



Telecom Decision CRTC 2006-20

Ottawa, 24 April 2006

MTS Allstream – Application to review and vary part of Telecom Decision CRTC 2005-52

Reference: 8662-M59-200512782

*In this Decision, the Commission **approves** MTS Allstream Inc.'s (MTS Allstream's) application to review and vary part of MTS Allstream's application to review and vary certain decisions relating to its Band F subsidy, Telecom Decision CRTC 2005-52, 9 September 2005, and **approves** the payment of subsidy to MTS Allstream in the amount of \$9.893 million for the provision of service to residential subscribers in its high-cost Band F for the period 1 January 2002 to 16 October 2003 (the Relevant Period). The Commission directs the Central Fund Administrator to remit \$9.893 million in Band F subsidy for the Relevant Period to MTS Allstream, as a priority payment, within 30 days of the date of this Decision.*

Introduction

1. MTS Allstream Inc. (MTS Allstream) made an application on 8 November 2005, pursuant to section 62 of the *Telecommunications Act* (the Act), to review and vary MTS Allstream's application to review and vary certain decisions relating to its Band F subsidy, Telecom Decision CRTC 2005-52, 9 September 2005 (Decision 2005-52), so that MTS Allstream could receive subsidy for the provision of residential service in its Band F (a high-cost band) for the period 1 January 2002 to 16 October 2003 (the Relevant Period). MTS Allstream submitted that the subsidy amount for the Relevant Period was \$10.14 million.

Background

2. In *Changes to the contribution regime*, Decision CRTC 2000-745, 30 November 2000 (Decision 2000-745), the Commission determined that subsidy would be payable to local exchange carriers (LECs) that provide residential telephone service in high-cost rural and remote areas of Canada (high-cost bands). The Commission also introduced a revenue-based contribution regime to collect the subsidy, under which telecommunications service providers (TSPs) or groups of related TSPs with \$10 million or more of annual Canadian telecommunications service revenues are required to contribute monthly to the National Contribution Fund.
3. In *Restructured bands, revised loop rates and related issues*, Decision CRTC 2001-238, 27 April 2001 (Decision 2001-238), the Commission established the criteria to be used by the large incumbent local exchange carriers (ILECs) to assign exchanges to high-cost bands for subsidy purposes. Since 1 January 2002, the regime established by Decisions 2000-745 and 2001-238 has been used to determine subsidy amounts for LECs that provide residential service to customers in high-cost bands within the territories of the large ILECs.

4. MTS Allstream did not assign any exchanges to Band F in its submissions made during the proceeding that led to Decision 2001-238 or when it issued revised tariff pages in response to Decision 2001-238. Accordingly, it did not receive subsidy for the residential service it provided to customers in Band F as of 1 January 2002.
5. In March 2003, MTS Allstream applied to the Commission to reclassify 17 exchanges from Band D to Band F. MTS Allstream also made related requests to revise loop rates for Bands D and F and to approve a residential primary exchange service (PES) cost and subsidy per residential network access service (NAS) amount for Band F.
6. In *MTS Communications Inc. – Reclassification of Band D exchanges to Band F and related rate issues*, Telecom Decision CRTC 2003-70, 17 October 2003 (Decision 2003-70), the Commission approved the reclassification of the 17 MTS Allstream exchanges from Band D to Band F, and also approved revised loop rates for Bands D and F, a residential PES cost for Band F and an interim subsidy per residential NAS amount for Band F, effective 17 October 2003.¹ As a result, MTS Allstream has received subsidy for Band F on a going-forward basis.
7. The Commission issued Decision 2005-52 in response to an application made by MTS Communications Inc. (now MTS Allstream) on 25 November 2003, pursuant to sections 60 and 62 of the Act, to review and vary certain determinations in Decision 2001-238; *Restructured bands, revised loop rates and related issues – Correction*, Decision CRTC 2001-238-2, 7 August 2001; and Decision 2003-70.
8. In Decision 2005-52, the Commission denied MTS Allstream's request to review and vary the decisions in question to permit it to receive subsidy for the Relevant Period, approved revised loop rates for Bands D and F, and approved a revised residential PES cost and subsidy per residential NAS amount for Band F. The Commission notes that the subject of the present application is the Commission's determination in Decision 2005-52 to deny MTS Allstream the subsidy for the Relevant Period.
9. When the Commission denied MTS Allstream's request for subsidy for the Relevant Period in Decision 2005-52, it stated:

