



Telecom Decision CRTC 2005-71

Ottawa, 16 December 2005

MTS Allstream Inc. - Request that Bell Canada's Exchange Services Tariff item 350, Enhanced Exchange-Wide Dial Service, be made interim

Reference: 8622-M59-200513136

*In this Decision, the Commission **denies** a Part VII application by MTS Allstream Inc. requesting that the Commission make interim Bell Canada's Exchange Services Tariff item 350, Enhanced Exchange-Wide Dial Service.*

1. The Commission received an application from MTS Allstream Inc. (MTS Allstream), dated 15 November 2005, filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure* (the Rules), and sections 24, 25, 27, 32(d), (e) and (g) and 61(2) of the *Telecommunications Act* (the Act) seeking an order, on an urgent and expedited basis, making the tariff for Bell Canada's Exchange Services Tariff item 350, Enhanced Exchange-Wide Dial (EEWD) service interim.
2. MTS Allstream requested the order on the basis that the current EEWD contract between Bell Canada and the Government of Canada (GoC) was set to expire at midnight on 19 December 2005 and there were several proceedings that had been initiated which might, in the company's view, make it necessary for the GoC to receive service under the EEWD tariff beyond the three-year term of the EEWD contract, but not necessarily pursuant to another three-year contract with Bell Canada.

Process

3. MTS Allstream served its application on Bell Canada and the Department of Public Works and Government Services (PWGSC). By letter dated 17 November 2005, the Commission established a process whereby MTS Allstream was directed to serve copies of its application on Rogers Telecom Holdings Inc., TELUS Communications Inc. (TCI) and Cisco Systems Canada by 17 November 2005; parties were directed to file comments in response to the application by 23 November 2005, serving a copy on all other parties; and MTS Allstream was directed to file reply comments by 25 November 2005, serving a copy on all other parties.
4. On 23 November 2005, Bell Canada and PWGSC filed comments. On 25 November 2005, MTS Allstream filed reply comments.

The application

5. MTS Allstream noted that EEWD service was a local exchange service currently used by Bell Canada to provide local telephone and optional services, such as voicemail and local calling features, to the GoC in the National Capital Area (NCA).

6. MTS Allstream submitted that Bell Canada's EEWD service was only available pursuant to a three-year contract and there were no alternative terms or provisions that allowed the customer (i.e. the GoC) to transition to the network of another service provider without incurring penalties.
7. MTS Allstream noted that PWGSC had issued two Requests for Proposals (RFPs) soliciting bids from interested service providers that would like to provide local exchange services to the GoC when the current EEWD contract expired. MTS Allstream indicated that although the original RFP had been terminated and a revised RFP had been issued, the original RFP was being challenged in the courts by Bell Canada and the revised RFP was also the subject of a judicial review application.
8. MTS Allstream submitted that these proceedings could have an impact on the two RFP processes that were initiated by PWGSC which, in turn, would have implications on the GoC's ability to obtain EEWD service during some interim period of time pending the resolution of these various proceedings.

Original RFP

9. MTS Allstream noted that on 18 February 2005, PWGSC had issued a RFP seeking a single supplier capable of providing local exchange service corresponding to approximately 177,000 GoC telephone numbers in the NCA by 20 December 2005, for an initial term of three years ending on 19 December 2008, with an option, at PWGSC's discretion, for a further three years until December 2011. The RFP also stipulated that, among other things, service was to be implemented by 20 December 2005.
10. MTS Allstream noted that it, along with Call-Net Enterprises Inc. (now known as Rogers Telecom Holdings Inc.) and TCI (collectively, the Complainants), had filed a complaint with the Canadian International Trade Tribunal (the CITT) on 23 March 2005 in relation to the RFP, alleging that PWGSC had failed to comply with the Agreement on Internal Trade (AIT)¹ and had failed to ensure equal access for this procurement.
11. MTS Allstream noted that on 5 August 2005, the CITT had issued its determination in which it had found, among other things, that the four-month cutover schedule and other requirements for implementation were onerous and unnecessarily rigid and, as a remedy, had made two alternative recommendations:
 - a) that PWGSC terminate the existing tendering process and initiate a new solicitation and in particular, that the new solicitation include implementation phases that are "adequate in length to allow competitors to structure their proposals to reflect their most efficient manner of addressing the Crown's requirement instead of having avoidable restraints thrust upon them"; or
 - b) that the Complainants "be compensated by an amount that recognizes the opportunity that they have lost collectively or separately to participate meaningfully in the procurement as a result of [PWGSC's] breaches."

