment, and those requiring that LECs use a common wiring infrastructure, can affect the design and operation of a LEC's network, and the types of services that the LEC can provide to its customers. Other terms and conditions, such as a provision allowing a building owner to prohibit any changes to the services provided to customers without the written permission of the building owner, can also have an adverse effect on a LEC's ability to adequately serve its customers. While the Commission considers that LECs should be minimally disruptive and respectful of the condition of buildings to which they are provided access, provisions unreasonably restricting a LEC's ability to access the MTR or other parts of the building would necessarily affect the LEC's ability to connect to the in-building wire, and to maintain or repair any telecommunications facilities necessary to provide service to its customers.

133. A number of LECs submitted that they were often unable to meet service commitments as a result of restrictions imposed by building owners preventing them from installing their own in-building wire and equipment to meet their customers' needs. In particular, LECs noted that copper in-building wire was often unsuitable to meet their customers' service requirements and that, in some cases, they needed to extend fibre-optic cable directly to customers in order to meet their customers' demands. The Commission recognizes that LECs need to have the ability to install specialized wiring and equipment as well as to upgrade or install additional copper wiring in order to be able to offer their customers more innovative services and meet the particular needs of their customers. In the Commission's view, LECs should not be restricted in the technology they adopt and customers should not be forced to accept less than optimal solutions as a result of obstacles imposed by building owners preventing the upgrading or the installation of in-building wire and other telecommunications facilities.

134. The Commission also considers that LECs must have access to MDUs during the construction phase, in order to have service available upon occupancy, to minimize disruption, and to avoid the additional costs associated with the installation of facilities after completion of the MDU. LECs that are prevented from accessing an MDU during this period will face higher costs and have greater difficulty in attracting customers than those who had access to the MDU during the construction phase.

135. In sum, based on the record of this proceeding, the Commission finds that there exists a variety of barriers to entry into MDUs that prevent LECs from providing service to end-users in MDUs, and thereby restrict the choice of these end-users and impair the ability of LECs to effectively compete in the local telecommunications market.

D. Ensuring access to MDUs: the MDU access condition

136. As indicated earlier, ARC et al. and all LECs, with the exception of Futureway, argued that, since some building owners were creating barriers to entry into MDUs, regulatory intervention by the Commission is necessary at this time to ensure that access to this crucial segment of the local market is made available on reasonable and equitable terms and conditions.

137. As noted earlier as well, parties representing building owners suggested that there were no access problems in MDUs and that if there were, market forces would, over time, serve to ensure that end-users in MDUs had access to the telecommunications services and the LECs of their choice. These parties referred to the Critical Connections survey to support their position that a very high percentage of end-users in MDUs were being served by the telecommunications providers of their choice. The Commission agrees, however, with the parties that submitted that the results of this survey were of limited value, given the absence of Canadian tenant participation in the survey, and in light of the evidence on the record of this proceeding regarding barriers to entry in the Canadian MDU market.

138. As regards the suggestion that market forces would resolve the issue of access to MDUs, the Commission is not persuaded that tenants can, in fact, exert sufficient influence to ensure end-user choice. The Commission considers that the length of leases and the expense and

difficulty of moving to a new location means that relocation does not generally represent a practical solution for tenants to obtain telecommunications services from the service provider of their choice.

139. The Commission notes that it has conducted a number of proceedings and issued several decisions since 1997 with a view to ensuring that LECs have reasonable and equitable access to serve end-users in MDUs. The Commission also notes that the SWG, comprised of representatives of building owners, ILECs, CLECs and consumers, has discussed MDU access issues for the last four years. It appears clear, however, that agreement on a number of important access issues has not yet been reached; that adherence to the Voluntary Code of Conduct adopted by the SWG has not been widespread; and that barriers to LEC entry into MDUs continue to exist. In light of the above, the Commission considers that regulatory intervention is required at this time.