The Commission also notes MTS Allstream's argument that there was no policy reason not to recognize MTS Allstream's Band F and related subsidy effective 1 January 2002. The Commission has considered this submission in the context of the late date at which MTS Allstream submitted its application, the circumstances relating to the original error, and the public interest in the finality of Commission decisions. In the Commission's view, MTS Allstream's submissions do not support its request to review and vary Decision 2001-238 as amended and Decision 2003-70 with respect to their effective dates.

¹ MTS Allstream's Band F subsidy per residential NAS amount for 2003 was approved on a final basis in *Final 2003 revenue-percent charge and related matters*, Telecom Decision CRTC 2003-84, 19 December 2003.

The Commission notes that the term "original error" referred to MTS Allstream's failure to assign any exchange to Band F in its submissions made during the proceeding that led to Decision 2001-238 or when it issued revised tariff pages in response to Decision 2001-238.

Process

10. The Commission received no comments with respect to this application.

MTS Allstream's application

11. MTS Allstream submitted that it was a fair reading of the Commission's reasons in Decision 2005-52 that the Commission denied MTS Allstream the subsidy for the Relevant Period due to the delay in submitting the application, the public interest in the finality of Commission decisions, and the circumstances relating to the original error.
12. MTS Allstream submitted that there was substantial doubt as to the correctness of Decision 2005-52 having regard to the manner in which the Commission weighed the public interest in the finality of the Commission's decisions against the policy objective of rendering telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada.
13. MTS Allstream submitted that, regardless of whether it was responsible, the original error was not a sufficient reason to deny the subsidy for the Relevant Period. MTS Allstream submitted further that the punitive consequence of the denial of the subsidy for the company and its shareholders was disproportionate to any error made by MTS Allstream. MTS Allstream argued that, on this basis as well, there was substantial doubt as to the correctness of the Commission's denial of the subsidy for the Relevant Period.
14. MTS Allstream submitted that the Commission erred in law when considering the test for denying a discretionary remedy due to the applicant's delay or conduct. Relying on jurisprudence, MTS Allstream submitted that the Commission erred in law by denying relief, notwithstanding what the company argued was the lack of prejudice to other parties resulting from MTS Allstream's delay in seeking relief. MTS Allstream submitted further that the Commission erred because the company's conduct was not sufficiently serious to justify in law denial of the relief sought.
15. MTS Allstream submitted that the Commission's jurisdiction to review and vary its own decisions pursuant to section 62 of the Act was the exercise of a discretionary power. MTS Allstream further submitted that the jurisprudence applicable to a Court's discretion to refuse to grant discretionary remedies was of direct relevance to the Commission's exercise of this authority.
16. MTS Allstream submitted that the Supreme Court of Canada's decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (*Oldman River*) was the leading case with respect to denial of a discretionary remedy due to an applicant's delay. MTS Allstream noted that in *Oldman River*, an environmental group commenced applications for judicial review in 1989 in relation to approval for construction of a dam

that had been granted in 1987 and that, by the time the applications were made, 40 percent of the dam had been constructed. A majority of the Court found that the motions judge should not have denied the remedies sought on grounds of unreasonable delay. MTS Allstream submitted that, while the Court's decision was based in part on the applicants having mounted a concerted and sustained effort to challenge the legality of the process followed to build the dam (aside from the applications at issue), the majority of the Court was motivated by its finding that there had been no prejudice resulting from the applicants' delay.

