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

Broadcasting Decision CRTC 2004-494

Ottawa, 12 November 2004

Complaint by Bell ExpressVu Limited Partnership against Rogers Cable Inc. alleging certain anti-competitive practices

The Commission ***allows*** *the portion of the complaint filed by Bell ExpressVu Limited Partnership (ExpressVu) against Rogers Cable Inc. (Rogers) that deals with an inside wire buy–back clause contained in certain access agreements between Rogers and owners of multiple unit dwellings (MUDs). The Commission concludes that, as a consequence of entering into agreements with building owners containing such a buy-back clause, Rogers has acted in violation of section 9 of the* Broadcasting Distribution Regulations *(the Regulations). The Commission further concludes that Rogers would be acting in violation of subsections 10(1) and 10(2) of the Regulations if it were to invoke the clause in question.*

The Commission ***dismisses*** *the portion of ExpressVu's complaint dealing with alleged operational breaches of requirements relating to the transfer of inside wire, breaches of the winback rules, and various targeted marketing actions aimed at MUDs in the Greater Toronto Area.*

The dissenting opinions of Commissioner Cram and Commissioner Langford are attached.

The complaint

1. Bell ExpressVu Inc. (the general partner) and BCE Inc. and 4119649 Canada Inc. (partners in BCE Holdings G.P., a general partnership that is the limited partner), carrying on business as Bell ExpressVu Limited Partnership (ExpressVu), is the operator of a national direct-to-home (DTH) satellite distribution undertaking. Rogers Cable Inc. (Rogers) is the licensee of some 90 cable broadcasting distribution undertakings serving approximately 2.3 million customers in Ontario, New Brunswick, Newfoundland and Labrador and Quebec.

2. On 29 July 2003, ExpressVu filed a complaint with the Commission against Rogers alleging breaches of existing regulations and policies relating to the following four matters:

   Provisions in agreements relating to the purchase of inside wire

   ExpressVu submitted that a clause in Rogers' agreements with the owners of certain multiple unit dwellings (MUDs) offends both the undue preference provision set out in section 9 of the *Broadcasting Distribution Regulations* (the Regulations) as well as section 10 of the Regulations dealing with access to inside wire. ExpressVu submitted that, under this clause, Rogers is not making its inside wire available to ExpressVu at the currently approved rate of $0.52 per subscriber per month. ExpressVu alleged that this clause makes it difficult or impossible for it to compete in those MUDs.

Transfer of inside wire

ExpressVu alleged that Rogers had breached various requirements related to the physical transfer of inside wire from one broadcasting distribution undertaking (BDU) to another when a subscriber elects to change BDUs.

Winback of subscribers

ExpressVu alleged that Rogers had breached the Commission's rules providing that, for 90 days after notification, an incumbent BDU is precluded from attempting to win back a subscriber that has decided to change BDUs (the winback rules).

Targeted marketing

ExpressVu alleged that Rogers has engaged in various targeted marketing actions aimed at Toronto-area MUDs. ExpressVu submitted that these actions have had, and will continue to have, the effect of severely restricting its ability, as well as the ability of other BDUs, to compete with Rogers.

3. In its analysis of this complaint, the Commission has considered the following correspondence from the parties:

ExpressVu: The original complaint letter dated 29 July 2003 and additional submissions dated 22 August 2003, 3 October 2003, 7 January 2004, 16 January 2004, 19 January 2004, 23 January 2004, 26 January 2004 and 4 February 2004.

Rogers: The original reply to ExpressVu's complaint dated 13 August 2003 and additional submissions dated 17 September 2003, 9 January 2004, 19 January 2004, 23 January 2004, 30 January 2004, 4 February 2004 and 6 February 2004.

4. The Commission issued a letter dated 22 March 2004 that set out determinations on a request by ExpressVu for confidentiality and a request by Rogers for disclosure of a list of buildings, as well as on procedural objections raised by Rogers in connection with certain remedies proposed by ExpressVu. The Commission directed ExpressVu to provide Rogers with a list of 5 of the 50 buildings that ExpressVu had filed on a confidential basis. ExpressVu filed the list on 25 March 2004. Rogers commented on the list on 13 April 2004, and ExpressVu provided a reply on 20 April 2004.

Provisions in agreements relating to the purchase of inside wire

General observations by ExpressVu

5. ExpressVu stated that, while it has enjoyed a measure of success competing against Rogers in the single-family household market, its success in MUDs has been marginal. It noted that, although it is Rogers' largest competitor, ExpressVu has only 10,000 subscribers who live in MUDs in the Greater Toronto Area (GTA). ExpressVu explained that it may use either of two technological approaches for access to MUDs in the GTA, both of which require it to conclude

an agreement with the owner of a MUD that allows it to provide service to the residents (the building access agreement). Under the very high bit rate digital subscriber line (VDSL) approach, ExpressVu delivers its signal to a VDSL receiver located in an individual suite using Bell Canada's copper wiring and uses the coaxial inside wire in order to connect television sets located in rooms of a subscriber's suite that are distant from the VDSL receiver. The other approach, known as the stacked solution, also requires the use of the inside wire.

6. ExpressVu argued that Rogers was in violation of sections 9 and 10 of the Regulations in virtue of a clause in the building access agreement related to the purchase of inside wire. This clause imposes an obligation on MUD owners to purchase Rogers' inside wire from Rogers as a precondition to the MUD owner granting another BDU access to the MUD. The purchase price is set by a pre-established formula based on the depreciated cost of the wire and, simultaneously, Rogers pays half of this amount back to the owner for an indefeasible right of use (IRU) in the wire in perpetuity, in priority to other service providers. This clause will be referred to in this decision as Clause 4 of Rogers' building access agreements (Clause 4).

7. According to the sample agreements submitted by ExpressVu as part of its complaint, the wording of Clause 4 is generally as follows:

> … In the event another service provider is granted access to the Premises by the Owner, as a pre-condition, the Owner will purchase the inside wire from Rogers at its depreciated cost plus applicable taxes at the time of acquisition. The cost of installing the inside wire is hereby fixed at $200.00 per residential suite in the Premises which cost shall be depreciated on an Interest free, straight line basis over fifteen (15) years, subject to adjustments for any verifiable costs of any upgrades or replacements of the inside wire made by Rogers. Simultaneously, Rogers will pay to the Owner fifty (50%) percent of the depreciated cost for the indefeasible right to use the inside wire in perpetuity. The minimum depreciated cost after 15 years shall be deemed to be not less than $1.00. Any amount received by the Owner from other service provider(s) for the non-exclusive right to use the inside [wire] shall be retained by the Owner for its own account. Rogers will continue to have the right to use the inside wire without interference to provide Communication Services in priority to other service providers as long as and to the extent that the subscribers serviced by any inside wire wish to subscribe for any of Rogers' Communication Services.[1]

8. ExpressVu argued that, since the owners are required to purchase the inside wire when an alternative BDU is granted access to a MUD, Clause 4 is a disincentive for a MUD owner to even consider an alternate service provider. ExpressVu also argued that, in the face of Clause 4, MUD owners would require a second BDU that is granted access to compensate them for any net loss incurred by purchasing the inside wire from Rogers. As an example of the costs that it would incur, ExpressVu submitted that, in a 5-year old MUD with 300 units, where the new entrant captured one-third of the suites in the building, ExpressVu's up-front cost would be $200 per affected suite served. ExpressVu also calculated that, if the new entrant achieved only 20% penetration in the building (60 suites), its up-front cost would be over $300

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[1] The Commission notes that a second sample of Clause 4 provided by ExpressVu as part of its submission bases the payment calculation on undepreciated costs.

per suite served, or more than 150% of the undepreciated cost of the inside wire that it was using. ExpressVu explained that, in the instance where the up-front cost would be at least $200 per suite served, over a typical 5-year agreement, this would amount to $3.33 per suite per month for the use of the inside wire. In the instance where the new entrant achieved only a 20% penetration, the cost would be $5 per suite per month. ExpressVu further noted that, in *Cable inside wire fee*, Broadcasting Public Notice CRTC 2002-51, 3 September 2002 (Public Notice 2002-51), the Commission established a lease rate of $0.52 per subscriber per month as a just and reasonable fee for the use of the inside wire.

9. ExpressVu noted that the Commission, in *Mandatory Order issued pursuant to subsection 12(2) of the* Broadcasting Act *against Vidéotron Ltée and its subsidiaries*, Broadcasting Decision CRTC 2002-299, 9 October 2002 (Decision 2002-299), determined that Vidéotron ltée (Vidéotron) and its subsidiaries could not use the inside wire that Vidéotron had ostensibly sold to an affiliate unless Vidéotron, its subsidiaries and/or affiliates made such wire available for use by competitors at a monthly fee that is not in excess of $0.52 per subscriber. ExpressVu submitted that the Commission has established an unambiguous regulatory framework providing that, if a cable BDU owns the inside wire in a MUD, it must make that wire available to customers or competitors at a monthly lease rate of $0.52 per subscriber per month. ExpressVu also suggested that Clause 4 is a "colourable device" by Rogers to escape section 10 of the Regulations. It argued that, using the 5-year old building example described above, the $200 fee per suite would result in a monthly cost to ExpressVu of $3.33 per month for use of the inside wire, which is more than six times the $0.52 per month rate deemed appropriate by the Commission.

10. ExpressVu maintained that Clause 4 is intended to ensure that Rogers' monopoly position with respect to providing broadcasting services to MUDs in the GTA continues to discourage competitive entry. ExpressVu questioned whether the first and second alternative service providers that enter a MUD would each be required to pay 50% of the cost of the inside wire. ExpressVu further noted that building owners can charge whatever they want if they own the inside wire, since they are not regulated by the Commission. ExpressVu also noted that, in some situations, there will be more than two BDUs serving a MUD and, as a result, Rogers' scheme is not administratively simple. ExpressVu argued that Clause 4 provides a simple solution for Rogers, but not for the other BDUs.

11. ExpressVu was also concerned that, as a result of the IRU that Rogers acquires in the inside wire under Clause 4, if an individual suite holder elected to receive broadcasting services from a competitor BDU, but elected to receive any telecommunications service from Rogers, the agreement would appear to allow Rogers to disconnect the competitor BDU and use the wire for its own purposes. It also pointed out that Clause 4 gives Rogers access in perpetuity at a pre-determined price, but does not guarantee access to the MUD at the same price for a second BDU.

In light of its concerns, ExpressVu requested that the Commission:

- require that Rogers immediately cease and desist placing clauses in its agreements with owners of MUDs that force the owners or developers to purchase the coaxial inside wire if another BDU is allowed entry into the building to compete with Rogers;
- declare any such clauses in existing agreements to be unenforceable and provide a clear statement that, if an incumbent BDU such as Rogers acted on such a clause, it would be in violation of sections 9 and 10 of the Regulations and subject to further enforcement action;
- require Rogers to notify all parties that have signed such an agreement with Rogers that the clause is unenforceable and to place notices to such an effect in the major newspapers in its service territory;
- order Rogers to place all of its access agreements on the public file;
- order Rogers to abstain immediately from using the inside wire for the delivery of its broadcasting services unless its agreements ensure that third parties in competition with Rogers for such delivery are granted the use of that wire at a fee not exceeding $0.52 per subscriber per month; and
- require Rogers to refrain from acting on provisions in its agreements that would grant Rogers perpetual priority access to the inside wire for delivery of other non-broadcasting communications services.

