



Telecom Decision CRTC 2014-668

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Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Request for disclosure of confidential information and for interim relief regarding traffic imbalance payments to Fibernetics Corporation

*The Commission **directs** the Bell companies to disclose certain confidential information to Fibernetics Corporation (Fibernetics). The Commission **approves** the Bell companies' request to make Fibernetics' compensation for traffic termination tariff interim, but **denies** their request to suspend payment of any traffic imbalance charges to Fibernetics pending disposition of their application for final relief.*

Application

1. The Commission received an application from Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies), dated 21 October 2014, concerning imbalance payments to Fibernetics Corporation (Fibernetics) for the termination of traffic.¹
2. As part of their application, the Bell companies requested interim relief. Specifically, they requested that the Commission immediately designate as interim, at least as it applies to the Bell companies, Fibernetics' compensation for traffic termination tariff (the imbalance tariff) and suspend the payment of any traffic imbalance charges by the Bell companies to Fibernetics during the interim period.
3. The Bell companies submitted that there has been a general decline in traffic imbalance payments to competitive local exchange carriers since Telecom Decision 2010-787 was issued; however, traffic imbalance payments to Fibernetics have been increasing. As a result, the Bell companies investigated the cause of the increasing imbalance payments by conducting a series of random tests of traffic transmitted to them over facilities leased by a third party that they suspected was being used by Fibernetics to divert its internal customer traffic.

¹ In the application, the Bell companies requested that the Commission (i) permanently eliminate the payment of any traffic imbalance charges by the Bell companies to Fibernetics from the date Fibernetics' tariff is designated as interim, and (ii) issue a general declaration that carriers may not send traffic that originates and terminates on their own network (i.e. internal customer traffic) over bill-and-keep trunks.

4. The Bell companies submitted that their tests and analysis revealed that a percentage of Fibernetics-destined traffic transmitted to them by a third party was internal Fibernetics customer traffic.
5. The Commission received an intervention from Fibernetics regarding the Bell companies' request for interim relief. The public record of this proceeding is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.

Issues

6. The Commission has identified the following issues to be addressed in this decision:
 - Should the Commission order the Bell companies to disclose certain confidential information to Fibernetics?
 - Should the Commission grant the Bell companies' request for interim relief?

Should the Commission order the Bell companies to disclose certain confidential information to Fibernetics?

7. In their application, the Bell companies provided, in confidence to the Commission, the call details and the name of the third party from their investigation.
8. Fibernetics requested that the Commission (i) direct the Bell companies to file with the Commission and disclose fully to Fibernetics all of the underlying data, assumptions, methodology, call details, and the name of the third party on which the claims made in the application were based; and (ii) extend the date for filing its answer.
9. The Bell companies replied that they did not object to providing the information; however, they stated that requested information pertains to call details regarding facilities leased by a third party. They stated that pursuant to their confidentiality agreements with that party, they cannot release the call details or the identity of the party without a Commission directive requiring them to do so. In addition, the Bell companies did not object to Fibernetics' procedural request for a filing extension, especially if the imbalance tariff rates were made interim.
10. The date for Fibernetics to file an answer was suspended pending a Commission decision on the Bell companies' request for a Commission directive for the disclosure of confidential information.
11. Commission staff sent a letter, in confidence, to the third party advising it that the Bell companies had identified it, in confidence, as having transferred the traffic at issue to the Bell companies, and that Fibernetics was requesting disclosure of the call details and the name of the third party. Commission staff also stated that it considered the third party to be an interested party under subsection 39(4) of the *Telecommunications Act* (the Act), and advised the third party that it could file

comments, in confidence, on the Bell companies' willingness to disclose the information to Fibernetics. The third party did not provide any comments.

