

**Industry Canada**

**Consultation into Proposed Guidelines regarding the  
Interpretation of Certain *Conditions of Licence for Mandatory  
Roaming and Antenna Tower and Site Sharing and to  
Prohibit Exclusive Site Arrangements* – CPC-2-0-17**

**Comments  
Of  
Bell Mobility Inc.**

**6 March 2009**

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## 1.0 EXECUTIVE SUMMARY

1. Bell Mobility Inc. (Bell Mobility or the Company) is in receipt of a letter, received 18 February 2009, from Industry Canada initiating a consultation (the Consultation Letter) on proposed "guidelines" applicable to conditions of licence relating to antenna tower and site sharing in the *Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements* (CPC-2-0-17), issued by Industry Canada on 21 November 2008 (Roaming and Tower Sharing COLs). Bell Mobility's comments on these proposed guidelines are set out in the following paragraphs. For convenience, Bell Mobility has provided its comments in the same sequence as the guidelines are proposed in the Consultation Letter. The Company hereby reserves its right to take whatever legal action it deems appropriate to the extent the proposed guidelines are implemented in whole or in part.

2. Bell Mobility is concerned at the increased and more prescriptive, detailed regulation embodied in these proposals – particularly those relating to the reservation of tower space for the owner's future use and the timelines for responding to requests for preliminary information - without regard to volume. These are regulatory measures which are fundamentally at odds with the Department's stated policy to rely upon market forces, which are wholly unjustified in the highly competitive and long-forborne wireless market, particularly given that it has barely been three months since the Department issued the finalized COLs and Arbitration Rules applicable to tower and site sharing.

3. It bears re-emphasizing that the Department's Roaming and Tower Sharing COLs are premised upon favouring market forces over regulation. That is why the COLs were expressly intended to result in tower and site sharing access rates, terms and conditions (and roaming rates, terms and conditions) that incorporate negotiated "commercial rates that are reasonably comparable to rates charged to others for similar tower access".<sup>1</sup> This is consistent with the statement in the Department's foundational November 2007 AWS Policy document that its policy is "to ensure that regulation is proportionate to its purpose and interferes with market forces only to the extent necessary to achieve the intended objective."<sup>2</sup>

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<sup>1</sup> See CPC-2-0-17, page 5, COL 8(4)(a): "The Licensee must provide the Requesting Operator with a response in writing and an offer to enter into a Site-Sharing agreement. Industry Canada expects that Site-Sharing Agreements, including access to ancillary equipment and services, will be offered at commercial rates that are reasonably comparable to rates currently charged to theirs for similar access."

<sup>2</sup> *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007, DGTP-007-07, page 4.

4. Regrettably, the proposed guidelines - in particular those relating to the reservation of space for the tower owner's future use, and timelines for responding to preliminary information requests without regard to workload, suggest the Department has abandoned market principles in favour of detailed, prescriptive regulation, where none is required or appropriate given the forbore status of the Canadian wireless industry.

5. The Department's "imminent" future use proposal marks a fundamental change to long-standing Canadian commercial tower management practice. The proposal would discontinue the tower owner's long-standing right to only offer to share that portion of its tower space which is not required for its own future needs. Instead, the guideline would force that owner to negotiate the sharing of all but its imminently-to-be-used spare capacity with a requestor. This marks a fundamental and substantive change to the tower sharing regulatory framework first announced by the Department prior to the start of the AWS auction, which is the policy and COLs on which the Company bid upon, won and paid \$750 million to the Department for AWS spectrum licences. If implemented, such a change could subject the Department to legal liability for negligently misrepresenting the applicable conditions of licence applicable to tower sharing prior to the conduct of the AWS spectrum auction. As well, the forced divestiture of a tower owner's reserved future capacity may well constitute illegal expropriation.

