



Telecom Decision CRTC 2006-37

Ottawa, 7 June 2006

Applications by TELUS Communications Company and Bell Canada that a proposed service solution by MTS Allstream Inc. requires prior Commission approval

Reference: 8622-B2-200602369 and 8622-T66-200602640

In this Decision, disposing of applications by Bell Canada and TELUS Communications Company, the Commission finds that the arrangement proposed by MTS Allstream Inc. in response to a Request for Proposals is a wide-area network service forborne from regulation and, hence, does not require prior Commission approval.

Background

1. Public Works and Government Services Canada (PWGSC) issued a Request for Proposals on 13 October 2005 for the supply of telecommunications services to the Government of Canada (the RFP). The RFP invited bidders to submit proposals for specified network services for a period of three years, with an option for two additional periods of one year each. These services were to be supplied to PWGSC nationally and to certain service delivery points in the United States. PWGSC entered into a contract with MTS Allstream Inc. (MTS Allstream) on 21 February 2006 for the services set out in the RFP.

The applications

2. The Commission received applications from TELUS Communications Company (TCC) and Bell Canada dated 24 February and 7 March 2006, respectively, filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*. TCC and Bell Canada argued that one of the circuits and the access portion of another circuit listed in the RFP were not forborne from regulation for MTS Allstream. TCC requested that the Commission investigate the mandatory service requirements of the RFP with a view to determining whether tariff approval was required for provision of the service, and, if so, that MTS Allstream be ordered to notify PWGSC of its obligation to obtain tariff approval, and not to provide service pending such tariff approval. Bell Canada sought a determination from the Commission that MTS Allstream had breached section 24 and/or section 25 of the *Telecommunications Act* (the Act) as well as an order that MTS Allstream be prohibited from providing non-forborne telecommunications services in the absence of a Commission-approved tariff.
3. Bell Canada submitted that among the circuits identified in the RFP, it had issues with the following two circuits that were located or terminated in MTS Allstream's serving territory:

- Circuit number 23 from Pinawa, Manitoba to Chalk River, Ontario comprised the following:
 - (i) an access portion that extended from the customer's premises in Pinawa to MTS Allstream's central office (CO) in or near Pinawa;
 - (ii) an interexchange (IX) portion that extended from MTS Allstream's CO in Pinawa to the serving CO in or near Chalk River; and
 - (iii) an access portion that extended from the serving CO in or near Chalk River to the customer's premises in Chalk River.
 - Circuit number 289 from Winnipeg, Manitoba to Thunder Bay, Ontario.
4. Bell Canada submitted that the access and IX components of circuit number 23 were Commission-regulated for MTS Allstream. In regard to circuit number 289, the company submitted that the access components were Commission-regulated and the IX component was forborne from regulation.
 5. TCC submitted that the RFP had mandatory requirements for tariffable accesses and IX circuits on at least one non-forborne route which the company described as accesses and IX circuits between Pinawa, Manitoba and Chalk River, Ontario. TCC also submitted that the RFP required tariffable accesses in Winnipeg, Manitoba.
 6. Bell Canada submitted that MTS Allstream should have filed a customer-specific arrangement for Commission approval or a revision to its existing tariffs to accommodate certain mandatory terms and conditions of the RFP. Bell Canada argued that when it provides the services in question, MTS Allstream will be in breach of section 25 of the Act.¹ TCC and Bell Canada noted that they had filed tariffs for the same RFP which had received interim approval from the Commission.
 7. TCC submitted that the services contemplated by the RFP were not subject to an existing forbearance order and were not forborne when offered by MTS Allstream in its serving territory.
 8. Bell Canada further submitted that in offering to provide a service otherwise than in accordance with a Commission-approved tariff, and by representing to PWGSC that no tariff approval was required, MTS Allstream had breached section 24 of the Act.²

¹ Section 25 of the Act reads as follows: No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

² Section 24 of the Act reads as follows: The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

Process

9. The Commission received comments from PWGSC dated 9 March 2006.
10. By letter dated 15 March 2006, Commission staff informed Bell Canada, MTS Allstream, PWGSC, and TCC that Bell Canada's and TCC's applications would be considered in the same proceeding. Parties were also informed of an extension to the deadlines for the filing of comments and reply comments.
11. PWGSC submitted additional comments on 21 March 2006.
12. MTS Allstream filed its answer on 27 March 2006, in part in confidence.
13. Bell Canada and TCC filed replies on 3 April 2006.
14. The Commission addressed interrogatories to MTS Allstream, dated 12 April 2006, with copies to PWGSC, Bell Canada, and TCC. MTS Allstream filed its responses in confidence on 24 April 2006, with no abridged version for the public record, submitting that removal of the confidential information would render them meaningless.
15. On 15 May 2006, the Commission requested MTS Allstream to show cause as to why part of its answer of 27 March 2006 that was filed in confidence should not be placed on the public record. MTS Allstream responded on 17 May 2006. On 18 May 2006, MTS Allstream was requested to identify, on the public record, the Commission's determination(s) upon which the company was relying to support its view that the company's service solution was not subject to prior Commission approval. MTS Allstream filed the information in question on 19 May 2006.
16. On 25 May 2006, TCC filed an additional submission. On 29 May 2006, MTS Allstream filed comments in response to TCC's submission.
17. PWGSC filed additional comments dated 29 May 2006.