¹ *Agreement on Internal Trade*, 18 July 1994, Canada Gazette, Part I, Vol. 129, No. 17 (29 April 1995).

12. MTS Allstream noted that on 2 September 2005, Bell Canada had filed a Notice of Application with the Federal Court of Appeal for a judicial review of the CITT's decision, asking, among other things, for an order setting aside the CITT's determination and reasons, and reinstating the initial RFP.

Revised RFP

13. MTS Allstream noted that on 18 August 2005, PWGSC had issued a revised RFP stipulating a service requirement date of 20 December 2005 providing that:
- potential suppliers select both an "In-Service Date" (ISD) and an "Implementation Completion Date" (ICD) of their choosing, provided that neither one of these dates exceeds 548 days or 18 months from the contract award date, 19 December 2005;
 - if the successful bidder chose an ISD falling after 20 December 2005, the GoC would enter into a new three-year EEWD contract with Bell Canada; and
 - where the successful bidder had chosen an ISD falling after 20 December 2005, the bidder would be required to assume the GoC's obligations under the three-year contract with Bell Canada, including the obligation to pay termination charges, if the bidder chose to terminate the Bell Canada contract prior to the end of its three-year term.
14. MTS Allstream submitted that irrespective of which service provider was awarded the bid, Bell Canada would continue to be the underlying service provider for a minimum of 18 months. MTS Allstream argued that the cost for a competing service provider to assume the Bell Canada EEWD contract for 18 to 36 months would place it at an extreme economic disadvantage relative to Bell Canada. MTS Allstream submitted that these costs could be reduced or even eliminated if modifications were made to the EEWD tariff in order to ensure the tariff would not provide Bell Canada with an artificial and wholly undue competitive advantage in this regard. MTS Allstream noted that, as is the case with other Bell Canada tariffs, a transition plan could be incorporated to allow the GoC to migrate its users over to the network platform of another service provider.
15. MTS Allstream stated that it had filed a Notice of Application for judicial review with the Federal Court (Trial Division), seeking, among other things:
- an order directing the Minister to negotiate compensation for the loss of opportunity to bid on the original procurement by PWGSC on behalf of the GoC for local exchange services in the NCA in the first RFP
- or, in the alternative;
- an order quashing the decision of the Minister not to implement to the greatest extent possible the recommendations of the CITT; and

- an order directing the Minister to reissue an RFP for local exchange services in the NCA on behalf of the GoC that implements to the greatest extent possible the recommendations of the CITT.
16. MTS Allstream submitted that there were many unresolved issues surrounding the RFP for local exchange services in the NCA and that it would be in the interests of all parties, including any parties that had submitted bids, to make Bell Canada's EEWD tariff interim. MTS Allstream argued that, by making this tariff interim, the Commission would be preserving the rights of bidders on these RFPs, and eliminating any undue advantage Bell Canada was deriving from the current tariff, while also preserving any rights which Bell Canada was, itself, asserting in the proceedings referenced above.
 17. MTS Allstream further submitted that by making the EEWD tariff interim, the Commission could preserve for PWGSC and the GoC the continued ability to receive EEWD service pending the resolution of the proceedings referenced above, while at the same time preserving any rights that these parties might wish to assert in these proceedings. MTS Allstream submitted that if these proceedings or possibly other proceedings that might be initiated with respect to the RFP for local exchange services in the NCA were resolved in favour of Bell Canada, then no harm would befall Bell Canada if the Commission were to make the EEWD tariff interim.

