REGULATORY AND POLICY DEVELOPMENTS

CULLEN CHASTISES NEB CHAIRMAN

By: Susan Brown, Student-at-Law, Fraser & Beatty, Ottawa

In a recent decision of the Federal Court Trial Division, Mr. Justice Cullen slapped the wrists of the Chairman and another member of the National Energy Board, citing their behaviour as "at best an extremely indiscreet mode of proceeding." While the October 18, 1991 decision in *CNG Transmission* v. *National Energy Board et al.* confirms that the test of bias in Canadian administrative law requires only the appearance (not proof) of bias, it did not go as far as the applicants would have liked.

Although the legal issues in this case are not complicated, the number of parties and the sequence of events makes them seem so. The case involves two groups of large pipeline companies competing to transport gas, received from the TransCanada pipeline system, to the upper New York state market. At issue is the construction of a 20.6 km "Blackhorse" extension to the TransCanada system to connect it with the proposed "Empire State" pipeline in New York state. The proponents of the Blackhorse extension are TransCanada Pipelines Limited, ANR Pipeline Company, Rochester Gas and Electric Corporation (RG&E) and St. Clair Pipelines Ltd. Since the Empire State pipeline would pass through market areas traditionally served by CNG Transmission Corporation, it and the Tennessee Gas Pipeline Company propose that the gas be received from the TransCanada system at an existing connecting point near Lewiston, New York, and that the CNG facilities and pipeline in New York be expanded. Both proposals require regulatory approvals in Canada and the United States.

The sequence of events is critical to the decision. In July 1989, TransCanada filed an application with the NEB for authority to construct the Blackhorse extension (GH-1-91). Events began to move quickly in 1991:

January 28	TransCanada asks the NEB to issue its decision on Blackhorse by July 3, 1991, with reasons to follow as soon as possible thereafter.
April 22-26	The NEB holds public hearings on the Blackhorse application.
May 6	Oral arguments are heard by the NEB.
July 4	The NEB issues its decision denying TransCanada's application with reasons to follow.
July 11	TransCanada presses NEB for early release of the reasons for its decision, preferably by July 22, and indicates that it anticipates filing a review application.
July 16	Mr. Edge, a former Chairman of the NEB now acting as a consultant for Coastal Corp., (the parent of ANR), contacts the NEB Chairman to arrange a meeting with NEB officials on July 23.
July 25	The NEB issues its reasons in respect of the GH-1-91 decision.
July 29	Mr. Edge and representatives of Coastal, RG&E and St. Clair meet with Chairman Priddle and Vice-Chairman Fredette.
August 2	TransCanada, on its own behalf and that of ANR, St. Clair and RG&E, files an application with the NEB for review of the GH-1-91 decision pursuant to section 21 of the *NEB Act.*
August 5	Eleven members of the NEB receive a copy of notes summarizing the July 29 meeting and an outline for "Board Action" submitted by Mr. Edge.
August 9	The NEB decides to abridge the review process and advises that it has been

persuaded by the applicants' arguments that a review is justified.

The issue raised before the Federal Court was whether the NEB decision of August 9 should be quashed because the July 29 meeting raised a reasonable apprehension of bias on the part of the NEB. The applicants also raised the question of whether the abridged review process constituted a further denial of natural justice, since Tennessee Gas and CNG were not given the opportunity to argue the merits of the review application. If a breach of natural justice were found, a further question would be how many of the NEB members, if any, should be prohibited from participating in any review or rehearing of the July 4, 1991 decision. The applicants argued that all eleven members who received the notes on the July 29 meeting should be prohibited.

The respondents claimed that the July 29 meeting simply involved discussions of NEB procedure, an activity provided for in the rules and policy of the Board. That argument rang hollow in the face of the document entitled "Board Action" which was prepared by Mr. Edge. This document, attached to notes of the meeting prepared by an NEB lawyer in attendance, was circulated to eleven Board members a few days after the meeting. "Board Action" implicitly outlines an abridgement of the review process.

