



## Telecom Decision CRTC 2020-368

PDF version

Ottawa, 3 November 2020

*File number: 8662-R28-202002971*

### **Rogers Communications Canada Inc. – Application to review and vary the 3 April 2020 Secretary General letter regarding the extension of the deadline for Bell Canada to deploy toll trunks**

*The Commission **denies** RCCI's application to review and vary the Commission's decision in the Secretary General letter dated 3 April 2020, in which the Commission extended by 90 days the deadlines outlined in Telecom Decision 2019-390 for Bell Canada to deploy toll trunks and file revised tariff pages. In particular, the Commission finds that there are no errors in law or in fact that raise substantial doubt as to the correctness of the Secretary General letter. The Commission also considers RCCI's request to require Bell Canada to deploy the toll trunks 30 days from the date of this decision to be moot. Finally, the Commission **denies** RCCI's request to exclude, as of 19 May 2020, toll-free traffic from the calculation of the bill-and-keep trunk imbalance between Bell Canada and RCCI.*

#### **Background**

1. In Telecom Decision 2019-390 (hereafter, the Decision), the Commission directed Bell Canada to deploy, within 150 days, or by 19 May 2020, one-way toll trunks between its network and Rogers Communications Canada Inc.'s (RCCI) network within Bell Canada's incumbent operating territory to receive toll-free traffic originating on RCCI's network and destined to Bell Canada's toll-free telephone number customers. The Commission also directed Bell Canada to file revised tariff pages by 31 March 2020 so that RCCI could begin charging Bell Canada for the traffic in question once toll trunks were deployed, or by 19 May 2020.
2. On 20 December 2019, Bell Canada filed an application to review and vary the Decision and requested a stay of the decision until the Commission ruled on the company's application.
3. On 3 April 2020, by way of a Secretary General [letter](#) (the Secretary General letter), the Commission extended on its own initiative, in light of the COVID-19 pandemic, the deadlines outlined in the Decision by 90 days for both the deployment of toll trunks and the requirement for Bell Canada to file revised tariff pages. The new dates were set as 20 July 2020 to file revised tariff pages and 17 August 2020 to complete toll trunk deployment.
4. In the Secretary General letter, the Commission recognized that telecommunications service providers, including Bell Canada and RCCI, had been focused on ensuring that their networks continued to function at peak efficiency to meet the heavy demands at that

time. The Commission considered that the COVID-19 pandemic represented an unprecedented *force majeure* situation during which it would not be appropriate for the Commission to expect Bell Canada or RCCI to make non-essential changes to their networks. Lastly, the Commission indicated that it would continue to assess Bell Canada's review and vary and stay application during the extension period.

5. On 15 July 2020, the Commission published Telecom Decision 2020-226 regarding Bell Canada's review and vary and stay application. The decision includes
  - the Commission's denial of Bell Canada's request to review and vary and stay the Decision; and
  - a confirmation that the dates prescribed in the Secretary General letter for the implementation of the Decision remain in effect: 20 July 2020 to file revised tariff pages and 17 August 2020 to complete toll trunk deployment.
6. On 6 August 2020, the Commission approved Bell Canada's filing of revised tariff pages on an interim basis under Tariff Notices 7616 and 7616A, with an effective date of 17 August 2020, consistent with the implementation deadline for the toll trunks.
7. On 8 September 2020, the Commission sent a request for information to Bell Canada and RCCI to confirm the actual deployment of the toll trunks. On 9 September 2020, both companies confirmed that the trunks could not be deployed by 17 August 2020 given the necessary number of trunks required. Bell Canada and RCCI indicated that they began collaborating following the issuance of Telecom Decision 2020-226 and reached a mutually agreed upon deadline for the deployment of the necessary toll trunks between their respective networks. Both companies confirmed that they expected deployment to be completed by mid-September 2020. As of the date of this publication, neither party has raised further issues on the matter.