140. As to the nature and extent of proposed regulatory intervention, the Commission notes that parties have, during the course of this proceeding, proposed a number of different approaches to ensure that access to MDUs be made available on reasonable and equitable terms and conditions. These include mandated access agreements, Commission-specified terms and conditions, and standard access agreements. The Commission is not persuaded, however, that these measures are appropriate at this time. The Commission considers it appropriate instead to proceed in the following manner.

141. As noted earlier, pursuant to Decision 97-8, all LECs are required, as a condition of providing service, to ensure that the end-users they serve are able to have direct access, under reasonable terms and conditions, to services provided by any other LEC serving in the same area. Based on the record of this proceeding, the Commission considers that it is necessary to amplify the condition imposed in Decision 97-8 in order to ensure that existing and potential end-users in new and existing MDUs can have direct access to the LEC of their choice. Accordingly, pursuant to its powers under section 24 of the Act, the Commission requires that the provision of telecommunications service 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 (the MDU access condition).

142. The Commission considers that LECs must have the ability to access and enter into MDUs, in order to connect and/or install their facilities, as well as repair and maintain them and do whatever else may be required to provide reliable, high-quality service to end-users in MDUs.

143. The Commission expects building owners to cooperate with LECs to enable them to access end-users in their MDUs in satisfaction of the MDU access condition. In section E below, the Commission sets out guidelines that, in its view, should assist parties in their negotiation of access arrangements on the basis of just and expedient conditions. These guidelines take into account the responsibilities of building owners to ensure the safety, security, appearance and condition of their properties and the safety and convenience of tenants and other persons.

144. In cases where negotiations on access cannot be concluded on a timely basis and where, following a process under Part VII of the *CRTC Telecommunications Rules of Procedure,* the Commission determines that access to an MDU has not been, or is not likely to be, provided on a reasonable basis, the Commission will take such further action as is 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 will 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.

145. Section 42 of the Act provides that:

> Subject to any contrary provision in any Act other than this Act or any special Act, the Commission may, by order, in the exercise of its powers under this Act or any special Act, require or permit any telecommunications facilities to be provided, constructed, installed, altered, moved, operated, used, repaired or maintained or any property to be acquired or any system or method to be adopted, by any person interested in or affected by the order, and at or within such time, subject to such conditions as to compensation or otherwise and under such supervision as the Commission determines to be just and expedient.

146. Section 42 of the Act empowers the Commission to issue an order requiring or permitting any or all of a very broad range of actions, subject to such time-frames and conditions and such supervision as the Commission determines to be just and expedient. The Commission considers that its powers under section 42 allow it to address situations where a LEC is prevented by another person from providing telecommunications services in an MDU, in accordance with the MDU access condition. For example, depending on the circumstances of the case, the Commission could permit a LEC to construct, install, operate or use telecommunications facilities in an MDU, or require a building owner to provide telecommunications facilities to a LEC.

E. Guidelines as to just and expedient conditions of access to MDUs

147. As indicated above, the Commission considers that, in order to assist LECs and building owners in concluding arrangements regarding access to MDUs, it is appropriate to establish guidelines as to conditions that might be considered just and expedient.

i) Exclusive and preferred access arrangements and preferred marketing arrangements

148. Exclusive access arrangements refer to arrangements between a building owner and a LEC whereby access to an MDU is limited to one LEC. Preferred access arrangements limit access to an MDU to a few selected LECs. Preferred marketing arrangements refer to arrangements between a building owner and a LEC providing for coordinated marketing activities by the LEC and the building owner for the purpose of promoting the LEC's services in an MDU.

149. The Commission notes that there was general consensus in the present proceeding that LECs and building owners should not enter into exclusive or preferred access arrangements that have the effect of excluding other LECs from providing service to end-users in an MDU. A number of parties submitted, however, that preferred marketing arrangements should be permitted so long as such arrangements did not limit access by other LECs to the MDU.

150. The Commission does not consider that permitting exclusive or preferred access arrangements would be consistent with its policy objectives, with the Act or with the access condition.

