



Telecom Decision CRTC 2006-45

Ottawa, 28 July 2006

Part VII application by Rogers Cable Communications Inc. regarding Aliant Telecom Inc.'s termination and assignment of a support structure agreement

Reference: 8690-R28-200512534

The Commission finds that Aliant Telecom Inc. (Aliant Telecom) could terminate its Support Structure Agreement (the SSA) with Rogers Cable Communications Inc. (Rogers) at any time, without cause, after providing one year's prior written notice to Rogers. Accordingly, the SSA terminated on 1 February 2006. The Commission further finds that Aliant Telecom could not assign its obligations under the SSA. Therefore, Aliant Telecom remained liable for non-performance of its obligations under the 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.

The application

1. On 2 November 2005, Rogers Cable Communications Inc. (Rogers) filed an application pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, sections 24, 25, and 32 of the *Telecommunications Act* as well as section 11 of the Support Structure Agreement (the SSA) between Rogers and Aliant Telecom Inc. (Aliant Telecom).
2. In its application, Rogers sought a declaration from the Commission that:
 - the 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 SSA by Aliant Telecom, the terms and conditions of all permits issued by Aliant Telecom or any assignee under the SSA, including the pole access rate, were as set out in the SSA and item 901 – Support Structure Service of the National Services Tariff (the NST);
 - notwithstanding assignment of all or any part of the SSA by Aliant Telecom, Aliant Telecom remained liable for non-performance of its obligations under the SSA;
 - in the event that Aliant Telecom wished to introduce changes to the SSA or the NST, Aliant Telecom had to seek prior approval from the Commission; and
 - Aliant Telecom could not modify its joint-use arrangements in a manner that prejudiced existing rights of third-party attachers.

Process

3. By letter dated 5 November 2005, Commission staff advised Rogers that it understood that Rogers had already requested that the New Brunswick Board of Commissioners of Public Utilities (the Board) establish a rate for cable attachments to the electric power poles of the New Brunswick Power Distribution and Customer Service Corporation (NB Power), and that the Board had subsequently determined on 27 October 2005 that it had jurisdiction to set the pole attachments rate charged by NB Power to Rogers. At that time, Commission staff further advised Rogers that Rogers' request regarding the terms and conditions of the SSA between Rogers and Aliant Telecom need not be addressed in view of the fact that the Board was seized with this matter.
4. By letter dated 15 November 2005, Rogers advised the Commission that it disagreed with the proposition that the Commission's jurisdiction with respect to the relief requested in its application was affected by the Board's decision. At that time, Rogers stated, however, that in the interest of expediency and on the understanding that the Commission would deal with all other aspects of the relief requested in its application, Rogers would not object to the proposal that the Commission not deal with the relief identified in Commission staff's letter of 5 November 2005. Rogers reserved the right to revisit its position in light of any comments filed with respect to its application.
5. In light of the above, the Commission will not address Roger's request for a declaration that, notwithstanding assignment of all or any part of the SSA by Aliant Telecom, the terms and conditions of all permits issued by Aliant Telecom or any assignee under the SSA, including the pole access rate, were as set out in the SSA and item 901 of the NST.
6. The Commission received an answer from Aliant Telecom dated 2 December 2005, reply comments from Rogers dated 12 December 2005, as well as additional comments from Aliant Telecom dated 16 December 2005.

Background

7. On 11 July 1996, the former New Brunswick Telephone Company (now part of Aliant Telecom) entered into a Joint Sub-Agreement: Support Structure – Third Party Attachments (the JUA) with NB Power for the provision of third-party access to, and use of, their facilities. The JUA took effect 1 April 1996.
8. Subsection 1(b) of the JUA indicated that all requests by a third party to place attachments for communications purposes on joint use poles owned by Aliant Telecom or NB Power were to be directed to Aliant Telecom.¹

¹ Subsection 1(b) of the JUA stated:
Any request by a third party for attachment to poles or to share in the use of a conduit system owned by either of the parties, or for extension of any existing use by such third party of poles or underground facilities owned by either of the parties, shall be directed to [Aliant Telecom] if the proposed attachments or use are intended for communication purposes, and to [NB Power], if intended for transmission of electric power or energy.

