



## Telecom Decision CRTC 2010-462

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Ottawa, 8 July 2010

### **MTS Allstream Inc. – Clarification of the phrase “subject to the applicable limitation periods provided by law” in TELUS Communications Company’s Terms of Service**

File number: 8622-M59-201000059

*In this decision, the Commission finds that the phrase “subject to the applicable limitation periods provided by law” in TCC’s Terms of Service, with respect to the overbilled Basic Service Extension Feature charges arising in Alberta, refers to the limitation periods set out in subsection 3(1) of the Alberta Limitations Act (the Alberta Act). In order to assess whether MTS Allstream is entitled to be refunded for the charges back to 1 June 2002, a determination must be made as to when MTS Allstream first knew, or ought to have known, about the overbilling within the meaning of paragraph 3(1)(a) of the Alberta Act.*

### **Introduction**

1. The Commission received an application by MTS Allstream Inc. (MTS Allstream), dated 15 January 2010, requesting that the Commission confirm that the phrase “subject to the applicable limitation periods provided by law” in item 120.1 of TELUS Communications Company’s (TCC) Terms of Service, in the case of the overbilled Basic Service Extension Feature (BSEF)<sup>1</sup> charges in Alberta, refers to the Alberta *Limitations Act* (the Alberta Act).<sup>2</sup>
2. The Commission received comments regarding MTS Allstream’s application from Bell Aliant Regional Communications, Limited Partnership; Bell Canada; and Saskatchewan Telecommunications (collectively, Bell Canada et al.); Rogers Communications Inc. (RCI); and TCC.
3. The public record of this proceeding, which closed on 8 March 2010, is available on the Commission’s website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under “Public Proceedings” or by using the file number provided above.

### **Background**

4. In Telecom Decision 2007-10, the Commission determined that the incumbent local exchange carriers (ILECs) had incorrectly applied BSEF charges to configurations involving Competitor Digital Network (CDN) DS-1 to DS-0 channelization service.

<sup>1</sup> BSEF is a retail tariff service that enables a customer to physically share access to DS-1 channelization equipment.

<sup>2</sup> *Limitations Act*, R.S.A. 2000, c. L-12

5. The Commission directed that the BSEF charges be refunded consistent with the ILECs' Terms of Service, which provide that customers must be credited for overbilled recurring charges "back to the date of the error, subject to the applicable limitation periods provided by law." To calculate credits for the overbilled BSEF charges, the Commission directed the ILECs to "use the earlier of either the date of notification by the customer of a dispute or the date of [Telecom Decision 2007-10]."
6. Pursuant to Telecom Decision 2007-10, MTS Allstream refunded competitors providing services in Manitoba for overbilled BSEF charges invoiced since 1 June 2002, the date on which the CDN service was first made available. MTS Allstream received refunds from all other ILECs back to 1 June 2002, except for TCC for Alberta. TCC only provided a refund for the period of 1 April 2004 to 3 April 2006 for Alberta.
7. In providing a refund only for this period, TCC argued that the phrase "subject to the applicable limitation periods provided by law" in its Terms of Service could refer only to the two-year limitation period in the Alberta Act, and not to all provisions in that Act. In TCC's view, it was only required to credit the overbilled BSEF charges back two years from the date of MTS Allstream's first intervention in the proceeding that led to Telecom Decision 2007-10 – that is, two years prior to 3 April 2006.
8. In response, on 12 August 2008, MTS Allstream applied to the Alberta Court of Queen's Bench for a declaration that the Alberta Act does not limit TCC's liability to refund MTS Allstream for overbilled charges from 2002 to 2004.
9. On 25 August 2008, TCC brought a motion to stay or dismiss the action on the grounds that the Commission had exclusive jurisdiction to deal with the dispute. On 2 March 2009, the Alberta Court of Queen's Bench dismissed TCC's motion. TCC subsequently appealed to the Alberta Court of Appeal.
10. On 10 November 2009, the Alberta Court of Appeal found that it was not clear what the Commission meant by directing in Telecom Decision 2007-10 that the BSEF charges were to be refunded "subject to the applicable limitation periods provided by law." It therefore directed MTS Allstream and TCC to return to the Commission to have the decision clarified.