6. Moreover, the proposal is illogical in that it completely ignores the Department's own long-standing regulatory practice (as set out in the conditions of licence in various classes of spectrum licences) of allowing licensees a *five* year period in which to implement their spectrum use, which necessarily encompasses tower space planning. Furthermore, it also ignores long-standing industry practice whereby licensees typically build out their networks based upon, at a minimum, three-to-five year forecasts. For more complex network upgrades, such as what will be required to build out AWS spectrum, the build out period would typically be closer to five years. Even in the much more heavily regulated wireline telecommunications sector, the CRTC and telecom industry stakeholders operate under the understanding that owners of spare support structure capacity (e.g., ducts and telephone poles) may reserve space allotted for their future use in a three to five year time frame. The Department's imminent use proposal effectively gives a new entrant or other licensee requestor virtually the same priority rights to the licensor's tower space as the licensor, something that would never happen in any other commercial sector of the economy subject to competitive market forces.

7. The proposal to impose a one week deadline in which responding licensees must provide responses to requests for preliminary information, without regard to workload, similarly ignores commercial realities and industry practice, including juggling resource allocation to meet the needs of customers, staffing and controlling costs, all of which face wireless operators in a highly competitive and recessionary market.

8. These proposals appear to confirm the Company's worst fears, as addressed in our AWS Consultation submissions, regarding the Department's inability to limit its interference with market forces. In the Company's 27 June 2007 Reply Comments in response to the Department's consultation on a *Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services, Canada Gazette Notice DGTP-002-07*, the Company noted, at page 15, that once the Department started down the path of regulatory intervention". It would lead the currently forborne and competitive wireless industry down a path of increasingly greater regulatory interference".

9. It bears emphasizing that it took the Department approximately seven months, from April to November 2008, to consult on and finalize its tower sharing and roaming arbitration rules. With these rules and the tower sharing conditions of licence barely three months old, it is far too soon to be tinkering with the tower and site sharing framework. Mindful of the Policy Direction, the Department should step back and let market forces work to ensure that Canada remains at the forefront of wireless market development.

10. The Company's experience in the relatively short period that the tower and site sharing regime has been in place is that the framework is working reasonably well. The Company showed good faith and began processing these information requests as early as August and September 2008, months before the Department had issued its finalized rules on arbitrations<sup>3</sup> and well in advance of the issuance of the finalized tower sharing COLs, in late November 2008.<sup>4</sup> The Company has worked cooperatively and expeditiously to process approximately 200 information requests from three different AWS new entrant requesters seeking preliminary information about access to the Company's tower sites.

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<sup>3</sup> *Industry Canada's Arbitration Rules and Procedures*. CPC-2-0-18, Issue 1, November 2008.

<sup>4</sup> *Conditions of Licence for Mandatory Roaming and Antenna tower and Site Sharing and to Prohibit Exclusive Site Arrangements*. CPC-2-0-17, Issue 1, November 2008.

11. As of the end of February 2009, the Company had provided technical information to new entrants on approximately 65% of their requests. In February 2009, the Company signed mutual Non-disclosure Agreements with three AWS new entrants. The Company reached a verbal understanding with one new entrant in the fall of 2008 on how many of its preliminary information requests would be processed weekly. In late February, the Company forwarded a draft of its site and tower sharing access agreement to the first of the new entrant requesters. This step should significantly accelerate the site sharing process in respect of all forthcoming official requests to share going forward.

12. The tower sharing process is progressing, but it is not perfect. As with any new procedure, it has taken time for the Company to set up and get established. The three months it has been in place, which included the December holiday period, is not an inordinate amount of time. However, the greatest concern has not been addressed in the guidelines, namely the lack of cost discipline that the current regime imposes upon tower and site requesters at the preliminary information stage and the resultant wasted costs it imposes upon responding licensees and the "gaming" that has resulted to date.

13. As of the end of February, the Company had received requests for preliminary information regarding 200 towers. This work has been at considerable time and expense. Yet it has generated only 55 official requests to share the Company's towers, representing just 27.5% of the requests. In the case of the 113 preliminary information requests from two of the three requesters, this has translated into just three official requests to share Company towers, or less than 3%. This is a profound waste of the Company's resources and slows our ability to respond timely to official requests to share and serve the needs of our own customers. More than any other element of the current site and tower sharing regime, it is this element that Industry Canada should be focused on fixing in order to bring much needed responsibility and cost discipline to the process. This is yet another example of the Department turning its back on long-established commercial practice contrary to its stated intention of relying upon market forces.

