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

Telecom Decision CRTC 2007-75

Ottawa, 20 August 2007

Rogers Communications Inc. – Application to review and vary Telecom Decision 2006-45 regarding the termination and assignment of a support structure agreement

Reference: 8662-R28-200612326

In this Decision, the Commission finds that there is substantial doubt as to the correctness of Telecom Decision 2006-45 and finds that section 8.1 of the 2002 Support Structure Agreement (the 2002 SSA) only permitted parties to terminate the 2002 SSA, without cause, upon giving notice one year prior to the end of the initial term or one year prior to the end of a renewed term. The Commission also finds that it does not have the jurisdiction to interpret or enforce any obligations between Bell Aliant Regional Communications, Limited Partnership and Rogers Communications Inc. with respect to New Brunswick Power-owned poles.

Introduction

1. On 29 September 2006, Rogers Communications Inc. (Rogers) filed an application with the Commission, pursuant to section 62 of the *Telecommunications Act* (the Act) and Part VII of the *CRTC Telecommunications Rules of Procedure,* to review and vary Telecom Decision 2006-45. Rogers requested that the Commission vary and reverse its determination that either Rogers Cable Communications Inc. or Aliant Telecom Inc., now Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) could terminate the 2002 Support Structure Agreement (the 2002 SSA) at any time, with one year's notice. Rogers also requested that the Commission declare that the 2002 SSA and any permits granted thereunder could not be terminated without cause prior to 31 May 2007.

2. The Commission received submissions from Bell Aliant on 30 October 2006 and reply comments from Rogers on 9 November 2006.

Background

3. Rogers and Bell Aliant had, in 2002, entered into a support structure agreement (SSA) providing Rogers access to and use of poles that were owned by Bell Aliant, or for which Bell Aliant had the right to grant permits for access. The pole rate for such access was $9.60 per year without any charge or gross-up for clearance poles. The 2002 SSA was for a five-year term expiring 31 May 2007, renewable for additional five-year terms subject to the other terms and conditions of the 2002 SSA.

4. The form of the 2002 SSA had been approved by the Commission in Order 2000-13 following a process of negotiations between the Stentor Alliance, on behalf of the telephone companies, and the Canadian Cable Television Association (CCTA) and the Competitive Telecommunications Association (CTA). The Commission, in Order 2000-13, established a national regime for access to telephone companies' support structures and expressed its intent

that such a regime include uniform wording for the telephone companies' tariffs and agreements for support structures. To that end, the Commission approved standard tariff wording and support structure agreements for the then members of the Stentor Alliance, which included the telephone companies that ultimately formed Bell Aliant.

5. At the time that Rogers and Bell Aliant entered into the 2002 SSA, Bell Aliant had the ability to grant permits for access, for communications purposes, to poles that were owned by New Brunswick Power Distribution and Customer Service Corporation (NB Power). Bell Aliant had this ability pursuant to a Joint Sub-Agreement: Support Structure – Third Party Attachments (the JUA), which one of its predecessor corporations, the New Brunswick Telephone Company, had entered into with NB Power in 1996.

6. In 2004, NB Power notified Bell Aliant that it was terminating the JUA, including Bell Aliant's ability to grant permits for access to NB Power-owned poles for communications purposes. According to Bell Aliant, NB Power took this action in light of the decision of the Supreme Court of Canada in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 (the *Barrie* decision), which found that the Commission did not have the jurisdiction to regulate the terms of access to supporting structures owned by provincially regulated electrical power companies.

7. Beginning in October 2004, NB Power began invoicing Rogers for the use of the NB Power poles at a rate of $18.91 per pole per year. NB Power provided for a mark-up of 20 percent for clearance poles. NB Power also informed Rogers that the annual rate would rise to $23.50 and $28.05 on 1 May 2005 and 1 May 2006 respectively.