Rogers' reply – General observations

12. Rogers confirmed that it enters into the agreements such as those attached to ExpressVu's complaint, but denied they violate either section 9 or section 10 of the Regulations. Rogers stated that Clause 4 has been included in agreements since the year 2000, and is in force in 304 new buildings as well as in 26 older buildings that have been rewired. According to Rogers, these buildings represent, in total, less than 5% of the MUDs in the GTA.

13. Rogers argued that the use of Clause 4 is a "sensible and practical solution" to the problem of wiring new MUDs, and that this approach is strongly in the public interest. It argued that the cost methodology used by the Commission to establish the $0.52 per subscriber per month rate for the use of inside wire results in an inadequate return, since the cost of new wiring is approximately $200 per suite.

14. Rogers further maintained that, based on a financing cost of 10% and a depreciation rate of 10% per year, a BDU must earn a return of $40 per year from the wiring in order to pay its financing and depreciation costs. It noted that, at $0.52 per subscriber per month, the BDU would earn revenues of only $6.24 per year. According to Rogers, under these circumstances,

no BDU would install inside wiring in either a new MUD or in an existing one. Furthermore, it maintained that, if the MUD owners were left to install their own inside wire, they would be able to charge whatever they deemed appropriate since they are not regulated by the Commission.

15. Rogers maintained that many MUD owners would rather not be in the communications business and would prefer to have BDUs incur the upfront costs. It explained that, in order to accommodate the expectations of MUD owners, it developed the inside wire contract attached to ExpressVu's complaint. Rogers further maintained that, under the approach established under Clause 4, whereby the depreciated cost of the inside wire is effectively split on a 50/50 basis (the 50/50 approach), MUD owners would not be disinclined to allow an alternate BDU into their buildings. With respect to ExpressVu's allegation that the 50/50 approach is not fair since the new entrant may not end up with 50% of the customers, Rogers maintained that it would be very complicated administratively if payments for use of inside wire were based on the penetration rate of the second BDU. It argued that the 50/50 approach is straightforward, clean and fair.

16. With respect to ExpressVu's objection to Rogers having access to the inside wire in cases where the customer wants to use the same wiring for two different service providers, Rogers explained that the agreements containing Clause 4 are only used in cases where new wiring is installed. Rogers noted that in most new buildings there are two or more wires extending from the panel box to the individual suite. As a result, Rogers maintained that end users would be able to obtain services from two different service providers. Furthermore, Rogers argued that, in cases where ExpressVu is the second BDU, it would use VDSL over twisted copper wire, thereby obviating the problem since, given the advances in VDSL technology, Bell Canada and its affiliates could deliver telephone, Internet and television service using only their own copper wire and, therefore, ExpressVu does not require access to the inside coaxial wire. Rogers stated that, in the rare case where there is one wire and the customer requires two wires in order to handle two service providers, it would be necessary for one of the two providers to install an additional wire. In such cases, Rogers maintained that it would be fair for the second provider in the building to install the second wire.

17. Rogers explained that, following the exercise of the rights contained in Clause 4, Rogers would no longer own the inside wire in the building but would have an IRU in the wire. Rogers explained that, if a customer were to switch to a second BDU, Rogers would no longer have control over the wire but would retain the right to use the wire at any time in the future. Rogers stated that, in the event the wiring configuration were such that two service providers could not use the wire, Rogers would have priority over other service providers for its use. This would mean, for example, that in the event that a Rogers BDU subscriber decided to switch to a second BDU for the delivery of broadcasting services but remain with Rogers to receive Internet or other communication services, Rogers would have the right to retain use of the wire for the provision of such services. On the other hand, Rogers noted that, if the wiring configuration permitted both service providers to use the inside wire, then both would use it.

18. Rogers argued that its access agreement with MUD owners is not similar to the Vidéotron case that was the subject of Decision 2002-299. It noted that, in the Vidéotron case, the Commission found that Vidéotron continued to control and operate all the inside wiring. Rogers maintained that this is not the case with its own agreement since a *bona fide* sale to the MUD owner is involved.

Denial of access to MUDs

i) ExpressVu's general position

19. ExpressVu stated that it had sought and been refused access to a number of buildings as a result of Rogers' building access agreements that contain Clause 4. ExpressVu submitted that, during the past year, its sales and marketing representatives have been involved in negotiations with the owners of 110 MUDs in the GTA with a total of over 33,000 suites. According to ExpressVu, 50, or 45%, of these MUDs have explicitly refused to provide access to ExpressVu. ExpressVu noted that it had approached the 110 buildings in partnership with Bell Canada, which has sought agreements to provide residents with non-broadcast services such as high-speed Internet services. It stated that there has been no case where a building owner has denied access to Bell Canada. ExpressVu argued that this strongly suggests that ExpressVu is being denied access as a result of Clause 4's financial impact on MUD owners, should they provide access to ExpressVu.

20. As requested by the Commission, ExpressVu provided Rogers with the names and addresses of residents of the following five MUDs, which were included in a list, filed in confidence, of the 50 MUDs to which ExpressVu indicated it had been denied access:

- Space – 255 Richmond Street East (Space)
- City Gate, Phase 1 – 3939 Duke of York (City Gate)
- Bayview Mansion, Phase 2 – 1 Clairtrell Road (Bayview)
- The Times – 51 Times Avenue (The Times)
- Mansions of Avondale – 51/55 Harrison Gardens (Mansions of Avondale).

ii) Rogers' general position on access to buildings

21. Rogers maintained that virtually all of the 110 buildings that ExpressVu had approached in the last year were new buildings. It based this position on ExpressVu's statement that it had approached these buildings with Bell Canada. Rogers argued that Bell Canada already provides its telephone and telecommunications services to every MUD in the GTA and would therefore not approach a building where it already provided service for access unless it was necessary to upgrade the wiring to provide high speed Internet service.

22. Rogers argued that it cannot be true that ExpressVu has been denied access to new MUDs as a result of Clause 4. Rogers explained that, when new residential MUDs are constructed, almost without exception, the buildings' owners are approached by Bell Canada, ExpressVu and Rogers. Rogers stated that these providers are interested in ensuring that they can provide service to the MUD, and that MUD owners are interested in minimizing construction costs, ideally by having the BDUs install the wiring at no charge.

23. Rogers maintained that, if a service provider is willing to install its infrastructure at no charge, the MUD owner will allow access in almost all cases. Rogers suggested that, if ExpressVu were willing to install the BDU inside wiring, it could get access to all 110 buildings. Rogers argued, however, that ExpressVu is not prepared to pay the substantial cost of wiring MUDs, but is implicitly taking the position that Rogers has an obligation to install the wiring and then allow ExpressVu to use it at the rate of $0.52 per subscriber per month.

iii) Positions of parties on each of the five buildings identified by ExpressVu

24. With respect to Space, Rogers stated that the agreement with the owner was signed in 2000 and contains no clause related to the reimbursement of the cost of inside wire. Rogers therefore maintained that any difficulties that ExpressVu may have experienced in gaining access to Space had nothing to do with Rogers.

25. ExpressVu replied that it does not have complete access to all contracts that Rogers has signed with MUDs in the GTA. It stated that, based on the response received when it approached the MUD owner about gaining access, it had formed the reasonable belief that Rogers' agreement with Space included Clause 4.

26. Rogers stated that it had entered into an agreement containing Clause 4 with the owners of each of the other four buildings.

27. With respect to City Gate, Rogers stated that the developer had advised Rogers that it wanted both Bell Canada and Rogers in the building. Rogers proposed to share the cost of the wiring but, when approached by the developer, Bell Canada refused, and indicated that it would not be using Rogers' wiring. Bell Canada, however, refused to confirm in writing that it would not be using Rogers' wiring although it was requested to do so by the developer. Rogers noted that City Gate was not scheduled to be occupied until October 2004, and that it has not yet wired the building. According to Rogers, ExpressVu cannot state that it has been denied access to this building if it is willing to pay its fair share of the cost of wiring.

28. ExpressVu disagreed with Rogers' statement that the developer had approached Bell Canada to share the cost of the wiring. Rather, ExpressVu maintained that the developer had requested that Bell Canada indemnify City Gate for the costs it would incur if Rogers enforced the buy-back provision of Clause 4. ExpressVu noted that Rogers confirmed that the developer refused to provide access to ExpressVu unless ExpressVu provided written assurance that it would not use Rogers' inside wire. ExpressVu argued that these admissions by Rogers demonstrate that ExpressVu is being denied access to the inside wire in City Gate because of the provisions of Clause 4.

29. In the case of Bayview, Rogers submitted that Bell Canada has refused to share the cost of the wiring for the building. It further noted that occupation of the building would not begin until November 2004, and that Rogers had not yet installed the wiring. Rogers argued that it is incorrect for ExpressVu to say that it has been denied access to the building, since ExpressVu could still obtain access to the building before it is occupied.

30. ExpressVu argued that Rogers' assertion that ExpressVu has not been denied access to Bayview because the building is not occupied is without merit and should be rejected. ExpressVu submitted that access agreements must be negotiated months in advance of occupancy, and that it had approached the developer in order to conclude such an agreement. The developer informed ExpressVu that the buy-back clause in its agreement with Rogers would be triggered if ExpressVu were given access to the building.

31. With respect to The Times, Rogers indicated that it had been informed that some dissatisfaction existed between the property manager and Bell Canada, because Bell Canada had approached the Board rather than the property manager about serving the building.

32. ExpressVu argued that Rogers' understanding of what happened was inaccurate and that it was negotiating with the appropriate parties. ExpressVu maintained that representatives of The Times had informed it that an agreement with ExpressVu would be in conflict with the developer's agreement with Rogers, and that it had been advised verbally that the conflict was due to Clause 4.

33. With respect to Mansions of Avondale, Rogers stated that ExpressVu either refused to pay for one-half of the wiring costs or to agree that it would not use Rogers' wiring.

34. In its response, ExpressVu noted that Rogers had confirmed that its agreement with the MUD contains Clause 4, and that the clause is responsible for ExpressVu being denied access to Mansions of Avondale.

The Commission's analysis and determinations

Regulatory background

35. The Commission has consistently considered matters related to the ownership, control and use of inside wire of cable BDUs to be important elements of its regulation and supervision of the Canadian broadcasting system. Until 1995, the Commission issued licences to cable BDUs to serve a defined area on a monopoly basis. The Commission established a new policy of competition for BDUs in *Competition and Culture on Canada's Information Highway: Managing the realities of transition*, 19 May 1995 (the Convergence Report). In the Convergence Report, the Commission stated that it would henceforth endorse increased competition in cable's core business in order to provide consumers with increased choice among distributors of broadcasting services. In addressing potential barriers to entry for new entrants, the Commission found that inside wire was a type of bottleneck, or essential, facility.

36. As part of its implementation of its new policy of competition, the Commission proposed new regulations designed to ensure that the appropriate rules would be in place to allow newly licensed competitors to have a fair and equitable opportunity to compete. In *Call for comments on a proposed approach for the regulation of broadcasting distribution undertakings*, Public Notice CRTC 1996-69, 17 May 1996 (Public Notice 1996-69), the Commission announced its intention to replace the existing regulations with new regulations governing all types of BDUs. It also established a public process for this purpose.

37. In *New regulatory framework for broadcasting distribution undertakings*, Public Notice CRTC 1997-25, 11 March 1997 (Public Notice 1997-25), the Commission emphasized the importance of inside wire as a key element of ensuring competition and consumer choice, stating:

> … A customer is likely to be reluctant to switch service providers if such a switch entails undergoing the inconvenience and disruption of having duplicate wiring installed in the customer's home. Accordingly, the Commission considers that, to the extent possible, customers should have the ability to connect the existing inside wire to the alternative service provider of their choice.

