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22 January 2008

Mr. Peter Hill
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300 Slater Street
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Dear Mr. Hill:

Subject: *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, 8 December 2007 (Gazette Notice No. DGRB-010-07)*

Pursuant to Gazette Notice No. DGRB-010-07 as amended by *Update on Clarification Questions for the AWS Policy Framework and Deadline Extension for the Consultation on Proposed Conditions of Licence (DGRB-010-07), Canada Gazette, Part I, 13 December 2007*, Gazette Notice DGRB-012-07, MTS Allstream Inc. submits its comments in the attachment to this letter.

Yours truly,

Original signed by Jennifer Crowe for Teresa Griffin-Muir.

Attachment

***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, 8 December 2007
Notice No. DGRB-010-07***

**Comments of
MTS Allstream Inc.**

22 January 2008

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I. INTRODUCTION

1. MTS Allstream Inc. (MTS Allstream) is pleased to provide its comments in response to the consultation document issued by the Department on 28 November 2007 (DGRB-010-07) and published in the *Canada Gazette*, Part I on 8 December 2007.¹
2. MTS Allstream fully endorses the Minister's decision to mandate roaming and antenna tower and site sharing among all existing cellular and Personal Communications Services (PCS) licensees and future AWS licensees (collectively, mobile wireless licensees).
3. New conditions of licence that mandate roaming and antenna tower and site sharing are necessary to achieve the Department of Industry Canada's fundamental objective of stimulating market entry and vigorous competition in Canada's mobile wireless sector. In turn, increased market entry in the mobile wireless sector will provide end-customers with a more seamless service experience, expanded service offerings, including alternative bundles of feature-rich services and the benefits of increased rivalry in the marketplace.
4. In order to ensure that the Department's proposed modifications to the conditions of licence of mobile wireless licensees are effective in delivering the benefits of vigorous competition in a timely way, MTS Allstream submits that the proposed conditions of licence should be clarified and bolstered. These additional provisions are required in recognition of the lack of market impetus for an incumbent mobile wireless licensee to enter into a roaming or site sharing agreement and the new entrant mobile wireless operator's lack of market power in such negotiations.
5. In particular, MTS Allstream submits that the proposed conditions of licence regarding mandated roaming should clarify that the quality and components of

¹ *Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*, Gazette Notice No. DGRB-010-07 *Canada Gazette*, Part I, 8 December 2007, pages 3385-3389, as amended by *Update on Clarification Questions for the AWS Policy Framework and Deadline Extension for the Consultation on Proposed Conditions of Licence (DGRB-010-07)*, Gazette Notice DGRB-012-07, *Canada Gazette*, Part I, 13 December 2007.

- the roaming provided to new entrants must be non-discriminatory and equivalent to that provided to licensee's own end-customers and other mobile wireless providers. Similarly, the conditions of licence should contain certain disclosure requirements and should be clarified to ensure that the provision of roaming at "comparable rates" does not allow mobile wireless licensees to discriminate on the basis of reciprocal arrangements.
6. With respect to antenna tower and site sharing, MTS Allstream submits that Industry Canada should add a provision to ensure that certain pertinent information is contained in the initial information request and the response thereto, as well as in the formal site sharing request and response.
 7. Finally, MTS Allstream has proposed an Arbitration Framework that would potentially reduce the need for arbitration and streamline any arbitration process that does take place.

II. BACKGROUND

8. In relation to roaming, in its policy document, entitled *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range*, dated 28 November 2007 (*AWS Auction Policy*), Industry Canada determined that all mobile wireless licensees must offer automatic digital roaming on their networks.² In particular, Industry Canada determined that as a condition of licence, it would, where technically feasible, require all mobile wireless licensees to offer both out-of-territory and in-territory automatic digital roaming on their networks as follows:
 - (a) to all cellular, PCS and AWS licensees outside of their licensed area, for at least the 10-year term of AWS licences;
 - (b) to all new entrants, in their licensed areas for a period of five years commencing with the date of issuance of their licence; and

² *AWS Auction Policy*, page 8.

