



Telecom Decision CRTC 2005-47

Ottawa, 25 August 2005

MTS Allstream's application to vary the terms and conditions of an existing municipal access agreement with the City of Calgary

Reference: 8690-A4-04/02

*In this Decision, the Commission **denies** MTS Allstream Inc.'s (MTS Allstream) application requesting an order to grant MTS Allstream access to public highways and municipal property within the jurisdiction of the City of Calgary (Calgary) on terms and conditions that are consistent with the principles set out in Leducor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver, Decision CRTC 2001-23, 25 January 2001. The Commission finds that MTS Allstream failed to demonstrate that its predecessor, MetroNet Communications Group Inc., did not intend to enter into a municipal access agreement with Calgary (the Agreement) and that the Agreement did not validly represent its acceptance of the terms because of mistake, duress, inequality of bargaining power or other circumstances.*

The application

1. On 24 June 2002, AT&T Canada Corp. (on behalf of itself and AT&T Canada Telecom Services Company), now MTS Allstream Inc. (MTS Allstream), filed a Part VII application pursuant to the *CRTC Telecommunications Rules of Procedure* requesting an order to grant MTS Allstream access to public highways and municipal property within the jurisdiction of the City of Calgary (Calgary) on terms and conditions that are consistent with the principles set out in *Leducor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001 (Decision 2001-23).
2. Specifically, MTS Allstream requested that the Commission align the following terms and conditions of an agreement signed between MetroNet Communications Group Inc. (MetroNet)¹ and Calgary (the Agreement) with the terms and conditions approved in Decision 2001-23:
 - i) provisions requiring MTS Allstream to pay market-based fees for the use of municipal property;
 - ii) provisions requiring that, notwithstanding the fact that a relocation was made at Calgary's request, and regardless of the reason of the relocation, the relocation costs were to be shared between Calgary and MTS Allstream, with Calgary's portion declining to 0 percent for years five and over;

¹ MetroNet subsequently merged with AT&T Canada Corp. The merged company took the name of AT&T Canada Corp.

- iii) a default, termination or expiry clause giving Calgary the right to enforce a number of remedies that could interfere with the operations of MTS Allstream's network and require it to cease operations or remove its facilities;
- iv) a section providing that third parties only attach to MTS Allstream's facilities if they have a valid and subsisting agreement with Calgary providing them with the right to use Calgary's property;
- v) a limitation of liability and indemnity clause that was not appropriately balanced pursuant to the ordinary and applicable provincial principles of liability;
- vi) an arbitration clause that makes no provision for Commission arbitration of access disputes; and
- vii) a governing law and jurisdiction clause providing that the Agreement is governed in all respects by the laws and the Courts of Alberta.

Process

3. In *AT&T Canada Corp. Part VII application re: City of Calgary*, Telecom Decision CRTC 2002-46, 9 August 2002 (Decision 2002-46), the Commission suspended its consideration of the application until such time as it had reached a decision in *Terms and conditions of existing agreements for access to municipal property*, Public Notice CRTC 2001-99, 31 August 2001, to consider what circumstances, if any, would justify an intervention by the Commission to alter the terms of an existing contract between a carrier and a municipality for access to municipal rights-of-way.
4. In *Terms and conditions of existing agreements for access to municipal rights-of-way*, Telecom Decision CRTC 2003-82, 4 December 2003 (Decision 2003-82), the Commission enunciated the conditions under which it was prepared to consider applications under section 43 of the *Telecommunications Act* (the Act) for existing municipal access agreements (MAAs). The Commission also set out a process for parties to comment on MTS Allstream's application against Calgary.
5. By letter dated 30 December 2003, the Commission suspended the process for comments set out in Decision 2003-82, at MTS Allstream's request, pending the Federal Court of Appeal's determination on the Federation of Canadian Municipalities' (FCM) application for leave to appeal Decision 2003-82.
6. On 5 March 2004, the Federal Court of Appeal dismissed FCM's application for leave to appeal Decision 2003-82. On 19 April 2004, the Federal Court of Appeal also dismissed the motion by FCM, the City of Edmonton, the City of Vancouver (collectively, FCM et al.), Calgary and the City of Toronto (Toronto) for reconsideration of FCM's application for leave to appeal.
7. By letter dated 20 April 2004, FCM et al. requested permission to intervene in this application. By letters dated 20 April 2004 and 21 April 2004, Toronto and Calgary, respectively, requested that the Commission establish an alternative process for making submissions in this

application and in a similar application by MTS Allstream against Toronto. In *Process for MTS Allstream's applications to vary the terms and conditions of existing municipal access agreements with the cities of Toronto and Calgary*, Telecom Decision CRTC 2004-79, 6 December 2004 (Decision 2004-79), the Commission denied FCM's, Toronto's and Calgary's requests. The Commission also revised the process timeframes for MTS Allstream's application against Calgary.

