



Telecom Decision CRTC 2005-36

Ottawa, 17 June 2005

Part VII Application by Allstream Corp. seeking access to Light Rail Transit (LRT) lands in the City of Edmonton

Reference: 8690-A74-200309593

In this Decision, the Commission finds that light rail transit (LRT) lands in the city of Edmonton (Edmonton) are an "other public place" within the meaning of section 43 of the Telecommunications Act. The Commission has, accordingly, directed MTS Allstream Inc. (MTS Allstream) and Edmonton to negotiate a fee structure based on causal costs for MTS Allstream to have ongoing access to the LRT lands for the purpose of constructing, maintaining and operating its transmission lines.

The Application

1. On 24 July 2003, Allstream Corp., now MTS Allstream Inc. (MTS Allstream), filed an application with the Commission pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure* and sections 42 and 43 of the *Telecommunications Act* (the Act) seeking an order for access to the Light Rail Transit (LRT) lands¹ in the city of Edmonton (Edmonton) for the purpose of constructing, maintaining and operating its transmission lines, under terms and conditions that are consistent with the principles set out in *Ledcor/Vancouver - Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001 (Decision 2001-23).

Process

2. On 29 September 2003, Edmonton filed an answer to MTS Allstream's application. On 23 October 2003, MTS Allstream filed reply comments.
3. Following the receipt of Edmonton's answer to the Part VII application and MTS Allstream's reply comments, the Commission received requests from several municipalities seeking the right to intervene in this file with respect to the issue of what constitutes an "...other public place" under section 43 of the Act. The cities of Calgary, Ottawa, Toronto, Winnipeg, and Vancouver and the Federation of Canadian Municipalities (FCM) sought the Commission's permission to intervene in this proceeding on the basis that this issue was one of national importance.
4. MTS Allstream urged the Commission to reject the requests to intervene and remove the submissions of the interveners from the record of the proceeding, on the basis that the matter was best dealt with as a bilateral dispute between itself and Edmonton.

¹ MTS Allstream defined the LRT lands to include LRT tunnels, LRT stations, the Dudley B. Menzies LRT Bridge, LRT rights-of-way, including attached pedways, stairwells, platform levels and concourse level properties within Edmonton and owned by or under the direction, control and management of Edmonton.

5. On 2 December 2003, following further submissions from TELUS Communications Inc. (TCI), the Canadian Cable Telecommunications Association (CCTA), Calgary, Ottawa, Toronto, Winnipeg, and Vancouver, it was determined by the Commission that MTS Allstream's Part VII application raised an issue with respect to the interpretation of the term "highway or other public place" for the purpose of sections 43(2) and 43(4) of the Act. In light of the fact that the Commission has not previously made a determination on the scope of this term and given that any Commission decision on the scope of this term could indirectly affect other parties, it was considered appropriate to allow for submissions by interested parties on the interpretation of "highway or other public place".
6. On 9 January 2004, the Commission received submissions from Calgary, Ottawa, Toronto, Vancouver and FCM (FCM et al.), and Futureway Communications Inc., doing business as FCI Broadband (FCI Broadband). A collective submission was also filed by CCTA, TCI, Bell Canada, Call-Net Enterprises Inc., Aliant Telecom Inc., Saskatchewan Telecommunications and 360networks Canada Ltd./LondonConnect Inc. (collectively CCTA et al.). Reply comments were received from Edmonton on 23 January 2004, and from MTS Allstream on 9 February 2004.

Scope of "other public place" under Section 43 of the Act

Relevant statutory provisions

7. *43. (1) In this section and section 44, "distribution undertaking" has the same meaning as in subsection 2(1) of the Broadcasting Act.*

(2) Subject to subsections (3) and (4) and section 44, a Canadian carrier or distribution undertaking may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.

(3) No Canadian carrier or distribution undertaking shall construct a transmission line on, over, under or along a highway or other public place without the consent of the municipality or other public authority having jurisdiction over the highway or other public place.

(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.

(5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.

Positions of parties

MTS Allstream and parties supporting MTS Allstream

8. MTS Allstream submitted that it had entered into two agreements with Edmonton² that commenced in 1997: a municipal access agreement (MAA) and a *LRT Lands Consent and Access Agreement* (the LRT Agreement). According to MTS Allstream, those agreements both expired in 2002.
9. MTS Allstream stated that the MAA gave it access to and the right to enter on and break up highways and other public places in order to construct its metropolitan network and serve office buildings located along or adjacent to that network. According to MTS Allstream, the LRT Agreement provided it with access to the pre-existing LRT tunnels which provided it with rights-of-way within Edmonton's downtown core.
10. According to MTS Allstream, 20 percent of its network within Edmonton was installed on the LRT lands. MTS Allstream submitted that, with the exception of the transmission facilities traversing the Gordon Menzies LRT Bridge, its transmission lines were housed within sub-ducts located in metal pipes anchored to the walls of the LRT tunnels. MTS Allstream further submitted that it installed junction boxes at splice points located at both ends of an LRT station, which connected with its main transmission lines serving various buildings within the downtown Edmonton core. MTS Allstream claimed that those transmission lines were housed within conduit installed by MTS Allstream in the pedways leading to the LRT tunnels and on other highways and public places.
11. MTS Allstream submitted that it commenced negotiations with Edmonton in September 2001, regarding the terms and conditions of the MAA and the LRT Agreement, in light of Decision 2001-23. According to MTS Allstream, it was able to reach an agreement with Edmonton on the terms and conditions of a new MAA, which it believed was consistent with Decision 2001-23. MTS Allstream submitted that this new MAA was not finalised because it was unable to reach an agreement with Edmonton, due to their differing views over whether the LRT lands constituted a "highway or other public place" and thus fell under section 43 of the Act.
12. MTS Allstream argued that the LRT lands constituted a "highway or other public place" as contemplated under section 43 of the Act. MTS Allstream argued that the LRT lands were public property owned by or under the direction, control or management of Edmonton. MTS Allstream submitted, therefore, that the principles set out by the Commission in Decision 2001-23 should apply to MTS Allstream's access to the LRT lands.
13. MTS Allstream submitted that neither the Commission nor the Courts have examined the meaning of the term "public place" in the context of section 43(2) of the Act. MTS Allstream argued that while the Commission³ and the Courts⁴ had considered the meaning of

² Through its predecessor, Metronet Alberta Inc.

