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MTS Allstream Inc.

3 July 2007

Mr. Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Dear Mr. Morin:

Subject: *Retail and competitor quality of service rate adjustment plans – Adverse events, Telecom Public Notice CRTC 2007-9*

1. Pursuant to the procedures set out in *Retail and competitor quality of service rate adjustment plans – Adverse events, Telecom Public Notice CRTC 2007-9* (PN 2007-9), MTS Allstream provides herein its comments on the adoption of a *force majeure* clause applicable to both the quality of service (QoS) retail rate adjustment plan (RAP) and the competitor rate rebate plan (RRP).
2. At paragraph 5 of PN 2007-9, the Commission has invited comments on a proposed clause, applicable to both the RAP and the RRP, which as currently drafted, provides as follows:

No penalty shall apply in a month where failure to meet the retail or competitor Q of S standard is caused, in that month, by fire, acts of God, labour difficulties (such as work stoppages, strikes, lock-outs, slow-downs and similar labour disrupting events), default or failure of other carrier, epidemics, war, civil commotions including acts of terrorism, acts of public authorities or other events beyond the reasonable control of the Company.

3. PN 2007-9 is a follow-up process to the Commission's recent decision¹ in the matter of Bell Aliant's applications to review and vary *Retail quality of service rate adjustment plan and related issues*, Telecom Decision CRTC 2005-17 (Decision 2005-17). In Decision 2007-26, the Commission stated that it would initiate a proceeding to consider whether natural disasters, acts of terrorism and labour disruptions should be considered "adverse" without the necessity of making such a determination on a case-by-case basis.

4. At this stage in the instant proceeding and without prejudice to its ability to reconsider this view in light of the comments of other interested parties to this proceeding, MTS Allstream has no objection to the inclusion of fires, acts of God, epidemics, war, civil commotions such as acts of terrorism, or unforeseen acts of public authorities in a *force majeure* clause in the form proposed at paragraph 5 of PN 2007-9. In its view, it is difficult to imagine a context in which such events would not be considered adverse in the true sense of Decision 2005-17 and its sister RRP decision, *Finalization of quality of service rate rebate plan for competitors*, Telecom Decision CRTC 2005-20 (Decision 2005-20).

5. However, MTS Allstream submits that it is not appropriate to treat all forms of labour difficulties as "adverse" for purposes of the RAP and RRP. The types, scope and very causes of labour disruptions are far too varied to warrant blanket "adverse" treatment. MTS Allstream is also of the view that there would be very little gained in terms of efficiencies were the Commission to take a blanket approach to labour difficulties. The balance of MTS Allstream's comments will be devoted to setting out MTS Allstream's position on the inappropriateness from a factual, legal and practical perspective, to granting to all forms of labour difficulties an automatic "adverse" characterisation for purposes of the Commission's RAP and RRP.

¹*Bell Aliant Regional Communications, Limited Partnership's request to review and vary Telecom Decision CRTC 2005-17, as interpreted and applied in Telecom Decision CRTC 2006-27 related to the retail quality of service rate adjustment plan*, Telecom Decision CRTC 2007-26, 27 April 2007 (Decision 2007-26).

Labour disruptions have varied causes and effects

6. Whether or not a particular labour disruption can be qualified as adverse can depend on a number of factors. For example, the following questions would naturally arise and would be relevant to determining whether or not a labour disruption in question was foreseeable and whether the ILEC's response to same was reasonable in the circumstances as a whole:
 - What personnel were affected? How involved were the affected personnel in the performance of services that are subject to QoS indicators? A labour disruption cannot be considered adverse if the personnel that is affected is not or is only tangentially involved in the delivery of services that are subject to QoS indicators.
 - Whether the strike was foreseeable: Was the union in a legal strike position or did it launch an illegal and thus, probably unforeseeable strike? Did the labour disruption come after a long period of talks and negotiations that would have allowed the ILEC ample opportunity to make alternate plans and provisions?
 - Reasonableness of the ILEC's response to the event: What measures and plans were put into place to address the possibility of a labour disruption? How long in advance was the possibility of the labour disruption known to the ILEC? Very few labour disruptions are in this day and age completely unforeseen by management. Typically, labour disruptions are preceded by long periods of negotiation and discussion. In such circumstances, the Commission's inquiry should be focused on the plans and measures put into place by the ILEC to address the labour disruption in question.

7. In so many ways, labour disruptions, unlike other true acts of God and events of *force majeure*, are both foreseeable in their incidence, duration and scope and by their very nature can be influenced by the actions of the ILEC. Although there may be rare instances in which a labour disruption was truly unforeseeable (such as "wildcat strikes"), by and large, the ILEC knows well in advance when a labour disruption is likely and may to a certain extent be able to control the impact of this type of event on retail and competitor customers.

As a result, MTS Allstream submits that the treatment of labour disruptions as adverse events should constitute the exception and not the rule.

