



## Telecom Decision CRTC 2021-129

PDF version

References: 2019-57, 2019-57-1, 2019-57-2, and 2019-57-3

Ottawa, 15 April 2021

*Public record: 1011-NOC2019-0057*

### **Bell Mobility Inc. – Request to strike the Commissioner of Competition’s expert report from the record of the proceeding initiated by Telecom Notice of Consultation 2019-57, and related procedural matters**

*The Commission **denies** Bell Mobility’s request to strike Dr. Tasneem Chipty’s report from the record of the proceeding and considers that no additional action is required in relation to the related requests.*

#### **Background**

1. Pursuant to his mandate under the *Competition Act* to make representations to federal boards and tribunals in respect of competition, the Commissioner of Competition (the Commissioner) chose to intervene in the proceeding initiated by Telecom Notice of Consultation 2019-57 (the proceeding).
2. The Commissioner’s participation in the proceeding generated a number of procedural requests, including the Commissioner’s requests for confidential information to be disclosed to him, as well as requests by other parties for disclosure of confidential information submitted by the Commissioner.
3. In accordance with section 39 of the *Telecommunications Act*, the Commission may decide to disclose to the Commissioner information filed with the Commission and properly designated as confidential, even where such information is not more broadly disclosed to the public.
4. On several occasions, parties opposed to the Commissioner’s positions raised objections related to his filing evidence that included information designated as confidential. Most of these objections were in relation to a report prepared by Dr. Tasneem Chipty of Matrix Economics (Dr. Chipty’s report) on behalf of the Commissioner. Dr. Chipty’s report assessed the competitive status of Canada’s mobile wireless retail marketplace and was filed on the record of the proceeding.
5. On 4 August 2020, following the proceeding’s deadline for filing final comments, Bell Mobility Inc. (Bell Mobility) filed a procedural request asking the Commission to strike Dr. Chipty’s report from the record of the proceeding and to consider the

Commissioner's conclusions regarding the market without recourse to Dr. Chipty's report.

6. Following receipt of Bell Mobility's procedural request, the Commission issued a letter providing all parties to the proceeding an opportunity to respond. Twelve parties filed responses to Bell Mobility's request.

### **Should the Commission approve Bell Mobility's request to remove Dr. Chipty's report from the record?**

#### **Positions of parties**

##### **Bell Mobility**

7. Bell Mobility noted that following the release of the Commissioner's final comments, it sent a letter to the Commissioner on its own behalf, which it later included with its request to the Commission, to highlight what it characterized as certain errors in the Commissioner's final comments. Bell Mobility noted that following that interaction, the Commissioner filed an amended version of his Final Comments. The amended final comments touched on some of the matters Bell Mobility had raised, but did not include other modifications that the company had requested, notably a reversal of the Commissioner's conclusion as to the existence of market power in the retail mobile wireless service market.
8. Bell Mobility argued that the Commissioner's unwillingness to change his conclusions to reflect what the company characterized as the "corrected evidence" gives rise to serious concerns regarding the validity and reliability of Dr. Chipty's report.
9. Bell Mobility submitted that only evidence which has been subject to sufficient scrutiny to have confidence in its accuracy ought to form part of the record of the proceeding.
10. Bell Mobility noted that it had previously raised procedural fairness issues relating to the Commissioner's economic report, including before it had been written. In a letter dated 27 March 2019, Bell Mobility suggested that the Commission institute a request for information (RFI) process to address its concerns with respect to the future report's reliability and validity and the Commission's potential reliance on it.
11. Bell Mobility submitted that given the above and the Commission's decision to deny its proposed RFI process, keeping Dr. Chipty's report on the record of the proceeding would give rise to a breach of Bell Mobility's procedural fairness rights. As a result and given the stage at which the proceeding finds itself, Bell Mobility asked that the Commission strike Dr. Chipty's report from the record of the proceeding and consider the conclusions regarding market power reached by the Commissioner without recourse to it.