³ *Part VII Application - Access to Supporting Structures of Municipal Power Utilities - CCTA vs. MEA et al - Final Decision*, Telecom Decision CRTC 99-13, 28 September 1999.

⁴ *Barrie Public Utilities v. Canadian Cable Television Association* (2001), 202 D.L.R. (4th) 272 (F.C.A.), aff'd [2003] 1 S.C.R. 476 at para. 26.

"public place" in the context of section 43(5) of the Act, those Decisions focused on the issue of whether the term "other public place" could be held to include support structures located on private land. In MTS Allstream's view, those Decisions were, therefore, distinguishable from the instant case.

14. MTS Allstream submitted that denying it access to the LRT tunnels would be inconsistent with section 43(2) of the Act, which specifies that a carrier "shall not unduly interfere with the public use and enjoyment of the highway or other public place". MTS Allstream submitted that denying it access to the LRT tunnels would force it to break up public highways or other public places to lay its transmission lines, even where tunnels already existed, resulting in unnecessary disruption to Edmonton and its constituents.
15. CCTA et al. submitted that Edmonton's LRT system arguably fell within the meaning of the term "highway", that is, "a public road or way open equally to everyone for travel". According to CCTA et al., Edmonton provided its LRT service as an alternative to the use of Edmonton highways. CCTA et al. submitted that, like a highway, the LRT system was used by the public for transportation within Edmonton, the public had the right to pass and repass along LRT system routes, and access to certain portions of the LRT system must be controlled for reasons of public safety.
16. CCTA et al. submitted that even if Edmonton's LRT system was not a highway it clearly fell within the definition of "other public place".
17. CCTA et al. submitted that the ordinary meaning of the phrase "highway or other public place" encompassed places that, just like a highway, were publicly-owned or controlled for the benefit or use of the public. CCTA et al. argued that such places clearly encompassed public parks, bridges, waterways and federal and provincial Crown land.
18. CCTA et al. submitted that public utility corridors and public transportation systems were the epitome of what Parliament intended by using the phrase "or other public place", as they were owned or controlled by public authorities and were administered for the use and benefit of the public.
19. CCTA et al. submitted that Parliament intended to give the Commission a broad jurisdiction under sections 43 and 44 of the Act to balance competing interests and to fulfill the policy objectives of the Act. CCTA et al. argued that without a purposive interpretation of "highway or other public place", the Commission's ability to ensure the development of an efficient and competitive telecommunications system in all regions of Canada would depend upon whether highways or highway-like properties happen to exist in the necessary locations. According to CCTA et al., the Commission would be limited to regulating access to a patchwork of highways and highway-like properties, but would be unable to regulate the gaps in between.

Edmonton and parties supporting Edmonton

20. Edmonton asserted that the Act does not give the Commission the jurisdiction to adjudicate MTS Allstream's application because:

- a) LRT facilities are neither highways nor other public places in the statutory sense and, thus, are not covered by the Act;
 - b) MTS Allstream's refusal to renew the two agreements was not related to municipally-imposed terms of access to transmission lines or new construction;
 - c) the creation of the Ledcor Principles out of the Commission's adjudication in Decision 2001-23, and the treatment of those principles as if they were regulations or rules applicable to MTS Allstream's different claim under different circumstances, would be regulation, not adjudication, of the LRT facilities; and
 - d) there were no unacceptable terms in the new MAA and the Commission had no jurisdiction over the LRT agreement; therefore, there was no dispute to trigger the Commission's jurisdiction.
21. Edmonton submitted that the expression "or other public place" could not mean, as proposed by MTS Allstream, any and all land that was not privately owned, regardless of its nature and location. Edmonton argued that the expression must be limited to a public place that was, if not a highway itself, generically similar to a highway for telecommunications purposes. Edmonton submitted that the expression "or other public place" must therefore be interpreted as implicitly saying "or other similar public place".
22. Edmonton argued that if the Commission accepted MTS Allstream's argument equating "public place" with any and all property under public ownership, the Commission would be extending its jurisdiction over all municipal public parks, National Capital Commission lands, and shortcuts across mountains and valleys in Banff National Park, as well as the Parliament Buildings, the War Memorial on Rideau Street in Ottawa, and the Supreme Court of Canada building. Edmonton further argued that, given the breadth of MTS Allstream's argument, to accept that argument on the meaning of "public place" would result in effectively reading out the words "highway or other" from section 43 of the Act.
23. Edmonton submitted that the ordinary meaning of the word "highway" does not include LRT structures. Edmonton argued that a highway or roadway was a place over which the public had a right to pass or repass, on which the providers of an essential utility service such as electricity or telephones had a right to locate their facilities, conditional upon the right of a municipality to grant or deny its consent.
24. Edmonton argued that the central feature of a highway is a corridor for private motor vehicles, and that feature allowed it to be used by all utilities, including carriers. According to Edmonton, if the "other public place" was for a different purpose, it was doubtful that it was generically similar to a highway.
25. Edmonton submitted that its LRT facilities were not an "other public place" because, although the land was publicly owned, it was not:
- a) a place to which the public was freely and customarily admitted or had a right to resort; and