151. In Decision 99-10, the Commission set out its view that any agreement between a LEC and another party that resulted in the provision of local service to an MDU on an exclusive basis was, *prima facie*, a violation of subsection 27(2) of the Act. Furthermore, as noted in Decision 99-10, the condition imposed in Decision 97-8, requiring all LECs to ensure that the end-users they served had direct access, under reasonable terms and conditions, to services provided by any other LEC serving in the same area, also requires that a LEC not take any action, either alone or in conjunction with another party, which would preclude such access.

152. In light of the above, the Commission concludes that any arrangement between a LEC and another party, whether written or unwritten, that has the effect of restricting another LEC from accessing and serving end-users in an MDU is unjustly discriminatory, and contrary to the MDU access condition.

153. By contrast, the Commission considers that preferred marketing arrangements could be of benefit to end-users in MDUs and are consistent with a competitive environment. The Commission therefore finds it appropriate to permit preferred marketing arrangements that are limited to the marketing of a LEC's services in an MDU, so long as these arrangements do not have the effect of limiting access by other LECs to the MDU.

ii) Fees

- *Fees for the use of in-building wire under the responsibility and control of building owners*

154. The record of this proceeding indicates that copper in-building wiring is generally available in MDUs and that copper pairs can be transferred between LECs when a customer changes service providers.

155. The Commission notes that the only alternative open to LECs that cannot use in-building wire is to install their own. The Commission does not consider it appropriate that LECs be forced to incur additional costs to install their own in-building wire in MDUs where the in-building wire is suitable to serve the needs of their customers. The Commission also considers that the need for LECs to connect to in-building wire becomes even more critical in MDUs where the installation of new in-building wire may not be feasible or practical.

156. The Commission notes that the majority of in-building wire remains the responsibility and control of the ILECs, and that building owners have responsibility and control of such facilities only in a limited number of areas in Canada. Some building owners have acquired

the responsibility and control of in-building wire following Decision 99-10, either as a result of the transfer of the responsibility and control of in-building wire from ILECs in existing buildings, or automatically in new buildings, as required in Decision 99-10.

157. The Commission recognizes that some building owners may have incurred costs to acquire or install copper in-building wire, or to upgrade in-building wire in order to provide superior facilities, such as fibre-optic cable or shielded cable, and may not have had the opportunity to recover their investment.

158. Accordingly, the Commission considers it appropriate for building owners to charge a fee for the use of in-building wire to recover any unrecovered capital costs reasonably incurred for in-building wire. By the same token, the Commission considers that it would be inappropriate for building owners to charge a fee for the recovery of capital costs of in-building wire in circumstances where the building owners acquired responsibility and control of such facilities at no cost.

159. The Commission also considers it appropriate that a building owner be compensated for any costs reasonably incurred for the maintenance of in-building wire, where the building owner is responsible for the maintenance of such facilities. Similarly, where a LEC uses the wiring management services provided by a building owner or an RMC on its behalf, the Commission considers that the LEC should compensate the building owner for the costs reasonably incurred for the services required by the LEC to connect and maintain its service to end-users in the MDU. The Commission considers that a LEC should not, however, be required to use and pay for maintenance or wiring management services unless it agrees to such services.

- *Fees for space occupied by telecommunications facilities*

160. The Commission considers it appropriate that LECs compensate building owners for the use of space occupied by telecommunications facilities. The Commission considers that fees for a specific space should reflect fees that could have been charged for an alternative use of that space, taking into account the location and the amount of space occupied by the telecommunications facilities.

- *Fees based on utility infrastructure construction costs*

161. The Commission considers that the costs associated with the construction of the utility infrastructure in new MDUs, including entrance conduits, equipment rooms, risers, runways and other common pathways, are part of the costs of construction of new MDUs, which would be incurred by building owners in the normal course of construction. The Commission therefore considers that there should be no up-front, construction-related charges for the utility infrastructure in new MDUs.

- *Fees for additional facilities and utility services*

162. Where additional floor space, ventilation or other building facilities must be constructed or provided to accommodate additional LEC requirements in an MDU, the Commission considers that it is appropriate that building owners recover the costs reasonably incurred for the provision, installation, construction and construction supervision of additional facilities from the requesting LEC.

