



FOR Teresa Griffin-Muir
Vice President, Regulatory Affairs
Vice-présidente des Affaires réglementaires
MTS Allstream Inc.

21 August 2006

By Epass

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Ms. Rhéaume:

Subject: Review of Price Cap Framework, Telecom Public Notice CRTC 2006-5: Request to Exclude the Regulatory Treatment of Competitor Services from the Scope of the Proceeding

This is a request by MTS Allstream Inc. (MTS Allstream) seeking a declaratory ruling from the Commission that excludes all issues relating to the regulatory treatment of Competitor Services from the scope of the proceeding initiated by *Review of Price Cap Framework*, Telecom Public Notice CRTC 2006-5 (PN 2006-5) and strikes all submissions that have been made on this issue from the record of the same proceeding. Alternatively, MTS Allstream requests that the Commission include all issues relating to the regulatory treatment of Competitor Services within the scope of the PN 2006-5 proceeding and amend the procedures of this proceeding in order to permit interested parties to make full and complete submissions on the regulatory treatment of Competitor Services.

Yours truly,

c.c.: Interested Parties to Public Notice 2006-5

I. Introduction

1. This is a request by MTS Allstream Inc. (MTS Allstream) seeking a declaratory ruling from the Commission that excludes all issues relating to the regulatory treatment of Competitor Services from the scope of the proceeding initiated by *Review of Price Cap Framework*, Telecom Public Notice CRTC 2006-5 (PN 2006-5) and strikes all submissions that have been made on this issue from the record of this proceeding. Alternatively, MTS Allstream requests that the Commission include all issues relating to the regulatory treatment of Competitor Services within the scope of the PN 2006-5 proceeding and amend the procedures of this proceeding in order to permit interested parties to make full and complete submissions on the regulatory treatment of Competitor Services.

2. MTS Allstream submits that it is improper for the Commission to examine or rule on only one aspect of the treatment of Competitor Services, namely, the pricing constraints applicable to Competitor Services, while excluding comment on all other issues relating to the price treatment of Competitor Services in the PN 2006-5 proceeding. The suitability of the pricing constraints applicable to Competitor Services cannot be determined in isolation of these other matters and, indeed, is necessarily tied to the overall regulatory treatment of Competitor Services. By ruling on the pricing constraints applicable to Competitor Services in isolation, the Commission would not only be fettering the exercise of its discretion, it would be breaching its duty of fairness by denying interested parties the right to make full and complete submissions in this proceeding on the price cap treatment of Competitor Services.

II. Background

3. The circumstances surrounding this request are as follows. On 9 May 2006, the Commission issued PN 2006-5, entitled *Review of Price Cap Framework*. According to paragraph 18 of PN 2006-5, the purpose of this public notice is to initiate a proceeding "to establish that (sic) price cap regime that will go into effect in 2007, in the operating

territories of Aliant Telecom, Bell Canada, MTS Allstream, SaskTel, and TCC (the telephone companies)."¹

4. In the portion of PN 2006-5 dealing with the "scope" of the proceeding, the Commission stated that "[I]n order to streamline this proceeding, the Commission is limiting the issues to be considered to those which it considers directly related to a price cap regime."² The Commission then stated at paragraph 22 of PN 2006-5 that interested parties are invited "to submit comments on what changes, if any, should be made to the price cap regime with regard to the following:

- objectives of the regime;
- basket structure and assignment of services, **except for Competitor Services**;
- constraints for basket(s) of services (e.g., I-X);
- constraints for individual services or rate elements (e.g., the percentage increase per year allowable for basic residential services), **except for Competitor Services**;
- rate de-averaging within a band;
- components of the price cap formula (e.g., I, X, and Z);
- the continuing need for a deferral account for the residential non-HCSA basket; and
- the length of the next price cap regime, including whether the regime should be of a fixed duration." (emphasis added)

5. Two of the eight items listed in paragraph 22 of PN 2006-5 expressly exclude from the scope of the proceeding certain matters relating to Competitor Services. Specifically, the Commission invited interested parties to submit comments on issues relating to "basket structure and assignment of services" and "constraints for individual services or rate elements", provided, however, that those submissions do not relate to Competitor Services.

¹ PN 2006-5, paragraph 18.

² PN 2006-5, paragraph 21.

