



Telecom Decision CRTC 2017-461

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Application to review and vary the Commission's 30 May 2017 letter decision denying certain telecommunications carriers' request to suspend the City of Calgary's application regarding municipal access

*The Commission **denies** an application from Bell Canada, Rogers Communications Canada Inc., Shaw Communications Inc., and TELUS Communications Company (collectively, the Carriers) to review and vary the Commission's 30 May 2017 letter decision, in which the Commission denied a request from those carriers, as well as Zayo Canada Inc. (the respondent carriers), to suspend a Part 1 application from the City of Calgary (Calgary) regarding municipal access. The Commission finds that the Carriers have not demonstrated that there is substantial doubt as to the correctness of that letter decision. The respondent carriers have until **22 January 2018** to file an answer to Calgary's application, and Calgary has until **1 February 2018** to file a reply.*

Introduction

1. The Commission received a Part 1 application from the City of Calgary (Calgary), dated 28 November 2016, in which Calgary requested, among other things,
 - that the Commission issue a declaration and a determination that certain telecommunications carriers (i.e. Bell Canada, Rogers Communications Canada Inc., Shaw Communications Inc., TELUS Communications Company,¹ and Zayo Canada Inc. (Zayo) [collectively, the respondent carriers]) may rely upon Calgary Bylaw Number 17M2016 (to regulate the process for access and use of municipal rights-of-way [ROWs], hereafter the ROW Bylaw) for the performance of their obligations under section 43 of the *Telecommunications Act* (the Act); and
 - in the event that the Commission denies issuing the above-mentioned declaration, that the Commission approve the terms and conditions of Calgary's proposed Municipal Consent and Access Agreement (MCAA).
2. By letter dated 23 January 2017, the respondent carriers requested that the Commission suspend consideration of Calgary's Part 1 application (hereafter,

¹ In this proceeding, submissions were received from TELUS Communications Company (TCC). However, effective 1 October 2017, TCC's assets were legally transferred to TELUS Communications Inc. and TCC ceased to exist.

the suspension request) while they challenged the constitutional validity of the ROW Bylaw with the Alberta Court of Queen's Bench (the Alberta Court).² In the alternative, the respondent carriers requested that the Commission extend the deadline for filing comments in response to Calgary's application. The respondent carriers submitted that since the ROW Bylaw would not take effect until 1 January 2018, such an extension would not prejudice any party.

3. In a Commission [letter](#) decision dated 30 May 2017 (the 30 May 2017 letter decision), the Commission denied the respondent carriers' request to suspend consideration of Calgary's application. The Commission determined that both main elements of Calgary's application (concerning the ROW Bylaw and the proposed MCAA) raise matters that involve interpreting provisions of the Act, which falls under the Commission's jurisdiction. Therefore, the Commission can rule on these matters without a ruling from the Alberta Court on the constitutional validity of the ROW Bylaw. The Commission considered that the core matter for its determination (i.e. disputed provisions regarding terms and conditions of access) must be examined without delay.
4. In that letter decision, the Commission established a new process associated with Calgary's Part 1 application, which had been suspended pending the Commission's determinations on the respondent carriers' suspension request. However, by procedural [letter](#) dated 9 June 2017, Commission staff modified the schedule for that process such that responses and interventions could be filed by 30 June 2017.

Application

5. The Commission received an application from the respondent carriers excluding Zayo (hereafter, the Carriers), dated 29 June 2017, in which the Carriers requested that the Commission review and vary its 30 May 2017 [letter](#) decision and suspend consideration of Calgary's Part 1 application. In the alternative, the Carriers requested that the Commission deny Calgary's Part 1 application on the basis that the Commission has neither the jurisdiction nor the statutory authority to impose terms and conditions of access under sections 42 to 44 of the Act.
6. The Commission received interventions regarding the Carriers' review and vary application from Calgary and the Federation of Canadian Municipalities (FCM).

Review and vary criteria

7. In *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since

² The respondent carriers (excluding Zayo) filed their application with the Alberta Court on 10 March 2017.

the decision, (iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision.

Issues

8. The Commission has identified the following issues to be addressed in this decision:
 - Did the Commission err in law or in fact by determining that it has the jurisdiction to consider whether Calgary's ROW Bylaw constitutes valid consent for the purpose of subsection 43(3) of the Act?
 - Did the Commission err in law or in fact by determining that Calgary's Part 1 application should be examined without delay?
 - Did the Commission's (i) determination to deny the Carriers' suspension request, and (ii) procedural timelines associated with Calgary's Part 1 application result in breaches of procedural fairness and the principles of natural justice?
 - If the Commission denies the Carriers' request to review and vary its 30 May 2017 [letter](#) decision, should it pronounce on its jurisdiction to establish terms and conditions of access for a Municipal Access Agreement (MAA)?

