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9 March 2011

Mr. Robert A Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

Dear Mr. Morin:

Subject: ***Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Proposed revision to the treatment of imbalance traffic compensation,*** **Telecom Decision CRTC 2010-787, 25 October 2010**

Fibernetics Corporation ("Fibernetics") makes application, pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure,* to review and vary the above-noted decision ("Decision 2010-787").

Fibernetics seeks first, to correct a palpable error on the face of Decision 2010-787, and second, to quash the tariff pages reflecting such palpable error that were directed to be issued by Bell Canada and Bell Aliant Regional Communications, Limited Partnership (collectively, the "Bell Companies") as a result of Decision 2010-787. Third, Fibernetics requests that the Commission initiate a follow-up proceeding to determine the appropriate transitional regime and resolve the implementation issues associated with the new principle established in Decision 2010-787.

Finally, Fibernetics requests that the Bell Companies' tariff pages as they existed on 23 November 2010, prior to the issuance of the amended tariff pages resulting from Decision 2010-787, be reinstated pending the Commission's determination of the tariff proceeding requested by Fibernetics in the enclosed application.

Yours very truly,

T. Jeffrey Zimnicki

Tom Zimnicki
Vice-President, Regulatory Affairs

c. LECs

Before the Canadian Radio-television and Telecommunications Commission

Application pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*

from

***Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Proposed revision to the treatment of imbalance traffic compensation*, Telecom Decision CRTC 2010-787, 25 October 2010**

by Fibernetics Corporation

9 March 2011

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I. INTRODUCTION

1. On 10 May 2010, Bell Canada and Bell Aliant Regional Communications, Limited Partnership (collectively, the "Bell Companies") applied to the Commission to request certain revisions to the current treatment of imbalance payments when more than 80 percent of the total traffic exchanged between a given competitive local exchange carrier ("CLEC") and one of the Bell Companies on bill-and-keep trunks terminates on the CLEC's network (the "80 percent unidirectional termination criterion").

2. The Bell Companies contended that based a two Sundays' worth of observations of the traffic exchanged between the Bell Companies and six (6) CLECs, they concluded that where the 80 percent unidirectional termination criterion was met, the CLEC in question must only be transmitting dial-up ISP-bound and two-stage toll traffic. The Bell Companies proposed in their application that the 80 percent unidirectional termination criterion serve as a proxy for determining the actual composition of traffic exchanged between a given CLEC and a Bell company.[1]

3. On the basis of the foregoing, the Bell Companies requested[2] that they be permitted to modify their imbalance tariffs such that where

   (a) the 80 percent unidirectional termination criterion was met; and

   (b) the total number of minutes of traffic exchanged between the CLEC in question and a Bell company was more 10 million minutes per month;

   then *no imbalance payments would be paid to the CLEC by the Bell Companies*.

4. Comments in the proceeding leading up to Decision 2010-787 were focused on whether, as a matter of principle, the imbalance regime should be altered as far as dial-up Internet and two-

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[1] Bell Companies, *In the matter of an application by Bell Aliant Regional Communications, Limited Partnership and Bell Canada pursuant to Part VII of the* CRTC Telecommunications Rules of Procedure, 10 May 2010 (the "Bell Application"), para. 36 (second sentence).

[2] Bell Application, para. 4.

stage long distance calling services were concerned and if so, what threshold level of traffic imbalance should be used as a proxy for actually determining the composition of traffic.

5. Importantly, however, no Tariff Notice accompanied the Bell Application and no proposed tariff pages, nor even proposed language modifying the existing tariff language were contained in the Bell Application. The Bell Application was also silent as to the transitional provisions that were appropriate to transition from the existing traffic imbalance rules to the proposed regime and as to the methodology for the calculation of the 80 percent unidirectional termination criterion. And nowhere in the Bell Application, in Bell's reply submission or indeed in any other submission on the record of the proceeding, was there any discussion of the foregoing implementation issues.

6. Against this backdrop, in *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Proposed revision to the treatment of imbalance traffic compensation,* Telecom Decision CRTC 2010-787, 25 October 2010 ("Decision 2010-787" or the "Decision"), the Commission determined that

   (a) it would be appropriate to revise the compensation regime for traffic imbalances in the case of CLECs that primarily provide dial-up Internet and two stage long distance calling services;

   (b) that in the case of such CLECs, the compensation otherwise payable should be reduced in accordance with paragraph 21 of the Decision and the imbalance payment reduction schedule (the "Reduction Schedule") set out at Appendix 1 of the decision; but only where:

      (i) the total volume of traffic exchanged is at least 10 million minutes per month;[3] and

      (ii) the volume of traffic in one direction is more than 80 percent of the total traffic exchanged between LECs *for three months or more*.[4]

[3] Decision, paras. 17 and 1.
[4] Decision, para. 21.

