

**NOTICES NOS. DGRB – 010–07 & 011-07**

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

**REPLY**

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**February 7, 2008**

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## PREAMBLE

The three major Incumbents have suggested a myriad of modifications to the Department's mandated roaming and site sharing regulations. They urge, among other changes, greatly emasculated roaming services, much longer time frames for compliance and much more costly procedures (with all of the cost burden thrust upon the New Entrants). The net effect of their proposals will be to substantially thwart the long-awaited introduction of competition into the Canadian wireless market. Mobilexchange suggests the Department would do well to keep in mind the evident intent and the self-interest, as well as the predictable results, of the Incumbents' suggestions when judging their merits.

Mobilexchange opposes the modifications urged by the Incumbents for mandated automatic digital roaming. We quite agree with the Incumbents<sup>1</sup> that automatic digital roaming ("ADR") is not, and should not be confused with, resale. ADR is a peer-to-peer arrangement that is a necessary adjunct if the New Entrants are to achieve equal status in the eyes of their customers. In order for the New Entrants to have a fair and equal opportunity to attract customers, it is essential that they receive the same type of automatic digital roaming services from the Incumbents as the Incumbents offer each other. Anything less makes them second class citizens.

We also agree with the Incumbents that the market place is the best arbiter of the terms and conditions under which ADR is to be offered.<sup>2</sup> As we suggested in our opening comments, the most efficient way to effect a fair and reasonable market place solution is to say to the Incumbents "provide the New Entrants with the same type of automatic digital roaming as you provide to each other." This edict is encapsulated in a Most Favored Nation ("MFN") approach.

MFN provisions have a long history in commercial relations and are quite familiar to the industry players. This simple direction avoids enmeshing the Department in fashioning rules and regulations and in endless negotiating sessions. The burden is placed upon the Incumbents, the only ones with direct and easy access to the facts, to step forward with copies of their roaming arrangements among

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<sup>1</sup> E.g., Telus at pp. 11-12; Rogers at paras. 41-44.

<sup>2</sup> See, e.g. Telus at p. 1.

themselves and with foreign carriers.<sup>3</sup> These are the terms and conditions, from services to charges that must be made available to the New Entrants. To the extent that there are disputes as to what is the most favorable arrangement where there are differences from one Incumbent carrier to another those disputes can be arbitrated in a much timelier and less costly fashion than otherwise.

Our belief is that in each of the areas in which the Incumbents would drastically limit the availability of automatic digital roaming to the New Entrants the limitations are not ones that are imposed upon their current peer group. We will address each of these suggested limitations in our following comments.

### BACKGROUND AND HISTORY OF ROAMING IN THE UNITED STATES

In support of their efforts to greatly emasculate the proposed roaming services and impose much longer time frames for compliance and much more costly procedures, the Incumbents cite various findings from the roaming decisions of the Federal Communications Commission.<sup>4</sup> Taken out of context, these findings appear to be consistent with the positions of the Incumbents. However, when viewed in context as part of the overall history of roaming in the United States, the fundamental weakness of the positions urged by the Incumbents, and the importance of adopting strong automatic digital roaming requirements, becomes clear.

The FCC has recognized the critical importance of roaming since 1981 when it imposed a manual roaming requirement as part of the original cellular service rules.<sup>5</sup> The FCC subsequently extended the manual roaming rule to include other CMRS providers in the Broadband Personal Communications Service (PCS) and Specialized Mobile Radio Service (SMR) that offer competitive telephony services

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<sup>3</sup> MTS Allstream proposes a similar approach. See, *id.*, at para. 30 (b),(c).