Positions of other parties

18. Bell Canada submitted that the relief sought by MTS Allstream was outside the jurisdiction of the Commission. Bell Canada submitted that while the courts have recognized that the Commission could retroactively alter rates in instances in which such rates had only been granted interim approval² or in which the Commission's original decision was a nullity,³ MTS Allstream was seeking retroactive changes to rates that had already received final approval, most recently some three years ago, in proceedings in which the Commission had before it a complete record.
19. Bell Canada submitted that the Commission's power to approve a rate for which no tariff had been filed was set out in subsection 25(4) of the Act which deals with ratification of rates. Bell Canada submitted that MTS Allstream's intention to seek retroactive approval in the future for a short-term EEWD rate correspond to none of the circumstances set out in subsection 25(4) of the Act as Bell Canada has never charged a short-term EEWD rate and the Commission therefore could not ratify the charging of such a rate.
20. Bell Canada submitted that quite apart from any jurisdictional considerations, the application, if granted, would set a dangerous precedent for Commission intervention in the operation of the marketplace. Bell Canada submitted that from a policy standpoint, granting approval to the application would send a message to the marketplace that a serving arrangement provided by Bell Canada to a customer may be reopened and modified by the Commission at any time in the future when a competitor can show that it would be commercially advantageous for it to obtain changes to such a serving arrangement.

² *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 SCR 1722.

³ *TELUS Communications Inc. v. Canada (Canadian Radio-television and Telecommunications Commission)*, 2004 FCA 365.

21. Bell Canada argued that MTS Allstream's application was built on speculation and conjecture because MTS Allstream had not made any request for specific changes but had left the Commission, the customer and the company to speculate on what the future changes to be made to the customer's service might be.
22. Bell Canada argued that MTS Allstream's request would harm the customer. In this regard, Bell Canada submitted that as with all other volume and term discounts offered by the company, the current rate provided for EEWD service reflected the scope of the commitment made by the customer. Bell Canada argued that if the customer had desired to make a more limited term commitment, it could have structured its RFP to require the company to seek approval of a tariff for service on a month-to-month or an annual basis. Bell Canada submitted that the customer did not do so and argued that it would be inappropriate for the Commission to now substitute MTS Allstream's request for the customer's request.
23. Bell Canada added that by making General Tariff item 350 interim, the company's EEWD tariff would now become subject to retroactive changes and the company could no longer (a) stand by the terms of its bid in the GoC's RFP and (b) state that its terms were firm, even in instances in which it had received final approval. Bell Canada submitted that the company would no longer be compliant with the GoC RFP and would face similar compliance issues in other RFPs as well.
24. Bell Canada argued that if MTS Allstream considered that the duration of the contract requested by the customer was inappropriate, the Commission was not the correct channel to pursue such a grievance. Bell Canada submitted that the grievances raised by MTS Allstream were addressed and disposed of in the decisions issued by the CITT on 5 August and 11 October 2005, on successive MTS Allstream complaints.
25. Bell Canada submitted that, on 11 October 2005, the CITT had specifically addressed and dismissed MTS Allstream's contention that the length of the contractual commitment specified in the EEWD tariff caused it harm. Bell Canada noted that in the 11 October 2005 decision,⁴ the CITT had found that MTS Allstream's complaints did not raise sufficient grounds to warrant holding a full inquiry into those complaints.
26. Bell Canada submitted that if MTS Allstream disagreed with the CITT's decision, there was an available remedy in the form of a judicial review application to the Federal Court of Appeal. Bell Canada added that a recent check with the Federal Court of Appeal indicated that MTS Allstream had not applied for a judicial review of the CITT's decision, and that the time for doing so had expired. Bell Canada submitted that the CITT's dismissal of MTS Allstream's complaints must therefore be taken as unchallenged and final. Bell Canada argued that MTS Allstream was now seeking to obtain from the Commission an outcome it had failed to obtain from the customer and then from the CITT.

⁴ Bell Canada filed a copy of the CITT's 11 October 2005 decision.