12. In support of its request, Bell Mobility identified four areas of concern with Dr. Chipty's report:
  - i. Any issues or problems with the data are not identifiable on the face of Dr. Chipty's report.
  - ii. The Commissioner's final comments show a pattern of analytical and calculation errors, use of misleading data, and failure to use the best sources of data and evidence, all of which cast doubt on the reliability and validity of Dr. Chipty's report.
  - iii. The Commissioner's response to the alleged errors confirms that his evidence cannot be relied upon without adequate testing by other parties.
  - iv. The Commissioner's final comments, which purportedly contain errors, are consistent with other submissions he made in the proceeding, and therefore there is an increased likelihood that Dr. Chipty's report contains similar errors.
13. Bell Mobility submitted that the alleged errors noted above could not have been addressed through the processes established by the Commission for the purposes of the proceeding.

**Other parties**

14. With the exception of the Canadian Electricity Association, which took no position on the substantive matters Bell Mobility raised, and TELUS Communications Inc. (TCI), all parties that submitted comments opposed Bell Mobility's procedural request.

***Parties other than the Commissioner***

15. While not all parties opposing Bell Mobility's request advanced the same arguments, a number of them argued that the company was attempting to re-litigate a matter that has already been raised and disposed of, namely procedural fairness requirements surrounding Dr. Chipty's report.
16. These parties noted that the Commission made certain amendments to its procedures in response to the concerns raised including, notably, the establishment of a process for submissions focused entirely on the Commissioner's further comments and Dr. Chipty's report. These parties argued that every party to the proceeding, including Bell Mobility, had numerous opportunities to engage with Dr. Chipty's report and tender their own expert evidence on the matters addressed therein.
17. A number of the parties opposing Bell Mobility's request noted that the Commission's duties include assessing the credibility of evidence and determining how much weight it is to be given, taking into consideration concerns raised on the record. These parties argued that the Commission should fulfil those duties rather than taking the extraordinary and unjustified step of striking evidence from the record.

18. Furthermore, a number of these parties noted that Bell Mobility's concerns pertain to the Commissioner's final comments. Given that Dr. Chipty's report was not prepared by the Commissioner and was submitted along with the Commissioner's further comments, they argued that there was no basis to support a claim that the alleged errors in the final comments increase the likelihood that Dr. Chipty's report would contain similar errors.
19. Competitive Network Operators of Canada (CNO) requested that the Commission strike from the record the comments in Bell Mobility's procedural request which point out what Bell Mobility considered to be the substantive shortcomings in the Commissioner's final comments and suggest how they could be remedied, because they represent an out-of-process reply.
20. TCI, the only party that supported Bell Mobility's request, argued that without access to the underlying data and further opportunities to test the evidence tendered by the Commissioner, parties have been unable to fully assess the credibility of Dr. Chipty's report. It added that this, coupled with what it considers to be the Commissioner's "unwillingness to correct facts and objectively weigh evidence in this proceeding" and its view that Dr. Chipty's report is prejudicial to TCI's position, support striking Dr. Chipty's report from the record.
21. TCI further argued that should the Commission decide not to strike Dr. Chipty's report from the record, the report's unreliability should determine the probative value that the Commission gives it. TCI highlighted examples from Dr. Chipty's report that, in its view, demonstrate its lack of credibility and argued that it would be an error for the Commission to rely on or accord any weight to it.<sup>1</sup>
22. TCI also argued that the Commission should either give no weight to the Commissioner's final comments, due to their purported errors, or give parties an additional opportunity to reply. It went on to describe what it would argue in such a reply.

### ***The Commissioner***

23. The Commissioner submitted that Bell Mobility's request should be dismissed on a number of grounds, including that the Commission should have the most complete evidentiary record possible to make its final decision, and that the Commission has already taken steps to ensure procedural fairness related to Dr. Chipty's report.