- b) part of a highway, lands serving a similar function as a highway, or the same type of transportation corridor to which pedestrians and private motor vehicles were admitted.
26. Edmonton argued that as the public was not customarily permitted to pass and repass over the LRT facilities either as pedestrians or in their own motor vehicles, and as other utilities such as sewers or electrical poles were not located there, then it was not generically the same type of public place as a highway for the purpose of installing telecommunications transmission lines.
 27. Edmonton stated that an LRT corridor was a specialized corridor which, although used for public transportation, was not open to the public in the ordinary sense because they could not walk along it nor drive their vehicles on it. Edmonton submitted that, unlike a public road or highway, access to LRT facilities was normally limited to "passengers", who must pay a fare for transportation, in special vehicles which they neither owned nor drove, from a station of origin to a station of destination. According to Edmonton, at times of day when the LRT was not operating these vehicles the public was excluded and, in fact, in most parts of the LRT tunnels any unauthorized access was prohibited.
 28. Edmonton further submitted that the Commission did not have jurisdiction, under section 43 of the Act, to adjudicate its dispute with MTS Allstream, as the dispute did not involve a question of access or construction. Edmonton argued that the Commission's jurisdiction under subsection 43(4) of the Act is limited to those situations where a Canadian carrier is denied access or permission to construct a new transmission line. Edmonton argued that, in this case, it had neither evicted nor threatened to evict MTS Allstream and it had not changed the terms and conditions originally proposed and agreed to by MTS Allstream; thus, there was no dispute about MTS Allstream's access. Edmonton further argued that the application related to the renewal of an agreement and did not relate to MTS Allstream seeking the consent of Edmonton to construct a new transmission line and, thus, there was no dispute about construction.
 29. Edmonton submitted that the Commission could not apply the Ledcor Principles as requested by MTS Allstream to different factual situations involving different carriers, municipalities and lands. Edmonton argued that if the Commission attempted to do so it would no longer be adjudicating a dispute as provided for under section 43(4) of the Act, but instead would be exercising a regulatory jurisdiction that it does not have.
 30. Edmonton argued that MTS Allstream was attempting to treat Decision 2001-23 as if the Commission had prescribed a standard agreement to which all future agreements must conform, which Edmonton argued was contrary to what the Commission said in Decision 2001-23. Edmonton noted that in Decision 2001-23, the Commission stated that it was not prescribing the terms and conditions related to the future construction by Ledcor or other carriers in Vancouver or elsewhere. Edmonton submitted that there were, therefore, no Ledcor Principles that were capable of being violated, and that these principles did not justify MTS Allstream's refusal to renew its LRT agreement with Edmonton.
 31. FCM et al. submitted that the term "other public place" should not be interpreted as meaning all publicly owned property, as asserted by MTS Allstream. FCM et al. argued that the proper interpretation of the term "other public place" required it to be read *ejusdem generis* with the

term "highway" to mean other public lands in the nature of a highway. FCM et al. submitted that this would encompass places where the public was afforded access by one or more independent means.

32. Ottawa argued that the Constitution conferred upon the provinces the power to make laws in relation to "local works" and to "property and civil rights in the Province". According to Ottawa, both Edmonton's LRT and Ottawa's transitway were property and local works and were subject to provincial jurisdiction, which, in this case, had been delegated to the respective municipalities.
33. Ottawa submitted that by not defining "public place" in the Act, Parliament had acknowledged that it was the owner of the land, within the constraints of provincial law, who could determine whether or not a place was a "public place".
34. Ottawa argued that it was not, as MTS Allstream suggested, simply Edmonton's or Ottawa's ownership, which determined whether or not lands and structures were public or private. According to Ottawa, the restrictions imposed on their use by Edmonton and Ottawa made the LRT and the transitway private.
35. Toronto submitted that the *ejusdem generis* interpretation of "other public place" would clearly not include the LRT facilities, as independent use of the facilities by pedestrians and private vehicles was prohibited. Toronto submitted that its arguments were equally applicable to its transit property and facilities.
36. Toronto argued that Decision 2001-23 applied only to the dispute between Vancouver and Ledcor and was not binding on any other party.
37. The FCM submitted that a Commission determination of whether a location was an "other public place" must respect the nature of the land holding or jurisdiction exercised over such lands, as determined by the owner or public authority having jurisdiction over the land.
38. The FCM further submitted that virtually every property situated within a municipality in Canada was accessible by some highway, road or road allowance, and each of those highways fell within the Commission's jurisdiction under sections 42 to 44 of the Act.

Reply comments of MTS Allstream and parties supporting MTS Allstream

39. MTS Allstream submitted that its proposed interpretation of the phrase "public place" did not have the effect of reading out the words "highway or other" as alleged by Edmonton.
40. MTS Allstream argued that the *ejusdem generis* rule had no application where a general term was linked to only one specific term.
41. MTS Allstream submitted that, when the overall context of the Act including the policy objectives was considered, the statutory context pointed to a broad meaning of "public place".
42. MTS Allstream submitted that the argument by Edmonton about the potential placement of facilities on the War Memorial and the Supreme Court building ignored the language of the

statute that makes carriers' access rights subject to the use and enjoyment of the highway or other public place by others. MTS Allstream also submitted that Edmonton and FCM et al. were ignoring the difference between the theoretical breadth of the powers of a tribunal and their exercise of those powers. MTS Allstream suggested that a Commission decision granting permission to string fibre along the top of the War Memorial would not be upheld by the courts, as the decision would not be rational.