While Mr. Justice Cullen seemed willing to accept that the NEB was within its rights to abridge the review process, he found the major problem with the decision to be the fact that the source of the idea came from the "group representing the losing pipeline interests during a private meeting with certain members of the NEB." Had the decision come from the NEB without any input from outside sources "it could not be subject to attack as the [*NEB*] Act does allow for procedural changes."

While he quashed the August 9, 1991 decision to proceed with an internal review of the July 4 Hearing Order, Mr. Justice Cullen only prohibited the two members involved in August 9 meeting from participating in any review or rehearing of the July 4 decision. He did not state any reasons for limiting the prohibition in this manner.

Since this decision does not seem to break any new legal ground in Canada, one wonders whether the lesson to be taken from this case is not "don't do it," but rather "don't get caught doing it."

CRTC ENDORSES TELEGLOBE RATE RESTRUCTURING

By: John F. Blakney
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In a decision released on November 29, 1991 (*Teleglobe Canada Inc.—Proposed Amendments to the Interconnection and Operating Agreement with Telecom Canada*, Telecom Decision CRTC 91-20), the CRTC approved in principal revisions to the *Teleglobe/Telecom Canada Interconnection Agreement* of 1975 which will change significantly the parties' respective roles in establishing international telephone service rates. The CRTC also endorsed a Teleglobe proposal to unbundle the rate for basic overseas telephone service into domestic and overseas rate components.

However, approval of the initial set of interconnection agreement amendments was made conditional upon the parties revising their agreement to include safeguards to ensure that the CRTC could directly affect Teleglobe's revenues, and hence profits, under the revised arrangements.

The proposed amendments involved the first reduction since 1975 (from 53¢/minute to 48.5¢/minute) in the share of Teleglobe's revenue "settled" in favour of Telecom Canada to provide Canadian traffic distribution services for both outgoing and incoming overseas telephone calls. In addition, Telecom Canada members would have the option of establishing Optional Calling Plans (volume-based discounts to the basic charges established under Teleglobe's tariff for Canadian-originated overseas telephone service). In order that Teleglobe's revenue share would not be affected by the Telecom Canada discounts, the parties agreed that Teleglobe would be guaranteed a fixed "remittance" per minute on outgoing calls. The parties also agreed to continue to negotiate the Telecom Canada settlement downwards to help to reduce overseas telephone rates. By comparison, the settlement received by Telecom Canada for the delivery in Canada of U.S.-originated long

distance telephone traffic is now about U.S. 12¢/minute.

At the hearing of Teleglobe's application, the "remittance" levels were criticized by reseller competitors of Telecom Canada as providing a discriminatory and anti-competitive price advantage to Telecom Canada when compared to the rates paid by resellers to access Teleglobe's network under its Globedirect service. The CRTC concluded, however, that this price difference was not unduly discriminatory since it was more than accounted for by costs incurred by Teleglobe in the provision of Globedirect that are not incurred in supplying interconnected telephone service with Telecom Canada. These additional Globedirect costs include billing hardware and software, additional points of presence for access to Teleglobe and dedicated transmission facilities to connect Teleglobe Points of Presence to the central Globedirect switch and to Teleglobe overseas gateway switches. As a result, the Commission also accepted the amending provisions that permit Telecom Canada members to introduce Optimal Calling Plans (OCPs) subject to separate regulatory approval.

However, the Commission declined to approve the amendments because it was concerned that it may not have jurisdiction to require changes in the Teleglobe remittance and hence in Teleglobe's guaranteed level of revenues. With OCPs in place and with the remittance guarantee, Teleglobe's revenues would be independent of its retail level overseas rates actually approved by the Commission. Specifically, the Commission questioned its ability to require telephone companies to substitute terms and conditions satisfactory to it (e.g. remittance) for unsatisfactory terms and conditions, and to ensure that such changes are made on a timely basis to prevent excessive revenues from being earned. The Commission also viewed the amending clause linking the retail rate and Teleglobe's remittance as too imprecise because it did not specify an exact relationship between the two and did not stipulate a time within which negotiations would have to be completed.

The Commission then went on to specify the measures necessary to ensure that reductions in Teleglobe's remittance and retail rates would be directly linked on an absolute dollar-per-minute basis, in the event of a CRTC finding that a reduction in Teleglobe's revenues was necessary to prevent Teleglobe from earning unreasonable profits.