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<sup>1</sup> TCI referred to the Federal Court's decision in *Brown v. National Capital Commission*, 2008 FC 734 in support of this proposition. TCI also argued that it would be appropriate for the Commission to apply the principle enunciated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 SCR 9 (Mohan), that expert evidence whose prejudicial effects outweigh its probative value should not be admitted onto the record. TCI cited several tribunal decisions that, in its view, demonstrate that Mohan can and should be applied in the administrative setting to reject unreliable expert reports – namely, *Clegg v Air Canada*, 2019 CHRT 4 and *Association des membres de la Police Montée du Québec v Treasury Board*, 2019 FPSLRB 70.

24. More specifically, the Commissioner argued that parties have had extensive opportunities to engage with Dr. Chipty's report. The Commissioner noted that, following concerns some parties raised regarding Dr. Chipty's report, the Commission required additional disclosure of information and allowed an additional opportunity for parties to comment. Parties could have also raised concerns regarding Dr. Chipty's report during the hearing and in their final comments.
25. The Commissioner also argued that, if Bell Mobility's request were to be granted, it would result in the loss of a study submitted by the only party who had access to large quantities of confidential industry data, besides the wireless carriers themselves.
26. The Commissioner emphasized that as the trier of fact in this proceeding, the Commission has the dataset that served as the basis for Dr. Chipty's report and is thus fully able to discharge its duty to examine all of the evidence tendered and weigh Dr. Chipty's report accordingly.
27. The Commissioner submitted that while it had made two corrections to its final submissions, neither of these called into question the conclusions that it reached and neither was related to Dr. Chipty's report.
28. The Commissioner also submitted that Bell Mobility and TCI were improperly attempting to characterize divergent positions as errors of fact.

### **Commission's analysis and determinations**

29. Given that Bell Mobility's concerns are related to whether the proceeding's procedures, as they relate to Dr. Chipty's report, respect the company's procedural fairness rights, the Commission has not assessed the merits of Bell Mobility's claims that the Commissioner's final comments contain errors in deciding this procedural request.
30. The Commission is of the view that Bell Mobility is using the current procedural request to revisit procedural matters that have already been decided earlier in this proceeding. On 27 March 2019, Bell Mobility requested the establishment of an RFI process whereby parties could propose requests for information targeted to the Commissioner's then-forthcoming economic studies. This request was denied in Telecom Notice of Consultation 2019-57-1, though the Commission did add a supplementary reply phase to permit parties to respond directly to any expert report filed as part of the Commissioner's further comments.
31. Bell Mobility reformulated its RFI request in its response to TCI's 6 December 2019 request for greater disclosure of Dr. Chipty's report after that report had been filed with the Commission. That reformulated request was denied in Telecom Decision 2020-104, though the Commission did order greater public disclosure of the contents of Dr. Chipty's report and increased the allowable size of parties' final submissions to account for the additional information on the public record.