## **Application**

8. On 20 May 2020, RCCI filed an application to review and vary the Secretary General letter pursuant to section 62 of the *Telecommunications Act* (the Act), as well as Part 1 and sections 7 and 71 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*.<sup>1</sup> That application is the subject of the present decision.
9. In its application, RCCI argued that the Commission made an error in law by failing to give RCCI notice of its intention to vary the Decision and failing to give the parties an opportunity to comment. RCCI further argued that the Commission made an error in fact in that the extension of the timeline for Bell Canada to deploy its toll trunks is

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<sup>1</sup> RCCI requested that its review and vary application be treated on an expedited basis, given the extension of the deadlines set out in the Decision and the expenses it would be required to incur. In consideration of this request, the Commission implemented an expedited intervention and reply period, and the record closed on 11 June 2020.

unjustified – even taking into consideration the impact of the COVID-19 pandemic – which creates substantial doubt regarding the reasoning of the decision.

10. RCCI therefore requested that the Commission rescind the Secretary General letter and require Bell Canada to deploy the ordered toll trunks with a completion deadline of 30 days from the publication of the Commission’s decision on the current matter. RCCI also requested the ability to deduct the toll-free traffic in question from its calculation of the traffic imbalance between the companies on their two-way bill-and-keep trunks by suspending the application of Bell Canada’s tariff to this class of traffic as of 19 May 2020, the toll trunk deployment date from the Decision.
11. RCCI argued that if the Commission does not correct the situation, RCCI would bear the entire cost of the prolonged imbalance following the 90-day extension in the Secretary General letter, and Bell Canada would unjustly reap financial benefits.
12. The Commission received interventions from Bell Canada and Quebecor Media Inc., on behalf of Videotron Ltd. (Videotron), regarding RCCI’s application.

### **Review and vary criteria**

13. Pursuant to section 62 of the Act, the Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision. In order for the Commission to exercise its discretion, and as outlined in Telecom Information Bulletin 2011-214, 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 the circumstances or facts since 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**

14. The Commission has identified the following issues to be addressed in this decision:
  - Is there substantial doubt as to the correctness of the Commission’s decision in the Secretary General letter due to an error in law?
  - Is there substantial doubt as to the correctness of the Commission’s decision in the Secretary General letter due to an error in fact?
  - Should RCCI be allowed to deduct the toll-free traffic amount, as of 19 May 2020, from the overall imbalance resulting from the bill-and-keep trunks?
15. Given that the confirmed date for the implementation of the toll trunks of 17 August 2020, as per Telecom Decision 2020-226, has already passed, RCCI’s request to require Bell Canada to deploy the toll trunks 30 days from the date of the present decision is moot.

## **Is there substantial doubt as to the correctness of the Commission's decision in the Secretary General letter due to an error in law?**

### **Positions of parties**

#### **RCCI**

16. RCCI submitted that the Commission does not have the authority to modify the implementation deadline determined in the Decision without providing parties with an opportunity to make submissions on the issue, even if Bell Canada had filed a review and vary application making such a request.
17. RCCI added that the Commission routinely considers applications from telecommunications service providers to extend implementation deadlines that it sets in its decisions where parties apply for that extension, and that the Commission gives all parties an opportunity to file interventions on the matter. That type of process serves to protect the well-recognized administrative law principle that once a tribunal has reached a final determination in respect to the matter that is before it in accordance with its enabling statute, that determination cannot be revisited because the tribunal has changed its mind or made an error within jurisdiction or because there has been a change of circumstances,<sup>2</sup> like in the case of the current COVID-19 pandemic.
18. RCCI submitted that the Commission necessarily affected the rights of the parties to the Commission's determination by changing the Decision's implementation deadline without receiving submissions from parties in accordance with the administrative law principles of fairness and natural justice. This error in law therefore provides grounds for the Commission to review the Secretary General letter.

#### **Bell Canada**

19. Bell Canada opposed RCCI's review and vary application and urged the Commission to deny both the request for the 30-day deadline to deploy toll trunks and the request for compensation regarding the imbalance resulting from the bill-and-keep trunks. Bell Canada submitted that RCCI is not entitled to compensation from what was effectively a Commission determination to issue a short stay of the Decision, especially in light of the extenuating circumstances associated with the COVID-19 pandemic.
20. With respect to RCCI's arguments that the Commission failed to provide the parties with notice or allow them to comment on the 90-day extension granted in the Secretary General letter, Bell Canada argued that the Commission had already received views from Bell Canada and RCCI regarding the merits of a stay of that length – or a potentially longer stay – in Bell Canada's review and vary proceeding.