163. Where additional costs are incurred for electrical power or other utilities to accommodate telecommunications equipment or other telecommunications facilities in an MDU, the Commission considers that charges for additional utility services that are not already included in the fees for the use of space occupied by telecommunications facilities should be based on metered charges or allocated to reflect the relative use of metered services.

- *Fees for other additional services*

164. The Commission considers that building owners should be compensated for any costs reasonably incurred for providing additional services, such as the approval of plans, safety and security measures and other similar services reasonably required in connection with the installation and operation of telecommunications facilities. The Commission does not consider that the costs associated with the negotiation of access agreements should be included as part of the fees.

- *Entry fees*

165. The Commission notes that some existing agreements between LECs and building owners not only provide for fees for the provision of new facilities and the use of services and existing facilities in MDUs but also provide for fees for the right to enter the MDU. The Commission considers that fees established in accordance with the principles set out in this Decision will provide building owners reasonable compensation for granting LECs access to MDUs and is, therefore, of the view that access fees for the right to enter MDUs that are in the nature of an admission or an entry fee are not appropriate.

iii) Installation of in-building wire and other facilities in MDUs

166. The Commission recognizes that building owners need to manage the use of space and supervise the installation of wiring and equipment in MDUs. However, the Commission considers that, consistent with its policy of end-user choice, it is reasonable that LECs have the option to install or upgrade in-building wiring and related facilities in MDUs.

167. The Commission considers that LECs that wish to install or upgrade new in-building wire and related facilities in an MDU should, subject to the building owner's reasonable acceptance of the wiring plan, be given access to the closets, panels and any common pathways required for the purpose of installing or upgrading their facilities. The Commission further considers that LECs that exercise this option must be responsible for the costs associated with the installation or upgrade, including costs reasonably incurred by the building owner. Similarly, building owners that install or upgrade the in-building wire and related facilities at the request of a LEC should be compensated for the costs associated with the installation or upgrade.

168. The Commission recognizes that there may be instances where there is insufficient space available in risers to install additional in-building wiring. In such circumstances, the building owner may either permit the 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. Where such options cannot be physically accommodated, the LEC may be required to rely on leased unbundled loops to serve its customers.

169. The Commission notes that, in Decision 99-10, it determined that building owners should have responsibility and control of the in-building wire in all new MDUs. However, given that LECs have the option to install in-building wire and facilities, the Commission finds that it is no longer appropriate to require building owners to assume responsibility and control of in-building wire in new MDUs. Accordingly, while building owners may still choose to install the in-building wire in new MDUs, they may also elect to enter into arrangements with LECs for the installation, and subsequent responsibility and control of the in-building wire.

iv) Right of entry during construction of MDUs

170. The Commission considers that the most efficient and economical time for the installation of telecommunications facilities, including entrance facilities to access an MDU, is during the construction stage.

171. Accordingly, the Commission considers that LECs that wish to install telecommunications facilities during the construction of an MDU should, subject to the building owner's reasonable acceptance of plans for the installation of any wiring or entrance facilities, be given access to the property, as required for the purpose of installing these facilities. The Commission also considers that LECs that install telecommunications facilities during the construction of MDUs must be responsible for the costs associated with the installation of their facilities, including any costs reasonably incurred by the building owner for such purposes.

v) Terms of liability

172. The Commission considers that the principles of liability for negligence that are in force in the province in which the MDU is located, should apply. Each party should seek assurance from the other that it is adequately insured or can self-insure, in light of its potential liability.

F. Disclosure of LECs' access agreements: the disclosure conditions

173. The Commission considers that it is necessary to ensure that adequate information be available in the marketplace to enable LECs to negotiate access to MDUs on reasonable and equitable terms and conditions, including fees. The Commission notes the concerns expressed by Boardwalk with respect to the financial harm that could result from disclosure of competitively sensitive information. The Commission concludes, however, that the specific direct harm, if any, that is likely to result from the disclosure of the terms and conditions of access, including fees, would not outweigh the public interest in such disclosure.

