

000006

Court File No.

FEDERAL COURT OF APPEAL

BETWEEN:

MTS ALLSTREAM INC. AND ACANAC INC.

Applicants

- and -

**CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION,
BELL CANADA, BELL ALIANT REGIONAL COMMUNICATIONS, LIMITED
PARTNERSHIP, ACCELERATED CONNECTIONS INC., AOL CANADA,
AVENTURES EN EXCELLENCE INC., THE CANADIAN ASSOCIATION OF
INTERNET PROVIDERS, THE COALITION OF INTERNET SERVICE PROVIDERS
INC., CYBERSURF CORP., DISTRIBUTEL COMMUNICATIONS LIMITED, EGATE
NETWORKS INC., ELECTRONIC BOX, EXECULINK TELECOM INC., L' UNION
DES CONSOMMATEURS, MANAGED NETWORK SYSTEMS, INC., THE ONTARIO
TELECOMMUNICATIONS ASSOCIATION, PRIMUS TELECOMMUNICATIONS
CANADA INC., TEKSAVVY SOLUTIONS INC., TELNET COMMUNICATIONS,
VAXINATION INFORMATIQUE, AND YAK COMMUNICATIONS (CANADA) CORP.**

Respondents

NOTICE OF MOTION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the Applicants, MTS Allstream Inc. ("MTS Allstream") and Acanac Inc. ("Acanac") will make a motion to the Court in writing under 64(2) of *Telecommunications Act* and Rules 352-356 and 369 of the *Federal Courts Rules*.

THE MOTION IS FOR

- (a) an order granting to the Applicants leave to appeal the Respondent Canadian Radio-television and Telecommunications Commission's (the "Commission" or the "CRTC") decision in *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Applications to introduce usage-based billing and other changes to Gateway Access Services*, Telecom Order CRTC 2009-484, 12 August 2009 ("Order 2009-484"), to the extent that it approved a new usage-based billing ("UBB") charge in relation to tariffed wholesale Gateway Access Services ("GAS") provided by the Respondents, Bell Canada and Bell Aliant Regional Communications, Limited Partnership (collectively, "Bell"), pursuant to these Respondents' General Tariff Item 5410;
- (b) an order granting leave to serve this notice of motion and Motion Record by e-mail or by other methods of service if requested by the person in question on approximately 6,300 individual Canadians who participated in the proceedings below but are not identified as intervenors to the proceedings by the CRTC and have therefore not been named as Respondents herein;
- (c) if leave to appeal is granted, the Applicants seek a direction pursuant to Rule 136 of the *Federal Courts Rules* that the notice of appeal may be served on the approximately 6,300 individual Canadians who participated in the first instance

but are not Respondents to this application for leave to appeal, either by e-mail or by other methods of service if requested by the person in question;

- (d) an order granting to the Applicants their costs of this motion; and
- (e) such further or other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Order 2009-484

1. In Order 2009-484, the Commission approved a new charge that would be applied on a monthly basis for each residential end-user customer belonging to a competitor that subscribes to the Respondent's GAS services. More specifically, in Tariff Notices 7181 and 242 ("TNs 7181 and 242") Bell proposed to introduce a new UBB charge that would be applied as soon as the competitor's end-user customer exceeds a predefined monthly data usage "allowance," which is defined as the cumulative amount of data which an end-user may upload and download in any month measured in gigabytes ("GB"). In the event that the end-user customers of a competitor incur usage beyond the predefined monthly usage allowance, a charge for each full or partial GB would apply up to maximum of \$22.50 per end-user per month, unless the end-user exceeds 300 GB per month, in which case Bell proposed to charge an "excessive usage charge" of \$0.75 for each additional GB in excess of 300 GB if Bell itself decides to introduce such a charge for its own retail high speed Internet access customers.

2. The usage-based charges approved by the Commission in Order 2009-484 drew opposing comments from over 6,300 individual Canadians as well as 18 organizations and corporations, including consumers groups, industry associations and competitors that are customers of Bell's wholesale GAS services.
3. The opportunity of interested parties to comment on TNs 7181 and 242 was closed before Bell disclosed or produced an economic cost study justifying the new UBB charges.
4. Bell filed an economic cost study with the Commission that purported to justify the new UBB charges on 16 July 2009. MTS Allstream filed a request for public disclosure of the economic information in the cost study.
5. Prior to ruling on MTS Allstream's disclosure request or giving interested parties any opportunity to comment on the economic cost studies, the Commission issued Order 2009-484 on 12 August 2009.
6. In Order 2009-484, the Commission approved the Bell companies' proposal to introduce UBB for GAS on the following basis: (i) to do so would be consistent with Telecom Decision 2006-77 in that UBB would apply to both their retail Internet and wholesale GAS; and (ii) approving the Bell companies' UBB proposal for GAS would be consistent with its approval of UBB for the incumbent cable carriers' TPIA services."
7. Since the issuance of Order 2009-484, the Commission has issued further process in the form of a letter dated 20 August 2009 in relation to TNs 7181 and 242 in which the Commission makes it clear that the right of interested parties to participate in the

remainder of the proceeding is expressly limited to Bell's cost study and its responses to interrogatories posed by the Commission to Bell in the 20 August 2009 letter.

