

**NOTICE NO. DGRB – 010 – 07/12**

**CONSULTATION ON PROPOSED CONDITIONS  
OF LICENCE TO MANADATE ROAMING AND  
ANTENNA TOWER AND SITE SHARING AND TO  
PROHIBIT EXCLUSIVE SITE ARRANGEMENTS**

Comments submitted by:

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("Mobileexchange")**

January 22, 2008

## 1.0 INTRODUCTION

Mobilexchange respectfully submits these comments as part of the Consultation ordered by the Department's November Policy Paper.<sup>1</sup>

The Policy Paper recognizes that the government's bedrock policy -- to "rely on market forces to the maximum extent feasible" -- "can only be pursued in an environment where market forces can be expected to deliver . . . a level of competition sufficient to protect the interests of users." The Policy Paper also finds that the characteristics of the Canadian wireless market "unavoidably provide incumbent carriers with both incentives and opportunities to prevent market entry or constrain competition, even in markets with multiple providers."<sup>2</sup>

In order to restrain the incumbent carriers' incentives to act in an anti-competitive manner, the Department, among other steps, required the incumbent licensees to offer new entrants a fair and equitable opportunity to share antenna tower and sites and mandated Automatic Digital Roaming (ADR). The Department realized that there could, and would be, disputes over interpretations of this requirement impelled by the incumbents "unavoidable" incentives to resist. Accordingly, the Department established dispute resolution procedures and initiated this further Consultation to consider the "wording of the conditions of license and provisions on the operative conditions such as dispute resolution mechanisms and time frames."<sup>3</sup>

Mobilexchange strongly supports the Department's basic conclusions regarding the need to mandate antenna and site sharing and ADR by the incumbents for the new entrants. The current relative lack of competition in the Canadian wireless market and the inability of new entrants in the past to gain a permanent foothold are due in no small measure to the obstacles

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<sup>1</sup> *Policy Framework for the Auction for Spectrum Licenses for Advanced Wireless Services and other Spectrum in the 2 GHz Range* (DGTP-007-07), November 27, 2007.

<sup>2</sup> *Id.* at p. 2.

<sup>3</sup> *Ibid.*

created and maintained by the incumbents. If we are to avoid a repetition of this sad history, it is critical that the Department develop effective mechanisms to enforce these mandates.

In particular, for the reasons summarized below, Mobilexchange urges the Department to strengthen the timeliness and effectiveness of its mandates by:

- (1) Requiring that the incumbent licensees adopt “Most Favored Nation”<sup>4</sup> procedures for ADR for new entrants (thereby harnessing the natural forces of the marketplace rather than relying upon the arbitrariness of arbitration);
- (2) Using the Department’s internal engineering resources on an informal basis to resolve the sometimes difficult issues of the technical feasibility of antenna site and tower sharing; and
- (3) Extending the time for the submission of auction applications and deposits for at least 60 days beyond the date upon which the Department concludes this Consultation and announces its decisions.

## **2.0 CONDITIONS OF LICENCE FOR MANDATORY ROAMING**

### **2.1 Intent**

In the Department’s February 2007,<sup>5</sup> Consultation on auction framework for AWS it pointedly recognized the importance of treating the new entrants on an equal footing with the incumbents: “As mobile services have become an important service to many Canadians, it is important that all networks be fully integrated into the national telecommunications networks.”<sup>6</sup> If this full integration of the newcomers with the incumbents is to be realized, it is

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<sup>4</sup> “Most Favored Nation” policies obligate the incumbents to extend the new licensees pricing and terms that are identical to the most favorable pricing and terms extended to any other service providers.

<sup>5</sup> *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services*, DGTP-002-07.

<sup>6</sup> Id at para. 12 (emphasis added).

important that this Consultation delineate with certitude the scope of the ADR and adopt effective measures for enforcing those rights.

## 2.2 The Scope of Automatic Digital Roaming (ADR)

The November Policy Framework agreed that mandated roaming was “important to promote competition.” The Policy Paper, therefore, “mandated” “automatic digital roaming” for new entrants “where technically feasible” “at commercial rates” on the networks of “cellular, PCS and AWS licensees.”<sup>7</sup> The Policy Framework did not otherwise describe the conditions under which ADR was to be provided.

In order to ensure that the new entrants have a level playing field and can have a reasonable and equitable opportunity to become viable competitors, it is essential that this Consultation firmly stresses the fundamental differences between “Resale” as provided by the incumbent carriers under the MVNO and/or other arrangements to unlicensed entities and the mandated ADR under these rules. The governments must adopt an enforceable policy that ensures that the type of ADR provided to the new entrants is equal in all essential respects to the highest grade of ADR provided to the incumbent legacy cellular and PCS carriers.

