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

Telecom Decision CRTC 2007-26

Ottawa, 27 April 2007

Bell Aliant Regional Communications, Limited Partnership's request to review and vary Telecom Decision CRTC 2005-17, as interpreted and applied in Telecom Decision CRTC 2006-27 related to the retail quality of service rate adjustment plan

Reference: 8662-B54-200609927

In this Decision, the Commission concludes that Bell Aliant's application dated 4 August 2006 is an application to review and vary Aliant Telecom Inc. – Applications to exclude certain quality of service results from the retail quality of service rate adjustment plan, *Telecom Decision CRTC 2006-27, 16 May 2006 (Decision 2006-27). The Commission determines that this application was filed within the timeframe contemplated by the guidelines for review and vary applications.*

The Commission concludes that there is substantial doubt as to the correctness of Decision 2006-27 in regard to the Commission's determination that the Bell Aliant work stoppage partially qualified as an adverse event. The Commission determines that the Bell Aliant work stoppage qualifies as an adverse event. The Commission also concludes that there is substantial doubt as to the Commission's determination in Decision 2006-27 that, to the extent the work stoppage affected the retail quality of service (Q of S) indicators, Bell Aliant was required to provide a credit to its customers of 50 percent of the amount that would have been calculated under the retail rate adjustment plan using the actual Q of S results for April 2004 to January 2005.

The Commission will no longer expect the incumbent local exchange carriers (ILECs) to file Q of S results during an adverse event. ILECs are to monitor Q of S standards during an adverse event, and are expected to file any outstanding Q of S reports within 30 days of its termination.

The Commission will, in the near future, initiate a public proceeding to consider whether, for the purposes of consideration of exclusions from the calculation of rate rebates for failure to meet prescribed retail and competitor Q of S standards, natural disasters, acts of terrorism and labour disruptions should be considered as adverse events without the necessity of making that determination on a case-by-case basis.

Introduction

1. On 4 August 2006, Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) filed an application requesting that the Commission review and vary *Retail quality of service rate adjustment plan and related issues,* Telecom Decision CRTC 2005-17, 24 March 2005 (Decision 2005-17) as interpreted and applied in *Aliant Telecom Inc. – Applications to exclude certain quality of service results from the retail quality of service rate adjustment plan,* Telecom Decision CRTC 2006-27, 16 May 2006 (Decision 2006-27).

2. Bell Aliant submitted that for the purposes of the consideration of exclusions from the calculation of rate rebates for failure to meet prescribed quality of service (Q of S) standards, the combination of the two decisions gave rise to either one of two new principles:

    a) strikes are arbitrarily considered to be the responsibility of the telco-employer to the extent of 50 percent or, alternatively,

    b) the responsibility for a strike is to be assessed by the Commission based on its analysis of the circumstances of the strike.

3. Bell Aliant submitted that there was substantial doubt as to the correctness of these principles.

4. Bell Aliant submitted that the period from 23 April 2004 to 31 January 2005 should be entirely excluded from its calculation for the 2004 and 2005 Q of S reporting periods.

5. Bell Canada, TELUS Communications Company (TCC), MTS Allstream Inc. (MTS Allstream), and Rogers Communications Inc. (RCI) filed comments. The record of the proceeding closed with Bell Aliant's reply dated 15 September 2006 in which Bell Aliant stated that it was asking the Commission to vary Decision 2006-27, thereby clarifying or varying the interpretation and application of the approach to exclusions enunciated in Decision 2005-17.

6. While the positions of parties have necessarily been summarized in this Decision, the Commission has carefully reviewed and considered the submissions of all parties.

Background

7. In Decision 2005-17 the Commission finalized the retail Q of S regime for Aliant Telecom Inc. (now Bell Aliant)[1], Bell Canada, MTS Communications Inc. (now MTS Allstream), Saskatchewan Telecommunications (SaskTel), TELUS Communications Inc. (now TCC), and TELUS Communications (Québec) Inc. (now part of TCC), collectively, the incumbent local exchange carriers (ILECs).

8. The Commission finalized 13 interim retail Q of S indicators to be included in the final retail Q of S regime. Monthly results are averaged out on a yearly basis for each indicator in order to devise an average annual performance.

9. Where an ILEC's average annual performance is below the established standard for a given indicator, a rate rebate is provided to retail customers (i.e. the rate adjustment plan (RAP)). The RAP mechanism is based on a maximum annual adjustment of up to five percent of total eligible business and residential local revenues for failed Q of S. The adjustment is payable to all subscribers across the ILEC's operating territory.