43. MTS Allstream submitted that the purpose for which the public accesses a place that was publicly owned and had a public purpose was irrelevant and could not negate the public character of such a place. MTS Allstream asserted, therefore, that Edmonton's assertion that the purpose for which the public accessed LRT lands and paid a fee was only to ride a train between specified stops and not to obtain access to the place itself, was incorrect.
44. CCTA et al. submitted that the fact that some portions of the LRT system were generally not accessible to the public was irrelevant to the issue of whether the LRT system was a "highway or other public place". According to CCTA et al., if public accessibility to the portion of the "highway or other public place" on which the transmission lines were to be placed was necessary for section 43 to apply, then the street crossings at issue in Decision 2001-23 would not have been under the Commission's jurisdiction, as they were underground and not generally accessible by the public.
45. CCTA et al. submitted that the fact that the LRT system requires the payment of a fee for entrance was also irrelevant. According to CCTA et al., a toll highway was no less a public highway because there was a fee for passage.
46. CCTA et al. argued that Parliament did not intend to leave it up to municipalities to determine whether or not their property would be deemed to be a "public place", as this would enable municipalities to undermine the Commission's jurisdiction simply by deeming municipal property not to be public.
47. CCTA et al. submitted that this case was not an appropriate one in which to apply the *ejusdem generis* rule of statutory interpretation. According to CCTA et al., the application of this rule was only appropriate where there was a real ambiguity in the meaning of the provision after having applied a contextual and purposive interpretive analysis to the phrase. CCTA et al. submitted that, in this case, the meaning of "highway and other public place", when viewed in context and in accordance with the purpose of section 43 of the Act, was clear and unambiguous.
48. FCI Broadband submitted that the Commission should adopt a broad interpretation of the term "highway or other public place" in the context of section 43 of the Act. FCI Broadband suggested that the Commission should interpret the term to mean: "Public property owned by or under the direction, control or management of a municipality."
49. FCI Broadband submitted that its proposed broad interpretation:
 - a) made the most common sense;
 - b) would ensure that all public places owned or under the control of municipalities were treated in the same manner;

- c) would ensure that carriers had the necessary rights to continue building their networks; and
 - d) would not infringe on the rights of the municipalities to have the necessary input into the installation of carriers' networks within municipal borders.
50. FCI Broadband submitted that if the Commission were to adopt the approach suggested by Edmonton, it would effectively exempt a substantial amount of municipal property from the Commission's jurisdiction and eliminate any possible recourse for carriers in the face of municipalities wishing to charge fees based on principles other than those found in Decision 2001-23.
51. FCI Broadband argued that the scope of public property that would be excluded by Edmonton's proposed interpretation was huge. FCI Broadband submitted that the following categories of municipal property would be excluded by Edmonton's interpretation:
- parks;
 - storm water management blocks;
 - walkways into municipalities and pathways within and between subdivisions;
 - lands preserved for conservation purposes;
 - pathways and other small roadways used only by the residents of a condominium community; and
 - other areas that are conveyed to a municipality upon plan registration of a new subdivision or development.
52. FCI Broadband submitted that an interpretation that would result in some public areas under municipal control subject to the Act and other public areas not under municipal control subject to the Act did not make sense.

Edmonton's reply comments

53. Edmonton reiterated that the words "or other public place" could not mean all public property owned by a municipality because it would render the use of the word "highway" in section 43 redundant, since "highway" would already be included in the broad definition of "public place".
54. Edmonton asserted that the Commission must find its jurisdiction within its powers under the Act and not with reference to the policy objectives set out in the Act.
55. Edmonton submitted that the issue in this case was whether the Commission had the jurisdiction to allow the indefinite occupation, without compensation, by any and all carriers of Edmonton's LRT property.

56. Edmonton asserted that the CCTA et al. had interpreted the phrase "other public place" out of context. Edmonton submitted that the proper approach to interpretation was not to consider the meaning of the words in the abstract, but instead was to look at the meaning of the phrase in the context of the statutory provisions within which the words were found.
57. Edmonton submitted that the CCTA et al.'s argument that the Commission should interpret the phrase "or other public place" as including all property serving a public purpose was not helpful, as all property owned by the public served a public purpose and, therefore, under the CCTA et al.'s interpretation all property owned by any level of government would be under the Commission's jurisdiction.
58. Edmonton asserted that the CCTA et al.'s argument regarding the street crossings at issue in Decision 2001-23 was incorrect, because the Vancouver crossings crossed city streets that were highways. In Edmonton's view, it was irrelevant whether a telecommunications transmission line ran along or across a highway, either above or below ground.
59. Edmonton submitted that the CCTA et al.'s arguments with respect to toll highways were not useful, in that municipal toll roads were rare or non-existent and, in any event, the LRT was a type of railway, not a toll highway. Edmonton further submitted that an important distinction between a highway and the LRT is that in the case of the LRT the public pays for a train ride, not for access for the purpose of walking or driving one's own vehicle.
60. Edmonton argued that while a municipality could not simply designate, without any factual or legal foundation, its property as not being "a public place", the designation by the municipality of its property's use might be a determinative factor if that usage was not that of a highway, or of a public place that was essentially highway-like.
61. Edmonton submitted that, contrary to the assertions of the CCTA et al., a purposive interpretation and application of the *ejusdem generis* rule were required to ascertain Parliament's intent. Edmonton submitted that the true intent of Parliament, in this case, was to expand the Commission's powers beyond highways to include other public places that were in the same class as highways.

Commission's analysis and determination

Access issue

62. The Commission considers that the issue raised by MTS Allstream in its application is one of ongoing access. The Commission notes that the LRT agreement between Edmonton and MTS Allstream expired in 2002 and that MTS Allstream's transmission lines, therefore, currently remain on the LRT lands only at the sufferance of Edmonton. The Commission considers that to accept Edmonton's argument that the Commission cannot adjudicate this dispute, on the basis that the application does not involve questions of construction or access because Edmonton has not yet forced MTS Allstream to remove its transmission lines from the LRT lands, could lead to absurd results. In the Commission's view, acceptance of Edmonton's argument could result in the Commission declining jurisdiction, a subsequent removal of the transmission lines by Edmonton or MTS Allstream, followed by a further application to the Commission by MTS Allstream on the basis that it now needed to reconstruct the very

transmission lines that had just been removed. The Commission considers that, in enacting section 43 of the Act, Parliament cannot be taken to have intended such an absurd result. In the Commission's view, where, as here, an agreement for access between a municipality or other public authority and a Canadian carrier has expired, the Commission can adjudicate a dispute regarding ongoing access by the Canadian carrier to a highway or other public place.

