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May 29, 2009

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

Dear Mr. Hill:

Subject: Gazette Notice DGRB-002-09 Consultation on the Renewal of Cellular and Personal Communications Services (PCS) Spectrum Licences, March 2009

TELUS Communications Company (TELUS) appreciates the opportunity to respond to the issues raised by Industry Canada (the Department) in Canada Gazette Notice DGRB-002-09 (Consultation Paper). The headings used are those found in the Consultation Paper.

In our comments below, TELUS recommends that the Department:

- In keeping with research undertaken by the Department, minimum licence periods be set at a minimum of 15 years and preferably higher.
- Ensure that renewed licences come with a high expectation of renewal.
- Eliminate its RP-019 *Policy for the Provision of Cellular Services by New Parties*.
- Remove the R&D condition of licence as unnecessary given the billions being invested in new and innovative technology and service by Canada's mobile wireless carriers.
- Champion cost recovery for licensees for the provision of Lawful Intercept services.
- Work with the industry to develop a methodology to set fees at a fair and reasonable level.

Renewal of Cellular and PCS Licences

The Department invites comments on its proposal to renew cellular and PCS licences.

TELUS agrees with the Department's intention to renew cellular and PCS licences where the licence is in compliance with the licence conditions by re-issuance or amendment. As outlined below TELUS believes the renewal term should be for a longer period than the 10 years proposed by the Department.

Service in Rural Areas

In the Consultation paper the Department notes that "wireless service is available to 98% of Canadians and covers 20% of the geography. This availability is significant considering Canada's vast land mass, which covers nearly 10 million km²."¹ As one example of this significance, TELUS has very close to 100% geographic coverage in the province of Alberta. Having recognized the admirable job of Canada's wireless service providers in deploying and growing networks and services to Canadians, the Department also notes that "service is being provided in areas where licensees have determined that there is a viable and sustainable business case."² Unfortunately the Department then proceeds to undo its recognition of the significant coverage being provided and the fact that over 98% of Canadians have cellular/PCS coverage. In the same section of the Consultation paper the department suggests that the mechanism contained in RP-019, *Policy for the Provision of Cellular Services by New Parties* may be *expanded*.

TELUS, along with many others has stated its opposition to the mechanism contained in RP-019 in the past and reiterates that such a mechanism was unnecessary when it was introduced and given the service availability and continuously expanding geographic coverage is even more unnecessary today. **TELUS respectfully recommends that rather than expanding the policy, the Department eliminate RP-019.**

Deployment targets

TELUS supports the Department's intention to eliminate the condition of licence relating to meeting deployment targets for cellular and PCS licences in recognition of both the extensive services being offered and, as outlined above, the very significant geographic and population coverage achieved. TELUS believes that any deployment concerns the Department might have had regarding availability of cellular and PCS services have been demonstrably

¹ DGRB-002-09 Consultation on the Renewal of Cellular and Personal Communications (PCS) Spectrum Licences, March 2009, page 4.

² Ibid

alleviated by the results to-date. TELUS also confirms that geographic expansion continues on a regular and ongoing basis as part of our capital build program. Additional cell sites to expand rural/remote coverage are added as they can be incrementally economically justified.

Licence Conditions at Renewal

The Department seeks comments on all licence conditions for renewed cellular and PCS licences.

Licence Term and Renewal

In the present Consultation Paper the Department stated that it intends to renew the cellular and PCS licences for a 10 year term. **TELUS supports the renewal of these licences for a longer term than 10 years combined with a high expectation of renewal.**

As previously noted TELUS believes that the renewal term for cellular/PCS licences should be longer than the proposed 10 year term. In the DGRB-001-09 Framework document the Department states that its reluctance to set a longer licence term is because “Industry Canada’s powers to revoke differ from those in other countries and do not include the power to revoke for spectrum management reasons”³ or in other words if reallocation of the spectrum to a different use was thought necessary.

This reservation should not deter the Department in renewing cellular and PCS licences for a greater term than 10 years. Realistically there will be no reallocation in this band as it is already being used for what are almost certainly the highest valued services for the foreseeable future. Additionally and supportive of this fact;

- Over 70% of Canada’s population have terminal equipment that uses the frequencies in this band.
- As the Department has stated, cellular and PCS networks cover 98% of the Canadian population and the geographic coverage is extensive.
- Multiple carriers have built out networks costing billions of dollars in these bands.