<sup>4</sup> E.g., Rogers at paras. 53-58; Telus at sec. 2.2

<sup>5</sup> See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 FCC 2d 469 (1981) (adopting requirement in then Section 22.911(b) of the Commission's rules that base stations render service to properly licensed roamers). See also 47 C.F.R. §22.901 (1995); 47 C.F.R. §22.911(b) (1981).

comparable to cellular service, so long as the roamer's handset is technically capable of accessing their systems.<sup>6</sup>

The FCC's decision to extend the manual roaming rule to other CMRS services was premised on its determination that the availability of roaming on broadband wireless networks was important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications.<sup>7</sup> Specifically, the FCC was concerned that, while these systems were being built, market forces alone might not be sufficient to cause roaming services to become widely available.<sup>8</sup> The FCC also found that roaming capability may be a key competitive consideration in the wireless market and that new entrants may be at a competitive disadvantage with respect to incumbent wireless carriers if their subscribers have no ability to roam on other networks.<sup>9</sup> Accordingly, the FCC extended the roaming rule "in order to ensure regulatory parity and to promote competition in the wireless market by enhancing all such carriers' abilities to compete."<sup>10</sup>

The FCC concluded initially that market forces would likely render explicit automatic roaming requirements unnecessary. For example, the Commission tentatively concluded in 1996 that the market might render any automatic roaming requirements unnecessary five years after the last group of initial broadband PCS licenses was awarded.<sup>11</sup> For this reason, the FCC did not adopt an explicit automatic roaming rule at that time.

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<sup>6</sup> See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 9462, 9471, para. 13 (1996) ("*Interconnection and Resale Obligations Second Report and Order*"); 47 C.F.R. §20.12. Section 20.12(c) provided as follows: "Roaming. Each carrier subject to this section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to this section, including roamers, while such subscribers are located within any portion of the licensee's licensed service area where facilities have been constructed and service to subscribers has commenced, if such subscribers are using mobile equipment that is technically compatible with the licensee's base stations."

<sup>7</sup> *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9464, para. 2, 9468-70, paras.10-11.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Id.* at 9469-70, para. 11.

<sup>10</sup> *Id.* at 9471, para. 13.

<sup>11</sup> *Id.*, 11 FCC Rcd at 9479, para. 32. In July 2000, the Commission generally affirmed the manual roaming requirement and modified the definition of CMRS providers to which the rule applied, including extending the rule to cover certain CMRS data as well as voice providers. See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 15 FCC Rcd 15975, 15979-81, paras. 13-19 (2000) ("*Manual Roaming Order on Reconsideration*"). As a result, the manual roaming requirement applied to all cellular, broadband PCS, and SMR providers that offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. See *id.* at 15981-83, paras. 18, 22-24.

In a Notice of Proposed Rulemaking issued in 2000, the FCC again concluded that ubiquitous roaming on CMRS systems is important to the development of a seamless, nationwide "network of networks."<sup>12</sup> However, the FCC reemphasized its belief that explicit automatic roaming rules were unnecessary because market forces should lead carriers to offer automatic roaming. Specifically, the FCC stated that, to the extent competition in the CMRS market has eliminated the means or economic incentives for certain CMRS providers to discriminate unreasonably in the provision of roaming, or otherwise to engage in unjust or unreasonable practices, the imposition of a roaming requirement would not be in the public interest. Thus, the Commission stated, it may be in the public interest to impose a roaming requirement "[o]nly where market forces alone are not sufficient to ensure the widespread availability of competitive roaming services, and where roaming is technically feasible without imposing unreasonable costs on CMRS providers."<sup>13</sup>

In August of 2007, the FCC codified an automatic roaming requirement based on its conclusion that reliance upon market forces alone had been insufficient to ensure the widespread availability of competitive roaming services.<sup>14</sup> As the FCC explained,

*Automatic roaming is far more convenient for a subscriber than manual roaming and, as a practice, has become increasingly widespread. Today, most wireless customers expect to roam automatically on other carriers' networks when they are out of their home service area. Accordingly, we recognize that automatic roaming benefits mobile telephony subscribers by promoting seamless CMRS service around the country, and reducing inconsistent coverage and service qualities.*

*Given the current CMRS market situation and wireless customer expectations, we find it is in the public interest to facilitate reasonable roaming requests by carriers on behalf of wireless customers, particularly in rural areas. In other words, in order to*

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<sup>12</sup> *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, 15 FCC Rcd 21628, 21634, para. 15 (2000)(2000 CMRS Roaming NPRM )(citing *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9467 para. 8).

<sup>13</sup> *Id.* at 21635, para. 16.

<sup>14</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007).

