



Telecom Decision CRTC 2008-62

Ottawa, 16 July 2008

Rogers Cable Communications Inc. – Application to review and vary part of Telecom Decision 2007-75

Reference: 8622-R28-200802646

In this Decision, the Commission finds that Bell Aliant did not have any obligations under the 2002 Support Structure Agreement (2002 SSA) with respect to NB Power-owned poles from the time Bell Aliant's Joint Sub-Agreement with NB Power was terminated until the termination of the 2002 SSA. The Commission further finds that when Bell Aliant provides access to support structures, it is providing a "telecommunications service" within the meaning of the Telecommunications Act and is therefore subject to the Commission's jurisdiction.

Introduction

1. On 20 February 2008, Rogers Cable Communications Inc. (Rogers) filed an application requesting the Commission to review and vary part of Telecom Decision 2007-75. Rogers requested that the Commission vary and reverse its determination that it does not have jurisdiction to interpret or enforce Bell Aliant Regional Communications, Limited Partnership's (Bell Aliant)¹ obligations under their 2002 Support Structure Agreement (the 2002 SSA). Rogers also requested that the Commission find that Bell Aliant was liable for failing to fulfill its obligations under the 2002 SSA, until its termination on 31 May 2007, including its obligation to provide Rogers with access to poles owned by New Brunswick Power Distribution and Customer Service Corporation (NB Power) at a rate of \$9.60 per pole per year.
2. The public record of this proceeding, which closed on 31 March 2008, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
3. The Commission has identified the following two issues to be addressed in its determinations:
 - a) Is Bell Aliant liable to fulfill its obligations under the 2002 SSA, until its termination on 31 May 2007, including its obligation to provide Rogers with access to NB Power-owned poles at the rate of \$9.60 per pole per year?
 - b) Does the Commission have jurisdiction over Bell Aliant's obligations under the 2002 SSA with respect to NB Power-owned poles?

¹ Parties to the 2002 Support Structure Agreement were Rogers and Aliant Telecom Inc. (Aliant Telecom). Aliant Telecom became part of Bell Aliant in July 2006.

Background

4. The 2002 SSA provided Rogers with access to and use of poles that were owned by Bell Aliant or which Bell Aliant did not own but had the right to grant permits for access. The pole rate for such access was \$9.60 per year without any charge or gross-up for clearance poles pursuant to item 901 – Support Structure Service of Bell Aliant's National Services Tariff (NST). The 2002 SSA was for a five-year term, expiring 31 May 2007, renewable for additional five-year terms subject to the other terms and conditions of the 2002 SSA.
5. At the time that Rogers and Bell Aliant entered into the 2002 SSA, Bell Aliant could grant permits for access for communications purposes to poles that were owned by NB Power. This authority was provided through a Joint Sub-Agreement: Support Structure – Third Party Attachments (the JUA) which one of its predecessor corporations, the New Brunswick Telephone Company, had entered into with NB Power in 1996.
6. On 30 January 2004, following the decision of the Supreme Court of Canada in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 (the Barrie decision) that the Commission did not have jurisdiction under subsection 43(5) of the *Telecommunications Act* (the Act) over the terms of access to support structures owned by provincially regulated electrical power companies, 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-owned poles for communications purposes. NB Power indicated that it would resume responsibility for billing third parties on its own poles.
7. Beginning in October 2004, NB Power began billing Rogers for the use of its poles at a rate of \$18.91 per pole per year.² NB Power informed Rogers that the annual rate would increase to \$23.50 and \$28.05 on 1 May 2005 and 1 May 2006, respectively.
8. In a letter to Rogers dated 31 January 2005, Bell Aliant confirmed that, effective 1 September 2004, it had assigned the administration of NB Power-owned poles to NB Power and that NB Power would be billing for and collecting any amounts owed for those poles from Rogers as of that date.
9. Following an application by Rogers on 2 November 2005, the Commission determined in Telecom Decision 2006-45 that Bell Aliant, pursuant to section 8.1 of the 2002 SSA, could terminate the agreement at any time, without cause, after providing one year's written notice to Rogers. This meant that the 2002 SSA was terminated on 1 February 2006. The Commission also found that Bell Aliant could not assign its obligations under the 2002 SSA without Rogers' express consent. Bell Aliant therefore remained liable to fulfill its obligations under the 2002 SSA, including the obligation to provide Rogers with access to NB Power-owned poles at a rate of \$9.60 per pole per year, until 1 February 2006.

