



Telecom Decision CRTC 2005-26

Ottawa, 27 April 2005

Request by MTS Allstream Inc. for interim permission to construct transmission lines in Vancouver

Reference: 8690-M59-200500844

In this Decision, the Commission denies MTS Allstream Inc.'s (MTS Allstream) request for interim relief with respect to its Part VII application requesting the Commission's permission to construct transmission lines in the City of Vancouver (the City or Vancouver). The Commission grants MTS Allstream permission on an interim basis to construct a transmission line at Station Street in Vancouver, subject to conditions.

Request for interim relief

1. On 24 January 2005, MTS Allstream Inc. (MTS Allstream) filed a Part VII application (the Application) with the Commission, seeking the Commission's permission to construct transmission lines in the City of Vancouver (the City or Vancouver).
2. Subsequently, on 8 April 2005, MTS Allstream filed with the Commission further requests for relief related to the Application (the interim relief request).
3. In the interim relief request, MTS Allstream indicated that it required access to a municipal right-of-way located at Station Street, in Vancouver, no later than 1 May 2005 (the Construction Date), in order to construct a transmission line along Station Street (the Station Street Line).
4. Specifically, MTS Allstream requested that the Commission issue its final determination in respect of the Application by the Construction Date either with or without reasons. MTS Allstream further requested that, if the Commission was unable to issue a determination in respect of the Application by the Construction Date, the Commission issue an interim order granting permission to MTS Allstream to construct transmission lines in Vancouver generally, on the terms requested by MTS Allstream in the Application.

Test for Interim Relief

5. Before granting a party interim relief under section 61(2) of the *Telecommunications Act* (the Act), the Commission has required the party requesting the relief to demonstrate that it meets the criteria for interim relief set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, as modified by the Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 ("the RJR-MacDonald criteria"). These criteria are that:
 - (a) there is a serious issue to be determined;

- (b) the party seeking relief will suffer irreparable harm if the interim relief is not granted; and
- (c) the balance of convenience, taking into account the public interest, favours retaining the status quo until the Commission has disposed of the issues.

Position of MTS Allstream on interim relief

6. MTS Allstream submitted that the City would not provide its consent to MTS Allstream to construct facilities on municipal property unless MTS Allstream entered into a site-specific interim agreement. MTS Allstream submitted that such a site-specific interim agreement was not acceptable to it.
7. MTS Allstream submitted that it could clearly meet the test established by the Courts and adopted by the Commission for interim relief.
8. MTS Allstream argued that there was a serious issue to be tried, since it involved both the qualified right of Canadian carriers to enter on highways and public places to construct transmission lines and the Commission's jurisdiction to enforce that right. MTS Allstream submitted that the Commission had a wide discretion to fix conditions of access to implement the objectives of the Act contained in section 7. MTS Allstream submitted that it had demonstrated how the lack of a city-wide municipal access agreement (MAA) prevented MTS Allstream from expanding its network and serving new customers in an efficient and certain manner.
9. MTS Allstream submitted that it would clearly suffer irreparable harm if the interim order was not granted and it did not build the Station Street Line, because it would be forced to incur serious risks to its business as a result of its inability to obtain access to municipal right-of-way on terms acceptable to it. In MTS Allstream's view, such an occurrence would jeopardize its existing contracts, and result in irreparable damage to its reputation and the loss of new business. MTS Allstream submitted that it would not be able to collect damages from Vancouver for any of these losses.
10. MTS Allstream argued that it would also suffer irreparable harm if the interim order was not granted and it entered into a site-specific agreement on terms not acceptable to it, since the City would argue that MTS Allstream had entered into the agreement voluntarily, and could neither re-open the agreement nor collect damages from the City.
11. MTS Allstream submitted that the balance of convenience favoured granting the requested interim order. MTS Allstream argued that such an interim order would uphold the public interest underlying the right of Canadian carriers to access highways and other public places to construct transmission lines, reduce the barriers faced by a new entrant in competing with the incumbent, and ensure that a new entrant is not prevented from providing reliable service or meeting its customers' needs because of a municipality's intransigence. MTS Allstream further argued that, by contrast, the City would not suffer any harm if the interim order were granted, since the City had not raised any issue concerning the use and enjoyment by others of Station Street or any other rights-of-way, and any such site-specific issue could be dealt with through

the City's permitting process, as had already occurred in respect of the Station Street Line. MTS Allstream noted that, after an iterative process between the City's engineers and MTS Allstream's personnel concerning the precise location of the Station Street Line, the City approved the drawing for the construction of the Station Street Line.

12. MTS Allstream concluded that it had met all three stages of the RJR-MacDonald criteria, and should therefore be granted the requested interim order.