---

1 On 7 July 2006, Bell Canada's regional wireline telecommunications operations in Ontario and Quebec were combined with, among other things, the wireline telecommunications operations of Aliant Telecom Inc., Société en commandite Télébec, and NothernTel, Limited Partnership to form Bell Aliant Regional Communications, Limited Partnership.

10. In Decision 2005-17 the Commission included an exclusion mechanism to accommodate the effects of natural disasters and other adverse events which, by their very nature, were unpredictable and beyond the reasonable control of an ILEC. The Commission considered that labour disruptions may qualify as such in certain circumstances.

11. The Commission concluded that a determination with respect to adverse events should be made on a case-by-case basis as to the modifications, if any, which should be made to the Q of S results for the purposes of the RAP.

12. Applying the principles established in Decision 2005-17, the Commission considered the first exclusion applications related to a labour disruption in Decision 2006-27.

13. Bell Aliant had filed two exclusion applications in accordance with the RAP finalized in Decision 2005-17.[2] Bell Aliant indicated that due to 70 percent of its unionized employees going on strike, it had had difficulty meeting the 12-month average for 5 of the 13 indicators subject to the retail RAP.[3] The work stoppage lasted from 23 April to 20 September 2004. Bell Aliant requested that the Commission exclude these results from April 2004 to March 2005 on the basis that the 2004 work stoppage was an adverse event.

14. In Decision 2006-27 the Commission considered that Bell Aliant's work stoppage was neither completely within, nor completely beyond, the control of the company. As a result, the Commission determined that the work stoppage partially qualified as an adverse event. Accordingly, the Commission determined that to the extent the work stoppage affected the retail Q of S indicators, Bell Aliant was required to provide a credit to its customers of 50 percent of the amount that would have been calculated under the RAP using the actual Q of S results for April 2004 to January 2005.[4]

15. The Commission considers that Bell Aliant's application raises the following issues:

I – which decision or decisions are the subject of the review and vary application?

II – should Bell Aliant's application be considered in light of the guidelines for review and vary applications?

III – is there substantial doubt as to the correctness of Decision 2006-27 and, if so, did the work stoppage qualify as an adverse event?

IV – reporting requirements during adverse events.

---

2 On 25 April 2005, Bell Aliant filed an exclusion application for the months of April to December 2004 due to a company-wide work stoppage that had lasted from 23 April to 20 September 2004. In its 6 May 2005 exclusion application, Bell Aliant requested that the Commission exclude certain retail Q of S results for the first quarter of 2005. Bell Aliant submitted that the indicators in question continued to be affected by the residual effects of the 2004 work stoppage. The Commission considered that since Bell Aliant's 2004 and 2005 exclusion applications were associated with the same event, it was appropriate to address both applications under the final plan established in Decision 2005-17.

3 These five indicators are: 1.5 – Access to Business Office, 2.1A (urban) and 2.1B (rural) – Out-of-service Trouble Reports Cleared Within 24 Hours, 2.2A (urban) and 2.2B (rural) – Repair Appointments Met, 2.5 – Access to Repair Bureau, and 4.2 – Access to Directory Assistance.

4 Contrary to Bell Aliant's submission that the impact of the work stoppage on the five missed indicators continued until March 2005, in Decision 2006-27 the Commission determined that the impact of the work stoppage continued until the end of January 2005.

I – Which decision or decisions are the subject of the review and vary application?

16. When reviewing Bell Aliant's application as well as its reply, it is not immediately apparent which decision Bell Aliant has truly taken issue with. For example, in its application, Bell Aliant stated that it was seeking to review and vary Decision 2005-17 as interpreted and applied in Decision 2006-27. In its reply, Bell Aliant requested that the Commission vary Decision 2006-27, thereby clarifying or varying the interpretation and application of the approach to exclusions enunciated in Decision 2005-17.

17. While Bell Aliant also raised certain arguments with respect to the correctness of Decision 2005-17, the Commission considers that the real focus of Bell Aliant's application is the Commission's determination in Decision 2006-27 that the work stoppage partially qualified as an adverse event and that, accordingly, Bell Aliant was required to provide a credit to its customers of 50 percent of the amount that would have been calculated under the RAP using the actual Q of S results for April 2004 to January 2005.