63. In light of the above, the Commission is of the view that the key preliminary issue to be determined in this proceeding is whether the LRT lands in Edmonton constitute a "highway or other public place" within the meaning of the Act.

LRT lands as highway

64. In the Commission's view, while portions of the LRT lands may seem to share some characteristics of a highway, the LRT lands do not have the essential features of a highway. The Commission considers that a highway, under the Act, must be a public road or way equally open to everyone for travel. The Commission further considers that an essential characteristic of a highway is that it is land intended to be used by the public to pass and repass over in their own motor vehicles. The public is not allowed to pass and repass over the LRT lands in Edmonton using their own motor vehicles. Accordingly, the Commission considers that the LRT lands are not a "highway" within the meaning of the Act.

LRT lands as an "other public place"

Ejusdem Generis

65. In the Commission's view, in order for the *ejusdem generis* maxim to apply there must be an identifiable class to which all the specific items set out in a provision belong. In the Commission's view, in the absence of a single identifiable class there can be no basis for limiting the scope of the general words. The Commission notes that, in the case of section 43 of the Act, the phrase "highway or other public place" provides only one specific item, highways, on which to determine an identifiable class. The Commission considers that it would not be appropriate to attempt to establish an identifiable class on the basis of a sample of one. The Commission notes that it is further buttressed in this conclusion by the use of the word "other" in the phrase "highway or other public place". In the Commission's view, the use of the word "other" indicates that Parliament, in enacting section 43 of the Act, contemplated places other than those in the nature of highways. Accordingly, the Commission does not accept the argument that it should apply the *ejusdem generis* maxim of statutory interpretation in interpreting the phrase "other public place".

No definition of "public place"

66. The Commission notes that the Act does not contain a definition of the term "public place". In the absence of such a definition, the Commission considers that the meaning of the term must be considered in the context of the particular facts of the case and the statutory context found in the Act.

Ownership of the LRT lands

67. The Commission further notes that the Supreme Court of Canada has indicated in *Barrie Public Utilities v. Canadian Cable Television Assn.* [2003] 1 S.C.R. 476 at para. 26 that:

I also agree that Parliament should be taken to know that some power poles are situated on private land and therefore cannot be captured by a provision referring to supporting structures "constructed on a highway or other public place".

68. Although this finding was made in the context of section 43(5) and not section 43(4) of the Act, the operative wording "highway or other public place" is the same and, in the Commission's view, the Supreme Court of Canada's finding in this context would apply equally to the case of section 43(4).
69. In the current case, the ownership of the LRT lands clearly resides with Edmonton. Therefore, the land is not privately owned and could potentially fall within the parameters of the term "public place" under the Act.

Public purpose

70. The Commission considers that it is not sufficient to show that a place is owned and/or controlled by a public authority like Edmonton for a public purpose in order for it to be considered a "public place" within the meaning of the Act. In the Commission's view, while the purpose of a place is an important factor to consider in determining whether or not a place is a "public place" within the meaning of the Act, it is not the definitive factor that MTS Allstream and CCTA et al. suggested. The Commission considers that the acceptance of their argument would result in the Commission having jurisdiction to mandate access by a Canadian carrier in places which, in the Commission's view, Parliament cannot have intended the Commission to have such jurisdiction. The Commission notes, for example, that under the definition proposed by MTS Allstream and CCTA et al., high security installations owned and operated by the Department of National Defence would be considered to be "public places" within the meaning of the Act. The Commission considers that Parliament cannot have intended the Commission to have jurisdiction over such places which, although publicly owned for a public purpose, the public has no access to.
71. The Commission is of the view, however, that while the fact that a place may be impressed with a public purpose is not the definitive factor in determining whether it is a "public place" under the Act, the nature of that public purpose may be helpful in determining whether a place is a "public place". The Commission considers that when the public purpose of the place is one that by its very nature involves extensive use of and access to it by the public, then that place is more likely to be a "public place" within the meaning of the Act than a place whose public purpose by its very nature precludes use of and access to it by the public.
72. The Commission notes that the LRT lands are part of a system designed exclusively for the transportation of the public in Edmonton. The purpose of that system is public transportation and, thus, by its very nature it involves extensive use of the LRT lands by the public. The public uses the LRT lands by regularly walking across the pedways and platforms, and

regularly passing and repassing through the tunnels on the LRT lands using LRT rail cars. The question which arises is whether the degree of access afforded to the public to the LRT lands is sufficient for the Commission to find that the LRT lands are a "public place" within the meaning of the Act.

Degree of access

73. As set out above, in the Commission's view any consideration of the term "public place" under the Act must also include consideration of the degree of access afforded to the public to the place in question. The Commission notes that the issue of the degree of access has been considered in other statutory contexts by the courts in determining whether a place is public or not. In this regard, the Commission notes the words of Van Camp J. in *R. v. Prince*, (1974) 16 C.C.C. (2d) 569 at p.569, interpreting the words "public place" in the context of the dangerous driving provisions of the *Criminal Code*:

In a review of these authorities it would seem that one looks at the purpose of the section in question, which was to protect the public from dangerous drivers; that access need not be of right, that the ordinary dictionary meaning of the words is "not restricted to private use", and one need not consider if the owner gave an implied invitation; that the question of ownership is secondary and that **the question to be decided is do the ordinary members of the general public have sufficient degree of access to make it a public place within the meaning of this section.** [Emphasis added]