² NB Power provided for a mark-up of 20 percent for clearance poles.

10. Following an application by Rogers³ to review and vary Telecom Decision 2006-45, the Commission determined in Telecom Decision 2007-75 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 a renewed term. The Commission also found that it did not have jurisdiction over granting access to power poles for communications purposes.

a) Is Bell Aliant liable to fulfill its obligations under the 2002 SSA, until its termination on 31 May 2007, including its obligation to provide Rogers with access to NB Power-owned poles at the rate of \$9.60 per pole per year?

11. The Commission notes Rogers' argument that Bell Aliant's obligations did not cease simply because on 30 January 2004 NB Power notified Bell Aliant that it was terminating the JUA. Rogers also argued that since Bell Aliant issued permits for NB Power-owned poles under the terms of the 2002 SSA and the NST, such permits were governed by the 2002 SSA until the date of termination. It further argued that the NST clearly establishes that the tariff rate applies to the provision of access to poles which Bell Aliant does not own "but for which it has the right to grant permits thereto." Since Bell Aliant represented to Rogers that it had the right to grant permits to NB Power-owned poles under the 2002 SSA and NST, Rogers submitted that this was evidence that the NST rate applied to the permits issued by Bell Aliant until the termination of the 2002 SSA.
12. The Commission is of the view that Bell Aliant's obligations under the 2002 SSA include the obligation to provide Rogers with access to "support structures." The 2002 SSA provides that unless the context otherwise requires, the definitions in the NST apply to the 2002 SSA. Item 901.2 of the NST defines "support structures" as "the supporting structures, including poles, ... which [Bell Aliant] owns or which [Bell Aliant] does not own but for which it has the right to grant Permits thereto." The Commission considers that the authority to issue permits for the NB Power-owned poles is a result of the JUA, which granted Bell Aliant the ability to issue permits for access, for communications purposes, to poles that were owned by NB Power.
13. The Commission further notes that as a result of NB Power terminating the JUA, Bell Aliant no longer had the authority to issue permits for the NB Power-owned poles. As a consequence, NB Power-owned poles no longer constituted "support structures" within the meaning of the 2002 SSA and the NST. Therefore, the Commission finds that, once the JUA was terminated, Bell Aliant no longer had any obligation under the 2002 SSA with respect to NB Power-owned poles, including providing Rogers with access to those poles at the NST rate.
14. In light of the above, the Commission finds that Bell Aliant's obligations under the 2002 SSA with respect to the NB Power-owned poles ended when NB Power terminated the JUA. Bell Aliant is therefore not liable for failing to fulfill those obligations from that point until the expiry of the 2002 SSA on 31 May 2007.

³ Rogers filed its application under Rogers Communications Inc.

b) Does the Commission have jurisdiction over Bell Aliant's obligations under the 2002 SSA with respect to NB Power-owned poles?

15. The Commission notes that Rogers submitted that the Commission's determination in Telecom Decision 2007-75 that it does not have jurisdiction to interpret or enforce Bell Aliant's obligations under the 2002 SSA with respect to the NB Power Poles is an error of law and raises substantial doubt as to the correctness of the Commission's resulting decision to rescind its earlier finding of Bell Aliant's liability.
16. The Commission further notes Bell Aliant's submission that as a result of the Barrie decision, the Commission has no statutory jurisdiction to make orders, or to prescribe contracts, with respect to facilities of provincial electric utilities. It further submitted that to the extent that support structures are telecommunications services, the Commission's jurisdiction pursuant to section 24 of the Act is limited to the provision of telecommunications services by a Canadian carrier. In the present case, the service was provided by NB Power, which is not a Canadian carrier.
17. As noted in Telecom Decision 2007-75, the Commission considers that, consistent with the Barrie decision, it does not have jurisdiction to grant access to power poles for communications purposes. However, the Commission considers that this does not mean that the Commission lacks jurisdiction over the granting of access to support structures by Bell Aliant. The Commission considers that when Bell Aliant provides access to support structures, including to support structures which it does not own but for which it has the right to grant permits for access, Bell Aliant is providing a "telecommunications service" within the meaning of the Act and is therefore subject to the Commission's jurisdiction.

Secretary General

Related documents

- *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

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