Commission's analysis and determinations

12. In considering requests for disclosure of information for which confidentiality has been claimed, the Commission is governed by the provisions of sections 38 and 39 of the Act and sections 23 and 33 the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*.
13. Under subsection 39(4) of the Act, where information is designated as confidential and is submitted in the course of a proceeding before the Commission, the Commission may disclose or require the disclosure of the information where it determines that, after considering any representations from interested persons, the disclosure is in the public interest.
14. As noted above, the date for Fibernetics to file its answer to the Bell companies' application was suspended. The Commission considers that Fibernetics requires the confidential information in question so that it can be in a position to meaningfully address the matters raised by the Bell companies.
15. The Commission considers that disclosure would not likely cause specific direct harm to either the Bell companies or the third party. To the extent that there may be such harm, it is outweighed by the public interest in favour of disclosure of the information to Fibernetics so that the company is in a position to make meaningful comments. Further, any harm is mitigated by the fact that disclosure is to Fibernetics only.

Conclusion

16. In view of the above, the Commission **directs** the Bell companies to release in confidence to Fibernetics, by **19 January 2015**, the call details and the name of the third party, with a copy to the Commission.
17. The Commission also **directs** the Bell companies to file with the Commission a copy of the underlying data, assumptions, and methodology that they stated they would provide to Fibernetics when they submit this information to Fibernetics.

Should the Commission grant the Bell companies' request for interim relief?

Making Fibernetics' tariff interim

18. The Commission considers that the record of this proceeding provides sufficient justification to make the imbalance tariff rates interim, which would allow the Commission to order that retroactive payments be made to the Bell companies for the period between the date of the decision and the disposition of the application on a final basis if the Bell companies' claim for relief were to be granted.

Suspending traffic imbalance payments to Fibernetics

The test for interim relief

19. When assessing applications for interim relief, the Commission's practice is to apply the criteria set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, and modified in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311. These criteria (the RJR-MacDonald criteria) are that (i) there is a serious issue to be determined, (ii) the party seeking the interim relief will incur irreparable harm if the relief is not granted, and (iii) the balance of convenience, taking into account the public interest, favours granting the interim relief. To be successful, an applicant must meet all three criteria.

Is there a serious issue to be determined?

20. The Bell companies submitted that their application raised the following issues that meet the threshold for a serious issue to be determined:

- Fibernetics' own internal customer traffic should be routed on the company's own network, not diverted to the Bell companies' network via a third party to be returned to the original carrier (Fibernetics) by the Bell companies over bill-and-keep trunks;²
- Fibernetics' actions are an abuse of the Commission's compensation for traffic imbalance regime; and
- Fibernetics' actions, left unchecked, have the capability to threaten the long-term integrity and viability of the traffic imbalance regime.

21. Fibernetics submitted that the speculative nature of the Bell companies' application, and the absence of any evidence or demonstration of contravention of any Commission ruling regarding traffic imbalance indicate that the Bell companies fall far short of demonstrating that there is any issue to be determined.

22. The Bell companies replied that contrary to Fibernetics' claim, they have provided evidence of Fibernetics' practice of routing internal local customer traffic³ to artificially elevate levels of traffic imbalance in the company's favour and prevent the bill-and-keep trunks⁴ from reaching a balanced or nearly balanced state.

² Trunks are the interconnecting facilities that local exchange carriers (LECs) use to exchange traffic.

³ "Internal local customer traffic" is defined as local voice traffic that is originated by and destined to Fibernetics' own customers.

⁴ Under the bill and keep approach, the originating carrier bills its customers for calls and keeps the corresponding revenue. The originating carrier does not compensate the terminating carrier for call termination expenses. Where an imbalance exists, the LEC originating less traffic than it terminates is entitled to compensation from the other LEC.

Commission's analysis and determinations

23. The Commission notes that the threshold for a finding that there is a serious issue to be tried is low. The question is whether or not the application for final relief is frivolous or vexatious. Based on the record, the Commission is satisfied that the Bell companies have demonstrated that there is a serious issue to be determined regarding the compensation for traffic imbalance regime.

Will the Bell companies incur irreparable harm absent interim relief?

24. The Bell companies submitted that they are suffering continual harm as a result of Fibernetics' practices. They submitted that it was therefore necessary that the Commission designate Fibernetics' imbalance tariff as interim and suspend all traffic imbalance payments from the Bell companies to Fibernetics until the Commission issues a ruling regarding the application.

25. The Bell companies submitted that if traffic imbalance payments from them were suspended during the interim period, Fibernetics would be tracking the payments that would otherwise be due. If the Commission eventually ruled in Fibernetics' favour, Fibernetics could retroactively bill the Bell companies for the suspended payments owed.