27. PWGSC submitted that by failing to specify any proposed revisions to the EEWD Tariff, MTS Allstream had failed to satisfy the requirements of subsection 57(2)(a) of the Rules, which require that any application made under Part VII of the Rules "contain a clear and concise statement of the nature of the order or decision applied for." In PWGSC's opinion, the application should be dismissed.
28. PWGSC submitted that, if MTS Allstream believed that the EEWD Tariff constituted a barrier to competition, MTS Allstream knew it could have applied to the Commission to request revisions to the EEWD Tariff and should have made its application many months ago, allowing it to participate in the revised RFP, where PWGSC addressed all of the CITT's recommendations. PWGSC noted that, instead, MTS Allstream had chosen not to submit a bid and not to make its application until after the competition had been completed. PWGSC submitted that MTS Allstream had delayed making this application until 15 November 2005, notwithstanding that it was aware of the issue in March of this year.
29. PWGSC submitted that if the application were approved, any revisions to the EEWD Tariff should not affect the rates and should not be made retroactive.
30. PWGSC added that although MTS Allstream had indicated that the original RFP was being challenged in the courts by Bell Canada, that was not accurate. PWGSC noted that Bell Canada's application to the Federal Court of Appeal had requested that the Court find that PWGSC did not breach any provision of the AIT in the original RFP (i.e. Bell Canada's position was that the CITT had erred in finding the original RFP was deficient in any way). PWGSC submitted that, therefore, while the original RFP was the subject of ongoing litigation proceedings, the original RFP itself was not presently being challenged in any proceeding. PWGSC noted that, in any event, the original RFP had been superseded by the revised RFP.

MTS Allstream's reply comments

31. MTS Allstream submitted that, contrary to PWGSC's submission, the application contained a "clear and concise statement of the nature of the order or decision applied for." MTS Allstream noted that the Commission made tariffs interim all the time and was very familiar with this remedy which has been used in the past to preserve the interests of all parties pending the completion of final proceedings. MTS Allstream argued that, consistent with this primary purpose, it had not sought specific changes to the EEWD tariff at the time it filed the application, because until the outcomes of the external proceedings were determined, the specific changes, if any, that would be required were unknown.
32. MTS Allstream argued that it had expended considerable financial and other resources in asserting its rights in an open and fair procurement process. MTS Allstream submitted that it was PWGSC's statutory obligation to ensure a level playing field in its procurement of goods and services. MTS Allstream stated that, furthermore, it was a policy objective of the GoC to promote competition in Canadian telecommunications markets and argued that this should be reflected through its own procurement practices. MTS Allstream submitted that competitors should not have to file applications with the CITT, the courts, or the Commission to ensure that these policy objectives were honoured and upheld.

33. MTS Allstream submitted that rather than "harming the customer", as alleged by Bell Canada, the requested relief was designed to protect the parties' interests pending a final determination of the external proceedings referenced in the application.
34. In this regard, MTS Allstream submitted that should it be successful in its application to the Federal Court, the revised RFP could be set aside such that PWGSC would have to re-tender the procurement. In that event, MTS Allstream submitted that a supplier other than Bell Canada might well be the successful bidder. MTS Allstream added that, however, by that time, PWGSC might be bound by a three-year contract with Bell Canada, assuming, as PWGSC appeared to do in its comments, that Bell Canada would be the successful bidder on the revised RFP. MTS Allstream submitted that in these circumstances, PWGSC might be forced to apply for relief from the terms of its new contract with Bell Canada and from the EEWD tariff. However, if the terms of that tariff were not made interim, PWGSC would be precluded from obtaining retroactive relief from the terms of the EEWD tariff, much to its detriment.
35. MTS Allstream submitted that by failing to make the EEWD tariff interim, both PWGSC and Bell Canada could find themselves in a situation where they might wish to apply to the Commission for amendments to the EEWD tariff retroactive to the date on which the EEWD contract was set to be renewed (i.e. 20 December 2005), but that such relief would be precluded because the EEWD tariff had not been made interim.
36. MTS Allstream submitted that if the outcome of the referenced judicial proceedings necessitated changes to the EEWD tariff, then an interim tariff would provide sufficient flexibility to change the tariff. In MTS Allstream's view, the balance of convenience and the best interests of all concerned, including PWGSC and Bell Canada, favoured making the EEWD tariff interim, pending the outcome of the external proceedings concerning the revised RFP process.
37. MTS Allstream submitted that there was nothing unusual or improper within the Commission's jurisdiction about making a final tariff for an existing telecommunications service, such as EEWD service, interim. MTS Allstream submitted that the "Bell Rebate Case" had involved a situation where the Commission had made the final tariff for Bell Canada's local telephone services interim so that the Commission could re-examine the rates for those services and then make adjustments to that tariff so that they would take effect back to the date that the tariff was made interim.⁵
38. MTS Allstream submitted that furthermore, because the Commission was statutorily bound to ensure that the rates for the telephone companies' services were "just and reasonable" and that these companies did not, in relation to the provision of a telecommunications service, unjustly discriminate or confer an undue or unreasonable preference or disadvantage on any person including themselves, the Commission would be acting well within its powers to make the tariff for EEWD service interim in order to take account of any judicial determinations that might be made as a result of the external proceedings.