38. To allow for end-user choice, the Commission proposed a regulation that would require the incumbent licensee to allow its customer to purchase its inside wire at a prescribed rate so that the subscriber could use the wire to obtain service from the service provider of his or her choice. This approach, referred to as the "customer-ownership model", addressed the potential barriers to entry that could arise from the incumbent's ownership of inside wire.

39. In *Broadcasting Distribution Regulations*, Public Notice CRTC 1997-150, 22 December 1997 (Public Notice 1997-150), the Commission announced its new regulations, which came into force on 1 January 1998. These regulations included a provision to implement the customer ownership model for inside wire, which constituted the predecessor to the current regulation. Under that provision, where the customer was an owner or operator of a MUD, the licensee was required to sell the wire to that customer. The regulation did not prescribe a fee for the sale of inside wire.

40. Subsequent to the issuance of the regulations, industry representatives worked together with Commission staff in a working group of the CRTC Interconnection Steering Committee (CISC) to attempt to resolve issues associated with the implementation of the regime for the transfer of ownership of inside wire. As a result of the discussions in the CISC group, on 19 May 1999, the Canadian Cable Television Association, now known as the Canadian Cable Telecommunications Association, (CCTA) wrote to the Commission. In this letter, the CCTA stated that there were problems with the transfer of ownership regime established by regulation in December 1997. It noted that no inside wire in a MUD had yet been transferred by incumbent BDUs, as required by the Regulations, and suggested that section 10 of the Regulations be amended to remove the mandatory sale of inside wire to the customer. As a substitute for the customer-ownership model of inside wire, the CCTA proposed a "non-interference model" under which a licensee would not interfere with a customer's use of the inside wire, but could charge for the use of such wire when it was used by another licensee.

41. The Commission sought comments on the CCTA's proposal in *Call for comments on a proposal to amend section 10 of the* Broadcasting Distribution Regulations*, submitted by the Canadian Cable Television Association,* Public Notice CRTC 1999-124, 29 July 1999 (Public Notice 1999-124).

42. The Commission decided to adopt the non-interference model proposed by the CCTA and sought comments on proposed amendments to the regulations to implement this model 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 (Public Notice 2000-81). In that notice, the Commission reiterated both the fundamental importance of inside wire issues to its efforts to promote the competitive provision of all communications services and to its commitment to end-user choice.

43. In Public Notice 2000-81, the Commission noted that the CCTA had enunciated the following four principles that it considered should be used in interpreting and implementing a new regime:

    - where the licensee owns the inside wire, it shall retain ownership of it*,* i.e., there is no transfer of ownership of the inside wire;

    - the licensee that owns the inside wire will be prohibited by regulation from interfering with a customer's use of it;

    - there will be no charge for use by another licensee of the inside wire in single-unit dwellings; in circumstances to be identified by the CRTC through the CISC process, there will be a charge, also to be determined by the Commission, for use by another licensee of the inside wire in MUDs; and

    - all licensees will refrain from damaging another licensee's distribution system, cable drops, customer service enclosures and panel boxes.

44. In *Amendments to section 10 of the* Broadcasting Distribution Regulations *for the purpose of implementing a revised policy on access to inside wire*, Public Notice CRTC 2000-142, 6 October 2000 (Public Notice 2000-142), the Commission implemented the non-interference model to govern access to inside wire, and adopted the current wording of section 10 of the Regulations. The new provision came into force on 18 September 2000, and states:

    > 10.(1) A licensee that owns an inside wire shall, on request, permit the inside wire to be used by a subscriber, by another licensee, or by a broadcasting undertaking in respect of which an exemption order has been granted, by order under subsection 9(4) of the Act, from a requirement to obtain a licence.
    >
    > (2) The licensee that owns an inside wire may charge a just and reasonable fee for the use of the wire.
    >
    > (3) The licensee that owns an inside wire must not remove it from a building if a request for the use of the wire has been made and is pending under subsection (1), or while the wire is being used in accordance with that subsection.

45. In amending section 10 of the Regulations, the Commission determined that a non-interference model was the most appropriate approach for governing access to inside wire. It considered that this approach balanced the interests of a variety of stakeholders, including, in particular, the interests of incumbent cable companies, new entrants and subscribers. The current regulation

was thus enacted in the public interest by the Commission in the exercise of its mandate to regulate broadcasting with a view to implementing the broadcasting policy objectives set out in the *Broadcasting Act* (the Act).

46. In Public Notice 2000-81 and again in Public Notice 2000-142, the Commission requested that the Cable Wiring CISC (CW-CISC) group meet to develop an appropriate rate for the use of inside wire, and that the rate be put in place within two months of the coming into effect of the amendment to the Regulations. If consensus were not reached within that period, the Commission indicated that the CW-CISC group should submit any dispute to the Commission for resolution.

47. The CW-CISC group convened in November and December 2000 to begin discussions on what would constitute an appropriate fee for the use of inside wire in MUDs. The CCTA, ExpressVu, and Rogers Communications Inc. were among the parties that participated actively in these meetings. By February 2001, the CW-CISC working group had reached consensus on some broad principles, including the need for a national lease fee and an historical cost-based approach as the appropriate methodology for establishing a lease fee. However, the working group determined that it would not be able to arrive at a consensus with respect to the amount of the lease fee. Participants agreed that it would be appropriate for the various parties to submit their proposals to the Commission for a final determination.

48. Following the filing of various proposals, the Commission conducted a public process to determine a just and reasonable fee for the use of inside wire, initiated by *Call for comments – cable inside wire lease fee*, Broadcasting Public Notice CRTC 2002-13, 8 March 2002 (Public Notice 2002-13). Many broadcasting undertakings, including cable BDUs and their industry association, the CCTA, participated in the Commission's review of the appropriate fee. In determining this fee, the Commission sought to ensure that consumers enjoy the full benefits of competition in distribution, including the benefits of end-user choice, while taking into account the interests of both incumbents and new entrants. The Commission considered that a just and reasonable fee should not create inappropriate price incentives that could impede the efficient delivery of programming using the most effective technologies available at a reasonable cost. In *Cable Inside Wire Fee,* Broadcasting Public Notice CRTC 2002-51, 3 September 2002 (Public Notice 2002-51), the Commission determined that a fee of $0.52 per subscriber per month constituted a just and reasonable fee for the use of inside wire in MUDs, based on an historical cost-based approach. The Commission also stated that the charging of a higher fee would generally constitute a breach of subsection 10(2) of the Regulations.

ExpressVu's use of VDSL and the requirement to use coaxial inside wire

49. In the Commission's view, ExpressVu's use of VDSL without having access to the coaxial inside wire is not a complete solution in that it would not permit ExpressVu to offer a service that would be fully competitive with Rogers' cable television offering since the inside wire is needed to connect the VDSL receiver to additional television sets located in rooms that are distant from the VDSL receiver. Based upon the record of this complaint, the Commission does not accept Rogers' argument that ExpressVu's use of VDSL means that it does not require access to the inside wire.

a) Clause 4 and section 10

50. As set out above, the Commission has consistently considered access to inside wire to be a critical issue for the development of competition in broadcasting distribution. The objective of section 10 of the Regulations is to eliminate a potential barrier to entry for new entrants and to ensure that subscribers are able to obtain service from the service provider of their choice. The Commission notes that the current regulation, which came into effect in 2000, reflects a proposal made in 1999 by the CCTA, of which Rogers was and remains a member. This request resulted in a change to a non-interference model for dealing with inside wire from the previous model, whereby cable licensees were required to sell their inside wire to customers at a set fee. Under the non-interference model, incumbent licensees must make their inside wire available for use by competitors and subscribers at a just and reasonable fee.

51. In the Commission's view, however, Rogers has elected to use Clause 4 to implement its own new model for dealing with inside wire rather than the non-interference model set out in Public Notice 2000-81. Rogers stated that "this clause is a sensible and practical solution to the problem of wiring new buildings and submit[ted] that it is strongly in the public interest," and that "[t]he arrangement is practical because it allows the building owner to avoid owning the inside wiring until such time as there are two service providers. It is also fair because both BDUs end up sharing the depreciated cost of the wiring." The Commission notes that section 10 is intended specifically to come into play at "... such time as there are two service providers" serving a MUD. Furthermore, subsections 10(1) and (2) have been specifically crafted to ensure that new entrants only pay for the wire that they use. Thus, new entrants should only share the cost of the wire equally if they use the same proportion of the wire.

52. The Commission further notes that, in its submissions, Rogers explicitly stated its assumptions that the building owner would grant access to new entrants, regardless of the existence of Clause 4, and that the owner would only charge the new entrant the net amount it must pay to purchase the wire from Rogers. However, the Commission notes that the agreement contains no terms to that effect, and considers that there is no basis for Rogers to assume that these assumptions would be the consequences of Clause 4 in all cases. Building owners could refuse access to buildings in order to avoid triggering Clause 4. Further, building owners could charge new entrants more than their net payment to Rogers. While building owners might seek only to recover costs incurred as a result of Clause 4, they could also seek to make a profit on the inside wire asset.

53. The Commission notes that this is a situation where Rogers has required the MUD owner to agree to purchase the inside wire as a precondition to allowing a competitor access to the building, and has retained for itself an IRU in the inside wire allowing it to use the wire in priority to others in perpetuity. As Rogers stated, it retains control of the inside wire that it uses, or that it wishes to use, in order to provide communication services to subscribers in the building.

54. In its submissions, Rogers stated that it has used Clause 4 because it does not consider that it would be adequately compensated for use of its inside wire at a monthly lease fee of $0.52 per subscriber per month. As set out above, the rate of $0.52 was established following an extensive process in which Rogers actively participated. The $0.52 rate is a national average

that includes both new and older buildings, allowing Rogers, overall, to be adequately compensated for use of its inside wire. Further, the Commission stated, in Public Notice 2002-51, that it may consider granting an exception to this approach and permit a greater fee where a licensee clearly demonstrates, based on detailed evidence, that a particular circumstance warrants such an exception.

55. Instead of filing an application for such an exception, Rogers has decided to implement its own approach for dealing with inside wire issues. Indeed, based on the record of this proceeding, it is clear that Rogers specifically intended to avoid having to make its inside wire available in accordance with subsections 10(1) and (2) of the Regulations at a rate of $0.52 per subscriber per month, which the Commission has determined to be just and reasonable. Rogers also has determined to retain an IRU in the inside wire, for use of the wire in priority over new entrants in perpetuity.

The Commission's determination – Section 10

56. In the Commission's view, by entering into agreements with MUD owners containing Clause 4, Rogers has explicitly sought to circumvent the process contemplated in subsections 10(1) and (2) of the Regulations and to avoid its regulatory obligations under those provisions. Clause 4 enables Rogers to do indirectly what it could not do directly, given subsections 10(1) and (2) of the Regulations.

57. In the Commission's view, Rogers' model, under which the MUD owner would purchase the wire as a precondition to granting a competitor access to the building while Rogers retains a perpetual priority right to use the wire, is inconsistent with and undermines the objects and purposes of subsections 10(1) and (2) of the Regulations and, more generally, the objectives of the Act. The Commission considers that it would be contrary to the public interest to allow Clause 4 to be acted upon.

