



Telecom Decision CRTC 2010-806

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Ottawa, 29 October 2010

Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application regarding access to municipal property in the City of Thunder Bay

File number: 8690-B54-201011098

In this decision, the Commission grants the Bell companies immediate access to municipal property in Thunder Bay, pursuant to section 43 of the Telecommunications Act. The Commission determines that such access shall be subject to the terms and conditions of Thunder Bay's generic municipal access agreement, as amended by the Commission's determinations set out in this decision.

Introduction

1. The Commission received an application from Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies) dated 8 July 2010, in which the Bell companies requested an order from the Commission granting them permission to construct, operate, and maintain their transmission lines on highways and other public places in the City of Thunder Bay (Thunder Bay). In their application, the Bell companies submitted that they have been in discussions with Thunder Bay over the terms and conditions of a municipal access agreement (MAA) to govern such activities, but that negotiations have reached an impasse over the specific wording of certain clauses.
2. As a result, the Bell companies requested that the Commission decide on wording with regard to the following disputed issues in the MAA:
 - treatment of the Bell companies' pre-existing property rights along service corridors (clauses 5.03 and 5.04)
 - Thunder Bay's involvement in negotiations between the Bell companies and third parties regarding the relocation of the Bell companies' facilities (clause 9.07(f))
 - removal of the Bell companies' facilities upon MAA termination (clauses 16.05 and 16.06)
3. The Bell companies also requested that, until a determination is made regarding the disputed clauses, the Commission issue an interim decision, pursuant to subsection 61(2) of the *Telecommunications Act* (the Act), granting them immediate access to Thunder Bay's municipal property.

4. The Commission received comments from Thunder Bay opposing the Bell companies' application. The public record of this proceeding, which closed on 3 August 2010, 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. Is regulatory intervention necessary?
 - II. What is the appropriate wording for the disputed clauses?

I. Is regulatory intervention necessary?

6. The Bell companies submitted that Thunder Bay has refused to process any construction permits until an MAA between the two parties is in place, a situation which has caused delays in facility deployment and resulted in the Bell companies losing customers and revenues. The Bell companies also submitted that Thunder Bay has refused to accept any amendments to its generic MAA.
7. Thunder Bay submitted that amending its generic MAA to address the Bell companies' concerns would require city council approval and would not be fair to other carriers who have signed the generic MAA.
8. The Commission notes that discussions between the parties date back to 2006 and have failed to produce an agreement. Further, the Commission notes that without an agreement, the Bell companies have been unable to secure access rights and construction permits from Thunder Bay in order to construct facilities on municipal property and provide service to customers. The Commission also notes that the Bell companies have applied for relief, pursuant to subsection 43(4) of the Act, because they have been unable to obtain municipal consent on terms acceptable to them.
9. In light of the above, the Commission considers that market forces cannot be relied upon to settle this dispute. Accordingly, the Commission concludes that, under the circumstances, regulatory intervention is necessary to resolve this dispute.

II. What is the appropriate wording for the disputed clauses?

Treatment of the Bell companies' pre-existing property rights along service corridors (clauses 5.03 and 5.04)

10. The Bell companies submitted that clauses 5.03 and 5.04 of Thunder Bay's generic MAA effectively nullify their pre-existing property rights, such as easements, along municipal service corridors. The Bell companies requested that the wording be changed to ensure that such easements are excluded from being covered under these clauses.

11. Thunder Bay submitted that the clauses are meant to prevent new encumbrances from being filed against municipal property and will not affect the Bell companies' pre-existing easements. Thunder Bay offered to enter into a supplemental agreement with the Bell companies to specifically exclude the easements in question but submitted that it is not willing to amend the generic MAA for this purpose.
12. The Commission notes that both parties have agreed that the Bell companies' pre-existing easements should not be subject to clauses 5.03 and 5.04. The Commission considers that either the Bell companies' proposed wording changes or Thunder Bay's proposed supplemental agreement would sufficiently protect the Bell companies' existing property interests.
13. However, the Commission notes the concerns raised by Thunder Bay regarding amendments to the generic MAA. As such, if Thunder Bay does not wish to incorporate the Bell companies' proposed amendments to clauses 5.03 and 5.04, the Commission directs parties to enter into a supplemental agreement to exclude the Bell companies' pre-existing easements from being covered under those clauses.

Thunder Bay's involvement in negotiations between the Bell companies and third parties regarding the relocation of the Bell companies' facilities (clause 9.07(f))

14. The Bell companies submitted that clause 9.07(f) of Thunder Bay's generic MAA puts their facility investments at risk because, if Thunder Bay is involved in third-party relocation negotiations, the Bell companies could be pressured into accepting unreasonable relocation agreements. The Bell companies submitted that they have had similar experiences with other municipalities.
15. The Bell companies therefore submitted that the wording of clause 9.07(f) should be changed to remove the requirement for Thunder Bay to be a party to cost-sharing agreements between the Bell companies and third parties for facility relocations, to clarify that the party requesting the relocation is responsible for covering the costs, and to clarify that any such relocation requests are subject to municipal approval via the permit approval process. The Bell companies argued that their revised wording would appropriately put Thunder Bay at arm's length with respect to third-party facility relocation requests, but still ensure that it maintains a measure of oversight through permit approvals.
16. Thunder Bay submitted that it is not appropriate for it to be at arm's length in discussions concerning municipal property and that the current wording of clause 9.07(f) is necessary to ensure that its interests are protected with respect to costs and traffic coordination. Thunder Bay also submitted that if the Bell companies were subject to unfair treatment in any such relocation discussions, they could appeal to the Commission for relief via the dispute resolution process outlined in the generic MAA.
17. The Commission recognizes that the relocation activities of telecommunications companies on municipal property can have a direct impact on municipalities, especially when these activities affect roads and sidewalks or result in traffic disruption.