*enable its subscribers to receive service seamlessly, a CMRS carrier may make an automatic roaming request on behalf of its subscribers. **If the request is reasonable, then the would-be host carrier cannot refuse to negotiate an automatic roaming agreement with the requesting carrier.***<sup>15</sup>

The FCC further clarified that

Automatic roaming is a common carrier service, subject to the protections outlined in Sections 201 and 202 of the Communications Act. If a CMRS carrier receives a reasonable request for automatic roaming, pursuant to Section 332(c)(1)(B) and Section 201(a), **it is desirable and it serves the public interest for that CMRS carrier to provide automatic roaming services on reasonable and non-discriminatory terms and conditions.**<sup>16</sup>

The FCC believes its clarification that “automatic roaming, as a common carrier service, is subject to protections outlined in Sections 201 and 202 of the Communications Act,”<sup>17</sup> and codification of the automatic roaming obligation into a rule will ensure that subscribers will “receive automatic roaming on just, reasonable and non-discriminatory terms,”<sup>18</sup> the agency has requested comment on whether it should impose further automatic roaming requirements.<sup>19</sup>

This history confirms not only that automatic roaming is critically important but also that the FCC believes that market forces alone are insufficient to protect new entrants from unreasonable discrimination with respect to automatic roaming. The proposals set forth by the Incumbents for Canada would be unreasonably discriminatory on their face. The Department should require all carriers to provide automatic roaming services on reasonable and non-discriminatory terms and conditions, offering the same terms and conditions to others as it provides itself and other carriers – the MFN approach.

## TIMING & GEOGRAPHIC SCOPE OF ROAMING

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<sup>15</sup> Id., paras. 27-28 (footnotes and paragraph references omitted, emphasis added).

<sup>16</sup> Id., para. 23 (emphasis added).

<sup>17</sup> Id., para. 28.

<sup>18</sup> Ibid.

<sup>19</sup> Id., paras. 77-81.

The Incumbents would place a variety of restrictions on the timing and geographic scope of roaming. Their main gambit is to contend that the New Entrants must complete a substantial amount of build-out of their network before they are allowed any roaming privileges on the Incumbents' networks. Bell (at para. E.6.2.b.) would require that the New Entrant first complete construction of 50% of the minimum population coverage set out in the 5 year roll-out targets. Telus (at p.5), for its part, would require the New Entrant's network to cover all of a Tier 4 calling area.

The Incumbents would also further handicap the New Entrants by refusing to provide roaming within those portions of a New Entrants license area if the New Entrant has already built some facilities within that area.<sup>20</sup> In addition to arguing that to allow ADR within their "built" areas would disincentivize them to complete their networks, the Incumbents argue that the New Entrants would use ADR as a subterfuge to attempt to improve the quality of their own services or off-load traffic to the Incumbents thereby interfering with the provision of service to the Incumbents' own customers and raising their costs.<sup>21</sup>

These restrictions stand the rationale for roaming on its head. The Incumbents would have the Department entangle the New Entrants in an endless "chicken and the egg," Catch 22 charade. The primary purpose for automatic digital roaming is to enable the New Entrants to attract and retain customers during the initial stages of their network build when their network reach is too small to otherwise attract customers. To be forced to wait until a substantial portion of their network is completed would substantially reduce their early stage cash flow and significantly increase their risks of not being able to afford to build out the network. The Incumbents' proposal is transparently self-defeating.<sup>22</sup>

The Incumbents argue that these build out requirements are necessary to incent the New Entrants to build. (E.g., Bell at paras. 56, 60; Telus at pp. 4,7) The

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<sup>20</sup> Bell at paras. 60, 64.1.b. The Incumbents would bar roaming within the signal or network coverage footprint. Bell at para. 60; Telus at p.7; Rogers at para. 47.

<sup>21</sup> Telus at p. 7; Bell at para 64.2.c. Bell does not suggest how it or anyone else could determine when a New Entrant was seeking ADR for a particular customer for purposes of "capacity off-load or quality enhancement." Granting Bell this condition would give it carte blanche to deny ADR on whim and caprice.