8. Subsequently, on 31 January 2005, Bell Aliant provided Rogers notice of termination of the 2002 SSA, effective 1 February 2006, pursuant to section 8.1 of the 2002 SSA, which reads:

> Subject to the termination provisions of this Agreement, this Agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

9. In its letter of 31 January 2005 to Rogers, Bell Aliant confirmed that, effective 1 September 2004, it had assigned the administration of NB Power-owned poles to NB Power and that NB Power would be billing for and collecting any amounts owed for those poles from Rogers as of that date.

10. On 2 November 2005, Rogers filed an application with the Commission seeking a declaration that:

    - the 2002 SSA and any permits granted thereunder could not be terminated without cause prior to 31 May 2007;

    - notwithstanding assignment of all or any part of the 2002 SSA by Bell Aliant, the terms and conditions of all permits issued by Bell Aliant or any assignee under the 2002 SSA, including the pole

access rate, were as set out in the 2002 SSA and in item 901 – Support Structure Service of the National Services Tariff (the NST);

- notwithstanding assignment of all or any part of the 2002 SSA by Bell Aliant, Bell Aliant remained liable for non-performance of its obligations under the SSA;
- in the event that Bell Aliant wished to introduce changes to the 2002 SSA or the NST, Bell Aliant had to seek prior approval from the Commission; and
- Bell Aliant could not modify its joint-use arrangements in a manner that prejudiced existing rights of third-party attachers.

Telecom Decision 2006-45

11. In Telecom Decision 2006-45, the Commission found that, pursuant to section 8.1 of the 2002 SSA, Bell Aliant could terminate the 2002 SSA with Rogers at any time, without cause, after providing one year's prior written notice to Rogers. The Commission determined that section 8.1 of the 2002 SSA was clear and unambiguous and that the ability to provide a notice of termination was not limited to any specific period of time when section 8.1 was given its plain and ordinary meaning.

12. The Commission noted that, based on the rules of punctuation, the comma placed before the phrase "unless and until terminated by one year prior notice in writing by either party" meant that the phrase qualified both the phrase "[the SSA] shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made" and the phrase "and thereafter for successive five (5) year terms".

13. The Commission agreed with Bell Aliant that had the intention been to limit the right to terminate to the end of the current and any renewal term of the 2002 SSA, clear wording would have been included specifying by what date the notice was required.

14. The Commission found, therefore, that Bell Aliant could terminate the 2002 SSA on 1 February 2006, one year following the date of written notice of termination to Rogers.

15. With regard to the assignment of portions of the 2002 SSA, the Commission found that Bell Aliant could not assign its obligations under the 2002 SSA without Rogers' express consent. The Commission also found that Bell Aliant remained liable for non-performance of its obligations under the 2002 SSA until 1 February 2006, and these obligations included the obligation to provide Rogers access to NB Power poles at the rate of $9.60 per pole per year.

16. The Commission found that there had been no amendments by Bell Aliant to the 2002 SSA or the NST that would have required prior approval by the Commission. The Commission also found that Bell Aliant had not violated the provisions of the NST that prohibited it from entering into joint-use agreements that prejudiced the rights of third-party attachers, as it had entered into the JUA with NB Power prior to the 2002 SSA. The provisions of the NST would apply to future joint-use agreements entered into after the 2002 SSA had been executed.

Rogers' application

17. Rogers submitted that there was substantial doubt as to the correctness of the Commission's determination, in Telecom Decision 2006-45, that either party could terminate the 2002 SSA at any time with one year's notice. Rogers submitted that its position was supported by:

    - the difference between the French and English language versions of section 8.1;
    - the evidence of the history of the negotiations of section 8.1;
    - the rules of punctuation and their application to contractual provisions; and
    - the basic principles of contractual interpretation as applied to Telecom Decision 2006-45.