Did the Commission err in law or in fact by determining that it has the jurisdiction to consider whether Calgary's ROW Bylaw constitutes valid consent for the purpose of subsection 43(3) of the Act?

Positions of parties

9. The Carriers submitted that in its Part 1 application, Calgary is seeking Commission confirmation that a bylaw of general application, which includes compliance and penalty clauses pursuant to provincial law, is an appropriate means for a municipality to provide its consent under subsection 43(3) of the Act for the construction of a transmission line by a carrier or a distribution undertaking on a public highway or another public place.
10. The Carriers submitted that the Commission has the statutory authority to interpret the Act to determine whether a particular form of municipal consent meets the requirements of subsection 43(3) of the Act. However, they argued that in this case, Calgary has invoked legislative powers from a municipal bylaw that derives its authority from the *Municipal Government Act*,³ a provincial statute. The Carriers submitted that Calgary intended to regulate access for all carriers seeking access to its ROWs through these legislative powers and not through individual terms of access for each carrier.

³ *Municipal Government Act*, RSA 2000, c M-26

11. The Carriers submitted that the Commission does not have the authority to interpret or examine provincial legislation, a necessary step in determining whether the ROW Bylaw is a valid form of municipal consent pursuant to subsection 43(3) of the Act. In the Carriers' view, for the Commission to do so would be an error in law.
12. Further, the Carriers submitted that even if the Commission did have such authority, it does not have the authority to set general terms of access to public highways and other public places. The Carriers argued that by extension, the Commission also lacks the authority to approve the terms of a bylaw of general application as an appropriate means of consent pursuant to the Act. Moreover, if the Alberta Court deems the ROW Bylaw to be invalid, a Commission determination on whether the ROW Bylaw is an appropriate means of consent would be moot.
13. The Carriers submitted that accordingly, there is substantial doubt as to the correctness of the Commission's 30 May 2017 [letter](#) decision.
14. Calgary submitted that the Carriers were using their review and vary application to advance arguments on the merits of its Part 1 application. Calgary indicated that the Commission properly determined in its 30 May 2017 [letter](#) decision that the question before it was whether it should suspend consideration of one or both main elements of Calgary's application, pending a decision by the Alberta Court regarding the constitutional validity of Calgary's ROW Bylaw. The Commission assessed parties' submissions on this issue and denied the Carriers' suspension request. Calgary argued that since the Carriers have not identified as an error any specific Commission determination regarding their suspension request, they have not met the burden of raising substantial doubt as to the correctness of the Commission's determinations. Calgary submitted that the fact that the Carriers disagree with the Commission's determinations does not make them erroneous in law or in fact.
15. The FCM submitted that the Carriers have consistently tried to link the interpretation of the word "consent" in section 43 of the Act with the validity of the ROW Bylaw and with the applicability of the ROW Bylaw's terms to individual carriers. The FCM submitted that these are three distinct matters that must be treated as such: (i) only the Commission can interpret what constitutes municipal consent under the Act; (ii) any disagreement relating to the validity of a municipal bylaw, either on constitutional grounds or with respect to the provincial statute granting the authority to the municipality, is a matter that must be resolved by the provincial courts; and (iii) the Commission can and should provide Calgary with guidance on the specific terms of the ROW Bylaw and the MCAA, as it has in all other similar cases.

Commission's analysis and determinations

16. In its 30 May 2017 [letter](#) decision, the Commission determined that the issue of whether Calgary's ROW Bylaw constitutes valid municipal consent involves an interpretation of provisions of the Act, which falls within the Commission's jurisdiction, knowledge, and expertise.
17. Section 48 of the Act provides that the Commission may inquire into and make a determination in respect of anything prohibited, required, or permitted to be done under Parts II, III, and IV of the Act, which includes section 43.
18. Further, the Carriers have not substantiated their claim that to rule on the interpretation of municipal consent under the Act, the Commission would first be required to interpret provincial legislation and rule on its constitutionality or on the validity of the ROW Bylaw.
19. In any event, section 52 of the Act provides that in exercising its powers and performing its duties under the Act, the Commission may determine any question of law or fact. This includes the ability to decide on statutory and constitutional questions in cases where the resolution of such questions is a prerequisite to determining anything under the Act.⁴
20. Regarding the Carriers' argument that the Commission does not have the authority to set general terms of access to public highways and therefore lacks the authority to approve terms of a bylaw, the Commission considers that this would best be addressed as part of its consideration of Calgary's Part 1 application.
21. Accordingly, the Commission finds that the Carriers have failed to demonstrate that the Commission erred in law or in fact by determining that it has the jurisdiction to consider whether Calgary's ROW Bylaw constitutes valid consent for the purpose of subsection 43(3) of the Act.

