

To

Mr. Claude Doucet
Secretary General
Canadian Radio-Television and Telecommunications Commission
Ottawa, Ontario
K1A 0N2

2 October 2020

File No. TEL 8638-B2-202006345

Regarding

Part 1 Application - Bell Canada - Application for permanent Commission approval to allow Bell Companies to continue to block certain fraudulent and scam voice calls

***Response re Bell confidentiality claims and proposed process;
Commission letter dated 22 October 2020***

& Procedural requests

From

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Comments re proposed procedures requiring the use of NDAs in CRTC public proceedings: The case of Bell's use of AI to block blatantly fraudulent and scam calls

Executive summary and procedural requests

1. We are in receipt of an email communication from the Commission regarding the Applicant's claims of confidentiality and proposal to utilize Non-Disclosure Agreements (NDAs) for information sharing among interveners the Commission considers "legitimate interested parties" per paragraphs 13-14 of the Application noted above.
2. We oppose the Applicant's proposed approach in this proceeding, as well as more broadly the utilization of NDAs in CRTC public proceedings.
3. If disclosure of information designated as confidential is in the public interest and/or is relevant to competition issues, Section 39 (4) already authorizes the Commission to disclose or require the disclosure of the relevant information on the public record. There is no statutory basis that authorizes the Commission to require private participants in a public proceeding to sign an NDA as a condition for effective participation.
4. From a legal perspective, requiring private parties to enter into an NDA with a regulated entity in a public consultation process is inconsistent with basic principles of procedural fairness as it poses a barrier to direct participation, transparency of evidence, and accountability in administrative decision making. Using NDAs as proposed by Bell to hide material information about risks of technologies and industrial processes would ultimately erode public trust in the Commission and the Canadian telecommunications industry.
5. From an economic perspective, authorizing the use of NDAs will create perverse incentives for regulated entities to make overly broad confidentiality claims on the public record. We already see this happening in other subsequent proceedings at the Commission, including those relating to data on SIM hijacking, wholesale access, and barriers to rural broadband. Going further down the road with NDAs, rather than determining what data points are sufficiently material that they should be put on the public record, will expand the range of "secrets" and undermine the quality and credibility of the Commission's decisions in this and a broad range of other matters in the future.
6. **Procedural Request 1: For reasons above, as well as a number of others detailed in this submission, we request the Commission narrows the scope of the Applicant's**

confidentiality claims in this matter and deny its request for the Commission to require signing an NDA with Bell as a condition for effective participation.

7. It is important to note here that the Commission has not published the email communication that we received on its website page on open Part 1 applications that includes links to this Application. We only learned about the request from the Commission to comment on confidentiality claims and the proposal to force participant to sign a private contract with Bell as a condition of effective participation via the email letter we received on October 22, 2020. Lack of public disclosure of the procedural request from the Commission on the CRTC website will limit the capacity of other interested parties to participate and comment on this important procedural matter. We suspect this omission may have been simply an administrative error.
8. **Procedural Request 2: We therefore request that the Commission publish the October 22, 2020, letter on CRTC's website alongside other documentation and submissions relating to this proceeding.**
9. **Procedural Request 3: To provide other parties that were not included on the Commission's email list for the above letter the opportunity to participate in this important proceeding, we request the Commission adjusts the deadline for submitting a response to the Applicant's confidentiality claims and proposed use of private NDAs by one month from the current deadline of November 2 to December 2, 2020.**
10. As we argued in response to Bell's prior motion to use NDAs in the proceeding leading the Commission to authorize the trial of Bell's network level monitoring and call blocking system, resorting to NDAs is neither necessary nor sufficient in this case. We are not interested in learning about the Applicant's trade secrets, commercial, technical, scientific information, or prejudice Bell's competitive position. What we are interested in knowing, and discussing on the public record without the constraints of an NDA, are risks associated with communication system reliability (i.e. false positives) and privacy of Canadians (what types of information the Applicant is harvesting from people and feeding into its call blocking algorithms). If the Commission had required the Applicant to be a bit more transparent about basic contours of its proposed approach in the first place, there would have been no need for the Applicant to ask the Commission to open the door to private NDAs. This error can be remedied by asking the Applicant to prepare public impact assessments of the system it has implemented and is now operating.
11. **Procedural Request 4: As we have done previously, we ask the Commission to require the Applicant to provide, on the public record, two independent reports that it commissions at its own expense: (a) a privacy impact assessment; (b) an algorithmic impact assessment.**

