



Telecom Decision CRTC 2007-25

Ottawa, 18 April 2007

Xittel telecommunications inc. – Application for interim relief regarding access to Bell Aliant Regional Communications, Limited Partnership's support structures

Reference: 8690-X4-200704040

The Commission denies an application by Xittel telecommunications inc. (Xittel) for interim relief associated with access to the road side of Bell Aliant Regional Communications, Limited Partnership's support structures pending the Commission's final determination of Xittel's Part VII application on this matter.

Introduction

1. The Commission received an application by Xittel telecommunications inc. (Xittel), dated 9 March 2007, pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, in which it requested an order for interim relief and a final order on an expedited basis regarding access to the road side of certain Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) support structures.
2. Xittel submitted that it had applied for permits requesting access to the road side of Bell Aliant's support structures to build a fibre optic network. Xittel added that Bell Aliant had approved its permit applications but had granted the company access to the field side of the support structures.
3. Xittel submitted that Bell Aliant had previously allowed Xittel to install cables on the road side of its support structures on several projects, an approval that Bell Aliant was now refusing for the current project. It also submitted that Bell Aliant had refused to consider the sealed engineering drawings attached to its permit applications. Xittel indicated that the drawings showed that there was sufficient spare capacity on Bell Aliant's support structures to attach Xittel's fibre optic cables to an existing strand on the road side of Bell Aliant's support structures. Xittel submitted that Bell Aliant had instead sent field crews to do its own engineering drawings, at Xittel's expense.
4. Xittel submitted that it had taken Bell Canada at most three months to process permit applications on similar projects and suggested that Bell Aliant should process its current permit applications within the same timeframe. Xittel also submitted that although Bell Aliant had had Xittel's permit applications for two months, Bell Aliant had only processed a handful of Xittel's permit applications. Xittel added that the delays caused by Bell Aliant had resulted in increased costs to Xittel and had caused it irreparable harm.

5. Xittel requested that the Commission issue an interim order requiring Bell Aliant to immediately resume processing Xittel's permit applications for access to the road side of Bell Aliant support structures.
6. On 13 March 2007, the Commission advised the parties of the procedure to dispose of Xittel's request for an interim order and modified the timelines for Xittel's Part VII application for a final order regarding access to the road side of certain Bell Aliant support structures.
7. In its letter of 13 March 2007, the Commission requested that Xittel specifically address how its request for interim relief met the criteria set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (*RJR-MacDonald v. Canada*). On 16 March 2007, Xittel filed its comments in response to the Commission's letter of 13 March 2007. Bell Aliant filed its response on 20 March 2007 and Xittel filed its reply on 22 March 2007.
8. The Commission notes that in order to determine whether it is appropriate to grant interim relief to Xittel, it will consider the test for interim relief based on the criteria set out in *RJR-MacDonald v. Canada*, as follows:
 - a) there is a serious issue to be determined;
 - b) the party seeking relief will suffer irreparable harm if the interim relief is not granted; and
 - c) the balance of convenience, taking into account the public interest, favours retaining the status quo until the Commission has disposed of the issues.

Positions of parties

Xittel's comments

9. Xittel submitted that the serious issue to be determined was whether Bell Aliant could refuse economic (road side) access to its support structures. In Xittel's view, Bell Aliant was invoking a new policy to refuse access to the road side of its support structures, which it had authorized in the past in its territory. Xittel added that Bell Aliant's refusal had brought the construction of Xittel's fibre optic network to a complete halt.
10. Xittel submitted that it would be unable to build the network within the contracted construction schedule as a result of Bell Aliant's refusal to grant access to the road side of its support structures, which would cause Xittel irreparable harm. Xittel submitted that it had been unable to negotiate a more favourable construction schedule with its contracting party and that any further delay would exhaust all contingency provisions built into the agreement, thereby bringing about the cancellation of the agreement. Xittel further submitted that it would have to postpone recurring revenues because of the delay. In Xittel's view, the delay would inhibit customer confidence in Xittel's ability to deliver on its agreement.