- (c) to national new entrants who have substantially met the five-year roll-out requirements outlined in their licences, as determined by Industry Canada, for an additional five years.
9. In addition, Industry Canada determined that these roaming arrangements "must be offered wherever technically feasible, negotiated expeditiously and in good faith" and that **"roaming would be offered at commercial rates that are reasonably comparable to rates that are currently charged to others for similar services [emphasis in original]."**³
10. These roaming "ground rules" were repeated once again by Industry Canada in DGRB-010-07. The Department also proposed that new conditions of licence be adopted in order to support the requirement for mobile wireless licensees to provide mandated roaming.⁴
11. In relation to antenna tower and site sharing, in its *AWS Auction Policy*, Industry Canada concluded that "it is in accordance with the orderly development and efficient operation of radiocommunication in Canada to mandate antenna tower and site sharing and to prohibit exclusive site arrangements for all licensees including broadcasting certificate holders."⁵ The Department further concluded that "[l]icensees will be directed to binding arbitration to resolve disputes where they cannot finalize an agreement to share within certain time frames."⁶
12. In DGRB-010-07, Industry Canada noted that it has adopted rules in its 28 June 2007 revision to *Radiocommunication and Broadcasting Antenna Systems*⁷ (CPC-2-0-03) which require "proponents of new antenna towers to search for existing sites and supporting structures, and requires licensees and site owners/operators to enter into good faith negotiations to share sites where technically feasible." As explained by the Department in DGRB-010-07, these rules were developed as a result of comments submitted in several proceedings,

³ *AWS Auction Policy* pages 8 and 9.

⁴ DGRB-010-07, page 3385.

⁵ *AWS Auction Policy*, page 9.

⁶ *AWS Auction Policy*, page 9.

⁷ CPC-2-0-03, Issue 4, effective January 1, 2008.

including the National Antenna Tower Policy Review, the Telecommunications Policy Panel review process and the proceeding which led to the Department's *AWS Auction Policy*.⁸

13. As in the case of roaming, licensees would also be directed to binding arbitration to resolve disputes where they cannot finalize an agreement to share antenna towers or sites within certain time frames.

III. CONSIDERATIONS APPLICABLE TO MANDATED ROAMING

14. In the *AWS Auction Policy*, Industry Canada determined as a matter of policy that mandated roaming was in the public interest. In mandating roaming, Industry Canada noted the barriers to entry faced by new entrants from their inability to obtain roaming, if at all, in a timely fashion and at prevailing commercial rates.⁹ Indeed, implicit in the Minister's decision to mandate roaming is the assumption that the operation of market forces alone in the Canadian mobile wireless market would not yield the negotiated roaming arrangements that are essential to the business case of any new entrant mobile wireless operator.
15. Mandated roaming to new entrant mobile wireless operators, in order to be effective, would have to be:
 - (a) provided on a much more timely basis further to a request for same than is currently the case;
 - (b) provided in the quality, including coverage, voice quality and data transmission speeds, at which it is offered to other mobile wireless operators; and
 - (c) offered at prevailing rates comparable to those at which the same services are being provided to other mobile wireless operators.

⁸ DGRB-010-07, page 3385.

⁹ *AWS Auction Policy*, pages 7 and 8.

16. In furtherance of the foregoing objectives, Industry Canada has proposed¹⁰ that the conditions of licence applicable to all mobile wireless licensees be amended to include the following terms:
- (a) the services offered must include digital voice and data services such as Internet access, e-mail, and other data services;
 - (b) when requested, mobile wireless licensees will provide an offer to enter into a roaming arrangement to provide roaming services on reasonable terms within 30 days. 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
 - (c) Roaming arrangements will be negotiated expeditiously and in good faith. If after 90 days from the initial request, the Licensee and the party requesting a roaming arrangement cannot agree to the terms of the roaming arrangement, the Licensee must agree to submit the matter to an arbitrator as agreed upon by the parties or in accordance with the provisions of the applicable provincial arbitration legislation. The Licensee agrees that the arbitrator shall have all necessary powers to determine all of the questions in dispute (including those relating to determining the appropriate terms of the roaming arrangement and those relating to procedural matters under the arbitration) and that any arbitration under this section shall be legally binding. The Licensee must participate fully in such an arbitration and follow all directions of the arbitrator in accordance with any arbitration agreement or with the applicable legislation. At any time, the Licensee and the party requesting roaming may agree to specific terms with regard to submitting their dispute to an arbitrator and may withdraw their arbitration, on agreed terms, so long as they agree to a roaming arrangement."
17. Industry Canada has stated in the *AWS Auction Policy* that roaming arrangements should be offered "wherever technically feasible, negotiated