14. In the circumstances, there is no basis to justify imposing the detailed and highly prescriptive forms of regulation proposed in the Consultation Letter and they should be withdrawn. If the Department does move forward with guidelines (which the Company opposes for the reasons set out in these Comments), then the "imminent" future use definition should be amended to reflect the applicable Canadian commercial standard, which embodies a three to

five year business planning cycle relative to the utilization of spare tower space. As well, in the event the Department opts to adopt a one week time line for responses to preliminary requests for information irrespective of workload, then this guideline must be made conditional upon requestors paying all of the associated underlying costs of responding to information requests. The Company elaborates on these points in the following paragraphs.

## **2.0 BELL MOBILITY COMMENTS ON THE PROPOSED GUIDELINES**

### **2.1 Transparency Concerns: *de facto* amendments of the Tower Sharing Conditions of Licence, post-auction, under the guise of "Guidelines"**

15. The Department states, at page one of the Consultation Letter, that it is not reviewing the conditions of licence set out in CPC-2-0-17. However, it then notes in the second paragraph on page 1:

Subsequent to this consultation phase, the Department will establish guidelines to be used when asked to respond to a complaint of non-compliance.

16. The Company has a number of serious concerns about this statement. First, some of the proposed "guidelines" are not interpretive guidelines at all. Rather, as set out below, they are tantamount to *de facto* changes to the tower sharing conditions of licence.

17. Industry Canada's general practice relative to the amendment of conditions in spectrum licences is to exercise its amending powers only on an exceptional basis and only after full consultation. Neither of these two requirements is met here.

18. Second, and related to the first point, it is highly inappropriate and procedurally unfair for the Department to implement what is tantamount to changes in the conditions of licence applicable to tower sharing *after* having consulted upon and finalized these conditions, conducted the auction process and collected in the Company's case \$750 million in license fees based upon them – with no right to have been heard on these proposals in advance of the auction.

19. The Department itself recognized the importance of being transparent about the licence conditions that would apply to roaming and tower sharing *before* commencing the AWS auction process so that parties could make fully informed bidding decisions. In its AWS Auction Policy Framework, the Department announced to parties that it would be consulting on the applicable

final conditions of licence, including those applicable to mandated tower and site sharing. Significantly, the Department stated as follows: (at pages 1, 9, 11 and 12 of the AWS Policy Document):

In addition, Industry Canada will undertake a supplementary public consultation on specific changes to the conditions of licence for current licenses to implement the policy measures announced in this document. This supplementary consultation will be announced in a notice in the *Canada Gazette*, Part I to be published as soon as possible. The consultation will also be posted on Industry Canada's Spectrum Management and Telecommunications website. Following the consultation, the final conditions of licence will be made public so that all those affected are aware of the changes prior to the deadline for auction applications.

Industry Canada has concluded that it is in accordance with the orderly development and efficient operation of radiocommunication in Canada to mandate antenna tower and site sharing and to prohibit exclusive site arrangements for all licensees including broadcasting certificate holders. . . . Before the auction commences, the department will undertake a supplementary consultation to add these conditions to existing licences. . . . The final decision on the operation and wording of the licence conditions regarding sharing will be taken before the auction starts. . . .

Following the consultation, the final conditions of licence will be made public so that all those affected are aware of the changes. They will be announced before the deadline for applications for the auction, to allow parties to make fully informed decisions, in a *Canada Gazette* notice and also posted on Industry Canada's spectrum Management and Telecommunications website. (emphasis added)

20. The lawful conditions of licence contained in the spectrum licences are the only valid basis upon which compliance or non-compliance of a licensee can be determined. The substantive changes to conditions of licence described below, particularly those relating to reservation of future tower space and responses to preliminary information requests, should be withdrawn.

## **2.2 Section 8, Licence Condition 3: The Proposed one week timeline is un-necessary and unwarranted**

21. The Consultation Letter proposes to provide "further clarity" on the timing related to the requirement to provide preliminary information in a "timely manner", by requiring responding licensees to respond to requests for preliminary technical information within a week of receiving a complete request, regardless of workload. The Company opposes this proposal for several reasons. It magnifies the already-flawed treatment of costs associated with responding to tower requests and it moves the process even further away from the market based principles on which it was supposed to be based.

