

Canada Gazette Notice No. DGRB-010-07

**Consultation on Proposed Conditions of Licence to Mandate
Roaming and Antenna Tower and Site Sharing and to
Prohibit Exclusive Site Arrangements**

**Published in the *Canada Gazette*, Part 1
dated 8 December 2007**

Reply Comments

of

Bell Mobility Inc.

7 February 2008

Table of Contents

	<u>Page</u>
1.0 INTRODUCTION.....	1
2.0 THE AWS POLICY DECISION.....	1
3.0 THE REQUIREMENT FOR AUCTION PROCESS DUE DILIGENCE.....	3
4.0 THE COSTS OF IMPLEMENTING THE AWS POLICY DECISION.....	4
5.0 REPLY COMMENTS RELATED TO MANDATED ROAMING	7
5.1 The Meaning of Roaming.....	7
5.2 When the Roaming CoL Will be Deemed to Have Been Met.....	10
5.3 Other Roaming Issues.....	11
5.4 International Roaming	12
5.5 New Entrants with Substantial Market Share.....	13
6.0 REPLY COMMENTS RELATED TO MANDATED SITE SHARING AND RELATED ISSUES.....	13
6.1 Site Sharing, Not Network Sharing	17
7.0 ARBITRATION ISSUES	18
7.1 No Jurisdiction to Delegate Arbitrations to the CRTC.....	18
7.2 Lack of Jurisdiction to Issue Immediate Access Orders.....	20
7.3 Disputes are Best Resolved by the <i>Commercial Arbitration Act</i> (CAA).....	20
7.4 Rates Determined Through Negotiation, Not Tariffs	21
7.5 Three Person Arbitration Panels.....	22
7.6 Right of Appeal.....	23
7.7 Discovery and Information Sharing.....	23
7.8 Most Favoured Nation Clauses.....	24
7.9 Method of Arbitration.....	25
7.10 Timing.....	25
7.11 Triggering Arbitration Process	26
8.0 CONCLUSION	27

APPENDIX

1.0 INTRODUCTION

1. Bell Mobility Inc. (Bell Mobility) provides the following reply comments in response to *Canada Gazette* Notice No. DGRB-010-07 - *Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements* dated 8 December 2007.

2. Bell Mobility has reviewed the comments of parties submitted on 22 January 2008. As noted in our submission, Bell Mobility relies, in providing its comments and these reply comments, on its 23 years of experience in operating mobile cellular and PCS networks in the Canadian wireless market. Bell Mobility also noted that it has also relied on its extensive experience and involvement, over that same timeframe, with the development of Canada's wireless regulatory regime.

3. In the following reply comments Bell Mobility will address:

- a. The AWS Policy Decision;
- b. The Requirement for Auction Process Due Diligence;
- c. The Costs of Implementing the AWS Policy Decision;
- d. Reply Comments Related to Mandated Roaming;
- e. Reply Comments Related to Mandated Site Sharing and Related Issues; and
- f. Arbitration Issues.

2.0 THE AWS POLICY DECISION

4. In its 22 January 2008 comments, Bell Mobility expressed its serious concern with the government's AWS Policy Decision. Bell Mobility's review of the comments of various parties only serves to reinforce that concern. The AWS Policy Decision represents a dramatic break with the Department's long record of sound spectrum management policy and practice. Moreover, the tangible evidence of this break is evident in the comments of parties such as TELUS which notes, at page 3, that:

Based on both investor expectations in anticipation of and the subsequent investor reaction to the actual terms of the Decision, TELUS and other incumbent wireless carriers have suffered billions of dollars in lost market capitalization, even though the Minister recognized that the market is, and remains, competitive.

5. The government's AWS Policy Decision has introduced uncertainty into the wireless market. Primus/Globility for example, provides its interpretation of the government's AWS Policy Decision, at page 7 of its submission, in the following terms:

By deciding to mandate roaming in the wireless market the Federal government has formally declared that market forces are not sufficient to protect the interests of end customers and by extension determined they [incumbent carriers] no longer qualify for forbearance.

6. While clearly the AWS Policy Decision has not impacted wireless forbearance, nor should it given the state of competition in the wireless industry as acknowledged in the AWS Policy Decision, the Primus/Globility comment is a direct result of the fact that the government has strayed quite far from its philosophy of relying on market forces and streamlining regulation.

7. In this regard, Bell Mobility notes the comments of the CRTC in adjudicating requests, from several parties, for mandated interconnection and access to the facilities of federally regulated wireless carriers in 1998 when it concluded that:

The Commission considers the current forbearance regime to be inconsistent with a regime which would mandate access to competitive wireless networks as proposed by AIReach. Mandating such access would run counter to the Commission's general approach of fostering the growth of competitive markets and, whenever possible, leaving rates, terms and conditions for the provision of services to be disciplined by competitive markets.¹

8. Bell Mobility also notes the submission of Rogers, at page 1, that the Minister does not have the authority to amend existing conditions of licence. Bell Mobility expressed the same concern and belief in its comments. The 2001 PCS Auction licences were awarded through a competitive bidding process, with the undertaking that these licences would only be amended in exceptional circumstances. Bell Mobility shares Rogers' view that, in the current case, the Minister's breach of the undertaking constitutes a breach of the Deed of Acknowledgement bidders signed in order to participate in the 2001 PCS Auction.

9. Therefore, as stated by Rogers at page 4, Bell Mobility notes that it too "... will comment on the proposed license conditions as though the Minister had the power to amend our licenses." Bell Mobility also shares Rogers' position that nothing in these comments should be

¹ Telecom Order CRTC 98-0192, *Applications Requesting Interconnection with the Telecommunications Networks of the Federally Regulated Cellular and Personal Communications Services Providers and Related Issues*, 3 November 1998, paragraph 29.

taken as a waiver of our rights and that Bell Mobility reserves the right to "...any and all remedies to prevent an unlawful amendment of our licence conditions."

3.0 THE REQUIREMENT FOR AUCTION PROCESS DUE DILIGENCE

10. Bell Mobility submits that the process laid out for the auction can only be characterized as one of undue haste. Other parties, including potential new entrants as addressed below, share this view.

11. For example, the current schedule of key dates suggests that the Department will release: (1) its decisions on the highly technical and complex matters being addressed in this Consultation; as well as (2) its responses to the filed Clarification Questions (some of which will constitute amendments to the Final Licensing and Auction Policy) by 27 February 2008, twenty calendar days after both the close of this proceeding and the receipt of a substantial number of Clarification Questions. Similarly, if the decisions on the final Conditions of Licence (CoL) and responses to Clarification Questions are posted by 27 February 2008, potential applicants will be required to file their applications by 10 March 2008, twelve calendar days after, presumably, a considerable amount of policy, technical, financial and legal information is made available to potential applicants for the first time.

