



Telecom Decision CRTC 2005-15

Ottawa, 17 March 2005

Part VII application to revise Article 11 of the Terms of Service

Reference: 8665-A53-200414417

In this Decision, the Commission directs Canadian carriers to modify their existing tariffs, customer contracts, and other arrangements to expand the list of acceptable methods of obtaining express consent for the disclosure of confidential customer information.

1. The Commission received an application from Bell Canada on behalf of itself; Aliant Telecom Inc.; Bell Mobility; NorthernTel, Limited Partnership; Northwestel Inc.; and Société en commandite Télébec (collectively the Companies); dated 29 November 2004, and filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*. In their application, the Companies requested a revision to Article 11 of the Terms of Service with respect to the methods of obtaining express customer consent for the disclosure of confidential customer information.

Process

2. The Commission received comments, dated between 20 December and 29 December 2004, from the Canadian Cable Telecommunications Association, Quebecor Média inc., MTS Allstream Inc., Rogers Communications Inc., and TELUS Communications Inc. and TELE-MOBILE COMPANY (collectively, the respondents).
3. The Commission received reply comments from the Companies, dated 13 January 2005.

The application

4. The Companies noted that in *Confidentiality provisions of Canadian carriers*, Telecom Decision CRTC 2003-33, 30 May 2003 (Decision 2003-33), as amended by Telecom Decision CRTC 2003-33-1, dated 11 July 2003 (Decision 2003-33-1), the Commission had expanded the forms of express consent required by Canadian carriers for the disclosure of confidential customer information, such that express consent might be taken to be given by a customer where the customer provided:
 - written consent;
 - oral confirmation verified by an independent third party;
 - electronic confirmation through the use of a toll-free number; or
 - electronic confirmation via the Internet.

5. The Companies submitted that while these existing methods provided some notional flexibility with respect to the collection of express consent, there were a number of shortcomings with them. The Companies also submitted that, in most cases, these methods provided little additional benefit beyond the previous written consent requirement. In the Companies' view, both oral confirmation verified by an independent third party and electronic confirmation through the use of a toll-free number were logistically awkward and disruptive to customers attempting to manage their telecommunications services with the Companies. According to the Companies, while electronic confirmation via the Internet did not present the same problems, the Internet was used to process online information transactions by too small a segment of customers to constitute a practical method for obtaining express customer consent.
6. The Companies argued that each of the express consent methodologies approved to date by the Commission could be characterized by two essential requirements, which were:
 - first, that the consent must require some deliberate, unequivocal action on the part of the customer in order to signify that the consent was express and not implied; and
 - second, that an acceptable form of consent must produce a record of the consent transaction that would be retained for as long as that consent was relied upon.
7. The Companies submitted that any consent methodology that might be available, currently or in the future, that would satisfy these two requirements, should satisfy the express consent requirement found in the Commission's restriction on confidentiality of customer information. The Companies further submitted that it was a far more efficient use of time and resources – for customers, the Commission, and telecommunications service providers (TSPs) – to establish express consent requirements that were based on clearly identified principles, rather than maintaining a regime where the Commission must approve each and every particular express consent method that TSPs might want to employ.
8. The Companies requested that the Commission amend the text of the Terms of Service dealing with the confidentiality of customer information by replacing the paragraph that describes the four existing methods for obtaining express consent to disclose confidential customer information with the following:

Express consent may be taken to be given by a customer where, in response to a request for consent, the customer signifies acceptance by providing an active, positive affirmation, and a record of the customer's consent is retained by [the Company].

9. As an alternative, the Companies requested that should the Commission determine that it must approve each potential express consent methodology rather than the text noted above, then the Terms of Service should be revised to add the following to the list of methods for obtaining express consent to disclose confidential customer information:

Oral consent, where an audio recording of the consent is retained by the Company.

10. The Companies submitted that, in the case of this alternative, customers would be advised of any such recording and its purpose, and that any audio recordings would be made in accordance with both the *Personal Information Protection and Electronic Documents Act (PIPED Act)* and the *Best Practices for Recording of Customer Telephone Calls* established by the Privacy Commissioner of Canada.
11. The Companies noted that they intended to use alternative forms of express consent to more efficiently obtain the required customer authorization, solely to share customer profile information with affiliated companies.
12. The Companies submitted that the requested modification to the existing restrictions would allow for more responsive and attractive offers and more efficient and effective service to customers. The Companies further submitted that customers and the Commission would be assured of the continued protection of customer privacy, including ongoing compliance with the Commission's restriction on confidentiality of customer information and the *PIPED Act*.
13. The Companies submitted that it was their intention, under each alternative, to retain records of express consent for as long as they intended to rely on such consent, and to provide access to such recordings in response to a request by a customer for access to personal information, consistent with the requirements of the *PIPED Act*.

Positions of parties

14. The respondents fully supported the application as filed, including the two alternatives as proposed. The respondents requested that the Companies' proposed amendments be extended to apply to all TSPs subject to the Commission's restrictions on confidentiality of customer information.

The Companies' reply comments

15. The Companies noted that the respondents had provided full and unequivocal support to the application as filed and had asked that the amendments requested by the Companies be extended to apply to other carriers subject to the Commission's restrictions on confidentiality of customer information.
16. The Companies further noted that the respondents were, or represented, current or potential competitors of the Companies and that no party had opposed the application, nor made any argument or adduced any evidence that would support a denial of the Companies' application.