Shortly after the decision, Teleglobe and Telecom Canada revised their amending agreement to adopt three measures. The Commission's decision had stated that with these measures in the agreement, it would be prepared to consider expeditious approval of the entire scheme.

Of perhaps greater long-term importance to telecommunication service competition was the Commission's favourable discussion of Teleglobe's general proposal to move to a new network access tariff in 1992 that would govern the provision of the overseas network element of overseas telephone service supplied by Teleglobe to all Canadian intermediaries, including users, resellers and Telecom Canada.

The effect of this network access tariff would be to put Telecom Canada on the same footing as any other customers of Teleglobe, and to eliminate the sharing of billing, service development and rate planning responsibilities that exists under the current Teleglobe/Telecom Canada interconnection agreement. This sharing creates at least the appearance of a partnership between the parties in the supply of basic overseas telephone service. Such partnership has become inconsistent with the fact that Teleglobe now competes directly with Telecom Canada for business customer patronage through Teleglobe's Globedirect service. Globedirect service was the major reason why Telecom Canada requested greater retail rate control through OCPs under the current interconnection agreement.

The CRTC noted with approval that an outgoing service gateway access tariff would enable it to implement a specific Teleglobe revenue requirement and that it would provide domestic service suppliers with greater flexibility in designing and packaging their services. Finally, by eliminating any requirement for negotiations with respect to outbound settlement rates, the potential for protracted negotiations and settlement disputes would be eliminated. However, the CRTC did not consider that the

appropriateness of a complementary domestic carrier inbound access tariff for Teleglobe had been sufficiently examined, and declined to express a view on it.

TELESAT PRIVATIZATION PROCEEDS

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On October 23, 1991, the federal government tabled legislation (Bill C-38) to continue Telesat Canada under the *Canada Business Corporations Act* (*CBCA*) and to provide for the disposal of the government's 53 percent interest in the company. The government indicated that it would solicit bids following passage of the enabling legislation. At the time of writing, the legislation is under clause review by a Committee of the House and it is anticipated that it would be enacted in early 1992.

In addition to changing Telesat from a private act company with limited powers to a *CBCA* company with unlimited powers, the legislation would establish a twenty percent, non-resident voting share limit, impose an obligation on Telesat to operate a domestic satellite telecommunication system on a commercial basis, require prior CRTC approval of any post-privatization acquisition of control of or disposition of integral telecommunication assets, and permit the CRTC to refrain from exercising its regulatory powers over competitive Telesat services. These provisions parallel those established for Teleglobe when that company was privatized in 1987.

In an accompanying telecommunications statement, the government stated that it will exercise its radio facilities licensing powers under the *Radiocommunications Act* to require Telesat to continue providing satellite facilities for the provision of telecommunications services to northern and remote areas of Canada, and to provide it with a domestic fixed satellite services monopoly for ten years.

This monopoly policy was established to ensure recovery of Telesat's substantial investment in two new "E" series satellites (which have a useful life of approximately ten years) and to permit cross-subsidization to meet Telesat's northern and remote service obligations. However, the policy statement makes it clear that this monopoly does not extend to mobile satellites, direct broadcast satellites or earth resources satellites. The exclusion of direct broadcast satellites is noteworthy since this technological development represents the principal competitive threat in the 1990s to Telesat's broadcaster customer base. This customer base, which represents sixty percent of Telesat's space segment revenues, includes conventional network television, cable-delivered speciality services, Pay-TV services and retransmission by CANCOM of signal packages to users and cable companies which cannot access U.S. broadcast signals directly.

The government's Telesat shares will be sold through an open, competitive bidding process. Potential purchasers have been encouraged to contact the Bureau of Competition Policy early on to determine if their bids raise merger law issues.

Finally, the government stated that its conditions of sale will include:

- a requirement that, for major purchases of satellites and earth stations, Telesat will use its best efforts to buy from Canadian suppliers;
- maintenance of the existing Employee Share Ownership Plan; and
- a requirement that bidders furnish their business and future organizational and management plans for Telesat, state their intention regarding the maintenance of Telesat's headquarters and operations in the National Capital Region, and outline their plans regarding the use of Canada's official languages.