11. With respect to the third criterion, Xittel requested that the Commission maintain the status quo that existed in Bell Aliant's territory prior to this application, namely that Bell Aliant process Xittel's permit application for access to the road side of its support structures based on Xittel's engineering drawings within three months. Xittel also submitted that Bell Aliant would not suffer any harm, financial or otherwise, if Xittel's Part VII application were ultimately denied because Bell Aliant would be able to charge Xittel any additional permit-processing fees for access to the road side of the support structures, in addition to the permit-processing fees for access to the field side.

Bell Aliant's response

12. Bell Aliant submitted that the issue raised by Xittel was not whether it could access Bell Aliant's support structures, but rather where Xittel could place its cables on Bell Aliant's poles. It also submitted that its past and current practice in the Atlantic region was to permit field-side attachment to its support structures by all cable television undertakings and Canadian carriers. Bell Aliant added that Xittel's reference to Bell Aliant's alleged past practices of allocating access to the road side of the support structures, aside from being erroneous, formed the basis of Xittel's Part VII application and should be dealt with in the normal course of the application process.
13. Bell Aliant submitted that while Xittel claimed that it would not be able to deliver the network within the contracted construction period because of Bell Aliant's actions, it had failed to disclose its estimate of the time required to complete its work obligations and the date at which the work had to be completed. In Bell Aliant's view, Xittel had therefore failed to demonstrate that it would suffer irreparable harm if the interim relief were not granted. Bell Aliant also submitted that it had not denied Xittel access to its support structures and that it had moved quickly to permit Xittel to attach its facilities on the field side. Bell Aliant further submitted that Xittel had not demonstrated that placing facilities on the field side versus the road side had adversely affected the time required for construction or caused any harm and that Xittel had not provided any rationale for how any harm could be irreparable.
14. Bell Aliant submitted that the Commission should retain the status quo and deny Xittel's request for interim relief.

Xittel's reply comments

15. Xittel submitted that it faced the serious risk that the agreement for the construction of the network would be cancelled and that, accordingly, it could be subject to lawsuits. Xittel also submitted that its agreement held it liable for any failure by Bell Aliant to deliver the last batch of approved megaproject permits and wave of make-ready works by 31 July 2007.
16. Xittel further submitted that the source of irreparable harm was the costs arising from the unnecessary requirement to place new strands, not the construction delays arising from having to build new strands.

Commission's analysis and determinations

17. The Commission considers that Xittel has demonstrated that there is a serious issue to be determined regarding Bell Aliant's terms and conditions of access to its support structures as they relate to the placement of facilities on support structures.
18. However, in the case at hand, the Commission considers that Xittel has not demonstrated that it will suffer irreparable harm if the interim relief is not granted. The Commission notes that Xittel indicated that it had already obtained permits from Bell Aliant to construct the network. The Commission also notes that Bell Aliant has stated its intention to move quickly to permit Xittel to attach its facilities to the field side of the support structures.
19. The Commission considers that Xittel could obtain further construction permits from Bell Aliant to begin construction of the network immediately on the field side to avoid potential breach of its contractual obligations. The Commission also considers that the only damage that Xittel could potentially suffer by beginning construction on the field side pending final determination of its Part VII application would be, as indicated by Xittel, additional construction costs should the Commission ultimately find that access to the road side of Bell Aliant's support structures must be granted. The Commission considers that any monetary damages that Xittel may potentially suffer would be compensable in nature and thus do not qualify as irreparable.
20. Since Xittel has failed to demonstrate the irreparable harm criterion, there is no need for the Commission to consider the third criterion of the *RJR-MacDonald v. Canada* test. Accordingly, the Commission considers that Xittel's application for interim relief does not meet the *RJR-MacDonald v. Canada* criteria. Therefore, the Commission **denies** Xittel's application for interim relief.
21. The Commission intends to proceed expeditiously with the final determination of Xittel's Part VII application.

Secretary General

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