174. The Commission also notes the concerns raised by a number of parties relating to the disclosure of end-user-specific information or building "system" information such as building plans and wiring maps. The Commission considers that the disclosure of this type of information is not necessary for the purpose of facilitating negotiations for reasonable and equitable terms and conditions for access to MDUs by LECs. The Commission further

considers that disclosure of such information raises concerns regarding building security and the privacy, security and safety of end-users. The Commission concludes that the specific direct harm that is likely to result from disclosure of such information outweighs the public interest in such disclosure. Accordingly, the disclosure conditions set out below do not require the disclosure of building plans, including wiring maps, or information identifying an end-user.

175. The Commission therefore requires, as a further condition of providing telecommunications service in an MDU, that a LEC disclose on its web site all terms and conditions, including fees, of any written access agreement concluded with the building owner of that MDU. Existing written access agreements are to be disclosed on the LEC's web site within two months of the date of this decision. Any written access agreements or amendments concluded after the date of this decision must be posted on the LEC's web site within 30 days of having reached or amended the agreement. The Commission also requires, as a condition of providing telecommunications service in an MDU, that a LEC disclose on its web site, all terms and conditions, including fees, of any unwritten access agreement concluded with the building owner of that MDU, within 30 days of having received a request from any other LEC operating in the same area.

176. The Commission also considers that all LECs should have an equal opportunity to install telecommunications facilities during the construction of MDUs as this would allow all LECs to benefit equally from cost efficiencies during the construction phase, maximize end-user choice upon occupancy, and minimize future disruptions for building owners in accommodating LECs requesting access after the completion of the MDU. The Commission therefore considers that it is necessary, in order to provide all LECs the opportunity to benefit from early notification of construction plans, to require that LECs provide notice of any access agreement for the installation of telecommunications facilities during the construction of an MDU.

177. Accordingly, the Commission requires, as a condition of offering or providing telecommunications service in an MDU, that a LEC disclose on its web site all terms and conditions, including fees, of any written access agreement concluded with the building owner for the installation of telecommunications facilities during the construction of that MDU, within 10 days of having reached such an agreement. The Commission also requires, as a condition of offering or providing telecommunications service in an MDU, that a LEC provide notice, on its web site, of any unwritten access agreement concluded with the building owner for the installation of telecommunications facilities during the construction of that MDU, within 10 days of having reached such an agreement, and that it disclose on its web site all terms and conditions, including fees, of such an agreement, within 10 days of having received a request from any other LEC operating in the same area.

178. For the purposes of this Decision, an access agreement means any agreement or arrangement between a LEC and a building owner, its agent or its affiliate, for access to an MDU, or an MDU under construction, including access to the MTR, access to install or connect to in-building wire, or access to, or use of, any other facility that may be required for the purpose of providing telecommunications services in the MDU.

V Access to MDUs through LECs' facilities

179. As regards the matter of access to MDUs through LEC facilities, the Commission considers that it is necessary to address the following issues: the terms and conditions of access to MDUs through unbundled loops; the transfer of responsibility and control of in-building wire under the responsibility and control of LECs; and the use of in-building wire under the LECs' responsibility and control.

A. Positions of the parties

180. Most CLECs submitted that unbundled loops should extend to the customer demarcation point[8] located at the customers' premises in order to avoid the difficulties they faced in connecting unbundled loops to in-building wire under the responsibility and control of building owners. Bell Canada et al. agreed that a loop could provide a connection to the customer demarcation point independent of which entity controlled the in-building wire. Call-Net submitted that the extension of a loop to a customer's premises would provide the customer the option of migrating all of its services from the serving LEC to the LEC of its choice or splitting the services between the serving LEC and a second LEC, using the same unbundled loop.

181. AT&T Canada and Call-Net argued that there should be no additional charges for the use of in-building wire in conjunction with unbundled loops. Bell Canada et al. offered to provide CLECs the option of having unbundled loops terminate at the MTR or at the customer demarcation point, at existing loop rates.

182. TCI submitted that, in circumstances where it was providing an unbundled loop that consisted in part of in-building wire controlled by the building owner, it should not be required to assume liability for the use of wire or the quality of the loop service that it did not control.