7. The Decision unequivocally states on its face in at least two separate instances that in the Bell Application, the "Companies proposed to eliminate compensation payments when the total volume of traffic exchanged is at least 10 million minutes per month and the volume of traffic in one direction is more than 80 percent of the total traffic exchanged between LECs *for three months or more*"[5] (emphasis added).

8. However, nowhere on the public record of the proceeding, whether in Bell's submissions or in any other party's submission, was the use of a "three month" period or of any other period to be used in association with the 80 percent unidirectional termination criterion raised, discussed or alluded to.

9. Not only does the Decision contain on its face a palpable error with respect to the "three month" period, this error translates into an error affecting the Commission's duty of procedural fairness. It means that the Commission exercised its power without regard to the material put before it and that interested parties were deprived of reasonable notice of the issue and full and fair opportunity to comment. In the circumstances, the parties were not only deprived of notice of and opportunity to comment on the issue of the methodology for calculating the 80 percent unidirectional termination criterion but on consequential tariff amendments as a whole.

10. Furthermore, the negative repercussions of the absence of any process for parties to comment on the consequential tariff amendments have manifested themselves since the issuance of the Decision. An unacceptable level of uncertainty surrounding implementation issues has arisen. The tariff pages issued by the Bell Companies do not even to the extent of the palpable error on the face of Decision 2010-787, faithfully reflect the Decision itself. Fibernetics is aware that Commission staff has had a number of informal exchanges since the issuance of the Decision concerning implementation issues, which culminated in the Commission staff opinion dated 11 February 2011 (the "Staff Opinion"). The Staff Opinion represents a further marked departure from the words of the Decision with respect to the three-month period.

11. In the circumstances, the Commission's review and vary criteria are met. There is substantial doubt as to the correctness of the original Decision and a need to conduct a proper tariff

[5] Decision, paras. 1 and 16.

proceeding to consider implementation issues overlooked and determined without process by the Commission in Decision 2010-787. Fibernetics respectfully requests that Decision 2010-787 be reviewed and varied such that

(a) paragraph 22 of the Decision is struck as void *ab initio*;

(b) the words "for three months or more" are struck as void *ab initio* from paragraphs 1, 16, 21, and Appendix 1 of the Decision;

(c) the tariff pages issued by the Bell Companies and other CLECs as a result of Decision 2010-787 are quashed as void *ab initio*;

(d) the Bell Companies be directed to file proposed tariff pages implementing the Decision as amended and a follow-up tariff proceeding to consider same be directed; and

(e) pending the Commission's determination of such follow-up proceeding, the Bell Companies' traffic imbalance tariffs as they were on 23 November 2010 be reinstated.

II. REVIEW AND VARY CRITERIA

12. **Section 62 of the *Telecommunications Act* states:**

> **62.** 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.

13. In accordance with *Guidelines for Review and Vary Applications,* Telecom Public Notice CRTC 98-6, 20 March 1998 ("PN 98-6"), in order for the Commission to exercise its discretion pursuant to section 62 of the *Telecommunications Act,* applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to:

(a) an error in law or in fact;

(b) a fundamental change in circumstances or facts since the decision;

(c) a failure to consider a basic principle which had been raised in the original proceeding; or

(d) a new principle which has arisen as a result of the decision.

14. Notwithstanding the foregoing four criteria, the Commission has and will exercise its discretion in an appropriate case, to review a decision in the first instance, for example, where it considers there was a procedural error, and then conduct a proceeding to determine whether to vary the decision.

15. Fibernetics submits that in the circumstances,

(a) there is substantial doubt as to the correctness of Decision 2010-787 because on its face, it discloses an error in stating that the Bell Application included a proposal that traffic imbalance payments be eliminated when the 80 percent unidirectional termination criterion is present "for three months or more"; and

(b) there is substantial doubt as to the correctness of Decision 2010-787 because the Commission erred in law by failing to give interested parties meaningful notice of and opportunity to comment on the implementation issues surrounding the changes to the traffic imbalance regime approved in Decision 2010-787.

III. ERROR ON THE FACE OF THE DECISION

16. Decision 2010-787 unequivocally states on its face that as part of Bell's proposal, Bell proposed that the 80 percent unidirectional termination criterion be established over a period of "*three months or more*." However, as stated above, there is no evidence on the public record of this proceeding to support this alleged fact.

17. Where there is "no evidence" to support a finding, such a mistake is regarded as a jurisdictional error affecting the duty of fairness of an administrative decision-maker, since to allow a decision-maker to exercise its power without regard to the material put before it renders the right of interested parties to make representations a mere formality.[6] As noted by the Ontario Court of Appeal in a leading authority, "[a] finding of fact in the absence of any evidence is a processing error of a most serious kind and constitutes a palpable error."[7]

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[6] Brown and Evans, *Judicial Review of Administrative Action in Canada,* Vol. 3, para. 14:3410.