12. Given that the system is already operational and can be temporality reauthorized, there is no reason for the Commission to authorize its continuation on a permanent basis in a hasty and secretive manner without proper consideration of its inherent risks to Canadians on the public record.
13. We would request the Commission considers addressing Procedural Requests 2 to 4 outlined above before proceeding to answer questions about Bell's proposed procedure vs. Procedural Request 1.
14. We are participating in this proceeding as individuals. The views expressed here do not represent those of any organizations with which we are affiliated.

Comments

15. **Context:** We participated in the proceeding that led to the Commission to authorize the Applicant's request to deploy its call blocking system on a temporary basis. We participated in that proceeding as individuals with some knowledge of machine learning technologies and their applications in telecommunications industry. Our objective in participating in that proceeding was to provide an independent perspective that assists the Commission in evaluating the potential benefits and risks associated with the implementation of the proposed system.
16. **Secrecy and trust:** In particular, we were originally concerned about the potential for the system to block legitimate calls (i.e. false positive errors), a risk inherent in the design of systems for the analysis and classification of communications. Given the reluctance of the Applicant to provide even basic information about the type of network and individual call information that it planned to collect and utilize as inputs into its call blocking system in the early stages of that proceeding, we became increasingly concerned about the potential risks that Bell's system poses for the privacy (and therefore security) of Canadians.
17. **Confidentiality vs secrecy:** To be clear, we did not expect the Applicant or the Commission to make public any information that might help "bad actors". We requested the Commission only makes public key high-level elements of the system that would allow the interveners and the general public to evaluate the extent to which the application of the system can impact the reliability of basic voice/telephone services (i.e. false positive errors) and the privacy and security of Canadians (i.e. classes of information the Applicant collects in order to train the system and block calls its algorithms consider to be blatantly fraudulent and scam like).
18. **Insufficient disclosure:** The Applicant failed to answer any of the basic questions we asked in the early stages of that proceeding. Rather than exercising its right under the procedures set out by the Commission to provide a final reply addressing substantive concerns raised by the parties (including us), the Applicant submitted a last minute motion to the Commission proposing what it called a "compromise", whereby interveners that are willing to sign a private non-disclosure contract with the Applicant would be able to view critical information previously submitted in confidence to the Commission.
19. **Private contracts vs. public law:** In our response to the Applicant's extraordinary and precedent setting request for a "compromise", we explained that we do not oppose the rights of any private parties to enter into a bilateral NDAs with any other party and share whatever information they want. However, we also highlighted that opening the door to using private NDA's as a condition for accessing material information in public regulatory proceedings would undermine the ability of the parties to inform the public on the public record if there are material risks to system

reliability (i.e. false positives) and privacy/security (i.e. location, content, “big data” harvesting) of Canadians.

20. **Public risk mitigation:** In Compliance and Enforcement and Telecom Decision CRTC 2020-7, the Commission acknowledged our concerns about the proposed and novel use of private NDAs in public CRTC proceedings:

*“Dr. Rajabiun and Dr. McKelvey questioned how such private disclosures would assist the Commission in developing an adequate public record upon which parties could comment and by which risks could be assessed. They added that the proposed NDA could limit their ability to comment on the public record should they wish to identify risks based on privileged information.”*¹

21. **Exaggerated confidentiality claims:** Furthermore, in its analysis and determinations the Commission acknowledged that *“Bell Canada filed an unusually significant amount of information in confidence, in both its application and its RFI responses, because of the nature of Bell Canada’s proposal”* and the negative impact this has had on ability of interveners to participate in the proceeding in a meaningful manner.²

22. The Commission further determined that it considers *“that the interveners in this proceeding are not persons seeking to make illegitimate calls”*.³ It is not clear to us how the Commission arrived at this determination. Nevertheless, based on this presumption, the Commission determined that:

“Given the unique circumstances of this proceeding, the Commission concludes that disclosure to the interveners in this proceeding who sign the NDA of the information referenced in Appendix 2 is in the public interest.”