18. Rogers submitted three French versions of the SSA, including two model SSAs filed in the proceeding leading to Order 2000-13 as well as an SSA between itself and TELUS Communications (Québec) Inc. executed on 18 December 2003. In the case of all three French versions of the SSA, section 8.1 reads as follows:

> Sous réserve des dispositions relatives à la résiliation du présent contrat, ce dernier prend effet à la date de signature. Il demeure en vigueur pour une période de cinq (5) ans, à partir de la date de la signature et il est subséquemment renouvelé pour des périodes successives de cinq (5) années, à moins d'un préavis écrit de résiliation à l'autre partie **un an avant l'expiration du contrat**. [Emphasis added]

19. Rogers submitted that the Commission had approved the French version of the model SSA in Order 2000-13 and that both the English and French versions of the model SSA were developed as the result of a single process to develop a uniform and standardized support structure agreement and tariff. Rogers further submitted that the French and English versions had not been negotiated separately and had been intended to be one and the same agreement.

20. Rogers argued that the Commission had recently emphasized the importance of uniformity in SSAs in Telecom Order 2006-223. Rogers noted that at paragraph 18 of Telecom Order 2006-223, the Commission had modified the termination provision of the SSA proposed by Sogetel inc. and Téléphone Milot inc. to require notice of termination of one year prior to the end of the contract rather than six months in order to reflect the equivalent provision in SSAs approved for other incumbent telephone companies.

21. Rogers submitted that the Commission's determination in Telecom Decision 2006-45 was inconsistent with the principle of uniformity that underpinned Telecom Order 2006-223.

22. Rogers further submitted that if Telecom Decision 2006-45 were not varied, the English and French language versions of the model SSA approved in Order 2000-13 would have different termination provisions.

23. Finally, Rogers submitted that the French version of section 8.1 provided clear evidence that the parties intended to restrict termination without cause to the end of the term. Rogers noted that while this evidence was not before the Commission in the Telecom Decision 2006-45 proceeding, the only interpretation of section 8.1 that is consistent with the parties' intentions is that which corresponds to the French version of section 8.1.

24. Rogers submitted draft SSAs and correspondence that had formed part of the negotiations between the Stentor Alliance, the CCTA and the CTA, which in its view demonstrated that the Commission's interpretation, in Telecom Decision 2006-45, of section 8.1 was inconsistent with the negotiating parties' intent.

25. Rogers submitted that the Commission's use of a rule of punctuation to interpret section 8.1 was an error of law because:

- the rule of punctuation that the Commission purported to rely on did not exist;
- the Commission's alleged punctuation rule was inconsistent with ordinary English usage;
- even if the Commission's alleged punctuation rule existed, it was an error of law to rely upon it as a rule in contractual interpretation to the exclusion of broader rules of construction; and
- to the extent that the Commission had applied a rule at all, it was not a punctuation rule but instead an approach to statutory or contractual construction known as the "Rule of the Last Antecedent," which had only been used by Canadian courts sporadically and inconsistently.

26. Finally, Rogers submitted that the Commission's interpretation of section 8.1 of the 2002 SSA rendered the parties' agreement to an initial five-year term meaningless, since either party could terminate the agreement, without cause, with one year's notice at any time. In Rogers' view, this interpretation was contrary to accepted rules of contractual interpretation that required the Commission to go beyond strict textual analysis and consider the larger context of the contract as a whole, taking into account the purpose and intention of the parties.

Bell Aliant's response

27. Bell Aliant submitted that Rogers' application should be denied, either on the basis that the issue was moot or on the basis that there was no substantial doubt as to the correctness of Telecom Decision 2006-45.

28. Bell Aliant argued that the core issue in dispute is the rate that Rogers should pay for its attachment to NB Power-owned poles. Bell Aliant submitted that, pursuant to the *Barrie* decision, the rates for these poles are not within the Commission's jurisdiction and that an SSA mandated by the Commission cannot, therefore, govern those rates.