¹⁰ DGRB-010-07, pages 3387-88.

expeditiously and in good faith."¹¹ MTS Allstream fully supports the objectives of timeliness, similar service quality and rates, good faith negotiations and transparency set out in the *AWS Auction Policy* and the proposed amended conditions of licence. In order to give effect to the Department's objectives MTS Allstream submits that the proposed conditions of licence and licensing framework should be strengthened as discussed below.

A) Quality of Roaming Services Offered to New Entrants

18. The ultimate objective of a mandated roaming requirement should be to provide end-customers of mobile wireless services with the same service experience in all respects, including coverage, voice quality or data transmission speed, whether those end-customers are within or outside of the territory of the mobile wireless licensee. This objective should be explicitly stated in the conditions of licence. The amended conditions of licence should explicitly state that **roaming services offered by the Licensee should provide end-customers of all mobile wireless operators with whom the Licensee has entered into a roaming or other arrangement with the same level and quality of services as that provided by the Licensee to its own end-customers or to the end-customers of other mobile wireless operators and must not discriminate based on the identity of the operator to whom the end-customer is subscribed.**

19. In order to give effect to this ultimate objective, it should also be clarified that the roaming arrangements include all services required to fully support "digital voice and data services, such as Internet access, e-mail and other data services" as well as any new or emerging services not currently widely deployed. The amended conditions of licence should explicitly state that **"automatic digital roaming" includes all services required to fully support the provision of digital voice and data services, as well as the provision of inter-network connectivity as required to support automatic seamless digital roaming and the exchange of pertinent network information between the licensee**

¹¹ *AWS Auction Policy*, page 8.

and the mobile wireless operator that has requested a roaming arrangement in a timely fashion and on an ongoing basis.

20. MTS Allstream also notes that the *AWS Auction Policy* states that roaming need only be provided where "technically feasible". Where 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. To this end, MTS Allstream submits that the service arrangements established between Bell Mobility and TELUS in their Enhanced Roaming and Resale Arrangement should serve as a "benchmark" or "baseline" for considering roaming requests from new entrant mobile wireless operators and, in particular, consideration of what constitutes a technically and commercially feasible roaming arrangement. The amended conditions of licence should explicitly state that **where roaming is not technically or commercially feasible, alternative arrangements to allow new entrant mobile wireless operators to extend their network reach and to permit additional competition shall be provided where feasible. The feasibility of alternative arrangements will be determined in part by the service arrangements already established between mobile wireless licensees and other mobile wireless operators.**

B) Roaming Rates

21. As referred to above, the Department in its *AWS Auction Policy* determined that "roaming would be offered at commercial rates that are reasonably comparable to rates that are currently charged to others for similar services."¹²
22. In determining what is a "commercial rate that is reasonably comparable," it must be borne in mind that in the case of roaming (and antenna tower and site sharing as discussed below), the Minister and Industry Canada have determined that regulatory intervention is necessary in order to achieve the objectives of promoting competition and supporting the orderly development of

¹² *AWS Auction Policy*, pages 8 and 9.

radiocommunication in light of the policy objectives of the *Telecommunications Act*. Implicit in this policy decision is the assumption that the operation of commercial market forces alone, at least in respect of roaming and antenna tower and site sharing for mobile wireless licensees, would not yield timely access to such services at prevailing commercial rates.

23. Therefore, MTS Allstream submits that Industry Canada should further clarify its expectation as to the rates that should be offered by licensees for roaming. In particular, MTS Allstream submits that "reasonably comparable" rates and terms should reflect those rates and terms that current licensees are able to negotiate due to their relatively equal bargaining power and reciprocal arrangements.
24. Subject to the foregoing clarification to the proposed condition of licence as to what would be an acceptable "reasonably comparable" rate, MTS Allstream agrees that issues concerning the rate charged for roaming services should be within the arbitrator's purview and that, in the case of a dispute concerning rates, the arbitrator should have the authority to make a final determination on this issue, in accordance with the Arbitration Framework appended to these comments.