58. In light of the foregoing, the Commission finds that Rogers would be in violation of subsections 10(1) and (2) of the Regulations if it does not make its inside wire available for use by other BDUs at a just and reasonable fee in circumstances where Rogers owns the wire at the time that the other BDU approaches the owner or developer of the MUD to obtain access and, instead, invokes Clause 4 to require the sale of its wire to the owner or developer while retaining an IRU in the wire.

b) Clause 4 and section 9 – Undue preference and disadvantage

59. Section 9 of the Regulations reads as follows:

> No licensee shall give an undue preference to any person, including itself, or subject any person to an undue disadvantage.

60. In analyzing a complaint under section 9, the Commission seeks to determine, first, whether a party has given a preference to any person, or subjected any person to a disadvantage. Second, the Commission considers whether any such preference or disadvantage is undue. In examining this second issue, the Commission considers whether a preference or a disadvantage has had,

or is likely to have, a material adverse impact on the complainant or on any other person. It also examines the impact the preference or disadvantage has had, or is likely to have, on the achievement of the objectives of the broadcasting policy for Canada set out in the Act.

i) Does Clause 4 confer a preference on Rogers or subject competitors to a disadvantage?

61. As part of its deliberations on whether or not Clause 4 confers upon Rogers a preference or subjects ExpressVu and/or other competitors to a disadvantage, the Commission has compared the effect of Clause 4 with the effect achieved under the Regulations. The Regulations provide ExpressVu and other new entrants the right to use Rogers' inside wire at a just and reasonable fee.

62. First, given that pursuant to Clause 4 Rogers would obtain an IRU in the inside wire in perpetuity while new entrants have no right to access the inside wire in the MUD, the Commission considers that Clause 4 confers upon Rogers a preference and subjects new entrants to a disadvantage.

63. Second, if Rogers were to invoke the right to use the inside wire in preference over competitors, it is reasonable to assume that the competitor would lose the customer or potential customer unless that competitor is able to install new inside wire in the subscriber's suite. In the Commission's view, to the extent that Rogers invokes its right to use the inside wire in priority to competitors, Rogers would confer upon itself a preference and subject its competitors to a disadvantage.

64. Third, based on the record of this proceeding, the Commission finds that ExpressVu has been denied, or is likely to be denied, access to at least three MUDs – City Gate, Bayview and Mansions of Avondale – unless it agrees to pay 50% of the cost of the inside wire.

65. In the Commission's view, it is reasonable to assume that any MUD owner or developer that would allow a new entrant into a building would seek to recover at least its net cost from the new entrant. Given that Rogers is obliged, under the terms of Clause 4, to pay 50% of the depreciated cost of the inside wire in the building, the building owner's net cost would also amount to 50% of the depreciated cost of the inside wire. In most scenarios, the payment of 50% of the depreciated cost by a new entrant to the MUD owner would be far in excess of what the Commission has to date determined would constitute a just and reasonable fee in accordance with section 10 of the Regulations. The Commission further notes that there is nothing in Clause 4 to prevent a building owner from seeking to charge the new entrant more than the owner is obliged to pay to Rogers for the wire.

66. In addition, the Commission notes that the obligation to pay 50% of the depreciated cost of the inside wire is independent of the penetration rate that the new entrant actually achieves. According to the record, ExpressVu would likely capture no more than one-third of the suites in a MUD, and it would likely take an extended period to reach that level. The Commission has no basis to dispute this estimate and accepts it as reasonable. Since ExpressVu would be required to pay the full 50% of the cost of the inside wire even if it were using significantly less than 50% of the inside wire in the MUD, ExpressVu would likely be responsible for paying far in excess of the depreciated cost of the inside wire that it actually uses. Rogers, for

its part, would be paying less than the depreciated cost of the inside wire it uses. This also means that ExpressVu would be required to pay a significantly higher rate, on a per-subscriber basis, than Rogers would pay.

67. In light of the foregoing, the Commission concludes that the effect of Clause 4 has been, or is likely to be, to require new entrants to pay a lump sum payment of at least 50% of the depreciated cost of the inside wire, regardless of the extent to which they use the wire. Therefore the effect of Clause 4 has been, or is likely to be, to subject ExpressVu to a disadvantage and/or to confer a preference on Rogers.

ii) Are the preferences and/or disadvantages undue?

68. In order to determine whether or not the preferences and/or disadvantages are undue, in contravention of section 9 of the Regulations, the Commission has examined whether Clause 4 has had, or is likely to have, a material adverse impact on ExpressVu, the residents of the MUDs in question, or any other person. It has also examined the impact that Clause 4 has had, or is likely to have, on the achievement of the objectives of the broadcasting policy for Canada set out in the Act.

69. Since the Convergence Report, the Commission has consistently found competition in the distribution of programming services to be in the public interest. The Commission remains of the view, previously expressed in Public Notice 2000-81, that access to inside wire by new entrant BDUs is critical to the development of a competitive BDU environment and the attainment of end-user choice. The Commission notes that ExpressVu has stated that it is the largest competitor in the MUD market in the GTA even though it has only 10,000 customers. According to ExpressVu, Rogers' share of the MUD market in the GTA is in excess of 95%. The Commission considers that Rogers is the dominant incumbent provider of broadcasting distribution services in the GTA. This is particularly true in the MUD market where it appears that Rogers serves almost all customers.

70. The Commission is not convinced by Rogers' argument that Clause 4 does not violate section 9 of the Regulations since it provides a "sensible and practical solution to the problem of wiring new buildings…." This argument was based primarily on two points, first, that a BDU that installs the inside wire will fail to earn an adequate return on its investment if it is limited to recovering $0.52 per subscriber per month from a competitor for use of the wire and, second, that it allows the building owner to avoid owning the inside wire until such time as there are two service providers, whereupon both BDUs end up sharing the depreciated cost of the wire.

71. On the first point, the Commission notes that Rogers, in entering into agreements with MUD owners that contain Clause 4, is effectively permitting itself to recover, over a similar period, more than it otherwise could have based on the Commission's determinations to date regarding what constitutes a just and reasonable fee, and therefore an adequate return, for the use of inside wire.

72. On the second point, the Commission notes that Rogers' proposed 50/50 split of the depreciated cost established by Clause 4, which would apply regardless of the relative penetration rates of Rogers and the new entrant, was explained simply by an assertion that it

would be very complicated administratively to have payments based on the penetration rate of the second BDU. The Commission is not convinced that any inefficiencies that may be imposed upon Rogers' administration outweigh the need to have an inside wire fee mechanism that is just and reasonable, taking into account the interests of subscribers as well as incumbents and new entrants. The Commission also does not consider that sharing of the depreciated cost in the form of an upfront lump sum payment is appropriate in all circumstances. Further, the Commission would be concerned if MUD owners were to be as reluctant to own inside wire and to incur the upfront cost as Rogers suggested, since owners might wish to avoid triggering Clause 4 by denying competitors access to their buildings.

73. The effect of Clause 4 has been, or is likely to be, to require new entrants to pay a lump sum of at least 50% of the depreciated cost of the inside wire, regardless of the extent to which they use the wire. Further, it is reasonable to assume that, in most situations, the lump sum fee, on a per-suite basis, will be far in excess of the monthly fee of $0.52 that the Commission has determined to be just and reasonable, depending on the penetration level achieved. The Commission considers that this can be expected to have a material adverse impact on the development of competition.

74. Further, Clause 4 also provides Rogers with an IRU in the inside wire in priority to other service providers, in perpetuity. Rogers has explained that "in the event that the wiring configuration is such that two service providers cannot use the wire, Rogers can use the wire in priority to other service providers." Consequently, if a subscriber wishes to remain with Rogers for Internet or other communications services such as telephone service, but switch to a new entrant BDU for broadcasting services, the new entrant would not be able to rely on the existing inside wire if Rogers needs the wire to provide its services to the subscriber. Further, if a subscriber switched to a new entrant BDU and subsequently wished to obtain Internet, telephone or pay-per-view services from Rogers, Rogers could invoke its priority right to use the wire to provide service to the subscriber. The IRU in the inside wire in priority to competitors would ensure that, in the event that a choice must be made between Rogers or a new entrant BDU's use of the inside wire, Rogers' use would always take precedence.

75. Rogers noted that, in almost all cases, new MUDs have two wires, so the issue of priority use of the inside wire should not arise. However, in MUDs where the inside wire cannot support two providers, the Commission considers that the exercise by Rogers of its IRU in the inside wire in priority to competitors would result in a material adverse impact on competitors since, under this scenario, the competitor would either lose its subscriber or be obligated to install its own wiring in the subscriber's suite.

iii) The Commission's determination – Section 9

76. In light of the foregoing, the Commission concludes that Clause 4 has had, or is likely to have, a material adverse impact on ExpressVu and other new entrants, as well as on the development of competition in the MUDs where an agreement containing Clause 4 is in force. Clause 4 is thus contrary to the objectives of the Act, and contrary to the public interest.

77. The Commission therefore finds that by entering into agreements containing Clause 4 with MUD owners, Rogers has acted in violation of section 9 of the Regulations by conferring upon itself an undue preference and subjecting competitors to an undue disadvantage. Accordingly, Rogers is expected to take all necessary steps to bring itself into compliance with the Regulations with regard to Clause 4.

78. As part of the relief sought in its application, ExpressVu had requested that the Commission require Rogers to notify all parties who have signed an agreement that includes Clause 4 that this clause is unenforceable; place notices to such an effect in the major newspapers in its service territory; and place on the public file all of its access agreements. The Commission considers that these specific measures are not necessary at this time. The Commission notes that in the event that Rogers does not take the necessary steps to remedy this situation, the Commission may initiate a public proceeding to examine why it should not exercise the enforcement powers at its disposal.

Transfer of inside wire

ExpressVu's complaint

79. ExpressVu alleged that Rogers has not complied with requirements relating to the transfer of inside wire. In its view, certain actions by Rogers constituted a breach of section 9 of the Regulations because they materially impeded ExpressVu's ability to transfer a MUD resident from Rogers to ExpressVu, and materially and unnecessarily affected the ability of a subscriber to receive service of acceptable quality. Moreover, ExpressVu suggested that Rogers' actions reflected a negligent attitude or deliberate stratagem on the part of Rogers intended to damage ExpressVu's ability to deliver its service promptly and efficiently to new clients.

80. In setting out the specifics of this portion of its complaint, ExpressVu raised three areas of concern:

- service intervals;
- operational impediments; and
- reporting requirements.

Service intervals – Positions of parties

81. ExpressVu noted that, while the Commission had established rules requiring cable companies to complete the transfer of inside wire within 24 hours and to provide a two-hour appointment window, it has agreed with Rogers to extend the notice period to 48 hours, with a two-hour appointment window. However, ExpressVu stated that transfers have not always been completed within 48 hours, and that it was sometimes difficult to access customer service enclosures (CSEs) and distribution panels.

82. Rogers admitted that there had been some occasions where it was not able to complete ExpressVu's transfer requests within the agreed 48-hour period, but maintained that such occurrences were infrequent. Rogers submitted that, when it became aware of a problem, it immediately notified its customer services group (CSG) which, in turn, notified ExpressVu so that the difficulty could be resolved in a timely manner.[2]

83. Rogers also noted that ExpressVu had documented only seven cases where Rogers had not completed transfers within 48 hours. Rogers noted that four of these cases occurred in 2002, and only five of them took place in the GTA. Rogers noted that ExpressVu had over 10,000 MUD customers, and submitted that an error rate of 5 in a total of 10,000 wire transfers is consistent with its position that its failures to complete transfers within 48 hours had been infrequent and unintentional.