183. CIPPREC/BOMA and Futureway were of the view that access agreements would not be necessary for LECs that used leased unbundled loops extending to the customer demarcation point, as long as the loop provider had an access agreement and there was no physical intervention in the MDU. CIPPREC/BOMA added that there should be no obligation to inform building owners of arrangements for the use of leased unbundled loops that extended to the customer demarcation point.

184. TCI and Call-Net were of the view that there should be no further transfer of control of in-building wire from ILECs to building owners. They argued that such transfers would only make issues of access to MDUs more difficult, by allowing building owners to exercise their gatekeeping control over in-building wire. Bell Canada et al. submitted that there should be no concerns associated with building owners taking control of in-building wire, if loops extended to the customer demarcation point.

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[8] Defined, pursuant to Decision 99-10, as the point at which the in-building wire and the inside wire meet. Inside wire refers to the wire and other facilities, which are located in, or in the proximity of, the customer's unit and which are under the responsibility and control of the customer.

185. Group Telecom considered that the transfer of in-building wire should not be permitted until MDU access issues were resolved. Futureway proposed that LECs that currently controlled in-building wire should be required to retain control until 2005, at which time the matter could be reviewed.

186. CIPPREC/BOMA submitted that the building owner should be able to control in-building wire. CIPPREC/BOMA noted that, except in Calgary, very little transfer of control of in-building wiring had occurred.

B. Commission analysis and determination

i) Access through leased unbundled loops

187. The Commission notes that, under the current regulatory framework, LECs using unbundled loops to serve MDUs where the building owner has responsibility and control of the in-building wire must negotiate with building owners in order to gain access to the MTR and connect loops to the in-building wire at the service provider demarcation point. By contrast, in MDUs where the responsibility and control of in-building wire has remained with the ILEC, unbundled loops terminate at the customer demarcation point.

188. The Commission notes that the ILECs represented by Bell Canada et al. agreed that a loop could provide a connection to the customer demarcation point regardless of who controlled the in-building wire. The Commission further notes that Bell Canada et al. offered to provide the unbundled loop service to the customer demarcation point at existing loop rates, regardless of who has responsibility and control of the in-building wire.

189. The Commission does not consider it appropriate to define demarcation points differently depending on whether a loop is a component of the local service provided by an ILEC or is leased by a CLEC as an unbundled loop. The Commission considers that an unbundled loop should provide LECs with the opportunity to connect to the end-user regardless of who has responsibility and control of the in-building wire in an MDU.

190. The Commission notes TCI's concerns that loop providers would be assuming additional responsibility in ensuring the quality of service of loops terminating at the customer demarcation point, where the building owner controlled the in-building wire. The Commission considers, however, that unbundled loops provided in an MDU, using the same in-building wire and access arrangements as the loop provider's own service, should not cause the loop provider to assume additional responsibility in ensuring the quality of service of the unbundled loop.

191. The Commission concludes that loop providers must provide LECs the option of terminating leased unbundled loops either at the service provider demarcation point or at the customer demarcation point, regardless of who has responsibility and control of the in-building wire.

192. The Commission notes that the rates for unbundled loops set out in the loop providers' tariffs include the in-building wire as part of the loop offering. The Commission further notes that there is no evidence on the record of this proceeding to suggest that the rates for unbundled loops need to be adjusted to take into account who has responsibility and control of the

in-building wire or the location at which the loops terminate. Accordingly, the Commission concludes that unbundled loops must be provided at current tariff rates, regardless of who controls the in-building component of the loops, or where LECs choose to have the loop terminate.

ii) Transfer of responsibility and control of in-building wire

193. As noted earlier, in Decision 99-10 the Commission set out rules for the transfer of responsibility and control of in-building wire from LECs to building owners. Under this regime, the service provider demarcation point was defined to be at the MTR in all new buildings and in all existing buildings where the building owner accepted responsibility and control of the in-building wire. In Decision 2001-364, the Commission noted that where building owners controlled the in-building wire loops would end at the MTR, thereby affecting the viability of services offered by CLECs that used unbundled loops to serve customers in MDUs, and potentially reducing end-user choice. In light of these concerns, the Commission, in Decision 2001-572, directed all LECs, as a condition of offering and providing local service, to retain responsibility and control of their in-building wire on an interim basis, pending a final determination in the Public Notice 2000-124 proceeding.