9. Subsection 2(a) of the JUA indicated that Aliant Telecom would collect the revenues from third parties on behalf of itself and NB Power.
10. In *Rates set for access to telephone companies' support structures*, Order CRTC 2000-13, 18 January 2000 (Order 2000-13), the Commission approved the support structure tariff, NST item 901 and the SSA (in form). The provisions of the support structure tariff are expressly incorporated by reference in the SSA.
11. In light of the JUA, on 31 May 2002 Rogers entered into the SSA, which provided it access to and use of the poles owned by either Aliant Telecom or NB Power. The pole rate for such access was \$9.60 per year and there was no charge or gross-up for clearance poles.
12. In 2004, NB Power notified Aliant Telecom that it was terminating certain provisions of the JUA relating to the parties' agreement on the administration of joint-use poles owned by NB Power. In addition, NB Power assumed the responsibility for administering billing for third-party access to the poles it owned. According to Aliant Telecom, NB Power took these actions in light of the ruling of the Supreme Court of Canada in *Barrie Public Utilities v. Canada Cable Television Assn.*, [2003] 1 S.C.R. 476 (*Barrie*) that the Commission does not have the jurisdiction to regulate the terms of access to supporting structures owned by provincially regulated electric power companies.
13. In or about October 2004, NB Power started invoicing Rogers for 108,904 poles, which included a markup of 20 percent for clearance poles on NB Power's estimated 90,754 joint-use poles. NB Power invoiced Rogers at a rate of \$18.91 per pole per year. NB Power also indicated that the annual rate would rise to \$23.50 and \$28.05 on 1 May 2005 and 1 May 2006, respectively.
14. By letter dated 31 January 2005, Aliant Telecom provided Rogers notice of the termination of the SSA, effective 1 February 2006, pursuant to section 8.1 of the SSA. In that letter, Aliant Telecom also confirmed that it had assigned the administration of NB Power-owned poles to NB Power and that NB Power would be billing and collecting the amounts owed for those poles from Rogers, beginning as of 1 September 2004.

Issues

15. The issues considered in this Decision are discussed below in the following sections:
 - A. Term of the SSA
 - B. Assignment of the SSA
 - C. Approval of changes to the SSA or to the NST
 - D. Modification of the JUA

A. Term of the SSA

16. Section 8.1 of the SSA states:

Subject to the termination provisions of [the SSA], [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 thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

Positions of parties

17. Rogers submitted that the words of a contract were to be given their plain and ordinary meaning unless this resulted in ambiguity or absurdity. Rogers also submitted that it was a fundamental principle that the interpretation of a contract was governed by the specific intent of the parties and that such intent should be determined by examining the words of the SSA together with the subject matter and circumstances surrounding the signing of the SSA.
18. Rogers submitted that the plain and ordinary meaning of section 8.1 of the SSA was that such agreement could only be terminated at the end of the five-year (current or renewal) term. Furthermore, Rogers submitted that such an interpretation was consistent with the intention of the parties as well as the inherently long-term nature of support structure arrangements.
19. Rogers submitted that if Aliant Telecom could terminate the SSA at any time upon one year's notice to Rogers, then the express agreement by the parties to a five-year term was effectively meaningless, and all of the following words of the section would be mere surplusage: "...for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms."
20. In its answer, Aliant Telecom submitted that section 8.1 of the SSA was clear and unambiguous on its face, and when given its plain and ordinary meaning, that section could only be interpreted as to allow the termination of the SSA, by either party, after providing one year's prior notice at any time. In particular, Aliant Telecom submitted that, based on grammatical rules of punctuation, since the comma in section 8.1 closed the clause "and thereafter for successive five (5) year terms", the subsequent qualifier "unless and until terminated by one year prior notice in writing by either party" qualified all of the preceding section. Aliant Telecom added that, had the intention been to limit the right to terminate to the end of the five-year term, there would have been no comma placed before the word "unless" and clear wording would have been included specifying by what date the notice was required.
21. Aliant Telecom also submitted that the one-year length of the termination notice was considerable, which supported the interpretation that the right to terminate could be exercised at any time. Aliant Telecom further submitted that the right to terminate had been given to both parties, which indicated that it was distinct from other termination rights in the SSA.
22. Aliant Telecom submitted that the terminology used in the SSA provided the parties a right to "terminate" upon one year's prior notice, not merely to give one year's prior notice of expiration. Aliant Telecom argued that if the latter had been the intent of the parties, it would