Operational impediments – Positions of parties

84. ExpressVu provided several examples of incidents where it alleged that Rogers had wrongly disconnected or cut ExpressVu's wiring, thereby disrupting the delivery of its service to customers.

85. In reply, Rogers stated that it was difficult to provide an explanation for the matters raised by ExpressVu without details concerning which customers had been wrongly disconnected. Rogers suggested that, where "accidental" disconnection had occurred, it had been due to improper labelling of ExpressVu's equipment.

86. ExpressVu rejected Rogers' claim that disconnections of its service were due to the improper labelling of ExpressVu's equipment. ExpressVu stated that its equipment is so physically different from that of Rogers that any technician or audit employee could distinguish between the two.

87. ExpressVu further suggested that the pattern and number of disconnects, wire cutting, locks being changed, panels being moved and missed appointments by Rogers pointed to more than a simple lack of training of Rogers' field personnel.

Reporting requirements – Positions of parties

88. ExpressVu requested that the Commission establish reporting requirements much like the ones currently in place for incumbent local exchange carriers (ILECs). Under the proposed requirement, Rogers would be ordered to meet a standard under which it must provide access to CSEs and distribution panels within 48 hours in the case of 90% of pertinent requests each month, and then to file monthly reports on its results in meeting this standard. ExpressVu also suggested that the Commission set similar standards at Rogers' licence renewals, consider additional indicators, introduce fines that would be applied when standards are not met, and

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[2] In Public Notice 2000-81, the Commission required Rogers and certain other large cable operators to establish CSGs for the purpose of isolating competitively sensitive customer/competitor information from the sales and marketing function.

consider that a failure to meet standards on a consistent basis would be a violation of section 9 of the Regulations. Finally, ExpressVu suggested that the Commission develop a code of conduct that would include the establishment of third-party contractors to handle the transfer of wires and the exchange of keys for each BDU's panel boxes.

89. In response, Rogers submitted that no new rules were required to ensure competition in the Toronto MUD market. In addition, Rogers stated that it did not agree with ExpressVu's proposed code of conduct, arguing that it constituted an attempt to force Rogers to provide ExpressVu with access to its panel boxes. Rogers noted that the Commission recognized the integrity of the equipment in panel boxes in Public Notice 2000-81.

90. In its submission of 22 August 2003, ExpressVu argued that past meetings between the parties had resulted in guidelines with respect to the transfer of wires, but that they have never developed any escalation[3] or notification procedures. ExpressVu contended that additional guidelines would reduce its costs as well as its complaints to Rogers. It reiterated its view that third-party contractors could handle wire transfers between the two companies in the GTA at no cost to Rogers. However, ExpressVu stated that Rogers had rejected the idea.

91. Regarding notification and escalation procedures, Rogers replied by citing the minutes of an 8 July 2003 meeting wherein the parties had agreed to provide a 72-hour notification of rebuild or repair work, in the interest of eliminating service interruptions.

92. In its final submission of 3 October 2003, ExpressVu argued that Rogers had no incentive to provide its competitors with good service on wire transfers, since it had no requirement to report on its performance and was not subject to any penalties if it delivered poor service. ExpressVu observed that, in the telecommunications sector, the Commission had ordered incumbent carriers to report on their service levels to competitors and to pay penalties if standards are not met. ExpressVu argued that cable BDUs should be subject to the same requirements for wire transfers. ExpressVu also indicated that it had recently begun to monitor and track wire transfers, and indicated that it was willing to provide the Commission with monthly reports on this matter.

The Commission's analysis and determination

93. In Public Notice 2000-81, the Commission stated:

> … in order to facilitate timely joint visits for transferring service, all licensees are required to accommodate requests by other distributors for access to CSEs or distribution panels within 24 hours of receiving such a request and to provide them with a 2-hour appointment window. In reaching its decision to introduce this policy requirement, the Commission has taken into consideration the requirement's impact on distribution undertakings of differing sizes and resources.

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[3] Escalation procedures are procedures for technicians to follow when they encounter problems completing a transfer and need advice about how to proceed. An escalation procedure would normally include a list of company representatives that technicians could contact for advice, so that problems could be quickly resolved.

94. The Commission notes that, in order to ensure that transfers are efficiently and reasonably executed, distributors often enter into mutually satisfactory agreements that may provide for a period longer than 24 hours to accommodate requests for transfers.

95. The Commission considers that the record of this proceeding establishes that Rogers has breached the wire transfer rules on a few occasions. However, the Commission considers that ExpressVu has not provided sufficient evidence to support its allegations that such breaches occur regularly, or that Rogers was acting in a deliberate or systematic manner in order to discourage BDU competition in MUDs in the GTA.

96. ExpressVu alleged that Rogers' actions related to service intervals and other aspects of wire transfers contravened section 9 of the Regulations. While the Commission has concluded that some errors and delays have been experienced, it considers that a certain number of operational errors can reasonably be expected to occur between any two businesses in such situations.

97. As well, the Commission cannot conclude that any of the problems that have occurred have harmed the public interest in a material way. The record of this proceeding suggests that the vast majority of subscribers have been transferred in a timely fashion. In this respect, Rogers' actions do not appear to have materially restricted end-user choice.

98. The Commission is therefore of the view that evidence of a few instances of missing a service interval, or other failure to meet operational requirements, is not sufficient to establish undue preference or disadvantage. Nevertheless, the Commission expects Rogers to be vigilant in performing wire transfers, in keeping with the current rules.

99. With respect to ExpressVu's request for an order requiring Rogers to provide access to CSEs and distribution panels within 48 hours in the case of 90% of such requests, and to submit monthly reports on its results in meeting this standard, the Commission considers that the resources that would be required, both for the parties and for itself, to implement such detailed reporting requirements are not warranted, given that ExpressVu has not provided a compelling argument or sufficient evidence to justify the need.

Winback of subscribers

ExpressVu's complaint

100. ExpressVu alleged that Rogers was engaging in the harassment of existing and potential ExpressVu subscribers in the Toronto MUD market by launching winback campaigns in MUDs within 90 days after subscribers had switched to ExpressVu, contrary to the winback rules.

101. In particular, ExpressVu cited the situation at the Marina Del Rey complex (Marina Del Rey), where a bulk-billing agreement was in place, as well as the South Beach condominiums (South Beach) in Toronto and certain MUDs in Orillia. ExpressVu alleged that subscribers in these buildings who had recently transferred their service from Rogers to ExpressVu were contacted by Rogers within 90 days of sign-up and were presented with special service offers, contrary to the winback rules.

102. The Commission notes that the winback rules that were applicable at the time of the filing of ExpressVu's complaint are set out in the Commission's letter decision *Re*: *CISC Dispute – Rules Regarding Communication Between the Customer and the Broadcasting Distribution Undertaking,* 1 April 1999. The relevant portion reads as follows:

> … the Commission has determined that, as a matter of policy, it will require that incumbent cable companies refrain from the direct marketing of customers who, through an agent, have notified their intention to cancel basic cable service. Such restriction will be in effect from the date of receipt of notice to terminate, and will continue for a period ending ninety (90) days from the date of disconnection of basic cable service. In instances where disconnection of service occurs in advance of the incumbent's receipt of notice of termination, the restriction will operate for ninety (90) days from the date of disconnection.
>
> The Commission has also determined that it will require incumbent cable companies to refrain from offering discounts or other inducements not generally offered to the public where customers personally initiated contact with the cable company for the purpose of cancelling basic cable service. This restriction will be in effect from the date of receipt of notice to terminate and for ninety (90) days from the date of disconnection of basic cable service.

103. In *Changes to the winback rules for broadcasting distribution undertakings*, Broadcasting Public Notice CRTC 2004-62, 13 August 2004 (Public Notice 2004-62), the Commission determined that, in addition to the 90-day prohibition on attempting to win back customers who have elected to change BDUs, an incumbent BDU would also be prohibited from marketing its service in a given MUD for 90 days from the time the BDU competitor enters into an access agreement. However, since the amended winback rules were put in place following the events that gave rise to this complaint, the Commission has considered the complaint under the winback rules as they existed prior to the amendments.

104. ExpressVu was also concerned that Rogers may not have adequate procedures in place to ensure compliance with the Commission's requirements for CSGs. The absence of these procedures, according to ExpressVu, has resulted in an undue preference for Rogers, and has subjected ExpressVu to an unfair disadvantage, since it has permitted Rogers to use anti-competitive tactics and inducements to win back customers or to persuade other customers not to switch service providers. ExpressVu also suggested that the Commission consider imposing conditions of licence that restrict Rogers' winback activities, at the time of Rogers' licence renewal.

105. ExpressVu requested that the Commission order Rogers to file immediately a description of the procedures that it follows to track customers who have left Rogers, in order to ensure that these names are removed from its marketing lists for a 90-day period; to report on the steps that it has taken to establish a fully independent CSG, and to set out the mechanisms it has in place to ensure that sales and marketing employees cannot access any competitively-sensitive information.

106. In its submission of 22 August 2003, ExpressVu addressed the applicability of winback rules to MUDs with bulk-billing agreements. ExpressVu stated that, if the winback rules do not apply to individual residents of MUDs where a bulk-billing agreement is in effect, the Commission should amend the rules so that they do apply in such situations. ExpressVu also argued that Rogers would be in violation of section 5 of the Regulations in instances where it provided discretionary services to subscribers, but not its basic service, under a bulk-billing agreement.[4]

107. As part of the relief sought in its complaint, ExpressVu also requested that the Commission:

- extend the period during which subscribers who have changed service providers may not be contacted from 90 days to twelve months;
- establish a procedure that should apply when subscribers call customer service representatives (CSRs) asking to be disconnected so that they can switch to another service provider that is considered a new entrant;
- decide whether the incumbent cable operator in the Toronto MUD market should be permitted to contact subscribers in that market in an attempt to change the package of services that they receive; and
- decide whether BDUs should be prohibited from offering inducements, including free service, to property owners or managers.

Rogers' reply

108. In Rogers' view, the winback rules apply when a customer, or the customer's agent, contacts Rogers to cancel service. Rogers argued that, in the case of a bulk-billing package, it is the condominium board and not the end-user that is its customer. Rogers therefore maintained that the end-users in Marina Del Rey who received only the bulk service were not Rogers' customers and did not call to cancel service since, in that case, ExpressVu acted as an agent for the condominium board rather than for the end-users themselves.

109. On the other hand, Rogers argued that the end-users that received discretionary programming services in addition to the bulk service were its customers. However, Rogers stated that these customers never cancelled their services with Rogers, and therefore the winback rules did not apply to them.

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[4] Section 5 states: Except as otherwise provided under a condition of its licence or these Regulations, no licensee shall provide a subscriber with any programming services, other than pay-per-view services, video-on-demand services or the programming services of exempt programming undertakings, without also providing the basic service of the licensee.

110. Rogers also submitted that ExpressVu's revenues are protected in Marina Del Rey, because ExpressVu continues to receive 100% of its bulk revenues whether the customer buys services from Rogers or not.

111. Rogers noted that some of the Marina Del Rey customers have high definition television sets, and that high definition service is not available using ExpressVu's VDSL technology. Rogers stated that some customers had therefore contracted with Rogers for cable television service in order to receive its high definition service. Rogers stated that customers in Marina Del Rey who continued to receive services from Rogers were receiving either Internet service or cable service, including basic service at a minimum, or both, and Rogers was therefore not in violation of section 5 of the Regulations.