The Department as it has noted in DGRB-001-09 still retains the right of revocation in this band “where the *Radiocommunication Act*, the *Radiocommunication Regulations* or the terms or conditions of licence have been contravened, or where an authorization was obtained through misrepresentation or for non-payment of fees.”⁴ In other words, save reallocating the cellular and

³ DGRB-001-09, Consultation on Revisions to the Framework for Spectrum Auctions in Canada, section 7.1, page 7.

⁴ Op cit.

PCS bands to a completely different use, the Department has all the revocation powers it needs and should move to lengthen the licence term to a minimum of 15 or more preferably 20 years.

The call for lengthier licence terms finds support in the McLean Foster report prepared for the Department in 2007. The report's authors say "We have considered both very long-term licences, which safeguard investment in assets over a term of 30-40 years, and long-term licences for, say, 15-20 years, which gives the regulator the opportunity to recover spectrum at intervals when it is desirable to do so. On balance, very long-term arrangements are more favourable on the grounds that they give better investment incentives and involve a clearer definition of licensee's rights. However, departures from this may be appropriate in specific bands."⁵

The FCC has recently moved to an initial 15 year term for spectrum licences in both their recent AWS spectrum auction and their 700 MHz spectrum auctions. While not as long as those recommended by Professor Cave and his colleagues this is still a 50% improvement on what the Department is proposing. **TELUS respectfully recommends that the cellular and PCS spectrum licences be renewed for a period of no less than 15 years and preferably for a period of 20 years.**

As noted above the one concern expressed by the Department regarding licence renewal periods over 10 years is not one that applies to the cellular and PCS spectrum bands in any realistic fashion. The less the uncertainty associated with these licences the greater incentive the operators have to invest and the greater willingness investors have in advancing them the funding to do so.

Most businesses in Canada do not operate under the threat of a ten year end to their ability to do business and reap returns from their investments. Longer terms engender greater certainty and therefore greater willingness to invest for long term stability and success. This greater investment brings newer services to market faster to meet the emerging requirements of Canadian consumers and businesses.

Ian Munro made much the same point when he said "The more uncertainty that the government injects into future licence terms, the greater will be the disincentive for licensees to invest in new and better technology and service offerings (and the lower will be the initial auction revenues for such licences). Just as an auction can determine the optimal distribution of licences initially, a secondary market (unencumbered by regulatory risk) can ensure an efficient distribution over time. The natural reluctance of politicians and bureaucrats to "let go" must be overcome and spectrum licences should be made perpetual."⁶ Mr. Munro also notes in this context that "Also in those rare cases of an unforeseen and overriding public need developing, the government could

⁵ Study of Market-based Exclusive Spectrum Rights, McLean Foster & Co. in collaboration with Prof. Martin Cave, Robert W. Jones and Dr. William Lehr for Industry Canada, August 31, 2007, page 7.

⁶ Ian Munro, Chicken Little Eats Crow: How the Critics Got It Wrong about Spectrum Auctions, Atlantic Institute for Market Studies, October 2008, page 20.

exercise its right of eminent domain, with appropriate compensation for the licensee that is required to vacate its spectrum.”⁷

TELUS further recommends that the renewed licences come with a high expectation of renewal in order to solidify business certainty. The nature of the wireless networks business, and other high fixed cost businesses, is one of significant upfront investment with returns only earned over a long period of time. A review of the public financial statements of the three largest wireless carriers in Canada shows that it took over 21 years before the industry was able to earn back the investment made to establish the networks. Given the huge embedded investment and ongoing capital and operating expenditures made by all cellular and PCS carriers coupled with the current and, as most economic pundits have it, ongoing economic rigors, having a high expectation of renewal attached to these licences culminates in lower costs of capital and longer planning horizons for these networks. This in turn benefits Canadians in both better and more intensive coverage and in competitive rivalry. TELUS notes that in DGRB-004-02 the cellular and incumbent PCS licences were granted with a high expectation of renewal, just as the PCS spectrum licences acquired in the 2001 spectrum auction were.⁸ Somewhere along the line and without specifically consulting on the matter this commitment has gone missing.