<sup>22</sup> The suggestion that the New Entrants not be granted roaming rights within their "built" area also could be the source of endless disputes as to what is the "built" area. Does it cover all of the license area if one part is served by the New Entrant's radio signals? Does it cover areas where the designed signal pattern cannot be detected cause of blockage? How and who would determine where roaming could not be provided? Could the Incumbent make dynamic changes in real-time on when and where it would provide roaming? Would the Incumbent have to notify the New Entrant in advance when it decided to deny roaming in an allegedly "built" area?

Incumbents surely know better. The New Entrants will have spent millions of dollars in the auction to obtain licensed spectrum and hundreds of millions building out their network infrastructure and installing their back office systems, hiring and compensating staff and launching marketing and sales campaigns. Though the Department's mandated ADR will enable the New Entrants to increase their early stage revenue, roaming revenues will never be a substitute for the substantially larger marginal profits accruing to a New Entrant that is operating its own facilities. In our view, a business founded in major part on revenues from roaming could not succeed and would not attract investment capital. Furthermore, a New Entrant's investors will be pushing to recoup the millions of dollars they invested in the auction purchase. Each month that passes without revenue from the network assets will be a month with millions of dollars of interest and lost profits and month lost in the time needed to satisfy the 5 year roll-out requirement. Management will be under intense pressure to build-out the network on as expeditious a basis as can be justified by projected sales. No further incentive is required.

Each of the supporting arguments made by the Incumbents to limit the scope and timing of roaming provided to the New Entrants could, at one time or the other, have been applied to deny the type of roaming the Incumbents have elected to provide to each other and to the regional providers such as SaskTel and MTS Allstream. We, as a potential New Entrant, are not seeking more (or less) than what the Incumbents have granted to other network providers in the various stages of build out.<sup>23</sup> Thus, there can be no legitimate justification for limiting the scope or timing of automatic digital roaming rights to the New Entrants as well.

### COST ALLOCATION

The Incumbents urge, in Bell's draconian words, that the "entire costs of accommodating any New Entrant requests must be borne upfront and wholly by the New Entrants."<sup>24</sup> (Bell at para. 32. See also Telus at p. 3) The only rationale for this apparently unprecedented suggestion is the "significant material

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<sup>23</sup> See MTS Allstream Comments, para. I.6 ("[T]he roaming provided to new entrants must be non-discriminatory and equivalent to that provided to [the] licensee's own end-customers and other mobile wireless providers.")

<sup>24</sup> Bell (at para. 32) claims that "these costs should be detailed and immediately invoiced to the applicable new entrants."

advantages” that the New Entrants allegedly will receive in the form of access to the Incumbents’ networks and a “substantial public subsidy.”<sup>25</sup>

The Incumbents do not spell out, as they could not, why access to their networks at the standard intercarrier rates that have already been established, and upon other standard terms and conditions, grants the New Entrants any more of a material advantage than each Incumbent has voluntarily given other network carriers including ones that compete with them at least in some locations.<sup>26</sup> All that the New Entrants are seeking is the same Most Favored Nation treatment that the Incumbents have granted to others. This can hardly be deemed a “significant material advantage.”

What is meant by the alleged “substantial public subsidy” is obscure. It apparently is meant to claim that the New Entrants will be paying less for their spectrum than the Incumbents because the Incumbents will not be bidding against them. This claim of course cannot be proven. This may be why the Incumbents do not spell out what they mean by a public subsidy.

The point in any event is that the New Entrants are likely to pay millions of dollars for no more than the right to spend much more to construct their networks. No other industry, including those using public infrastructure (the freight industry, for example) pays anywhere near as much to the government coffers just for the license to enter business. Furthermore, what the Incumbents conveniently ignore is that whatever amount the New Entrants do pay is likely to be much more than the Incumbents paid for their first licenses. The “public subsidy” argument does not bear scrutiny.

The details of the Incumbents proposal on costing of ADR needs to be assessed in two parts – first the question of what are the costs, next the question of when they should be paid.

### *What Costs*

Mobilexchange is concerned here primarily with the cost of providing ADR. The question of cost allocation for ADR is less complicated than allocating costs for

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<sup>25</sup> Bell at para. 31.