6. The exclusion of Competitor Services from the scope of the PN 2006-5 proceeding is continued at paragraph 24 of the public notice which also deals with the "scope" of the proceeding. Specifically, the Commission states at paragraph 24 that "[T]his proceeding will strictly focus on issues directly related to those identified above and **will not include** the following:
- proposals for new **Competitor Services** or new categories of Competitor Services;
 - examination of Phase II costs for existing **Competitor Services**;
 - existing assignments of **Competitor Services** between Categories I and II; and
 - definition of Category I and Category II **Competitor Services...**" (emphasis added)³
7. As is evident from these extracts, the Commission has excluded from the scope of the PN 2006-5 proceeding several matters relating to Competitor Services.
8. On 24 May 2006, subsequent to the release of PN 2006-5, Commission staff sent out a series of interrogatories to the various telephone companies that are participating in the proceeding. Included among these interrogatories was one which asked MTS Allstream to provide its views on the following:
- a) the continued application of a pricing constraint equal to inflation less the productivity offset (I-X) to ILEC services assigned as Category I Competitor Services, with the exception of Category I services identified as exempted in Appendix 1 to *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002; and
 - b) the application of a pricing constraint equal to I-X to all ILEC services assigned as Category II Competitor Services.

³ PN 2006-5, paragraph 24.

9. Since PN 2006-5 appeared to exclude the regulatory treatment of Competitor Services from the scope of the proceeding, MTS Allstream responded to this interrogatory by indicating that, based on its reading of PN 2006-5, the issue of how Competitor Services should be treated for price caps purposes was outside the scope of the proceeding. MTS Allstream also stated that while there is clearly a need to consider the treatment of Competitor Services in the context of some proceeding, it believed that this issue should be addressed elsewhere in a proceeding on the regulatory framework for wholesale or competitor services.⁴ This point was reiterated by MTS Allstream in its 10 July 2006 comments in this proceeding.⁵
10. However, on 8 August 2006, Commission staff issued a new set of interrogatories to interested parties in the PN 2006-5 proceeding. Included among these interrogatories was one addressed to MTS Allstream, which instructed MTS Allstream to refer to the third bullet of paragraph 22 of PN 2006-5 which, as noted above, indicates that one of the matters that is within the scope of this proceeding is "constraints for basket(s) of services (e.g., I-X)".⁶
11. According to Commission staff, this bullet point stands for the proposition that "the Commission has not specifically excluded the issue of pricing constraints on competitor services" from the PN 2006-5 proceeding.⁷ Commission staff therefore asked MTS Allstream in the 8 August 2006 interrogatory to respond to the interrogatories that were originally posed to it on 23 May 2006 relating to pricing constraints on the Competitor Services Basket.

III. The Issue

12. MTS Allstream acknowledges that the third bullet in paragraph 22 of PN 2006-5 does not expressly exclude Competitor Services; however, given the exclusionary language set out in paragraphs 22 and 24 of the public notice and taking PN 2006-5 in its entirety,

⁴ Response to interrogatory MTS Allstream(CRTC)06May23-203 PN 2006-5.

⁵ MTS Allstream Evidence, 10 July 2006, paragraph 15.

⁶ MTS Allstream(CRTC)8Aug06-1202 PN 2006-5.

⁷ MTS Allstream(CRTC)8Aug06-1202 PN 2006-5.

MTS Allstream submits that this bullet cannot be said to extend to Competitor Services for both practical and equitable reasons. In order for interested parties to comment meaningfully on the types of pricing constraints, if any, that should apply to the Competitor Services basket overall, interested parties must know the answers to, or must be able to make full and complete submissions to the Commission on a whole host of interrelated issues, including the following: (i) what services should be included in the Competitor Services basket; (ii) whether existing prices for services and rate elements thereof within the basket are appropriate; (iii) what pricing constraints should apply to individual services and rate elements within the basket; and (iv) whether these pricing constraints should vary depending on the services or rate elements in question.

13. As noted above, PN 2006-5 and, in particular, paragraphs 22 and 24, expressly excludes these items from the scope of the price caps proceeding. For example, paragraph 22 of PN 2006-5 makes it very clear that interested parties are not to submit comments on the structure of the Competitor Services basket nor the assignment of services to this basket. It is also clear from paragraph 22 of PN 2006-5 that issues relating to constraints for "individual" services or rate elements within the Competitor Services basket are outside the scope this proceeding. After all, under the current price cap regime, the existing "I – X" does not apply to the Category I Competitive Services sub-basket as a whole, but rather to a subset of individual services within the sub-basket. If interested parties cannot address the question of pricing constraints on individual services (and elements thereof) within the Competitor Services basket, how is it possible to comment meaningfully on the pricing constraints that should apply to this basket overall?
14. The same predicament holds true for the items that have been excluded from the scope of the PN 2006-5 proceeding by virtue of paragraph 24 of the public notice. Once again, MTS Allstream submits that it is not possible to comment meaningfully on the pricing constraints applicable to the Competitor Services basket overall, when it is precluded by paragraph 24 of PN 2006-5 from discussing the regulatory treatment to be accorded to (i) new Competitor Services or new categories of such services (bullet #1 of paragraph 24); (ii) the Phase II costs for existing Competitor Services (bullet #2 of paragraph 24);

(iii) the existing assignments of Competitor Services between Categories I and II (bullet #3 of paragraph 24); and (iv) the definition of Category 1 and Category II Competitor Services 9 (bullet #4 of paragraph 24).