29. Bell Aliant submitted that prior to the *Barrie* decision, NB Power did not question the authority of the Commission to set rates for attachment by federally regulated communications undertakings to the structures of provincially regulated utilities. In Bell Aliant's view, NB Power accordingly accepted the rate of $9.60 per year prescribed by the Commission until the *Barrie* decision led it to change its position and terminate the JUA.

30. Bell Aliant submitted that the 2002 SSA and the NST could apply to facilities owned by a telephone company or to facilities for which it had the right to grant permits, but could not apply to the facilities or interests of a provincially regulated owner. In Bell Aliant's view, neither the 2002 SSA nor the NST could extend the Commission's ratemaking jurisdiction to a provincial undertaking.

31. Bell Aliant submitted that the NB Power-owned poles were never "Support Structures" within the meaning of the 2002 SSA or the NST since, pursuant to the JUA, it had no authority to set the rates for the NB Power-owned poles and it was required to seek approval from NB Power for each use of the NB Power-owned poles.

32. Bell Aliant argued, in the alternative, that if the NB Power-owned poles were ever "Support Structures," within the meaning of the 2002 SSA or the NST, this ceased to be the case when NB Power gave notice of termination of the JUA in 2004. In Bell Aliant's view, whether the 2002 SSA continued in effect or the parties were to enter into a replacement agreement on the same terms, neither agreement can govern the rate for attachment to the NB Power-owned poles.

33. Bell Aliant argued, in the further alternative, that when NB Power gave notice of termination of the JUA, this caused the NB Power-owned poles to cease to be "Support Structures" and was therefore tantamount to removal or abandonment of those "Support Structures" by Bell Aliant. According to Bell Aliant, it was entitled to rely on the provisions of the NST that allowed a telephone company to cease providing access to a support structure that it was removing or abandoning upon giving 180 days' notice to parties who had attached their facilities to the support structure.

34. In Bell Aliant's further view, the rate for access to the poles was not, as alleged by Rogers, a matter of contract. According to Bell Aliant, the rate for access to the poles was prescribed solely in the NST and was not incorporated by reference into the 2002 SSA. Bell Aliant submitted that, in light of the *Barrie* decision, the NST had no application to the NB Power-owned poles and that even if Rogers was entitled to access these poles, to the extent that Bell Aliant had the right to grant access, such access did not include setting the rate to be paid to NB Power.

35. In light of these arguments, Bell Aliant submitted that Rogers' application had no effect on the core matter in dispute between the parties, i.e., the price that Rogers was to pay for its pole attachments to NB Power-owned poles. Bell Aliant submitted, therefore, that the issue was moot and the Commission should decline to exercise its power to review and vary its decision on that basis.

36. Bell Aliant submitted that if, despite its arguments on mootness, the Commission decided to consider Rogers' application on the merits, then the Commission should deny the application on the basis that Rogers had not established substantial doubt as to the correctness of Telecom Decision 2006-45.

37. Bell Aliant submitted that the Rogers application approached the 2002 SSA as a freely negotiated contract between parties. In Bell Aliant's view, this approach ignored the fact that the relationship between Bell Aliant and Rogers was not in any sense a negotiated commercial arrangement but entirely a regulated one. Bell Aliant argued that, in interpreting the 2002 SSA, the Commission was seeking to implement not the intent of the negotiating parties but rather its own regulatory intent in prescribing the terms of the 2002 SSA and the NST.

38. Bell Aliant submitted, therefore, that any evidence regarding the "history of negotiations" was of no assistance to the Commission, as the form of the agreement was established by the Commission following a regulatory process. Bell Aliant also submitted that, while the history of submissions to the Commission in that process could be considered, it would be of little assistance to the Commission in determining its own intent.

39. Bell Aliant submitted that the Commission's interpretation of section 8.1 was not based solely on punctuation rules, but in fact reflected the Commission's understanding of the intent of the clause as the prescribing regulator.

40. Bell Aliant further submitted that the Commission's interpretation of section 8.1 was valid, regardless of the rules of punctuation, and that an inquiry into the separation of phrases by commas was unnecessary to dispose of the application.

