



February 7, 2008

**By E-Mail: [AWS@ic.gc.ca](mailto:AWS@ic.gc.ca)  
and REGULAR MAIL**

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

Dear Mr. Hill:

**Re: *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**

Please find attached the reply comments of Bragg Communications Inc., carrying on business as EastLink ("EastLink"), in response to *Canada Gazette* notice DGRB-010-07.

We appreciate the opportunity to provide our views to Industry Canada and are available to answer any questions that Industry Canada may have regarding our submissions.

Yours very truly,

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Lee Bragg

Co-CEO  
EastLink

Enclosure

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

**Canada Gazette, Part I, November 28, 2007**

**Notice No. DGRB-010-07**

**Reply Comments of  
Bragg Communications Inc.,  
carrying on business as EastLink**



**February 7, 2008**

1. Bragg Communications Inc., carrying on business as EastLink ("EastLink"), hereby provides its reply comments in relation to *Canada Gazette* notice DGRB-010-07, *Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*.
2. EastLink reiterates herein its key positions and addresses some of the issues raised by Rogers Communications Inc. ("Rogers"), Bell Mobility Inc. ("Bell") and TELUS Communications Company ("TELUS"), collectively the "Incumbents", in their submissions, each dated January 22, 2008. EastLink generally denies any allegations or arguments in the Incumbents' submissions that are contrary to EastLink's stated positions. Accordingly, failure to address any specific comment made by any of the Incumbents should not be taken as agreement or concurrence with such comment, where such agreement or concurrence would be contrary to EastLink's interests.

## **ROAMING**

3. EastLink agrees with Industry Canada that the ability to roam on the Incumbents' networks is essential for new entrants if they are going to compete effectively. EastLink also believes that, in order to offer a truly competitive service, a new entrant must not only be able to roam on the Incumbents' networks, but, must also be able to offer its subscribers, where possible, the same services and applications they receive in their home service area when they are roaming. Otherwise, the quality of service offered by new entrants and, as a result, their ability to compete, will be significantly impacted. Accordingly, in its earlier submissions, EastLink proposed the following additions to the conditions of licence to ensure that mandatory roaming is truly successful:
  - (a) Because some of the advanced services available today (as well as many of those to be implemented in the years to come) are not adequately supported on 2G networks, mandated roaming should include the ability of new entrants to roam on the Incumbents' 3G networks (where available) so that new entrants' customers will not lose access to advanced services when roaming.
  - (b) Mandated roaming should include support for applications that are available on both the Incumbent's and the new entrant's networks so that the new entrant's subscribers do not lose access to advanced mobile services when roaming.
  - (c) Mandated roaming should include handovers so that new entrants' subscribers do not face dropped calls when leaving their nominal or home coverage area.
  - (d) The conditions of licence should define the expected Incumbent collaboration with respect to management of the evolution of the border between new entrants' home networks and adjacent Incumbent networks. Otherwise, as a new entrant's network expands, its subscribers may be forced to roam prematurely and/or may experience dropped calls, negatively impacting the quality of service experienced by the new entrant's subscribers when using its service within these newly expanded fringe areas.

4. EastLink believes that each of these measures is necessary to ensure that new entrants are able to compete on a level playing field and reiterates that any suggestion by the Incumbents that roaming should be limited to mere “connectivity” should be rejected. To be truly competitive, new entrants must be able to offer their customers the same quality of service available from the Incumbents and this will not be possible without all of the above-mentioned measures.
5. In *Conditions for PCS and Cellular Spectrum licences*, issued in 1995, and updated November 1, 2005, Industry Canada provided new entrants with very limited mandated roaming rights:

*Cellular licensees will be required to offer analogue cellular resale and analogue cellular roaming through commercial arrangements to PCS licensees who are not also cellular licensees. The commercial arrangements are to be offered on a non-discriminatory basis and apply to those licensed areas which are common to the parties of any such arrangement. The Department does not further define the scope of these commercial arrangements.<sup>1</sup>*

As a result, new entrants were limited to access to basic first generation analogue cellular service, while incumbents were deploying 2G digital systems across the country.

6. EastLink submits that this mandated roaming scheme, which is similar to Rogers' current proposal with respect to roaming (e.g., no handovers, no roaming on 3G, no e-mail or data access), was insufficient to allow the 1995 new entrants to compete with the incumbents on a level playing because it created a gap between the incumbents and the new entrants with respect to the quality of service they were able to offer their customers. Because new entrants' customers were not roaming on the most advanced technology available at the time, those customers did not have access to many advanced services when roaming outside of their coverage area. EastLink suspects that this may have been one of the factors that contributed to the failure of the PCS new entrants. Accordingly, Eastlink respectfully requests that Industry Canada reject Rogers' position that mandated roaming should be limited to mere connectivity and submits that the roaming provisions requested by Eastlink herein and in its January 22, 2008, submissions should be granted.
7. Finally, EastLink notes that Industry Canada's proposed conditions of licence state that new entrants' 5-year mandated roaming period commences “with the date of issuance of their licence”. EastLink submits that the default start date for roaming should be the date when a new entrant's service launches, as opposed to the date its licence is issued. Roaming is limited to a five-year term and a new entrant may not be ready to launch its service immediately upon issuance of the licence. As a result, commencing the five-year term upon issuance of the licence may result in a portion of the term elapsing before the service is launched, depriving the new entrant of some of the benefits of mandated roaming. As a result, EastLink

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<sup>1</sup> See paragraph 13.

submits that the default start date should be the date the new entrant launches its service; however, new entrants and Incumbents should be free to agree to a later date. Additionally, regardless of what date is chosen, EastLink submits that licensees should be required to begin accepting roaming requests as soon as new entrants receive their licences. This will prevent unnecessary delay by allowing negotiations to commence in advance of service launch.

8. The following sub-sections constitute EastLink's response to some of the issues raised by the Incumbents in their submissions.