8. The CRTC's jurisdiction to set just and reasonable rates is set out in sections 25 and 27 of the *Telecommunications Act*, S.C. 1993, c. 38 (the "*Telecommunications Act*");

Approval of UBB Charge in Relation to Wholesale GAS Services Contravenes Subsection 27(1) of the Act

9. Pursuant to subsection 27(1) of the *Telecommunications Act*, the Commission has a duty to ensure that rates for telecommunications services are just and reasonable at all times.
10. The Commission clearly failed to turn its mind to its obligations pursuant to subsection 27(1) in approving a UBB charge in relation to wholesale GAS Services. Nowhere in Order 2009-484 is there any indication that the Commission considered a usage-based charge to be just and reasonable and if it did, what evidence on the record it considered in coming to such conclusion.
11. The Commission's failure to consider the justness and reasonableness of applying UBB charges to wholesale GAS services constitutes an error law, contrary to subsection 27(2) and paragraph 47(a) of the *Telecommunications Act*.

Approval of UBB Charge in Relation to Wholesale GAS Contravenes Subsection 27(2) of the Act

12. Pursuant to subsection 27(2) of the *Telecommunications Act*, the Commission has a duty to ensure that no Canadian carrier, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminates or gives an undue or

unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

13. The Commission failed to consider whether Bell was granting to itself an undue preference in being permitted to impose UBB charges on competitors that subscribe to GAS without being compelled or required in any way to impose UBB charges when Bell is providing to itself the same underlying service as GAS.
14. The Commission's failure to consider the undue preference that Bell is conferring upon itself constitutes an error of law, contrary to subsection 27(2) and paragraph 47(a) of the *Telecommunications Act*.

Breach of Rights to Procedural Fairness

15. The Commission is a quasi-judicial administrative body that is subject to the duty of procedural fairness.
16. The CRTC breached the Applicants' rights to procedural fairness by establishing procedures that prevent the Applicants and other interested parties from further commenting on the threshold issue of whether a UBB charge should apply, in the first instance, to wholesale ADSL services such as GAS even though the evidentiary record in the proceeding has not yet closed.

Service

17. Approximately 6364 individuals and 20 corporations participated in the first instance in the TN 242/7181 proceeding. On its website, www.crtc.gc.ca, the Commission lists the

20 intervener corporations and the names and partial contact information for the comments received from individuals.

18. Rules 339(1)(c) and 352(2) of the *Federal Courts Rules* require personal service on all parties as well as persons who are not parties but who participated in the first instance. Also, s. 64(3) of the *Telecommunications Act* requires notice of an application for leave to appeal to be served on the Commission and on each party to the proceedings appealed from. In light of the very large number of interested persons in the proceedings below and the fact that they are located throughout Canada, it is not practical for the Applicant to personally serve all these individuals to the application for leave to appeal.

Statutory and Other Instruments

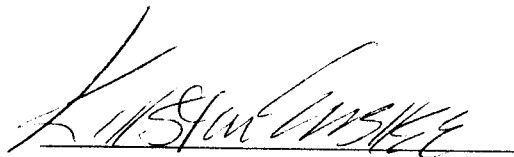
19. The Applicants will be relying on the following statutory and other instruments in support of their motion for leave to appeal from Order 2009-484:
- (a) *Telecommunications Act*, ss. 7, 27(1), 27(2), 47 and 64;
 - (b) *Federal Courts Rules*, SOR/98-106, as amended, Rules 3, 136, 339, 352-356, and 369;
 - (c) *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, 14 December 2006; and

- (d) Such further and other grounds as counsel may advise and this Honourable Court permit.

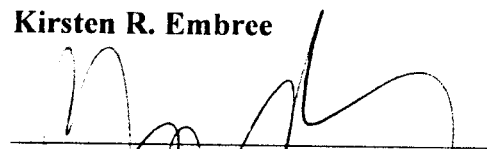
THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

20. the Affidavit of Teresa Griffin-Muir, sworn 10 September 2009, and the exhibits thereto;
and
21. such further and other material as counsel may advise and this Honourable Court permit.

September 10, 2009



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