C) Timelines and Other Terms and Conditions Relevant to Negotiations Leading up to Arbitration of Roaming Disputes

25. The Department stressed in its *AWS Auction Policy* that "[n]egotiations between carriers will be time limited", and it concluded that parties will be required to submit to binding arbitration within a short time frame.
26. As noted by the Minister in his 28 November 2007 policy statement and as reiterated in the *AWS Auction Policy*, delayed access to roaming arrangements constitutes a barrier to entry for new entrant operators. In turn, customers of new entrant mobile wireless operators are deprived of the benefits of ubiquitous wireless communications capabilities. Furthermore, potential customers of new entrants may well be dissuaded by virtue of delays and uncertainty alone, from switching to new entrant mobile wireless operators, thereby decreasing overall competition in the market.

27. The deleterious effects of delayed provision of mandated services on competition in the market and on end-customers is difficult to quantify but is a reality with which MTS Allstream is all too familiar. MTS Allstream is not alone in this experience and the Department's policy decision to strictly confine the time limits applicable to the "negotiation" of roaming agreements is tacit confirmation of the experience of competitors. MTS Allstream commends the policy initiative of including in mobile wireless licensees' conditions of licence a condition that would require them to:

- (a) respond within thirty days to a request for roaming;
- (b) negotiate expeditiously and in good faith with the requesting operator;
and
- (c) agree to enter into binding arbitration within 90 days of an initial request for roaming, absent a negotiated agreement within that time frame.

28. In relation to the objectives of timely and effective negotiations, which Industry Canada has built into its proposed amended conditions of licence, it must be borne in mind that new entrant mobile wireless operators will not be aware of the rates the mobile wireless licensee to whom a roaming request has been made is charging to others. In order to ensure timely and effective negotiations and arbitrations, MTS Allstream submits that the Department should adopt conditions of licence and an Arbitration Framework, which permit the new entrant mobile wireless operator requesting roaming to review all roaming arrangements of the licensee that is the recipient of a roaming request.

29. Thus, in order to truly give effect to the Department's concerns with respect to the expeditious resolution of disputes concerning the terms and conditions upon which mobile wireless licensees are to provide roaming to new entrant mobile wireless operators, the amended conditions of licence should explicitly provide as follows:

- (a) within thirty days of an initial request for roaming, the licensee must provide a written draft agreement or Term Sheet incorporating all relevant

and material business terms and conditions upon which it would be prepared to grant roaming; this draft agreement or Term Sheet must include a representation and warranty by the licensee that the services that will be provided to the requesting operator will be of the same quality as services offered to other operators and that the rates offered by the licensee are reasonably comparable, as defined in the conditions of licence, to commercial rates at which the same services are offered to other operators;

- (b) in conjunction with the provision of a written draft agreement or Term Sheet, the licensee shall provide to the requesting operator a copy of all of its current offers, Term Sheets and agreements in relation to roaming and alternative arrangements; and
 - (c) in the absence of a negotiated agreement, with respect to a given request, the terms will be decided by an arbitration held pursuant to the licence within set timeframes as specified in the Arbitration Guidelines adopted by Industry Canada, as proposed by MTS Allstream below.
30. Given the recognition by the Department of the lack of market impetus for a mobile wireless licensee to enter into a roaming agreement and the new entrant mobile wireless operator's lack of market power in such negotiations, MTS Allstream submits that the foregoing additional conditions of licence are minimally necessary. Thus, at a minimum,
- (a) the licensee should be made to disclose at the earliest opportunity in the negotiations the exact terms and conditions upon which it is prepared to enter into a roaming arrangement with the new entrant;
 - (b) second, the licensee should be prepared to represent and warrant that the service level and quality is the same as what it offers or provides to other mobile wireless operators and that the rates contained in its offer are "reasonably comparable" to the prevailing commercial rates at which it offers roaming or alternative arrangements to other mobile wireless operators for the same services; and

