

1 **Q. Will Bell Aliant be a public utility for purposes of the *Act* after the sale? Explain.**

2
3 A. Bell Aliant will not be a public utility for purposes of the *Act* after the sale.

4
5 **A. Definition of Public Utility**

6
7 Prior to 1989, Newfoundland Telephone Co. Ltd. (a predecessor of Bell Aliant) was
8 considered a “public utility” for purposes of the *Public Utilities Act* (the “*Act*”).

9
10 At that time, subparagraph 2 (1) (e) (i) of the *Act* provided that

11
12 2 (1) In this Act

13
14

15 (e) “public utility” means a person, firm or corporation that owns, operates,
16 manages or controls in this province equipment or facilities for

17
18 (i) the conveyance or transmission of messages or communication by telephone
19 or telegraph where the service is offered to the public or a corporation for
20 compensation,...

21
22 In the 1989 decision of the Supreme Court of Canada in *Alberta Government Telephones*
23 *v. Canada (CRTC)*, it was determined, in effect, that telecommunications companies were
24 undertakings subject to federal jurisdiction and federal regulation.¹ This determination
25 had the practical effect of rendering Newfoundland Telephone Co. Ltd. subject to federal
26 regulation as administered by the Canadian Radio-television and Telecommunications
27 Commission (the “CRTC”) as opposed to the Board of Commissioners of Public Utilities
28 constituted under the *Act* (the “Board”).

29
30 In 1998, subparagraph 2 (1) (e) (i) of the *Act* was repealed.² However, in the period
31 following the 1989 decision in *Alberta Government Telephones* until the 1998 repeal of
32 subparagraph 2 (1) (e) (i) of the *Act*, Newfoundland Telephone Co. Ltd. was effectively
33 subject to the regulatory jurisdiction of the CRTC, not the Board.³

¹ The basis of the Supreme Court of Canada’s decision was the division of provincial and federal powers under the *Constitution Act*. See: *Alberta Government Telephones v. Canada (CRTC)* [1989] 2 S.C.R. 225.

² See: S.N. 1998 c. 29, s. 1 (2).

³ The 1998 repeal of subparagraph 2 (1) (e) (i) of the *Act*, was not, from a legal perspective, required for Newfoundland Telephone Co. Ltd. to no longer be subject to the jurisdiction of the Board under the *Act*. The Supreme Court of Canada decision in *Alberta Government Telephones* determined that telecommunications was exclusively a matter of federal jurisdiction. This effectively resulted in Newfoundland Telephone Co. Ltd. being no longer subject to the jurisdiction of the Board under the *Act*, regardless of provisions of the *Act* which indicated otherwise.

B. Application to Joint Use

Newfoundland Power is a public utility for the purposes of the *Act*. Amongst other things, this obliges Newfoundland Power to provide "...service and facilities which are reasonably safe and adequate and just and reasonable."⁴

This obligation does not require Newfoundland Power to *own* all facilities connected with the provision of service or for the Board to exercise jurisdiction over all such facilities.⁵

The terms of Joint Use agreed between Bell Aliant and Newfoundland Power govern the Joint Use of *Support Structures* (i.e., utility poles, anchors and guys). They do not affect the ownership or responsibility for electrical facilities or telecommunications facilities attached to those Support Structures. Newfoundland Power will continue to own and be responsible for electrical facilities such as cross-arms, insulators, grounding systems and electrical conductor, and will continue to be subject to the provisions of the *Act*.

Prior to 2001, Newfoundland Power jointly used Support Structures owned by Aliant Telecom (a predecessor of Bell Aliant) to provide service to its customers even though Aliant Telecom was not at that time a "public utility" for the purposes of the *Act*.⁶

Both the *Act* and the federal *Telecommunications Act* (under which Bell Aliant and its predecessors are regulated) provide for Joint Use of Support Structures by providers of services to the public.⁷ This reflects a broad regulatory consensus that Joint Use of facilities by providers of services to the public should be encouraged where it results in lower costs for consumers of those services. In cases where joint users cannot agree on terms of access, both the *Act* and the federal *Telecommunications Act* provide regulatory authority to determine terms of access to Support Structures owned by entities regulated under their respective jurisdictions.⁸

C. Conclusion

That Bell Aliant will not be a public utility for the purposes of the *Act* should not have any material impact on the Application before the Board.

⁴ See: Section 37 of the *Act*.

⁵ The provisions of section 41(3) (b) of the *Act*, for example, clearly indicate that a public utility may lease, as opposed to own, property necessary for the provision of electrical service to its customers. The joint use agreement relating to support structures owned by Bell Aliant is a contractual right to use property upon agreed terms. This is conceptually similar to a lease which is a contractual right to use (as opposed to own) property.

⁶ These pre-2001 arrangements by which both Newfoundland Power and Aliant Telecom owned Joint Use Support Structures were consistent with national practice. They are also consistent with current national practice. Support Structures owned by Bell Aliant are currently jointly used by electric utilities in Nova Scotia, New Brunswick, Prince Edward Island, Quebec and Ontario. In each of these provinces, the electric utilities which are jointly using the Bell Aliant-owned Support Structures are provincially regulated.

⁷ See: Section 53 of the *Act* and section 43(5) of the *Telecommunications Act*.

⁸ While regulators typically have the specific ability to determine the terms of joint use of support structures in the absence of agreement between telecommunications service providers and electric utilities, such terms are usually agreed between parties on a broadly consistent basis across the country. See: Evidence of Newfoundland Power, Page 5, lines 11-12 and footnote 13.

1 The proposed sale of Joint Use Support Structures will enable a Joint Use regime broadly
2 similar to that which existed prior to 2001. This regime is consistent with (i)
3 Newfoundland Power's continuing fulfillment of its obligations under the *Act* and
4 (ii) current Canadian public utility practice.