The requirement that Telesat only use its "best efforts" to buy from Canadian suppliers would appear to be a significant loosening of Telesat's current Canadian content obligation. Under the current *Telesat Canada Act*, each request by the company for a proposal to construct an earth station or a satellite must be submitted to the Department of Communications (DOC) for approval. DOC reviews each request to ensure that it will result in proposals that specify a reasonable utilization of Canadian design and engineering skills and the incorporation of an appropriate proportion of Canadian components

and materials. Bill C-38 does not contain such an approval requirement, and it would appear that the government is content to rely upon its contractual remedies to enforce this best-efforts standard.

Telesat is expected to submit an application to the CRTC for final space segment service rates to the end of 1999 before the end of the year. Currently, Telesat has approved space segment rates to only the end of 1992. The CRTC has traditionally approved space segment rates subject to tracking and ongoing financial performance standards covering the expected useful life of new satellite series. The CRTC will hold a public hearing on the application in the spring of 1992 and a Commission decision can be expected in the late summer or fall. This proceeding will be critical to bidders, since it will establish Telesat's space segment rates for the next eight years, approve the recoverable cost of the "E" series plant, and establish the basis for allocating corporate expenses between Telesat's monopoly space segment and other competitive activities. In so doing, the CRTC will make important underlying findings concerning the rate of change in the demand for Telesat's space segment capacity, the structure of the company's customer base, whether different rating principles should apply to telecommunication and broadcast customers, and the growth of overall corporate expenses during the 1990s.

CRTC SHEDS LIGHT UPON PRIVATE LINE SERVICE PRICING POLICIES

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In two decisions released on November 21, 1991, the CRTC has attempted to introduce a greater degree of competitive pricing freedom in the private line service market, while at the same time continuing to regulate the private line services of telephone companies on a case-by-case basis.

The decision of broader application (Telecom Decision CRTC 91-10, *Megaplan Reductions and Related Proposals*, November 21, 1991), disposes of applications from all Telecom Canada member companies subject to the Commission's jurisdiction, proposing rate reductions and related rating policy changes for the Megaplan family of services. Megaplan covers the local and interexchange digital private line services offered by Telecom Canada companies.

The principal reason provided by Bell Canada and other Telecom Canada members for the proposed Megaplan rate reductions was to bring the Megaplan rates into line with the Mach III digital private line service portfolio offered by Unitel. The underlying request was for Commission approval of a price difference of no more than 15 percent between Bell's services and those of Unitel, in order to minimize customer migration from Bell to Unitel. Bell and other Telecom Canada members also referred to the increasing competitive pressure from lower -priced private line services available in the United States.

The Commission concluded that there was "little to support" the proposed tariff revisions on the basis of the applicants' argument that a particular rate relationship needed to be maintained with Unitel. The Commission also found the telephone companies' evidence to be weak with respect to the relationship between end-to-end service price differentials and customer migration projections. The Commission reiterated its policy first articulated in Letter Decision 90-15 (October 24, 1990), that there is no longer any basis to maintain a regulated price differential between the basic rates for the private line services of Unitel and those of Telecom Canada.

Notwithstanding the Commission's rejection of the telephone companies' first line of argument, it nevertheless approved the proposed rates through reference to strong customer pressure favouring reduced private line rates and the need to remove incentives to bypass Canadian facilities through lower-priced U.S. private line services. In so doing, the Commission essentially skirted (for the time being) the question of whether the rate reductions would result in cross-subsidization of the competitive network services of the telephone companies from their monopoly services. Instead, the Commission has simply required Bell and B.C. Tel, the only federally regulated carriers required to provide annual actual and forecasted broad service category revenue/costs information, to continue to file such information for competitive network services in the normal way.

The Commission has not answered the question of what it might do in the event that 1992 forecasted competitive network service costs for Bell and B.C. Tel exceed forecasted revenues from these categories under the new tariffs when these results are filed at the end of 1991. One option would be to require a sufficient Megaplan rate increase in 1992 to offset the planned revenue shortfall. This option would be difficult for the Commission in light of its stated reasons for allowing further Megaplan rate reductions, and of the continuing wide disparity between Canadian and U.S. private line rates. The latter imply that there may be an overriding public interest rationale favouring business competitiveness and maximum use of Canadian controlled networks, notwithstanding the near-term quantified private line service cost/revenue relationship that results.