22. First, the existing regime is already flawed because it fails to impose any cost consequences and discipline upon the entrant requesting Operators in making their preliminary information requests. This has resulted in a situation where, of 200 requests for preliminary information received by the Company as of 28 February 2009, only 55, or a meager 27.5%, have resulted in official sharing requests. In the case of the 113 preliminary information requests received from two of the three new entrants' combined, the requests have translated into just three tower sharing requests, or less than 3%. The Department's proposal to impose a one week timeline, without regard to the volume of the requests being processed, would only serve to exacerbate this already unacceptable situation.

23. The root of the problem lies with section 3.0 of the COLs, which states "costs incurred at each step in the process will generally be borne by the party carrying out the step." As a result, new entrant Requesting Operators have no economic incentive to be disciplined and focused in making their preliminary information requests. To the contrary, the existing system gives them every incentive to: (i) be unfocused in choosing the sites in respect of which to request preliminary information; (ii) game the system; and (iii) "pile on" with their preliminary information requests, since doing so has adverse cost and staffing consequences for responding incumbents who are also their competitors.

24. The above-noted results confirm this. By addressing this flawed "front-end" of the tower and site sharing process, it can be expected to bring greater efficiency and timeliness to the "back-end," which is the execution of site sharing agreements and the actual provision of shared site and tower access. Accordingly, the Company is of the view that the Department should seriously consider initiating a full consultation aimed at amending section 3.0 of the roaming and tower sharing COLs to provide that the costs of responding to a request for preliminary information be covered in their entirety by the Requesting Carrier. This will give requestors the cost incentive to be strategic in making their preliminary information requests and to limit their requests to those sites where there they believe there is a reasonable possibility they will have an interest in actually sharing access.

25. The Company notes that there is a long-established precedent favouring cost recovery by the responding carrier, even in the highly regulated wireline telecommunications industry, where responding carriers are entitled to be compensated for the reasonable costs they incur as a result of processing requests for services received from other carriers. In the case of

competitors requesting co-location in the incumbent carriers central offices, a situation directly analogous to potential applications to share access to tower sites, CRTC-approved tariffs<sup>5</sup> allow cost recovery for: the work required to determine whether co-location can be provided; the administration, design and engineering tasks required to accommodate the request for co-location; the make-ready costs associated with getting a site ready for co-location; and construction costs. It is particularly egregious that the cost of providing information to be used by new entrant competitors to access forborne wireless structures, which have never been monopoly provided and which were built using private shareholder equity, must be borne by the owner of the asset being accessed.

26. The lack of discipline inherent in the existing system also adversely impacts the ability of an incumbent responding licensee to respond to official requests to share. In an intensely competitive market, cost containment is critical. The Company has limited resources to devote to tower and site sharing requests. We do not have a central repository of information and it takes considerable time to locate and verify the currency of information provided in response to a preliminary information request. We generally require 30 days to pull this information together and send it to the requester. Time spent responding to wasteful preliminary information requests is time diverted from responding to official sharing requests and serving our customers.

27. The Company's second concern is that the proposed guideline moves the tower and site sharing process even further away from the commercial and market principles that were intended to apply and imposes regulation where none is required. In this regard, the Company notes that it verbally undertook in the fall of 2008 to process preliminary information requests from one of the new entrant at a stated weekly volume. Providing this level of transparency was beneficial because it allowed that new entrant to prioritize its preliminary information requests. This mirrors the way wireless carriers do business in the real world. It is also how customers and suppliers arrange their relationships in other competitive markets. Imposing a "top down" one week deadline for information responses, without regard to the volume of requests being processed by the responding licensee ignores such market forces and the operational realities of the business. Moreover, it makes no sense to give the same priority to all requesters when it is unclear that some of the new entrants may not be able to meet the Canadian ownership and

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<sup>5</sup> CRTC 7516, Item 110.

control requirements which are a legal precondition that must be met in order to lawfully hold AWS licenses.

28. In any event, imposing such an arbitrary processing requirement, without regard to workload, would require the Company to hire additional staff to meet the requirement or risk being in non-compliance. These costs must be born by the requestor, not the responding licensee if the market forces principle is to be maintained.

29. For all of these reasons, the proposal to require responses to preliminary information requests within a week should be withdrawn. If the Department does opt for some type of guideline relating to response times for requests for preliminary information (which the Company opposes for the reasons outlined above), it should be made conditional upon the full causal costs of responding to requests for preliminary information covered by the requesting operator.

