



20 November 2006

Mr. Kevin Lynch
Clerk of the Privy Council and Secretary of the Cabinet
Langevin Block
80 Wellington Street
Ottawa, Ontario
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Lawson A.W. Hunter
Executive Vice-President and
Chief Corporate Officer

Dear Mr. Lynch:

Re: **October 21, 2006 Canada Gazette Notice No. DGTP-010-2006 — Petition to the Governor in Council concerning Telecom Decision CRTC 2006-27, Aliant Telecom Inc. — Application to exclude certain quality of service results from the retail quality of service rate adjustment plan.**

Bell Canada welcomes the opportunity to comment on the Appeal to Cabinet by The Federally Regulated Employers – Transportation and Communications (FETCO), of a decision made by the Canadian Radio-television and Telecommunications Commission (CRTC), regarding Quality of Service issues (Telecom Decision CRTC 2006-27).

Bell Canada feels that this Appeal by FETCO raises fundamentally important issues about the jurisdiction and scope of the CRTC's mandate. We support, unequivocally, the FETCO's Petition of 8 July 2006 to overturn Telecom Decision CRTC 2006-27.

By refusing to recognize a labour dispute as beyond the control of a telephone company, and thereby attaching additional punitive financial consequences to such a dispute, the CRTC has overstepped its jurisdiction. In doing so the Commission has established a precedent that is inappropriate in the delicately balanced labour relations environment in Canada.

BACKGROUND

The CRTC has created Quality of Service regimes for incumbent telephone companies across Canada. Under these regimes, telephone companies are required to meet specified service levels for various installation, repair and customer service functions, failing which they are subject to the payment of penalties. There are separate regimes for retail customers and for wholesale customers (service providers that operate in competition with the telephone companies, who purchase certain underlying services from incumbent telephone companies).

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The CRTC's intrusion into the labour relations field seems to be entirely inconsistent with earlier indications of how the Commission viewed labour issues in the telecommunications environment. In an earlier decision (CRTC 2005-17) the Commission recognized that it would be appropriate to exclude performance failures due to circumstances or events beyond the reasonable control of the incumbent companies. With regard to the types of adverse events which would qualify, the CRTC said in Decision 2005-17 that "...labour disruptions may qualify in certain circumstances".

Remarkably, in Telecom Decision CRTC 2006-27, relating to an application by Aliant Telecom Inc. (now Bell Aliant Regional Communications Limited Partnership, or Bell Aliant) to exclude from the requirement to pay penalties certain quality of service results missed due to a 2004 strike, the CRTC found that a work stoppage was not an event beyond the control of a telephone company. In a departure from commercial precedent, the Commission ruled that Bell Aliant was required to pay 50% of the quality of service penalties payable for missed indicators under the CRTC quality of service penalty regimes.

STRIKES ARE BEYOND AN EMPLOYER'S CONTROL

In Bell Canada's view labour disruptions should generally be considered to be an adverse event which should be accommodated through the Commission's exclusion mechanism. The Canada Labour Code and similar provincial regimes explicitly recognize the right of workers to strike and the right of employers to lock out employees in various circumstances. This delicate balance in the labour relationship and between the rights of employers and employees, has been achieved over many years. Companies should not be penalized by regulators for failing to meet standards due to the exercise by workers of rights conferred upon them by the Canada Labour Code. There should be no attribution of blame to either the employer or the employee by a regulator such as the CRTC. Such an attribution clearly is not consistent with the balance that has been achieved. In a dissenting opinion, Commissioner Andr e No l pointed out that "...the amalgamation of Aliant's bargaining units following the merger of the four incumbent local exchange carriers (ILECs) serving the Atlantic provinces is the result of a decision by the CIRB (Canada Industrial Relations Board), not a decision by Aliant. To conclude that the resulting work stoppage is not completely beyond the company's control seems risky, to say the least, and subsequently using this argument to justify a credit during the period in question seems frankly dangerous". Commissioner No l went on to say that "...as Aliant rightly points out, this establishes a precedent that will tip the scales in the unions favour, and will no doubt be used as a powerful lever in collective bargaining."