Commission's analysis and determinations

17. The Commission notes that prior to Decision 2003-33, the only acceptable method of obtaining customer consent to the disclosure of confidential customer information was written consent. In Decision 2003-33, the Commission denied the request by some parties to allow the disclosure of confidential customer information based on implied consent. The Commission confirmed that where customer consent was required, express consent remained the appropriate type of consent. The Commission recognized, however, that it was appropriate to expand the list of acceptable means of obtaining express customer consent to include those methods which had been

approved previously by the Commission in *Optel Communications Corporation vs. Bell Canada – CRTC clarifies contract requirements for local link service*, Order CRTC 2000-250, 30 March 2000. The Commission considered that these methods would allow Canadian carriers greater flexibility in obtaining customers' consent to the disclosure of their confidential information, while still allowing a sufficient level of privacy protection.

18. In *Follow-up to Telecom Decision CRTC 2003-33 – Confidentiality provisions of Canadian carriers*, Telecom Decision CRTC 2004-27, 22 April 2004, the Commission directed all Canadian carriers, as a condition of providing telecommunications services, to include in their service contracts or other arrangements with resellers, the requirements that these resellers abide by the confidentiality provisions approved in Decision 2003-33, as amended in Decision 2003-33-1.

The "blanket" rule

19. In the Commission's view, the Companies' preferred alternative of replacing the list of acceptable methods of obtaining express consent with a "blanket" rule does not provide customers with sufficient privacy protection.
20. The Commission notes that under the Companies' proposed blanket rule, express consent would be considered to have been obtained where the customer provides an active positive affirmation and a record of the customer's consent is retained by the Company. In Decision 2003-33, the Commission rejected a proposal that would have allowed express consent to be obtained by means of verbal consent from the customer followed by a letter of confirmation from the Canadian carrier to the customer. The Commission considered that this method would inappropriately put the onus on the customer to dispute the confirmation letter and would not, therefore, be an acceptable method of obtaining express customer consent.
21. The Commission also notes that the key characteristic of all of the approved methods of obtaining express customer consent is that the record of that consent is not created by the party obtaining the consent. In all of these cases, a documentary record is created in an objective manner, thereby drastically reducing the possibility of disputes between the customer and the Canadian carrier over whether consent has been given. The Commission notes, further, that with all of these methods, the onus of proving that consent was given lies with the Canadian carrier, who must produce the documentary record containing the consent of the customer.
22. The Commission considers that the blanket rule, as proposed by the Companies, would allow for the adoption of methods of consent that would conflict with the Commission's concerns expressed in Decision 2003-33. The Commission considers that the Companies' proposal is worded so broadly that it would allow for the possibility of oral consent with a written record created by the company rather than by the customer or an independent third party. In the case of a dispute between the customer and the company over whether consent had been given, the burden would be placed on the customer to dispute the correctness of the company's record keeping. The Commission is of the view that, in the absence of an objective method of record gathering, such disputes would be reduced to a contest of the customer's word versus the company's word.

23. The Commission considers that the Companies' proposed blanket rule does not provide customers with sufficient privacy protection. The Commission also considers that this rule would open the door to methods of consent that would not result in an objective record of consent being created by the customer or an independent third party, but would, however, shift the burden of disputing the fact of consent to the customer.

The audio recording method

24. The Commission notes that the Companies proposed, as an alternative, that the Commission should add another option to the list of acceptable methods of obtaining customer consent to the disclosure of confidential customer information. This alternative consists of oral consent, where an audio recording of the consent is retained by the company.
25. The Commission considers that the audio recording method would result in a record of the consent being created in an objective manner by the action of the customer, in contrast to the blanket rule discussed above. The Commission also considers that the audio recording method would be consistent with the other methods previously approved by the Commission in Decision 2003-33.
26. The Commission considers, further, that the reasons provided in the Companies' application and the unanimous support provided by the respondents demonstrate that the current acceptable methods of obtaining customer consent do not provide TSPs with sufficient flexibility to obtain customer consent in a manner that is practical for the Companies, while still protecting the privacy of customers.
27. The Commission notes the Companies' commitment to advise customers of any recording and its purpose, and their commitment that any audio recordings would be made in accordance with both the *PIPED Act* and the *Best Practices for Recording of Customer Telephone Calls* established by the Privacy Commissioner of Canada. Accordingly, the Commission considers that the audio recording method would provide customers with sufficient privacy protection.

Additional methods

28. The Commission considers, further, that maintaining a regime where the Commission must approve each and every particular express consent method that TSPs may want to employ would not result in the most efficient use of time and resources – for customers, the Commission, or the TSPs. In the Commission's view, permitting the TSPs to obtain consent through other methods that ensure that the customer or an independent third party create an objective documented record of customer consent would provide greater flexibility to the TSPs, while still ensuring sufficient privacy protection for customers.

Conclusion

29. In light of the above, the Commission directs Canadian carriers to modify their existing tariffs, customer contracts, and other arrangements to amend the list of acceptable methods of obtaining express consent as determined in the last paragraph of Decision 2003-33-1 as follows:

Express consent may be taken to be given by a customer where the customer provides:

- *written consent;*
 - *oral confirmation verified by an independent third party;*
 - *electronic confirmation through the use of a toll-free number;*
 - *electronic confirmation via the Internet;*
 - *oral consent, where an audio recording of the consent is retained by the carrier; or*
 - *consent through other methods, as long as an objective documented record of customer consent is created by the customer or by an independent third party.*
30. The Commission also directs those Canadian carriers that offer services pursuant to approved tariffs to file for approval proposed tariff pages reflecting the determinations made in paragraph 29, no later than **15 April 2005**.
31. The Commission directs, further, as a condition of providing telecommunications services, that Canadian carriers include, on a going-forward basis, provisions reflecting the direction given in paragraph 29 in customer service contracts and other arrangements, including those with resellers, with respect to all forborne services, except forborne mobile wireless services that are not switched (affected forborne services). In addition, these provisions will also apply to all existing customers of affected forborne services, including resellers, regardless of whether the provisions were included in the service contracts or other arrangements entered into by those customers.

Secretary General

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