be clear and explicit in section 8.1; that is, the word "termination" would have been replaced with the word "expiration" and additional words would have been necessary to clearly articulate that the notice to be provided would be one year's prior notice "before the end of the current term."

23. In its reply comments, Rogers submitted that Aliant Telecom's proposed interpretation of section 8.1 was inconsistent with the unambiguous agreement of the parties to an initial term of five years, followed by renewal terms of five years each. Rogers stated that a one-year notice period was not excessive. Rogers submitted that even if it could build its own pole line to replace Aliant Telecom's and NB Power's poles, which was not the case, it would require well in excess of one year to do so. Rogers added that, given the nature of the subject matter of the SSA, it was highly unlikely that the parties would have contemplated granting to each other the right to terminate the SSA at any time on one year's notice. Rogers submitted that stable access to support structures was essential to the operation of cable distribution undertakings and telecommunications common carriers, and long-term support structure agreements were therefore necessary to ensure the on-going operation of these types of undertakings. In Rogers' view, providing a party with the ability to terminate the SSA every five years was not a long period of time in this context.
24. Rogers submitted that if the parties had intended to have the ability to terminate the SSA on one year's notice, they would have expressly stated so in the SSA or would have limited the term of the SSA to one year.
25. In response to Rogers' reply comments, Aliant Telecom submitted that it had terminated the SSA at NB Power's request, in order to grant NB Power the rights conferred to it in *Barrie*. Aliant Telecom submitted that to hold NB Power to the terms of the SSA would be against the spirit of *Barrie*, since it would extend the Commission's regulation to a power utility.
26. Aliant Telecom further submitted that the parties' intentions were clear within the words and the structure of the clause in section 8.1 of the SSA. Aliant Telecom submitted that, had the parties wanted to ensure that the SSA would not be terminated before the five-year term, they could have easily expressed their intention explicitly, which they had not.

Commission's analysis and determinations

27. The Commission is of the view that the wording in section 8.1 of the SSA is clear and unambiguous. The Commission notes 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" means that that phrase qualifies both the phrases "[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".
28. The Commission further notes that the phrase "unless and until terminated by one year prior notice in writing by either party" does not specify any triggering event from which to give notice. The Commission agrees with Aliant Telecom that had the intention been to limit the right to terminate to the end of the current and any renewal term of the SSA, clear wording would have been included specifying by what date the notice was required. The Commission

considers, therefore, that notice of termination under section 8.1 of the SSA is not limited to any specific period in time. In light of the above, the Commission is of the view that the plain and ordinary meaning of section 8.1 of the SSA allows for the termination of the SSA at any time, without cause, upon one year's written notice.

29. The Commission considers that the above interpretation does not bring about an unrealistic result or a result that would not be contemplated in a commercial environment.
30. In light of the above, the Commission finds that the wording in section 8.1 of the SSA is clear and unambiguous, and when given its plain and ordinary meaning, allows the termination of the SSA, by either party at any time, after providing one year's prior written notice.

B. Assignment of the SSA

31. Section 12.5 of the SSA states:

This Agreement may be assigned, in whole or in part, by either party upon thirty (30) days written notice, provided that any assignment by [Rogers] shall be subject to [Aliant Telecom]'s prior written consent that shall not be unreasonably withheld. [...]