23. Unfortunately, the Commission did not address the obvious problems that hiding material information in a public regulatory proceeding from the public via a private NDA creates. The same problems would also exist if interveners would have to sign an NDA with the public agency directly, a possibility the Commission did not contemplate. An NDA amounts to an effective “gag order” on capacity of interveners (or as the Applicant is requesting in this case “legitimate interested parties”) to inform the public about potential risks based on privileged information.

24. An NDA might be appropriate in private settings, for example when a business enters into a relationship with another business, or when the Commission utilizes external experts to assist it

¹ Para 25.

² Para 31.

³ Ibid.

based on information the Commission holds in confidence. The courts can also issue confidentiality orders and publication bans, usually to protect the privacy and dignity of victims of harmful conduct (i.e. not parties engaged in risky activities with the potential to cause harm). Use of NDAs with regulated entities and other parties as part of a public proceeding is an entirely different matter.

25. **Procedural integrity at the CRTC:** Needless to say, in the previous proceeding we did not sign the NDA with Bell that the Commission required the parties sign if they want to be informed about some of the basic features of the proposed network monitoring, call classification, and blocking system. This system is now in place and the Applicant is asking the Commission to authorize its continued use on a permanent basis. While we trust the Commission made the right decision by allowing for the trial and restricting the ability of Bell to use information it collects for other purposes, we continue to oppose the use of NDAs and would not be willing to sign one if the Commission agrees with Bell's proposed process in this proceeding.
26. While we do not necessarily oppose the use of the system to identify and block blatantly fraudulent and scam calls, given that we will not have access to critical information that helps assess potential risks to the public, the Commission would leave us with little option but to oppose the Application for permanent authorization of the system if it chooses to adopt the NDA-based approach to disclosure of material information as Bell has proposed.
27. In our view, it goes against the grain of best practices in law and public policy for a public regulatory agency to be requiring entities it regulates or other private parties participating in a public proceeding to enter into a private contract with another private party as a condition of effective participation in a public proceeding.
28. **Commission's responsibility:** We recognize the importance of confidentiality with respect to certain information to protect legitimate business interests. However, the Commission is a public administrative body authorized and required to determine what information might be material to the public interest that needs to be placed on the public record. The Commission has the duty to assess claims of confidentiality on their merits when considering if there is information that is genuinely too sensitive to be disclosed. We do not believe the Commission has the authority, or should as a practical matter, let regulated entities have a say in screening interveners for their legitimacy. Furthermore, we feel it is unfair for the Commission to ask private interveners to enter into a private contract with a regulated entity, effectively allowing the entity creating the NDA to define the terms of engagement for public-interest participants in the process. The onus is more appropriately on the Commission to differentiate between material and immaterial information a particular regulated entity claims to be confidential, and ensure a process where all participants engaging in the public interest are operating with the same information.

29. **Slippery slope:** Rather than taking responsibility for determining the line between private confidential and information required for assessing privacy and false positive risks to Canadians on the public record, the Commission avoided making this critical decision at the time it authorized the activating the call blocking system on a trial basis. Instead, the Commission gave into Bell's extraordinary request and made effective participation in a public proceeding conditional on interveners signing an NDA with a private entity that Parliament has mandated the Commission to regulate for the benefit of the public. A "third way" using NDAs where material information is withheld from the public and only granted to interveners willing to compromise their ability to publicly discuss the merits or detriments of any given program in exchange for the ability to understand the true nature of the proposal in question represents a slippery slope that will inevitably reduce the transparency, quality, and public trust in CRTC decisions.
30. **Legal vs. policy considerations:** We are not legal experts specialized in standards of public evidence disclosure in quasi-judicial administrative bodies such as the CRTC. As such, we cannot comment on the legality of the Commission requiring interveners to sign an NDA with Bell if they want to get a better grasp of the potential benefits and risks associated with its system. However, we would argue that any procedures authorized by the CRTC that limit public participation, accountability and transparency in proceedings explicitly designed to support those principles must be demonstrably necessary to prevent a serious risk to an important interest, and be minimally impairing of the openness principle that grounds the proceedings. The benefits of such actions must be publicly justified with an explanation supporting contentions that the benefits of protecting confidentiality outweigh the deleterious effects on the public interest in open and accessible proceedings. In other words, it is not enough to simply recognize a proprietary or commercial interest in confidentiality; due process requires a more careful weighing of that private interest against the public interest in open proceedings and the free expression rights, to speak and hear, that are engaged in such proceedings.
31. **Open questions in this matter:** Given that we did not sign the NDA as part of the proceeding to approve the call blocking system trial, we still do not know what type of information the Applicant is collecting from communications that flow through its network, and potentially other sources of information, to identify and block fraudulent or scam calls. This raises significant questions, regarding which we can only speculate on the public record:
- How can we validate the zero (0) false positive rates the Applicant claims? A zero false positive rate in an experimental trial would be really unusual. The redacted Application does not provide any information that would help validate/reject the Applicant's claims in this regard, or to assist the Applicant and the Commission come up with a more credible approach to measuring and monitoring false positive rates if the trial were to be made permanent.