<sup>26</sup> We note that MTS Allstream (at para. 23) suggests that roaming rates “reflect those rates and terms that current licensees are able to negotiate due to their relatively equal bargaining power and reciprocal arrangements.”

site sharing. Site sharing cost allocations are more complex due to the involvement of third parties, such as the landlord/lessor and other tenants. Yet, the cost allocation process even in ADR could become embroiled in difficult questions, such as how to allocate common costs for the provision of roaming accumulated over the years, what if any costs or “additional capital investment”<sup>27</sup> are due solely to providing ADR to the New Entrant, etc.

The most expedient and fairest solution to this conundrum is to use the MFN approach – the New Entrant should pay no more nor no less than what other carriers including other Incumbents are charged for similar services.<sup>28</sup> This approach avoids the knotty, expensive and time consuming issues of cost allocations for ADR. And it is fair to all concerned, including the Incumbents, who can scarcely be heard to complain since they established the cost allocations in the first place.

#### *When Paid*

The Incumbents do not even attempt to offer a rationale for requiring that the “entire cost” of ADR be paid “upfront” and “immediately.” Worse, their unstated implication is that, if the Department were to agree with their formulation, any New Entrant would have to make a deposit of some indefinable amount, an amount to be established by its Incumbent competitor, before its customers could receive the advantages of ADR .

Upfront payments of the entire bill would only ever be appropriate in the circumstances of an insolvent carrier that presented a high risk of default and even then would probably be inappropriate considering the relatively small size of the invoices. This suggestion is clearly inappropriate in the case of a New Entrant who had just expended hundreds of millions of dollars on an auction and network build-out.

We assume that requiring deposits and immediate payment of all costs is not the Incumbents standard operating procedure with other carriers. In any event these suggestions should be dismissed out of hand as proffered for only one reason and

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<sup>27</sup> Bell at para. 54.

<sup>28</sup> MTS Allstream (at para. 15) supports this approach, stating that the New Entrants should receive roaming services in “quality, including coverage, voice quality and data transmission speeds” and “prevailing rates comparable to those at which the same services are being offered to other mobile wireless operators.”

that is delay and hardship. The New Entrants should be treated no differently than the Incumbents other carrier roaming partners.

### ROAMING HAND-OFF

Rogers, but significantly neither Bell nor Telus, would deny the New Entrants the right to have their roaming customers signals handed off. (Rogers at paras. 51-57) It appears that Rogers would not deny the New Entrants the right to have their customers roaming calls automatically handed off from one cell of the Incumbent carrier to another cell of that same carrier. Rogers appears to be concerned only with the situation where a direct connection is required between the Incumbent's switch and the switch of the New Entrant.

There is no justification for denying cell-to-cell hand-off within the foreign carrier's own network. Rogers argues, however that there are technical difficulties in interconnecting switches of different carriers in order to hand a roaming customer back to its home carrier's network.

We are not convinced that these difficulties are insurmountable. Significantly, in the passages from the FCC decision on roaming call hand-off that Rogers quotes at length, the FCC did not find that carrier-to-carrier hand-off was technically impossible. The FCC only found that such hand-off "may" be technically and administratively complex and "might" impose costs and burdens on the carrier providing the roaming services. Moreover, the FCC noted, and this was almost 10 years ago, that such call hand-off is "available at this time in some cellular markets."<sup>29</sup> We would agree nonetheless that this type of hand-off should be treated in the same manner as it is handled in the current roaming agreements among the Incumbents and between them and the their cousins in the United States.

Rogers also contends that the roaming ordered for the benefit of the New Entrants will "distort the competitive market" as it will not be reciprocal. (Rogers at para. 33) However, this lack of reciprocity presumably existed (and still exists) from time to time in its roaming exchanges with other carriers. Furthermore, an

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<sup>29</sup> See Rogers at paras. 55-56.

imbalance in the traffic carried and hence in the perceived benefits should be relatively short lived.

Mobilexchange will be building one of the first of the next generation (4G) networks, with open access and innovative services. Its network and services should produce all of the proven and expected benefits sought by the Department. And this includes increased traffic for the Incumbents through roaming services provided by Mobilexchange and other AWS providers over their AWS frequencies.

