



6 March 2009

Delivered via email to: spectrum.operations@ic.gc.ca

Mr. Peter Hill
Director, Spectrum Management Operations
Industry Canada
Radiocommunications and
Broadcasting Regulatory Branch
300 Slater Street
Ottawa, Ontario
K1A 0C8

Dear Mr. Hill:

Re: Response of Globalive Wireless Management Corp. to Industry Canada letter seeking comment on Timelines for Antenna Tower & Site Sharing Process, Reservations for Future Use, and Requirements for Confidentiality

1. Globalive Wireless Management Corp. ("GWMC") is in receipt of a letter from Industry Canada regarding the above noted matter (the "IC Letter"). GWMC understands that the purpose of this process is not to review the conditions of licence set out in CPC-2-0-17. Rather, Industry Canada is seeking comment on specific issues and proposals outlined in the IC Letter that will be used as input in the formulation of guidelines concerning complaints of non-compliance.
2. GWMC is pleased to provide comments on each of the specific issues and proposals set out in the IC Letter. Our experience since the end of the AWS auction has shown, unfortunately (but not, as reflected in previous comments and correspondence provided by GWMC or Globalive Communications Corp., surprisingly) that there is a very real and ever-more-pressing need for the guidelines set out in the IC Letter.
3. **Compliance guidelines are in the public interest.** In CPC-2-0-17 Industry Canada reiterated the two policy objectives that were in the public interest and the drivers for the licence conditions relating to mandatory tower and site sharing i.e., to limit the social impacts of a proliferation of new towers and to facilitate new competitive entry into the provision of wireless services.¹ These policy objectives are clearly being frustrated by

¹ CPC-2-0-17, Section 1.1

the incumbents. Thus, GWMC strongly urges Industry Canada to establish compliance guidelines around the conditions of licence as soon as possible and without further drawn-out processes. The issues raised by the IC Letter go to the very heart of a number of matters that are delaying GWMC's roll-out plans for wireless service, and no doubt those of other new entrants as well.

4. Without compliance guidelines it is quite clear that the incumbent wireless carriers have no incentive to provide tower sharing information to new entrants on a timely basis as the revenue from tower sharing is likely to pale in comparison to the revenue effects of new competitive entry. Whether it is claims of a shortage of resources to process requests for information in parallel, the stretching of the interval for delivery of preliminary information packages, exaggerating owner space requirements such that new entrants are forced to evaluate use of the least desirable portions of a tower, or providing incomplete information in hopes the new entrants will go away, the effects are the same, namely delay of new wireless entry and frustration of new entrants' efforts to share towers.
5. **Industry Canada needs to follow up on enforcement.** Establishing compliance guidelines is not in itself enough. If such guidelines are to be at all effective, incumbent behaviour thus far has made clear that Industry Canada will also have to follow up with actual enforcement of these guidelines in a just and expedient manner which creates material incentives for the incumbents to "negotiate with a Requesting Operator in good faith, with a view to concluding a Site-Sharing Agreement in a timely manner."²
6. The total reliance on free market principles as governing principles to guide tower and site sharing as envisioned by some incumbents and captured in the following comment is totally unrealistic and will not promote the above-noted policy objectives:

"Fourth, the framework for negotiations should respect the private property of the owners and the objective of maximum reliance on market forces. For example, reservation by a tower owner of reasonable capacity to support future use without requiring that tower owner to incur costs for tower reinforcement/rebuild that are not required for that carrier's own current and future network design requirements would be permitted."³

It is also important to note that a spectrum license is a privilege which must be exercised subject the conditions of the licence. The licences mandate tower and site sharing and therefore private property rights must be subservient to the conditions of licence unless the tower owner wishes to surrender its license.

² CPC-2-0-17, Section 8, Condition 6

³ Telus Communications Company submission to Industry Canada dated January 22, 2008 in response to Canada Gazette Part I, Gazette Notice DGRB-010-07 at section 4.1

Timelines for Antenna Tower and Site Sharing

7. The conditions of license applicable to antenna tower and site sharing requires licensee's, among other things, to:
 - “... respond, in a timely manner, to an initial request for information by a Requesting Operator as follows:
 - the Licensee shall provide to the Requesting Operator any preliminary technical information for each Site, such as drawings, surveys, technical data, engineering information, future requirements, lease provisions and other information relating to the site relevant to formulating a Proposal to Share that it has in its possession or control; and
 - upon reasonable notice by the Requesting Operator, the Licensee shall facilitate access to the Site so that a formal Proposal to Share can be formulated.”⁴ {emphasis added}
8. The IC Letter sets out a guideline which address three elements of the above license condition as follows:
 - a. interpreting the phrase “in a timely manner”;
 - b. the minimum amount of information to be included in the preliminary information package; and
 - c. the minimum the time frame for facilitating site access prior to a Proposal to Share.
9. **GWMC agrees that the phrase “in a timely manner” needs further specification given the delays that GWMC has experienced to date.** In the absence of such guidelines, GWMC could, and has in fact, been waiting months for preliminary information packages from un-cooperative licensees. While some Licensees may in fact argue that they are resource constrained and thus cannot meet defined time guidelines, a lack of resources is merely a reflection of priorities and competitive objectives. A lack of resources is not an acceptable excuse for delay and most certainly is not an excuse for thwarting the two important public policy objectives of the license conditions, namely, to limit the social impacts of a proliferation of new towers and to facilitate new competitive entry into the provision of wireless services.
10. **GWMC also agrees with the guideline that equates “in a timely manner” with a period of one week.** In GWMC's experience, this information is on hand and should be available by all incumbents in a relatively short period of time. To the extent that a Licensee's records are not well organized for each site (a proposition that GWMC does not accept given the importance of each site to Licensees), the incumbents ought to be

⁴ CPC-2-0-17, Section 8, License Condition 3

able to bring their records up-to-date within a reasonable initial time period (i.e., no more than two weeks after a decision by Industry Canada on this matter) so that future requests could be met with the very reasonable one week time frame. Indeed, GWMC submits that if the incumbents were currently in compliance with the conditions of licence, no transition period ought to be necessary, as they will already have taken such steps.