26. Fibernetics submitted that the Bell companies had failed to demonstrate that it had acted in a manner that contravenes any Commission determination. Fibernetics argued that in the absence of any unlawful conduct by the company, the Bell companies have not suffered any harm whatsoever, let alone irreparable harm. It added that in the event that the Commission finds that Fibernetics was routing traffic improperly, the payments made by the Bell companies to Fibernetics would be insignificant to the Bell companies.

27. Fibernetics further submitted that the Bell companies had failed to demonstrate that the requirement to make imbalance payments amounted to irreparable harm within the meaning of the law, which contemplates that it would be difficult, if not impossible, for Fibernetics to compensate the Bell companies for the harm incurred. Fibernetics submitted that the type of traffic that the Bell companies describe, if it exists, can be quantified through measurements and subsequent estimates; therefore, the Bell companies can be adequately compensated by Fibernetics if they were successful in their application for final relief.

28. In reply, the Bell companies submitted that failure to grant the interim relief would result in a situation whereby they would not be compensated for traffic imbalance payments made to Fibernetics during the period in which their application is under review, if the Commission approves the application. They argued that the magnitude of these amounts or their ability to absorb the unrecovered payments was immaterial; what matters in the determination of irreparable harm is whether such harm can be compensated. They submitted that their request satisfied the Commission's criterion of irreparable harm.

Commission's analysis and determinations

29. The Commission notes that in determining whether there is irreparable harm, the issue it must assess is whether the Bell companies can be compensated absent interim relief if their request for final relief is granted.
30. The Commission notes that by making Fibernetics' imbalance tariff interim, the Commission may amend the rates for the period in question such that the Bell companies would be compensated for the payments made to Fibernetics if their application for final relief were successful. Hence, in the Commission's view, the Bell companies have not provided sufficient evidence to demonstrate irreparable harm.

Does the balance of convenience, taking into account the public interest, favour granting the interim relief?

31. The Bell companies submitted that failure to grant their requested interim relief would provide Fibernetics financial incentive to unnecessarily prolong the proceeding and cause irreparable harm to them. The Bell companies argued that this harm could only be partially offset by a lengthy and costly exercise after the fact to attempt to quantify the harm done during the interim period. They submitted that the balance of convenience favours granting their requested interim relief that all traffic imbalance payments by them to Fibernetics be suspended during the period in which the Commission reviews their application.
32. Fibernetics submitted that the traffic imbalance revenues in dispute represent a greater financial impact on Fibernetics than they would for the Bell companies. Fibernetics argued that the balance of convenience is such that it should not be deprived of these revenues without due process. This includes the disclosure of certain confidential information by the Bell companies so that Fibernetics can respond to the Bell companies' application, and a clear Commission determination can be made that the routing of certain traffic resulting in those revenues should no longer attract traffic imbalance payments.
33. In reply, the Bell companies submitted that suspension of payments until the Commission's final determination is issued would be the most efficient and simple approach, and would allow for a single payment to be made once the Commission's final determination is made, rather than have several payments during the interim period with probable retroactive adjustments after the Commission's final determination. They argued that, therefore, the balance of convenience favours granting the requested interim relief.

Commission's analysis and determinations

34. Given that the Bell companies have not established irreparable harm, it is not necessary for the Commission to consider whether the balance of convenience favours granting the interim relief.

Conclusion

35. In light of the foregoing, the Commission **approves** the Bell companies' request to make Fibernetics' imbalance tariff interim, effective the date of this decision, but **denies** their request to suspend traffic imbalance payments from them to Fibernetics during the interim period.
36. The Commission **directs** Fibernetics to issue revised tariff pages⁵ for item 201 – Compensation for Traffic Termination by **19 January 2015**.

Secretary General

Related document

- *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Proposed revision to the treatment of imbalance traffic compensation, Telecom Decision CRTC 2010-787, 25 October 2010, as amended by Telecom Decision CRTC 2010-787-1, 16 August 2011*

⁵ Revised tariff pages can be submitted to the Commission without a description page or a request for approval; a tariff application is not required.