Another option would be to wait until the end of 1992 to see if the planned revenue shortfall actually occurs. This option exposes the Commission to criticism that it would be giving Telecom Canada a year's grace to cross-subsidize its Megaplan portfolio to prevent customer migration to a more efficient competitor. It also raises the problem of potentially unlawful retroactive regulation, were the CRTC to amend prospective 1993 rates taking into consideration past-period financial performance.

Finally, the Commission could offset the impact of a possible 1992 competitive services shortfall onto the Bell and B.C. Tel shareholders by adjusting monopoly service revenues in 1992 downward, through rate reduction and an amount equal to the forecasted cross-subsidization to competitive network services. This last option, while elegant, has its own problems. First, to achieve procedural fairness, considerable time would be required during 1992 to determine whether and to what extent monopoly service rates should be so adjusted. Second, the Commission may find it very difficult to adjust monopoly service rates to a level which, when combined with competitive services, would generate a total corporate return on equity below that which is necessary to attract investment capital to fund each carrier's investment programs.

While rejecting price-matching as a sufficient reason for carrier private line rate reductions, the Commission, in this decision, has offered no alternative standard of immediate practical value to competitors of Bell, B.C. Tel and other dominant telecommunication carriers, to assist them in determining exactly how low and for how long the Commission is prepared to let dominant carrier private line rates drop. The only apparent test of the reasonableness of these rate reductions is the economic evaluation normally filed by the applicants with the Commission to identify whether or not the proposed rate reduction would reduce the extent of revenue contribution from those services to corporate overheads and fixed asset costs. Unfortunately, it is highly unlikely that applicants would ever file an economic evaluation which did not conclude that demand stimulation and projected unit cost decreases more than offset revenue declines associated with pure price change. Further, key data for these evaluations is generally treated as confidential business information by the Commission. Interested parties including competitors, seldom see anything more than the broad assumptions that are applied to a confidential current and projected traffic data base.

In the second decision (*British Columbia Telephone Company v. B.C. Rail Telecommunications—Rates for Interconnected Interexchange Voice Rate Services*, Telecom Decision CRTC 1991-17), the Commission examined whether it should impose a rate relationship on substitutable private line services offered by B.C. Tel and B.C. Rail. B.C. Tel applied to the CRTC for a condition of B.C. Rail interconnecting with B.C. Tel that B.C. Rail must maintain the rate relationship (85 to 90 percent of B.C. Tel's rates) upon which its successful 1985 application for interconnection was, in part, based. B.C. Tel submitted that B.C. Rail's rates were now as much as thirty percent less than B.C. Tel's for equivalent analog interexchange private line services.

B.C. Rail replied that its rates should not be driven by B.C. Tel's costs, and that its actual market penetration had fallen short of the projection that it had made in the 1985 interexchange competition case.

The Commission found that, taking into account B.C. Tel access and link charges in

addition to line charges, B.C. Rail's rates were in fact 15 to 25 percent below those of B.C. Tel on most mileage bands. The CRTC also took into account the fact that B.C. Tel was raising analog interexchange private line rates, while at the same time decreasing digital rates, as a customer migration strategy to develop its digital services and facilities. This suggests that B.C. Tel's comparable analog channel rates may even be well above B.C. Tel's own current costs. The Commission found that B.C. Rail should not be required to raise its rates for its own analog private line services simply to complement B.C. Tel's migration strategy. The Commission also found that, given the limited market for analog private line services addressed by B.C. Rail, B.C. Tel was not likely to suffer any significant loss if B.C. Rail's rates exceeded the original planned 15 percent maximum differential. Accordingly, the Commission concluded:

> Under these circumstances the Commission does not consider it necessary for B.C. Rail to adhere to a specific differential from the rates of B.C. Tel.