### **2.3 Section 8, Licence Condition 3: The Proposed Information Requirements are generally acceptable**

30. Page two of the Consultation Letter proposes to impose minimum information requirements that a responding operator would be required to include in a response to a preliminary information request. The Company provides the following general comments before addressing the particular proposed minimum information requirements.

31. Just as requesting operators must be responsible for the volume of information requests they make, so too must they take responsibility for their content. Requesting operators can play a significant role in streamlining the efficiency of the information exchange process by including the site reference number and the geographic coordinates with any request for preliminary site information. This information is easily obtained from the Industry Canada website.<sup>6</sup> Any preliminary information request that fails to include this basic information results in additional delays. Preliminary information requests that fail to include this information should be automatically returned to requesters as incomplete.

32. Furthermore, as the Department is aware, its policy mandating the sharing of tower sites has created an "open season" for parties other than AWS provisional licensees to seek access to the Company's structures. While some of these parties have been radiocommunication

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<sup>6</sup> [http://sd.ic.gc.ca/pls/fmdoc\\_anon/web\\_search.geographical\\_input](http://sd.ic.gc.ca/pls/fmdoc_anon/web_search.geographical_input)

carriers, others have not. These parties appear to view the Department's new mandated tower and site sharing policy as an opportunity to solve their technical and network issues. As stated above, the Company has limited resources to deal with the significant numbers of sharing requests it is receiving from AWS licensees, especially during this early phase of the new environment. As a result, the Company believes that it would be appropriate for the Department to grant responding licensees the flexibility to prioritize processing of sharing requests originating from AWS and incumbent mobile licensees for at least the first two years of the tower and site sharing framework.

33. The Company has the following brief comments on the specific proposed preliminary information requirements:

- Tower loading profile: the Company believes this information is relevant to a requesting operator in formulating an official request. The Company endeavors to provide this information in a timely fashion and has no objection to continuing to do so.
- "Imminent" future tower use plans: the Company addresses this issue in detail in section 2.4, below.
- Contracted third party lease arrangements: The Company understands this to refer to leases (or other contractual arrangements) between the Company and third parties, under which the Company has licensed tower or site space, or reserved such space on the tower for future use. The disclosure of this information is highly inappropriate for several reasons. First, it is commercially sensitive information. Its disclosure could reasonably be expected to materially and adversely impact contractual arrangements or negotiations between the Company and other parties regarding access to its towers and sites. In some cases, there are contractual relationships which prohibit its disclosure. In any event, this is information that is consistently treated in a confidential manner and that would never be disclosed to a prospective customer under any circumstances in a competitive market. Moreover, this information is unnecessary and irrelevant to a new entrant requester in deciding whether or not to make an official site sharing request. At most, all the responding licensee needs to do is indicate what space on the tower (and site) is currently in use or has been allocated for future use. The Company makes good faith attempts to provide such information as part of its responses to requests for preliminary information. By providing this information, requesting operators can decide

the extent to which they wish to formulate an official request to share the available space (if any) on the tower.

- Compound layout: the Company believes this information is relevant to a requesting operator in formulating an official request. The Company endeavors to provide this information in a timely fashion and has no objection to continuing to do so.
- Tower foundation design: Where this information is available, the Company provides it and has no objection to continuing to do so. However, the Company notes that the tower foundation study is often irrelevant to the determination of technical feasibility of any subsequent official proposal to share, as the sharing decision is likely to be based primarily upon radio-frequency related considerations, such as interference.
- Transport Canada/NAV Canada Form: the Company believes this information is relevant to a requesting operator in formulating an official request. The Company endeavors to provide this information in a timely fashion and has no objection to continuing to do so.
- Site Lease Summary: the Company objects to providing this information as it goes beyond what is required by a requesting operator at this stage of the information exchange. In the event the requesting operator submits an official request to share and there are relevant head lease issues that would require the requestor to contact the landlord for access, the Company would advise of this requirement at that time. It would be wasteful and counter-productive to require the responding licensee to provide a site lease summary at the preliminary information stage, particularly when only about one in four preliminary information requests is currently crystallizing into an official request to share.
- Site Contact Information: the Company agrees this information is relevant and provides it in all instances. The Company has established a single point of contact regarding site and tower information and sharing requests. This information is available at [cololocation@bell.ca](mailto:cololocation@bell.ca).
- Site access within one week of the request: the Company generally agrees to coordinate a site access visit within one week of receiving the request. However, such

visits may be subject to accessibility limitations. For example, in winter, the requesting operator should be prepared to access certain sites by way of snow shoes or cross country skis in the event the access road is unplowed.