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<sup>2</sup> *Chandler v. Alberta Association of Architects* (Supreme Court of Canada, [1989] 2 SCR 848).

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

21. When it issued the Secretary General letter, the Commission had before it the present parties' submissions with respect to Bell Canada's review and vary application and its request for a stay, including submissions regarding the impact of a delay in the implementation of the Decision.<sup>3</sup>
22. The Commission acknowledges that application did not include notice that the Commission could delay implementation of the Decision for reasons other than Bell Canada's request, such as the unique circumstances created by the COVID-19 pandemic.
23. However, as originally declared in the Secretary General letter, the COVID-19 pandemic is a singular event akin to a *force majeure* situation that has significantly disrupted not only the telecommunications industry, but also the day-to-day lives of all Canadians. It has warranted significant adjustments to a broad spectrum of ongoing proceedings at the Commission and elsewhere. The Commission considers that impacts of the COVID-19 pandemic were not only well documented and taken into consideration but also the major factor behind the 90-day extension of the toll trunk implementation deadline granted in the Secretary General letter.
24. Moreover, to the extent that there was new evidence or argument about the specific implications of the COVID-19 pandemic to the specific facts of this case, RCCI has provided such evidence and argument within the context of the present review and vary application. The Commission has considered that evidence and argument in this decision. Therefore, even if the disruptive nature of the COVID-19 pandemic meant that RCCI did not have the opportunity to file submissions regarding whether an extension should be awarded, the Commission finds that any error in law has been addressed by this decision.

## **Is there substantial doubt as to the correctness of the Commission's decision in the Secretary General letter due to an error in fact?**

### **Positions of parties**

#### **RCCI and Videotron**

25. RCCI argued that the Commission made an error in the Secretary General letter in that the extension was not requested by any of the parties and was not needed to alleviate Bell Canada's workload during the COVID-19 pandemic.
26. RCCI argued that both parties had the ability to increase the number of interconnecting trunks between their respective networks without affecting their overall service to Canadians, despite the COVID-19 pandemic. RCCI submitted that

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<sup>3</sup> This situation is distinguishable from the cases cited by RCCI in its submissions because a reconsideration of the Decision was already before the Commission pursuant to its statutory review and vary provisions.

it had deployed toll trunks with several other carriers, even in the heart of the COVID-19 pandemic.

27. RCCI argued that the extension for Bell Canada to construct the one-way toll trunks would not have been problematic if it did not also burden RCCI with the consequential increase in imbalance costs. RCCI stated that the total imbalance costs represented a considerable financial burden<sup>4</sup> for RCCI that the Commission should have taken into consideration before issuing the Secretary General letter.
28. Videotron fully supported RCCI's submission and added that recent events related to the COVID-19 pandemic have highlighted the urgent need for Bell Canada to implement the Decision. The congestion created by the lack of one-way toll trunks on the existing bill-and-keep trunks is creating significant service issues that cause Videotron's customers to experience dropped calls.

#### **Bell Canada**

29. Bell Canada disagreed with RCCI's claim that the impact of RCCI-originating traffic destined to Bell Canada's toll-free customers would create imbalance costs to the extent of the amount claimed by RCCI solely within the 90-day extension period. Bell Canada submitted that much of the toll-free traffic RCCI sends over bill-and-keep trunks is destined to a toll-free provider other than Bell Canada and thus falls outside the scope of the Decision.
30. Bell Canada also submitted that RCCI unfairly blames Bell Canada for an alleged lack of support during the COVID-19 pandemic by claiming that Bell Canada refused to hold any discussions. RCCI itself acknowledged that the parties worked well together during that period, and that they added capacity throughout and between their networks to alleviate congestion due to the sudden increase in traffic.