11. Moreover, with the more narrow and streamlined definition of “future requirements” and other streamlined information in the proposed guidelines, meeting the one week timeline should be straight forward and easily streamlined.
12. With respect to the guideline for the content of a response to a request for a preliminary information package, the IC Letter states:

“...the licensee is expected to produce a response including as a minimum: tower loading profile including imminent future use and contracted third-party lease arrangements, compound layout, tower foundations design, Transport Canada and/or NAV Canada form, site lease summary as well as site access information, such as contact, procedure and any specific restrictions relating to a site visit.”
{emphasis added}
13. **GWMC agrees with the information outlined above.** This clearly is information which is on hand and available for all incumbents and is the minimum information that will allow the new AWS carriers to begin sizing up specific sites.
14. Lastly, **GWMC believes it is perfectly reasonable for incumbents to provide access to their sites within a week of the request.** Extenuating circumstances such as the remoteness of the site are quite acceptable to GWMC, on the presumption that these extenuating circumstances are few and far between.

Reservations for Future Use

15. The IC Letter proposes that guidelines be established around the terms “future requirements” and “lease provisions” as these terms are used to define information required in preliminary information packages.
16. The IC Letter proposes 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. Further, 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.
17. **GWMC agrees that the term "imminent future use" be defined as being in the annual capital plan.** However, GWMC is concerned that this is not enough to achieve its aim. Past practice of the incumbents has shown that they cannot be relied on to be honest

and to act in good faith in this regard. GWMC would suggest, at a minimum, that any "imminent future use" be attended by a affidavit in a form acceptable to Industry Canada, acting reasonably, that there is an actual and good faith intention to use this space in that period, signed by a responsible officer of the company so claiming. We would also suggest that Industry Canada undertake to follow up with such companies and officers after the period has expired and the space has not been used, to satisfy itself that no breach of the conditions of licence has occurred.

18. In addition, the IC Letter also proposes that any space reserved on a tower for future use of a third party be disclosed in the preliminary information package only where a contract is in place and fees are being paid. The IC letter also states that in this situation, the requesting carrier can consider approaching the third party to discuss access to that space. This of course implies that the preliminary information package disclose the identity of the third party as well as the space reserved by that party.
19. GWMC supports the proposal with respect to tower space reserved by third parties as fair and reasonable with one important caveat, namely, umbrella sharing agreements between licensees that do not reserve specific tower or site space (e.g., joint planning agreements or master agreements for tower sharing) need not be disclosed on the tower profiles, and in any event, the rates for access should be left up to commercial negotiation and arbitration if necessary.

Requirements for Confidentiality

20. GWMC submits that the parties have a mutual interest in executing a Non-Disclosure Agreement ("NDA") between themselves as the process for tower sharing progresses. GWMC also agrees with the IC Letter's statement that NDA's should be generic in nature and should not include provisions that are unique to a single operator or group.
21. **In order to significantly reduce the continued inefficient argumentation about NDAs, it is in the public interest to add some simple clarifications.** GWMC, based on experience negotiating with one certain uncooperative licensee, hereby suggests that the following additional clarification be added to the guidelines:
 - i. The NDA's do not prohibit a party's rights to raise issues with Industry Canada concerning technical feasibility or non-compliance with license conditions (in confidence).
 - ii. The standard of care for protecting confidential information imposed on the recipient should be at least that degree of care the recipient uses to prevent disclosure, publication or dissemination of its own confidential information, but in no event less than reasonable care.
 - iii. The NDA must not create undue operational impediments for the recipient when working with the confidential information to achieve the purpose of such disclosure, i.e., tower sharing. Thus, disclosure of confidential information must

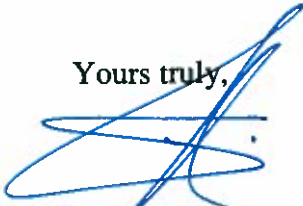
be permitted in confidence to the recipient's employees, officers, directors, contractors, sub-contractors, agents and professional advisors as well as the employees, officers, directors, contractors, sub-contractors, agents and professional advisors of any of its affiliates, to the extent necessary for the purpose of the NDA (and, for the sake of clarity, without the prior written consent of the disclosing party).

22. GWMC also agrees that the strict disclosure of only imminent future plans and basic technical information during the preliminary phase makes the lack of a signed non-disclosure agreement an inappropriate reason to delay providing preliminary information packages as contemplated in the IC Letter.

Summary

23. A speedy decision by IC is critical to the launch of service this year. As noted above, GWMC's experience regarding antenna tower and site sharing has shown that there is a very real and pressing need for the guidelines set out in the IC Letter and such guidelines must be established as soon as possible. GWMC supports the proposed guidelines in the IC Letter.

Yours truly,



Simon Lockie
DIRECTOR