Positions of parties

32. Rogers submitted that it did not dispute that Aliant Telecom could assign its rights under the SSA. However, Rogers submitted that such an assignment did not alter the terms of the SSA or Aliant Telecom's obligations. In particular, Rogers submitted that the assignment of contract did not operate to transfer the obligations under the contract unless the parties expressly agreed to the new arrangement. Rogers indicated that the process by which contractual liability was transferred was referred to as novation. Rogers submitted that novation had not occurred and the SSA remained in place. Further, Rogers indicated that if a party to a contract could assign liability for performance with impunity, then a party could escape its contractual obligations by transferring liability to an entity with no assets or ability to perform. Therefore, Rogers submitted that Aliant Telecom remained liable for non-performance of its obligations to provide access to joint-use poles in accordance with the terms and conditions of the SSA.
33. In its answer, Aliant Telecom submitted that section 12.5 of the SSA allowed it to assign the SSA, in whole or in part, upon notice to Rogers, without Rogers' consent. Aliant Telecom submitted that it had assigned the administration for NB Power-owned poles to NB Power in response to that company's request. Aliant Telecom submitted that the assignment was not for the purpose of avoiding its contractual obligations. Aliant Telecom added that the assignment had allowed the party that owned the assets to administer access to them, and that NB Power's decision to administer its assets was related to, and consistent with *Barrie*.
34. In reply, Rogers submitted that Aliant Telecom's assignment of the SSA, although permitted, had not absolved it of its contractual obligations, including its obligation to provide access to the poles at the rate of \$9.60 per pole per year.

35. In response to Rogers' reply comment, Aliant Telecom submitted that although it would need Rogers' consent to assign the SSA in common law, the SSA specifically allowed Aliant Telecom to assign without seeking Rogers' consent. Aliant Telecom submitted that, therefore, it was no longer responsible for the assigned portion of the SSA.

Commission's analysis and determinations

36. The Commission notes that a contract is a mixture of rights and obligations. One party to a contract, the assignor, may assign the rights of the contract in his or her favour to a third party, the assignee. The assignor may not, however, assign his or her obligations and release himself or herself from his or her primary liability for the obligations under the contract without the express consent of the other contracting party. This principle seeks to ensure that a party cannot escape its contractual obligations by transferring liability to an entity with no assets or ability to perform.
37. In light of the above, the issue becomes whether the language in section 12.5 of the SSA constitutes express consent to the transfer of obligations. In this case, section 12.5 of the SSA indicates that "this Agreement may be assigned, in whole or in part [...]". This section only references the word "Agreement." It does not specifically reference the assignment of "burdens," "obligations," or "liabilities," absent wording which the Commission considers is key in determining whether Rogers has expressly consented to the assignment of obligations.
38. In light of the above, the Commission finds that the word "Agreement" in section 12.5 of the SSA is not sufficiently clear to indicate Rogers' express consent to have permitted Aliant Telecom to assign its obligations to NB Power. Therefore, the Commission concludes that Aliant Telecom remained liable for the non-performance of any of its obligations under the SSA. Such obligations included providing access to NB Power poles at the rate of \$9.60 per pole per year until the SSA was terminated.

C. Approval of changes to the SSA or to the NST

Positions of parties

39. Rogers requested that the Commission declare that in the event that Aliant Telecom wished to introduce changes to the SSA or to the NST, it must seek prior approval from the Commission.
40. In its submissions, Aliant Telecom stated that it was not seeking to make any changes to the form of the SSA or the NST. Aliant Telecom stated that if it sought any changes to the SSA or to the NST, it would seek the required approval of the Commission.

Commission's analysis and determinations

41. The Commission notes that Aliant Telecom is not proposing any changes to the NST or to the SSA and that it has agreed to seek the Commission's approval should any changes be sought. Therefore, the Commission's approval of any amendments to the SSA or to the NST is not required in this case at this time.