12. In comparison, in the process leading up to the 2001 PCS Auction the Department invited clarification questions subsequent to releasing its comprehensive licensing and auction policy, all within one document and addressing all related policy issues. The Department required clarification questions to be filed on 11 August 2000 with the Department's responses eventually posted on 17 October 2000, over two months later. Further, and even though the Department has extended the deadline for auction applications to 10 March 2008, this still only leaves 12 calendar days, compared to 29 calendar days in the 2001 PCS Auction process, for potential applicants to analyze, assimilate and make decisions based on the information forthcoming on 27 February 2008.

13. Mobilexchange, a potential new entrant applicant, in discussing the dependency of new entrant business plans on the Department's decisions and responses, notes, at pages 10 to 11 of its submission, that:

Unfortunately, the final shape of these plans, particularly what constitutes mandatory automatic digital roaming, has yet to be determined. The Department

is committed to making a final decision before the date for bid submissions. However, that decision is unlikely to be reached until a few weeks if not [a] few days before many new entrants will be required to raise and deposit up to hundreds of millions of dollars. That is clearly far too short a period to make any necessary alterations in business plans, finalize a bidding strategy and secure the necessary funds.

...

Accordingly, Mobileexchange respectfully requests that the date to submit [applications] be extended by at least 60 days. This modest extension is necessary for the new entrants to be able to line up the financing necessary to successfully bid in the Auction after they have been able to finalize their business case following the Department's final decisions on how it will implement ADR and antenna site sharing. A corresponding extension should be made in the subsequent dates.

14. Mobileexchange's request should come as no surprise to the Department. It is to be expected, given today's corporate governance standards, that potential applicants must perform stringent due diligence before committing hundreds of millions of dollars to the auction process. Indeed, Industry Canada's own *Framework for Spectrum Auctions In Canada* (Issue 2 October 2001) notes, at page 5, that:

Understanding exactly what is being auctioned is very important for bidders to develop business plans, secure adequate financing and develop a bidding strategy. While upholding the status of radio spectrum as a public natural resource, it is important to provide bidders, and subsequently licensees, with a well-defined set of licence attributes so as to enhance their abilities to secure financing; to invest in their networks; and, to provide the best possible services to Canadian consumers. (Emphasis added)

4.0 THE COSTS OF IMPLEMENTING THE AWS POLICY DECISION

15. Bell Mobility submits that, in the circumstances, all costs directly attributable to accommodating the Department's AWS Policy Decision should be borne by any new entrant(s) licensed as a result of that Decision. Incumbent wireless networks, as has been previously discussed, are not essential facilities. Therefore, while the AWS Policy Decision mandates access to those networks, all costs incurred as a direct result of accommodating or implementing that Decision, including the costs of arbitration, should be borne by the parties directly benefiting from such mandated access. Simply put, those costs would not be incurred by the incumbents absent the AWS Policy Decision.

16. In this regard, several parties appear to be of the view that elements of the costs of implementing the government's AWS Policy Decision, as well as of implementing the provisions of this Consultation, should be incurred by the incumbents. MTS Allstream, in discussing "Costs" states, at page 34, that:

The [arbitration] Tribunal shall be entitled to make separate awards for legal costs and the fees and expenses of the arbitration and shall be entitled to apportion costs and expenses between the Parties.

17. Shaw, at Appendix B, notes that, "The costs of the arbitration, if any, shall be divided equally between the parties".

18. Look takes the discussion beyond arbitration costs and states, at page 7, that, "It is not clear how the available roaming capacity on incumbents' networks will be allocated between incumbents and new entrants".

19. In addition to the comments of prospective new entrants above, other parties with experience in the operation of wireless infrastructure also observed the significant resource and cost impacts flowing from the AWS Policy Decision. Discussing "Incurred Costs", CBC/Radio-Canada states, at page 2, that:

If a technical study is required in order to provide the response to a sharing request, the fees incurred must be at the requester's expense. These fees include the study themselves and the administration fees incurred by the owner of the tower or site. ...CBC/Radio-Canada, given the number of sites and towers owned, would have to dedicate significant resources to handle the expected workload created. (Emphasis added)

20. The Canadian Electricity Association (CEA), whose members operate extensive wireless networks throughout their operations, notes at paragraph 9, that:

Besides personnel safety and the integrity of the electrical power system, there are also cost allocation issues that are raised by site sharingAdditional capacity requirement [to meet sharing requests] on top of existing and future utility needs must be accommodated for in the tower analysis upfront, so that additional costs are not borne by utilities at a future date.

21. The Canadian Association of Fire Chiefs (CAFC), commenting in their letter on the potential impact on municipal, provincial and federal agencies states:

The potential increase in demands for mandatory sharing of sites owned and operated by the aforementioned governments will force an increased workload of a highly technical nature, and in some cases, require that government hire additional staff, in order to deal with these demands.

22. Clearly, there will be significant costs, both administrative and operational, associated with the implementation of the AWS Policy Decision. In forborne markets, such as the Canadian wireless industry, these costs are purely commercial in nature and should be borne by the party benefiting from the Decision. No elaborate methodology to allocate costs is required. In this regard, Bell Mobility agrees with the view expressed by TELUS, at page 4, that:

...arbitration must be based on commercially accepted standards applied in Canada, as well as other jurisdictions, not regulatory costing principles designed for access to former monopoly wireline or essential facilities. In a commercial arrangement, incumbents are fully compensated at prevailing market rates for services provided and would not be placed at a competitive disadvantage *vis a vis* the new entrants as a direct result of fulfilling any requests or obligations from the new entrants. (Emphasis added)

23. In its comments, at pages 5 to 8, Bell Mobility elaborated on the distinct wireless regulatory regime, developed through numerous public proceedings, and which reflected a deliberate government policy designed to develop the then nascent wireless industry in a competitive environment. Bell Mobility elaborated on the fact that there is no history of monopoly provision or cross-subsidization in the Canadian wireless industry. Government policy deliberately and carefully ensured that the networks of affiliated wireless entities were built and operated using shareholder equity, not regulated returns. Finally, in this regard, Bell Mobility showed that regulators had acknowledged that there is no history of monopoly supply in the industry and that there were no essential or bottleneck facilities, such that other parties had a legitimate right of access to those facilities.

24. Furthermore, tower and site sharing was mandated to "assist", not to "subsidize," new entrants. Nor was it mandated to allow new entrants to avoid all costs associated with entry. In this regard, new entrants are not being asked to fund all future costs associated new tower and site construction, it is only reasonable to expect them to pay all costs associated with accommodating their specific requests.

25. Bell Mobility submits therefore that the record of the Consultation shows that the costs of accommodating any new entrant requests for mandated access to the facilities of the federally regulated carriers will be substantial. The record also shows that these costs have to be borne

up-front by the new entrants and that potential applicants should be aware of this fact prior to finalizing their business plans and prior to filing applications to participate in the auction. It is particularly instructive that this view is shared by many parties in addition to the wireless incumbents.