41. With regard to Rogers' contention that the French language version of the model SSA demonstrated the true meaning of section 8.1, Bell Aliant submitted that it was inappropriate to determine the parties' intent by reference to a form of words and a language they did not use.

42. Finally, Bell Aliant argued that Rogers' evidence relating to the history of negotiations and interpretation of section 8.1 was inadmissible, as the Commission's finding in Telecom Decision 2006-45 that section 8.1 was unambiguous would preclude Rogers from adducing extrinsic evidence to aid in the interpretation of section 8.1.

43. Bell Aliant also submitted that the Commission should not receive any new evidence at this stage of the proceeding unless it could be shown that the evidence met the test used by the courts with respect to the admission of new evidence on an appeal, i.e., that such evidence is not admissible unless it could not have been obtained with due diligence before the trial and the new evidence is such that it is practically conclusive. In Bell Aliant's view, the new evidence submitted by Rogers did not satisfy either of these requirements.

44. Bell Aliant also suggested that the submission of new evidence by Rogers was not in accordance with Telecom Public Notice 98-6, which contemplates that one of the grounds to demonstrate substantial doubt as to the correctness of the original decision is a change in circumstances since the decision. In Bell Aliant's view, this would not appear to contemplate additional evidence that was available at the time of the original proceeding but was not presented in the original proceeding.

Rogers' reply comments

45. Rogers submitted that the main issue before the Commission was Bell Aliant's obligations under the 2002 SSA, and that, despite Bell Aliant's arguments, this issue was not moot.

46. Rogers submitted that, if its interpretation of the 2002 SSA was correct, the 2002 SSA would remain in place until 31 May 2007, requiring Bell Aliant to provide access to all poles for which it had granted permits, including the NB Power-owned poles.

47. Rogers submitted that Bell Aliant's own conduct confirmed that this issue was not moot because:

- the NB Power poles were qualified and treated by Bell Aliant as support structures that it did not own, but for which it had the right to grant permits;
- none of the permits issued by Bell Aliant for NB Power-owned poles were ever expressed to be conditional on Bell Aliant's arrangements with NB Power; and
- as Bell Aliant was not seeking any changes to the terms of the 2002 SSA or the NST, Bell Aliant's only purpose in terminating the 2002 SSA was to attempt to limit its contractual obligations with respect to the NB Power-owned poles.

48. Rogers submitted that the issue raised by its application fell within the Commission's jurisdiction over Bell Aliant because:

- NB Power's obligation to provide access to its poles was not at issue in this proceeding and the only poles at issue are those for which Bell Aliant issued permits to Rogers under the terms and conditions of the 2002 SSA;
- Bell Aliant elected to issue permits for NB Power-owned poles not as a consequence of a regulatory requirement but as a consequence of its agreement with NB Power; and
- the *Barrie* decision has no bearing on the application, as the Commission is not engaged in regulating the rates that NB Power charges for access to its poles but instead is determining the term of Bell Aliant's obligations under the 2002 SSA.

49. Rogers argued that at the time Bell Aliant issued the permits to Rogers for access to the NB Power-owned poles under the 2002 SSA, Bell Aliant had held itself out as having the authority from NB Power to issue those permits in accordance with the 2002 SSA. In Rogers' view, the fact that Bell Aliant and NB Power subsequently terminated the JUA did not relieve Bell Aliant from the voluntarily assumed contractual obligation to provide access to NB Power-owned poles at a rate of $9.60 per pole per year until the 2002 SSA terminated.

50. Contrary to Bell Aliant's arguments, Rogers submitted that Bell Aliant had clearly not removed or abandoned the NB Power-owned poles and could not therefore avail itself of the wording in the NST with respect to removal and abandonment.