**2.4 Section 8, Licence Condition 3: The Proposed "Imminent" Future Use guideline contravenes COLs, Past Industry Canada practice and should be withdrawn**

34. At page 3 of the Consultation Letter, the Department proposes the following guideline regarding the reservation of tower and site space for future use:

It is hereby proposed that only imminent future use should be considered in the context of the preliminary information package and that "imminent" would include plans which are clearly and specifically identified in the Licensee's annual capital plan. Where the tower owner is reserving space because there is a plan to install equipment on the tower in the longer term, the companies are expected to deal with this during the negotiation of their commercial arrangements. In addition, any space reserved on a tower for future use by a third party where a contract is in place and fees are being paid should be identified as part of the preliminary information package. In this situation, the requesting carrier can consider approaching the third party to discuss access to that space.

35. This proposal is improper and the Companies are opposed to this proposal on a number of grounds set out below.

36. First, as noted in section 2.1 above, there is the transparency concern with the Department introducing what is tantamount to a substantive amendment to the Tower and Site Sharing COLs long *after* having conducted the AWS auction process, including receiving payment of \$750 million from the Company for AWS spectrum fees, on the basis of the former substantive rules and without having provided a prior right to comment on this material change.

37. The Department gave notice of the prior substantive tower and site sharing rules by way of Gazette Notice DGRB-002-08, entitled *Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements* on 8 March 2008, prior to the application deadline for parties wishing to participate in the AWS spectrum auction so that potential bidders could make fully informed decisions about their participation. Nowhere did Notice DGRB-002-08 give any indication that the Department intended to place the rights of a requesting licensee to request access to spare capacity on a responding licensee's tower on par with those of the tower owner. To the contrary, Notice DGRB-002-8 contains the same

commercial and market based standard applicable to tower sharing as is found in section 8(4)(a) of the finalized COLs:

Industry Canada expects that Site-Sharing Agreements, including access to ancillary equipment and services, will be offered at commercial rates that are reasonably comparable to rates currently charged to others for similar access; (emphasis added)

38. The marked departure from the commercial market-based standard to similar access which the proposed guideline represents can best be illustrated by the following hypothetical example. Assume the Company owns a tower with two open slots for antenna attachments. The Company's planned attachment of an antenna in Slot A is contained in the Company's 2009 Capital Plan, and thus meets the proposed definition of "imminent" future capacity use. The Company plans to utilize Slot B in mid 2010 as part of its AWS rollout plan. Under the commercial access standard embodied in Notice DGRB-002-08, the Company would have been entitled under COL 8(3), consistent with commercial practice relating to access to spare capacity to indicate in its response for preliminary information that Slots A and B are reserved for its future needs and to respond to the requester that there is no available space on that tower. The response under proposed guideline would be materially different. The Company would still indicate that Slot A is allocated for its imminent future use and would continue to be "off the table". However in the case of Slot B, the Company would be required to indicate that this is available future spare capacity and be required to negotiate access to this space on commercially reasonable rates, terms and conditions for "similar access".

39. The responding licensee's refusal to negotiate access in respect of its non-"imminent" future space needs relative to Slot B would become a relevant consideration in determining the responding carrier's compliance or non-compliance with the Tower and Site Sharing COLs, including Section 8, COL 3.

40. It is inappropriate and procedurally unfair for the Department to now propose such a material substantive change to the COLs post-auction in this manner and to do so under the guise of a guideline. On this basis alone, this proposed guideline should be withdrawn.