8. On 5 January 2005, MTS Allstream filed its submissions pursuant to Decision 2004-79. Calgary filed its answer on 4 February 2005 and MTS Allstream filed its reply on 14 February 2005.

Statutory provision and regulatory background

9. Section 43(4) of the Act states that:

(4) Where a Canadian carrier or distribution undertaking cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct a transmission line, the carrier or distribution undertaking may apply to the Commission for permission to construct it and the Commission may, having due regard to the use and enjoyment of the highway or other public place by others, grant the permission subject to any conditions that the Commission determines.

10. In Decision 2003-82, the Commission stated that section 43 of the Act contemplates that any consideration of access to a municipal right-of-way must be done on a case-by-case basis, bearing in mind the particular circumstances of each case. The Commission also noted that the law consistently recognized circumstances under which a written agreement may not validly represent one or both parties' acceptance of its terms. These circumstances include cases of mistake, duress and inequality of bargaining power. The Commission stated that it was, therefore, prepared to consider applications from Canadian carriers, regarding signed MAAs, seeking to establish that municipal consent was not obtained on terms acceptable to the carrier. The Commission noted that the onus would be on the Canadian carrier to establish that the signed MAA does not represent proof that it has obtained, on terms acceptable to it, municipal consent.

Position of parties

MTS Allstream

11. MTS Allstream submitted that the Agreement did not validly represent its acceptance of the terms. MTS Allstream submitted that there had been a change in circumstances with the issuance of Decision 2001-23, which justified changing the Agreement.
12. MTS Allstream submitted that Calgary was particularly important to MetroNet, noting that it started in Calgary, located its headquarters there and was known nationally as a Western business. MTS Allstream added that, without access to Calgary's rights-of-way, MetroNet would have been precluded from competing in the local market and would have lost customers, financing and its competitive advantage.

13. MTS Allstream submitted that MetroNet needed to sign the Agreement because of the state of competition at the time. MTS Allstream submitted that MetroNet negotiated the Agreement at the outset of local competition, when a number of new entrants were vying for a share of the market. MTS Allstream submitted that MetroNet needed to sign the Agreement to ensure its survival and to prevent other competitors from gaining crucial ground.
14. MTS Allstream further submitted that in *Local Competition*, Telecom Decision CRTC 97-8, 1 May 1997 (Decision 97-8), the Commission established a model for competition in switched local services that clearly favoured and encouraged the development of facilities-based competition. MTS Allstream was of the opinion that, in the context of Decision 97-8, MetroNet decided that it would have to make substantial investments to build its own transmission facilities instead of simply leasing fibre.
15. MTS Allstream submitted that Calgary had an overwhelming advantage in bargaining power because it was the only source of supply to its rights-of-way. MTS Allstream argued that Calgary could dictate onerous and unconscionable terms and conditions and extract fees well beyond its causal costs. MTS Allstream added that, at the same time, it was not feasible for MetroNet to involve the Commission to resolve access issues given the regulatory delays in rendering a decision, as compared to the pace of competition and the necessity to gain access to Calgary's rights-of-way on a timely basis.
16. MTS Allstream submitted that MetroNet entered into the Agreement prior to the advent of local competition and was the first entrant in the local services market. MTS Allstream added that the Commission had not yet set the terms under which competitive local exchange carriers (CLECs) could have access to municipal rights-of-way.
17. MTS Allstream submitted that Calgary was working with FCM and other Canadian municipalities to ensure, among other things, that CLECs paid market-based fees to access municipal rights-of-way. MTS Allstream submitted that MetroNet was of the view that any MAA it signed with Calgary would likely have to include the five principles established by FCM in 1995 for MAAs that ensured, among other things that municipalities:
 - i) were not responsible for the costs of relocating telecommunications infrastructure if so required for planning or other reasons deemed necessary by the municipality;
 - ii) were not liable for economic loss, legal costs or physical restoration costs for disruption of telecommunications services arising from municipal actions; and
 - iii) were entitled to receive revenue greater than their direct costs as compensation from those accessing municipal property for profit.

Calgary

18. Calgary submitted that MetroNet approached it to obtain access to Calgary's rights-of-way. Calgary also submitted that MetroNet proposed the type of agreement used to negotiate the MAA, as well as an annual access fee on a per meter basis and other pricing models, before the parties agreed to an annual sliding scale access fee that varied with the amount of MetroNet

facility located in the rights-of-way. Calgary further submitted that it agreed to add provisions allowing termination in the event that MetroNet did not install facilities under the MAA and the reduction of MetroNet's access fee to the lower fee that a competitor would subsequently be able to negotiate with Calgary.