5.0 REPLY COMMENTS RELATED TO MANDATED ROAMING

5.1 The Meaning of Roaming

26. The concept of roaming is a well-understood practice in the wireless industry. As Rogers' states, at page 16:

Roaming, in general, is reciprocal. Each party to a roaming arrangement provides benefits to the other parties. The roaming arrangements mandated by Industry Canada will not be reciprocal. Rogers will provide roaming to new entrants and to regional incumbents but will not receive any roaming benefits in return. Such imbalances of traffic impact the standard terms and conditions of roaming agreements. Accordingly, the roaming arrangements mandated by the Department have a great potential to distort the competitive market in Canada and lead to unintended consequences.

27. Bell Mobility agrees with Rogers and believes that the Department has recognized, in the AWS Policy Decision, that roaming in the context of this proceeding has specific and limited application. In this regard, the Department noted, at page 8 of the AWS Policy Decision, that:

...to facilitate new entry, incumbents will be required to make roaming available to new entrants within their licensed service areas, also at commercial rates, for a period of 5 years while the licensee builds out its network. In the event that a national new entrant is successful in the auction, roaming within its licensed areas may be extended for an additional 5 years if the spectrum is used in accordance with the roll-out targets specified in Annex 2. (Emphasis added)

28. New entrants should not be permitted to use mandated roaming for purposes of either capacity off loading or to accomplish quality enhancement within their built area. The specific and only intention of the mandated roaming policy, within the context of the AWS licensing process, is to "... facilitate new entry ..." for a limited period of time, assuming new entrant compliance with the Department's roll-out targets. As Rogers notes above, the normal reciprocal nature of wireless roaming, evident in all existing commercial roaming agreements, is entirely absent. Mandated roaming, in the context of the AWS licensing process, therefore reflects the Department's intention of providing roaming to new entrants "...while the [new

entrant] licensee builds out its network" and not, as proposed by several parties, as a means of extending the coverage of new entrant networks.

29. Bell Mobility also submits that the above supports the view, expressed by Bell Mobility, TELUS and Rogers that, logically, "mandated roaming" is neither necessary nor required in the built-out footprint of national or regional new entrants resulting from the AWS auction.

30. The record of the Consultation is also clear that, consistent with the FCC's treatment of roaming in its decision, "roaming" is not "resale". In the context of the AWS licensing process, "in-territory roaming" is, as discussed above, a unique and limited policy specifically intended to facilitate new entrant licence build-out. As the Department noted in the AWS Policy Decision, at page 7:

In [its] general [application], roaming allows a subscriber from one network to access another operator's network when outside the subscriber's home area.
(Emphasis added)

31. Further, in this regard, Bell Mobility agrees with TELUS and echoes its call for clarity when it states, at page 12, that:

TELUS recognizes that the Department has not mandated resale even though parties to this proceeding requested resale. We also note that both the Department and the FCC have used the terms "roaming" and "resale" in past decisions to describe separate and unique activities.

...Accordingly, in its decision on the issues in this consultation, TELUS respectfully submits it is of critical importance that the Department expressly state that roaming for either voice or data is not intended to be defined or used directly or indirectly for resale, MVNO, wholesale or other similar commercial activities. (Emphasis in original)

32. Bell Mobility categorically disagrees with MTS Allstream's request, at page 9, that:

The amended conditions of licence should explicitly state that **where roaming is not technically or commercially feasible, alternative arrangements to allow new entrant mobile wireless operators to extend their network reach and to permit additional competition shall be provided where feasible. The feasibility of alternative arrangements will be determined in part by the service arrangements already established between mobile wireless licensees and other mobile wireless operators.** (Emphasis in original)

33. Bell Mobility believes that MTS Allstream, in the above statement, is attempting to open the door to "resale" and, as stated above, the AWS Policy Decision clearly includes mandated "roaming" and clearly does not include "resale".

34. Furthermore, a number of parties are taking an inappropriate and overly broad approach to "roaming" and attempting to use the AWS Policy Decision as a reason to advocate widespread wholesale regulation of the incumbent wireless carriers.

35. Primus/Globility states, at page 8, for example:

Since the Industry Minister has determined that the market is not competitive, the Commission must employ its standard approach of *ex ante* tariff approval for mandated roaming agreements.

36. MTS Allstream states, at page 8, that:

The amended conditions of licence should explicitly state that **roaming services offered by the Licensee should provide end-customers of all mobile wireless operators with whom the Licensee has entered into a roaming or other arrangement with the same level and quality of services as that provided by the Licensee to its own end-customers or to the end-customers of other mobile wireless operators and must not discriminate based on the identity of the operator to whom the end-customer is subscribed.** (Emphasis in original)

37. At page 7 of its comments, Look, in recommending that roaming should include network functionality, proposes that:

...mandatory roaming should include the broadest of definitions for roaming and that this definition should include, amongst other things:

- a) access to all network features and functionality (e.g. call forwarding and call waiting) afforded Mobile Virtual Network Operators (MVNO);
- b) the use of the incumbent's billing systems;
- c) the incumbent's administrative back office services, and;
- d) advance receipt of the incumbents' automated provisioning protocols to ensure a transparent roaming setup for the new entrants' subscribers.

38. Again Bell Mobility notes that the approach suggested by Primus/Globility, MTS Allstream and Look is predicated on the view that new entrants have a right of access to the incumbent's infrastructure, including network functionality, billing systems, administrative back office services, etc., as if the incumbents were operating essential monopoly facilities in a

regulated environment. They are not, and new entrants do not have a legal right of access to those facilities. Moreover, access to the incumbent's entire infrastructure, on the scale proposed by MTS Allstream, Look and others, would run counter to the notion of promoting facilities-based competition.

39. Further, as indicated in its comments, Bell Mobility believes that mandated roaming includes basic voice and data connectivity extended to the customers of new entrants when roaming outside the new entrant's built-out licence area. As in 1995, such roaming is accomplished through the use of multi-banded handsets, one band of which is in the new entrant's AWS frequency. Clearly, in order to accomplish the above, the new entrant requires a built-out, operating wireless network and must be marketing its services to customers in that built-out area. Absent that condition, i.e. a built-out wireless network with a customer base, there would exist no customers who would require roaming outside their home network.

40. Consistent with the FCC's treatment of roaming, which has been referred to by the Department in its AWS Policy Decision, as well as by parties in their comments, roaming does not include broadband data such as Internet browsing, video downloads or mobile broadcasting. Similarly, and also consistent with the FCC determinations on this matter, it does not include access to 3G services.