194. The Commission notes that many LECs have argued that there should be no further transfer of control of in-building wire to building owners in light of the numerous difficulties caused by the building owners' gatekeeping role. In light of the Commission's determination that loop providers be required to provide unbundled loops terminating at the customer demarcation point at current tariff rates, and the conditions and principles for the provision of telecommunications services in MDUs set out in this Decision, the Commission considers that the restriction on the transfer of responsibility and control of in-building wire is no longer necessary and, accordingly, determines that the condition imposed in Decision 2001-572, is of no effect as of the date of this Decision. The Commission expects that LECs will ensure that the terms of any transfer of responsibility and control of their in-building wire will not create barriers to entry into MDUs and will permit LECs to provide telecommunications service in accordance with the MDU access condition.

iii) Fees for the use of in-building wire under the responsibility and control of LECs

195. In Decision 2001-362, the Commission required all LECs that had responsibility and control of in-building wire to accommodate the connection of facilities of other LECs to the in-building wire. The Commission also applied, on an interim basis, a rate of $1 per month for such connections to copper in-building wire.

196. The Commission notes that there was very little information provided by the parties to this proceeding to justify a rate for the use of copper in-building wire. The Commission also notes that Bell Canada et al. and TCI indicated that they had largely recovered their initial investment and that the costs for repair and maintenance of copper in-building wire were minimal. Furthermore, Bell Canada et al. proposed that there should be no charge for the use of such wire.

197. While the Commission generally supports the principle of cost recovery, the Commission considers that putting in place a regulatory mechanism for the cost recovery of minimal amounts for copper in-building wire would not be practical or in the public interest, given the administrative complexity involved. The Commission therefore concludes that it is appropriate to require all LECs that have responsibility and control of copper in-building wire in an MDU to permit other LECs to connect to and use the in-building wire at no charge. The LECs that make use of such facilities are responsible for their maintenance.

C. Tariff filings

198. Loop providers must provide LECs the option of terminating leased unbundled loops either at the service provider demarcation point or at the customer demarcation point, at current tariff rates. The Commission **directs** the LECs that provide unbundled loops to file, for the Commission's approval, within 30 days of the date of this Decision, proposed tariff pages reflecting the Commission's determination.

199. LECs that have responsibility and control of copper in-building wire in an MDU must permit other LECs to connect to and use the in-building wire at no charge. The Commission **directs** all LECs that have responsibility and control of copper in-building wire to file, for the Commission's approval, within 30 days of the date of this Decision, proposed tariff pages reflecting the Commission's determination.

VI Other matters

200. The Commission notes that parties raised a number of jurisdictional issues in their submissions. In the Commission's view, it is not necessary to address any of these issues in the context of the specific determinations made in this Decision.

201. The Commission notes that Bell ExpressVu, CFAA, CCTA, Look, Regional and Whistler Cable submitted comments with respect to the broadcasting industry. These parties were generally of the view that the regulatory framework established in *Revised policy concerning inside wire regime; Call for comments on proposed amendments to section 10 of the Broadcasting Distribution Regulations*, Public Notice CRTC 2000-81, 9 June 2000, was appropriate and that there was no need to address access issues for BDUs at this time. The Commission does not therefore consider that there is a need to address the terms and conditions of access by BDUs to MDUs at this time.

202. Furthermore, the Commission is not persuaded by the facts on the record of this proceeding that there is a need to make any determination relating to the placement of wireless telecommunications equipment, such as antennae or satellite dishes, in MDUs. The principles set out in this decision therefore apply only to wireline telecommunications facilities in MDUs.

203. The Commission will monitor the status of access to MDUs with a view to determining whether the principles set out in this decision remain appropriate, and the degree to which it can rely on negotiations between building owners and LECs to achieve the Canadian telecommunications policy objectives.

Secretary General