32. In both cases, the Commission was not persuaded that procedural fairness required the specific relief requested by Bell Mobility. In Telecom Decision 2020-104, the Commission considered the scope of procedural fairness owed to Bell Mobility and other parties and assessed how the procedures adopted met the procedural fairness requirements in light of the Commissioner's participation, including the tendering of Dr. Chipty's report on the record. The Commission emphasized that the procedures adopted provided parties with numerous opportunities to introduce evidence and determined that these procedures were sufficient to safeguard procedural fairness.
33. The Commission notes that while it did not accept either of Bell Mobility's above-mentioned requests, the procedures associated with the proceeding have evolved as a direct result of the Commissioner's participation. The proceeding allowed for three distinct rounds of written comments, one of which was put in place specifically to allow parties to respond to Dr. Chipty's report. These were followed by a nine-day public hearing, which was then followed by a final round of written comments. The Commission also notes that it sought parties' input throughout the process by way of multiple RFIs.
34. In conjunction with those procedures, the Commission's decisions on disclosure requests have resulted in the public disclosure of additional information filed by the Commissioner, including some of the information in Dr. Chipty's report.
35. As a result of the adopted procedures and disclosure determinations, the record contains submissions and expert evidence in support of parties' positions as well as detailed rebuttal submissions, again including expert evidence, to the positions and related findings put forward by parties adopting contrary positions.
36. Bell Mobility argued that the concerns it outlined in its request could not have been identified simply through comments on methodology. However, it did not specifically address the findings in Telecom Decision 2020-104 with respect either to the nature of the proceeding and the case to be met, or to the parties' demonstrated ability to provide their own expert evidence and to engage substantively, through written submissions and orally at the public hearing, with evidence tendered by the Commissioner.
37. The Commission is of the view that nothing about the Commissioner's final comments constitutes a change in circumstances for Bell Mobility sufficient to require further procedural modifications. As noted above, Dr. Chipty's report was not prepared by the Commissioner. Even if one accepts, for the sake of argument, that the Commissioner's final comments contain the errors alleged by Bell Mobility, it is not clear how those errors could cast doubt on the reliability of a report authored by someone else, nor has Bell Mobility satisfactorily explained how this could be the case.
38. The Commission finds that nothing filed in relation to the present procedural request should cause it to reverse its past determinations on this matter.

39. The matters addressed in Dr. Chipty's report are relevant to the proceeding, particularly to the state of retail competition in the Canadian mobile wireless service market. In a broad policy review proceeding such as the one at hand, it is expected that participants will have different views, with regard to both the assessment of the environment and the policy decisions that should be taken. The fact that one party disagrees with another party's assessment is not, in and of itself, cause to impugn the assessment's reliability, much less is it grounds to expunge it from the record of a proceeding.
40. The Commission is an expert tribunal that has extensive experience dealing with complex and conflicting information, including information filed in confidence. The Commission is fully equipped to perform an independent assessment of evidence tendered before it, informed by the submissions of parties and its own expertise, and to weight it accordingly.
41. The Commission considers that TCI's additional request that the Commissioner's final comments be given no weight unless the Commission provides parties with additional process is premised on the assumption that they contain the errors posited by Bell Mobility.
42. As noted above, the purpose of this decision is not to evaluate whether such errors exist. Further, even if one assumes that TCI does have a procedural right to a further reply, it has already described, in substantive detail, how it would make such a reply, thereby effectively providing itself with one.
43. With respect to the cases cited by TCI as grounds to reject or give no weight to Dr. Chipty's report, the Commission considers that these have little to no applicability in the circumstances. The Commission is not bound by the rules of evidence applicable to a criminal or civil court, and the tribunal decisions TCI cited deal with specific circumstances that are materially different from the polycentric, multilateral policy-making exercise undertaken in this proceeding.
44. The Commission does not consider it appropriate to strike any evidence or submissions from the record. Rather, as suggested by numerous parties, and as described above, the most appropriate course is for the Commission to evaluate and weigh the evidence as part of its examination of the record and issues in the proceeding. Accordingly, the Commission considers that no further action is required in respect of the requests made by other parties in response to Bell Mobility's procedural request.
45. In light of all of the above, the Commission **denies** Bell Mobility's request to strike Dr. Chipty's report from the record of the proceeding.

Secretary General

## Related documents

- *TELUS Communications Inc. and the Canadian Network Operators Consortium Inc. – Requests for disclosure of information filed in confidence as part of the Telecom Notice of Consultation 2019-57 proceeding, and related procedural requests*, Telecom Decision CRTC 2020-104, 24 March 2020
- *Review of mobile wireless services*, Telecom Notice of Consultation CRTC 2019-57, 28 February 2019; as amended by Telecom Notices of Consultation 2019-57-1, 28 October 2019; 2019-57-2, 20 March 2020; and 2019-57-3, 23 June 2020