⁴ In their suspension request, the respondent carriers referenced *Windsor (City) v. Canadian Transit Co.*, [2016] 2 SCR 617 (the Windsor decision) to support their claim that the Commission does not have the jurisdiction to examine the constitutionality of Calgary's ROW Bylaw. The Windsor decision involved an assessment of the true nature of the claim being made and of the Federal Court's jurisdiction as set out in the *Federal Courts Act*. In the case of Calgary's application, the nature of the claim related to Calgary's ROW Bylaw is not constitutional but rather relates to an interpretation of the Act. Further, the Windsor decision did not involve statutory provisions akin to those set out in sections 48 and 52 of the Act. In *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854, the Supreme Court of Canada reiterated that (i) administrative tribunals have only such jurisdiction as that provided by statute, and (ii) if a tribunal has been granted, by statute, the power to determine questions of law, it has the ability to address constitutional issues.

Did the Commission err in law or in fact by determining that Calgary's Part 1 application should be examined without delay?

Positions of parties

22. The Carriers stated that the parties involved in Calgary's Part 1 application have been operating under the terms and conditions of their expired MCAAs with Calgary for at least the last two years, and that they will continue to do so until at least 1 January 2018 when the ROW Bylaw is set to come into force. Therefore, the Commission's assertion that Calgary's application should be examined without delay is factually unsubstantiated.
23. The Carriers argued that given Calgary's clear intention to apply the ROW Bylaw in lieu of an MCAA (if the ROW Bylaw constitutes valid consent under section 43 of the Act), the Alberta Court's determination regarding the validity of the ROW Bylaw is necessary prior to any Commission determination on the appropriate terms of a potential MCAA. The Carriers argued that the Alberta Court is the only appropriate venue for this matter, noting that the parties in that process have agreed to an aggressive timetable.
24. The Carriers submitted that accordingly, there is substantial doubt as to the correctness of the Commission's 30 May 2017 [letter](#) decision.
25. Calgary stated that it made clear in its response to the Carriers' suspension request that the status quo (i.e. the Carriers operating under expired MAAs) was unacceptable. Calgary added that the Carriers' reference to the status of their ongoing constitutional challenge in the Alberta Court is not relevant and does not discharge them of their burden to raise substantial doubt as to the correctness of the Commission's determinations in its 30 May 2017 [letter](#) decision.

Commission's analysis and determinations

26. The record associated with Calgary's Part 1 application indicates that Calgary and the Carriers have been operating without an MAA since 2014 and that, despite extensive communications between these parties over the years, agreement on new terms of access has not been reached.
27. Given the length of time that has elapsed since the previous MAAs expired and Calgary's stated objection to operating under these expired MAAs, the Commission remains of the view that it is in the public interest to proceed with the consideration of Calgary's application. Since the Alberta Court is not being asked to decide on what constitutes a valid form of municipal consent for the purpose of subsection 43(3) of the Act or to resolve disputed terms of access, there is no risk of conflicting determinations on these matters.
28. Accordingly, the Commission finds that the Carriers have failed to demonstrate that the Commission erred in law or in fact by determining that Calgary's Part 1 application should be examined without delay.

Did the Commission's (i) determination to deny the Carriers' suspension request, and (ii) procedural timelines associated with Calgary's Part 1 application result in breaches of procedural fairness and the principles of natural justice?

Suspension request

Positions of parties

29. The Carriers stated that one of the fundamental principles of natural justice is the *audi alteram partem* rule, or the right of a party in a proceeding to be heard. This rule ensures that a party is afforded sufficient notice to be able to respond appropriately to all issues raised in a proceeding and associated evidence.
30. The Carriers submitted that one aspect of this rule is for a party to be entitled to a suspension of an administrative proceeding if a related matter is pending before a superior court. If there is a sufficient connection between the issues before the court and the administrative tribunal, the tribunal must grant the suspension of its proceeding. The Carriers argued that there is a sufficient connection between the issues before the Alberta Court and the Commission and that, as such, a suspension must be granted to ensure respect for judicial hierarchy.
31. The Carriers submitted that accordingly, the Commission's failure to suspend consideration of Calgary's application pending a decision from the Alberta Court on the Carriers' constitutional challenge constitutes an error in law.
32. Calgary, supported by the FCM, submitted that the Carriers have mischaracterized and misapplied the intent of the *audi alteram partem* rule. Calgary argued that a series of cases⁵ shows that a tribunal is allowed to use its discretion to deny a suspension request, subject to any breach of natural justice or procedural fairness. Calgary submitted that the Carriers based their suspension request not on the fact that they needed more time to respond to Calgary's Part 1 application, but rather on the time required for their constitutional challenge. The Carriers were afforded a full and fair hearing of their suspension request. Calgary indicated that accordingly, the Commission did not breach the *audi alteram partem* rule in its 30 May 2017 [letter](#) decision.

