



## Telecom Decision CRTC 2008-118

Ottawa, 11 December 2008

### Regulatory policy

#### **MTS Allstream Inc. – Application to review and vary certain determinations in Telecom Decision 2008-17 regarding the classification of wholesale Ethernet services**

Reference: 8662-M59-200807266

*In this Decision, the Commission denies MTS Allstream's request to review and vary the Commission's determinations in Telecom Decision 2008-17 regarding the classification of Ethernet access and transport services and related services.*

### Introduction

1. The Commission received an application by MTS Allstream Inc. (MTS Allstream), dated 21 May 2008, requesting that the Commission review and vary its determinations in Telecom Decision 2008-17 regarding the classification of Ethernet access and transport services and related services (Ethernet services).<sup>1</sup>
2. MTS Allstream submitted that the Commission had made several errors in its determinations regarding Ethernet access and transport services and that, as a result, there is substantial doubt as to the correctness of the Decision as it applies to these services. Specifically, MTS Allstream submitted that the Commission had erred in
  - assuming that an allegedly high incidence of self-supply by competitors is evidence of alternative wholesale supply of Ethernet services on a national scale of sufficient scope to protect the interests of users,
  - finding that incumbent local exchange carrier (ILEC) broadband networks are practically and feasibly duplicable on a national scale,
  - finding that there are substitutes for Ethernet access and transport services, and

---

<sup>1</sup> MTS Allstream's application also requested that the Commission review and vary its determinations in Telecom Decision 2008-17 regarding the classification of aggregated asymmetric digital subscriber line (ADSL) services. However, in a letter dated 11 June 2008, the Commission determined that it would address issues regarding aggregated ADSL services in conjunction with a related review and vary application filed by Bell Canada, Bell Aliant Regional Communications, Limited Partnership, Saskatchewan Telecommunications, and Télébec, Limited Partnership, dated 15 May 2008.

- making determinations that are inconsistent with the Governor in Council's *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, 14 December 2006 (the Policy Direction) and the policy objectives and forbearance provisions of the *Telecommunications Act* (the Act).
3. MTS Allstream also submitted that Ethernet access and transport services should be classified as conditional essential for the access and transport elements of the service and essential for the related central office services required to provide the service.
  4. The Commission received comments from Bell Canada, Bell Aliant Regional Communications, Limited Partnership, Saskatchewan Telecommunications, and Télébec, Limited Partnership (collectively, Bell Canada et al.); the Canadian Association of Internet Providers (CAIP); Primus Telecommunications Canada Inc. (Primus); and TELUS Communications Company (TCC). The public record of this proceeding, which closed on 30 June 2008, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings."
  5. The Commission notes that Bell Canada et al. and TCC opposed MTS Allstream's application while CAIP and Primus supported it.

## **Background**

6. In Telecom Public Notice 98-6, the Commission set out the criteria to consider review and vary applications. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example, due to one or more of the following: i) an error in law or in fact, ii) a fundamental change in circumstances or facts since the decision, iii) a failure to consider a basic principle which had been raised in the original proceeding, or iv) a new principle which has arisen as a result of the decision.
7. In Telecom Decision 2008-17, the Commission determined that a service or facility would be essential if the following conditions were met:
  - (i) The facility is required as an input by competitors to provide telecommunications services in a relevant downstream market;
  - (ii) The facility is controlled by a firm that possesses upstream market power such that withdrawing mandated access to the facility would likely result in a substantial lessening or prevention of competition in the relevant downstream market; and
  - (iii) It is not practical or feasible for competitors to duplicate the functionality of the facility.

8. All three elements of this test must be satisfied under prevailing market conditions in order for the service to be classified as essential or conditional essential. Depending on the circumstances, a service might not satisfy the test of essentiality but should be mandated for other reasons. In these cases, a specific service might be classified as either conditional mandated non-essential, public good, or interconnection.
9. The Commission notes that MTS Allstream does not dispute the test criteria for essentiality or the criteria used to establish the other categories of mandated competitor services. Rather, the company submitted that there is substantial doubt as to the correctness of the Commission's determinations in Telecom Decision 2008-17 regarding the classification of Ethernet access and transport services.
10. The Commission considers that MTS Allstream's arguments rest on whether or not the ILECs' Ethernet services meet the essentiality test or the criteria used to develop the other categories of mandated services. The Commission notes that its finding that Ethernet services are not essential was based on its finding that these services do not meet the third criterion of essentiality regarding duplicability.

