



Telecom Decision CRTC 2005-46

Ottawa, 25 August 2005

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

Reference: 8690-A4-01/01

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

The Application

1. On 28 May 2001, AT&T Canada Corp. (on behalf of itself and AT&T Canada Telecom Services Company), now MTS Allstream Inc. (MTS Allstream), filed a Part VII application pursuant to the *CRTC Telecommunications Rules of Procedure* requesting an order to grant MTS Allstream access to public highways and municipal property within the jurisdiction of the City of Toronto (Toronto) on terms and conditions that are consistent with the principles set out in *Leducor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001 (Decision 2001-23).
2. Specifically, MTS Allstream requested that the Commission align the following terms and conditions of an agreement signed between MetroNet Communications Group Inc. (MetroNet)¹ and Toronto for the lease of a decommissioned underground pipe system and a licence to use Toronto's rights-of-way (hereinafter referred to as the Agreement) with the terms and conditions approved in Decision 2001-23:
 - i) provisions that require MTS Allstream to pay licence access fees that exceed Toronto's causal costs;
 - ii) reporting obligations relating to the calculation of the access fees and related audit requirements;
 - iii) a provision requiring that Toronto be given the option of acquiring exclusive use of a dark fibre licence and any one or more of the lit fibre services

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

offered by MTS Allstream on terms and conditions as good as the best industry price;

- iv) a limitation of liability and indemnity clause that obliges MTS Allstream to indemnify and protect Toronto and its employees against all claims and losses with respect to life, personal injury, damage to property and economic losses incurred by Toronto and its employees arising from the exercise of MTS Allstream's rights under the Agreement;
- v) the assumption of costs by MTS Allstream for plant relocation, regardless of the factors surrounding the relocation;
- vi) a default, termination or expiry clause giving Toronto the right to enforce a number of remedies that could interfere with the operations of MTS Allstream's network and require it to cease operations or remove its facilities; and
- vii) a governing law and jurisdiction clause providing that the Agreement is governed in all respects by the laws and the Courts of Ontario.

Process

3. In *Terms and conditions of existing agreements for access to municipal property*, Public Notice CRTC 2001-99, 31 August 2001, the Commission initiated a public proceeding to consider what circumstances, if any, would justify an intervention by the Commission to alter the terms of an existing contract between a carrier and a municipality for access to municipal rights-of-way.
4. In *Terms and conditions of existing agreements for access to municipal rights-of-way*, Telecom Decision CRTC 2003-82, 4 December 2003 (Decision 2003-82), the Commission enunciated the conditions under which it was prepared to consider applications under section 43 of the *Telecommunications Act* (the Act) for existing municipal access agreements (MAAs). The Commission also set out a process for parties to comment on MTS Allstream's application against Toronto.
5. By letter dated 30 December 2003, the Commission suspended the process for comments set out in Decision 2003-82, at MTS Allstream's request, pending the Federal Court of Appeal's determination on the Federation of Canadian Municipalities' (FCM) application for leave to appeal Decision 2003-82.
6. On 5 March 2004, the Federal Court of Appeal dismissed FCM's application for leave to appeal Decision 2003-82. On 19 April 2004, the Federal Court of Appeal also dismissed the motion by FCM, the City of Edmonton, the City of Vancouver (collectively, FCM et al.), the City of Calgary (Calgary) and Toronto for reconsideration of FCM's application for leave to appeal.
7. By letter dated 20 April 2004, FCM et al. requested permission to intervene in this application. By letters dated 20 April 2004 and 21 April 2004, Toronto and Calgary, respectively, requested that the Commission establish an alternative process for making submissions in this

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

8. On 5 January 2005, MTS Allstream filed its submissions pursuant to Decision 2004-79. Toronto filed its response on 4 February 2005 and MTS Allstream filed its reply on 14 February 2005.
9. On 23 February 2005, Toronto filed an objection to evidence filed by MTS Allstream in its reply. Toronto also responded to MTS Allstream's evidence, in the event that the Commission chose to accept it. MTS Allstream replied to Toronto's additional comments on 28 February 2005. This evidence has been included in the record.