Positions of parties

PWGSC's comments

18. PWGSC indicated that it had advised all the bidders (i.e., MTS Allstream, Bell Canada, and TCC) that if the Commission issued its determination on Bell Canada's and TCC's applications by 7 June 2006, and the determination clearly revealed that the regulatory certifications, representations, or warranties provided by MTS Allstream were untrue, PWGSC would terminate the contract with MTS Allstream.

MTS Allstream's answer

19. MTS Allstream submitted that it had complied with its statutory duties under the Act and that the Commission should dismiss Bell Canada's and TCC's applications.

20. MTS Allstream argued that PWGSC had not requested a service solution using traditional digital private line services as alleged by Bell Canada. MTS Allstream submitted that the RFP permitted flexibility in the choice of technologies that would be used to provision circuits. MTS Allstream argued that it was within the exclusive domain of PWGSC, and not up to Bell Canada, to say whether MTS Allstream had met the technical requirements of the RFP.
21. MTS Allstream submitted that, in contrast to the number of circuits located in each of Bell Canada's and TCC's serving territories, only three percent of the 528 circuits identified in the RFP were located in MTS Allstream's serving territory (i.e., Manitoba), and that only two circuits came within the class of circuits described in Bell Canada's and TCC's complaints.

Bell Canada's and TCC's reply comments

22. Bell Canada and TCC submitted that the issue before the Commission was whether the service sought by PWGSC required regulatory approval. TCC noted that while MTS Allstream had certified that Commission approval was not required, both Bell Canada and TCC had certified in their bids that certain services required filing tariffs for the Commission's approval.
23. Bell Canada submitted that MTS Allstream was attempting to convey the impression that the customer had established very general requirements for the service in question, which MTS Allstream could then implement with considerable flexibility. While recognizing that the RFP provided some flexibility in the choice of technology, Bell Canada submitted that MTS Allstream's argument that under the terms of the RFP it could offer a forborne solution was incorrect. In Bell Canada's view, regardless of the technology choice made by MTS Allstream, the customer's requirement was for a private-line service supported by digital-network accesses, among which some route-specific cross-sections and accesses were subject to a requirement that MTS Allstream submit a tariff for the Commission's approval, notably for services it would provide in MTS Allstream's serving territory.
24. Bell Canada submitted that, except in the case of forborne wide-area network (WAN) services, all services comprising digital-network access were subject to regulation, and that if MTS Allstream had chosen to characterize its proposal as a forborne WAN service, MTS Allstream was incorrect in doing so. Bell Canada argued that the customer's requirement for route-specific dedicated digital circuits priced on a route-specific basis was at odds with the scope of forborne WAN services described in *Forbearance granted for telcos' wide area network services*, Order CRTC 2000-553, 16 June 2000 (Order 2000-553), in which the Commission stated:

The Commission considers that the market for WAN services is national or regional in scope (rather than route-specific as in the case of private line services). Although in certain situations WAN services may be an alternative to private lines services, WAN services are considerably different from private line services. Unlike private lines, WAN services are neither priced nor offered on a route-specific basis. There are also technological differences in that private line services involve dedicated lines on specific routes for the physical transport of voice and data traffic between sites, whereas WAN services involve networking amongst interconnected sites on lines that are not dedicated.

25. TCC also submitted that the customer's requirements included dedicated digital circuits that involved route-specific circuits with route-specific pricing, and that MTS Allstream's proposal was not a WAN service. TCC argued that the Pinawa to Chalk River circuit required Commission approval and that MTS Allstream had not filed a tariff seeking Commission approval for that circuit. TCC further submitted that MTS Allstream had never pointed to a forbearance order that would apply to the services in question because, in TCC's view, no such forbearance order existed. TCC argued that the Commission has exclusive jurisdiction to determine whether MTS Allstream should have filed tariffs for the services in question.
26. Bell Canada and TCC argued that MTS Allstream's submission that only three percent of the circuits were located within its incumbent local exchange carrier serving territory, in contrast to considerably higher percentages of such circuits in the case of Bell Canada and TCC, was irrelevant. Bell Canada and TCC submitted that the requirements of the Act are not triggered by the number of facilities provided to a customer.

MTS Allstream's responses to Commission interrogatories

27. The Commission requested MTS Allstream to provide schematic diagrams identifying all individual service elements and demarcation points in the company's proposed service solution for the provision of circuit numbers 23 and 289. MTS Allstream was also requested to explain, in detail, the differences between the company's proposed service solution for circuit numbers 23 and 289 and a service solution configured using digital network access and IX digital private line services. MTS Allstream provided its responses in confidence, with no abridged version for the public record because, in the company's view, removal of the confidential information would render them meaningless. As part of its responses, MTS Allstream also provided technical information concerning its proposed service solution as a whole.