We agree with Rogers when it fully *“supports the interconnection of all public networks into a single national communications grid in which the customers of all carriers can communicate with each other and with the world at large regardless of the access technology used.”* We believe that this vision can only be accomplished by implementing the type of roaming services that include complete hand-off and all of the other services and accommodations that Rogers grants to the other Incumbents.

#### TECHNICAL FEASIBILITY

Bell argues that Incumbents should not have to provide roaming to a carrier's customer if the carrier uses a different protocol than that of the Incumbent being visited. For instance, a CDMA network roamer would only be picked up by a visiting CDMA network operator. (Bell at para. 54)

There are two primary elements to address regarding technical feasibility. The first issue is the airlink of the two carriers, either GSM or CDMA. The airlink interconnection can be managed by the use of multimode, multi-protocol handsets that are interoperable with the protocol of the roaming provider. As stated in the next section, Mobilexchange assumes that it and the other New Entrants will provide multi-protocol handsets to their customers. There thus should be no technical feasibility issue with the airlink interface of the New Entrant and the visiting carrier's network.

The second issue is the need to seamlessly connect the authentication and data base infrastructure of the New Entrant and the carrier that is the Roaming Host. The GSM operators (Rogers) use a mature HLR/VLR/SIM cards authentication approach. In contrast, the CDMA operators (Telus and Bell) use a network-based

registration and authentication solution rather than the SIM-equipped handset approach of the GSM operators.

In either case, the Roaming Host will need to authenticate the roaming customer by interconnecting to the data base of the New Entrant. The burden for creating the required data bases and the interconnection links into the Incumbents' switches and databases would and should fall upon the New Entrant. So long as the New Entrant has created industry-standard data bases and interconnection links, the Incumbents must be required to cooperatively test and trouble-shoot the interconnection and to offer the same type of roaming services to the New Entrant as they offer to their fellow Incumbents. Though the situation may prove to be unusual, if the New Entrant chooses to provide its customers with the ability to roam on the network of another carrier whose protocols are different (such as a CDMA-network hand-set roaming on a GSM network), the Roaming Host must be required to accommodate this desire.

A final note on the technical feasibility issue. MTS Allstream proposes that "[w]here roaming is not technically feasible or it is not feasible for other reasons (such as customer preferences), alternative arrangements to allow new entrant mobile wireless operators to extend their network reach and to permit additional competition should be included within the definition of roaming."<sup>30</sup> MTS Allstream suggests that the Department use the Bell-Telus "Enhanced Roaming and Resale Arrangement as a benchmark baseline. We fully support this proposal. We also would note that it is our understanding that Bell has roaming arrangements with Rogers that allow its CDMA customers, who have dual mode handsets to roam onto the Rogers GSM network.

### MULTI-BAND HANDSETS

The Incumbents argue that they should not be required to provide ADR to customers of a New Entrant unless the customer's handset is a multi-band handset that includes the AWS frequencies for which the New Entrant has been licensed. (Bell at para. 61; Telus at p. 11) Mobilexchange has no objection to this requirement. We anticipate that all of the New Entrants will, like ourselves, provide our customers with multi-protocol handsets. These hand-sets will of

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<sup>30</sup> MTS Allstream at para. 20.

course incorporate the AWS frequencies as well as those frequencies of the Incumbents on whose network they wish their customers to roam.

## ANTENNA TOWER AND SITE SHARING

### *Time Frames and Procedures.*

The Department proposed that the Incumbents respond to requests for sharing of existing sites within 30 days, with arbitration to ensue if there were no agreement within 90 days from the original request. The Incumbents, to no great surprise, respond with proposals that would more than double the time - to 180 days according to Bell<sup>31</sup> and 210 days in the case of Rogers.<sup>32</sup> And this 6 to 7 month period could be substantially understated – it is just the time which Bell and Rogers claim they need to complete negotiations with the New Entrants and other parties.<sup>33</sup> However, at the end of this period, any remaining disputes over business issues would still need to be sent to arbitration. Arbitration could add an unknown number of additional months, stretching the time from the initial request by a New Entrant for site sharing out towards a year, even much longer if the arbitration decision were to be appealed as the Incumbents have a right to do.