*Qualifying for Mandated Roaming - The Definition of "New Entrant"*

9. Rogers proposes that the status of "new entrant" be restricted to those entities holding less than 25% of the market share (based on number of subscribers) in their licensed area.<sup>2</sup>
10. Industry Canada has granted new entrants the right to roam on the Incumbents' networks within their licensed areas for a period of five years for the express purpose of permitting new entrants sufficient time to build out their networks.<sup>3</sup> Accordingly, EastLink submits that it would be inappropriate for a company's status as a new entrant to be contingent on market share, since there will not always be a direct correlation between a new entrant's market share and the extent to which they have been successful in building out their network.
11. For example, one of the licensed areas available in the auction consists of mainland Nova Scotia. Because almost half of the population of mainland Nova Scotia is concentrated within the bounds of the Halifax Regional Municipality (the "HRM"), any company receiving a licence for mainland Nova Scotia would likely launch its service in the HRM first. If that company experience success within the HRM, because of the population concentration in that municipality, it would be possible for that new entrant to gain a 25% market share within mainland Nova Scotia without even beginning to expand its network beyond the HRM. Thus, under Rogers' proposal, even though that new entrant might not yet even have begun the expansion its network to include any areas outside of the HRM, the company would lose its status as a new entrant and, accordingly, its right to mandated roaming within its licensed area. Any such company would then face significant challenges in terms of retaining and acquiring customers since, without roaming beyond the HRM, the quality of service offered by the company would be significantly impacted, and, without a right to mandated roaming, the company would, due to its small size, likely be unsuccessful in negotiating reasonable rates for roaming (since it would be to the advantage of the Incumbents to charge the new entrant high rates in an effort to impede its success).

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<sup>2</sup> See paragraph 38 of Rogers' submissions.

<sup>3</sup> See *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range*, November 2007, page 8, where Industry Canada states: "As well, 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." [emphasis added]

12. EastLink submits that mandated roaming is essential to the business case of any new entrant. As a result, conditions of licence should not be added that will prematurely remove a new entrant's right to mandated roaming.

*Qualifying for Mandated Roaming - The Definition of "National New Entrant"*

13. Rogers proposes that a group of new entrants should only be considered to be "cooperating" as a national new entrant if, *inter alia*, "3) They plan their network facilities and operations jointly; 4) They brand their products and services together on a national basis; and 5) They market their products and services together on a national basis."<sup>4</sup>
14. EastLink submits that there is no reason why companies cooperating as a national new entrant should be unnecessarily restricted in terms of the manner in which they brand and market their products, nor the manner in which they manage their networks.
15. Rogers does not suggest any reason for the restrictions they have proposed and EastLink is not able to ascertain what those reasons might be. EastLink notes that the Incumbents each currently offer several brands (Rogers' wireless service is marketed under two brands: *Fido* and *Rogers Wireless*; TELUS offers its service under the *TELUS Mobility* and *Mike* brands; and Bell's service is marketed as both *Bell Mobility* and *Aliant Mobility*) and some of those brands are not offered on a nation-wide basis. As a result, it is unclear why Rogers feels that national new entrants should not have the same flexibility.
16. EastLink submits that the only relevant consideration is customers' experience of the service. The customers of a national new entrant should experience a seamless service across the networks of all of the cooperating entities. This does not require common branding and marketing, nor does it require network facilities and operations that are jointly planned. All that is required to accomplish this "customer experience" is that each individual company plans its network in a way that allows for interoperability. It does not require common management of the networks as one unit.
17. EastLink notes that any group of companies coming together to cooperate as a national new entrant will be facing a greater risk than they would have faced if they had each individually bid on a small number of Tier 2 or 3 licences in the most densely populated areas, where they would likely be most profitable. In order to qualify as a national new entrant, the cooperating companies must acquire any combination of Tier 2 and 3 licences that cover all of Canada in the AWS or PCS bands, including sparsely populated rural areas. As a result, Industry Canada must recognize that such companies are facing additional risks and capital outlays in order to offer a national service and, if Industry Canada's goal is to encourage national new entrants so as to introduce competition to all regions in Canada, the conditions of licence should not unnecessarily stifle potential national new entrants by imposing unnecessary restrictions on how they manage, market and brand their

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<sup>4</sup> See paragraph 39 of Rogers' submissions.

networks and services. Accordingly, EastLink submits that the above noted items 3), 4) and 5) in Rogers proposed condition of licence should be rejected.

#### *Qualifying for Mandated Roaming - Roll-Out Targets*

18. Bell has proposed a condition of licence specifying that, in order to qualify for mandatory roaming, a new entrant must “have built-out [its] local AWS wireless network and must first have provided service to a minimum of 50% of the minimum population coverage specified in the five year Roll-out Targets”.<sup>5</sup> Bell states that such a condition is necessary to encourage facilities-based competition.
19. EastLink notes that Industry Canada states in *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range* (the “*Policy Framework*”):

Taking into account the overall policy framework for this auction, and the stated intentions of both incumbents and new entrants, the department is of the view that specific roll-out obligations are appropriate only in relation to roaming provisions for national new entrants. Allowing general flexibility in this respect will enable winning bidders to respond to market factors in determining infrastructure build-out decisions.<sup>6</sup> [emphasis added]

20. Industry Canada states on page 1 of the *Policy Framework* that the policy decisions contained therein are final. Accordingly, EastLink submits that it is not now open to Bell to suggest changes to the above-noted policy decision by proposing a new roll-out requirement in order for new entrants to qualify for mandated roaming.
21. Moreover, EastLink submits that Bell's proposed condition of licence is unnecessary because Industry Canada has already put in place several policies that encourage facilities-based competition. For example, the maximum 5 and 10-year timeframes proposed for mandated roaming will be sufficient to encourage competitors to build out their networks in a timely manner.
22. Accordingly, EastLink submits that Industry Canada should deny Bell's proposal.