41. Moreover, the Department gave official notice of the prior rule. All auction participants thus reasonably relied upon the substance of the prior rule as it was articulated in the Notice in preparing their AWS business plans and auction valuations and in making their spectrum bids. Such a material substantive change not only undermines the integrity of this (and potentially,

future) Industry Canada spectrum auctions it may well subject the Department to legal claims on the basis of negligent misrepresentation of the post-auction licence framework. The taking of responding licensees' spare capacity in this manner may also subject the Department to actions in illegal expropriation.

42. Beyond these legal and procedural flaws, the imminent use proposal is also inconsistent with the Department's long-established policies generally providing licensees with a five year period in which to demonstrate their spectrum utilization.<sup>7</sup> It is irrational to view five years as a reasonable period in which to expect a licensee to rollout its spectrum implementation, which necessarily includes utilization of that licensee's spare tower capacity, and then effectively adopt a one-year "use it or lose it" policy in respect of that licensee's tower capacity utilization.

43. The proposed imminent use guideline also ignores well-established Canadian industry practice in wireless network provisioning, which typically works on the basis of three to five year provisioning plans. This constitutes a further erosion in the principle of relying upon market forces and allowing commercial principles to govern the industry when it comes to tower sharing and roaming.

44. The Company notes that its 2001 expansion into western Canada, its 2003 1xRTT data network deployment and its planned implementation of AWS spectrum were all based on three year deployment timeframes.

45. The Company's 2003 1xRTT business case is illustrative. 1xRTT is the 2.5G technology for the CDMA 2000 evolution path, fully backwards-compatible to IS95. Its main benefits include peak data speeds of 163 kbps and an increase in voice capacity by 50%. 1xRTT represents an example of a technological change that required a full network upgrade, impacting all cell sites and the Company's core network that was implemented on the basis of the Company's standard three year business planning cycle. The Company is filing the Bell Mobility 2001 business plan as Attachment 1 in confidence with the Department to demonstrate this point. The Company is also filing in confidence Attachment 2, being a related spread sheet

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<sup>7</sup> By way of illustration, the following Condition of Licence appears in the Department's 2001 PCS Licences:

14. Implementation of Spectrum Usage

Within *five years* of the auction's close, the licensee must demonstrate to the Department that the spectrum has been put into use. The establishment of coverage to 50% of the population within the licensed service area, or some other indicator of usage that is acceptable to the Department, will be required. (Emphasis added)

illustrating the phased upgrades to the Company's cell sites associated with the operationalization of the business plan. The Company claims confidential treatment in respect of both attachments under section 20 of the *Access to Information Act*. The information in the attachments constitutes financial, commercial information that is Bell Mobility confidential information supplied to the Department that is treated consistently in a confidential manner by the Company. The aforementioned information is information the disclosure of which would enable our competitors to better understand our network provisioning practices and metrics, which could reasonably be expected to result in material financial loss to, or could reasonably be expected to prejudice the competitive position of the Company, particularly in the increasingly competitive Canadian wireless market.

46. The attachments illustrate how a network upgrade is justified by the Company as an overall program spanning multiple budget years. Included within year one of the business plan is business planning, the decision to move ahead based on early technology trials and strategic rationale and lab development. This is followed in subsequent years with lab development, first office applications, market trials and commercial launch. These are standard milestones applied by the Company with the introduction of any new technology to insure that business and technology plans are optimized and therefore typically require three to five years to complete. For more complex network upgrades, such as what would be required to build out AWS spectrum, this period would typically be closer to the five year end of this spectrum.

47. It bears repeating that the stated policy underpinning Industry Canada's tower and site sharing policy framework is reliance upon commercial rates and market forces. The commercial reality is that tower owners have historically had the right to manage their assets and provision space on their towers based on the fact they incurred all of the risks, and invested their capital to build the asset. As Attachments 1 and 2 amply demonstrate, the Company does this based upon minimum three to five year planning cycles. Owners built these assets in a competitive, un-regulated market and not under guaranteed rate of return regulation. Imposing a one year imminent use period and effectively placing the requesting operator on an even footing with the responding licensee tower owner in terms of entitlement to access spare tower capacity (from the tower owner and third parties with whom the tower owner has granted future space utilization rights) is offensive to the notion of commercial practice and market forces. If implemented, this proposal could also result in a situation where a responding licensee was forced to yield its own non-"imminent" future tower capacity to one or more requesting operator(s) only to be forced to subsequently replace or rebuild that tower. That situation would

arise under the above hypothetical scenario if the Company ceded access to Slot B in 2009 only to require that slot in mid 2010 in accordance with its current plans. With no additional capacity remaining on that tower the Company could conceivably be forced to have to augment or entirely replace the tower. It would be highly improper for the Company to incur any such tower replacement or augmentation costs, particularly since this cost would be causally linked to the requesters' use of the owner's spare capacity.