### **Issues**

11. The Commission has identified the following issues to be addressed in its determinations:
  - I. Is there substantial doubt as to the correctness of the Commission's conclusion that Ethernet services do not meet the third criterion of essentiality?
  - II. Is there substantial doubt as to the correctness of the Commission's determination regarding compliance with the Policy Direction and the objectives of the Act?
  - III. Is there substantial doubt as to the correctness of the Commission's forbearance determinations with respect to Ethernet services?

### **I. Is there substantial doubt as to the correctness of the Commission's conclusion that Ethernet services do not meet the third criterion of essentiality?**

12. MTS Allstream submitted that there is substantial doubt as to the correctness of the Commission's conclusion regarding the essentiality of Ethernet services in that the services are not duplicable on a national basis and there are no substitutes for them. The Commission will consider the company's arguments separately in the following two sections.

#### **a) Duplicability on a national basis**

13. MTS Allstream submitted that ILEC broadband Internet-Protocol-based local access and transport services are not practically or feasibly duplicable on a national scale. It argued that a reasonably efficient competitor only builds where there is a business case to do so, and to serve a single national customer with Ethernet services involves a significant network investment with an excessively long payback period.

14. MTS Allstream submitted that, therefore, a reasonably efficient competitor will develop its network facilities on an incremental basis as its customer base grows, using ubiquitous ILEC facilities to fill in any gaps in its ability to serve specific locations. MTS Allstream argued that the availability of unbundled network components at cost-based rates is critical to the success of this strategy.
15. MTS Allstream further submitted that the information about sources of supply for Ethernet access and transport facilities that was provided in the proceeding leading to Telecom Decision 2008-17 was limited to the proportion of competitor access and transport facilities that was self-supplied, obtained from a third party, or leased from ILECs. It also submitted that ILECs themselves had provided this information only as it related to their out-of-territory operations. MTS Allstream argued that this information could not be used to establish the extent of ILEC dominance in the provision of these Ethernet services because the volumes of Ethernet access and transport facilities were not ascertained or compared to the volumes of similar services provided by the ILECs in their own operating territories.
16. The Commission notes that in the course of the proceeding that led to Telecom Decision 2008-17, it sought information from facilities-based competitors regarding their dependence on ILECs for a number of competitor services, including Ethernet access and transport services. Data provided by parties in confidence to the Commission indicated that in metropolitan areas, for high-speed access and transport services, including Ethernet access and transport services, a large proportion of these services were either self-provided or obtained from parties other than the ILECs. The Commission notes that the record of this proceeding does not raise doubt as to the accuracy or reliability of that data. Based on that information, the Commission considers that ILEC Ethernet access and transport networks have been duplicated by competitors.
17. The Commission notes that according to MTS Allstream's argument, the test for essentiality would consider whether competitors can duplicate the functionality of the facility on a national scale. The Commission also notes that the third condition for essentiality is that it is not practical or feasible for competitors to duplicate the functionality of the facility in question; however, it does not require that duplication by competitors be on a national scale. The Commission considers that such a requirement would amount to a condition that facilities-based competition must occur nationally on a complete end-to-end basis before ILEC services could be deemed to be non-essential. In Telecom Decision 2008-17, the Commission noted that no expert witness or party submitted evidence or argument that national facilities-based competition on a complete end-to-end basis is a reasonable goal.
18. The Commission considers that the question of ILEC dominance in the provision of Ethernet access and transport services is not relevant to the proper classification of these services since the issue of dominance does not inform the third criterion for essentiality.

19. Accordingly, the Commission finds that MTS Allstream has failed to demonstrate that the Commission erred in finding that competitors have the ability to duplicate ILEC services and, consequently, that MTS Allstream has failed to demonstrate that the Commission erred when it concluded that, given the degree of self-supply or alternative supply of Ethernet services, these services did not meet the test for essentiality.

**b) The lack of substitutes for Ethernet services**

20. MTS Allstream submitted that there is substantial doubt as to the correctness of Telecom Decision 2008-17 given that the Commission appears to have considered legacy digital access and transport services to be a substitute for Ethernet services. MTS Allstream argued that the ILECs' legacy digital access and transport services are not adequate substitutes for Ethernet services.
21. The Commission considers that MTS Allstream's argument that the Commission had based its determination about the appropriate classification for Ethernet services on the availability of legacy digital access and transport services as substitutes is not supported by evidence.
22. As noted above, the Commission based the classification of Ethernet services on the data regarding the extent to which competitors self-supply high-speed access and transport services or lease these services from third parties. The data indicate that competitors self-supply or lease from third parties a large proportion of their service requirements. The Commission notes that self-supply is a potential substitute to leasing services from ILECs.
23. Accordingly, the Commission finds that MTS Allstream is incorrect in assuming that the availability of legacy digital access and transport services served as the basis for the Commission's determinations on the classification of Ethernet services.