112. Rogers also maintained that no special offers had been extended to any residents of Marina Del Rey and that, in all cases, residents received only generally available offers that existed in the GTA market at the time, whether or not there was a competing BDU in the building.

113. Rogers further stated that, since its CSG and its winback procedures comply completely with the Commission's winback rules, the type of offers that Rogers extends to customers are irrelevant. Rogers maintained that, contrary to ExpressVu's allegations, it does not offer free digital service to customers in MUDs, but that all Rogers VIP customers, whether they reside in single unit dwellings (SUDs) or MUDs, are entitled to a free digital box.

114. Rogers reported that information is communicated to its sales and marketing group in the following ways:

- directly from its clients, including building owners and managers or condominium boards and strata councils;
- by observing the presence of a competitor at a MUD while conducting its own meetings with the condominium board; or
- when existing customers in a MUD contact Rogers' CSRs about the presence of another service provider. Such information is generally forwarded to Rogers' sales group, which then verifies that a competitor is present using methods such as discussions with a building's property manager.

115. Given the various ways in which information is communicated to its sales and marketing group, Rogers stated that ExpressVu's argument that Rogers' CSG is the source of competitive intelligence for its sales and marketing group is completely unfounded and quite wrong.

116. Rogers disagreed with ExpressVu's claim that subscribers who had recently transferred to ExpressVu from Rogers were contacted by Rogers with a special offer within 90 days of sign-up. Rogers explained that it had provided service to Marina Del Rey residents for several years under a bulk agreement, before ExpressVu contracted with the condominium board to provide its own bulk services in replacement of Rogers'. Following the condominium board's decision to switch to ExpressVu for the provision of bulk video services, Rogers continued to provide bulk service to the entire development, at the board's request, for a period of time

during the phased roll-out of ExpressVu's VDSL service. Accordingly, both Rogers and ExpressVu were under contract to provide bulk service to the entire Marina Del Rey complex until 31 August 2003. Rogers was subsequently informed that, effective 1 September 2003, "any remaining Rogers customers at Marina Del Rey will be on Direct Tenant basis only."

117. Rogers explained that, in most buildings, where one bulk service provider is replaced by another, all customers are converted from one BDU to another in the course of an evening. However, in the case of Marina Del Rey, in light of the phased roll-out of ExpressVu's VDSL service and in order to comply with the spirit of the winback rules, Rogers endeavoured to ensure that it did not contact any customer that had been converted to the ExpressVu bulk service for 90 days after that customer had been disconnected from Rogers' service. Rogers stated, however, that due to an administrative error, telemarketers, on one occasion, used a list that had been updated approximately one week before. Therefore, Rogers stated that it was possible that a few customers had been contacted within 90 days of their conversion to ExpressVu's service.

118. Rogers stated that it had called and advised customers that they could continue to receive service from Rogers, without making any special offers, and that this practice was permissible. Rogers submitted that, even though ExpressVu is the bulk service provider in these buildings, this does not mean that ExpressVu can exclude Rogers from the building, as is stated in the Commission's *Bulk billing by direct-to-home satellite distribution undertakings*, Broadcasting Public Notice CRTC 2002-7, 12 February 2002 (Public Notice 2002-7), which discusses bulk billing by DTH providers.

119. Rogers submitted that it has offered building superintendents free cable television service for decades in both competitive and non-competitive buildings regardless of whether they provide any assistance in marketing Rogers' services. Rogers stated that these inducements assist it in establishing good relations with the building owners and managers. Rogers argued that ExpressVu offers similar free services, citing complimentary service to a guest suite in a property located in Collingwood, Ontario, as an example.

120. Rogers reported that its sales group became aware that South Beach was receiving service from ExpressVu, but that this information was not communicated to its door-to-door sales group. Rogers maintained that its door-to-door marketing campaign was normal sales activity designed to attract new customers to cable, and was not initiated in response to ExpressVu's entry.

121. Rogers also stated that its door-to-door sales personnel obtain a "scrubbed list" for each building, which excludes active cable customers and any customers that have switched to a competitor in the past 90 days. Rogers also noted that ExpressVu did not allege that any of its customers were actually contacted by Rogers within the 90-day prohibition period.

The Commission's analysis and determination

a) Applicability of winback rules – MUDs with bulk-billing agreements

122. Rogers sought clarification concerning whether the winback rules apply to a MUD that is subject to a bulk-billing agreement. More particularly, Rogers asked whether the winback rules apply to the condominium board with which the bulk-billing agreement is concluded, or whether the rules apply at the level of the individual unit holders.

123. The Commission notes that bulk-billing agreements have been permitted for cable undertakings for some time and, consistent with this practice, in Public Notice 2002-7, the Commission allowed DTH providers to engage in bulk-billing as well. The Commission further notes that, although the cost of broadcasting services obtained under a bulk-billing agreement is usually included in the condominium fees, this does not preclude residents from choosing another distributor and paying the additional costs associated with that service, if they so wish.

124. Furthermore, in *Complaint by Cablevision TRP-SDM Inc. against Cogeco Cable Inc. alleging contraventions of section 9 of the* Broadcasting Distribution Regulations, Broadcasting Decision CRTC 2004-4, 14 January 2004 (Decision 2004-4), the Commission stated that, even when a bulk-billing agreement is in place, nothing precludes another distributor from providing its service in a MUD, upon payment of the appropriate fee for the use of the inside wire. Accordingly, an incumbent service provider is permitted to solicit MUD residents even when a MUD has a bulk-billing agreement with another service provider.

125. In cases where a bulk-billing agreement is in place, the Commission has never excluded MUDs from the application of the winback rules. In the Commission's view, the winback rules apply to all types of dwellings served by BDUs, including those MUDs where a bulk-billing agreement is in effect. The Commission notes, however, that the winback rules apply to "customers" who cancel basic cable service. Furthermore, the Regulations specifically distinguish between "customer" and "subscriber," which are defined as follows:

> "customer" means a person who is liable for payment for programming services that are distributed by a licensee and that are received directly or indirectly by one or more subscribers. It does not include the owner or operator of a hotel, hospital, nursing home or other commercial or institutional premises.
>
> "subscriber" means
> a) a household of one or more persons, whether occupying a single-unit dwelling or a unit in a multiple-unit dwelling, to which service is provided directly or indirectly by a licensee; or
> b) the owner or operator of a hotel, hospital, nursing home or other commercial or institutional premises to which service is provided by a licensee.

126. The Commission considers that, based on the definition of customer set out above, the customer of basic cable service would be the condominium corporation, or landlord as the case may be, that enters into a bulk-billing agreement with the BDU and is liable for

payment for the services distributed under that agreement, and not the condominium unit holder or tenant. Therefore, in these circumstances, on a strict reading of the rules, the winback rules would prohibit a BDU from contacting the board or landlord but not the end-user.

127. It is the Commission's preliminary view, however, that the objective of the winback rules would be better achieved by ensuring that they apply to both the customer and the subscriber, when basic cable service has been cancelled. The objective is to ensure that the incumbent BDU cannot specifically target for winback either the customer or the subscriber whose basic service has been cancelled during a specific period of time. The principle applies equally whether the subscribers are tenants or condominium unit holders in a MUD.

128. Taking into account the above considerations, the Commission is issuing *Call for comments on changes to the winback rules regarding their application to both customers and subscribers*, Broadcasting Public Notice CRTC 2004-86, also of today's date. The proposed modifications to the winback rules set out in that public notice are intended to ensure, among other things, that the incumbent BDU cannot contact directly, during the established period, any of the residents of MUDs, including individual condominium unit holders, that are subject to a bulk-billing agreement that has been cancelled, and that they cannot provide inducements, that are not generally offered to the public, to a subscriber that has contacted the BDU directly to terminate basic cable service.

b) Alleged breach of section 5 of the Regulations

129. ExpressVu has argued that Rogers breached section 5 of the Regulations. The Commission notes that Rogers is permitted to provide additional discretionary programming services to its subscribers that obtain Rogers' basic service pursuant to a bulk-billing agreement or otherwise. The Commission also notes that Rogers is permitted to provide Internet service, whether or not the subscriber obtains its basic cable service from Rogers. Based on the record of this proceeding, the Commission cannot conclude that Rogers has provided service in breach of section 5 of the Regulations.

c) Alleged breach - Bulk-billing agreement and Marina Del Rey

130. In the case of Marina Del Rey, the fact that the record reveals that Rogers did contact individual unit holders in the building in two or more cases does not permit the Commission to conclude that Rogers has breached the winback rules. As discussed above, the rules, as they are currently formulated, do not prevent Rogers from contacting individual unit holders in circumstances where the condominium board was Rogers' customer for basic service, and it was the board that notified Rogers of its intention to cancel basic service. Further, in these circumstances, Rogers would likewise not be prevented, under the current rules, from contacting individual unit holders who were customers for discretionary services.

d) Alleged breaches - No bulk-billing agreement in effect

131. With respect to the MUDs in Orillia, the Commission notes that ExpressVu stated that the alleged winback activities occurred when it was "close to signing an agreement." Since the agreement had not actually been signed, the winback rules had not yet been triggered.

132. With respect to South Beach, the Commission notes that Public Notice 2000-81 states that, where the incumbent service provider engages in mass marketing of MUD tenants, such marketing "falls outside the scope of the winback restrictions," so long as "this tactic does not involve the direct marketing of the customer who has cancelled service." The Commission considers that ExpressVu provided insufficient information to substantiate its winback allegations for South Beach, such as information as to whether the actual suites that subscribed to ExpressVu were actually contacted. The Commission notes that ExpressVu merely claimed that Rogers was on the premises during the 90-day period during which solicitation of former Rogers customers was not allowed, and that Rogers "must have used its records to determine which suites did not subscribe to its services, thereby targeting only the 15 ExpressVu subscribers in the building and those residents that had demonstrated a lack of interest in either cable or DTH." ExpressVu did not, however, identify the actual suites that subscribed to ExpressVu that Rogers allegedly contacted.

133. The Commission further notes that soliciting residents who were neither cable nor DTH customers falls outside the scope of the winback rules, since a BDU cannot win back a resident who was not a former customer.

134. Having taken into consideration all of the information provided, the Commission cannot conclude that Rogers has breached the winback rules in these instances.

e) Alleged breach – Inducements

135. ExpressVu claimed that Rogers offers various MUD building supervisors free cable service, free security cameras, and other perquisites such as scenic flights, dinners, lunches, and free playground equipment to win back subscribers.

136. The Commission notes Rogers' statement that it has been offering building superintendents free cable service for decades, whether or not they provide any assistance in marketing Rogers' services. The Commission considers that ExpressVu has provided insufficient evidence to substantiate its allegation that inducements were offered in an attempt to win back subscribers and to support a finding of an undue preference.

f) New CSG tracking requirements and other measures

137. With respect to the issue of CSG tracking requirements and the establishment of a fully independent CSG, the Commission is of the view that the mechanisms Rogers currently has in place are comparable to those of the other large incumbent BDUs. In addition, the Commission notes that Rogers provided a description of its tracking procedures during the course of this proceeding. The Commission therefore concludes that the establishment of reporting requirements for Rogers, as requested by ExpressVu, is not warranted at this time.