Position of Vancouver on interim relief

13. The City, in its comments filed on 19 April 2005, opposed MTS Allstream's interim relief request. The City stated that MTS Allstream's request for an interim order was simply an invitation to the Commission to make an order granting permission to MTS Allstream to construct transmission lines on all the streets and highways in Vancouver before the Commission decided whether it had the jurisdiction to make such an order, since the fundamental jurisdictional issue was the same as the one arising from the Application. The City stated that the Commission could not make the interim order MTS Allstream sought and then decide at a later time whether or not it had the jurisdiction to make the order.
14. The City argued that MTS Allstream had failed to establish the first element in the three-part test for granting interim relief. The City submitted that the jurisdictional issue differed significantly from any considered in previous Commission decisions. The City stated that, in its view, the provisions of the Act cited by MTS Allstream, in arguing that it had a significant prospect of succeeding at trial, did not confer jurisdiction on the Commission to make an order such as that sought by MTS Allstream.
15. The City submitted that the second requirement in the three-part test for interim relief had not been satisfied. The City submitted that MTS Allstream had an obvious third option, besides being unable to build the Station Street Line or being forced to enter into an agreement with Vancouver on terms not acceptable to it, which would avoid irreparable harm even without the interim relief requested. The City stated that MTS Allstream could simply have applied for an order granting it permission to construct its transmission line on Station Street, and that the City would neither have opposed the order, nor have raised any jurisdictional issues with respect to such an application. The City further stated that if MTS Allstream required access to another street or highway while the Commission's decision on the Application was still pending, and it could not obtain such access on terms acceptable to it, then it could apply to the Commission for permission, on an expedited basis if necessary, for that site-specific requirement.
16. The City submitted that MTS Allstream's argument with respect to the issue of the balance of convenience was based on the same flawed premise as its argument with respect to the issue of irreparable harm, and must fail for the same reason. The City stated that MTS Allstream's view that its access rights could be rendered nugatory and that it would suffer a competitive disadvantage if the interim relief requested were not granted, did not take into account the option of applying to the Commission for permission to construct a particular transmission facility on a street or highway in Vancouver before the Commission delivers its final decision on the Application.

17. The City submitted that the appropriate relief to grant MTS Allstream would be permission to enter on and break up the required portion of the 1500 block of Station Street in Vancouver for the purpose of constructing its transmission line, in accordance with the final plan submitted by MTS Allstream. The City submitted that if the Commission granted such relief, it would not be necessary to consider the three-part test for interim relief, since an order relating solely to Station Street could be a final order subject to the right of the parties to apply to the Commission to deal with issues that might arise in the future, such as allocating the cost of relocation of the transmission line.
18. The City further proposed conditions to be imposed should the Commission grant permission to MTS Allstream by a final order to construct a transmission line in the 1500 block of Station Street. Of these conditions, the City was of the view, based on the Application, that MTS Allstream would dispute the City's proposed loading fee of 20 percent on plan approval and site inspection fees, and request the right to restore pavement itself rather than pay the City's proposed pavement restoration costs. The City requested that if the Commission allowed MTS Allstream the right to restore pavement itself, that the Commission should impose a condition that MTS Allstream indemnify the City with respect to any claims made against the City, or any losses incurred by the City, that are caused by the negligence or fault of MTS Allstream or contractors or agents of MTS Allstream with respect to the pavement restoration.

MTS Allstream's reply comments

19. MTS Allstream, in its reply comments filed on 21 April 2005, submitted that while the City's proposal of interim relief with respect to the construction of the Station Street Line would solve MTS Allstream's immediate requirements this would be a distant second best solution to the interim order sought for city-wide access.
20. MTS Allstream submitted that an order providing MTS Allstream with city-wide permission would reaffirm the Commission's commitment to uphold carriers' access rights pursuant to the Act.
21. MTS Allstream submitted that the Commission could reach a determination on its jurisdiction in the context of considering the interim relief request and is not, therefore, prevented from granting the interim relief request by the jurisdictional arguments raised by the City.
22. With respect to the RJR-MacDonald criteria, MTS Allstream reiterated that, in its view, the Commission has a wide discretion to fix conditions of access so as to implement the objectives of the Act, and that if MTS Allstream is not granted its interim relief request and it is forced to bring repeated applications for site-specific access, its qualified right to access will be frustrated, adversely impacting the Commission's facilities-based competition policy. MTS Allstream submitted that this result would undercut the public interest in efficient and effective regulation.
23. With respect to the specific conditions of access proposed by the City for the Station Street Line, MTS Allstream reiterated its general objections raised in its submissions on the Application. MTS Allstream also submitted that a final order with respect to the Station Street Line would be inappropriate at this time, until the Commission has considered the question of the appropriate terms and conditions for city-wide access in the context of the Application.

