



Telecom Decision CRTC 2009-187

Ottawa, 8 April 2009

Rogers Cable Communications Inc. – Application to review and vary part of Telecom Decision 2008-62

File number: 8662-R28-200814617

In this decision, the Commission denies RCCI's application to review and vary the part of Telecom Decision 2008-62 regarding Bell Aliant's support structure obligations. The Commission also denies Bell Aliant's request that the Commission award costs.

Introduction

1. On 29 October 2008, Rogers Cable Communications Inc. (RCCI) filed an application requesting that the Commission review and vary its determination in Telecom Decision 2008-62 regarding Bell Aliant Regional Communications, Limited Partnership's (Bell Aliant) support structure obligations.
2. In that decision, the Commission determined that Bell Aliant's obligations under the 2002 Support Structure Agreement (the 2002 SSA) had ended in March 2004 when New Brunswick Power Distribution and Customer Service Corporation (NB Power) terminated the Joint Sub-Agreement: Support Structure – Third Party Attachments (the JUA) between NB Power and Bell Aliant.
3. RCCI requested that the Commission declare that Bell Aliant was contractually obligated to provide access to all NB Power poles for which Bell Aliant had issued permits to RCCI in accordance with the terms and conditions of the 2002 SSA, at the rate specified in that agreement, until the 2002 SSA terminated on 31 May 2007.
4. The Commission received comments regarding RCCI's application from Bell Aliant, including a request that the Commission award Bell Aliant costs in this proceeding. The public record of this proceeding, which closed on 8 December 2008, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.
5. The Commission has identified the following issues to be addressed in this decision:
 - I. Did the Commission err in law and in fact in Telecom Decision 2008-62 in concluding that Bell Aliant's obligations under the 2002 SSA ended when NB Power terminated the JUA on 29 February 2004?
 - II. Should the Commission award costs to Bell Aliant?

Background

6. The 2002 SSA provided RCCI with access to, and use of, poles either owned by Bell Aliant or to which Bell Aliant had the right to grant access permits. The rate for such access – \$9.60 per pole per year without any charge or gross-up for clearance poles – was set out in Bell Aliant's National Services Tariff item 901, Support Structure Service (item 901), which the Commission approved in Order 2000-13. The 2002 SSA's five-year term expired on 31 May 2007.
7. When RCCI and Bell Aliant entered into the 2002 SSA, Bell Aliant had the authority to issue permits for access for communications purposes to poles owned by NB Power. This authority was provided through the JUA, which one of its predecessor corporations, the New Brunswick Telephone Company, had entered into with NB Power in 1996.
8. On 30 January 2004, NB Power gave Bell Aliant 30-days' notice that it was terminating the JUA, including Bell Aliant's authority to grant permits for access to NB Power poles for communications purposes. NB Power took these actions 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 that the Commission did not have jurisdiction under subsection 43(5) of the *Telecommunications Act* (the Act) over access to power poles owned by provincially regulated power companies.
9. In April 2004, NB Power informed RCCI that it would be taking over the administration of access to its poles and that it intended to increase the monthly fees for the use of those poles.
10. In October 2004, NB Power began billing RCCI for the use of NB Power poles at the provincially regulated rate of \$18.91 per pole per year.
11. In a letter to RCCI dated 31 January 2005, Bell Aliant confirmed that, effective 1 September 2004, it had assigned the administration of NB Power poles to NB Power and that NB Power would be billing for and collecting any amounts owed for its poles from RCCI as of 1 September 2004.
12. Following an application by RCCI on 2 November 2005, the Commission issued Telecom Decision 2006-45. The Commission determined that Bell Aliant could terminate the 2002 SSA at any time, without cause, after providing one year's written notice to RCCI pursuant to section 8.1 of that agreement. The Commission found, therefore, that the 2002 SSA had terminated on 1 February 2006. The Commission also found that Bell Aliant could not assign its obligations under the 2002 SSA without RCCI's express consent. Bell Aliant therefore remained liable to fulfill its obligations under the 2002 SSA, including the obligation to provide RCCI with access to NB Power poles at a rate of \$9.60 per pole per year, until 1 February 2006.

13. Following an application by RCCI to review and vary Telecom Decision 2006-45, the Commission issued Telecom Decision 2007-75. The Commission determined that there was substantial doubt as to the correctness of its interpretation of section 8.1 of the 2002 SSA as set out in Telecom Decision 2006-45. The Commission found that section 8.1 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 the renewed term. However, the Commission also found that it did not have the jurisdiction to interpret or enforce any obligations between Bell Aliant and RCCI with respect to NB Power poles.
14. Following an application by RCCI to review and vary part of Telecom Decision 2007-75, the Commission issued Telecom Decision 2008-62. The Commission determined that, following termination of the JUA, NB Power poles were no longer "Support Structures" within the meaning of the 2002 SSA and item 901 and, as such, Bell Aliant did not have any obligations under the 2002 SSA with respect to NB Power poles from the time that Bell Aliant's JUA with NB Power was terminated. The Commission also determined that the Commission has jurisdiction over Bell Aliant when it provides access to support structures, including those that it does not own but for which it has the right to grant permits for access because, in doing so, Bell Aliant is providing a telecommunications service within the meaning of the Act.

I. Did the Commission err in law and in fact in Telecom Decision 2008-62 in concluding that Bell Aliant's obligations under the 2002 SSA ended when NB Power terminated the JUA on 29 February 2004?