5.2 When the Roaming CoL Will be Deemed to Have Been Met

41. On a related matter, Bell Mobility also submits that, consistent with the Department's 1995 licensing policy, incumbent licensees should not be mandated to enter into roaming agreements with new entrant licensees who have already executed a roaming agreement with another incumbent licensee. In the Department's 1995 PCS licensing process, incumbent licensees were prohibited from deploying their PCS spectrum until new entrants, Clearnet and Microcell, had signed roaming agreements with either Rogers or a Mobility Canada member. The Department specified, at that time, that should both the new entrants sign a roaming agreement with one incumbent, then the condition was deemed to have been met for both incumbents.

42. Wireless network coverage is a key competitive differentiator for wireless carriers. Network coverage is very unique to each carrier in that it reflects the entity's marketing vision and strategy as well as its capital spending decisions. While the incumbent carriers compete on

the basis of network coverage, reflecting the entity's marketing plans and capital priorities, by definition not all networks are exactly the same. It would be inappropriate, and a further distortion to the competitive market, if new entrants were permitted to pick and choose the incumbent carriers and areas with whom and where they will roam. For example, if a new entrant were able to obtain the aggregate coverage footprint of all the incumbents in a given area, through multiple roaming agreements, the new entrant would actually have coverage superior to that of any individual incumbent in that area. A national or regional new entrant licensee, therefore, should be limited to striking a roaming agreement with one incumbent licensee, for its regional or national licence, and that when it does, the mandated roaming CoL will be deemed to have been met for all incumbent carriers, with respect to that new entrant.

5.3 Other Roaming Issues

43. Bell Mobility also notes the suggestion by a number of parties that roaming includes automatic seamless hand-off between networks. In this regard, EastLink, at footnote 3, states, "...EastLink understands that the roaming agreements between the incumbents and their US roaming partners include the provision of [hand-off]." This is incorrect. All roaming agreements by definition require the roaming party to disengage from their "home" network and reinitiate on the "roamed" network. Among other things, the re-initiation process provides the roamed network with the capability of verifying (through inter-system messaging that is transparent to the customer) that the roamer wireless number is associated with a *bona fide* customer with an active account, in good standing, on the Home Location Register (HLR) of their home carrier. Similarly, the same system is used by the roamed network to acquire the necessary billing information (i.e., the customer's home carrier, as well as other relevant inter-carrier and billing information, etc.). Creating handoff between networks requires complex coordinated custom engineering in both the networks and the handsets of the carriers involved. In fact, we are aware of no standard technical solution to such a requirement. In our opinion, this is not practical for multiple networks or networks still being built-out with changing boundaries.

44. A number of potential new entrants have pointed to the reciprocal infrastructure agreement between Bell Canada, Aliant and TELUS and incorrectly identified it as a roaming agreement and as one which could be used as a benchmark for the government's mandated roaming policy. Quebecor included a 2001 press release in its comments at pages 2 and 3.

45. Quebecor then states, at page 3, that, "Similar arrangements exist among other Canadian and American carriers, as well as internationally". Again, this is incorrect. The Bell – TELUS agreement was an innovative network sharing agreement aimed at expanding the coverage provided by two similar networks with complementary rural coverage. While there are some other examples of such infrastructure sharing, this type of arrangement is rare and we are aware of no such other arrangement in Canada or the United States. Two key attributes of a network sharing agreement distinguish it from a roaming agreement:

- i. A carrier provides network coverage to the other carrier in order to get access to the other carrier's network coverage in return. In the Bell – TELUS agreement, each party is currently making up to three thousand cell sites available to the other party, while at the time the agreement was signed each party made over one thousand cell sites available to the other party. At the time that the agreement was negotiated, each party was not only required to build out its own urban areas, but also to deliver a number of rural sites, each of which would expand the other party's rural coverage, similar to the number of sites it was gaining in return.
- ii. The agreement aims to ensure balance, with each carrier providing the other with similar amounts of coverage and traffic. This balances both the incremental capital that each carrier must deploy for increased capacity, and the capital that each carrier conserves in reduced capital for network expansion.

46. Bell Mobility also points to the number of references in the quoted press release to the "rural" focus of that agreement. The agreement was and remains an innovative approach to extending the benefits of transparent competition to rural areas, based on the use of a common CDMA platform, in as efficient a manner as possible.

5.4 International Roaming

47. A number of parties in their submissions, e.g., Globalive at page 3, Look at page 5 and Mobilexchange also at page 5, suggest that the mandated roaming requirement should also extend to international roaming. Existing international roaming arrangements represent commercial agreements between the domestic carrier and a foreign roaming partner. Bell Mobility has no contractual right to unilaterally introduce a new party, e.g., a new entrant licensee, into such agreements. Rather, it will be the responsibility of new entrant licensees to

negotiate their own international roaming arrangements with foreign carriers as they deem appropriate.

5.5 New Entrants with Substantial Market Share

48. Bell Mobility also agrees with Rogers' comment, at paragraph 38 of its submission, that there should be no mandated requirement to provide roaming to a party, such as MTS Allstream within its home territory, when it currently has more than a 25% market share within that territory.

6.0 REPLY COMMENTS RELATED TO MANDATED SITE SHARING AND RELATED ISSUES

49. Regarding the government's policy to mandate wireless antenna tower and site sharing Bell Mobility submitted, at page 14, that:

Regarding CPC-2-0-03, Bell Mobility submits that it will be critically important that the Department revise CPC-2-0-03 to reflect the new policy before tower/site sharing, either with other incumbents or new entrants, commences. An appropriately revised CPC-2-0-03 will be the primary procedural document relied on by licensees, municipalities, residents, broadcasters and now potential new entrants to govern the proposed installation and subsequent approval or denial of wireless antenna towers and sites throughout Canada. Bell Mobility submits that, in the absence of an appropriately revised CPC-2-0-03, which provides fundamental guidelines and timeframes for all involved parties, the Department's proposed sharing policy will be a recipe for chaos. (Emphasis added)

50. The record of the Consultation to date, as well as the Clarification Question process, demonstrates that confusion among key parties is already evident. Bell Mobility, based on its extensive involvement with the development of Client Procedures Circular CPC-2-0-03 *Radiocommunication and Broadcasting Antenna Systems* (Issue 4, effective 1 January 2008), as well as its extensive experience with the predecessor document, CPC-2-0-03 *Environmental Process, Radiofrequency Fields and Land-Use Consultation* issued in 1995, strongly urges the Department, for the reasons discussed below, to revise CPC-2-0-03 before any mandated sharing comes into effect. In this way, potential new entrants can participate in the necessary government – industry consultative process that is needed to produce a workable and efficient CPC which reflects the mandated site sharing policy.