Filing on the public record

28. In response to the Commission's request, MTS Allstream filed with the Commission for the public record, serving a copy on Bell Canada and TCC, a letter stating that the company was relying on determinations made by the Commission in Order 2000-553 to support its view that its proposed service solution in response to the RFP did not require prior Commission approval.
29. In its additional comments, PWGSC submitted, among other things, that while MTS Allstream may treat the information it filed with the Commission as confidential in that it described the company's bid, based on the documentation available on the public record of this proceeding, the information filed by MTS Allstream did not appear to be part of the bid itself.

Further pleadings

30. TCC submitted that, based on MTS Allstream's letter of 19 May 2006, MTS Allstream was asserting that the telecommunications services sought by the customer by way of the RFP, and the company's proposed service solution, were WAN services. TCC argued that the RFP made no mention of WAN services, and that, based on the RFP, the customer had not sought WAN services. TCC reiterated its submission that the services sought in the RFP, including the circuits between Pinawa and Chalk River, were dedicated digital circuits. TCC argued that these circuits provided transport services only and did not include switching, routing, or provision of

interfaces to provide Ethernet, token-ring or asynchronous transfer mode (ATM) protocols. TCC submitted that the circuits identified in the RFP between Pinawa and Chalk River were inconsistent with the description of forborne WAN services in Order 2000-553. Relying on *Application by Westman alleging failure by MTS Communications Inc. to comply with tariff filing requirements*, Telecom Decision CRTC 2004-32, 14 May 2004 (Decision 2004-32), TCC argued that the circuits did not qualify for forbearance even if the customer combined the network service components with its own interfaces, switches and routers to expand the customer's own private WAN. In TCC's view, the provision of the stand-alone component elements that make up a WAN service, to the extent that they fall short of a complete WAN service, was subject to prior Commission approval.

31. In its response to TCC's submission dated 25 May 2006, MTS Allstream reiterated that the company's service solution met all the technical requirements of the RFP and fully complied with the Act. MTS Allstream submitted that the purpose behind an RFP was to solicit proposals from interested bidders for telecommunications network services of different grades, each of which must meet certain service quality management criteria and service interface point types. MTS Allstream further submitted that the company never asserted that the RFP specifically solicited bids for WAN services nor did the RFP solicit private line services, as argued by TCC and Bell Canada.
32. With respect to TCC's reliance on the Commission's ruling in Decision 2004-32, MTS Allstream submitted that the RFP in this proceeding was very different from the RFP that was the subject of the proceeding that led to Decision 2004-32. MTS Allstream argued that PWGSC's RFP sought a complete service solution from the winning bidder, with a single contract for all services provided, unlike the RFP considered in Decision 2004-32 which involved three separate and distinct components, each of which could be awarded to a different bidder.

Commission's analysis and determinations

33. The Commission notes Bell Canada's and TCC's submissions that the issue for determination by the Commission in this proceeding is whether the services sought in the RFP required prior Commission approval. Based on the record of this proceeding, the Commission notes that there is a fundamental disagreement between Bell Canada and TCC, on the one hand, and MTS Allstream on the other, as to how the service requirements of the RFP were to be met. Bell Canada and TCC took the position that the RFP required the provision of route-specific dedicated digital circuits whereas MTS Allstream's position is that the RFP did not impose such a requirement and allowed bidders flexibility in meeting the customer's requirements.
34. The Commission considers that the issue as framed by Bell Canada and TCC would require the Commission to interpret the terms of the RFP, and, ultimately, to rule on which of the interpretations being advanced by the parties should be accepted. In the Commission's view, such a role would not be appropriate because, in the circumstances of this case, PWGSC is the proper entity to determine whether a bidder's interpretation is consistent with the RFP or not.
35. The Commission considers that the issue for determination in this proceeding is whether MTS Allstream's proposed service solution requires prior tariff approval. The Commission notes that MTS Allstream submitted in confidence details of its proposed service solution.

In addition, MTS Allstream stated on the public record that it was relying on the Commission's determinations in Order 2000-553 to argue that its proposed service solution did not require prior tariff approval.

36. The Commission has carefully examined the service solution described by MTS Allstream as well as the submissions made by all parties. The Commission finds, based on the record of this proceeding, that, as described, MTS Allstream's proposed service solution constitutes forborne WAN services within the meaning of Order 2000-553. Further, the Commission finds that the circumstances in this proceeding are different from those that led to the Commission's determination in Decision 2004-32. In light of these findings, the Commission determines that MTS Allstream's proposed service solution, as described, does not require prior tariff approval.
37. Accordingly, the Commission **denies** the relief sought by Bell Canada and TCC.

Secretary General

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