Legal inconsistencies would be created by blanket treatment of labour difficulties

8. MTS Allstream notes that to qualify all labour difficulties as “adverse” would be inconsistent with the definition of adversity set forth in Decisions 2005-17 and 2005-20. In these decisions, the Commission defined an event as “adverse” for purposes of the RAP and RRP when the event in question was both
 - (a) unpredictable and
 - (b) beyond the reasonable control of an incumbent local exchange carrier.

9. As a preliminary matter, MTS Allstream submits that the different types of labour disruptions that an ILEC may experience are far too varied to warrant a blanket characterisation of adversity in the sense that they are both unforeseen and truly beyond the reasonable control of the ILEC.

10. MTS Allstream further notes that judicial considerations of labour disruptions in the context of limiting the liability of common carriers from their statutory duties clearly establish that
 - (a) the fact of a strike in and of itself is not enough to excuse a regulated entity from performing its statutory duties. On the contrary, labour disruptions, by their very nature, and legal strikes in particular, involve an element of voluntariness that is incompatible with the definition of *force majeure* events in the sense of true “Acts of God”;² and
 - (b) the test that emerges is that the Court will look at all of the circumstances of the case to determine, not whether the strike could have been prevented by the

² *Canada v. Prince Edward Island* (1975), *supra* at paragraph 31, Cattanach J.

entity that is under the statutory duty, but rather at what the regulated entity "has effectively done or can effectively do to meet and resolve the situation."

11. As set out in much greater detail in its response to Bell Canada's 5 December 2005 exclusion application, the authorities stand for the proposition that there is no blanket exception from the performance of statutory duties by reason of an intervening labour disruption. Even in the case of an illegal strike (as was the case in *A.L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway*, a 1959 decision of the Supreme Court of Canada), the Court did not automatically consider that such an event was "beyond the control" of the entity with the statutory duty. Indeed, according to the Court's analysis, the extent, if at all, to which an adverse event will excuse a regulated entity from fully performing its statutory duties depends (1) on the nature of the statutory duty in question (i.e., is it absolute or relative); (2) the foreseeability of the event; and (3) the reasonableness of the plans and measures put in place by the entity under the statutory duty to continue to meet its obligations notwithstanding the event.

12. MTS Allstream submits that the duty of the ILECs to meet their QoS obligations is absolute and that the two other factors, namely the foreseeability of an alleged adverse event and the reasonableness of the plans and measures put in place by the ILEC in question to meet a foreseeable event, cannot effectively be considered absent a case-by-case approach.

13. MTS Allstream notes that in the course of QoS proceedings that have come before the Commission to date since the establishment of the RAP and RRP, the ILECs have attempted to characterize the exercise of determining whether or not a labour disruption is adverse as an encroachment into the jurisdiction of labour boards. MTS Allstream submits that this mischaracterizes the nature of the inquiry that is required. The Commission in determining whether an event is "adverse" in the sense ascribed to that term in Decisions 2005-17 and 2005-20 has not embarked on an exercise of ascribing legal "responsibility" for the labour strife in question. The criteria for determining adversity, which the Commission should reinforce in its decision in the instant proceeding, are foreseeability of the labour disruption and the measures and plans taken to address the labour disruption, neither of

which necessitate a finding of responsibility or blame under labour statutes or other employment laws.

14. MTS Allstream submits that the definition and criteria for adversity found in Decisions 2005-17 and 2005-20 are consistent with and are reinforced by caselaw analyzing labour disruptions in a regulated context and the criteria that should be used to determine whether or not a regulated entity should be excused from the performance of its statutory duties as a result of an alleged adverse event. It would greatly clarify and reduce the complexity of exclusion application proceedings were the Commission to reinforce the definition and criteria that must be addressed by ILECs in their exclusion applications by expressly reiterating that the applying ILEC must establish to the Commission's satisfaction that the alleged adverse event was both (a) not foreseeable and (b) that in light of the degree of foreseeability of the event, that the measures and plans put into place by the applying ILEC to address the event being relied upon to exclude QoS results were reasonable in light of the circumstances as a whole.

Practical considerations militate against a blanket approach

15. Although MTS Allstream does not consider that the Commission has prejudged the matter, paragraph 3 of the PN 2007-9 appears to suggest that the Commission's rationale for initiating a proceeding to consider the appropriateness of a *force majeure* clause that includes labour disruptions in all its forms as qualifying adverse events boils down to the perception that doing away with one step of the exclusion analysis (namely determining whether or not the event is adverse in the sense that it was not foreseeable and no reasonable plans or measures could have addressed the event) will result in increased timeliness of decisions.
16. In response, MTS Allstream notes that the Commission has expressly stated at paragraph 6 of PN 2007-9 that it intends to continue to consider in each instance whether there is a causal link between the adverse event upon which an exclusion is being claimed by the ILEC, the retail or competitor QoS results and any proposed adjustment to those results. MTS Allstream further notes that in investigating the causal link between the allegedly adverse event, poor QoS results and any proposed QoS adjustment plans, the Commission

will necessarily look into the very questions that the Courts have indicated are relevant to determining whether a regulated entity should be excused from the performance of its statutory duties, namely the foreseeability of the event and whether the regulated entity did everything reasonably within its power to address that event.