- While the system may have blocked a large number of fraudulent calls, has it been effective in reducing the incidence of fraudulent and scam calls? It would be reasonable to expect that enterprising fraudsters have already responded to the adoption of the Bell AI system by finding ways of bypassing it. The Application provides little information about the systems overall effect in reducing harm from fraudulent and scam calls, only the total number of calls that were blocked by the system.
- In terms of privacy concerns raised by us and various other public interest interveners in the original proceeding, we still do not have basic information about information the Applicant is collecting and analyzing. Is the Applicant just using information about call patterns based on originating numbers (i.e. meta-data), or is it using more intrusive methods such as locational and/or content analysis to monitor and evaluate if particular calls are blatantly fraudulent or not? Is the Applicant integrating call metadata and other network information it collects itself, or procures from other third-party sources of personal data, to operational the blocking system?

32. **Confidentiality vs. secrecy:** It is easy to see that answers to the first two questions above would not necessarily tip off any “bad actors” about the intricacies of the network level call monitoring and filtering system. At the same time, it is also obvious, at least to us, that having some basic information that helps answer these questions can have significant public interest value. While there might be some risk in tipping off “bad actors” if the Commission would disclose what information the Applicant is harvesting from Canadian’s phone calls and third party sources for the purpose of its call blocking system, it is arguable that the minimal risk that might occur in answering the last question could be warranted given the high public interest in protecting the privacy of Canadians. Keeping the details of the “secret sauce” may be reasonable, but failure to disclose the type of information the Applicant Bell is harvesting from Canadians’ communications creates the impression that the Applicant might be hiding something that would raise public concern if it were to be made public.

33. **Impact assessments:** For this reason, as we did in the previous proceeding, we propose the Commission requires the Applicant to provide independently commissioned privacy and algorithmic impact assessments (or perhaps “audits” now that the system has been operational for a few months) before proceeding to discuss authorizing Bell’s venture on a permanent basis. Impact assessments/operational audits would in fact be an effective way of mitigating risk of disclosures, while providing appropriate public assurances that the regulated entities, and the public entity that regulates them, are taking sufficient precaution to limit risks to the reliability of the communication system (i.e. false positives), privacy, and therefore security, of Canadians.

34. **NDA and incentives:** The Commission’s decision to open the door to using private NDAs as part of public proceedings that led to the authorization of Bell call blocking trial is already having a chilling effect on the willingness of the regulated entities to share material information on the public record. This is particularly apparent in ongoing proceedings regarding the design of the wholesale access regime, where regulated entities are refusing to share already public information about the location of their local Points of Presence (PoPs) and other critical information for enabling disaggregated interconnection on the public record. In response, the Canadian Network Operators Consortium (CNOc) has asked the Commission to use the NDA based solution Bell proposed and the Commission accepted in the case of trial call blocking.⁴ Needless to say, in that case Bell is opposing the use of NDAs as proposed by CNOc, arguing that the issue of NDAs in public consultations should be viewed on a case-by-case basis.⁵ We disagree with Bell in this matter.
35. **Public authority and accountability:** For reasons detailed in our previous submissions and in this one, the NDA-based approach Bell is proposing in this proceeding, and opposing in the case of wholesale access design, should be per se prohibited as part of CRTC’s public consultation processes. Using NDAs gives large regulated entities such as Bell the effective power to pick and choose when NDAs are appropriate and when they are not. Allowing use of private NDAs in public proceedings would effectively erode the Commission’s statutory authority to determine what information designated as confidential by regulated entities should be disclosed on the public record in the public interest. At the same time, the case-by-case approach would usurp the Commission’s responsibility for ensuring procedural fairness and public accountability of its decisions. For example, if material information is held secret under NDAs in a particular proceeding, then it is not clear how the parties would be able to effectively utilize judicial and Cabinet level redress mechanisms to Commission decisions that are based on secret information in the first instance.
36. **Related examples:** Public information about telecommunications in Canada is a matter shared in a number of regulatory files. Here and elsewhere, public information is lacking. A similar problem is also apparent in the proceeding to address barriers to rural broadband deployments, where some parties have asked the Commission to use confidential information it already has in its possession to develop a national map of existing transport facilities and support structure to enable efficient broadband deployments.⁶ National regulatory agencies in a number of other jurisdictions have already developed such maps and make them publicly available, but