#### **RCCI's reply**

31. In response, RCCI submitted that Bell Canada had failed to address RCCI's argument that the extension itself has resulted in a change in circumstances for the parties. RCCI stated that the extension (i) worsened the unfavourable imbalance for RCCI regarding the bill-and-keep trunks, and (ii) prevented RCCI from being able to start charging Bell Canada for traffic originating with RCCI that was destined for Bell Canada's toll-free telephone number customers. In RCCI's view, Bell Canada was given an extension to install the trunks in question while it continued to refuse to negotiate the deployment of these trunks, and RCCI had to pay Bell Canada traffic imbalance charges as a result. Being required to pay for this delay constitutes a fundamental change in circumstances for RCCI that it was not given an opportunity to address.

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<sup>4</sup> RCCI provided the amount it estimates it will have to pay Bell Canada in traffic imbalance charges to the Commission in confidence.

32. RCCI submitted that Bell Canada's intervention only presents arguments – which RCCI rebuts and urges the Commission to reject – regarding the amount RCCI will have to pay as a result of the 90-day extension, and not regarding whether RCCI will be negatively affected by that extension.

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

33. In the Secretary General letter, the Commission recognized RCCI's unfavourable position regarding the imbalance resulting from the types of trunks in use. However, the Commission emphasized the extreme circumstances created by the COVID-19 pandemic and the need for the telecommunications industry to focus on the delivery of services to Canadians.
34. Having considered the record of this review and vary application, the Commission considers that both Bell Canada and RCCI had a reasonable ability to increase the number of interconnecting trunks between their respective networks despite the COVID-19 pandemic. However, the extension granted in the Secretary General letter was not due to a potential inability of the parties to deploy toll trunks. Rather, it was due to a perceived necessity, created by a *force majeure* situation, to allow the parties to prioritize more important efforts, such as ensuring service to Canadians and the mental and physical well-being of the parties' staff. The Commission notes that it issued many extensions for other procedural and reporting deadlines, both on request and on its own initiative, during the same time period for similar reasons.
35. The Commission therefore considers that RCCI has not demonstrated that the Commission made an error in fact by extending the implementation deadline for the toll trunks by 90 days.

### **Should RCCI be allowed to deduct the toll-free traffic amount, as of 19 May 2020, from the overall imbalance resulting from the bill-and-keep trunks?**

#### **Positions of parties**

##### **RCCI**

36. RCCI submitted that the delay to implement toll trunks has created an undue preference in Bell Canada's favour because RCCI has had to pay Bell Canada for the total imbalance over the bill-and-keep trunks. RCCI added that the total imbalance costs have been exacerbated by the increase in toll-free traffic due to the COVID-19 pandemic. RCCI further explained that until Bell Canada has finalized the deployment of the one-way toll trunks, RCCI would not be able to bill Bell Canada for Bell Canada's own toll-free calls.

##### **Bell Canada**

37. Bell Canada responded that RCCI is not owed compensation, and that even if it were, RCCI overestimated the amount it has to pay.

## Commission's analysis and determinations

38. In the Decision, the Commission did not find that Bell Canada conferred upon itself an undue or unreasonable preference. Rather, it found that both parties' toll-free routing arrangements over bill-and-keep trunks complied fully with the policy framework set out in Telecom Decision 97-8 and with Bell Canada's Commission-approved tariff. Although this arrangement was one of the sources of the imbalance payable to Bell Canada and the resulting unfavourable situation for RCCI, it represents the status quo, which the two companies freely negotiated in line with then-current Commission policy.
39. Also in the Decision, the Commission did not find that RCCI should be allowed to start billing Bell Canada retroactively as RCCI had requested, but rather that RCCI could only initiate billing once Bell Canada had finalized implementing the ordered toll trunks. Because the Commission did not find errors in law or in fact with the Secretary General letter, RCCI should not be allowed retroactive billing in the current situation either.
40. In other words, until Bell Canada deploys the toll trunks and the Commission approves the revised tariff pages as per the Decision, the situation in which the routing of toll-free calls is unfavourable to RCCI represents the status quo. The extension of the deadline for the implementation of the decision in the Secretary General letter only prolonged a situation resulting from agreements freely negotiated by both parties and consistent with the policy framework in place.<sup>5</sup> These agreements on traffic routing should not now be retroactively modified to align with the change in policy framework.
41. The Commission therefore concludes that it should not require that RCCI be able to deduct the toll-free traffic amount, as of 19 May 2020, from the overall imbalance resulting from the bill-and-keep trunks.