17. MTS Allstream submitted that its delay in addressing the issue of subsidy for the Relevant Period was not so unreasonable under the circumstances as to justify the denial of the subsidy. MTS Allstream further submitted that all the events at issue occurred while the new subsidy regime was in its infancy, and that there were no parties who would have been prejudiced by being required to act or not act on the basis of the original decisions.
18. MTS Allstream also relied on the Ontario Court of Appeal's decision in *The Chippewas of Sarnia Band v. Attorney General of Canada et al.*, 51 O.R. (3d) 641 (*Chippewas*), in which the Court declined to vindicate Aboriginal title that was transferred, but never formally surrendered, over 150 years before. MTS Allstream argued that, unlike in *Chippewas*, providing MTS Allstream with subsidy for the Relevant Period would not cause hardship or prejudice to the public interest or to third parties.
19. MTS Allstream argued that notwithstanding the legitimacy of the Commission's concern for the finality of its decisions generally, in the specific circumstances of this case, given the lack of hardship or prejudice to either third parties or the public interest in good government, there was substantial doubt as to the correctness of the Commission's denial of relief due to MTS Allstream's delay.
20. MTS Allstream submitted that the principles on which judicial review had been decided had long included disentitlement where a court, because of the conduct of the applicant, would decline the grant of the discretionary remedy. MTS Allstream argued, however, that this discretion to deny a remedy that was otherwise warranted should be exercised only with the greatest of care, and only in cases where the applicant's conduct was characterized by some level of moral turpitude.
21. MTS Allstream submitted that the type of misconduct justifying the denial of a discretionary remedy was illustrated in the British Columbia Court of Appeal's decision in *Cock v. Labour Relations Board* [1960], 26 D.L.R. (2d) 127, where the Court stated that the relief sought, namely the quashing of a labour relations board's award, should not be granted to the applicants because of their fraud, trickery, and apparent perjury.
22. MTS Allstream also relied on the Supreme Court of Canada's decision in *Homex Realty and Development Company Limited v. The Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011 (*Homex*). MTS Allstream noted that the Court found in *Homex* that the respondent municipality had failed to provide the appellant, a developer, with an opportunity to be heard before authorizing a by-law, the effect of which was to prevent the appellant from selling its land. However, the Court, by majority, denied the relief sought by the appellant, namely the quashing of the by-law, because of the developer's deceptive and obstructionist behaviour.

MTS Allstream submitted that in comparison to the conduct of the applicant in *Homex*, the error it originally made in describing its costs, even if the responsibility of MTS Allstream, was an honest mistake. In MTS Allstream's submission, this conduct did not begin to approach the type that would warrant the denial of a subsidy to which MTS Allstream was otherwise clearly entitled.

23. MTS Allstream also submitted that because competitors had not leased local loops in the bands at issue for the Relevant Period, neither the re-assignment of bands nor the underlying re-assessment of MTS Allstream's costs for the Relevant Period would result in any prejudice to any third party. Further, MTS Allstream submitted that the Commission's earlier decisions, which did not re-assign the relevant NAS to Band F for the Relevant Period, would not have caused the public to order its affairs in a particular manner in reliance on those decisions.