#### *Qualifying for Mandated Roaming - Roll-out Requirements*

23. Rogers and Bell have suggested changing the wording of the following proposed condition of licence:

*Roaming is to be offered...To national new entrants who have substantially met the 5-year roll-out requirements outlined on their licence, as determined by Industry Canada, for an additional 5 years.* [emphasis added]

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<sup>5</sup> See paragraph 57 of Bell's submissions.

<sup>6</sup> See page 10.

Each suggests changing “who have substantially met” to “who have satisfied”.<sup>7</sup>

24. Bell offers no explanation for this change, while Rogers claims that this change would make the proposed condition of licence consistent with *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (the “Licensing Framework”)<sup>8</sup>, which contains a requirement that, in order to be eligible for the additional 5 years of roaming, a national new entrant must demonstrate that “the spectrum was used in accordance with the roll-out targets specified in Appendix C.”
25. EastLink submits that the current wording of the proposed condition of licence is entirely consistent with the section of the *Licensing Framework* highlighted by Rogers. If Industry Canada had intended to require new entrants to completely satisfy the roll-out requirements before being granted an additional 5 years of roaming, it would have stated so. Instead, Industry Canada chose to use the phrase “used in accordance with”, which, EastLink submits, implies an element of discretion, which Industry Canada could use to address situations where, for example, a company is only slightly shy of the roll-out requirement for reasons beyond its control.
26. Accordingly, EastLink submits that Rogers’ and Bell’s proposed change would unnecessarily fetter Industry Canada’s discretion to extend roaming rights where the circumstances warrant and should, therefore, be denied.

*Qualifying for Mandated Roaming - TELUS’ proposed Condition of Licence 2c*

27. TELUS proposes the following condition of licence:

*2. In order to fulfill the condition of offering roaming in accordance with this licence... c. The roaming arrangement is to be offered in those licensed areas that are common to the Licensee and the requesting Licensee and only where the requesting Licensee has not already negotiated a cellular roaming, PCS roaming or AWS roaming arrangement with Licensee or any other carrier within the Licensee’s coverage area applicable to such service. [emphasis added]<sup>9</sup>*

28. EastLink is confused by TELUS’ suggestion that roaming would only be offered in licensed areas that the Licensee and new entrant have in common. This appears to restrict the mandated roaming obligation to in-territory roaming. EastLink submits that this is inconsistent with Industry Canada’s *Policy Framework*, which mandates both in-territory and out-of territory roaming. Accordingly, TELUS’ proposal should be denied.

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<sup>7</sup> See, for example, paragraphs 86-87 of Rogers submissions.

<sup>8</sup> DGRB-011-07

<sup>9</sup> See page A3 of the Attachment to TELUS’ submissions.

### *Exclusions from Roaming - Resale*

29. Each of the Incumbents has proposed changes to the wording of the conditions of licence that are aimed at prohibiting the use of roaming as a means of resale.<sup>10</sup>
30. EastLink wishes to state first and foremost that it fully supports Industry Canada's goal of promoting facilities-based competition. EastLink is presently a facilities-based competitor in the wireline telephony industry. As a result, EastLink agrees that new entrants should not be permitted to rely solely and permanently on resale as a means of offering their service. However, EastLink submits that there are circumstances where resale can play an important role in the development of facilities-based competition.
31. The Canadian Radio-television and Telecommunications Commission (the "CRTC") has stated on numerous occasions that it is: "of the view that resale can promote the development of a competitive market while allowing competitors time to construct their own facilities."<sup>11</sup> As a result, even though the CRTC considers facilities-based competition to be the ultimate goal in wireline competition, it has, on numerous occasions, required the incumbent wireline telephone companies to provide mandatory resale of their services and facilities as a means of fostering competition. This policy has not discouraged the development of facilities-based competition in the wireline industry (facilities-based competition is now common across Canada) and a similar policy will not discourage the development of facilities-based competition in the wireless industry.
32. Building facilities requires significant time and capital and most new entrants will need time to build out their licensed territories. EastLink submits that allowing limited resale in the early stages of new entry will support the introduction of facilities-based competition to the wireless industry in two important ways. Firstly, it will permit new entrants to bring competition to all parts of their licensed territory *immediately*, while allowing them time construct their facilities. Secondly, it will allow new entrants to develop a customer base outside of their network footprint that will support further expansion .
33. Contrary to the arguments put forth by the Incumbents, resale will not discourage new entrants from constructing facilities. As noted elsewhere herein, the proposed conditions of licence already contain sufficient incentive for new entrants to construct their own facilities (e.g., the maximum 5 and 10 year timeframes in place for mandatory roaming). However, if Industry Canada is concerned that the use of roaming as a means of resale might discourage the development of facilities-based competition, EastLink requests that, rather than prohibiting such activity, Industry Canada consider using certain restrictions to limit the use of roaming as a means of resale to those instances where it will support the development of facilities-based competition. For example, the use of roaming as a means of resale could be limited such that it is only available within a certain timeframe after a new entrant launches its service and within the new entrant's licensed area. Alternatively, it could contingent on complying with certain roll-out targets.

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<sup>10</sup> See, for example, paragraphs 40-44 of Rogers' submissions.

<sup>11</sup> See, for example, Telecom Decision CRTC 97-8 and Telecom Decision CRTC 2006-14.

34. In the alternative, if Industry Canada agrees with the Incumbents that roaming should not be used as a means of resale, EastLink respectfully requests that Industry Canada consider adopting a form of mandated resale to support the development of facilities-based competition.