51. With respect to the use of the French language versions of the model SSA, Rogers submitted that these versions of the SSA were relevant to ascertain the Commission's understanding of the meaning of section 8.1. In Rogers' view, the Commission should apply the principle, generally applied in the context of statutory interpretation, that words should be interpreted in a manner that is consistent with both the English and French versions of the provision.

52. With respect to the history of the negotiations, Rogers submitted that, as the Commission had not commented on section 8.1 in Order 2000-13 and had accepted section 8.1 as proposed by the parties to that proceeding, then there was no basis for distinguishing between the negotiating parties' and the Commission's intent. In light of this, Rogers submitted that the evidence of the negotiations of the model SSA was directly relevant to the intention and meaning of section 8.1.

53. Finally, Rogers submitted that there was no basis for the Commission to reject any new evidence that it had filed with its application. In Rogers' view, the Commission's reliance in Telecom Decision 2006-45 on punctuation and inferences based on omitted text, as well as the obvious discrepancy between the Commission's conclusions and evidence of the intention of the parties that drafted the model SSA, clearly demonstrated that the wording of section 8.1 was not clear on its face, and that failure to consider the evidence of negotiations and the French language versions of the model SSA would result in an injustice.

54. Rogers further submitted that the test for admission of evidence on appeal was not applicable to a review and vary proceeding. In Rogers' view, unlike an appeal, a review and vary application was a new proceeding before the trier of fact.

Commission's analysis and determinations

55. In Telecom Public Notice 98-6, the Commission set out the criteria to consider review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated the following:

> … applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to: (i) an error in law or in fact; (ii) a fundamental change in circumstances or facts since the decision; (iii) a failure to consider a basic principle which had been raised in the original proceeding; or (iv) a new principle which has arisen as a result of the decision.

56. The Commission considers that in order to dispose of the question of whether there is substantial doubt as to the correctness of Telecom Decision 2006-45, it must address the following:

    a. Should the Commission consider the new evidence filed by Rogers with its application?

    b. What is the correct interpretation of section 8.1 of the 2002 SSA?

    c. What is the status of the NB Power-owned poles?

a. Should the Commission consider the new evidence filed by Rogers with its application?

57. In coming to its determinations on this application, the Commission has considered the new evidence filed by Rogers. In the Commission's view, the test applied by the courts in the case of appeals is not appropriately applied to administrative tribunals, such as the Commission, which are afforded greater procedural flexibility with respect to the admission of evidence than are appellate courts. In this case, the new evidence submitted by Rogers is directly relevant to the key issue of the interpretation of section 8.1 before the Commission and allows the Commission to render a more informed decision. In the Commission's further view, consideration of this evidence is consistent with the primary purpose for which administrative tribunals are afforded greater flexibility with respect to the admission of evidence, i.e., ensuring that tribunals can reach correct decisions in a timely fashion.

b. What is the correct interpretation of section 8.1 of the 2002 SSA?

58. The Commission notes that in making its determinations in Order 2000-13, it approved both English and French language versions of the model SSA.

59. While the Commission notes Bell Aliant's submission that the Commission should not use the French language version of the model SSA in interpreting section 8.1 as it is not the version that the parties executed, it is the Commission's view that Bell Aliant is incorrect on this point. In the Commission's view, Bell Aliant correctly characterized the issue before the Commission as a regulatory one and not a contractual one. The Commission considers, therefore, that it must look to what the regulatory intent was in imposing the model SSA in Order 2000-13, which included section 8.1.

60. In looking to determine the regulatory intent in imposing a model SSA in Order 2000-13, the Commission considers it appropriate to consider both the French and English language versions of the model SSA, which were approved in Order 2000-13. The Commission notes that it is required, pursuant to the *Official Languages Act*, to publish its decisions in both French and English. The Commission generally issues both the English and French versions of its decisions simultaneously, consistent with its obligations under the *Official Languages Act*, and considers both versions to be equally authoritative.