18. In this regard, the Commission notes, for example, that Bell Aliant argued that the determination in Decision 2006-27 that the work stoppage partially qualified as an adverse event was arbitrary and sets unsound labour policy, an area over which the Commission has no expertise. Bell Aliant submitted that Decision 2006-27 was clearly inconsistent with the case-by-case approach set out in Decision 2005-17. According to Bell Aliant, Decision 2005-17 does not contemplate an apportionment based on the degree of control.

19. In light of the above, the Commission concludes that Bell Aliant's application is an application to review and vary Decision 2006-27.

II – Should Bell Aliant's application be considered in light of the guidelines for review and vary applications?

Positions of parties

20. RCI and MTS Allstream submitted that Bell Aliant's application was filed outside the six-month limitation period set by the Commission in *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998 (Public Notice 98-6). MTS Allstream submitted that the statutory appeal period provided for in the *Telecommunications Act* (the Act) had long since expired and that Bell Aliant had not established any exceptional circumstances that would justify the exercise of the Commission's discretion to re-hear a portion of Decision 2005-17.

21. Bell Aliant replied that it was seeking to vary Decision 2006-27, thereby clarifying or varying the interpretation and application of the approach to exclusions enunciated in Decision 2005-17, and therefore its application was not out of time. Bell Aliant argued that the six-month guideline provided for in Public Notice 98-6 was not a statute of limitations that would limit the power of the Commission to correct errors or to recognize changes. Rather, the time limit goes to what the result of the application will be – whether it will be a variation of the previous order, with effect as of the original date, or a new order changing the principle with prospective effect.

Commission's analysis and determination

22. In Public Notice 98-6 the Commission determined that given the public interest in regulatory certainty, applications made pursuant to section 62 of the Act should generally be filed within six months of the Commission's original decision. The Commission also stated that review and vary applications made after that time would generally only be considered in exceptional circumstances and if it was satisfied that there were good reasons for the delay.

23. As noted above, the Commission considers that Bell Aliant's application is an application to review and vary Decision 2006-27. The Commission notes that Bell Aliant's application accordingly falls within the six-month timeframe established in Public Notice 98-6, and will proceed to consider whether to review and vary Decision 2006-27.

III – Is there substantial doubt as to the correctness of Decision 2006-27 and, if so, did the work stoppage qualify as an adverse event?

24. Public Notice 98-6 sets out a non-exhaustive list of the criteria established by the Commission to exercise its discretion under section 62 of the Act to review and rescind or vary any decision made by it or re-hear a matter before rendering a decision. Applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to:

    a) an error in law or in fact;

    b) a fundamental change in circumstances or facts since the decision;

    c) a failure to consider a basic principle which had been raised in the original proceeding; or

    d) a new principle which has arisen as a result of the decision.

25. In determining whether there is substantial doubt as to the correctness of Decision 2006-27, the Commission will examine whether it misapplied its own criteria when it found that an event can partially qualify as an adverse event and, if so, whether the Bell Aliant work stoppage qualifies as an adverse event.

Positions of parties

26. Bell Aliant submitted that in Decision 2006-27 it was not clear if the Commission determined that 50 percent responsibility for all work stoppages would be arbitrarily assigned to the employer, or if the Commission was making such an allocation based on its assessment of the evidence in the case.

27. Bell Aliant submitted that an arbitrary allocation of 50 percent responsibility to the employer was unreasonable on its face, and the very idea that fault could be attributed following a work stoppage invites the Commission to consider, in any future case, whether one side might be more at fault than the other. Bell Aliant submitted that the more proper answer is that neither side is at fault. Labour law contemplates that a work stoppage is sometimes the natural

consequence of the collective bargaining regime, and of two parties exercising their lawful rights to resolve their differences. A strike or lockout is an unfortunate occurrence beyond the control of the employer.

28. Bell Aliant argued that Decision 2006-27 included no analysis of the facts of its case to find that it had failed to take all reasonable steps to mitigate the impact of the work stoppage by 70 percent of its workforce.

29. Bell Aliant also argued that, in interpreting and applying Decision 2005-17 in Decision 2006-27, the Commission had created a dangerous precedent which threatens the stability of labour relations in the telecommunications sector and sets unsound labour policy, an area over which the Commission has no expertise.