Commission's analysis and determinations

33. The Carriers referenced no legal authority to support their claim that due to their constitutional challenge before the Alberta Court, the Commission is required to grant the requested suspension.

⁵ See *K.G. v. Canada (Citizenship and Immigration)*, 2005 CanLII 59364 (CA IRB); *Cormier v. M.N.R.*, 2006 TCC 382; *Wayzhushk Onigum Nation v. Kakeway*, 2001 FCT 819 (CanLII); and *Javadi v. Canada (Citizenship and Immigration)*, 2012 FC 278.

34. The Act provides the Commission with broad powers with respect to the conduct of its proceedings. In particular, it is within the Commission's discretionary power to determine whether or not to suspend its proceedings in a given case, whether pending a court ruling on a **related** constitutional matter or otherwise. In deciding whether to suspend its proceedings, the Commission is guided by the public interest. The existence of proceedings in the Alberta Court on the constitutional validity of Calgary's ROW Bylaw is not sufficient, by itself, to strip the Commission of its discretionary power to control its proceedings.⁶
35. As the Commission recognized in its 30 May 2017 [letter](#) decision, Calgary requested in its Part 1 application that the Commission, among other things, pronounce on whether its ROW Bylaw constitutes an appropriate form of consent for the purpose of subsection 43(3) of the Act. This matter, which is within the exclusive jurisdiction of the Commission, is not being contemplated by the Alberta Court.
36. Accordingly, should the Alberta Court uphold the constitutional validity of the ROW Bylaw, all carriers and municipalities would benefit from a timely Commission determination on the validity of such form of consent under subsection 43(3) of the Act.
37. In addition, Calgary's Part 1 application calls into question the terms that should govern the Carriers' access to Calgary's ROWs. Although these entities have agreed to provisionally operate under the terms of expired MAAs, it is clear that this arrangement is not to Calgary's liking and that there is a lack of agreement on what the terms of access should be.
38. In light of the above, granting the Carriers' suspension request would not be in the interest of justice. Accordingly, the Commission finds that its decision to deny the Carriers' suspension request was not a breach of the principles of natural justice.

Procedural timelines

Positions of parties

39. The Carriers submitted that they should be given sufficient time to respond to Calgary's application, noting that they would be required to conduct a clause-by-clause analysis of the ROW Bylaw, carry out a comprehensive review of Calgary's proposed MCAA, and respond to all of Calgary's supporting

⁶ See for example *Canada (Attorney General) v. Sam Lévy et Associés Inc.*, 2005 FC 208, *aff'd* 2005 FCA 318; and *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110. Both of these cases involved consideration of whether a suspension of administrative proceedings was warranted given that constitutional challenges on the validity of statutory provisions relevant to these cases were being made before the courts. Neither of these decisions resulted in a suspension of proceedings due to the existence of the constitutional challenges. Rather, in both decisions, the courts engaged in a fact-specific assessment and took into account a number of considerations.

arguments. Moreover, the Carriers argued that their constitutional challenge will take up a lot of their time and resources, and that the Commission's filing dates are unreasonable and fall within the material procedural dates in the constitutional challenge.

40. The Carriers submitted that by failing to give them sufficient time to respond to Calgary's Part 1 application, the Commission has contravened the *audi alteram partem* rule and erred in law in its 30 May 2017 [letter](#) decision.
41. Calgary noted that the initial 30-day intervention period was extended and then further extended as a result of the respondent carriers' 23 January 2017 suspension request. Calgary further noted that on the date it filed its answer to the Carriers' review and vary application, eight months had passed since it filed its Part 1 application. In Calgary's view, eight months is more than adequate time for four sophisticated and experienced parties such as the Carriers to consider and respond to Calgary's application.
42. Finally, Calgary submitted that the Carriers' claim that their constitutional challenge has resulted in extra work for them is not relevant to the *audi alteram partem* rule. Since the Carriers launched the constitutional challenge themselves, they have to deal with the consequences of that decision.
43. The FCM supported Calgary's submissions on this issue.