51. On 22 June 2007 the Department released *Gazette Notice No. DGRB-001-07 Release of Issue 4 of CPC-2-0-03, Radiocommunication and Broadcasting Antenna Systems*. In the accompanying press release the Department specifically stated that:

Industry Canada recognizes that tower sharing is a matter on which a number of interested parties have commented. This same matter is the subject of comment in the context of the current and ongoing consultation on a policy framework for the Advanced Wireless Services (AWS) auction. As such the Department takes no decision at this time and will do so as part of the AWS policy framework. (Emphasis added)

52. Nonetheless, several parties are clearly confused regarding CPC-2-0-03 (Issue 4), which recently came into effect, and its applicability to the government's mandated sharing policy. Mobilexchange, for example, at pages 6 and 7, states that:

The November Policy Paper [AWS Policy Decision] noted that, in June 2007, Industry Canada had required owners of existing antenna towers and sites to negotiate "in good faith" with newcomers in order to facilitate "sharing" of their facilities. ...The November Policy Paper did not address the difficult issues of the circumstances under which a licensee must share its facilities and when it would be justified in refusing to share.

53. Similarly, MTS Allstream, at page 5 of its submission, suggests that CPC-2-0-03 (Issue 4) reflects the new mandated site sharing policy adopted in the AWS Policy Decision. This is incorrect.

54. As stipulated in the Industry Canada Press Release cited above, the June 2007 CPC-2-0-03 (Issue 4) requires current licensees, not "newcomers", to share facilities. Moreover, the CPC-2-0-03 (Issue 4) which was released in June 2007 does not reflect a mandated requirement to share sites, as this requirement was only added by the government's subsequent AWS Policy Decision released in November 2007. As Mobilexchange points out, the CPC-2-0-03 (Issue 4) has to be revised to reflect the new policy or there will be considerable opportunity for significant confusion. Further, Bell Mobility notes the following Clarification Question filed by the City of Toronto, by far the largest operator of wireless antenna sites in the GTA and likely in all of Canada:

Is this Gazette Notice specific to cellular providers or does it include municipal/provincial/federal radio systems including emergency services?

55. There is no doubt on Bell Mobility's part that, other than where considerations related to national security are involved, the new policy concerning mandated sharing applies to municipal/provincial/federal radio systems. In this regard, the AWS Policy Decision unequivocally states, at page 9, that:

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 broadcast certificate holders.

56. Several parties, in expressing their concern with the mandated sharing policy, echo Bell Mobility's call for a government – industry consultative meeting, of the type which resulted, subsequent to the National Antenna Policy Consultation, in the development of CPC-2-0-03 (Issue 4).

57. The Canadian Association of Fire Chiefs expresses several concerns with the implementation of the mandated sharing policy noting in closing its letter that:

This short list reflects only our deepest concerns, and should not be considered as exhaustive. It is for all these reasons that we wish to be consulted on these matters before they are finalized.

58. The Ontario Ministry of Government and Consumer Services, noting that it speaks on behalf of several agencies including the OPP, Ministry of Community Safety and Correctional Services, Ministry of Health and Long-Term Care (Ambulance) and the Office of the Fire Marshal, among others, notes at page 1 that it, "... has concerns with the mandatory tower and site sharing proposed by Industry Canada, ..." stating at page 3 that:

To emphasize this point, Ontario requests a separate meeting with Industry Canada officials to further discuss the spirit of this proposal and to further identify other unique requirements, such as robustness, and performance, faced by [] not-for-profit public safety networks.

59. The RCMP, which operates in excess of 1,600 sites across Canada, states at page 2, that:

The determination of tower siting and sharing implications could become such a complex matter in some instances that the RCMP would prefer that it be left to the parties to address through private negotiations.

These aspects may warrant further dialogue between the public safety community and the Department to alleviate some of the concerns for the future.

60. Bell Mobility submits that these are not inconsequential concerns that are being raised. It is important that mandated site sharing is governed by a CPC that has been properly framed to reflect the new policy thus ensuring that the health, security and life of citizens is not jeopardized or put at risk, due to unforeseen circumstances. In addition to business, family and social applications, public safety authorities, for example, indicate that over half of all calls to 9-1-1 services originate from wireless devices. In addition to the police, fire and ambulance services, it is important, for reasons of personal safety, that the integrity of Canada's wireless infrastructure be maintained. Bell Mobility strongly urges therefore that prior to the implementation of mandated site sharing that appropriate government - industry consultative meetings be convened to address the concerns of all affected parties.

61. As the Department is well aware, the Federation of Canadian Municipalities and its constituent members are key stakeholders in the antenna site approval process throughout Canada. Many municipalities have formally adopted antenna site approval protocols that intentionally favour multiple, low profile sites over larger more prominent structures. Mandated sharing will by definition result in more prominent structures. In this regard, EastLink, at page 13 of its submission, identifies a significant issue when it suggests:

...EastLink respectfully requests that the Department consider communicating to municipalities that the Department, in CPC-2-0-03, [sic] has implemented a new procedure aimed at discouraging the proliferation of towers by requiring the sharing of tower space by multiple carriers and that any restrictions placed on the height of tower structures [by municipalities] may undermine the success of the Department's initiative, as well as compromising the success of new entry into the wireless market.

62. Clearly it is the Department's AWS Policy Decision that has introduced mandated site sharing into the Canadian market and not CPC-2-0-03 (Issue 4). Again, this demonstrates the need to revise CPC-2-0-03 (Issue 4) before any mandated sharing takes place. Bell Mobility submits that all key stakeholders, including the municipalities, have to be involved in that process in order to produce an effective, efficient and realistic CPC that reflects the mandated sharing policy.

63. The record of the AWS Consultation demonstrates that the number of incumbent wireless antenna sites in Canada, including towers, declined significantly in the period from

2001 – 2006. While a number of parties have implied that the Department's mandated sharing policy will reduce the overall number of sites, the net result of licensing additional carriers will likely be a significant increase in the construction of antenna sites, including new towers, throughout Canada. This increase in antenna site construction activity is another reason which makes it crucial that the Department's CPC is revised so as to be reflective of the post-AWS auction operating environment.

6.1 Site Sharing, Not Network Sharing

64. A number of parties expressed the view that mandatory tower and site sharing should be extended to include access to incumbents' network infrastructure facilities. Look suggests, at page 13, for example, that:

Where possible, an incumbent should share facilities, including space in the equipment shelter, power, antennas, and backhaul links (e.g., fiber). Look believes that "infrastructure sharing" should be added to the tower and site sharing policy, where it is technically feasible. At the very least, arbitrators should have the power to order "infrastructure sharing" as a means to resolving disputes, even to the point of ordering site upgrades, at the expense of the new entrant.

65. Bell Mobility reiterates that wireless incumbent facilities are neither monopoly-based nor essential and new entrants have no mandated right of access to these facilities. Further, access to equipment shelters, power, antennas and back-haul facilities are unequivocally not a component of sharing today, even among incumbent wireless carriers, are beyond the scope of the Department's site sharing policy and again would run counter to the notion of promoting facilities-based competition.