In judging the merits of the Incumbents' reaction, we suggest the Department keep in mind the critical importance of site access to the New Entrants and the powerful motivation that the Incumbents have to thwart that access for as long as possible, and to make it as expensive as possible. The Department needs to develop an effective, visible and even-handed mechanism for ensuring that the Incumbents do not “game” the site sharing process.

As each site sharing negotiation is likely to have a different set of participants and different facts, it is difficult to fashion a “one size fits all” prescription. There may

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<sup>31</sup> Bell at para. 48.

<sup>32</sup> Rogers at paras. 14-23, 30. Rogers and Bell don't proffer detailed case studies to support these order of magnitude increases in the time necessary for them to respond to site sharing requests.

<sup>33</sup> This initial 6-7 month period could be stretched out by the Incumbents for an indefinitely longer period were the Department to accept Rogers implicit suggestion that the clock not start unless and until the New Entrant submit all of the paper work that Rogers or another Incumbent might claim is necessary to be filed up front. Rogers at \_\_\_\_\_.

be situations where the time frames suggested by the Department do in fact need to be extended. It is unlikely, however, that most negotiations, in the normal course of affairs, that is ones without the motivation of the Incumbents to stall, would take anywhere near the amount of time urged by Rogers and Bell.

We believe the best solution is to adhere to the Department's original suggestion of 30 days for an initial response by the Incumbents and an additional 60 days to resolve any issues. This total of 3 months should be quite sufficient in most cases. If circumstances arises that well justify additional time, the Incumbents could appeal to the Department for a special exception. The Incumbents should have the burden of proceeding and the burden of proof in any such hearing. This procedure would allow the Department to develop factors on a case-by-case basis that would build up a body of case law to guide all participants. The Incumbents also should have the burden of demonstrating by specific facts that the New Entrants are not being singled out for discriminatory treatment.

### *Costs*

As is true in the case of mandatory roaming, the Incumbents would pile all of the costs upon the person requesting to share an antenna site, including such costs as those incurred by the Incumbents for analysis, engineering and response and costs incurred by third parties. (E.g., Bell at para. 50.5)<sup>34</sup>

We have no objection to paying our fair share of costs occasioned by our requests for site sharing. The thorny question is how to allocate these costs. We suggest that, in the spirit of the MFN approach we have suggested for mandatory roaming cost and price allocation, the Department should state that the New Entrants would be charged on the same basis (structure and level) as other parties (including those who are not telecom licensees) who seek to share antennas sites and towers.<sup>35</sup>

### *Other Matters*

REQUEST VOLUME: Bell would limit the New Entrants (and presumably others) to 12 new requests every 6 months. (Bell at para. 49). This is an average of 2

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<sup>34</sup> Bell once again argues that all of the costs should be paid "immediately. Bell at para. 32. This suggestion should be rejected for the same reasons we discussed in our response to the similar suggestion in connection with mandatory roaming.

<sup>35</sup> The Telus request (at p. 15) that each New Entrant be required to submit a "binding forecast" of antenna sharing request and then pay the shortfall is unworkable, discriminatory and punitive.

requests per month. Rogers, on the other hand, indicates that it currently is handling 15 to 20 requests per month. Rogers sees no need to impose a cap on the number it will handle, though it would seek an unspecified amount of additional time if the requests in any month exceed 150% of the current volume, which equates to 23 to 30 requests per month. (Rogers at paras. 28-29, 24) If Rogers can handle up to 15 times the cap suggested by Bell, we see no reason why Bell cannot handle the same volume. In any event, the solution is to extend the time for compliance by the minimal amount needed to handle an unusual volume of requests (not to impose an arbitrary cap), using the procedures we suggested in the immediately preceding section.