Commission's analysis and determinations

24. The Commission notes MTS Allstream's submissions that there was substantial doubt as to the correctness of Decision 2005-52 because the Commission had failed to apply the proper legal tests with respect to the denial of relief due to delay and denial of relief due to the applicant's conduct.
25. With respect to the matter of delay, the Commission disagrees with MTS Allstream's contention that, if its request for subsidy for the Relevant Period had been granted in Decision 2005-52, no other person would have been affected. The Commission therefore considers that the jurisprudence MTS Allstream relied on is distinguishable on this ground. Accordingly, the Commission is not persuaded by the company's submissions that the Commission made an error of law in Decision 2005-52 with respect to its treatment of MTS Allstream's delay.
26. With respect to the matter of MTS Allstream's conduct, the Commission notes that MTS Allstream's argument was specifically premised on the proposition that, as a matter of law, the company was otherwise entitled to the relief sought. In this connection, the Commission notes that in *Homex*, the case cited by MTS Allstream in support of its position in this proceeding, the appellant persuaded the Court that the municipality had breached the rules of natural justice and that, as a result, it was otherwise entitled to the relief sought. By contrast, the Commission considers that MTS Allstream has not demonstrated that the Commission was legally obliged to grant the relief sought in the proceeding that led to Decision 2005-52. For example, as discussed above, the Commission is not persuaded by MTS Allstream's submission that the Commission's treatment in Decision 2005-52 of the company's delay constituted an error of law that required it to grant the relief sought. Accordingly, the Commission is not persuaded by MTS Allstream's submission that the Commission made an error of law in Decision 2005-52 with respect to its treatment of the company's conduct.
27. In light of the above, the Commission finds that it did not make an error of law with respect to its consideration of MTS Allstream's conduct in the disposition of the company's request for subsidy for the Relevant Period in Decision 2005-52.

28. The Commission notes MTS Allstream's submission that there was substantial doubt as to the correctness of Decision 2005-52 having regard to the manner in which the Commission weighed the public interest in the finality of the Commission's decisions against the policy objective of rendering telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada. The Commission further notes MTS Allstream's submission that there was also substantial doubt as to the correctness of Decision 2005-52 because denial of the requested subsidy was disproportionate to the nature of MTS Allstream's mistake related to its original classification of the exchanges in question.
29. The Commission has reviewed the appropriateness of the weight to be attached to the policy considerations relevant to the disposition of MTS Allstream's request for subsidy during the Relevant Period in Decision 2005-52.
30. The Commission notes that it is clear the company provided service to its residential customers in Band F during the Relevant Period. The Commission finds that, in providing this service, MTS Allstream contributed to the achievement of the policy objective in section 7(b) of the Act: namely, to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada. The Commission further notes that MTS Allstream provided the residential service in question at retail rates that were significantly less than cost. The Commission finds that, like other ILECs that received subsidy for the provision of service in their high-cost bands during the Relevant Period, MTS Allstream would have received the subsidy it has now requested if it had correctly assigned its exchanges to Band F in 2001.
31. The Commission considers that the error that led to MTS Allstream's original mis-assignment of exchanges was an honest mistake made during the implementation period of a new subsidy regime. The Commission considers further that its denial of the subsidy in Decision 2005-52 was disproportionate to this mistake.
32. In light of the above, the Commission concludes that, in the circumstances of this case, insufficient weight was given to the policy considerations raised in MTS Allstream's application. The Commission therefore finds that there is substantial doubt as to the correctness of the Commission's determination in Decision 2005-52 to deny MTS Allstream's request for subsidy for the Relevant Period. Accordingly, the Commission finds that MTS Allstream should receive subsidy for the provision of service in Band F during the Relevant Period.
33. The Commission notes that MTS Allstream did not provide a calculation for its requested subsidy amount. Based on MTS Allstream's annual subsidy filings for the Relevant Period and the Commission's determination with respect to MTS Allstream's service improvement program in Decision 2005-52, the Commission determines that the subsidy amount for the Relevant Period is \$9.893 million.
34. Accordingly, the Commission **approves** the payment to MTS Allstream of \$9.893 million in subsidy for the Relevant Period.

35. The Commission directs the Central Fund Administrator to remit \$9.893 million in subsidy for Band F for the Relevant Period to MTS Allstream, as a priority payment, within 30 days of the date of this Decision. The Commission notes that, in the event that the National Contribution Fund goes into a shortfall position, the payment process contained in the procedures approved in *Revised procedures for the operation of the National Contribution Fund*, Telecom Decision CRTC 2005-59, 7 October 2005, will apply.

Secretary General

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