17. Thus, MTS Allstream submits that the efficiency gains from eliminating the initial step of the exclusion analysis would be illusory at best.
18. Secondly, MTS Allstream notes that in the exclusion applications that have come before the Commission since the establishment of the Commission's RAP and RRP, much of the delay in achieving final QoS decisions can be laid at the doorstep of the ILECs themselves, who have delayed in bringing their QoS applications.
19. Thirdly, and as submitted above, a far more effective incremental improvement to the Commission's current QoS regime would be for it to specify what evidence an applying ILEC must include in any exclusion application in order to satisfy the Commission that the event upon which the exclusion is being claimed was (a) not foreseeable and (b) that the applying ILEC took all reasonable measures and put into place plans to address the event. This would bring added clarity to the criteria and evidence that would be considered satisfactory to the Commission and would reduce the debates, which not surprisingly have taken place given the relatively recent establishment of the RAP and RRP regimes, surrounding the type of evidence and the nature of the legal test that must be satisfied in order for an ILEC to avail itself of a QoS exclusion.
20. Finally, MTS Allstream reiterates its view that the Commission should not revise its RAP and RRP regimes in a way that would undermine the very rationale for establishing a QoS regime, which is to provide the ILECs with what minimal incentives they have to provide good quality of service to their retail customers and co-carriers alike.³ As further noted by

³ As stated by the Commission, "the performance standards established by the Commission represent the minimum acceptable performance for the services in question. They are not performance targets. Consequently, the failure of an ILEC to satisfy a Q of S indicator should result in a rate adjustment which

the Commission in *Finalization of the Quality of Service rate adjustment plan for competitors*, Telecom Public Notice CRTC 2003-9, 30 October 2003, the competitor RRP was established to protect competitors from the actions of an ILEC to improve earnings at the expense of the competitors receiving poor quality service. In MTS Allstream's view, to allow labour disruptions to qualify as *force majeure* events would remove any incentive for ILECs to avoid and mitigate the affects of a labour disruption. ILECs would therein derive a triple QoS benefit:

- first, by not paying the striking labour and by not having the expense of sufficient replacement labour;
- second, by having the resulting poor service excluded so as not to have to make rebate payments to competitors; and;
- third, by gaining new customers that would have otherwise migrated to a competitor and in the process tarnishing that competitor's good name.

21. Were labour disruptions to be granted blanket "adverse" treatment, the ILECs would be incented to prolong these situations as long as possible. MTS Allstream submits that it would be possible for a ILEC to make decisions to disadvantage competitors while avoiding retail RAP payments were it known in advance that a labour disruption would automatically qualify as being "adverse". The ILEC could make a decision to prioritize its own business customers above all other customers during a labour disruption, knowing that it would be granted exclusions from rebates based on labour disruptions as *force majeure* events. Furthermore, ILECs, particularly those that are integrated wireless providers, could use a labour disruption to their advantage as labour disruptions do not affect wireless operations to the same extent as wireline operations.

22. Thus, from a practical perspective, if the Commission wishes to reduce the timelines associated with rendering final decisions on QoS exclusion applications, it can do so by enforcing its 21-day timelines for the filing of such applications and by reaffirming the criteria

reflects the significance of that failure and establishes an adequate incentive to avoid such failures in the future": Decision 2005-17 at paragraph 122.

for determining whether an event qualifies as adverse, namely the non-foreseeability of the event in question and the plans and measures put into place by the applying ILEC in order to meet the event. Qualifying all labour disruptions as adverse and deferring to the causality stage of the analysis the questions that in any event must be addressed before excusing an ILEC from its minimal QoS obligations does very little to reduce the administrative burden on the Commission in dealing with ILEC exclusion applications.

Conclusion

23. In conclusion, therefore, MTS Allstream submits that a *force majeure* clause, if one is to be adopted, should not characterize all manner and form of labour disruptions as adverse. At the very most, only labour difficulties that are unforeseen and do not arise out from the legal strike position of an accredited bargaining agent should qualify as adverse. Of course, this is not to say that on a case-by-case basis labour disruptions could never be considered as adverse. However, taking into consideration the factual, legal and practical aspects of the matter, there is very little justification for a departure from the existing framework, which commands a case-by-case approach to the question of characterizing labour disruptions as being adverse in the circumstances of each particular case. Indeed, the case-by-case approach should be bolstered by expressly reaffirming the legal test and criteria that must be met in order to satisfy the Commission that an event is truly adverse within the meaning of Decisions 2005-17 and 2005-20, namely evidence of the non-foreseeability of the even in question and the plans and measures put into place by the applying ILEC in order to address the allegedly adverse event in question.

Yours truly,



for Teresa Griffin-Muir
Vice President, Regulatory Affairs

cc: James Robinson, MTS Allstream, (204) 941-5132
Parties to PN 2007-9

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