D. Modification of the JUA

42. Item 901.3(g) of the NST states:

Nothing contained in this [NST] item limits, restricts or prohibits the Company from honouring existing or entering into future joint-use or joint ownership agreements regarding Support Structures used or offered under this [NST] item and the SSA, provided that the existing rights of a Licensee shall not be prejudiced by a joint-use or joint-ownership agreement entered into by the Company after the Licensee has been granted access to Support Structures. The one exception to this provision is a circumstance in which the Company is forced to move a Support Structure by a property owner, in which case a Licensee must move its facilities at its own expense.

Positions of parties

43. Rogers submitted that if there was any doubt about the interpretation of the SSA, item 901.3(g) of the NST made it clear that Aliant Telecom could not modify its joint-use arrangements and enter into new joint-use arrangements that prejudiced the existing rights of Licensees, such as Rogers.
44. In its submissions, Aliant Telecom stated that it did not dispute Rogers citing item 901.3(g) of the NST as precluding Aliant Telecom from entering into future joint-use agreements that prejudiced the rights of existing Licensees. Aliant Telecom argued, however, that its termination of the SSA did not constitute Aliant Telecom entering into a new joint-use agreement. Aliant Telecom stated that it was merely acting in accordance with the terms of the SSA and responding to NB Power's request that it govern third-party access to its own support structures, in accordance with *Barrie*.
45. In its reply comments, Rogers agreed that the termination of the SSA was not a new joint-use agreement. Rogers submitted, however, that the joint-use arrangements that were pertinent were the arrangements between NB Power and Aliant Telecom. Rogers argued that it was revisions to these arrangements that had motivated Aliant Telecom's assignment to NB Power of parts of the SSA as well as its position on termination of the SSA. Rogers submitted that, as indicated in its application, if there were any doubt about the interpretation of the SSA, the NST made it clear that Aliant Telecom could not modify its joint-use arrangements in a manner that prejudiced the existing rights of Licensees, such as Rogers.
46. In reply, Aliant Telecom stated that the termination of a portion of the JUA between Aliant Telecom and NB Power had been requested by NB Power and was in accordance with the terms of the JUA. Aliant Telecom asserted that NST item 901.3 was clear in its application that it restricted Aliant Telecom from entering into any future joint-use agreements that would prejudice Rogers' use of Aliant Telecom's poles. Aliant Telecom submitted, however, that the termination by a third party of a portion of an existing joint-use agreement was not a contravention of NST item 901.3(g).

Commission's analysis and determinations

47. The Commission notes that item 901.3(g) of the NST clearly indicates that the protection of a licensee's rights afforded under that provision is triggered by the Company (Aliant Telecom) entering into a joint-use or joint-ownership agreement after the Licensee (Rogers) has been granted access to support structures. Therefore, in order for the protections of item 901.3(g) to apply to this instance, Aliant Telecom must have entered into a new joint-use or joint-ownership agreement after Rogers had been granted access to the support structures.
48. The Commission notes, however, that although NB Power has terminated a portion of the JUA, and Aliant Telecom has terminated the SSA and assigned a portion of the SSA to NB Power, Aliant Telecom has not entered into a future joint-use or joint-ownership agreement with NB Power. In light of the above, the Commission concludes that the facts of the case before it do not trigger the operation of item 901.3(g) of the NST.

Commission's conclusions

49. Based on the above, the Commission finds that:
 - Aliant Telecom could terminate the SSA at any time, without cause, after providing one year's prior written notice to Rogers. Therefore, the SSA terminated on 1 February 2006, one year following the date of written notice of termination to Rogers;
 - Aliant Telecom could not assign its obligations under the SSA without Rogers' express consent. Therefore, Aliant Telecom remained liable for non-performance of its obligations under the 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;
 - There are no amendments by Aliant Telecom to the SSA or the NST before the Commission that would require its approval; and
 - Aliant Telecom's termination of the SSA, its assignment of a portion of the SSA to NB Power, and NB Power's termination of a portion of the JUA are not circumstances that would trigger the operation of item 901.3(g) of the NST.

Secretary General

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