61. The Commission considers that the wording of section 8.1 in the French language version of the model SSA can be interpreted in only one way: termination of the model SSA can only occur upon notice one year prior to the end of the initial term or one year prior to the end of a renewed term. The wording of the French language version, therefore, clearly points to a result opposite to that arrived at in Telecom Decision 2006-45.

62. The Commission notes that Rogers and Bell Aliant disagree over the interpretation of the English language version and that the Commission only arrived at its conclusion in Telecom Decision 2006-45 after performing a grammatical analysis, which interpretation of the French language version does not require.

63. The Commission considers that, between the two versions, it is appropriate to prefer the French language version as it has only one possible interpretation, and that interpretation is consistent with one of the two possible interpretations of the English language version.

64. The Commission considers that, in making its determination in Telecom Decision 2006-45 that the 2002 SSA could be terminated at any time upon one year's notice, it made an error of law in its interpretation of section 8.1 based on an incomplete record that did not include the French language version of the model SSA. As such, the Commission failed to consider the equally authoritative French language version of the model SSA. The Commission considers that Rogers has demonstrated that there is substantial doubt as to the correctness of the Commission's interpretation of section 8.1 as set out in Telecom Decision 2006-45.

65. Given the Commission's conclusion that there is substantial doubt as to the correctness of its interpretation of section 8.1 as set out in Telecom Decision 2006-45, the Commission does not consider it necessary to reach any conclusions with respect to Rogers' arguments on the history of negotiations, contractual rules of interpretation, or punctuation rules.

c. What is the status of the NB Power-owned poles?

66. The Commission does consider it necessary to consider the arguments put forward by Bell Aliant regarding the nature of the NB Power-owned poles, as the Commission's conclusions on such arguments could have an impact on the Commission's authority to grant a remedy to Rogers.

67. As noted above, the 2002 SSA and the NST under which the use of the model SSA was prescribed are regulatory. The Commission considers that these requirements cannot be interpreted as extending the Commission's authority to support structures that fall outside of the Commission's jurisdiction under the Act. It is clear, following the *Barrie* decision, that the Commission's jurisdiction does not extend to power poles.

68. Given that the Commission does not have jurisdiction over granting access to power poles for communications purposes, it follows that the offering by a telephone company of access to power poles for which it has the authority to provide permits is done on a voluntary basis, and not as the result of a Commission requirement.

69. In the Commission's view, if parties voluntarily elect to bind themselves with respect to poles that fall outside of the Commission's jurisdiction under the Act, the Commission cannot assume jurisdiction to resolve any issues relating to non-performance of those obligations.

70. The Commission finds, in light of the above, that it does not have the jurisdiction to interpret or enforce any obligations between Bell Aliant and Rogers with respect to NB Power-owned poles.

71. In light of all of the above, the Commission finds as follows:

a) section 8.1 of the 2002 SSA only permits parties to terminate the 2002 SSA, without cause, upon giving notice one year prior to the end of the initial term or one year prior to the end of a renewed term;

b) the determination in Telecom Decision 2006-45 that the 2002 SSA terminated on 1 February 2006, one year following the date of written notice of termination to Rogers, is rescinded;

c) the 2002 SSA continued in force until 31 May 2007; and

d) the determination in Telecom Decision 2006-45 that Bell Aliant remained liable for non-performance of its obligations under the 2002 SSA until the termination of the 2002 SSA, including the obligation to provide Rogers access to NB Power-owned poles at the rate of $9.60 per pole per year, is rescinded as it applies to the NB Power-owned poles.

Secretary General

Related documents

- *Part VII application by Rogers Cable Communications Inc. regarding Aliant Telecom Inc.'s termination and assignment of a support structure agreement*, Telecom Decision CRTC 2006-45, 28 July 2006
- *Sogetel inc. and Téléphone Milot inc. – Support structure license agreement*, Telecom Order CRTC 2006-223, 28 August 2006
- *Rates set for access to telephone companies' support structures*, Order CRTC 2000-13, 18 January 2000
- *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998