There must be equal access at the originating and the terminating end and to all network elements on all types of network protocols, including GSM, CDMA, etc. Equal access must include, among other features: white-listed International Mobile Equipment Identity (“IMEI”) for GSM roaming and Electronic Serial Number (“ESN”) and Mobile ID Number (“MIN”) for CDMA roaming; non-discriminatory voice and data channel seizure during origination and termination; and equivalent data packet Quality of Service (“QoS”) levels during network transit to that provided by the incumbent network. When a new entrant’s roaming customer is within the territory of another mobile licensee, the foreign licensee must allow the roamer to register on its network as if it were a mobile from an approved roaming

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<sup>7</sup> Id at p. 8.

partner. The territory covered must include not only Canada but also all international territories for which any incumbent has a roaming agreement, including, most especially, the United States in view of the large amount of roaming calls from below the border.<sup>8</sup> The roaming mobile must be allowed to seize a voice channel or establish a data session; and the serving incumbent network must allow the new entrant to interconnect and receive the voice or data traffic for termination in its network. It is also essential that the standard adopted be capable of being implemented without prolonged proceedings, continual delay and obfuscation.

The simplest, clearest and most expeditious mechanism of ensuring equal and equitable automatic roaming would be through a Most Favored Nation (“MFN”) approach. Under this traditional MFN scheme, each cellular or PCS license, as well as each AWS license (including those granted to the “new entrants”) would require that the licensee operator afford all new entrants automatic roaming that is no less favorable than the most favored terms afforded by a licensee to the most favored third party to whom it provides roaming.

A MFN approach has several advantages over the Department’s suggested dispute resolution process. The Department would have the new entrant and the incumbent licensee’s engage first in negotiations over a time period to be specified and then, if the negotiations are unsuccessful, to submit to binding arbitration. The Department does not suggest that there would be a time frame on the arbitration process. This would be difficult to fix in any case due to the complexity of the issue of “technical feasibility.” Even if an arbitration timetable were to be established and enforced, the process is likely to prove to be time consuming and costly. Arbitration would be much

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<sup>8</sup> It is noteworthy, as the November Policy Paper itself recognizes (id at p.8), that the US Federal Communications Commission has recently confirmed that its common carrier rules require that its wireless licensees offer automatic digital roaming similar to what Industry Canada is now requiring and what Mobilexchange is requesting in these Comments. For instance, on August 16, 2007, the FCC clarified that commercial mobile radio service carriers are required to provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007).

more costly and detrimental to the new entrant. The new entrant would not be able to fund its arbitration costs from revenues. And each day of delay would be another day without revenue for the new entrant. Furthermore, it could be quite difficult, if not virtually impossible, for the arbitrator(s) to determine what is technically feasible in the provision of automatic roaming, absent a definition of what that phrase means and in light of the myriad, rapidly changing network systems.

The MFN approach solves these obstacles to full and fair competition. And it does so based upon the very marketplace principles that the incumbents have urged and that the Government has embraced. The incumbent licensee only has to certify (subject to verification) the manner in which it grants ADR to each of the other licensees with whom it has agreements and agree to grant the most favorable methods, terms and conditions to the new entrant. Any disputes are likely to be minimal and can be resolved through a truncated and much simpler arbitration process similar to what the Policy Paper suggests.

The MFN approach also solves the dilemma of how to establish the rates to be charged for ADR. The Policy Paper requires that the incumbent licensee charge “commercial” rates. This phrase is not otherwise defined. It begs such questions as whether the rates are to be retail or wholesale or under what types of plans for what types of customers. The resolution of these questions also is likely to become entangled in a lengthy and unmanageable dispute resolution process to the detriment of the new entrants. These obstacles to competition would be avoided if the rates, instead, were to be established through the MFN process.

### **3.0 CONDITION OF LICENCE FOR MANDATORY ANTENNA TOWER AND SITE SHARING AND PROHIBITION OF EXCLUSIVE SITE ARRANGEMENT**

The November Policy Paper noted that, in June of 2007,<sup>9</sup> Industry Canada had required owners of existing antenna towers and sites to negotiate “in

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<sup>9</sup> *Radiocommunications & Broadcasting Antenna Systems*, CPO-2-0-03 (June 2007).

good faith” with newcomers in order to facilitate “sharing” of their facilities.<sup>10</sup> In the November Policy Paper the Department implemented this policy by instructing incumbent licensees to share their facilities and to avoid entering into exclusive arrangements. In order to enforce these mandates, “licensees will be directed to binding arbitration to resolve disputes where they cannot finalize an agreement to share within certain time frames.”<sup>11</sup>

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. There are a variety of potential issues, such as possible RF interference, access to sufficient power, access to terrestrial backhaul, physical space limitations, the cost and timing of rearrangement of existing facilities, the often-esoteric claims by the incumbent that it must “reserve” space for expansion of its facilities, etc. As the Department implicitly recognizes, it is not feasible to establish “a priori” rules regarding such issues. These issues must necessarily be addressed on a case by case basis based upon the facts of each unique situation.