30. Bell Aliant argued that the arbitrary allocation of 50 percent responsibility to the employer in Decision 2006-27 was clearly inconsistent with the case-by-case approach set out in Decision 2005-17. Bell Aliant submitted that in Decision 2005-17, the Commission neither rejected nor accepted a methodology by which a work stoppage would be considered to be within 50 percent of the ILEC's control, but left the question to be determined on the specific circumstances associated with each exclusion application. Bell Aliant submitted that Decision 2005-17 does not contemplate an apportionment based on the degree of control; it simply states that where a *force majeure* occurs, an ILEC should not be liable.

31. Bell Aliant submitted that the Commission's reasoning in Decision 2006-27 was inconsistent with Decision 2005-17, in that it misapplied the concept of control over the extraordinary event.

32. Bell Canada argued that in making a determination that the work stoppage was partly within Bell Aliant's control, the Commission made a qualitative assessment of the reasons for the work stoppage and had inadvertently and inappropriately entered into the field of labour relations. The Commission had neither the expertise nor the mandate to make such a decision.

33. In addition, Bell Canada argued that the Commission did not cite any evidence of wrongdoing by Bell Aliant in Decision 2006-27. Nevertheless, the Commission concluded that Bell Aliant's work stoppage was neither completely within, nor completely beyond, the control of the company. In Bell Canada's view, this decision was made in error and would have serious consequences on the bargaining positions of all ILECs in future labour negotiations.

34. TCC agreed with Bell Aliant's submission that the combination of Decisions 2005-17 and 2006-27 had given rise to the principle that work stoppage are arbitrarily considered to be the responsibility of the ILEC to the extent of 50 percent. According to TCC, there was substantial doubt as to the correctness of that principle.

35. In TCC's view, the Commission's determination was arbitrary because it had not alluded to any fact preceding the work stoppage at Bell Aliant that would give rise to a determination that both parties were 50 percent responsible. Such a principle constituted an error of law because it disregarded the reasonable control test that the Commission is supposed to apply when determining whether an event qualifies as adverse. Second, such a principle constituted an

error of law as it was contrary to the case-by-case approach to the determination of adverse events the Commission stipulated in Decision 2005-17 and amounted to the Commission fettering its discretion. Finally, such a principle failed to consider the effect it would have upon the federal labour relations regime.

36. TCC also argued that even if the Commission concluded that Bell Aliant was 50 percent responsible based on its assessment of the surrounding circumstances, there was substantial doubt as to the correctness of the Commission's findings. First, there were no facts to support the Commission's findings. Second, in any event, the Commission should not be investigating the reasonableness of the ILEC's conduct in assigning responsibility for a work stoppage.

37. MTS Allstream argued that with respect to Decision 2006-27, the Commission correctly found that the 2004 work stoppage at Bell Aliant partially qualified as an adverse event. In order to qualify an event for an exclusion, an ILEC must prove that the adverse event or circumstances that it claims impaired Q of S to its customers were beyond its control. In MTS Allstream's view, the work stoppage was a predictable event whose likelihood was known to Bell Aliant well before its advent, and the means to plan for and respond to this event were fully within its control.

38. RCI disagreed with Bell Aliant's position. RCI submitted that in Decision 2006-27, the Commission merely applied the principles that it set out in Decision 2005-17 to the facts as it found them. Accordingly, there were no new principles established in Decision 2006-27. Even if it was accepted that the direction for Bell Aliant to pay a 50 percent rebate was arbitrary, the only reasonable alternative would have been to find Bell Aliant liable to provide a 100 percent rebate.

Commission's analysis and determination

39. The Commission agrees with Bell Aliant's assessment that Decision 2005-17 does not contemplate an apportionment of credit based on the degree of control held by the ILEC over the event. Rather, Decision 2005-17 established that where an ILEC can demonstrate that an event was unpredictable and beyond its reasonable control, the event qualifies as an adverse event. Any modifications to the Q of S results for the purposes of the RAP should be assessed when the particular effects of the adverse event on the Q of S indicators are examined.

40. The Commission considers that when examining whether an event qualifies as an adverse event, it must decide whether an event is within or beyond the ILEC's reasonable control, with no partial qualification.

41. Accordingly, the Commission concludes that there is substantial doubt as to the correctness of Decision 2006-27 in that the Commission misapplied the criteria established in Decision 2005-17 when it determined that an event can partially qualify as an adverse event based on a purported degree of control held by the ILEC over the event.

42. As a result of this determination, the Commission will examine whether Bell Aliant's work stoppage qualifies as an adverse event.