*Exclusions from Roaming - Marketing outside the coverage area*

35. Rogers has proposed the following condition of licence:

*Automatic Digital Roaming does not permit a licensee to sell or market wireless services to subscribers located outside of their coverage area; including but not limited to, the use of local telephone numbers, or the establishment of a retail distribution network.<sup>12</sup> [emphasis added]*

36. At paragraphs 45 and 46 of its submission, Rogers justifies this condition of licence on the basis that selling and marketing to customers outside of the licensee's "licensed territory" should not be permitted and EastLink agrees with the example provided in Rogers' submission to the effect that a new entrant should not be permitted to purchase one spectrum licence in Newfoundland but then offer service to customers in Vancouver using the mandated roaming service (though parties should be free to negotiate arrangements with other carriers that would permit licensees to sell and market their products outside of their licensed area via resale, roaming, etc.). However, EastLink notes that Rogers' proposed condition of licence does not reference the new entrant's "licensed territory" but, rather, its "coverage area", and, EastLink submits that limiting marketing outside of a new entrant's "coverage area" is significantly different from limiting marketing outside of the new entrant's "licensed territory".
37. The use of "coverage area" suggests that Rogers is proposing that new entrants be prohibited from marketing their service outside of their network footprints, even where those locations are within their licensed areas. EastLink submits that any such proposal would unduly restrict new entrants' ability to market their services. For example, if a new entrant had a licence to serve mainland Nova Scotia and had only built out its network to cover the Halifax Regional Municipality, under Rogers' proposed condition of licence, it would be prohibited from marketing its services outside of the Halifax Regional Municipality, despite the fact that many people from the neighbouring communities work in and otherwise visit the HRM on a daily basis. Additionally, that same company would be prohibited from marketing in those areas in anticipation of an expansion of its network into those areas.
38. For all of the foregoing reasons, EastLink submits that Rogers proposed condition of licence is unreasonable and should be rejected by Industry Canada.

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<sup>12</sup> See paragraph 61 of Rogers' submissions.

### *Exclusions from Roaming - Material Capital Expenditures*

39. Rogers proposes a condition of licence which states: "Automatic Digital Roaming does not require material capital expenditures to be made by a licensee".<sup>13</sup>
40. As noted by Industry Canada, "the policy objective for managing the radio frequency spectrum resource is to maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource."<sup>14</sup> Industry Canada has determined that the introduction of more competition into the wireless industry will benefit Canadians and that "mandated roaming is important to promote competition and supports the orderly development of radiocommunication in light of the policy objectives of the Telecommunications Act."<sup>15</sup> Accordingly, it is not unreasonable to expect that the Incumbents would have to incur some costs in association with implementing competition within the wireless industry via mandated roaming.
41. When local competition was introduced in the wireline telephone industry, various processes and procedures were introduced to support the entry of competitive service providers. Compliance with those new processes and procedures required both competitors and the incumbent phone companies to allocate time, money and resources towards their implementation, and parties were generally expected to bear their own costs. EastLink submits that a similar approach is warranted in the wireless industry.
42. Moreover, EastLink notes that the Incumbents will be compensated for the use of their networks in association with mandated roaming through roaming charges. As a result, the Incumbents are not being asked to expend capital in support of competition and receive nothing in return. The Incumbents will benefit from additional revenue as a result of mandated roaming.
43. Based on all of the foregoing, EastLink submits that Rogers proposed condition of licence should be rejected.
44. In the alternative, in the event that Industry Canada does implement Rogers' suggestion, EastLink submits that Industry Canada must consider measures to address questions which will inevitably arise in relation to how "material capital expenditures" will be identified and confirmed.
45. For all of the foregoing reasons, EastLink similarly submits that Industry Canada should deny TELUS' proposal in section 5 of its submissions that the "Department should clarify that technical feasibility by definition includes a reasonableness standard that includes economic cost and practicality". The Incumbents should not be permitted to avoid all responsibility for the costs of Industry Canada's efforts to increase competition for the benefit of Canadian consumers. If, in a given situation, there are some technical challenges that must be overcome before mandated roaming is technically feasible between two parties, both the Incumbent

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<sup>13</sup> See paragraph 61 of Rogers' submissions.

<sup>14</sup> See *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range*, November 2007, page 1.

<sup>15</sup> See *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range*, November 2007, page 8.

and the new entrant should be expected to assume their respective costs in relation to overcoming those challenges.

#### *Exclusions from Roaming - Roaming within the Home Network Footprint*

46. The Incumbents have suggested that roaming should not be available to new entrants within the footprint of the new entrant's network.<sup>16</sup>
47. EastLink generally agrees with this proposal, but offers one proviso. If a call is initiated by a new entrant's subscriber outside of the new entrant's service area, and the subscriber moves back into the new entrant's service area during the call, roaming should be permitted so that the call is not dropped.<sup>17</sup> Absent such a procedure, new entrants will not be able to offer their customers a quality of service similar to that available from the Incumbents and their ability to compete will be significantly impacted. This will be particularly true in the early years of competition, when the new entrants' network footprints will likely be relatively small and their customers will cross their borders regularly.

#### *Planned Capacity for Roaming*

48. At paragraphs 88 through 95 of its submissions, Rogers proposes a scheme whereby those parties requesting roaming would be required to provide quarterly and annual forecasts of their expected traffic and compensate the roaming provider for any shortfall or overage. Rogers premises this proposition on its fears that it will face substantially increased traffic that will force it to invest in additional capacity, which investment could turn out to be stranded. EastLink submits that those fears are unfounded.
49. Firstly, EastLink expects that each of the Incumbents' networks currently have additional capacity built into them in order to accommodate customer growth, the needs of its current roaming partners, etc. As a result, EastLink does not anticipate that mandated roaming will have a significant impact on the Incumbents' networks, particularly in the early years of competition, when new entrants will only be beginning to build a subscriber base.
50. Secondly, EastLink submits that a significant portion of the customers acquired by new entrants will likely have been the Incumbents' customers before switching to a new entrant. Industry Canada noted in the *Policy Framework* that the Incumbents account for 94% of the national wireless markets.<sup>18</sup> As a result, new entrants' customers should not result in a substantial amount of additional capacity on the Incumbents' networks since a significant portion of those customers will have been on the Incumbents' networks prior to the implementation of mandated roaming.
51. Finally, EastLink notes that the Incumbents will be compensated for the use of their networks in association with mandated roaming through roaming charges.