74. The Commission notes that the public has virtually unimpeded access by independent means to a portion of the LRT lands (i.e., the platforms and the pedways). In the Commission's view, such impediments that restrict the public's access to these places, for example fare and time of day restrictions, are no more stringent than those impediments which might apply to other places which would clearly fall within the meaning of "public place" under the Act, such as a municipal parking lot or municipal campground. The Commission considers that these impediments do not restrict the public's access to those portions of the LRT lands in a meaningful way.
75. The Commission notes, however, that the primary point of disagreement between the parties over the degree of access to the LRT lands relates to the LRT tracks and tunnels, as the majority of MTS Allstream's network installed on the LRT lands is in conduit which runs through the LRT tunnels.
76. The Commission is of the view that the fact that the public only has the ability to access the tunnels and pass and repass through those tunnels in rail cars does not, by itself, render the tunnels not a "public place" within the meaning of the Act. The Commission notes that in considering whether the degree of access is sufficient to ground a finding that a place is a "public place", at least one court has found that a place may be a "public place" even where the public crosses the place in question in a vehicle operated and controlled by another. In this regard, the Commission notes the words of Lane Prov. J. in *R. v. Singh*, [1994] O.J. 2452 (O.C.J. - Prov. Div.) at para. 22, considering whether the apron area of Lester B. Pearson

Airport was a public place within the meaning of the dangerous driving provisions of the *Criminal Code*:

In my view the apron area of Lester B. Pearson Airport is clearly a place to which the public has ready access. Passengers (at peak times 16,000 per hour) holding tickets on the aircraft landing at or embarking from the Airport are clearly on the apron. The fact that only a small fraction of them actually walk across the tarmac is, in my view, of no significance. All passengers by virtue of being on aircraft are on the apron and equally subject to the concerns about safety expressed by Mr. Gludish.

77. The Commission notes that the finding in this case was based on the Court's interpretation of the purpose of the statutory provision in question.
78. The Commission, as set out above, is of the view that in attempting to determine whether a place is a "public place" within the meaning of the Act it must have reference to the statutory context. The Commission is further of the view that a consideration of the statutory context must include a consideration of the purpose of section 43 of the Act.
79. The Commission found in Decision 2001-23 that the Act sets out a detailed statutory code with respect to construction issues involving carriers and municipalities. In Decision 2001-23, the Commission stated that the Act provides carriers a qualified right to enter on and break up highways or other public places for the purpose of constructing, maintaining or operating their transmission lines, subject to not unduly interfering with the public use and enjoyment of the highway or other public place and to the requirement for municipal consent or the permission of the Commission.
80. In the Commission's view, the purpose of section 43 of the Act is to facilitate the expansion of the facilities of Canadian carriers by allowing the construction, maintenance and operation of transmission lines on highways or other public places while balancing the carrier's interests with those of the municipality or other public authority, and considering the interests of the other users of the highway or other public place.
81. The Commission considers that, in providing it with an adjudicative role in resolving disputes over appropriate terms and conditions of access, Parliament intended that the Commission attempt to minimize the disruption to users of the highway or other public place caused by the construction, maintenance and operation of transmission lines while still facilitating the expansion of the facilities of Canadian carriers through the construction, maintenance and operation of transmission lines and balancing the carrier's interests with those of the municipality or other public authority.
82. The Commission notes that the majority of MTS Allstream's transmission lines are installed in sub-ducts that are located in metal pipes anchored to the walls of the LRT tunnels. In the Commission's view, the evidence on the record of this proceeding indicates that in the absence of these transmission lines in the LRT tunnels, MTS Allstream would have needed to break up a number of city streets to construct these same transmission lines to serve its customers in Edmonton. The Commission considers that the construction of these transmission lines under,

over, or along the city streets in Edmonton would have been more disruptive to the users of those streets than the installation of the transmission lines in the LRT tunnels.

83. The Commission notes that the public passes and repasses through the LRT tunnels on a regular basis for the purpose of public transportation. The entire LRT system is built on the premise of the public using the system to pass and repass through the tunnels thus, to that extent, the public has access to the tunnels. In the Commission's view, the fact that such access is through the mechanism of a rail car, when considered in light of the purpose of section 43 of the Act, as discussed above, does not remove the LRT lands from the scope of "public place" within the meaning of the Act. The Commission considers that to find that a place, owned and operated by a municipality for a public purpose and accessed by the public on a regular basis for the purpose of transportation is not a "public place" within the meaning of the Act would run contrary to Parliament's intent of minimizing the disruption caused by the construction of transmission lines to users of highways and other public places.

Determination on "public place"

84. In light of the above, the Commission finds that the LRT lands in Edmonton are an "other public place" within the meaning of the Act and that it, therefore, has the jurisdiction to adjudicate the dispute between MTS Allstream and Edmonton with respect to ongoing access to the LRT lands.

Terms of access to the LRT lands

Positions of parties

MTS Allstream's application

85. MTS Allstream submitted that it commenced negotiations with Edmonton in September 2001 regarding the terms and conditions of the MAA and the LRT Agreement, in light of Decision 2001-23. According to MTS Allstream, it was able to reach an agreement with Edmonton on the terms and conditions of a new MAA for 2002 to 2007, for lands in Edmonton other than the LRT lands, which it believed was consistent with Decision 2001-23. MTS Allstream submitted that the new MAA had not been finalised because MTS Allstream and Edmonton were unable to reach an agreement with respect to the inclusion of the LRT lands in the new MAA.
86. MTS Allstream submitted that the LRT Agreement with Edmonton that expired in 2002 contained a number of terms and conditions which it felt were contrary to the principles set out in Decision 2001-23. MTS Allstream submitted that it had requested that the provisions of the new MAA apply to the LRT lands and had indicated that the new MAA could include specific safety provisions applicable only to the LRT lands. MTS Allstream submitted that Edmonton had refused to include the LRT lands in the MAA because Edmonton did not consider the LRT lands to fall within the meaning of "highway or other public place" as contemplated by the Act.
87. MTS Allstream stated that Edmonton had passed a resolution authorizing a new fee structure for attachments to the LRT lands subsequent to the expiry of the LRT Agreement. MTS Allstream further stated that following the breakdown of negotiations over the inclusion

of the LRT lands in the new MAA in June 2003, Edmonton had launched an action against MTS Allstream in the Alberta Court of Queen's Bench for fees outstanding under the resolution as of 2002.