⁴ See Telecom Notice of Consultation CRTC 2020-187, Call for comments – Appropriate network configuration for disaggregated wholesale high-speed access services (TNC 2020-187) – CNOc's Appeal of the Commission's staff ruling on requests for disclosure of information filed in confidence.

⁵ Telecom Notice of Consultation CRTC 2020-187, Bell Response to CNOc's Appeal of the Commission's staff ruling on requests for disclosure of information filed in confidence.

⁶ See Telecom Notice of Consultation CRTC 2019-406, submissions from various smaller service providers, Federation of Canadian Municipalities (FCM) and rural communities from across Canada, as well as Request for Information (RFI) from the Commission to addressed to the parties dated August 31, 2020.

unfortunately in Canada overly broad confidentiality claims over information that is already mostly public via private commercial databases and in disaggregated form has inhibited this type of initiative. Another recent example of problems excessive secrecy creates relates to the case of SIM hijacking, where mobile carriers have argued, and the Commission has agreed, that the historical number of SIM hijacking cases should remain secret.⁷ Hiding this sort of information under an NDA might mitigate against negative reputational effects on mobile carriers with a poor record of protecting their customers against SIM hijacking. However, secrecy would do nothing to inform consumers of wireless services about potential risks they might be facing, incentivise them to take some precautions, and motivate regulated entities to be more vigilant in protecting their customers from damages associated with SIM hijacking.

37. **Legitimate vs. less legitimate interveners:** It is not clear to us if the Commission has the legal authority and/or practical capacity to determine who is a legitimate participant, and who may pose a risk if they were to get their hands on valuable information shared under an NDA. For example, short of a very detailed and invasive security background check, we cannot see how the Commission can determine if particular companies or individuals represent/do not represent a security risk (i.e. are “bad actors” or will communicate critical information to “bad actors”). In addition, there is no way for the Commission to prevent parties that initially appear to be legitimate from informing “bad actors” about what they learn under an NDA (e.g. for a price that exceeds expected cost of breaching the NDA). What the Applicant is asking the Commission to do in classifying public interveners into legitimate and less illegitimate categories would be impractical, reduce incentives for private participation, and ultimately do little to achieve security through obscurity. We suspect sophisticated fraudsters have already figured out what Bell is doing and adjusted their methods accordingly. Only legitimate interveners and the general public are likely to remain in the dark.
38. **Opinion:** By rejecting the Applicant’s proposed approach using NDAs in this case, and requiring the public disclosure of high-level information about the nature of Bell’s system, types of information about communications it collects (i.e. metadata, location, content) and independent assessments, the Commission would reduce the incentives of regulated entities to make overly broad confidentiality claims in future proceedings. In our view, the Commission cannot avoid making the hard decisions about the line between information regulated entities consider confidential, and information that is critical to put on the public record in order to enable contemplative evidence-based decision making via public regulatory proceedings. In other words, we don’t believe a “third way” via NDAs is viable, nor would it be consistent with the intent and objectives of the Parliament in establishing the CRTC as a relatively open and transparent quasi-judicial body. Moreover, we can’t really see how would the Commission be

⁷ See Commission letter at: <https://crtc.gc.ca/eng/archive/2020/lt201016.htm>

able to justify its decisions before the Courts or the Cabinet if much of the evidence that is used to arrive at its decision in the first instance is held as a secret from the public.

Respectfully yours,

Dr. Reza Rajabiun & Dr. Fenwick McKelvey

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