Labour negotiations require the participation of both an employer and a union to avoid either a strike or a lockout. While the behaviour of the employer and the reasonableness of the offer put to the workers will obviously be a factor in the declaration of a strike, there are also many significant factors that are inherently beyond the control of an employer, including the union agenda or demands.

For this reason, clear precedents exist in commercial arrangements for the waiver of performance obligations missed due to a labour disruption. Service suppliers generally, including telecommunications service providers (TSPs), have traditionally included in their contractual arrangements a *force majeure* provision to excuse or exempt their performance upon the occurrence of a *force majeure* event, and strikes and labour disruptions have traditionally been specifically referenced in the definition of a *force majeure* event. Furthermore, inclusion of a *force majeure* provision in a contractual arrangement is widely accepted as reasonable commercial behaviour on the part of service suppliers generally - including TSPs - and Canadian courts have upheld the reliance of a contracting party on a *force majeure* provision to excuse or exempt such party's performance. Telephone companies should be held to no higher standard for compliance with CRTC quality of service indicators than they would be with respect to fulfillment of bilaterally-negotiated contractual obligations.

Most fundamental, however, is our view, supported it would seem by many others, that the Commission has no particular expertise in industrial relations matters, nor any legislative objective or authority to assess the reasonableness of a company's conduct in collective bargaining. Any assessment of the conduct of labour relations, a process overseen, as necessary, by the CIRB, is clearly beyond the jurisdiction and expertise of the Commission. The potential for a work stoppage is an accepted integral feature of the collective bargaining process and is enshrined in both Canadian labour law and international labour conventions.

Furthermore, for the Commission to disallow adjustments to quality of service results which are sub-standard as a result of a labour disruption, thus resulting in significant financial penalties to a company, serves only to provide additional negotiating leverage to the unions, by increasing the already significant negative financial impact of a labour stoppage. This is not an outcome that the Government should condone. As Commissioner Noël further noted, "Furthermore as summarized in paragraphs 18 to 22 of the majority decision, the evidence clearly demonstrates that Aliant used every recourse available to it to minimize the impact of the strike on its customers, including an unsuccessful application to the CIRB to have certain services declared essential to public health and safety." This point is critical. The efforts made to protect the interest of the customer are critical. While it is clear to all that customers suffer in strike or lock out situations what is equally clear is that the CRTC's intervention now poses even further risk to the customer interest. Tilting the labour relations balance in favour of unions will likely increase costs and decrease company flexibility, to the detriment of consumer prices.

CONCLUSION: THE CRTC SHOULD NOT INTRUDE IN LABOUR RELATIONS

In refusing to grant Bell Aliant's exclusion application, thereby forcing that company to pay significant financial penalties for service objectives that it failed to meet due to a strike affecting the vast majority of its work force, the CRTC has significantly shifted the balance in labour relations in Canada, providing the unions that represent telephone

company workers with substantial new leverage in labour negotiations. We submit that such a result is neither in the public interest nor a result in any way connected with the objectives of the *Telecommunications Act*. The CRTC's intrusion into the field of labour relations, with this decision, sets a disturbing precedent not only for incumbent telephone companies, but potentially for other unionized Canadian businesses, should other regulatory agencies decide to follow suit.

For all of the foregoing reasons, Bell Canada submits that the Governor in Council should exercise its discretion under section 12 of the *Telecommunications Act* and vary Telecom Decision CRTC 2006-27 so as to grant the application of Bell Aliant for an exclusion of certain results from quality of service penalty calculations and advise the CRTC to exclude quality of service results from penalty calculations, where the indicators in question were missed due to a labour disruption. Furthermore, the Governor in Council should instruct the CRTC to refrain from venturing into the field of labour relations in deference to the authority, knowledge and clear mandate of the CIRB and the Canada Labour Code.

Respectfully,

A handwritten signature in black ink, appearing to read "Lawson A.W. Hunter". The signature is written in a cursive, flowing style.

Lawson A.W. Hunter
Executive Vice-President &
Chief Corporate Officer

cc: The Honourable Maxime Bernier, Minister of Industry
The Honourable Jean-Pierre Blackburn, Minister of Labour
Ms. Diane Rhéaume, Secretary General, CRTC
Mr. Michael Binder, Assistant Deputy Minister,
Spectrum, Information Technologies and Telecommunications
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