Edmonton's answer

88. Edmonton submitted that the LRT tunnels were not constructed for the purpose of carrying sewers, or telecommunications or power utilities.
89. According to Edmonton, it was approached by MTS Allstream's predecessor in 1996 with a business proposal to use Edmonton's public lands and its non-public facilities.
90. Edmonton noted that, prior to any negotiations with MTS Allstream, it had arrived at a rate of \$20 per metre plus annual CPI escalation, for the use and occupation of municipal land by carriers in the downtown core. According to Edmonton, the rate was based on its land value formula and incorporated into Edmonton Bylaw 12846, which addresses work on city roads, rights-of-way and other lands similar to roads. Edmonton noted that Edmonton Bylaw 12846 does not include LRT facilities specifically, but the rate was adopted for the use of LRT facilities and subsequently formally endorsed for LRT facilities through a resolution by Edmonton's Municipal Council in June 2002.
91. Edmonton stated that in 1997 it rejected MTS Allstream's original proposal of a fee of two percent of its gross revenue for access to the LRT lands and MTS Allstream had objected to the \$20 per metre rate proposed by Edmonton. According to Edmonton, it subsequently accepted MTS Allstream's proposal of a \$10 per metre rate plus one percent of gross revenues and municipal use of some dark fibre for the use of LRT facilities. Edmonton stated that it estimated that the MTS Allstream proposal would likely be of equal value to Edmonton's proposed \$20 per metre rate. Edmonton submitted that while other carriers had requested permission to use the LRT tunnels to locate their facilities, those carriers had declined Edmonton's proposed terms because they found alternative ways of bringing fibre to their customers.
92. Edmonton noted that its proposed rate of \$20 per metre for access to the LRT lands, which are the terms for all other carriers seeking access to the LRT lands, would result in MTS Allstream paying only \$22,000 more in 2003 than it would pay under the current rate of \$10 per metre and one percent of gross revenue. In Edmonton's view, the cost difference was minimal relative to the costs incurred by the parties and the Commission to resolve MTS Allstream's application.
93. Edmonton submitted that there were factual differences between this case and Decision 2001-23, which rendered the use of any principles derived from that Decision inappropriate in this situation. Edmonton submitted that the proposed use of municipal property was minimal in Vancouver, involving construction by Leducor and not by Vancouver. According to Edmonton, Vancouver had proposed to use causal costing and was then unable to demonstrate some of those costs to the Commission's satisfaction. Edmonton argued that, in the current situation, it had spent millions of dollars constructing the LRT tunnel structures. According to Edmonton, MTS Allstream proposed to use and occupy these tunnels without any contribution to their construction cost, except to pay an occupation fee. Edmonton submitted that it charged occupation fees for all commercial occupation of its property, and businesses that wished to

advertise on or in LRT vehicles or other property or to install vending machines in LRT stations were expected to pay for it. Edmonton argued that it did not use causal costing to determine such charges. Edmonton submitted that MTS Allstream had not argued that Edmonton should use such costing, let alone provide any support for such an argument. Edmonton further submitted that the Commission had not accepted Vancouver's method of land valuation because there was no free market for the land and Vancouver's method was too complex. Edmonton submitted that, by contrast, there was a market that could be established by auction for the right to occupy the scarce and valuable LRT facilities.

94. Edmonton submitted that MTS Allstream had not offered a bona fide reason of substance as to why the terms and conditions it proposed and agreed to were no longer acceptable to it in any objective sense. Edmonton further submitted that MTS Allstream had not offered to put Edmonton back in the position it was in before it accepted the MTS Allstream proposal.
95. Edmonton submitted that it was unfair for MTS Allstream to demand a change in the fundamental relationship between the parties, where Edmonton could not be put back in its original position unless MTS Allstream offered to remove its lines, and where Edmonton had given up certain rights or opportunities. Edmonton submitted that it had given up the right by agreement to provide another carrier the scarce space it had given MTS Allstream, or to terminate MTS Allstream's access if Edmonton could get a better deal from another carrier.
96. Edmonton asked what was to become of those uncontested valid agreements that Edmonton currently had with other carriers such as 360networks Corporation, Bell West Inc., TCI and Shaw Telecom Inc. if the Commission intervened in this case on the grounds given in MTS Allstream's application. Edmonton submitted that the Commission could be granting MTS Allstream a competitive advantage over the other carriers in Edmonton, which might cause an obligation on the part of the Commission to intervene in those other agreements. Edmonton stated that if the Commission intervened in this case then, in effect, the principles in Decision 2001-23 would become the rule for all carriers in making payments to any municipality for the use of municipal lands when an agreement was renewed.
97. Edmonton submitted that it should be incumbent on MTS Allstream to demonstrate that there was a fundamental change in the relationship between the parties, which had materially and adversely affected MTS Allstream's business prior to being able to seek Commission intervention. Edmonton argued that MTS Allstream had not alleged any such change.
98. According to Edmonton, a mere showing that the proposed terms of access were inconvenient, disliked by the carrier, or would cost more than zero was insufficient. Edmonton submitted that the carrier should provide some analysis of the impact of the proposed terms on the carrier. Edmonton submitted that MTS Allstream had not suggested that the terms and conditions which it had agreed to in 1997 would have any significant negative impact or would render doing business unprofitable, through no fault of its own.
99. Edmonton submitted that there had been no suggestion that the fee arrangements that the parties originally agreed to rendered doing business uneconomic or were significant. Edmonton argued that the impulse to foster competition and remove barriers to entry must be tempered by consideration of when costs were barriers to entry and when costs were just costs that must be paid for the occupation of municipal property.