However, the need to address each request for sharing of antenna tower and site space without guidance once again creates a large potential for abuse. In order to mitigate this potential as much as possible, it is important that the procedures for dispute resolution be swift, affordable and effective.

Mobilexchange does not believe that the Department’s suggested resort to arbitration is the most efficient and effective way to ensure that the incumbents are not “unavoidably” led to deny access to the new entrants. Rather, Mobilexchange respectfully submits that the Department itself should resolve these disputes on an informal basis, using its own internal engineering resources, supplemented if necessary by outside independent experts.

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<sup>10</sup> November Policy Paper at p.9.

<sup>11</sup> Id at p.9.

The Department has expert resources in-house, who understand these types of “technical feasibility” issues and deal with them on a regular basis. The Department also has knowledge of, and ready access to, external “independent” experts in wireless technical and operational issues, who can be called upon when and if needed. Using an informal negotiation process among the private sector parties (with the Department as facilitator and, when necessary, decider) should be faster, less costly and more effective than formal arbitration.

Because the Department is the licensor and regulator of the incumbent licensees, they are likely to be more responsive and more forthcoming than if they were being judged by outside arbitrators. Additionally, unlike outside arbitrators, the Department will have a complete history of each negotiation and the positions and postures of the participants. Unlike arbitrators, the Department will have an institutional memory. The Department will be in a much better position to separate the substantial from the insubstantial claims, the wheat from the chaff.

For these reasons, Mobilexchange urges the Department to undertake to resolve antenna tower and site sharing within the Department’s four walls, rather than resort to a formal arbitration process.

#### **4.0 THE CRITICAL IMPORTANCE OF EFFECTIVE ENFORCEMENT OF THE AUTOMATIC DIGITAL ROAMING AND ANTENNA SHARING PROVISIONS**

The November Policy Paper placed special emphasis on “greater competition in the market and further innovation in the industry.”<sup>12</sup> Minister Prentice noted that “at the end of the day, our goals are lower prices, better services and more choice for consumers and business” and “that is why we are setting aside a portion of radio spectrum exclusively for new entrants

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<sup>12</sup> Industry Canada News Release, *Government Opt for More Competition in the Wireless Sector*, Nov. 28, 2007

into the wireless market.”<sup>13</sup> Under consideration in this Consultation are the additional provisions for automatic digital roaming and antenna tower and site sharing adopted in order to level the mobile wireless playing field and increase the chances that the new entrants might survive the 25-year “head start” and 95% market ownership advantages of their competitors.

In contrast to the provisions intended to facilitate access to spectrum and market entry in 1985 and 1995, which unfortunately culminated in a near duopoly in many of the Canadian markets in 2008, the Government is, correctly, determined this time to insure the sustainability of a diverse and competitive industry.

The provisions being implemented hereby to ensure this vision are *critical* for the survivability of any AWS new entrant. They must be clearly defined and economically and technically fully detailed. New entrants, who will be heavily investing in the opportunity of creating “new services, more choice for consumers and businesses,” must not wake up after the auction to discover that their promised equal access to antenna sites and interconnection provisions has been an illusion.

## 5.0 SUMMARY & REQUESTED MODIFICATIONS

Mobilexchange respectfully submits that the goal of leveling the playing field so that new entrants into AWS have a fair and equal opportunity to compete requires that this Consultation modify the provisions of the November Policy Statement in the following respects:

### *Antenna and Site Sharing*

Instead of formal arbitration of difficult issues such as claims of technical infeasibility, the Department should undertake to “facilitate,” and mandate if necessary, a resolution informally, using outside experts if necessary.

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<sup>13</sup> Ibid.

### *Automatic Digital Roaming (ADR)*

Instead of negotiation and arbitration over what constitutes “technically feasible” roaming services and what constitutes “commercial rates,” the licenses of all cellular, PCS and AWS licensees should be conditioned on their providing Most Favored Nation NDR services (including access to and use of all network elements) nationally and internationally to the New Entrants. Any disputes should be resolved by expeditious arbitration within pre-established stringent time frames.

### *Extension of Time for Bidder Application and Auction Dates*

The November Policy Paper indicated that bidder applications would be due sometime between the beginning and the end of March. However, it was not until the end of December that the date was firmly fixed as the beginning of March. This means that the amount of time between the date when the Department adopted the structural rules and also announced the bid submission date and the date when the deposit funds need to be in hand will be only a matter of weeks.

Although it is true that the Department has been conducting an open consultation on this matter since last spring, the degree, if any, to which it would adopt equal interconnection and site and tower sharing was not known until a short time ago. Those new entrants whose business plans depend critically upon equal access could not finalize those plans and enter into detailed negotiations with their prospective investors until the equal access provisions were finally cast in stone.

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 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, Mobilexchange respectfully requests that the date to submit bids 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.

Respectfully submitted,

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