Targeted marketing

ExpressVu's complaint

138. ExpressVu alleged, among other things, that Rogers had been offering promotions to MUD residents after it discovered that ExpressVu intended to offer a competitive service in the building, and that these offers were typically made available only to residents of a MUD in such circumstances. ExpressVu suggested that Rogers' intent was to lock in as many customers as possible in order to prevent them from switching to a competitor. ExpressVu argued that such narrowly-targeted pre-emptive marketing of special offers constitutes an undue preference and undue disadvantage, contrary to section 9 of the Regulations.

139. ExpressVu estimated that Rogers' concentrated marketing campaign in each MUD that is not subject to a bulk-billing agreement and where ExpressVu installs its service reduces ExpressVu's penetration by at least 50%. Further, ExpressVu stated that such campaigns ensure that ExpressVu's contracts with MUD owners will not be financially viable, since they drive up costs and required resources to a level where it is no longer possible to offer MUD residents in some properties a viable competitive alternative.

140. ExpressVu requested that the Commission impose a new requirement to prevent such targeted marketing activities from the time a new entrant formally identifies to Rogers a building where it plans to install facilities.

141. ExpressVu submitted that Rogers retains in excess of 95% of the customers in MUDs in the GTA, but that Rogers, despite its substantial market power, is currently subject to almost none of the constraints and regulations imposed on Bell Canada under the Commission's telecommunications regulatory policy. ExpressVu requested that the Commission place restrictions on Rogers that are similar to those imposed on ILECs in relation to their promotions.

142. ExpressVu also argued that the Commission should establish a new requirement to address this perceived inequity and prohibit Rogers from engaging in narrowly-targeted pre-emptive marketing of special offers in MUDs where a competitor is installing facilities to compete.

143. As well, ExpressVu suggested that, at the time of Rogers' licence renewal, a number of detailed remedies should be imposed by condition of licence.

Rogers' reply

144. In response, Rogers argued, generally, that ExpressVu's complaint did not require further action by the Commission. In Rogers' view, ExpressVu did not demonstate that its performance in the MUD market has anything to do with Rogers' actions. Rogers further suggested that ExpressVu has not devoted the same energy to the MUD market as it has to the SUD market, which is why it has enjoyed a greater level of success in SUDs.

145. Rogers submitted that it makes no narrowly-targeted offers that are directed only to residents of competitive MUDs and that all of its sales activities, whether they occur in competitive MUDs, non-competitive MUDs, or SUDs, are designed to induce customers to upgrade their service package. This is referred to as "right sizing" the customer. These promotional offers do not allow customers to retain their existing services at a reduced price.

146. Rogers noted that, with a new product such as digital television, customers are often reluctant to subscribe, particularly because they would have to incur incremental monthly costs. It maintained that providing a discount on the price of digital service for an initial limited period was an effective way to market the service and encourage customers to try digital television. Rogers argued that, in a building with competitive service providers, its competitors often stated that their services were digital and cable service was not. According to Rogers, its offers were designed to demonstrate to its customers that Rogers offered state-of-the-art digital cable services.

147. Rogers maintained that ExpressVu had used misleading analysis and data to suggest that Rogers had a much larger share of the BDU market than was actually the case. It estimated that residents in 11.3% of the MUDs in the GTA have a choice of BDU. According to Rogers, residents of 8% of the MUDs in the GTA have the choice of receiving Look TV or Star Choice. In addition, in a large number of MUDs, tenants can receive Star Choice or ExpressVu service by placing individual satellite dishes on their balconies.

148. Rogers suggested that the proposed new requirements that ExpressVu recommended be applied to Rogers were an attempt by ExpressVu to stop Rogers from competing fully in MUDs. Rogers noted that, while Bell Canada files tariffs for its prices, Bell Canada has a 99.6% market share, which amounts to a monopoly, while Rogers has lost 15% of the market share and is subject to vigorous competition.

The Commission's analysis and determinations

149. The Commission's general position on anti-competitive pricing can be found in its regulatory framework for BDUs set out in Public Notice 1997-25. In that notice, the Commission stated that it considered that, in general, the public interest would be harmed where an incumbent, after lowering its rates in an attempt to eliminate the competition, was subsequently able to raise them above competitive levels and, thereby, recover its previously lost revenues. This would be practicable, however, only in circumstances where there were significant barriers to the ability of competitors to enter the market. The Commission's view was that new competitors, whether DTH, wireless or wireline, would be able to enter the market, so that, as soon as the cable operator raised its rates above competitive levels, the competitor or competitors would enter or re-enter the market, and thus pressure the cable operator to reduce its rates. The Commission concluded that it was not convinced that there was any need for specific competitive pricing safeguards.

150. Based on the record of this proceeding, Rogers' promotions may include :

- analog cable service at a reduced price for a short period, with free installation;
- digital cable service at a reduced price for a short period, with free installation, free pay-per-view movies, 60 days of free digital channel preview and a free set-top box; and
- Internet at a reduced price for a short period, with free installation.

151. The Commission notes Rogers' statement that its promotions were not narrowly-targeted offers made only to residents of competitive MUDs, but rather, were marketing activities designed to "right size" customers in competitive MUDs, non-competitive MUDs, and SUDs.

152. The Commission considers that, based on the record, Rogers offered various promotions of limited duration in MUDs in the GTA, and that the nature of these promotions conferred a preference on new Rogers subscribers and constituted a disadvantage to existing Rogers subscribers.

153. Regarding whether these preferences or disadvantages were undue, the Commission notes that promotions are generally considered a legitimate business practice in both monopoly and competitive markets, and that some customers benefit from promotions. As pointed out by Rogers, promotions can be used to stimulate the demand for new and existing services, and induce customers to upgrade their service package. It was also recognized by ExpressVu that all service providers modify their prices and service packages from time to time.

154. The Commission notes that the current case involves circumstances similar to those cases discussed in *Complaint by Novus Entertainment Inc. alleging anti-competitive marketing practices by Shaw Cablesystems Company*, Broadcasting Decision CRTC 2004-3, 8 January 2004. In that case, the Commission addressed similar targeted marketing concerns to those at issue here and decided that Novus Entertainment Inc. (Novus) had not made a sufficient case to support a finding of undue preference. The Commission cited, among other things, the limited duration of the relevant promotion by Shaw Cablesystems Company (Shaw) and Novus' failure to demonstrate that Shaw's activity had or was likely to have a material adverse impact upon itself or the Canadian broadcasting system. Consistent with that case, the Commission also finds here that Rogers' promotions were of limited duration, usually in effect for periods of 30 or 60 days, and that ExpressVu has provided insufficient information upon which to assess whether the promotions have had, or are likely to have, a material adverse impact on any person or upon the Canadian broadcasting system.

155. In light of the above, the Commission is unable to conclude, based on the record of this proceeding, that the special promotions offered to a portion of subscribers in the GTA market, have had, or are likely to have, a material adverse impact upon the complainant, other subscribers, and/or the Canadian broadcasting system. The Commission therefore cannot conclude that Rogers' use of the limited duration targeted marketing promotions confers an undue preference on itself or its subscribers or subjects its competitors to an undue disadvantage.

156. Finally, the Commission also notes that part of ExpressVu's primary concern regarding narrowly targeted "pre-emptive" marketing by Rogers raised in this complaint has been addressed in Public Notice 2004-62. In that notice, the Commission implemented changes to the existing broadcasting winback rules, including a prohibition for 90 days against promotional offers in buildings where a competing BDU is installing facilities.

Other matters - Requests for confidentiality

157. ExpressVu requested that Appendix I of its letter of 22 August 2003 be treated on a confidential basis. Appendix I contains an exchange of e-mails between Rogers and ExpressVu, which the latter believes contains information that should be kept confidential in order to protect customer privacy. The material was provided to Rogers for its review.

158. The Commission considers that the potential harm that could result from the disclosure of the e-mails outweighs the public interest in making the material public. The Commission also notes that Rogers did not contest the confidentiality request. For these reasons, ExpressVu's request for confidential treatment is therefore allowed.

159. Both Rogers and ExpressVu have requested that their bulk-billing agreements with Marina Del Rey, expired for Rogers and current for ExpressVu, be treated on a confidential basis. The parties considered that the agreements contain highly confidential and commercially sensitive information that, if disclosed, would give an undue competitive advantage to its competitor(s) and cause serious and irreparable damage to Marina Del Rey and to Rogers and ExpressVu. Rogers has also requested confidentiality for its letters with Marina Del Rey; one of which extended its agreement and the other of which states Marina Del Rey's authority for Rogers to continue to provide service on a "direct tenant basis" only. ExpressVu has also requested confidentiality for a list it provided regarding alleged breaches of the winback rules in certain units at Marina Del Rey. The Commission notes that an abridged version of the list, which withholds the names and suite addresses of Marina Del Rey tenants, was also provided for the public file.

160. The Commission is of the view that the potential harm that could result from disclosure of the above-mentioned information outweighs the public interest in disclosure. The Commission notes that neither party contested the other's confidentiality request. The requests for confidential treatment of these particular documents are therefore allowed.

Secretary General

This decision is to be appended to each licence. It is available in alternative format upon request, and may also be examined at the following Internet site: http://www.crtc.gc.ca

Dissenting opinion of Commissioner Barbara Cram

I respectfully disagree with my colleagues in the majority, primarily as to the interpretation of section 10 of the Regulations. Secondly, I believe a review of the entire issue of BDU inside wiring as to new buildings is warranted, both to ensure the concept of end-user choice is maintained and with a view to regulatory symmetry between broadcasting and telecommunications.

Breaching section 10 of the *Broadcasting Distribution Regulations* (BDU Regulations) is an offence which can result in a summary conviction. As such it is quasi criminal in nature and therefore must be strictly interpreted. I believe this is analogous to offences under the *Income Tax Act* and as with that Act where there is a distinction between avoiding and evading tax, there is likewise a critical distinction between being a licensee and an owner of an IRU.

Section 10(1) refers to 'a licensee that owns an inside wire'. The Commission has already decided that an IRU does not give ownership of the wire (*Regulatory Regime for the Provision of International Telecommunications Services*, Telecom Decision CRTC 98-17, 1 October 1998, Decision 98-17).

The regulatory scheme in section 10 the BDU Regulations requires the licensee-owner of the inside wiring used by a subscriber to be used by another licensee or BDU. If, at the operative time, the time of granting access or 'permitting use' by the other licensee or BDU, ownership of the inside wire is in the hands of a third party, section 10 does not apply.

Under an otherwise valid contract, in this case pursuant to clause 4 of the agreement between Rogers and the Building Owner "as a pre-condition" of granting access the Building Owner must purchase the inside wiring from Rogers. Rogers is, therefore at the relevant time of granting access, not a licensee-owner. And the fact that Rogers is further granted an IRU does not change this fact.

The majority decision in paragraphs 56 thru 58 essentially nullifies clause 4 of these agreements as it 'specifically intended to avoid having to make its inside wire available . . .' (paragraph 55). In my view this is regulatory avoidance and not regulatory evasion.

The majority holds that Rogers is therefore deemed to be a licensee-owner because clause 4 is deemed inoperative as it is: inconsistent with and undermines the objectives of . . . 10(1) and 10(2), more generally the objectives of the Act and finally contrary to the public interest. Respectfully, I believe this stretches the common law to an untenable extent and invades the realm of private contract law to a degree hitherto unseen.

I take issue with the majority's comments in paragraph 54. Although Rogers actively participated in the process of PN 2002-51 they were requesting a rate far in excess of that subsequently granted. Secondly, although the same public notice granted a right to apply for an exception to the rate granted, if I am correct and section 10 of the BDU Regulations did not apply to Rogers at the time of 'permitting use', Rogers would have no basis or need to apply for an exception.