Statutory provision and regulatory background

10. Subsection 43(4) of the Act reads as follows:

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

Position of parties

MTS Allstream

12. MTS Allstream submitted that the Agreement did not validly represent its acceptance of the terms. MTS Allstream submitted that there had been a change in circumstances with the issuance of Decision 2001-23, which justified changing the Agreement.
13. MTS Allstream submitted that Toronto's predominance in the Canadian economy made acquiring a presence in Toronto a business necessity. MTS Allstream added that, without access to Toronto's rights-of-way, MetroNet would have been precluded from competing in the local market and would have lost customers, financing and its competitive advantage.
14. MTS Allstream submitted that MetroNet needed to sign the Agreement because of the state of competition at the time. MTS Allstream submitted that MetroNet negotiated the Agreement at the outset of local competition, when a number of new entrants were vying for a share of the market. MTS Allstream submitted that MetroNet needed to sign the Agreement to ensure its survival and to prevent other competitors from gaining crucial ground.
15. MTS Allstream submitted that Toronto had an overwhelming advantage in bargaining power because it was the only source of supply of its rights-of-way. MTS Allstream argued that Toronto could dictate onerous and unconscionable terms and conditions and extract fees well beyond its causal costs. MTS Allstream added that, at the same time, it was not feasible for MetroNet to involve the Commission to resolve access issues given the regulatory delays in rendering a decision, as compared to the pace of competition and the short time available to sign the Agreement.
16. MTS Allstream submitted that MetroNet entered into the Agreement prior to the advent of local competition and was the first entrant in the local services market. MTS Allstream added that the Commission had not yet set the terms under which competitive local exchange carriers (CLECs) could have access to municipal rights-of-way.
17. MTS Allstream submitted that Toronto was working in concert with FCM and other Canadian municipalities to ensure, among other things, that CLECs paid market-based fees to access municipal rights-of-way. MTS Allstream submitted that MetroNet was of the view that any MAA it signed with Toronto would likely have to include the five principles established by FCM in 1995 for MAAs that ensured, among other things, that municipalities:
 - i) were not responsible for the costs of relocating telecommunications infrastructure if so required for planning or other reasons deemed necessary by the municipality;
 - ii) were not liable for economic loss, legal costs or physical restoration costs for disruption of telecommunications services arising from municipal actions; and
 - iii) were entitled to receive revenues greater than their direct costs as compensation from those accessing municipal property for profit.

18. MTS Allstream submitted that MetroNet's inability to renegotiate the Agreement on acceptable terms following the amalgamation of Toronto in 1998, validated that the Agreement did not represent MetroNet's acceptance of the terms. MTS Allstream submitted that, even though MetroNet vigorously argued that the access fees it already paid to Toronto should not be increased, MetroNet had to agree to pay greater annual fees in light of Toronto's unwillingness to negotiate.

Toronto

19. Toronto submitted that in order for MTS Allstream to demonstrate that the Agreement was unconscionable it had to show that MetroNet's will was coerced and that the pressure to do so was not legitimate. Toronto submitted that MetroNet's will had not been coerced because:
 - i) MetroNet did not protest about the terms of the Agreement;
 - ii) there was an alternative course via section 43 of the Act open to MetroNet;
 - iii) MetroNet was independently advised; and
 - iv) after entering into the Agreement, MetroNet and its successors did not take steps to avoid it.
20. Toronto submitted that MetroNet provided the standard form MAA used to negotiate the Agreement. Toronto also submitted that MetroNet voluntarily proposed the leasing fee schedule that ultimately formed part of the Agreement and also proposed, as an alternative, that the fee schedule be based on a percentage of MetroNet's gross revenue. Toronto further submitted that MetroNet offered other incentives, such as the allocation of dark fibre, to incite Toronto to sign the Agreement. Toronto submitted, furthermore, that MetroNet, in its response to Toronto's request for proposal, indicated that its offer was reasonable, economically viable and appropriate for both MetroNet and Toronto.
21. Toronto submitted that, following the amalgamation of Toronto, MetroNet requested that the Agreement include the new amalgamated city on the same terms and conditions already in place. Toronto submitted that MetroNet's request demonstrated that the original terms and conditions were acceptable to MetroNet at the time. Toronto also submitted that, at the request of MetroNet, it agreed to reduce the recurring amounts MetroNet had to pay for cable installed outside Toronto's core.
22. Toronto submitted that MetroNet could have applied to the Commission under section 43 of the Act, as an alternative to signing the Agreement, on the basis that it could not, on terms acceptable to it, obtain the consent of Toronto to construct its facilities. Toronto noted that MetroNet chose not to exercise that right.
23. Toronto noted that MetroNet was represented by independent legal counsel, in-house legal counsel and its management team during the negotiation of the Agreement. Toronto noted that MetroNet received advice from expert consultants throughout the negotiations. Toronto noted, in contrast, that it was represented by three municipal staff, namely a staff lawyer and two engineers experienced only in street allowance control issues.