15. RCCI submitted that the Commission's finding in Telecom Decision 2008-62 that Bell Aliant's obligation regarding NB Power poles had ended on 29 February 2004, upon termination of the JUA, failed to properly apply basic principles of contract law.
16. RCCI also submitted that Bell Aliant's conduct after the termination of the JUA was at odds with the Commission's determination in Telecom Decision 2008-62. RCCI noted that Bell Aliant had issued permits under the 2002 SSA until April 2006, had attempted to terminate the 2002 SSA effective February 2006, and had transitioned and assigned billing responsibility under the 2002 SSA for NB Power poles after termination of the JUA. RCCI further noted that at no time did Bell Aliant purport to terminate the permits it had issued under the 2002 SSA.
17. RCCI argued that the Commission should have held Bell Aliant liable for its obligations under the 2002 SSA because Bell Aliant held out that it had the authority to issue permits for NB Power poles pursuant to the 2002 SSA. RCCI stated that, in contract law, a contracting party that holds itself out as having the authority to enter into and honour the terms of a contract cannot escape liability, either by subsequently asserting that it did not in fact have the authority to enter into that contract or by relinquishing its authority to enter into that contract. RCCI argued that if Bell Aliant did not have the authority to grant permits for NB Power poles under the 2002 SSA for the duration of its entire term, it had an obligation to disclose this to RCCI, which it had not done.

18. RCCI was of the view that permits issued under the 2002 SSA had not been terminated by the termination of the JUA on 29 February 2004 and that Bell Aliant's obligations in relation to those permits had continued for the full term of the 2002 SSA, which ended on 31 May 2007. RCCI argued that the only reasonable interpretation of the definition of "Support Structure" in the 2002 SSA and item 901 was as a structure to which Bell Aliant had the right to grant permits for access at the time the permit was issued. RCCI also submitted that validly issued permits had granted it the right to use NB Power poles for the remaining duration of the 2002 SSA at a guaranteed annual rate, unless the permit was terminated earlier in accordance with the 2002 SSA or item 901.
19. Bell Aliant submitted that the understanding, or misunderstanding, by parties of their legal position does not affect that legal position, and therefore Bell Aliant's conduct after termination of the JUA was irrelevant. Bell Aliant argued that even if it was relevant, its conduct was not inconsistent with the Commission's finding, but rather clearly demonstrated that Bell Aliant intended NB Power to administer the billing for NB Power poles and that rates for those poles would be established by NB Power and its regulators.
20. Bell Aliant argued that signing the agreement in the form prescribed by the Commission and issuing permits designating the poles on which RCCI was authorized to place its facilities prior to the termination of the JUA did not constitute holding out that it had the authority to guarantee access at the tariffed rates for the entire term of the 2002 SSA. Bell Aliant also argued that such an allegation of holding out essentially amounted to asking the Commission to impose estoppel by conduct.
21. Bell Aliant further argued that permits issued pursuant to the 2002 SSA only provided for access at the tariffed rate and that there was no longer an applicable tariffed rate when Bell Aliant's right to grant permits ended upon termination of the JUA. Bell Aliant was of the view that if the Commission did not have jurisdiction over access to the NB Power poles, then it did not have jurisdiction to compel Bell Aliant to provide access to those poles in accordance with the rates, terms, and conditions of item 901. Bell Aliant submitted that this reasoning applied equally to the 2002 SSA and any permits issued under it.

Commission's analysis and determinations

22. In Telecom Public Notice 98-6, the Commission stated that it would exercise its power to review and vary decisions pursuant to section 62 of the Act where the party seeking relief demonstrates that there is substantial doubt as to the correctness of the original decision, including where an error in law or in fact has been made.
23. The Commission notes that permits issued pursuant to the 2002 SSA are contemplated in, and are stated to form part of, that agreement. Further, these permits are dependant on an approved tariff to establish the price on an ongoing basis. Moreover, the Commission considers that after termination of the JUA, it was NB Power and not Bell Aliant that was entitled to grant access to NB Power poles.

24. As such, the Commission considers that RCCI has failed to demonstrate that the Commission erred in fact or law in finding that Bell Aliant's obligations under the 2002 SSA, including any rights pursuant to subsisting permits, ended upon termination of the JUA. Any other finding would require the Commission to impose its tariff on NB Power's grant of access to provincially regulated power poles and would therefore be outside the Commission's jurisdiction.
25. The Commission considers that RCCI's request for relief is best characterized as a request under contract law for damages from Bell Aliant for the increased costs that RCCI incurred to purchase access from NB Power to NB Power poles for which permits were issued under the 2002 SSA. The Commission notes that it has no jurisdiction to award damages and expresses no view on any potential civil recourse RCCI may be entitled to pursue.
26. Accordingly, the Commission finds that RCCI has not raised substantial doubt as to the correctness of the Commission's determinations in Telecom Decision 2008-62 and **denies** RCCI's application.

II. Should the Commission award costs to Bell Aliant?

27. The Commission notes that Bell Aliant requested that the Commission award costs in this case. The Commission considers that both parties had sufficient motivation to participate in this proceeding without an award of costs. The Commission sees no reason to depart from its general practice of limiting cost awards to circumstances serving to facilitate the informed participation of individual Canadians or public interest groups in Commission proceedings. Therefore, the Commission **denies** Bell Aliant's request.

Secretary General

Related documents

- *Rogers Cable Communications Inc. - Application to review and vary part of Telecom Decision 2007-75, Telecom Decision CRTC 2008-62, 16 July 2008*
- *Rogers Communications Inc. - Application to review and vary Telecom Decision 2006-45 regarding the termination and assignment of a support structure agreement, Telecom Decision CRTC 2007-75, 20 August 2007*
- *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*

- *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.

This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>