The issue of undue access is in my respectful view tied in with the issue I prefer to call commercial realities and regulatory symmetry.

The fact of the matter is that inside wiring of buildings costs money. The fact is that in the past building developers have approached both Rogers and Bell to pay for those costs and at some time prior to this complaint Bell decided it would not do so. The fact is that new buildings now require substantial wiring and not just single wires but in fact double wires. And, notwithstanding that it may have been a good idea at the time, the rate set by the Commission in PN 2002-51 does not cover these costs, as they were based on historical costs.

Thus the market is left with a conundrum. Building Owners want BDUs to pay the construction costs of the wiring as it will be they who will benefit from such construction. BDUs are compelled to grant access to others of that inside wiring at non-compensatory rates, in their view.

Thus clause 4 became the compromise solution between the Building Owners and Rogers. As a result, Bell ExpressVu claims they would be required to pay inordinately high rates for access from the Building Owners, compared to the rates prescribed by the Commission, or alternatively would have to pay 50% of the upfront costs. Commercial reality says 'someone' has to pay the actual costs. I don't believe clause 4 is the disincentive to building owners granting access but it is commercial realities. From the examples of Bell ExpressVu's best possible cases (as the choice was to them) it appears the Building Owners are not denying access outright, they are simply insisting that 'someone' pay for a capital cost from which the Owners receive minimal benefit.

There is a lack of symmetry in our regulatory scheme given the decision of the majority. Last year this Commission decided as to telecommunications that it would be appropriate for the building owners to charge a fee for the use of in-building wire to recover any unrecovered capital costs reasonably incurred for the in-building wire (*Provision of Telecommunications Services to Customers in Multi-Dwelling Units*, Telecom Decision CRTC 2003-45, 30 June 2003). Thus, the incumbent telephone companies, who have an obligation to serve, are recompensed and effectively covered should they choose to pay for wiring in new buildings and employ an equivalent of clause 4. The BDUs, who do not have an obligation to serve, will have no such recompense.

In my respectful view the Commission is now left with the conundrum of commercial realities and our policy of end-user choice, not to mention the issue of regulatory symmetry which at this time of convergence may be even more pressing. This decision of the majority means that construction of inside wiring and its leasing may well end up outside Commission control, thus jeopardizing the real goal, end-user choice. I would have decided to deal with the issue of the existing inside wire fee mechanism in new buildings rather than risk the priority of end-user choice.

Dissenting opinion of Commissioner Stuart Langford

I agree with the majority's decision to dismiss those complaints by Bell ExpressVu Limited Partnership (ExpressVu) regarding the transfer of inside wire, winback rules and targeted marketing. I disagree, however, with the majority's conclusion that Rogers Cable Inc. (Rogers) is in violation of sections 9 and 10 of the *Broadcasting Distribution Regulations* (the Regulations). In my view, the majority's evaluation of the record of this proceeding is flawed. As well, its decision places the Commission in the untenable position of issuing orders to persons, corporate or natural, that the Commission does not regulate.

Despite the length of the majority decision, the matter giving rise to it is really very simple. This proceeding dealt with the question of access to multi-unit dwellings (MUDs) by distributors of communications services like telephone, television and Internet in the Greater Toronto Area (GTA). ExpressVu blames its lack of success in attracting MUD residents as subscribers to its satellite-delivered television services on a clause (Clause 4) contained in a number of building access contracts entered into between Rogers and certain GTA building owners.

Clause 4, the pertinent portions of which are quoted in paragraph 7 of the majority decision, is a buy-back provision triggered when access to a MUD is granted to a Rogers competitor by the MUD's owner. Under the other terms of the contract containing Clause 4, Rogers agrees to pay all installation costs (agreed to by the parties to the contract as being $200 per suite) to provide new or refurbished MUDs with the wiring and related equipment required to deliver Rogers' products, in return for the right to market its products to those residents of the building who choose to subscribe to them.

The record demonstrates that access contracts appear to be standard when it comes to the marketing of communications services in Canada. For example, Bell Canada, a corporate sibling of ExpressVu, also enters into access contracts with MUD owners whereby it wires new buildings in exchange for the right to market its products to the future residents of them. Whether or not those agreements contain the equivalent of a Clause 4 is not determinable from the record.

Under the terms of Clause 4, the building owner and Rogers agree that should the owner of the MUD allow a Rogers competitor to market its services in a building, that owner will compensate Rogers for some of the expense it has incurred by purchasing the inside wiring at cost less depreciation. Once that transaction has transpired and the MUD owner becomes the sole proprietor of the inside wire, a second event is contractually triggered. Clause 4 obligates Rogers to pay the new owner of the wire 50% of the price he or she paid for it in exchange for "a right to use the inside wire in perpetuity," and to use it "in priority to other service providers as long as and to the extent that the subscribers serviced by any inside wire wish to subscribe for any Rogers' Communication Services."

To review, under the access contract entered into between Rogers and the MUD owner, Rogers, at its expense, wires the owner's building in exchange for the right to market its services there. Clause 4, triggered by a grant of access to a Rogers competitor, allows Rogers to retain its right of access while recovering part of its investment through the sale of its wire to the MUD owner. Once it buys the inside wire, the owner agrees to allow Rogers to use it and to have the right to do so in preference to a competitor in cases where a building resident wishes to purchase services from both Rogers and the competitor. Presumably, in situations where the capacity of the wiring in a given suite will not support the provision of services by Rogers and a competitor, Rogers' priority status would obligate the competitor to upgrade the wiring at its expense, to pay the building owner to do so, or to forgo signing a service agreement with the suite's resident.

What appears to have prompted ExpressVu's application to the Commission and the majority's ruling on it is the likelihood that having purchased the inside wiring in their buildings, MUD owners would charge competitors to use it. How much might be charged is anyone's guess, but ExpressVu's concern appears to be that it will almost certainly exceed the 52 cents per subscriber, per month limit established by the Commission in Broadcasting Public Notice CRTC 2002-51 (PN 2002-51). This, of course, is quite possible because PN 2002-51 sets a 52 cents rate only when one Commission-regulated licensee rents wiring to another Commission-regulated licensee. Such is not the case here.

Apartment building owners in the GTA are not Commission-regulated licencees. Even if they were, in my opinion, ExpressVu's application to find Clause 4 in violation of sections 9 and 10 of the Regulations must fail. There is insufficient evidence on the record to conclude that the contract between Rogers and various MUD owners in the GTA is an effort to grant Rogers an undue preference over competitors or to skirt the 52 cents rule. Clause 4 says nothing about shutting competitors out; in fact, its very existence contemplates competitors obtaining a right of access to the MUDs affected by it. The cost of such access will be negotiated between them and the MUD owners. What competitors pay may well exceed 52 cents per subscriber per month but it is unlikely to exceed the amount of money invested by Rogers. How such a situation could constitute preferential treatment accorded Rogers is, therefore, anyone's guess.

The majority concludes, though on no evidence I could discover on the record, that competitors will be forced "to pay 50% of the depreciated cost of the inside wire" (paragraphs 64 & 66). It does so, as nearly as I can determine, on the strength of a series of flawed steps in logic. First, forgetting that the inside wire is no longer "Rogers' inside wire," but belongs to the building owner, the majority in paragraph 61 relies upon a regulatory rule that is not relevant: "The Regulations provide ExpressVu and other new entrants the right to use Rogers' inside wire at a just and reasonable fee." Next, in paragraph 62, the majority declares that while Rogers' enjoys an indefeasible right to use (IRU) triggered by Clause 4, "new entrants have no right to access the inside wire" of new entrants. What appears to be forgotten by the majority is the fact that the IRU only comes into existence once access has been granted to a new entrant. Finally, the majority in paragraph 75 concludes, "that the exercise by Rogers of its IRU in the inside wire in

priority to competitors would result in a material adverse impact on competitors." What is overlooked is the "material adverse impact" Rogers would suffer should it waive its priority right and find itself unable to use facilities it had paid to install and paid to use even in a situation where a resident of a MUD sought to purchase some of its products.

What this case really seems to be about is not an undue preference engineered for itself by Rogers but preferential treatment sought for itself by ExpressVu. What we have here is nothing more nor less than an attempt by ExpressVu to have Rogers and/or MUD building owners underwrite significant costs of ExpressVu's broadcast distribution business. Rather than paying to install its own coaxial wire in new or refitted MUDs, ExpressVu appears to prefer to let Rogers do it and then to claim an absolute right to use the wire even in priority to Rogers in situations where the tenant wishes to subscribe to ExpressVu and Rogers' products, but the wire lacks the capacity to support both licensees' services. In effect, ExpressVu sought and has gained a Commission decision ordering Rogers to subsidize its operations. Unburdened by investments in MUD infrastructure, ExpressVu is now positioned to undercut Rogers' prices and, using a building owner's wire, lure away Rogers' subscribers.

The record demonstrates that in the buildings at issue in this proceeding both Rogers and Bell Canada installed inside wiring. Rogers paid to install coaxial cable suitable for television signals and Internet-based products including telephone service using an Internet-based protocol. Bell Canada paid to install copper wire in twisted pairs suitable for telephone and Internet but perhaps not competitive quality television signal transmission. ExpressVu is silent on why it did not co-operate with its sister company, Bell Canada, to install the wiring it required to compete with Rogers. Neither does ExpressVu explain why it did not accept Rogers' offers to share the cost of installing wire. The majority reaches a good many conclusions based, in my opinion, on very thin evidence. Why, one wonders, did it overlook the possible conclusion that ExpressVu's strategy was to stand back, spend nothing, allow Rogers to invest huge sums and then take over Rogers' investments for a few pennies per month?

The record shows that, Rogers itself reached this very conclusion and reacted accordingly. It saw itself confronted by a choice: either underwrite a competitor – a competitor owned by Canada's most powerful communications company, BCE – or find a way to avoid falling into the trap of subsidizing it. Rogers, not surprisingly, chose option two. Based on the evidence before the Commission, one could just as easily conclude that Rogers, acting in self defence rather than in a calculated attempt to confer upon itself an undue preference, inserted Clause 4 into access contracts with MUD owners.

There is no evidence that Rogers somehow forced MUD owners to sign these contracts, that owners who did so acted under duress. It is logical to assume that as sophisticated property developers assisted by competent lawyers, those MUD owners who agreed to Clause 4 did so because they saw it as beneficial to their interests and those of their

tenants. They got their buildings wired for free and when the time came to keep their tenants happy by offering them competitively provided communications choices, they knew they would be able to do so at a huge cost saving, 50% of the depreciated value.

MUD owners may know little or nothing about installing sophisticated communications networks but they know everything about making a profit by leasing assets. Whereas they might have balked at the challenge and expense of wiring their own buildings, surely they would feel right at home leasing infrastructure to communications providers like ExpressVu. After all, leasing is what apartment building owners do for a living. The terms of such leases might not have complied with subsections 10(1) and 10(2) of the Regulations, but those subsections apply only to “A licensee that owns an inside wire.” I conclude, as this dissent began, with the issue of regulatory impact. In my view, dictating the terms of business contracts willingly entered into between arm’s length, private property owners and licensed distribution undertakings like ExpressVu and Rogers, lies outside the clear terms and intended impact of subsections 10(1) and 10(2) of the Regulations. Accordingly, I would have dismissed ExpressVu’s application in its entirety.