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<sup>16</sup> See, for example, Section 2.3 of TELUS' submissions.

<sup>17</sup> Note: such a requirement will not be necessary if bi-directional handovers exist with the Incumbent at the new entrant's network border

<sup>18</sup> See page 2.

Because the Incumbents will benefit from additional revenue as a result of mandated roaming, they will receive a return on any investment in additional capacity that is necessitated by mandated roaming.

52. In light of all of the foregoing, EastLink submits Rogers' expressed fears regarding the need to invest in large amounts of additional capacity are unfounded and, as a result, Rogers' proposal should be denied. Additionally, even if Rogers' fears were legitimate, which EastLink denies, it would be up to the Incumbents to manage their businesses in accordance with their needs and it is inappropriate to shift this burden to new entrants by requiring them to provide binding forecasts. EastLink submits that, because the success of mandated roaming will benefit all Canadians, all participants in the industry should be required to manage their business in a manner that will ensure the success of Industry Canada's initiative. Rogers' proposal would place the burden on the new entrants to determine what resources the Incumbents should make available to accommodate roaming requests. EastLink submits that this is inappropriate. The Incumbents are, presumably, presently able to properly allocate resources to accommodate the current volume of requests and, EastLink submits, they should be similarly able to properly manage their businesses once mandated roaming is implemented. There is no reason why this obligation should be shifted to new entrants. However, should Industry Canada feel that the provision of forecasts to the Incumbents would aid them in managing their businesses, EastLink submits that such forecasts should be non-binding and should not result in payments due to overages or shortfalls.

#### *Technical Feasibility*

53. At paragraph 54 of its submissions, Bell states that it "interprets the phrase 'where technically feasible' to mean that, for example, a carrier using a CDMA-based network will not be required to provide roaming to a requesting carrier using other than a CDMA-based network."
54. EastLink submits that any such restriction should not apply to carriers who request roaming and are able to provide their customers with a handset capable of handling multiple technologies such as CDMA-2000 EDDO, GSM, UMTS HSPA, etc.

#### *Volume-based Rates*

55. EastLink notes that TELUS has suggested changes to the proposed conditions of licence which would permit the Incumbents to take volume into account in determining the appropriate rate to be charged to new entrants for roaming.<sup>19</sup> EastLink submits that TELUS' proposal should be rejected. The purpose of mandating that roaming be provided "at commercial rates that are reasonably comparable to rates currently charged to others for similar access" is to ensure that new entrants are not disadvantaged by their small size in comparison to the

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<sup>19</sup> See proposed footnote 2b, which states: "...Industry Canada expects that roaming would be offered at commercial rates that are reasonably comparable to rates that are currently charged to others for similar services and similar volumes." [emphasis added to indicate new wording proposed by TELUS]

Incumbents. Accordingly, EastLink submits that allowing the Incumbents to use new entrant's small size against them by penalizing them for having smaller roaming volumes would undermine the achievement of Industry Canada's objective of introducing viable competition.

## **ANTENNA TOWER AND SITE SHARING**

56. As noted in its earlier comments, EastLink agrees with Industry Canada that access to antennas and supporting structures is a significant barrier to entry into the wireless markets. As a result, EastLink has previously proposed the following changes to the conditions of licence to ensure that mandated antenna tower and site sharing achieves its objectives:
- (a) EastLink agrees that the 30 day and 90 day timeframes proposed by Industry Canada are appropriate for the first set of negotiations that take place between two parties with respect to tower and site access. However, EastLink submits that, because the result of these initial negotiations is, generally, a master agreement that can apply to all subsequent requests for tower and site access, a much shorter timeframe would be appropriate for requests that are made after a master agreement is in place.
  - (b) To prevent tower owner/operators from being able to reject sharing requests for technical reasons that could be resolved through cooperation between the parties, EastLink proposed amendments to the conditions of licence that would permit the party requesting access to determine whether it is willing to undertake the work necessary to make sharing feasible and, if that is the case, that would require the tower owner/operator to cooperate with all such efforts. Additionally, EastLink proposed that a mechanism be developed to expeditiously resolve any disputes relating to whether sharing is technically feasible.
  - (c) EastLink proposed that the conditions of licence expressly state that licensees' obligation to "facilitate" sharing goes beyond a requirement that they not interfere with other parties' efforts to access a site/tower and includes an obligation to undertake commercially reasonable efforts to assist such parties.
  - (d) EastLink is concerned that new entrants may be forced to invest significant (and unnecessary) time and money in expanding or modifying licensees' towers if a mechanism is not put in place to prevent licensees from reserving unreasonable amounts of space on their towers for their future use. Accordingly, EastLink has proposed four possible mechanisms through which this issue could be addressed.
  - (e) EastLink proposed amendments to the conditions of licence to ensure that no party is granted preferential access rights (i.e., access requests should be dealt with on a first come, first served basis, and the same technical constraints should be applied to all parties.)

57. EastLink believes that each of these measures is necessary to ensure that new entrants are able to compete on a level playing field with the Incumbents.
58. The following sub-sections constitute EastLink's response to some of the issues raised by the Incumbents in their submissions.