43. The Commission notes that federal labour law is designed to encourage free collective bargaining and the constructive settlement of disputes.[5] Nevertheless, in some cases, parties reach an impasse over issues which are fundamental, and a work stoppage is the natural and inevitable result. The Commission acknowledged this reality when it found in Decision 2006-27 that the negotiations and the work stoppage involved two sophisticated entities acting in accordance with, and exercising, their legal rights within the framework of applicable Canadian labour legislation.

44. In Decision 2006-27 the Commission found that while it was Bell Aliant's decision to merge the operations of four formerly independent ILECs, the amalgamation of the bargaining units, whether a contributing factor to the work stoppage or not, was not imposed by Bell Aliant but resulted from a decision of the Canadian Industrial Relations Board. The Commission also acknowledged that the labour negotiation process was a complex one which emerged out of a process of merging four companies, combining four bargaining agents, and merging nine collective agreements into one.

45. Yet, in light of this factual background, the Commission concluded that Bell Aliant still exercised some reasonable control over the occurrence and/or the impact of the work stoppage and, accordingly that the work stoppage partially qualified as an adverse event.

46. Given that the Bell Aliant work stoppage was the result of a complex negotiation between two sophisticated entities acting in accordance with, and exercising, their legal rights within the framework of applicable Canadian labour legislation, the Commission considers that, for the purposes of determining whether the work stoppage qualified as an adverse event, Bell Aliant did not exercise reasonable control over either the occurrence or the length of the work stoppage. The Commission is of the view that an event which is partially controlled by one party and partially controlled by another is essentially beyond the reasonable control of either party.

47. In light of the above, the Commission concludes that there is substantial doubt as to the correctness of Decision 2006-27 in regard to the Commission's determination that the Bell Aliant work stoppage partially qualified as an adverse event, and finds that the Bell Aliant work stoppage, which was neither completely within nor completely beyond the control of the company, qualifies as an adverse event.

48. Having concluded in Decision 2006-27 that there was a causal link between the work stoppage and the actual Q of S results during the period from April 2004 to January 2005, the Commission accordingly determined that to the extent the work stoppage affected the retail Q of S indicators, Bell Aliant was required to provide a credit to its customers of 50 percent of the amount that would have been calculated under the RAP using the actual Q of S results for April 2004 to January 2005.

49. As a result of the Commission's conclusion above that the Bell Aliant work stoppage qualifies as an adverse event, Bell Aliant will be allowed to recuperate the $1,525,537 paid out to its subscribers as a result of the Commission's determinations in Decision 2006-27. The

---

[5] *Canada Labour Code*, R.S., 1985, c. L-2, preamble.

Commission notes that Bell Aliant indicated in its application that it would be inappropriate to attempt to recover these amounts from customers, but rather it would seek to recoup these amounts through a future application.

IV – Reporting requirements during adverse events

50. In Decision 2006-27 the Commission noted that Bell Aliant had failed to file its Q of S results during the work stoppage. The Commission indicated that in the future, it expected all ILECs to continue to file their Q of S results during events that the ILECs considered to be adverse.

51. In its application, Bell Aliant argued the Commission's expectation that ILECs maintain Q of S reporting to the Commission during any future work stoppage, and the imposition of penalties for failure to meet the prescribed Q of S measures signals that these factors should be given increased emphasis in the allocation of resources.

52. Bell Aliant submitted that these were inappropriate policy messages because a company faced with a work stoppage must allocate its remaining resources in a way that is consistent with the public interest and the maintenance of the health and safety of its employees.

53. The Commission notes that during adverse events there is a need for ILECs to establish priorities to preserve services required for public security and maintenance of the basic communications infrastructure. Given this, the Commission considers that it would be reasonable for the ILECs to reallocate resources from routine Q of S reporting to more urgent service priorities during an adverse event. Accordingly, the Commission will no longer expect the ILECs to file Q of S results during an adverse event. ILECs are to monitor Q of S standards during an adverse event, and are expected to file any outstanding Q of S reports within 30 days of its termination.

Future Proceeding

54. The Commission will, in the near future, initiate a public proceeding to consider whether, for the purposes of consideration of exclusions from the calculation of rate rebates for failure to meet prescribed retail and competitor Q of S standards, natural disasters, acts of terrorism, and labour disruptions should be considered as adverse events without the necessity of making such determinations on a case-by-case basis.

Secretary General