19. Calgary submitted that MetroNet did not indicate that it was signing under duress when it signed the Agreement. Calgary noted that MetroNet did not register any "without prejudice" protests to the terms and conditions of the Agreement when it signed and it did not seek relief from the Commission under section 43 of the Act during or after the negotiations. Calgary also noted that when MetroNet merged with AT&T Canada Corp., AT&T Canada Corp. assured Calgary in writing that its obligations and responsibilities under the Agreement would continue and remain unchanged.
20. Calgary submitted that MetroNet was a sophisticated business enterprise represented by legal counsel when it negotiated the Agreement. Calgary also submitted that MetroNet's goal and business strategy at the outset of competition, and a critical element of its commercial success was to expand its facilities and increase its market share. Calgary added that, in signing the Agreement, MTS Allstream enjoyed a seven-year lead in establishing market presence over its competitors. Calgary submitted that competition was not predicated on competitors having identical business strategies and cost structures.
21. Calgary submitted that while it might have had bargaining power and an opportunity to extract monopoly compensation, municipalities had a different mandate than maximizing value to the shareholder. Calgary submitted that elected municipal bodies have the responsibility to serve the people who elected them. Calgary also submitted that there was no evidence that it used its bargaining power to extract monopoly compensation.
22. Calgary submitted that the fact that the Agreement was structured on different terms than the principles set out in Decision 2001-23 did not support MTS Allstream's claim that the Agreement was unconscionable or offended community standards or commercial morality. Calgary submitted that the fact that other utilities in other jurisdictions that were not subject to Commission regulation were paying use and occupancy fees for the use of public rights-of-way and, in some cases, these fees were provided for in legislation, was compelling evidence that such terms did not offend commercial morality.

Commission analysis and determination

23. The Commission notes that in Decision 2003-82, it determined that it would bear in mind the particular circumstances of each case when considering applications under section 43 of the Act for existing MAAs, including the parties' intent and their relative bargaining power when the MAA was signed. The Commission considered that the onus would be on the Canadian carrier, in this case MTS Allstream, to establish that the MAA did not validly represent its acceptance of the terms because of, but not limited to, mistake, duress and inequality of bargaining power.
24. The Commission notes that in a Letter Decision entitled *Part VII Application by Independent Cable Operators Regarding Access to Support Structure to Ontario Hydro Services Company Inc. and/or Ontario Hydro Networks Company Inc.*, issued on 28 April 2000, the Commission

examined another case where the applicants claimed that an unacceptable agreement was signed in the face of serious threat of interference with access or continued access. The Commission notes that, in that case, the applicants took steps shortly after signing the agreements to demonstrate that they objected to the terms of the agreements. For example, the applicants wrote to the Commission for its assistance and they also wrote to the respondents and to their own counsel to express their dissatisfaction with the agreements.

25. The Commission considers that, while the state of competition is relevant in establishing whether the Agreement validly represented MetroNet's and its successors' acceptance of the terms, the circumstances surrounding the signing of the Agreement indicate that MetroNet suggested many of the impugned terms of the Agreement. The Commission considers that MetroNet's actions, such as proposing the type of agreement used to negotiate the Agreement, negotiating an annual sliding scale access fee, securing clauses to terminate the Agreement if MetroNet did not install facilities and proposing to reduce MetroNet's access fees to match those of competitors, demonstrate that MetroNet agreed with the clauses in the Agreement.
26. The Commission is of the view that, given the expertise and experience of MetroNet and the fact that it was represented by legal counsel, it knew or ought to have known of the extent and the scope of the Agreement and its potential impact on MetroNet and its successors.
27. The Commission considers that the actions of MetroNet and its successors following the signing of the Agreement demonstrate that MTS Allstream accepted the terms of the Agreement. For example, the Commission notes that MetroNet did not object, in writing or otherwise, to the terms of the Agreement. The Commission also notes that AT&T Canada Corp. confirmed its intention to conform with the obligations and responsibilities of MetroNet under the Agreement, following MetroNet's merger with AT&T Canada Corp. The Commission also notes that AT&T Canada Corp. only applied to the Commission to modify the Agreement after the issuance of Decision 2001-23, almost five years after the Agreement was signed.
28. In light of the above, the Commission finds that MTS Allstream failed to demonstrate that it did not intend to enter into the Agreement and that the Agreement did not validly represent its acceptance of the terms because of mistake, duress, inequality of bargaining power or other circumstances. Accordingly, the Commission **denies** MTS Allstream's application.

Secretary General

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