TRANSPARENCY: Telus (at p. 13) suggests that the parties to any negotiation over site sharing should be permitted to agree that any contractual arrangements reached are to be kept confidential. Mobilexchange opposes this suggestion. The essence of this process must be transparency. As Telus itself stated in its “Guiding Principles” (at p. 2) regulations should be “open, transparent and reasoned.” Without transparency the New Entrants and the Department can never be sure that the Incumbents are not discriminating against the New Entrants.<sup>36</sup>

## DISPUTE RESOLUTION

Bell and Rogers suggest the Department divide disputes into two categories – those that are technical in nature and those that involve “business disputes.” (Bell at para. 39; Rogers at paras. 14, 30)

The Incumbents suggest that the Department should resolve technical disputes. Mobilexchange agrees with regard to technical disputes. This was the position we took in our opening comments (Mobilexchange Comments, pp. 7-8).

We disagree, however, that business issues should be diverted immediately to formal arbitration. There is no clear dividing line as to what constitutes a business issue. For instance, Bell declares that the issue of technical feasibility in site sharing involves a “reasonableness standard that includes economic cost and

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<sup>36</sup> MTS Allstream (at para. 28) proposes that the Department should permit New Entrants to “review all roaming arrangements of the licensee that is the recipient of a roaming request.” We suggest that this prescription should also apply to site sharing agreements.

practicality.”<sup>37</sup> This definition would seem to mix both technical and business issues, indicating that the dividing line is murky at best.<sup>38</sup> The fairest and most effective way to resolve these “business” issues is for the Department to address them first, along with the entire bundle of issues in any site sharing dispute.

## OTHER MATTERS

### *Failure to Meet Minimum Bids*

Bell suggests that, if the minimum bid for any given set-aside block is not forthcoming during Phase 1 of the Auction, the set-aside designation for that block should be removed and the Incumbents permitted to bid “immediately.” (Bell at para. 29) There could, of course, be a variety of reasons if the minimum bid for a given block is not met (insufficient time to line up funding; doubts created by the current international credit crunch; etc.). This does not mean, however, that no New Entrant is ready, willing and able to purchase the spectrum and build a competitive network. In view of the need to introduce competition, the Departments’ solution – to reduce the minimum bid or auction at a later time<sup>39</sup> - is clearly the preferable course.

### *Branding*

Branding, as we are using it here, refers to the pop-up screen message that appears on a roaming subscriber’s hand-set when he has roamed into the visiting carrier’s territory. We believe that there are some circumstances in which the screen simply announces that the subscriber is roaming and other situations in which the Roaming Host carrier’s brand is identified. We urge the Department to require the Roaming Host to only alert the home carrier’s customer that he is roaming and not to allow the Roaming Host to insert its brand (unless the two carriers mutually agree to a different arrangement).

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<sup>37</sup> Bell at para. 15.

<sup>38</sup> Bell also would ban site sharing if it degrades the Incumbent’s network. Though seemingly a technical question, this issue could implicate several business issues such as forecasting, budgeting, QoS formula, rate plans, etc. Regardless of how the issue of network degradation is classified it is an issue that should be addressed first before the body that has the expertise, the Department itself

<sup>39</sup> *November Policy Framework* at p. 4.

## EXTENSION OF TIME FOR SUBMITTING BID APPLICATIONS

At least one of the other commentators (SaskTel at p.7) recognizes that the present time frame for submitting applications after the date the department issues its rulings following this Consultation is too short. We appreciate the Department's desire to expedite the initiation of viable competition. We believe, however, that this goal is best served by an extension in the application date and a commensurate extension in the auction date. An extension will enable the prospective bidders to absorb the ramifications of the Department's conclusions on the thorny issues raised by this Consultation and to adjust their business cases and their auction strategy in consultation with their investors. **We continue to believe that a 60 day extension is justified.**

## CONCLUSION

In our opening comments in this Consultation, we stressed that the New Entrants must have "equal access at the originating and the terminating end and to all network elements on all types of network protocols, including GSM, CDMA, etc."<sup>40</sup> in order for the Department's vision of a truly competitive wireless marketplace to come true. Many of the suggestions of the Incumbents would interfere with equal access and thwart the competitive goal. We urge the Department to keep the goal of equal access and fair competitive entry in mind in ruling upon the merits of their suggestions regarding both roaming and site sharing.

Respectfully submitted,

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<sup>40</sup> Mobilexchange at p. 4.

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