The newly acquired AWS spectrum licences merely state that “The process for issuing licences after this term and any issues related to renewal will be determined by the Minister of Industry”.⁹ The expectation of renewal is as important as the licence term in ensuring business confidence and hence certainty. Moreover, TELUS notes that in its DGRB-001-09 Consultation Paper and speaking of the renewal of auctioned licences the Department “recognizes the significant investments made by licensees to establish networks and the importance of long-term certainty that the industry requires to provide a stable investment climate. It is therefore proposed that licences continue to have a high expectation of renewal per the existing Framework.”¹⁰ **TELUS recommends that the Department revert to the use of a high expectation of renewal for all cellular and PCS spectrum licences, those that are the subject of this consultation as well as auctioned spectrum licences.**

Spectrum Aggregation Limit

TELUS supports the Department’s intention to remove the Spectrum Aggregation limit for Cellular and PCS spectrum in accordance with the August 27, 2004 decision by the Minister of Industry to rescind the then mobile spectrum cap relating to Cellular and PCS spectrum.

⁷ Ibid.

⁸ DGRB-004-02, Consultation on a New Fee and Licensing Regime for Cellular and Incumbent Personal Communications Services (PCS) licensees, page 14, section 5.3.1.1.

⁹ AWS Spectrum Licence, Industry Canada, December 2008, page 1, section 1.

¹⁰ DGRB-001-09, Op. Cit., section 5, page 7.

Research and Development

TELUS notes that as this condition of licence applies to many licences other than cellular and PCS spectrum, the Department, will be discussing the status of this licence condition under its consultation respecting DGRB-001-09. While TELUS will respond to the Department in that consultation, TELUS notes that this particular condition of licence has, in our view, outlived its usefulness and should be removed.

The requirement for research and development spending may make sense where artificial encouragement is required to ensure that a technology or technological ecosystem gains momentum and does not stagnate. The wireless business, however, has very robust ecosystems that are global in nature and continued innovation is a permanent feature of the industry. Furthermore, Canadian carriers are highly incented to find ways to innovate their offerings in order to differentiate themselves and attract or retain the subscribers required to earn a return on the significant network investments.

In particular TELUS is concerned that at a time when capital is constrained by recession and when the industry must make billions of dollars to upgrade or build innovative new networks significant spending is being dictated by a narrow definition of R&D used by CRA.

Investment in 3G and LTE is by definition investment in innovation. It is clear now that wireless has established very stable ecosystems that innovation at the network level does not have to be encouraged. Vendors are now competing in a global market serving over a billion consumers and business customers. In a 3G world innovation is enabled through the building of modern infrastructure for businesses to innovate on. According to the Department of Finance, Canada's SR&ED program compares favourably with other similar world class incentive programs. Accordingly, the level of R&D generated by wireless development should be optimal based on the income tax incentives for SR&ED and there should not be a need to have an artificial requirement in the licence conditions for, especially, cellular and PCS spectrum to conduct R&D just for the sake of conducting R&D.

Resale and Roaming

TELUS agrees with the Department that the new conditions of licence that came into effect on November 29, 2008 and apply to all cellular, PCS and AWS licences supersede the existing licence conditions concerning resale and roaming and therefore these preceding conditions should be removed.

Implementation of Spectrum Usage

As outlined above, **TELUS agrees with the Department that the extensive deployment of this spectrum means that there is no longer any need for an implementation licence condition.**

TELUS supports that Department's decision to remove this licence condition from all cellular and PCS licences, both incumbent and auctioned licences.

Lawful Interception

TELUS notes that this condition of licence currently only applies in respect of circuit-switched voice telephony systems. TELUS believes that any application to packet switched or other new technologies must recognize the necessity for industry wide standards for intercept capability - i.e. for the Carriers to implement this capability, requirements should be tied to the presence of standardized solutions versus jury rigged, stand-alone Canadian solutions.

TELUS also notes that there are significant on-going operational costs for Canada's wireless carriers associated with the provision of lawful interception results and information to Law Enforcement Agencies (LEAs). While extremely supportive of the objectives and efforts of LEAs, TELUS feels that wireless carriers should be reimbursed for these on-going costs. In this regard;

- automobile manufacturers are not required to donate police cars and other vehicles,
- uniform companies are reimbursed for the cost of uniforms supplied to LEAs, and,
- all other suppliers of services and supplies are reimbursed save wireless carriers when they provide lawful intercept services.

For wireless carriers not to be compensated turns this condition of licence into an unfair and discriminatory regulatory tax upon wireless carriers. The Canadian Radiocommunications and Telecommunications Commission (CRTC) has ruled that the provision of lawful interception services are not telecommunications services and therefore outside their jurisdiction.¹¹ **TELUS recommends the Department amend this condition of licence in order that wireless carriers are able to be compensated for the provision of these services to LEAs.**

Fee Review for Cellular and PCS Licences

The Department makes a number of comments with respect to fees for cellular and PCS spectrum licences in the Consultation Paper. The first is that the Department may establish fees following a public consultation. TELUS is concerned that there may be a consultation gap between a request for comment on the application of certain principles like fair value of fees and discussion about the methodology that impacts the quantum fee established.