24. Toronto submitted that neither MetroNet nor MTS Allstream disputed the validity of the Agreement after it was signed. Toronto noted that MTS Allstream only disputed the Agreement following Decision 2001-23, almost four years after the Agreement was signed, mainly on the basis that the Agreement was contrary to the principles set out in Decision 2001-23. Toronto submitted that MTS Allstream only alleged that the Agreement was illegal or unconscionable after the Commission established its review process in Decision 2003-82.
25. Toronto noted that when MetroNet merged with AT&T Canada Corp., AT&T Canada Corp. assured Toronto in writing that its obligations and responsibilities under the Agreement would continue and remain unchanged. In Toronto's view, this demonstrated that AT&T Canada Corp. was also satisfied with the terms and conditions of the Agreement.

Commission analysis and determination

26. The Commission notes that in Decision 2003-82, it determined that it would bear in mind the particular circumstances of each case when considering applications for existing MAAs under section 43 of the Act, including the parties' intent and their relative bargaining power when the MAA was signed. The Commission considered that the onus would be on the Canadian carrier, in this case MTS Allstream, to establish that the MAA did not validly represent its acceptance of the terms because of, but not limited to, mistake, duress and inequality of bargaining power.
27. The Commission notes that in a Letter Decision entitled *Part VII Application by Independent Cable Operators Regarding Access to Support Structure to Ontario Hydro Services Company Inc. and/or Ontario Hydro Networks Company Inc.*, issued on 28 April 2000, the Commission examined another case where the applicants claimed that an unacceptable agreement was signed in the face of serious threat of interference with access or continued access. The Commission notes that, in that case, the applicants took steps shortly after signing the agreements to demonstrate that they objected to the terms of the agreements. For example, the applicants wrote to the Commission for its assistance and they also wrote to the respondents and to their own counsel to express their dissatisfaction with the agreements.
28. The Commission considers that, while the state of competition is relevant in establishing whether the Agreement validly represented MetroNet's and its successors' acceptance of the terms, the circumstances surrounding the signing of the Agreement indicate that MetroNet suggested many of the impugned terms of the Agreement. The Commission considers that MetroNet's actions, such as proposing: (a) the standard form MAA to negotiate the Agreement, (b) the amount of the annual access fee, (c) the calculation of the annual access fee based on a percentage of MetroNet's gross revenue, and (d) the allocation of dark fibre, demonstrate that MetroNet agreed with the clauses in the Agreement.
29. The Commission also considers that MetroNet's claim, in its response to Toronto's request for proposal, that its proposal was reasonable, economically viable and appropriate for both itself and Toronto demonstrates that it was satisfied with the terms and conditions of the Agreement when it was signed.

30. The Commission is of the view that, given the expertise and experience of its negotiating team, which included lawyers, expert consultants and its management team, MetroNet knew or ought to have known of the extent and the scope of the Agreement and its potential impact on MetroNet and its successors.
31. The Commission considers that the actions of MetroNet and its successors, following the signing of the Agreement, demonstrate that MTS Allstream accepted the terms of the Agreement. For example, the Commission notes that MetroNet did not object, in writing or otherwise, to the terms of the Agreement. The Commission also notes that AT&T Canada Corp. confirmed its intention to conform with the obligations and responsibilities of MetroNet under the Agreement, following MetroNet's merger with AT&T Canada Corp. The Commission also notes that AT&T Canada Corp. only applied to the Commission to modify the Agreement after the issuance of Decision 2001-23, almost four years after the Agreement was signed.
32. The Commission is of the view that MetroNet's request to expand the Agreement under the same terms, following the amalgamation of Toronto, demonstrates that MetroNet was satisfied at that time with the terms of the Agreement as originally signed or, at least, found them sufficiently acceptable to continue abiding by them. Furthermore, the Commission considers that the parties' ability to agree on new terms for the access fees and the fees for cable installed outside Toronto's core demonstrates that there was room for negotiation when the Agreement was amended.
33. In light of the above, the Commission finds that MTS Allstream failed to demonstrate that it did not intend to enter into the Agreement and that the Agreement did not validly represent its acceptance of the terms because of mistake, duress, inequality of bargaining power or other circumstances. Accordingly, the Commission **denies** MTS Allstream's application.

Secretary General

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