## Conclusion

42. In light of all the above, the Commission finds that there is no substantial doubt as to the correctness of the decision in the Secretary General letter due to any errors in law or in fact. Therefore, the Commission **denies** RCCI's application to review and vary the determinations in the Secretary General letter.
43. Regarding the dates for the implementation of the toll trunks, the Commission considers the issue resolved. In Telecom Decision 2020-226, published on 15 July 2020, the Commission ruled on Bell Canada's review and vary application prior to the deadlines to file revised tariff pages and complete toll trunk deployment established in the Secretary General letter: 20 July 2020 and 17 August 2020, respectively. As a result, the Commission determines that RCCI's request for the

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<sup>5</sup> See Telecom Decisions 97-8 and 2019-390.

Commission to order Bell Canada to implement the toll trunks within 30 days of this decision is moot.

44. The Commission **denies** RCCI's request to exclude, as of 19 May 2020, toll-free traffic from the calculation of the bill-and-keep trunk imbalance between Bell Canada and RCCI.

## Policy Directions

45. The 2019 Policy Direction<sup>6</sup> provides that when the Commission exercises its powers and performs its duties under the Act, it should consider how its decisions can promote competition, affordability, consumer interests, and innovation. Moreover, the Commission should, in its decisions, demonstrate its compliance with the 2019 Policy Direction and should specify how those decisions can, as applicable, promote competition, affordability, consumer interests, and innovation.
46. The Commission finds that its denial of RCCI's application is consistent with subparagraphs 1(a)(i), (ii), and (vi) of the 2019 Policy Direction, which state that the Commission should consider the extent to which its decisions
- i. encourage all forms of competition and investment;
  - ii. foster affordability and lower prices, particularly when telecommunications service providers exercise market power; and
  - vi. enable innovation in telecommunications services, including new technologies and differentiated service offerings.
47. The Commission considers that its determinations will help bring into effect the determinations of the Decision. The determinations of the Decision encourage both competition and affordability by enabling RCCI to capitalize on its innovation in the way in which it delivers toll-free traffic to Bell Canada. As a result, RCCI can deliver toll-free traffic to Bell Canada at a lower cost, which (i) can result in lower prices for RCCI's customers for local voice services, and (ii) supports competition in the marketplace, especially against incumbent local exchange carriers.
48. Additionally, the 2006 Policy Direction<sup>7</sup> requires that the Commission, in implementing the policy objectives set out in section 7 of the Act, rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives. Further, when relying on regulation, the Commission should use measures that are efficient and proportionate to their purpose and that interfere with the

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<sup>6</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227, 17 June 2019

<sup>7</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, 14 December 2006

operation of competitive market forces to the minimum extent necessary to meet the policy objectives.

49. The Commission considers that the denial of RCCI's application is consistent with the 2006 Policy Direction in that it (i) maintains the requirement for Bell Canada to deploy toll trunks to RCCI in a manner that is consistent with current industry practices for the delivery of toll-free traffic between local exchange carriers and interexchange carriers, and (ii) does not introduce any new regulatory measures.

Secretary General

### **Related documents**

- *Bell Canada – Application to review and vary and stay Telecom Decision 2019-390 regarding the routing of toll-free traffic destined for the company's toll-free telephone number customers*, Telecom Decision CRTC 2020-226, 15 July 2020
- *Rogers Communications Canada Inc. – Application regarding routing of the company's toll-free traffic destined for Bell Canada's toll-free telephone number customers*, Telecom Decision CRTC 2019-390, 2 December 2019
- *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Rebilling of carrier access tariff charges for incumbent local exchange carriers*, Telecom Order CRTC 2014-364, 11 July 2014
- *Canadian Network Operators Consortium Inc. – Application to review and vary Telecom Regulatory Policies 2011-703 and 2011-704*, Telecom Decision CRTC 2013-73, 21 February 2013
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997