- (c) third, the licensee should be prepared to provide the new entrant mobile wireless operator with the information required to assess the similarity of the rates, terms and conditions being offered to it by the licensee, which the new entrant can only do if it is fully informed about the rates, terms and conditions upon which the licensee is currently providing roaming services or alternative arrangements to others.
31. Without the foregoing minimal conditions of licence, the negotiations will likely fail and the timelines provided for in the conditions of licence will serve as nothing more than a built-in delay of 90 days in favour of the licensee to whom a roaming request has been made. It would be better to allow for arbitration to be triggered automatically once a roaming request is received than to create licence conditions that do not adequately take into account the imbalance of market power and knowledge as to market rates that, if left unremedied, will inevitably lead to delayed access to the roaming services that have been mandated by Industry Canada.

IV. PROPOSED ARBITRATION FRAMEWORK

32. MTS Allstream submits that the additional conditions of licence that it has proposed are minimally necessary in order to ensure the effectiveness and timeliness of negotiations for mandated roaming. The additional conditions are also consistent with the fact that licensees have been afforded the privilege of exploiting a scarce and valuable public resource which must be done, first and foremost in the public interest. Assuming that the foregoing additional conditions of licence are adopted, MTS Allstream concurs with the Department that arbitration may well be the most expeditious and efficient way to resolve any persistent disputes between mobile wireless licensees and new entrant mobile wireless operators seeking to enter into a roaming arrangement.
33. MTS Allstream notes that in DGRB-010-07, the Department proposed that arbitrations take place in accordance with the arbitration legislation and rules applicable in the province (presumably where the licensee in question is located). Apart from making binding arbitration mandatory within 90 days of a request for a

roaming arrangement, DGRB-010-07 sets out very few particulars of the arbitration framework that would be applicable absent an agreement between the parties.

34. MTS Allstream has attached to these comments a comprehensive Arbitration Framework, which absent agreement between the parties as to other terms, would automatically be triggered by a failure of the parties to reach agreement within 90 days of such request. In MTS Allstream's view, a comprehensive Arbitration Framework is necessary in this particular context for several reasons, as summarized below:
- (a) both provincial and generic arbitration frameworks have been devised on the assumption that an underlying arbitration agreement exists; in the case of mobile wireless licensees, arbitration arises not by virtue of an agreement (although that possibility is permitted) but by virtue of regulatory compulsion; as a result, there is oftentimes an awkward fit between rules contemplated under provincial legislation or generic arbitration frameworks;
 - (b) the arbitration being contemplated under the proposed conditions of licence is also unlike most commercial arbitrations in that the arbitration will lead to the creation of a contract (i.e., the roaming agreement) rather than the resolution of a dispute pertaining to an existing contract. A related point, of course, is that the lack of a freely negotiated commercial agreement points to the fundamental imbalance in market power between the licensee and the new entrant operator. No roaming arrangement would freely be entered into by a licensee without the constraint of licence conditions imposed by the rule of law. The fundamental imbalance in market power must be addressed in the arbitration framework with respect to issues such as the full disclosure of all existing roaming arrangements and service offerings;
 - (c) in order to assess the technical or commercial feasibility or infeasibility of a requested roaming or alternative arrangement, the arbitrator or arbitration panel in question would be most effective if she or it has a

degree of specific expertise in the management, operation and regulatory aspects of terrestrial wireless undertakings. Here again, rules such as those found in the ADR Institute's rules that allow the Institute or another such independent body to appoint the member(s) of the arbitral panel would not be suited to the particular context of arbitrations contemplated in the conditions of licence proposed in DGRB-010-07;