TELUS also notes that the present consultation is not a consultation on fees related to the cellular and PCS spectrum licences to be renewed.

¹¹ Order CRTC 2000-676, July 21, 2000, paragraph 12.

The second comment the Department makes in the Consultation Paper is that “The 2007 *Spectrum Policy Framework for Canada (SPF)* states that the Department’s policy objective is to maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource. Market forces are to be relied upon to the maximum extent feasible to promote the efficient assignment of spectrum and earn a fair return for the Canadian public for the privilege of access to the spectrum.”¹² TELUS reminds the Department that using market forces to assign spectrum is one thing, defining and setting a fair return to the Canadian public for renewal fees is quite another.

That such a reminder is needed is seen in section 5.2 of the Consultation Paper when the Department says “As mentioned above, the SPF dictates that in managing spectrum, the Department must “earn a fair return for the Canadian public for the privilege of access to the spectrum – a public resource.” The challenge is to set fees that reflect the underlying market value while taking into account the wide variations in different markets and comparing prices paid for the spectrum in different auctions, which is further complicated by carrying economic conditions, different auction bidding strategies and the overall demand for the spectrum at the time.”¹³

TELUS submits that the Department has set itself the wrong challenge. Rather than the challenge it has outlined for itself, the Department’s challenge, in TELUS’ view is as the Department outlined in section 5.1 of the Consultation Paper, i.e. to set fees that earn a fair return for the Canadian public for non-auctioned spectrum licences.

Regardless of the “challenges”, we would submit that a fair return does not and should not equate to market value. In the truest sense Government is not a business, rather it is in the business of enabling business to occur. Government is a steward of spectrum and its job is to work to ensure that spectrum is used to enable wealth creation. Licence holders enable that wealth creation by investing in the networks that are an input to improved productivity. The investment made through the use of spectrum forms a large part of the return to the public.

Measuring the economic contribution our investment adds in terms of fees already paid, investment in plant and operating expenses, including employment, are all factors that contribute to fair return. TELUS believes that the taxes the business pays are also an important component of a return to the Canadian public. TELUS also considers that a fair return must include compensation for Government managing the spectrum.

Any further returns must both reflect investment in the spectrum, business taxes and fees and the impact of setting fees higher. In assessing a fair return to Canadians one of the goals of government should be to ensure that the maximum number of Canadians benefit from the use of this resource. Clearly if government sought to create commercial return on spectrum, the ultimate impact would be to diminish investment in higher cost areas such that carriers ensure a

¹² DGRB-002-09, Op. Cit., page 7, section 5.1.

¹³ DGRB-002-09, Op. Cit., Page 7, section 5.2.

reasonable return to their shareholders. That is not the goal of stewardship and it is not a holistic view of the matter.

TELUS further notes that the Spectrum Policy Framework (SPF) itself does not speak of ensuring, let alone maximizing, a return for the Canadian public. As stated in the SPF the “Framework is comprised of a Preamble, a Policy Objective (the Objective) and a set of Enabling Guidelines (the Guidelines).”¹⁴ A careful review of these three elements will find no reference to such a requirement. What is referenced is a requirement to “maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource.”¹⁵ Rather than justify a regime to maximize rents on spectrum licensees this objective requires that the Department take a holistic look at all of the benefits to Canadians derived from up-to-date, ubiquitous, broadband mobile networks and the continuing large investments required by the licensees. TELUS asserts that such a holistic view of the net benefits accruing to Canadians is the right focus for the Department. We submit that rather than develop market-based formulas outside of a consultative process, the Department work with industry to establish a methodology to set fees at a fair and reasonable level. We submit that the RABC could provide a forum to help define what is meant by a “fair return”.

In section 5.2 of the Consultation Paper, the section entitled Fee Review for Cellular and PCS Licences, the Department had this to say “In 2003, the Department issued DGRB-005-03, *Radio Authorization Fees for Wireless Telecommunication Systems that Operate in the Radio Frequency Bands 824.040 MHz to 848.970 MHz, 869.040 MHz to 893.970 MHz or 1850 MHz to 1990 MHz*, which specified the annual charges that would apply for legacy cellular and PCS spectrum awarded in 1985 and 1995. This fee order currently covers all of the frequency bands included in this consultation paper and sets the fee at \$0.03512361 per person.”¹⁶ This is correct, as far as it goes but the background might prove constructive.