Commission's analysis and determinations

44. The Commission considers that, by their conduct, the Carriers have waived the ability to raise the issue of sufficient time in the context of their review and vary application.
45. Pursuant to section 50 of the Act, it was open to the Carriers to request an extension of the timelines set out in the 30 May 2017 [letter](#) decision for filing their answers to Calgary's Part 1 application. Not only did the Carriers fail to make such a request, but they expressed no opposition to the revised procedural timelines proposed by Calgary and adopted by way of the Commission's 9 June 2017 procedural [letter](#).
46. The Commission is the master of its own proceedings and, as conferred by section 55 of the Act, it has the powers of a superior court with respect to the conduct of its proceedings. As such, the Commission is entitled to rely on the doctrine of waiver⁷ and deny the Carriers' objections on this issue.
47. By examining the procedural timelines set out in the Commission's 30 May 2017 [letter](#) decision without reference to the rest of the process associated with Calgary's Part 1 application, the Carriers failed to account for the time period between the filing of Calgary's Part 1 application on 28 November 2016 and the

⁷ The doctrine of waiver means that by their conduct, parties waive their rights to redress.

Commission's process suspension announced on 26 January 2017. Further, and as a result of the 9 June 2017 procedural [letter](#), the Carriers were provided with 31 additional days to file an answer to Calgary's Part 1 application.

48. Taking into account the time that has already elapsed since the filing of Calgary's Part 1 application, excluding the time during which the associated procedural timelines were suspended, the Carriers have not made a convincing case that the established procedural timelines breached the principles of natural justice. Further, the adoption of the procedural timelines set out below will provide the Carriers with sufficient opportunity to respond to Calgary's Part 1 application.
49. Accordingly, the Commission finds that the Carriers have failed to demonstrate that the procedural timelines set out by the Commission in its 30 May 2017 [letter](#) decision with respect to Calgary's Part 1 application breached the principles of natural justice.

Conclusion

50. In light of all the above, the Commission finds that the Carriers have not demonstrated that there is substantial doubt as to the correctness of its 30 May 2017 [letter](#) decision. Accordingly, the Commission **denies** the Carriers' review and vary application.

If the Commission denies the Carriers' request to review and vary its 30 May 2017 [letter](#) decision, should it pronounce on its jurisdiction to establish terms and conditions of access for an MAA?

Positions of parties

51. The Carriers submitted that even if the Commission determines not to suspend Calgary's Part 1 application, it should deny the application on the basis that the Commission lacks the jurisdiction to impose terms and conditions of access in the circumstances.
52. Calgary submitted that the Carriers are not alleging that the Commission erred regarding their suspension request, rather they are making submissions related to Calgary's Part 1 application. Calgary argued that as such, the Commission should disregard these submissions for the purpose of the review and vary application.
53. The FCM submitted that the Carriers have raised an entirely new argument that was not raised in their initial suspension request; therefore, the Commission should deny this argument on procedural grounds.

Commission's analysis and determinations

54. The Commission considers that the issue of its jurisdiction could be examined when it disposes of Calgary's Part 1 application. The Commission finds that it is neither necessary nor appropriate for it to examine the issue of its jurisdiction as

part of this review and vary proceeding. The Commission therefore **denies** the Carriers' request in this regard. The Carriers retain the right to raise this issue in the context of the proceeding initiated by Calgary's Part 1 application.

Re-establishment of the process for Calgary's Part 1 application

55. By procedural [letter](#) dated 5 July 2017, the filing of interventions and answers to Calgary's Part 1 application was suspended pending the Commission's ruling on the present review and vary application.
56. In view of the Commission's conclusion above, the Commission hereby re-establishes the process regarding Calgary's Part 1 application. For the purpose of disposing of Calgary's Part 1 application, the Commission will assume the ROW Bylaw to be both constitutional and within Calgary's jurisdiction, with these questions to be resolved before the Alberta Court. Doing so recognizes that these questions are currently before a court with the jurisdiction to invalidate and/or declare inoperative the ROW Bylaw and ensures that parties to Calgary's Part 1 application are not arguing the same matter before two separate bodies. The Commission will therefore address only the statutory issues relating to the Act.
57. With respect to Calgary's Part 1 application, as set out in the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, the time frames of 30 days for answers and interventions followed by 10 days for replies apply. Therefore, the respondent carriers have until **22 January 2018** to file an answer and interested persons have until that date to file an intervention regarding Calgary's Part 1 application, serving a copy on Calgary. Calgary may file a reply by **1 February 2018**, serving copies on the respondent carriers and any other party.
58. The Commission reminds each of the respondent carriers that they are required to identify the sections of Calgary's proposed MCAA to which they object, provide supporting rationale for their objection(s), and propose alternative wording.

Secretary General