15. In the view of MTS Allstream, it is unfair and, indeed, prejudicial to the interests of parties to this proceeding to require them to comment on one aspect of the price cap treatment of Competitor Services when they are precluded from discussing virtually every other aspect of the price cap treatment of these services. Not only does this place interested parties in an awkward position, it compromises very seriously their procedural and substantive rights to participate in this proceeding in a meaningful fashion and to make full and complete submissions. Indeed, in the view of MTS Allstream, this constitutes a breach of the Commission's duty to act fairly⁸ because it prejudices the rights of interested parties to adduce evidence and to make full and complete submissions on the issue at hand.⁹ In administrative law, a breach of the duty of fairness constitutes a jurisdictional error which is reviewable by the courts.¹⁰
16. Moreover, the Commission would be improperly fettering the exercise of its discretion in this proceeding if it were to deal with the issue of the regulatory treatment of Competitor Services in such a piecemeal fashion and without examining all of the evidence that is necessary to arrive at a reasoned determination on this issue.¹¹ By adopting an overly rigid approach to the scope of the PN 2006-5 proceeding, the Commission is effectively fettering its ability to properly rule upon the issue of pricing constraints on Competitor Services. In fact, based on the language of PN 2006-5, it would appear that the

⁸ In general, the courts require that decisions that affect the rights of individual persons be made following procedures that are fair to the affected parties. See, for example, *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385 at 410 and 412.

⁹ See, for example, *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 and *Cohnstaedt v. University of Regina*, [1989] 1 S.C.R. 1011.

¹⁰ *Komo Construction Inc. v. Commission des relations de travail du Québec*, [1968] S.C.R. 172 at p. 175. See also section 64 of the *Telecommunications Act*, S.C. 1993, c. 38.

¹¹ In *Judicial Review of Administrative Action in Canada*, Brown and Evans state that "decision-makers cannot *confine* their exercise of their discretion by refusing to consider other factors that are legally relevant." (emphasis in the original) See Donald J.M. Brown, Q.C. and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada* Canvasback Publishing, Vol. 2, at 12:4421 as well as *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2.

Commission is *refusing* to consider evidence and other submissions that are highly relevant to the issue at hand.

17. MTS Allstream also notes that if the Commission were to make a determination in this proceeding on the pricing constraints that should apply to the Competitor Services basket, this could prejudice the outcome of how Competitor Services are dealt with in a separate proceeding that the Chair of the Commission has indicated that the Commission intends to initiate regarding the regulatory treatment to be accorded to wholesale services.¹² By issuing a determination in this proceeding on the pricing constraints applicable to the Competitor Services basket, the Commission would constrain its ability to deal in an open and flexible manner with the regulatory treatment to be accorded to wholesale services in this separate proceeding.
18. The Commission has broad discretion to render decisions on the issues that come before it. The Commission must not fetter this power by prejudging one aspect of a much larger issue.

IV. Conclusion

19. As indicated above, it is impossible to deal with the issue of pricing constraints on the Competitor Services basket issue in a vacuum. These constraints are influenced by a whole host of factors that are currently deemed to be outside the scope of this proceeding. In the view of MTS Allstream, if the Commission wishes to deal with the issue of pricing constraints on the Competitor Services basket in this proceeding, then the rules of procedural fairness dictate that interested parties must be given a full and complete opportunity to comment on this issue without having their hands tied behind their back.
20. MTS Allstream therefore requests that the Commission issue a declaratory ruling, along with any associated procedures, that excludes all issues relating to the regulatory treatment of Competitor Services from the scope of the PN 2005-6 proceeding and

¹² Charles Dalfen, speech at the Canadian Telecommunications Summit, Toronto, 14 June 2006.

strikes all submissions that have been made on this issue from the record of this proceeding. Alternatively, MTS Allstream requests that the Commission include all issues relating to the regulatory treatment of Competitor Services within the scope of the PN 2006-5 proceeding and amend the procedures of this proceeding in order to permit interested parties to make full and complete submissions on the regulatory treatment of Competitor Services.

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