**II. Is there substantial doubt as to the correctness of the Commission's determination regarding compliance with the Policy Direction and the objectives of the Act?**

24. MTS Allstream submitted that without mandated, fully unbundled Ethernet services provided at cost-based rates, the level of investment in network facilities will be less than it otherwise would have been. It argued that this result would be contrary to subparagraph 1(c)(ii) of the Policy Direction.<sup>2</sup>

---

<sup>2</sup> Subparagraph 1(c)(ii) of the Policy Direction directs the Commission as follows: with a view to increasing incentives for innovation and investment in and construction of competing telecommunications network facilities, to complete a review of its regulatory framework regarding mandated access to wholesale services, to determine the extent to which mandated access to wholesale services that are not essential services should be phased out and to determine the appropriate pricing of mandated services, which review should take into account the principles of technological and competitive neutrality, the potential for incumbents to exercise market power in the wholesale and retail markets for the service in the absence of mandated access to wholesale services, and the impediments faced by new and existing carriers seeking to develop competing network facilities,

25. MTS Allstream also submitted that the decision to classify Ethernet access and transport services as non-essential subject to phase-out is contrary to objectives set out in paragraphs 7(a), (c), and (f) of the Act.<sup>3</sup>
26. The Commission considers that the evidence related to the duplicability of Ethernet access and transport services on the record of the proceeding that led to Telecom Decision 2008-17 indicates that competitors have sufficient opportunities and incentives to invest in the competing network facilities required to provide these services. Consequently, the Commission considers that ILECs should not be mandated to provide these services to competitors.
27. The Commission notes that based on its determinations in Telecom Decision 2008-17, ILECs must continue to offer Ethernet access and transport services to competitors for five and three years, respectively. The Commission considers that the framework set out in that Decision provides competitors with sufficient time for reasonable business planning and expanding their networks or making other arrangements as required, so that they will no longer need to rely on these ILEC wholesale services.
28. Accordingly, the Commission finds that its decision to phase out wholesale Ethernet access and transport services is consistent with the Policy Direction and the objectives of the Act cited by MTS Allstream.

**III. Is there substantial doubt as to the correctness of the Commission's forbearance determinations with respect to Ethernet services?**

29. CAIP submitted that the Commission had granted forbearance for Ethernet services without applying the test in section 34 of the Act and without any of the prerequisite factual findings. In its reply comments, MTS Allstream also submitted that the Commission had erred in law by forbearing in a manner inconsistent with section 34 of the Act.
30. In particular, MTS Allstream argued that the Commission was legally precluded from forbearing pursuant to subsections 34(1), (2), and (3) given, in MTS Allstream's submission, the acute need for unbundled components in the geographic areas where there is no alternative source of supply and there are technical and economic barriers to constructing competitor facilities.
31. The Commission notes that in Telecom Decision 2008-17, it specifically addressed the criteria for forbearance under subsection 34(1) of the Act and the test set out in subsection 34(3), and that this was the basis for its determination that forbearance was appropriate. The Commission specifically found that forbearance would be consistent with the telecommunications policy

---

<sup>3</sup> These objectives are:

7(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

7(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; and

7(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective.

objectives set out in paragraphs 7(c), (f), and (g) of the Act. In addition, the Commission considered that the functionalities in question have been duplicated by competitors and found that forbearance will not be likely to impair unduly the establishment or continuance of a competitive market for the services in question, which include Ethernet services.

32. Accordingly, the Commission finds that it properly addressed the preconditions for the exercise of its power to forbear pursuant to subsections 34(1) and (3) of the Act and did not err in determining to forbear, to the extent set out in the Decision, from regulating Ethernet services.

### **Conclusion**

33. In light of the above, the Commission determines that MTS Allstream has failed to demonstrate that there is substantial doubt as to the correctness of the Commission's determinations in Telecom Decision 2008-17 regarding the classification of Ethernet services. Accordingly, the Commission **denies** MTS Allstream's application to review and vary Telecom Decision 2008-17 and to reclassify Ethernet services as conditional essential or essential.

Secretary General

### **Related documents**

- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008
- *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*