As pointed out in DGRB-005-03 the Department had in its prior consultation document issued on December 21, 2002 DGRB-004-02 - *Consultation on a New Fee and Licensing Regime for Cellular and Incumbent Personal Communications Services (PCS) Licences*, proposed a licence fee of \$0.052 per 1 MHz of assigned spectrum per person in a defined geographic area for cellular and PCS licences. This document went on to state “The Department proposes a seven year implementation time frame before the full measure of the new fee becomes payable.”¹⁷

TELUS participated in this Consultation and in our Reply Comments stated “As TELUS noted at the beginning of these Reply Comments this Consultation is quite different than the usual consultation involving a Reply Comment Phase. In this Consultation there is no controversy on the main items and issues under discussion. All of the industry participants and associations are violently agreeing and just as violently disagreeing with the level of the Department’s current

¹⁴ DGTP-002-07, Spectrum Policy Framework for Canada, Industry Canada, June 2007, page 7, section 4.1.

¹⁵ Ibid

¹⁶ Consultation Paper, Op. Cit., page 7, section 5.2.

¹⁷ DGRB-004-02, Op. Cit., page 13, section 5.2.

and proposed fees for cellular and PCS spectrum. The Department should take note and act accordingly.”¹⁸

In the last consultation on fees for cellular and PCS spectrum licences in 2003 the Department did take note and did act accordingly. Instead of a seven year ratcheting process culminating in a licence fee of \$0.052 per 1 MHz of assigned spectrum per person in a defined geographic area the Department took the counsel of industry and correctly, in our view, lowered the imposed fee to a more reasonable 2011 level of \$0.03512361 per person. TELUS is of the view that even this level is too high as it extracts approximately \$130 million annually from Canada’s wireless carriers. To put that amount into context the department is looking at ways to spend \$225 million to extend service to rural and remote areas of Canada. That \$130 million could otherwise be spent on network investment by operators assuming a corresponding reduction in licence fees. As the industry prepares to invest billions in 3G and LTE technology, infrastructure and services, the government should ask whether that investment is a fair return in itself and in turn whether higher taxes in terms of fee increases stimulates or deters said investment. If stimulating investment for the benefit of the Canadian public, because they are the beneficiaries of such investment, is the goal of public policy then higher fees are merely a prescription for failure. By the Department’s own estimates the cellular and PCS operators in paying the approximately \$130 million in licence fees annually account for 57% of the total non-broadcasting licence fee revenue while accounting for a very small percentage of non-broadcast spectrum usage.

TELUS notes that in section 5.2 of the Consultation Paper the Department states that it is “undertaking a formal study to assess the current market value of cellular and PCS spectrum. The study will include, but not be limited to, an international fee comparison and a review of prices paid for similar spectrum in Canada. Once the study is complete, the Department will launch a separate consultation seeking comments on the proposed fee.”¹⁹ This seems somewhat circular. The Department did an internal PCS licence study in the 2002 process outlined above and it was universally panned. A similar situation greeted the setting of the 28 GHz fees when that band was introduced. TELUS strongly recommends that the Department establish a consultation aimed at determining the terms of reference and methodology for such a study before launching it and if such a study has begun that it be halted until such a consultation has been completed.

In conclusion;

- TELUS strongly supports the Department’s proposal to renew the cellular and PCS spectrum licences.
- TELUS strongly recommends that the Department renew these licences for a minimum of 15 to 20 years for the reasons we have discussed.

¹⁸ TELUS Reply Comments, DGRB-004-02, Consultation on a New Fee and Licensing Regime for Cellular and Incumbent Personal Communications Services (PCS) licensees as amended by DGRB-001-03, page 14.

¹⁹ Consultation Paper, Op. Cit., page 7.

- With respect to conditions of licence TELUS generally supports the Department's proposals and recommends that the Department eliminate the condition of licence requiring specified R&D expenditures.
- TELUS requests that the Department alter the condition of licence respecting the provision of lawful intercept to ensure cost compensation by operators for the provision of these services and adherence to telecommunications industry standardized solutions for this function for new and developing technologies.
- TELUS reminds the Department that when looking at fee levels in a future consultation, its SPF requires that it take a holistic view to industry benefits and economic well being.
- Finally, TELUS urges the Department to consult on the terms of reference and methodology of any study designed to address cellular and PCS licence fees.

All of which is respectfully submitted.

Yours truly,

(filed electronically)

Ed Prior