While on the surface seeming to favour increased private line price competition, the Commission's decision may actually have a chilling effect on price competition. The Commission did not reject the possibility that it would be prepared to revisit the terms and conditions under which a federally regulated telephone was required to provide interconnection with an unregulated supplier of private line services, if the telephone company could establish that the unregulated supplier's pricing was causing it to suffer a significant loss of market share or some other form of financial harm. The method of CRTC intervention in these circumstances presumably would be to order an increase in the contribution surcharge under which the unregulated private line supplier interconnected with the facilities of the regulated carrier, thus indirectly forcing a price increase by that unregulated supplier.

CRTC APPROVES WIC ACQUISITION OF CHCH—WITH A TOUGH CONDITION

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On October 18, 1991, the Canadian Radio-television and Telecommunications Commission approved the acquisition of CHCH-TV Hamilton by Western International Communications Inc. (WIC), on the condition that within two years WIC transfer ownership or effective control of either CHAN-TV Vancouver or CHEK-TV Victoria to a third party (Decision CRTC 91-804).

CHCH was originally part of the Selkirk Communications group of broadcasting companies acquired in 1989 by MacLean Hunter Limited (MHL), although MHL did not intend to maintain ownership of the money-losing CHCH.

The conditional acquisition of CHCH-TV by WIC follows the CRTC's 1989 denial of an application by MHL to transfer CHCH-TV to CFPL Broadcasting, the owner of CFPC-TV London, and the Commission's 1990 denial of a transfer of ownership of CHCH-TV to a partnership of MHL and CFPL Broadcasting. In both instances, the CRTC was not persuaded that the applicant's business plan would improve the financial performance of CHCH-TV

WIC's business plan, on the other hand, did satisfy the Commission that the acquisition would result in significant and unequivocal benefits to the Canadian broadcasting system, particularly through a new $8.5 million fund for the development of Canadian programming.

In deciding that WIC must sell a station to get CHCH, the CRTC noted that it considered the significant expansion of WIC's role in the broadcasting system, the possible negative impact of this growth on the future of the CTV network, and the potential for conflict of interest between WIC's existing responsibilities as a CTV affiliate and its increasing involvement as the operator of independent stations across the country. Finally, the CRTC noted the potential shift that could occur in the competitive balance between commercial television licensees in terms of foreign program acquisition.

The CRTC also noted that WIC's ownership of CHAN-TV and CHEK-TV, which operate in the same market, represents an anomaly running counter to the Commission's ownership policy, which generally precludes the ownership of two television stations broadcasting in the same language in the same market.

The principal focus of interveners was the potential for increased Canadian competition for foreign programming rights and ensuing higher acquisition costs against a backdrop of stagnant or declining advertising revenues for private broadcasters over the last several years.

WIC stated that CHCH-TV would not compete for national rights to foreign programs except to protect rights it currently holds against bids from competing Canadian buying groups.

The CRTC concluded that the potential for a new WIC-based national buying group existed whether or not WIC acquired CHCH-TV, and that a regulatory prohibition against WIC bidding on certain national programming rights would be an "unwarranted departure from its practice not to intrude in the program acquisition activities of the broadcast industry."

The only option available to the CRTC to reduce foreign program competition, therefore, was to reduce the bargaining power of WIC both as a player in CTV and as a potential leader of an independent station buying group.

WIC is the second largest CTV participant, after Baton Broadcasting. But with the acquisition of CHCH-TV, WIC would also derive most of its television revenues from independent CTV competitors. This, the CRTC reasoned, would make it even more difficult for the shareholders of CTV to resolve their internal differences and to conclude a new shareholders agreement, which has been under negotiation since the CRTC's critical treatment of the existing arrangement in its 1987 CTV network license renewal decision.

The Commission reasoned that separate ownership of CHAN-TV and CHEK-TV was now financially viable, since both stations had been profitable during the 1980's and the strength of the Vancouver/Victoria advertising market had become sufficient to support competing stations. The Commission also observed that the stations had already begun to compete in programming content. CHEK-TV had been permitted by the CTV Board to reduce its CTV network programming broadcast simultaneously with CHAN-TV to seven and a half hours per week, and the Victoria station was operating as an independent station with respect to the foreign content of its program schedule.