## **Positions of parties**

11. MTS Allstream and RCI submitted that the phrase "subject to the applicable limitation periods provided by law" in TCC's Terms of Service and similarly worded provisions of the other ILECs' Terms of Service refer to the statute of limitations of the province in which the overbilled charges arose, as per industry practice, case law, and Commission precedent.<sup>3</sup>

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<sup>3</sup> MTS Allstream and RCI cited Commission Letter Decision *Re: ERORS Inc.*, dated 11 January 2000 (January 2000 Letter Decision), in support of their position.

12. MTS Allstream further submitted that item 120.1 of TCC's Terms of Service mandates that a limitation period must be both "applicable" and "provided by law." It argued that the only way to determine if a limitation period is "applicable" and "provided by law" is to interpret and apply all provisions in the statute in which the limitation period is set out. In MTS Allstream's view, it is the entire Alberta Act – and not just a particular period from the Act – that applies.
13. In contrast, TCC argued that neither Telecom Decision 2007-10 nor item 120.1 of TCC's Terms of Service refers to the application of a particular piece of legislation. TCC also argued that its approach of importing the two-year limitation period from the Alberta Act without applying the entire Act is consistent with the Commission's January 2000 Letter Decision.<sup>4</sup>
14. TCC further submitted that the Alberta Act cannot apply to the calculation of a rebate by the Commission since this calculation is not a "remedial order" and the Commission is not a "court" under section 1 and subsection 2(3) of the Alberta Act. TCC also stated that this calculation engages the Commission's rate-setting powers and the Alberta Act cannot impair this constitutionally protected activity. However, TCC submitted that the Commission can use a particular limitation period from provincial statutes of limitations to calculate rebates for overbilled charges.
15. TCC requested that the Commission declare that TCC is liable to refund the overbilled BSEF charges for a period of only two years prior to the date of MTS Allstream's 3 April 2006 intervention in the proceeding leading to Telecom Decision 2007-10.
16. Bell Canada et al. supported TCC's approach of applying a particular limitation period to limit how far back a customer can claim a refund.

### **Commission's analysis and determinations**

17. The Commission notes that MTS Allstream and TCC agree that the relevant legislation in this case is the Alberta Act, although they disagree about the scope of its application.
18. The Commission considers that the starting point for its analysis must be the language of TCC's Terms of Service. The Commission notes that item 120.1 of TCC's Terms of Service refers to limitation periods that are "provided by law." As such, the Commission considers that in order to determine which limitation periods are applicable and when they began to run, it must consider the statute in which the limitation periods are found.
19. In this case, the Alberta Act provides for two applicable limitation periods. In particular, the Act establishes, in subsection 3(1), a two-year limitation period, which begins on the date on which a claimant first knew, "or in the circumstances

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<sup>4</sup> See footnote 3.

ought to have known,” about specific facts set out in paragraph 3(1)(a) regarding the existence of the claim, *and* a 10-year limitation period, which begins on the date the claim arose. As well, under subsection 3(1) of the Alberta Act, a defendant’s liability is only limited if one of the two limitation periods has expired at the time the claim for a remedial order is made. Therefore, if the two-year limitation period has not expired, a claimant has 10 years from the date the claim arose to bring the claim for a remedial order.