66. Bell Mobility agrees with TELUS when it states, at page 2, that:

The policy framework for the upcoming AWS auction departs significantly from pure reliance on market forces in order to facilitate entry in the wireless market, by providing material competitive advantages to new entrants at the expense of incumbent carriers. TELUS considers that, far from promoting competition, public policy seems driven by a desire to resurrect the parameters of wireline regulation in a wireless world contrary to competitiveness and innovation. ...there remain, however, significant determinations to be made through the consultation process. In this regard, TELUS submits that further deviation from a market-based approach, in the form of additional concessions to prospective new entrants, are not warranted. Rather, the Department, having granted significant concessions to new entrants, should make further determinations guided by the principle of maximum reliance on market forces.

67. Finally, in this regard, Bell Mobility does not support Look's proposal, at page 6 of its submission, to the effect that the Department's determinations in the AWS Policy Decision will automatically apply or be extended to any current or future bands to which a mobile designation is added and which are licensed for mobile use in the future. Such considerations would more properly be addressed in the pre-licensing consultations normally held prior to such licensing processes.

7.0 ARBITRATION ISSUES

68. Bell Mobility repeats and relies upon its submission of 22 January 2008 as it relates to arbitration of disputes. Accordingly, Bell Mobility recommends the application of a single national arbitration code, the *Commercial Arbitration Act* (CAA). Bell Mobility submits that arbitration panels should consist of three arbitrators, and encourages Industry Canada to adopt strict confidentiality rules to prevent new entrants from using the arbitration process as a "fishing expedition" to obtain confidential commercially sensitive information that would otherwise not be available to them in this extremely competitive market. In the following paragraphs, Bell Mobility responds to a number of recommendations by other parties regarding proposed arbitration rules. Consistent with the usual practice, failure to address specific proposals should not be construed as Bell Mobility's approval or agreement therewith.

7.1 No Jurisdiction to Delegate Arbitrations to the CRTC

69. At the outset, Bell Mobility wishes to comment on proposals that the CRTC act as the arbitrator. In this regard, Bell Mobility noted with some surprise, the CRTC's comment that:

The CRTC suggests that it is best positioned to act as an arbitrator of such disputes and that it would be pleased to do so in order to assist with the furtherance of the government's stated aim of improving competition and innovation in the wireless services market. (Emphasis added)

70. This proposal raises a number of issues, not the least of which is jurisdictional. It is well established in administrative law that a statutorily created tribunal may only exercise the powers conferred upon it by legislation and those reasonably incidental to carrying out these functions.²

² See, for example: Sara Blake, *Administrative Law in Canada*, Butterworths (1992), page 130 and Denys C. Holland and John P. McGwoan, *Delegated Legislation in Canada*, Carswell (1989), page 118: "As we shall see in the ensuing chapters, the requirement that legislative powers be conferred expressly in statute has several corollaries. Not only must the power to legislate be clear, but also the recipient of the power, and the extent to and subject on which he may legislate.

The Commission is a statutory tribunal whose powers are limited to those expressly conferred by Parliament. The Commission's powers are delineated under section 12 of its constitutive statute, the *Canadian Radio-television and Telecommunications Act* (CRTC Act), to the regulation of broadcasting under the *Broadcasting Act* and to the regulation of telecommunications under the *Telecommunications Act*. Absent an express grant of authority from Parliament, the Commission lacks the jurisdiction to arbitrate disputes in relation to radio apparatus and radio authorizations.

71. The Commission's offer is problematic as well from a policy perspective. Under Bell Mobility's arbitration proposal, a finding from Industry Canada that the roaming, tower or site sharing access sought by a new entrant is "technically feasible" will be a condition precedent to arbitration. Without such a factual finding of technical feasibility, there would be no need for arbitration, since access or roaming would not be mandatory in such circumstances. This is entirely consistent with Industry Canada's statement that roaming and tower and site sharing will only be mandated where "technically feasible."³ Accordingly, to the extent arbitration is required, it will involve primarily commercial rather than technical issues. Arbitrators are best positioned to resolve such disputes in a timely manner, having regard to commercially relevant rates, terms and conditions prevalent in the market place. There appears to be an emerging consensus favouring three-member arbitral tribunal panels who are comprised of senior lawyers and/or retired judges. Rogers and TELUS recommend this as the most effective way to foster confidence in the decision-making process, and to reduce the likelihood (and resultant costs and time delays) of appeals.⁴ MTS Allstream also suggests a three-person panel if parties are unable to agree on one arbitrator.⁵

72. Bell Mobility does not believe therefore that the Commission is better positioned than senior lawyers or retired judges to arbitrate commercial issues. Bell Mobility is concerned that the CRTC would, by orientation and approach, find it difficult not to apply overly prescriptive regulatory concepts which are actually being scaled back, streamlined or eliminated in the context of wireline regulation in accordance with the Governor in Council's Policy Direction. It would be inappropriate for such overly prescriptive concepts (i.e., Phase II costing) to be applied

³ *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range*, 28 November 2007, pages 8 and 9.

⁴ See page 16 of TELUS' 22 January 2008 submission, and paragraph 32 of Rogers' 22 January 2008 submission.

⁵ See paragraph 36(c) of MTS Allstream's 22 January 2008 submission.

to the day-to-day functioning of the already competitive and forborne Canadian wireless industry.

7.2 Lack of Jurisdiction to Issue Immediate Access Orders

73. Quebecor recommends that arbitrators have the authority to order that roaming services be offered from the date the matter is referred to arbitration, even though agreement (or arbitral awards) on commercial matters have not yet been reached.⁶ MTS Allstream's arbitration framework would go even further, empowering arbitrators to order specific performance, equitable relief, or an interim injunction.⁷ These proposals are improper for a number of reasons. First, they go far beyond Industry Canada's stated intent that the arbitrator's function be limited to establishing commercially reasonable rates for roaming, tower and site access and purport to transform arbitrators into quasi-judicial bodies.

74. Furthermore, the parties advocating these powers have failed to demonstrate that the Minister has the requisite jurisdiction to delegate such quasi-judicial authority, which he does not. In this regard it is notable that unlike the Commission under the *Telecommunications Act*, under the *Department of Industry Act* and the *Radiocommunication Act*, the Minister lacks the powers of a superior court.⁸

75. Authorizing the granting of specific performance or interim injunctions at the commencement of arbitration is a drastic and extraordinarily interventionist remedy. Bell Mobility questions whether specific performance is appropriate at such a time given that the parties have not yet concluded an agreement. In any event, permitting the arbitrator to order roaming or access from the outset of the arbitration would require the arbitrator to prematurely fill gaps in the disputed agreement and decide rates, or other unsettled issues, without yet having received evidence on these issues. This would constitute a gross and unwarranted distortion of the arbitration process.

7.3 Disputes are Best Resolved by the Commercial Arbitration Act (CAA)

76. Bell Mobility submits that parties should be free to agree on the procedure and related details applicable to arbitration. To the extent they are unable to do so, the CAA should apply to

⁶ See page 16 of Quebecor's 22 January 2008 submission.