Commission's analysis and determination

24. The Commission notes that the Application raises a number of complex issues including, but not limited to, consideration of both the geographic and temporal scope of the Commission's powers under subsection 43(4) of the Act. The Commission considers that it would not be prudent to render a final decision on the Application without due consideration of these issues. Accordingly, the Commission denies MTS Allstream's request for a final determination on the Application prior to the Construction Date.
25. With respect to the interim relief request, the Commission notes that the applicant must meet all three of the RJR-MacDonald criteria. Regarding the irreparable harm criterion, the Commission considers that while MTS Allstream may have demonstrated that irreparable harm may be suffered if MTS Allstream does not get permission to construct the Station Street Line, this is not sufficient to ground a finding that the interim relief request is warranted for the Application, particularly in light of the position taken by the City with respect to the Station Street Line. Accordingly, the Commission finds that MTS Allstream failed to demonstrate that it will suffer irreparable harm in the absence of it being granted its interim relief request.
26. In light of the Commission's determination with respect to irreparable harm, it is not necessary for the Commission to consider whether MTS Allstream has successfully met the other RJR-MacDonald criteria.
27. In light of the above, the Commission denies MTS Allstream's interim relief request.
28. The Commission considers that it has jurisdiction to make an order granting permission to construct the Station Street Line. The Commission further notes that the City has indicated that it did not dispute the Commission's jurisdiction to make an order granting MTS Allstream permission to construct the Station Street Line, in accordance with the final plan submitted by MTS Allstream to the City.
29. The Commission notes the concerns of MTS Allstream with respect to a final order on the Station Street Line. The Commission considers that since terms and conditions of access to municipal property in Vancouver are an issue to be considered in reaching a determination on the Application it would not be appropriate to make a final order with respect to the Station Street Line at this time.
30. The Commission considers that under the circumstances of this case, and given the City's submission that the Station Street Line raises no issues with respect to the use and enjoyment of the 1500 block of Station Street by others, it is appropriate to make an interim order granting MTS Allstream permission to construct the Station Street Line.
31. With respect to the conditions on such permission, the Commission considers that the terms proposed by the City are generally appropriate.
32. The Commission notes the City's argument that the 20 percent loading charge on plan approval and site inspection fees is its standard figure and the City's belief that a 20 percent loading fee more accurately captures causal costs incurred by the City than 15 percent. The Commission notes, however, that the City has not indicated the basis for its belief that a 20 percent loading

charge more accurately captures the causal costs incurred by the City. The Commission further notes that the City indicated at paragraph 88 of its submissions on the Application that the difference between a 15 percent and a 20 percent loading charge on plan approval and site inspection fees is usually so trivial as to make little difference either to a carrier or the City. In light of the above, the Commission considers that a loading fee of 15 percent on plan approval and site inspection fees would be more appropriate with respect to the Station Street Line than the 20 percent fee proposed by the City.

33. The Commission notes the concerns raised by the City with respect to its ongoing liability for the streets and the quality of pavement restoration work. While the Commission considers that MTS Allstream should have the right to have any pavement restoration work done by its own contractors, the exercise of that right should be subject to conditions that safeguard the interests of the City. In light of the above, the Commission considers that MTS Allstream should have the right to use its own contractors to restore the pavement on Station Street. The Commission further considers that should MTS Allstream choose to exercise this right, the City is entitled to recover its causal costs for the:

- review of specified material/mix design;
- inspection, testing and certification of backfill; and
- ongoing inspection of the restored pavement.

34. The Commission further considers that if MTS Allstream chooses to restore the pavement using its own contractors then MTS Allstream should indemnify the City with respect to any claims made against the City, or any losses that are incurred by the City, that are caused by the negligence or fault of MTS Allstream or any contractors or agents of MTS Allstream with respect to the pavement restoration.

35. In light of the above, the Commission grants MTS Allstream permission, on an interim basis pending a final determination on the Application, to construct the Station Street Line in accordance with the final plan submitted by MTS Allstream to the City on the following conditions:

1) That MTS Allstream pay to the City the following costs:

- a) Plan Review Fee - \$1,200.00;
- b) Site Inspection Fee - \$65.00/day;
- c) Loading Fee on Plan Approval and Site Inspection Fees – 15 percent;
- d) Traffic Signage Costs – cost to City based on time and materials to install temporary no stopping signs to clear the street for proposed construction work; and
- e) Pavement Restoration – cost to City if MTS Allstream chooses to have the City restore the pavement.

- 2) MTS Allstream must submit to the City the following:
 - a) an acceptable traffic management plan;
 - b) a list of 24-hour emergency contacts;
 - c) acceptable as-built plans; and
 - d) a letter of credit in the amount of \$2,500.00 as security for inspection and pavement restoration costs.
- 3) If MTS Allstream chooses to restore the pavement itself:
 - a) MTS Allstream shall pay to the City:
 - i) the causal cost to review specified material/mix design;
 - ii) the causal cost of inspection, testing and certification of backfill; and
 - iii) the causal cost of ongoing inspection of the restored pavement.
 - b) MTS Allstream shall indemnify the City with respect to any claims made against the City, or any losses incurred by the City, that are caused by the negligence or fault of MTS Allstream or any contractors or agents of MTS Allstream with respect to the pavement restoration.
36. The Commission notes that, as suggested by the City, it is prepared to adjudicate any issues with respect to the Station Street Line that may arise in the future between the parties.
37. The Commission notes that it intends to make a final determination on the Application in the near future. In the meantime, should MTS Allstream require access to another highway or public place in Vancouver, it can apply to the Commission for permission, on an expedited basis if necessary, for that site-specific requirement.

Secretary General

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