*Compensation for Foregone Exclusivity Rights*

59. Rogers has proposed that parties requesting access to sites and towers be required to compensate licensees for foregone exclusivity rights by paying the licensee an amount equal to the value of the premium paid by the licensee for the foregone rights.<sup>20</sup>
60. EastLink submits that Rogers' proposal should be rejected for the following reasons:
  - It is EastLink's understanding that it would be a very rare occasion where a licensee would have paid a premium for exclusive access to a site. As a result, it would be inappropriate for a compensation scheme to be developed which assumes that all licensees have paid such a premium.
  - Even if a licensee had paid such a premium, it would be virtually impossible to prove the amount thereof, since such a premium would likely not be expressly set out in the contract but would, rather, be an element that went into determining the amount of the rent due under the contract. As a result, it would be impossible to determine after the fact whether a licensee had paid a premium for exclusivity rights and what value was placed on those rights at the time the contract was signed.
  - In those rare instances where a licensee may have paid a premium for exclusive access, it would be open to that licensee to negotiate a reduction in its rent that would take into account the fact that the licensee no longer has exclusive access to the site.
  - Licensees will be compensated for granting access to their sites and towers. This is money they would not receive if they enforced any exclusivity provision that may exist with respect to the site or tower. As a result, licensees will receive additional revenue as a result of mandatory tower and site access which should offset any foregone exclusivity rights.
61. EastLink notes that neither TELUS nor Bell has suggested that similar compensation is necessary. EastLink submits that this is likely because both of those parties realize that there is no need for such a compensation scheme.

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<sup>20</sup> See paragraph 98 of Rogers' submission.

### *Inability to Waive Exclusivity Rights*

62. Some of the Incumbents have suggested that there may be situations where they are unable to waive their exclusivity rights.<sup>21</sup> EastLink expects that licensees will be free to waive exclusivity rights in virtually all circumstances.
63. Because landlords may benefit from additional rent if the licensee waives its exclusivity rights (due to the presence of additional tenants), EastLink expects that landlords will generally not seek to enforce exclusivity rights. The fact that Rogers indicates that they have paid a premium for these rights suggests that they are generally granted at the licensee's request, and not for the benefit of the landlord or a third party. As a result, EastLink would expect that it should be fully within the discretion of licensees to waive exclusivity rights.
64. In light of the foregoing, it is unclear what type of situation TELUS is anticipating where it would not be within a licensee's power to waive its exclusivity rights. However, should a situation arise where a third party prevents a licensee from waiving its exclusivity rights or otherwise hinders access to a site or tower, EastLink repeats its position as set out in its January 22, 2008, submissions to the effect that the licensee should be required to undertake all reasonable commercial efforts to assist new entrants in gaining access to the site or tower.

### *Timelines for Responding to Tower and Site Sharing Requests*

65. The Incumbents have proposed various changes to the timelines for responding to sharing requests. All of the proposed changes would result in either longer timelines or no mandatory timeline at all.<sup>22</sup>
66. In particular, Rogers has proposed a convoluted process involving two approval stages (a "conditional" approval and a "final" approval). EastLink submits that the timeline proposed by Rogers is unnecessarily complex and introduces unnecessary delay. EastLink continues to be of the opinion that the timeline proposed in its January 22, 2008, comments is reasonable. That timeline can be summarized as follows:
  - (a) Expression of Interest - A party requesting access to a site or tower (the "requestor") indicates its interest in site/tower access to the tower owner/operator by filing an "expression of interest".
  - (b) Preliminary Information Package - The tower owner/operator must respond to the expression of interest within 30 days by providing the requestor with a "preliminary information package" which contains plans for the tower indicating the location of equipment currently installed on the tower, as well as an indication of the space the tower owner/operator wishes to reserve for its future use.

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<sup>21</sup> See, for example, page 13 of TELUS' submissions.

<sup>22</sup> For example, TELUS has suggested that no mandatory timeframe exist for determining the technical feasibility of a sharing request

(c) Sharing Request - Once it receives the preliminary information package, the requestor would, within 30 - 60 days, provide its official and complete tower sharing request, which would include all of the engineering, plans, structural analysis, etc. necessary to permit the licensee to examine the technical feasibility of the requestor's plan.

(d) Approval / Rejection - Within 30 days of receiving this request, the tower owner/operator would be required to provide a response in one of three forms: (i) approving the request as is; (ii) approving the request subject to certain modifications (in which case, the parties would have 30 days to work out the technical issues before proceeding to dispute resolution); or (iii) rejecting the request due to technical infeasibility, with the appropriate explanation. EastLink expects that, if a licensee identifies an issue which it feels renders sharing technically infeasible, it would bring this issue to the requestor's attention *immediately*, rather than waiting the full 30 days.

67. Additionally, EastLink notes that both TELUS' and Rogers' proposed timelines suggest that negotiation of contract terms with respect to rates and other commercial issues would not start until after the tower owner/operator grants final approval of the technical aspects of the requestor's plan (i.e., after the licensee has determined whether the request is technically feasible). EastLink submits that this introduces unnecessary delay into the process. Depending on the timeline adopted by Industry Canada, 100+ days may elapse before the technical aspects of the sharing request are finalized. If negotiations of the commercial aspects of the arrangement are put on hold during this period, this introduces an unnecessary four month delay into the negotiations. EastLink submits that there is no reason why negotiations with respect to the technical and commercial aspects of tower sharing must run consecutively, as opposed to concurrently.
68. Moreover, as previously stated in EastLink's January 22, 2008, comments, EastLink expects that the first set of negotiations between a licensee and a new entrant will result in a master agreement covering the rates and other commercial terms that will apply to site/tower access at all locations owned or controlled by the licensee. As a result, EastLink submits that, in most cases, there will be no need for any negotiations with respect to the commercial terms of site and tower access. Therefore, any suggestion by the Incumbents that 60 days or more should be allowed to negotiate commercial terms for site/tower access *after* technical feasibility has been confirmed, is simply an attempt by the Incumbents to introduce unnecessary delay into the process. Accordingly, Eastlink submits that Industry Canada should reject the Incumbents' proposal and requests that Industry Canada consider mandating the use of master agreements so as to prevent the Incumbents from delaying the implementation of site/tower sharing by needlessly requiring negotiations on a site by site basis.
69. Finally, EastLink specifically rejects Rogers' contention that the timelines should be relaxed if the volume of requests increases from its current levels.<sup>23</sup> Similarly, EastLink rejects Rogers' contention that the timelines should not apply where multiple requests are received<sup>24</sup>, as well as Bell's contention that the number of

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<sup>23</sup> See paragraph 14 of Rogers' submissions.