⁷ See section 23(d) of MTS Allstream's arbitration framework.

⁸ See, for example, *Telecommunications Act*, sections 55, 60 and 61.

any issue not addressed in parties' arbitration agreements. The CAA provides an effective basis for arbitration because it is national, is a statute passed by the Parliament of Canada, is based on the model law adopted by the United Nations Commission on International Trade Law on 21 June 1985, and it was drafted with specific attention to commercial disputes.

77. A national code like the CAA is preferable to the adoption of a multiplicity of provincial or territorial arbitration schemes. A single, national set of arbitration rules provides clarity and consistency and does so in the most efficient and effective manner. MTS Allstream's proposal to create a new arbitration framework, as set out in Schedule A of its submission should be rejected on at least two bases. First, its proposal encroaches beyond the arbitration process and unnecessarily attempts to regulate commercial *negotiations* between the parties (at a time when arbitration may not even be required.) In other words, MTS Allstream's proposed arbitration framework undermines Industry Canada's express preference for minimalist regulation and maximum reliance on market forces. Second, and in any event, there is no need to create a new regulatory framework given the existence of a pre-existing, established, national framework that has worked well for many years.

78. Parties' recommendations⁹ that arbitrations be conducted in accordance with the rules and legislation in force in the province where the roaming or tower or site sharing dispute arises should also be rejected. Wireless services are national and disputes can be expected to involve roaming, site or tower sharing issues in two or more provinces. It makes little sense to adopt a patchwork of individual provincial arbitrational schemes, particularly given the likelihood of conflicts over which applies. The CAA provides certainty to parties, and removes the possibility of jurisdictional disputes or forum shopping. Moreover, the use of a single, nationally applicable code is consistent with the "Enabling Guidelines" announced by Industry Canada in its June 2007 Spectrum Policy Framework for Canada, in particular, reliance upon the most efficient and effective measures.¹⁰

7.4 Rates Determined Through Negotiation, Not Tariffs

⁹ For example: Shaw recommends that arbitration processes be governed by the set of rules Shaw proposes in Appendix B of their submission, that the process be subject to the laws set out in the governing agreement between parties, and the default being the law of the province where the licensee's head office is located. (See paragraph 24 of Shaw's 22 January 2008 submission). SaskTel recommends the adoption of provincial arbitration processes. Should a party wish to roam or share towers in Saskatchewan that party should be willing to attend an arbitration hearing in Saskatchewan. (See pages 10 and 11 of SaskTel's 22 January 2008 submission).

¹⁰ DGTP-002-07, *Spectrum Policy Framework for Canada*, page 9. Enabling guideline (d) states: "Regulatory measures, where required, should be minimally intrusive, efficient and effective."

79. Look¹¹ and Primus/Globility's¹² proposals that the CRTC establish tariffs for roaming and tower and or site sharing rates should also be rejected. As discussed above, the Commission has forborne for many years from regulating rates and agreements in relation to incumbent carriers' cellular and wireless services under section 34 of the *Telecommunications Act* on the basis that these markets are competitive.¹³ As recently as 28 November 2007, Industry Canada confirmed again that wireless markets in Canada remain competitive.¹⁴ Thus, these retrograde proposals are inconsistent with current Commission forbearance rulings in respect of the wireless market and would in all likelihood violate section 34(3) of the *Telecommunications Act*. In any event, this aspect of Industry Canada's consultation was restricted to inviting parties' proposals relating to arbitration provisions. Proposals which are tantamount to applications to review and vary valid CRTC forbearance determinations are beyond the scope of this Consultation and relate to matters under the *Telecommunications Act* that are outside the jurisdiction of Industry Canada. For all of these reasons, proposals that the Commission fix tariffs for roaming and tower sharing rates must be rejected.

7.5 Three Person Arbitration Panels

80. Bell Mobility notes the importance to all parties of a fair and impartial tribunal. As such, Bell Mobility submits that unless parties can agree upon a single arbitrator, arbitration panels should consist of no fewer than three arbitrators who are drawn from the ranks of senior lawyers and retired judges. Panels comprised of three arbitrators are the most equitable format because each party has the opportunity to appoint a single arbitrator, with the third arbitrator chosen by the first two appointed arbitrators.

81. Bell Mobility believes that it would be administratively simple for Industry Canada to establish and maintain a roster of qualified arbitrators with input from stakeholders. In the alternative, Bell Mobility would agree with Rogers' proposal that senior lawyers and retired judges from the ADR Chambers would be acceptable since these individuals are eminently qualified to arbitrate such commercial disputes. As Rogers' states, at paragraph 31 of its submission: "The ADR Chambers is Canada's largest and most prestigious alternative dispute resolution group, with senior experienced panel members from across Canada."

¹¹ See pages 5, 8, and 10 of Look's 22 January 2008 submission.

¹² See paragraphs 20 to 23 of Primus' 22 January 2008 submission.

¹³ See, for example, *Regulation of mobile wireless telecommunications services*, Telecom Decision CRTC 96-14, 23 December 1996; *NB Tel Inc. – Forbearance from Regulating Cellular and Personal Communications Services*, Telecom Decision CRTC 98-18, at paragraph 43.

¹⁴ *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, page 4.

82. Bell Mobility is concerned about certain statements in the ADR Institute's 22 January 2008 comments. For example, ADR Institute stated at page 2 of its submission: "...the owner of the infrastructure will want to delay the actual sharing until such time as the amount to be paid is determined." (Emphasis added) In Bell Mobility's view, there is no basis to support such a view. Moreover, it is improper for the ADR Institute to present what at this juncture can only be regarded as its own opinion as fact, particularly given the ADR Institute's expressed desire to provide arbitrators. Bell Mobility does not therefore agree with the appointment of the ADR Institute as the arbitrator for the purposes of the AWS Policy Decision.

7.6 Right of Appeal

83. Bell Mobility disagrees with Quebecor's proposal that parties to arbitration not have the right to appeal an arbitrator's ruling on an error of law. Depriving a party of its right to appeal on an error of law (or jurisdiction) offends principles of fundamental justice and due process. Instead, Bell Mobility agrees with Rogers that arbitrators' decisions be subject to review on any question of law, mixed fact and law and fact and matters of jurisdiction. Bell Mobility recommends that such appeals be heard by a court of competent jurisdiction. However, if Industry Canada chooses the National ADR Rules as a national code for disputes in the wireless industry, then Bell Mobility submits that arbitrators' decisions should, at a minimum, be appealable to the Appeal Services of the ADR Chambers, as suggested in the submission of Rogers.

7.7 Discovery and Information Sharing

84. MTS Allstream's proposal that each new entrant have the right (by way of condition of licence) to request a review of all roaming arrangements of a licensee with whom the entrant requests roaming privileges¹⁵ should be rejected on several grounds.