100. Edmonton argued that the Commission did not prescribe conditions in Decision 2001-23 for all situations involving access to municipal property. According to Edmonton, the Commission provided nothing more than helpful hints for negotiations for situations that were similar to the Vancouver situation. Edmonton submitted that MTS Allstream was attempting to treat Decision 2001-23 as if the Commission had prescribed a standard agreement to which all future agreements must conform.

MTS Allstream's reply comments

101. In reply, MTS Allstream submitted that Edmonton was complicating a straightforward dispute. According to MTS Allstream, if the LRT lands were included in the new MAA, they would be made subject to the terms and conditions of the MAA agreed to by the parties which were consistent with Decision 2001-23. MTS Allstream submitted that if the LRT lands were not included in the new MAA, then those lands would be subject to fees which were not causal costs, were inconsistent with Decision 2001-23, and were unacceptable to MTS Allstream.
102. MTS Allstream submitted, in addition, that in Decision 2001-23, the Commission found that Vancouver was not allowed to charge compensation for the occupation of municipal land by, in that case, a carrier. MTS Allstream submitted that the Federal Court of Appeal upheld the Commission determination, but did so on the narrow ground that the case did not decide any broad principles but only the narrow issue between parties.

Commission's analysis and determination

Appropriateness of applying the cost causality principle in this case

103. In the Commission's view, the key point of dispute between MTS Allstream and Edmonton is the appropriateness of using causal costs as the correct measure for determining the rate MTS Allstream should pay to Edmonton for ongoing access to the LRT lands.
104. The Commission notes the concerns raised by Edmonton with respect to the potential imposition of Phase II costing methodology on it. The Commission further notes that it did not impose Phase II costing in Decision 2001-23; Vancouver proposed the use of Phase II costing to determine its causal costs. The Commission notes that it has never found that municipalities must use Phase II costing methodology in order to determine their causal costs.
105. In the Commission's view, it is appropriate that MTS Allstream, as a private commercial entity, should pay for the costs it causes rather than imposing those costs on the municipal taxpayer base. With respect to the methodology for determining these incremental costs, the Commission believes that any reasonable method agreed to by the parties would be appropriate and that Edmonton should not be required to use a Phase II costing methodology. In the event of a dispute over costing methodology, the Commission is prepared to consider applications to resolve any such dispute.
106. With respect to the issue of Edmonton's proposal for an occupation fee based on its land value formula, the Commission considers that such a fee as proposed by Edmonton would be inappropriate in the circumstances of this case.

107. The Commission notes that Edmonton has stated that it arrived at its \$20 per meter rate through an analysis of its land value formula. The Commission also notes Edmonton's belief that it is possible to arrive at a market value for the occupation of the LRT land through an auction. The Commission notes that the rate negotiated between MTS Allstream and Edmonton in the new MAA, which MTS Allstream submitted was consistent with the Ledcor Principles and which did not include access to the LRT lands, is significantly lower than the \$20 per meter rate based on Edmonton's land value formula.
108. The Commission notes Edmonton's submission that the LRT system was not constructed for the purpose of carrying sewers, or telecommunications or power utilities. The Commission considers that, based on this submission, relatively little, if any, of the millions of dollars which Edmonton states were paid for the construction of the LRT system are attributable to the usage of that system by MTS Allstream for its transmission lines. Based on the above, it is the Commission's view that Edmonton seeks to recover more than causal costs through its \$20 per meter rate.
109. The Commission considers that as very little, if any, municipal money was apparently expended to make the LRT lands useable by a carrier, there should be no concern in this case that MTS Allstream will be subsidized by the taxpayers of Edmonton, so long as MTS Allstream pays for all additional costs caused by the construction, maintenance and operation of its transmission lines.
110. The Commission considers that Edmonton's submission that a market value for the occupation of LRT lands could be established through an auction is incorrect. While there may be more than one potential purchaser for the right to occupy the LRT lands, there is only one seller, i.e. Edmonton. While carriers and other parties may be able to use other locations to place their facilities, such as city streets, these alternate locations would generally require significantly greater expense and disruption in order to install facilities. In the Commission's view, these alternate locations do not represent an equivalent source of supply such that it can be said that there is a truly "free" market under which a true market value can be determined for occupation of the LRT lands.
111. The Commission notes Edmonton's claim that if the Commission were to grant MTS Allstream the relief it seeks, MTS Allstream would be advantaged relative to the other carriers who rejected Edmonton's terms and went to the expense of installing their facilities in other locations. In the Commission's view, Edmonton's position ignores the disadvantage relative to other carriers that would likely accrue to MTS Allstream if Edmonton's proposal is accepted. MTS Allstream would potentially be the only carrier paying fees which far exceed causal costs. The Commission notes that while the record of this proceeding does not contain any details with respect to the rates paid by other carriers for access to Edmonton's streets, the fact that Edmonton was willing to negotiate significantly lower rates for access to its streets with MTS Allstream gives some indication that other carriers are likely paying significantly lower rates for access to the city streets than Edmonton is requiring MTS Allstream to pay for LRT access. In the Commission's view, an adoption of Edmonton's proposed higher fee structure, in the absence of any compelling economic justification for a higher fee structure, would put MTS Allstream in the position of either being disadvantaged relative to other carriers by paying

higher rates in order to connect to its customers or by paying significant amounts of money in order to relocate its facilities onto the lower priced city streets.

112. The Commission notes that the record of this proceeding does not contain sufficient details to allow the Commission to determine what would constitute causal costs in this case. Therefore, the Commission considers that the appropriate remedy in this case would be to direct the parties to work out an agreement with respect to access to the LRT lands with fees for that access based on the principle of cost causality.
113. The Commission directs MTS Allstream and Edmonton to negotiate a fee structure based on causal costs for MTS Allstream to have access to the LRT lands, for the purposes of constructing, maintaining and operating transmission lines.

Secretary General

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