<sup>24</sup> See paragraph 27 of Rogers' submissions.

requests that must be dealt with within the proposed timeframes should be limited to 12 new requests per six month period.<sup>25</sup>

70. Industry Canada and various other government entities have determined that tower and site sharing will benefit Canadians by introducing increased competition in the wireless industry, as well as by halting the unnecessary proliferation of cell towers. The Incumbents should be required to manage their businesses in a way that will ensure that those objectives are fulfilled within a reasonable timeframe. Granting the Incumbents' request to cap the number of sharing requests or relax the mandated timelines for responding to those requests could significantly delay the launch of competition within the wireless industry. Accordingly, EastLink submits that the Incumbents should be required to manage their businesses in a manner that will permit them to comply with the timelines established by Industry Canada.

#### *Engineering Costs / Application Fees*

71. TELUS and Bell suggest that parties requesting site or tower access should be required to pay all engineering and other costs related to sharing requests.<sup>26</sup> EastLink submits that such proposals should be rejected.
72. As noted by Industry Canada in the *Policy Framework*, there are compelling social and economic reasons to mandate antenna tower and site sharing.<sup>27</sup> Moreover, as noted several times herein, Industry Canada has determined that "the policy objective for managing the radio frequency spectrum resource is to maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource."<sup>28</sup> Industry Canada has determined that the introduction of more competition into the wireless industry will benefit Canadians and that mandated tower and site sharing is necessary in order to achieve that objective. Accordingly, it is not unreasonable to expect that the Incumbents would have to incur some costs in association with implementing competition within the wireless industry via mandated tower and site sharing.
73. As noted above, when local competition was introduced in the wireline telephone industry, various processes and procedures were introduced to support the entry of competitive service providers. Compliance with those new processes and procedures required both competitors and the incumbent phone companies to allocate time, money and resources towards their implementation and parties were generally expected to bear their own costs. EastLink submits that a similar approach is warranted in the wireless industry.
74. Moreover, EastLink notes that the Incumbents will be compensated for the use of their sites and towers in association with mandated tower and site sharing. As a result, the Incumbents are not being asked to expend capital in support of competition and receive nothing in return. The Incumbents will benefit from additional revenue as a result of mandated tower and site sharing.

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<sup>25</sup> See paragraph 49 of Bell's submissions.

<sup>26</sup> See Section 4 of TELUS' submissions.

<sup>27</sup> See page 9.

<sup>28</sup> See *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range*, November 2007, page 1.

75. Based on all of the foregoing, EastLink submits that Industry Canada should reject any proposal requiring new entrants to bear all of the costs associated with implementing mandated tower and site sharing. Instead, both the Incumbents and the new entrants should each bear their own costs. Competition will benefit all Canadians and the costs of implementing competition should be borne by all participants in the industry.
76. In the alternative, if Industry Canada determines that some form of compensation is appropriate, EastLink respectfully requests that Industry Canada consider requiring new entrants to compensate the Incumbents for only a portion of their costs, specifically through the introduction of a fixed application fee of \$2,000.00, which would be payable upon approval of a tower/site sharing request. EastLink submits that a fixed application fee would introduce certainty into the process by preventing disputes with respect to the reasonableness of the costs incurred by the Incumbents, as well as the calculation thereof. It would also be more efficient from an administration perspective as there would be no need for the Incumbents to track, invoice and prove their costs and, similarly, new entrants would not have to devote resources to verifying the costs submitted by the Incumbents. Accordingly, if Industry Canada determines that some form of compensation is appropriate, EastLink submits that an application fee would be the most efficient mechanism.
77. For all of the reasons set out above, EastLink similarly submits that Industry Canada should reject Rogers' contention that new entrants should pay *additional* application fees if the volume of sharing requests increases in order to compensate the Incumbents for the hiring of additional resources to process sharing requests.<sup>29</sup> Again, EastLink suggests that it is reasonable for the Incumbents to bear the costs of hiring additional resources to assist in implementing competition within the industry. Moreover, the Incumbents will receive additional revenue from mandated tower and site sharing; accordingly, there is no reason why new entrants should be required to bear all of the costs of hiring new resources to process sharing requests. Finally, EastLink notes that Rogers' proposal calls into question Bell's and TELUS' suggestion that new entrants should be required to fully compensate Incumbents for all of their costs in relation to mandated tower and site sharing. The fact that Rogers has not requested full compensation suggests that Bell's and TELUS' proposals are unfounded.
78. EastLink also rejects, for reasons similar to those set out above, TELUS' suggestion that new entrants should be required to enter into binding forecasts of their requirements that will trigger binding payments.<sup>30</sup> EastLink submits that, because the success of mandated tower and site sharing will benefit all Canadians, all participants in the industry should be required to manage their businesses in a manner that will ensure the success of Industry Canada's initiative. TELUS' suggestion would place the burden on the new entrants to determine what resources the Incumbents should make available to accommodate sharing requests. EastLink submits that this is inappropriate. The Incumbents are, presumably, presently able to properly allocate resources to accommodate the current volume of requests and, EastLink submits, they should be similarly able to

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<sup>29</sup> See paragraph 14 of Rogers' submissions.

<sup>30</sup> See Section 4 of TELUS' submissions.

properly manage their businesses once mandated tower and site sharing is implemented. There is no reason why this obligation should be shifted to new entrants. However, should Industry Canada feel that the provision of forecasts to the Incumbents would aid them in managing their businesses, EastLink submits that such forecasts should be non-binding and should not result in payments due to overages or shortfalls.