85. First, it runs counter to the Department's stated objective of relying on market forces to the maximum extent feasible to ensure the provision of telecommunications services to Canadians.¹⁶ Parties should generally be free to adduce the evidence they wish to rely upon in presenting their respective positions to the arbitrator, and arbitral decisions should be based on evidence present on the record of the arbitration. Discovery, be it oral or documentary, should

¹⁵ See paragraph 28 on page 11 of MTS 22 January submission.

¹⁶ *Policy Framework for the Auction for spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range*, page 2.

be the exception rather than the rule. In other words, discovery beyond the evidence which is put forward by the parties should be narrowly limited solely to those circumstances where a party believes, and the arbitrator agrees, that it is absolutely necessary in order for the party to adequately present its case.

86. Second, MTS Allstream's proposal to grant automatic discovery of a party's arrangements would undermine the very essence of commercial negotiation in a functioning market. Companies cannot be expected to compete effectively while being required to divulge their highly confidential corporate information to new entrant competitors. Roaming and tower sharing negotiations and arbitrations should not be used to obtain competitive information and trade secrets that would not otherwise be available. Allowing a party who requests roaming or sharing to have immediate access to all other contracts will unduly prejudice and distort the negotiation process and the wireless market.

87. In those limited circumstances where the arbitrator considers such agreements relevant, this and any other relevant evidence should be disclosed in confidence solely to the arbitrator and not to the other party to the arbitration. Industry Canada must be vigilant in protecting and maintaining the confidentiality of proprietary and commercially sensitive third party roaming and tower sharing agreements.

88. In this regard, Bell Mobility agrees with Rogers and MTS Allstream that arbitrator's authority to request documentation should be limited. As noted by Rogers, "the unlimited exchange of documents and examinations of witnesses will result in significant delays, undermining the entire arbitration process." Bell Mobility agrees that the right of oral discovery should be conditional upon leave of the Arbitral Tribunal. As well, Bell Mobility agrees that document discovery should be limited solely to those documents that are directly relevant to the roaming and site sharing matters at issue.¹⁷ These principles must apply equally in the event of appeals from the decisions of arbitrators.

7.8 Most Favoured Nation Clauses

89. Look's and Mobilexchange's suggestion that most favoured nation (MFN) clauses be adopted to expedite negotiations relating to roaming and tower sharing should also be

¹⁷ See page 15 of Rogers' 22 January 2008 submission.

rejected.¹⁸ Bell Mobility strongly opposes the use of MFN clauses. MFN clauses embody the worst form of unwarranted, top down, one-size fits all regulation. In addition to protecting competitors instead of competition, they diminish incentives for firms to compete effectively, and distort markets. This proposal too runs directly counter to the Department's stated intention to interfere with market forces to the minimal extent possible.

7.9 Method of Arbitration

90. A number of parties have proposed that all arbitrations be conducted on the basis of "final offer arbitration" (FOA).¹⁹ Bell Mobility does not believe it is necessary for Industry Canada to impose a rule requiring FOA in every circumstance. Rather, the nature of disputes will vary and different circumstances may require different resolution techniques. Consistent with the principle of giving parties the flexibility to establish and agree on the arbitration rules for any particular dispute in the first instance, Bell Mobility submits FOA, if it is to be mandated at all, be required only in the event parties are unable to agree on an alternative arbitration method.

7.10 Timing

91. Shaw and MTS Allstream have proposed unworkably narrow time deadlines that would apply to roaming and tower and site access disputes. For example, Shaw proposes that parties be granted 14 days from the date of initiation of arbitration to make written submissions to the arbitrator.²⁰ MTS Allstream proposes that the claimant set out its proposed material terms and conditions immediately and the respondent respond within 10 days from receipt of such proposal.²¹ The parties, (under MTS Allstream's regime, the claimant, and under Shaw's regime, both parties) then would have just five days to reply. Parties must be given four or five days, respectively, notice of an oral hearing and the arbitrator would render a decision within 10 or 14 days of close of arbitration.²² Bell Mobility submits there is no demonstrated need to impose such strict, inflexible timelines. Disputes will vary according to the nature of the dispute

¹⁸ See pages 5 and 10 of Look's 22 January 2008 submission.

¹⁹ See page 17 of TELUS' 22 January 2008 submission, and paragraph 36 of MTS Allstream's 22 January 2008 submission.

²⁰ See Appendix B of Shaw's 22 January 2008 submission.

²¹ See Section 24 of Schedule "A" of MTS Allstream's 22 January 2008 submission.

²² See Appendix B of Shaw's 22 January 2008 submission, and Sections 24 and 40 of Schedule "A" of MTS Allstream's 22 January 2008 submission.

and the unique circumstances of each. A one-size timeline will not fit all disputes. Parties may need time to gather evidence, produce expert reports, and develop arguments. Commercial arbitrators recognize the need for speedy resolution of disputes in the commercial context. They are experienced with the need to move arbitrations along as quickly as possible. Allowing the commercial arbitrator flexibility with respect to scheduling is necessary to allow for a full and proper arbitration process.

7.11 Triggering Arbitration Process

92. Bell Mobility reiterates its submission of 22 January 2008 that dispute resolution through mandatory arbitration should not be triggered any earlier than 180 days after the first request for roaming or tower sharing is made. Such time is necessary for parties to make their best effort to resolve disputes through negotiation. Allowing parties to go to arbitration within 60 or 90 days of the initial request diminishes parties' incentives to negotiate in good faith. Meaningful negotiation requires the participation of both parties, and licensees cannot meaningfully respond to a request without receipt of the necessary technical documents. As such, Bell Mobility agrees with Rogers that the timelines triggering the start of arbitration should not begin to run until the applicant has provided all reasonable information required to support the access or roaming request.²³

93. MTS Allstream proposes that Industry Canada introduce strict CoL to govern the negotiation process and that absent such conditions, the initial request for roaming or tower sharing by an operator would automatically trigger the commencement of the arbitration process.²⁴ As noted above, Bell Mobility disagrees with this proposal. Instead of relying on market forces, it assumes market failures, without any evidentiary basis, and assumes a need for detailed and prescriptive regulatory oversight where none is required. Parties must be given the opportunity to negotiate in good faith. Only after parties have exhausted attempts to come to a mutually agreeable solution, should parties have recourse to binding arbitration.

²³ See paragraphs 20 and 21 of Rogers' 22 January 2008 submission.

²⁴ See paragraph 31 of MTS Allstream's 22 January 2008 submission.

8.0 CONCLUSION

94. Bell Mobility respectfully requests that the Department give serious consideration to the concerns and recommendations addressed in its 22 January 2008 Comments and in these Reply Comments. To facilitate the Department's consideration of these concerns and recommendations, the Appendix to this Reply outlines Bell Mobility's proposed CoL reflecting the issues raised in our response to this Consultation.

*** End of Document ***