⁵ *Bell Canada v. Canada (CRTC)*, [1989] 1 SCR 1722 (hereinafter referred to as the Bell Rebate Case).

39. MTS Allstream submitted that Bell Canada had mischaracterized the purpose of the application. MTS Allstream stated that it had asked that the EEWD tariff be made interim because there were a number of judicial and administrative proceedings underway which could have an impact on the GoC's ability to obtain EEWD service from Bell Canada (or another party) under the terms and conditions of the existing EEWD tariff.
40. MTS Allstream submitted that if the EEWD tariff was not made interim and there was a judgment rendered in one of the proceedings referenced in the external proceedings which had an impact on the existing EEWD tariff, then it would only be possible to alter that tariff on a prospective basis. MTS Allstream maintained that Bell Canada and PWGSC stood just as much to benefit from having the EEWD tariff made interim as any other party that was interested in the outcome of these external proceedings.

Commission's analysis and determinations

41. The Commission notes that Bell Canada has argued that the relief sought by MTS Allstream was beyond the jurisdiction of the Commission, on the basis that to make rates interim for a service that has received final approval would be engaging in unlawful retroactive rate-making. Bell Canada also argued that interim dispositions can only be given as relief for regulated companies and their customers stemming from the negative impact caused by the length of proceedings before the Commission.
42. The Commission disagrees with Bell Canada that in the circumstances of this case, the Commission would be engaging in unlawful retroactive rate-making if it were to make the EEWD tariff interim as requested by MTS Allstream. The Commission notes that its power to make rates interim stems from subsection 61(2) of the Act, which clearly permits the Commission to apply rates, terms and conditions back to the date of the interim disposition. Subsection 61(2) of the Act provides as follows:

The Commission may make an interim decision and may make its final decision effective from the day on which the interim decision came into effect.
43. Accordingly, the Commission disagrees with Bell Canada's argument that the Commission does not have jurisdiction to make the EEWD tariff interim.
44. The Commission also disagrees with Bell Canada's view with respect to the circumstances in which the Commission can make interim decisions. The Commission considers that it has a broad discretion under the Act to make rates interim and has previously made rates interim with respect to services whose rates were final, such as in *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002, when it made all incumbent local exchange carrier tariffed rates interim. The Commission considers that it may, after appropriate process, make rates interim when, for instance, it is concerned that rates may not be just and reasonable, consistent with its legal obligation to ensure that rates are just and reasonable at all times.

45. Also, the Commission is not persuaded by PWGSC's submission that MTS Allstream's application should be dismissed because it fails to satisfy the requirements of subsection 57(2)(a) of the Rules which contemplates that an application "contain a clear and concise statement of the order or decision applied for." The Commission agrees with MTS Allstream that its application is very clear: it is requesting that the EEWD tariff be made interim.
46. The Commission notes, however, that when the Commission has previously made rates interim, it has done so in the context of Commission proceedings to consider the appropriateness of such rates on a final basis. By contrast, in this case, the appropriateness of the EEWD tariff is not before the Commission at this time and the proceedings identified by MTS Allstream are external to the Commission.
47. The Commission further notes that the outcomes of the applications for judicial review filed in the Federal Court by Bell Canada and MTS Allstream are uncertain at this time.
48. In the Commission's view, based on the record of this proceeding, MTS Allstream's major issue is with respect to the terms of the revised RFP, which, among other things, as noted above, requires that a new supplier would have to assume PWGSC's obligations under the three-year contract with Bell Canada, including the obligation to pay termination charges if the supplier chooses to terminate the Bell Canada contract before the end of the three-year term. The Commission notes that the appropriateness of the RFPs such as the revised RFP in question is not a matter in respect of which the Commission has jurisdiction. The Commission further notes that MTS Allstream complained to the CITT with respect to the revised RFP but that the CITT declined to initiate an inquiry into the complaint.
49. In light of the above, the Commission considers that it would not be appropriate to make the EEWD tariff interim at this time. Accordingly, the Commission **denies** MTS Allstream's application.

Secretary General

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