[7] *Waxman v. Waxman,* [2004] O.J. No. 1765 (C.A.), para. 335.

18. There is no evidence to support the assertion that Bell included in its proposal the use of a three month period for purposes of determining whether the 80 percent unidirectional termination criterion is met. This is a reviewable error not only because there is no evidence to support it on the public record but also because this error affects the fundamental fairness of the Decision. Given that the alleged three-month proposal was not a part of the Bell Application, interested parties had no notice of and no opportunity to comment on the alleged three-month proposal, nor indeed on any aspect of the transitional and methodological issues surrounding the implementation of the new principle contained in Decision 2010-787.

19. The Bell Application did not touch on the implementation issues of transition and methodology and they did not contain any tariff proposals. As such, Fibernetics reasonably believed that such issues would be determined in accordance with a proper Tariff Notice. In the circumstances, it represents a breach of the parties' right to be heard for the Commission to have relied on the non-existent "three-month" proposal and to have proceeded to issue directions concerning the implementation of the changes to the traffic imbalance regime approved in the Decision revolving around the non-existent "three-month" proposal without providing parties a full and fair opportunity to be heard on such issues.

IV. NEED FOR A TARIFF NOTICE PROCEEDING

20. Fibernetics submits that there is substantial doubt as to the correctness of the Commission's choice of procedures in this case. In particular, Fibernetics submits that there is substantial doubt as to the correctness of the Commission's choice to order the Bell Companies to proceed directly to issuance of amended tariff pages implementing the new principle established in Decision 2010-787, in the absence of any notice of the proposed tariff pages and any opportunity to comment on same. While the proposals contained in the Bell Application necessitated an amendment to the Bell Companies' traffic imbalance tariff, no party had notice of the fact that the Bell Companies would be directed to proceed to issue amended pages without a process to consider same.

21. It is a practical and legal requirement that tariffs and amendments thereto should not be promulgated prior to their approval by the Commission and that such approval should respect all legal, procedural and past practices of the Commission. Particularly in the case of competitor tariffs, tariffs should not be approved and made effective prior to a process being provided for

parties to receive notice of the proposed tariffs and to be given a full and fair opportunity to comment on same. Clearly, no such process occurred here.

22. In this regard, Fibernetics notes that it is highly unusual for the Commission to direct the issuance of revised tariff pages *in the absence of any underlying or accompanying Tariff Notices* that would have given interested parties specific notice of the proposed tariff amendments. And unlike tariff processes for retail services, the Commission has not instituted so-called "streamlined" procedures for competitor services, including interconnection services.

23. Fibernetics submits that new facts arising since the issuance of Decision 2010-787 amply demonstrate the negative repercussions attendant on the lack of public process concerning necessary tariff amendments and implementation issues associated with the new principle established in Decision 2010-787.

24. First, the issued tariff pages do not reflect the Decision, flawed as it is, and are remarkably consistent with the subsequent Staff Opinion. Without in any way prejudicing Fibernetics' position in relation to the error on the face of the decision in relation to the use of the "three-month" criterion, Fibernetics notes that the issued tariff pages do not faithfully reflect the Decision's treatment of the three-month period. According to a plain reading of the Decision, the 80 percent unidirectional termination criterion must be present for three months or more at all times in order for the reductions to imbalance payments otherwise payable to apply. There is no indication in Decision 2010-787 that this criterion need only be present for an initial "eligibility" period in order for the scheduled reduction in traffic imbalance payments to apply.

25. Indeed, the ILECs' issued tariff pages go well beyond the words of the decision. Bell's issued tariff pages provide that the three-month period is only relevant for an initial, one-time period:

> **Item 105. LOCAL NETWORK INTERCONNECTION AND COMPONENT UNBUNDLING – continued**
>
> 4. Rates and Charges – continued
>
> (d) Compensation for Traffic Terminations – continued
>
> (1) Termination of CLEC Intraexchange or Intra LIR Traffic – continued

> The discounts set out in the table below ill initially apply when the 10 million minute volume and Traffic Threshold conditions described in the preceding paragraph have been met in three consecutive months, and will continue to apply for each month until the traffic falls to, or below, the Traffic Threshold.
>
> Following the initial application of the discounts in the table below, those discounts will apply in any subsequent month when the total volume of traffice exchanged between the Company and a CLEC over all their local shared-cost trunks is at least 10 million minutes per month, and the volume of traffic in the direction of that CLEC network is more than the Traffic Threshold, whether or not those conditions have been met in the immediately preceding month(s). That is, the three month eligibility rule is relevant only to the initial application of discounts, not for any subsequent re-application between the same Company and the same CLEC.