48. Even in the highly regulated telecom industry, there is an understanding amongst the CRTC and stakeholders that incumbent local exchange carriers retain their spare capacity for their own future use based upon three to five year provisioning cycles.<sup>8</sup> Bell Canada's internal practice in terms of provisioning for spare capacity typically operates on such three to five year time frames.

49. The Company also views as inappropriate the Department's proposal that new entrants enter into discussions with third parties, who have contracted with the Company for future tower space requirements. The Company believes that as the owner of the site in question it must be a party to any such negotiations, consistent with standard commercial principles granting a property owner the right to approve any agreement to sub-license its property.

50. For all of the foregoing reasons, Industry Canada's proposed policy on imminent use should be withdrawn. If the Department opts to move forward with some form of imminent use guideline, which the Company opposes for the reasons outlined above, in order to remain consistent with Canadian commercial practice and the Department's own long standing policies and spectrum conditions of license, the proposed definition of imminent must be amended to reflect, at a minimum, the industry standard embodied by a three to five year tower provisioning cycle.

## **2.5 Requirements for Confidentiality are generally appropriate**

51. At page 3 of the Consultation Letter, the Department recognizes the need to maintain confidentiality and accepts the use of non-disclosure agreements between responding licensees

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<sup>8</sup> See: Telecom Decision CRTC 95-13, *Access to Telephone Company Support Structures*, wherein the Commission stated: "The Commission finds it reasonable that the telephone companies be required to provide access to their support structures where spare capacity is available. Accordingly, the Commission directs the telephone companies to make their support structures available to telecommunications carriers and cable television undertakings, where spare capacity is available."

and requesting operators. The Department proposes that NDAs be generic and should not be unique to a single operator or group. The Consultation Letter goes on to state the Department's view that signing a non-disclosure agreement should not be a reason to delay providing a preliminary information package to a requesting operator.

52. The Company generally agrees that NDAs should be generic, however, the Company considers there are sound commercial reasons for executing mutual NDAs prior to commencing the exchange of preliminary information.

53. The Company notes that as of 27 February 2009 it has executed three mutual NDAs. All three are *mutual* NDAs, in so far as they protect the disclosure of confidential information originating with either party. The Company can confirm that all three of these NDAs are substantially similar. The Company made some minor revisions to one of the NDAs to accommodate concerns raised by a new entrant regarding the disclosure of confidential information for the purpose of licence renewals or in arbitration proceedings as contemplated under the Tower and Site Sharing COLs. The Company would have no objection to executing a standard form NDA with all requesting licensees.

54. The Company's experience executing the NDAs is that they have not meaningfully delayed responses to the preliminary information requests. Moreover, signing the NDA at the front end of the process avoids delays at the back end, since the same NDA protects against the improper disclosure of sensitive confidential business information throughout the process.

### **3.0 CONCLUSION**

55. The Company appreciates the opportunity to file these comments. As indicated above, this consultation provides further evidence of the Company's concern since the very beginning of the AWS consultation process in 2007 regarding the government's ability to limit its interference with market forces despite the competitiveness of the wireless market. These prescriptive, detailed and intrusive proposed regulatory measures provide further evidence of the adage that regulation begets more regulation.

56. The Department should respect the foundational policy on which the tower and site sharing rules are based: negotiated commercial rates based on competitive market forces. It is

far too soon to be effectively rewriting tower and site sharing conditions of licence that have barely been in force for three months.

57. For all of these reasons, the proposed guidelines should be withdrawn. In the event the Department opts to go forward with guidelines (which the Company opposes) then the proposals should be amended as proposed above in order for the tower and site sharing conditions of licence to remain consistent with the overarching standard of being consistent with commercial practice in a non-regulated and competitive market.

All of which is respectfully submitted.

\*\*\* End of Document \*\*\*