20. The Commission considers that TCC’s approach ignores the fact that the Alberta Act provides for two applicable limitation periods. Indeed, TCC has not provided any justification as to why it chose the two-year limitation period as opposed to the 10-year period.
21. The Commission considers that the proper approach is to determine whether either the two-year limitation period *or* the 10-year period had expired in accordance with the Alberta Act. In order to do so, it is necessary to determine two dates: (i) the date the limitation periods began, and (ii) the date the claim was brought. If neither limitation period had expired by the date the claim was brought, TCC is liable to refund MTS Allstream back to the date of the error in accordance with its Terms of Service.
22. In a court proceeding, the date the claim is brought is the date the claimant seeks relief in court. However, in order to reflect the fact that the refunds were not taking place in the context of a court proceeding, in Telecom Decision 2007-10, the Commission directed the ILECs to use the earlier of either the date of notification by the customer of a dispute or the date of Telecom Decision 2007-10 as the date on which to base an assessment of whether any applicable limitation periods had expired. Accordingly, in order to assess whether TCC’s liability to refund MTS Allstream is limited under the Alberta Act, it must be determined whether either of the limitation periods in the Alberta Act had expired by 3 April 2006, which both TCC and MTS Allstream agree is the date of MTS Allstream’s first notification of a dispute.
23. Given that the overbilled charges could not have arisen before 1 June 2002, the 10-year period had not expired by 3 April 2006. As such, the only unresolved issue is whether MTS Allstream disputed the overbilled charges within the two-year limitation period, which involves determining when the two-year limitation period began.
24. As noted above, under the Alberta Act, the date the two-year limitation period begins is the date the claimant – in this case, MTS Allstream – knew or in the circumstances ought have known about the specific facts set out in paragraph 3(1)(a) of the Act regarding the existence of the claim. The Commission notes that in Telecom Decision 2007-10, it did not determine when MTS Allstream first knew or ought to have known about the overbilling within the meaning of paragraph 3(1)(a).

The Commission also notes that the parties did not submit any evidence on this issue in the present proceeding, nor has the matter been determined elsewhere. In the Commission's view, if the two-year period had not expired by 3 April 2006, TCC would be required to refund MTS Allstream back to 1 June 2002.

25. The Commission considers that interpreting the phrase "subject to the applicable limitation periods provided by law" in item 120.1 of TCC's Terms of Service to refer to both applicable limitation periods in the Alberta Act is consistent with its past decisions. The Commission notes that in its January 2000 Letter Decision, it referred to the Ontario statute of limitations, which at the time provided, in relation to overbilled charges, for only a single applicable limitation period of six years from when the cause of action arose. In contrast, the Alberta Act provides for two applicable limitation periods, one of which starts when the claimant is said to have discovered the existence of the claim. The Alberta Act is therefore significantly different in structure from the Ontario statute referred to in the January 2000 Letter Decision.
26. Regarding TCC's constitutional argument, the Commission notes that in Telecom Decision 2007-10, it did not set a rate or calculate a rebate. The Commission only found that the ILECs were overbilling BSEF charges, and it therefore directed them to refund their customers in accordance with the ILECs' Terms of Service, which incorporate applicable limitation periods provided by law.
27. Finally, the Commission notes that the definition of a "remedial order" in the Alberta Act does not cover a Commission direction to provide a refund pursuant to TCC's Terms of Service. However, the Commission considers that, in the case of the overbilled BSEF charges that arose in Alberta, this does not prevent the Commission from incorporating, as it did in item 120.1 of TCC's Terms of Service, the limitation periods set out in that Act.
28. In light of the above, the Commission finds that the phrase "subject to the applicable limitation periods provided by law" in item 120.1 of TCC's Terms of Service, in the case of the overbilled BSEF charges that arose in Alberta, refers to the limitation periods set out in subsection 3(1) of the Alberta Act. In order to assess whether MTS Allstream is entitled to be refunded for the overbilled BSEF charges back to 1 June 2002, pursuant to item 120.1 of TCC's Terms of Service, a determination must be made as to when MTS Allstream first knew, or ought to have known, about the overbilling within the meaning of paragraph 3(1)(a) of the Alberta Act.

Secretary General

## Related documents

- *AT&T Global Services Canada Co. – Application seeking relief with respect to the application of Basic Service Extension Feature charges to configurations involving Competitor Digital Network DS-1 to DS-0 channelization service, Telecom Decision CRTC 2007-10, 15 February 2007*
- *Commission Letter Decision Re: ERORS Inc. (on behalf of the Regional Municipality of Ottawa–Carleton) vs. Bell Canada, 11 January 2000*