26. The traffic imbalance measurement period – how long that period should be, when that period begins to run, whether that period runs on a rolling basis or as proposed in the ILECs' issued tariff pages only as an initial "eligibility rule" – none of these implementation issues, among others, were raised or even touched upon in the Bell Application or in any other submission in the proceeding leading up to the Decision.

27. That a significant degree of uncertainty concerning the implementation of the new principles established in Decision 2010-787 exists is undeniable. In addition to the inconsistency between the use of the "three months" as set out in the Decision and the liberties taken by the Bell Companies in "interpreting" the use of the "three months" in their issued tariff pages, it would appear that Commission staff attempted to resolve the uncertainty concerning the appropriate transitional regime and when the three months should start to run by issuing opinions of their own in the absence of a proceeding to determine these issues. The Staff Opinion only serves to

underline and exacerbate the uncertainty surrounding the implementation of the new principles set out in Decision 2010-787.

28. The Staff Opinion purports to clarify the Decision by

(a) "noting" that the Decision provides that the Reduction Schedule applies when the traffic between a Bell Company and a given LEC meets two criteria, namely,

(i) the volume of traffic in one direction is more than 80 percent of the total traffic exchanged; and

(ii) the total volume of traffic exchanged is at least 10 million minutes per month;

when in fact, in the Decision at para. 21, the Commission determined that the first criterion was that "the volume of traffic in one direction (across all points of interconnection between LECs) is more than 80 percent of the total traffic exchanged *for three months ore more*";

(b) "noting" that "the revised traffic imbalance compensation applies *after* a LEC has had an imbalance that meets the above criteria for three consecutive months or more," (emphasis added), when the Decision determines nothing of the kind;

(c) "noting" that the revised traffic imbalance compensation amounts set out in the Appendix to Decision 2010-787 apply "*if it has met the above-mentioned criteria three consecutive months prior to the effective date of the tariff*" (emphasis added), when again, the Decision determines nothing of the kind in terms of the relationship of the three month period to the effective date of the proposed tariffs;

(d) stating, therefore, that "in the case of the Bell Companies, since the effective date of the tariff is 24 December 2010, the revised tariff imbalance compensation amounts would have been applicable effective on that date if the LEC met the above criteria for three consecutive months prior to that date." Again, the Decision determines nothing of the kind.

29. Staff can provide non-binding staff opinions but cannot in so doing, purport to re-write decisions. The Staff Opinion goes beyond interpretation to re-writing of the Decision by expanding the use of the "three-month" proposal.

30. Prior to the issuance of the Staff Opinion, the position of the Bell Companies was that the first month in which traffic would be measured for purposes of determining whether the revised Reduction Schedule would apply would be January 2011, because the Bell Companies recognised that basing the traffic imbalance payments on traffic flows occurring prior to December 24, 2010 would represent retroactive rate-making. However, since the issuance of the Staff Opinion, Bell has aligned its position with that of staff.

31. In sum, the Decision contains a palpable error with respect to the reference to the "three month" period. The issued tariff pages compound this error in that they do not reflect the decision itself and the Staff Opinion further compounds and underlines the uncertainty surrounding the implementation of the Decision brought about by the lack of a proper proceeding to consider amendments implementing the changes to the tariff imbalance regime approved in the Decision.

32. The tariff pages issued to date as a result of the Decision must be quashed, with the establishment of a process for the Bell Companies to file proposed tariff pages and an opportunity for interested parties to comment on the proposed tariff pages. Pending the determination of this follow-up proceeding to consider the fresh proposed tariff pages, the Bell Companies' traffic imbalance tariffs as they stood prior to 24 December 2010 should be reinstated.

V. ORDERS SOUGHT

33. In the circumstances, the Commission's review and vary criteria are met. There is substantial reason to doubt the correctness of the original Decision and substantial evidence since the issuance of the Decision establishing the need for a proper follow-up tariff notice proceeding to determine implementation issues. Fibernetics respectfully requests that Decision 2010-787 be reviewed and varied such that

(a) paragraph 22 of the Decision is struck as void *ab initio*;

(b) the words “for three months or more” are struck as void *ab initio* from paragraphs 1, 16, 21, and Appendix 1 of the Decision;

(c) the tariff pages issued by the Bell Companies and other CLECs as a result of Decision 2010-787 are quashed as void *ab initio*;

(d) the Bell Companies be directed to file proposed tariff pages implementing the Decision as amended and a follow-up tariff proceeding to consider same be directed; and

(e) pending the Commission’s determination of such follow-up proceeding, the Bell Companies’ traffic imbalance tariffs as they were on 23 November 2010 be reinstated.

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