79. Finally, EastLink rejects TELUS' suggestion that new entrants should pay a deposit when filing a sharing request.<sup>31</sup> It is unlikely that a new entrant will file a sharing request with no intention of actually going ahead with access to the site or tower if it is deemed to be technically feasible. Moreover, the notion of a deposit suggests that new entrants should be required to compensate Incumbents for processing sharing requests, which proposal EastLink has specifically rejected for the reasons noted above.

#### *Access to Compounds and the Space at the Base of the Tower*

80. TELUS states the following on page 14 of its submissions:

*Fifth, carriers must have the right to protect sites and ensure network security. It is critical in the case of sites and towers that all forms of gated compounds, equipment shelters and closets remain in the control of the incumbent carrier. That is common industry practice today and does not interfere with the ability to use towers, run cables or put up antennae where sites and capacity are available.*

81. EastLink interprets TELUS' proposed condition of licence as suggesting that new entrants should not be permitted access to gated compounds, equipment shelters and closets. On that basis, EastLink disagrees with TELUS' assessment of the current common practice with respect to access to gated compounds and submits that new entrants should not be prohibited from accessing gated compounds.
82. "Compound" generally refers to the fenced portion of land at the bottom of the tower, which land is normally leased from the landowner. Normally, the tower itself is enclosed within the compound. EastLink understands that TELUS wants to protect its network security. EastLink also agrees with TELUS that shelters and equipment cabinets are not normally shared. However, EastLink submits that it is presently quite common for operators sharing a tower structure to also share the compound. EastLink further submits that TELUS' concerns with respect to security in relation to compounds are unfounded since, today, operators who are sharing a tower generally have equipment shelters that are located next to each other, with no fencing between them.
83. Generally speaking, there is enough room within the compound for 2 or 3 equipment shelters/cabinets (and, with the ongoing miniaturization of electronic equipment, this number is likely to increase). Accordingly, EastLink submits that prohibiting new entrants from access to the compound, when the amount of space

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<sup>31</sup> See Section 4 of TELUS' submissions.

is sufficient to accommodate the new entrant's equipment, would cause new entrants to incur unnecessary costs in relation to the expansion of the existing compound and any compensation that may be due to the landowner or tower owner as a result of any such expansion.

84. In light of all of the foregoing, EastLink submits that new entrants should not be prohibited access to the gated compound.

## **ARBITRATION**

85. Many of the parties appear to agree that a national code is appropriate and that specific timelines and procedures must be put in place to ensure that arbitrations both commence and progress in an expeditious manner. As stated in its January 22, 2008, comments, EastLink concurs with both of these opinions.
86. EastLink disagrees with the various confidentiality provisions proposed by the Incumbents.<sup>32</sup> EastLink submits that parties should be permitted to use both the evidence filed, and the results reached in prior arbitrations in subsequent arbitrations between the same parties. Prohibiting the use of this information will result in an unnecessary duplication of efforts and unnecessary delays. Moreover, EastLink submits that knowing that the results of previous arbitrations will be used in subsequent arbitrations will remove the temptation for the Incumbents to take every case to arbitration as a means of delaying the implementation of competition since it will be apparent to the arbitrators that the same issue has been adjudicated several times in the past, and the arbitrator will be able to impose the appropriate sanctions via an award of costs, etc.
87. EastLink also disagrees with the Incumbents' position that there should be a right to appeal the arbitrator's decision.<sup>33</sup> Any such right would only introduce unnecessary delay with respect to the implementation of mandated roaming and site/tower sharing.
88. Bell and TELUS propose that the arbitrator should have regard to whether there is available to the applicant an alternative, effective, adequate and competitive means of attaining access to a tower or roaming.<sup>34</sup> Bell further proposes that the arbitrator "shall rely on the principle of market forces to the greatest extent possible."<sup>35</sup> EastLink submits that Industry Canada has determined that market forces alone will be insufficient to support viable new entry into the wireless market. As a result, Industry Canada has mandated that the Incumbents provide roaming and site/tower access "at commercial rates that are reasonably comparable to rates currently charged to others for similar access." Accordingly, the only relevant question for the arbitrator in dealing with a dispute relating to rates is whether the rates proposed by the Incumbent are consistent with the commercial rates currently charged to others for similar access. The other issues raised by the Incumbents are irrelevant.

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<sup>32</sup> See, for example, Section 6 of TELUS' submissions.

<sup>33</sup> See, for example, paragraph 32 of Rogers' submissions.

<sup>34</sup> See paragraph 70 of Bell's submissions.

<sup>35</sup> See paragraph 70 of Bell's submissions.

89. Finally, EastLink notes that Rogers has proposed that all arbitrations should be conducted in Ottawa, pursuant to the laws of Ontario.<sup>36</sup> EastLink submits that, while such a requirement would be convenient for Rogers, whose head offices are located in Toronto, it would result in unnecessary costs for carriers operating outside of the Ottawa/Toronto region. EastLink submits that the location of any arbitration should be determined by agreement between the parties and, if such agreement is not reached within a specified timeframe, the location of the arbitration would be determined by the arbitrator.

## **OTHER ISSUES**

90. At paragraphs 26 and 29 of its submissions, Bell raises several issues with respect to the conduct of the auction (i.e., the assignment of tiers to the set-aside and the ability of the Incumbents to bid on certain spectrum). EastLink submits that these issues are outside the scope of the current proceeding, which is meant to address tower/site sharing and roaming. Accordingly, the issues raised by Bell should be viewed as being out of process and should be ignored in their entirety.

## **CONCLUSION**

91. Once again, EastLink wishes to thank Industry Canada for the opportunity to offer comments on the proposed conditions of licence and we look forward to reading the final versions.

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<sup>36</sup> See paragraph 31 of Rogers' submissions.