18. However, the Commission notes that the clause under dispute specifically focuses on the cost-sharing arrangements between the third party and the Bell companies, and only in cases where Thunder Bay has not required the relocation. The Commission considers that it is important for the Bell companies to be able to negotiate and enter into cost-sharing agreements with other private entities, without the municipality also being a signatory to such agreements. Further, the Commission notes that access to municipal property has always been, and will continue to be, conditional on a carrier obtaining municipal consent through the permit process. The Commission therefore considers that the reference in clause 9.07(f) that requires Thunder Bay to be party to a cost-sharing agreement is not appropriate in this case.
19. However, the Commission considers that, to ensure that Thunder Bay maintains a measure of oversight over activities that occur on its property, it should have a right to participate in any talks between the Bell companies and third parties regarding facility relocation requests that involve municipal property.
20. With regard to the amendments to clause 9.07(f) put forward by the Bell companies, the Commission considers that the proposed wording is too strong in terms of imposing all costs on a third party, regardless of such mitigating factors as the age of the equipment. As a result, the Commission does not consider the Bell companies' wording to be appropriate.
21. In light of the above, the Commission determines that Thunder Bay's existing wording in the generic MAA is to be maintained, with the exception of the requirement for Thunder Bay to be a signatory to a cost-sharing agreement. The Commission therefore directs that the wording of clause 9.07(f) be amended as shown in italics below:

For equipment relocation requests from parties other than the City, or those not required for municipal purposes, the relocations shall be at the discretion of the Company, acting reasonably. All the Costs of these relocations will be the subject matter of an agreement in writing *between the Company and the party* requesting the change. *The City maintains the right to be an observer of the discussions leading to the agreement.* This agreement will relieve the City of any responsibility for all such relocation Costs. The agreement shall be required prior to any of the associated relocation work activities being initiated.

Removal of the Bell companies' facilities upon MAA termination (clauses 16.05 and 16.06)

22. The Bell companies submitted that clauses 16.05 and 16.06 of Thunder Bay's generic MAA would impose unacceptable risks on their facility investments because, in the event that the MAA terminates for any reason, the Bell companies would be required to remove all their equipment from the service corridors.
23. The Bell companies argued that the municipal consent required by subsection 43(3) of the Act only pertains to the construction of telecommunications facilities, not their continued presence or operation.

24. The Bell companies therefore requested that clause 16.06 be removed, and that section (c) of clause 16.05, Post Termination, be amended to add the words in italics below:
 - (c) All the unfulfilled covenants, indemnities and obligations of the Company and the City under this Agreement *shall survive until the Company removes its Equipment from the Service Corridor and restores the Service Corridor to a condition satisfactory to the City, wear and tear excepted.*
25. Thunder Bay submitted that clauses 16.05 and 16.06 in its generic MAA are necessary to protect municipal property rights in the event of MAA termination. Thunder Bay argued that subsection 43(3) of the Act requires carriers to obtain municipal consent for telecommunications plant to remain on municipal property in perpetuity and that, in the absence of an MAA, there is no such consent.
26. The Commission notes that the terms and conditions related to facility abandonment are covered under clause 16.04 of the generic MAA. The Commission also notes that the roles and responsibilities of both Thunder Bay and the Bell companies are clear under this scenario and that the Bell companies are responsible for removing abandoned equipment at their own cost.
27. In the Commission's view, clause 16.04 protects the city's interests with respect to abandoned telecommunications facilities and clause 16.06, as proposed by Thunder Bay, is therefore redundant in this case.
28. Further, the Commission considers that it is not reasonable to expect the Bell companies to remove all their facilities from municipal property if the MAA terminates. The Commission notes that the MAA could terminate for many reasons, possibly while the Bell companies are still providing service to customers.
29. In light of the above, the Commission determines that the amendment to clause 16.05 as proposed by the Bell companies is to be adopted and that clause 16.06 of the generic MAA be removed.

Conclusion

30. In light of all the above, the Commission **approves** the Bell companies' request for immediate access to municipal property in Thunder Bay, pursuant to section 43 of the Act, for the purpose of constructing, maintaining, and operating their transmission facilities. The Commission determines that such access will be subject to the terms and conditions of Thunder Bay's generic MAA, as amended by the Commission's determinations set out in this decision.
31. Finally, given that it is disposing of the Bell companies' application in this decision, the Commission concludes that the request for an interim decision is moot.

Secretary General