- (d) procedural time lines are not defined in many provincial arbitration frameworks. Adopting these frameworks without modification would likely undermine Industry Canada's objective of having roaming arrangements negotiated in an expeditious fashion.
35. MTS Allstream, therefore, proposes that the Department should establish an arbitration framework that reflects the unique circumstances of this industry sector. This arbitration framework would apply where parties are not able to agree on their own arbitration framework within 90 days of an initial request for roaming. By way of further clarification, if an agreement as to the terms of a roaming arrangement or the terms of arbitration is not reached within 90 days, arbitration may be initiated by the requesting party pursuant to the Arbitration Framework. The Arbitration Framework would be incorporated by reference in the amended conditions of licence for all mobile wireless licensees and would be published by the Department in a separate Client Procedures Circular or other suitable document form.
36. This Arbitration Framework is described in detail in the attached Schedule "A". MTS Allstream has proposed a "final offer" arbitration model that limits the Arbitrator to selecting between the last offers of the licensee and the requesting operator. This model provides both parties with the incentive to make reasonable proposals, likely reducing the need for arbitration and, in the event of arbitration, simplifying the process for a more expeditious conclusion. The other major elements of this framework are as follows:

- (a) All disputes concerning the establishment of the terms of a roaming (or antenna tower and site sharing) agreement shall be arbitrated pursuant to the rules set out in the framework.
- (b) The arbitration is commenced by the party initiating the arbitration (the Claimant) by way of a Notice to Arbitrate delivered to the other party (the Respondent).
- (c) The parties have 10 days from the commencement of the arbitration to agree on a single arbitrator. If the parties cannot agree on a single arbitrator, each party will select their own arbitrator, and the two arbitrators selected by the parties shall together appoint a third arbitrator (the Chair). If one party fails to appoint an arbitrator within 15 days after the other party has appointed an arbitrator, then the arbitration shall be decided solely by the arbitrator then appointed. If the arbitrators appointed by the parties are unable to agree on a Chair, either party may apply to the Court to make this appointment.
- (d) Arbitrators must be unbiased with no interest or affiliation within the past five years in either party and no financial stake in the outcome. Arbitrators (except the Chair) must also have at least five years' experience in the Canadian telecommunications industry. It would be preferable if such Arbitrators have experience in the wireless services industry, with direct experience negotiating the terms of roaming or site-sharing agreements.
- (e) The parties may agree on the place of arbitration, and if they cannot agree the Arbitrator(s) shall decide the place of arbitration. The applicable law shall be the law of the province where the arbitration is held.
- (f) The Arbitrator(s) have control over the conduct of the arbitration, and shall apply the following timelines:
 - At the time of the commencement of the arbitration, the Claimant shall deliver to the Respondent a Term Sheet or draft agreement

setting out the material terms and conditions that the Claimant seeks in relation to roaming (or site sharing) agreement.

- Within 10 days of receiving the Term Sheet or draft agreement, the Respondent shall deliver to the Claimant its own Term Sheet or draft agreement which shall be a written response to the Claimant's Term Sheet or draft agreement, identifying which terms are accepted, refused, or modified. The Respondent may also add additional terms. Within five days of receipt of the Respondent's Term Sheet or draft agreement, the Claimant may deliver its reply Term Sheet or draft agreement which is restricted to the acceptance, refusal or modification of the Respondent's additional terms (if any). A party failing to respond to a Term Sheet or draft agreement shall be deemed to have accepted the terms contained therein. The Term Sheets or draft agreements are filed with the Arbitrator(s) and no amendments are allowed.
- Each party shall submit with its terms a list of relevant documents. At a party's request, the Arbitrator(s) shall order the disclosure of any roaming or site sharing agreements that are in the possession or control of the other party, and the Arbitrator(s) may also order the production of such agreements by non-parties to the arbitration if the Arbitrator(s) is satisfied that such agreements would assist with the determination of the terms in dispute. Each party shall disclose all documents relating to the matters in issue at least 15 days prior to the hearing.
- Within 10 days of the appointment of the Arbitrator(s), a pre-arbitration meeting shall be held with the parties to establish a procedural timetable for the arbitration which shall not exceed 60 days from the commencement of the arbitration. No oral discovery shall be conducted unless agreed by the parties or ordered by the Arbitrator(s).

- The hearing date shall be no more than 90 days from the commencement of the arbitration. The arbitration award shall be delivered within 10 days after the hearing.
- (g) The Arbitrator(s) shall be limited to making its award by selecting either the Claimant's Term Sheet or draft agreement (including reply) or the Respondent's Term Sheet or draft agreement.

V. ANTENNA TOWER AND SITE SHARING

37. In DGRB-010-07, the Department proposed that the following conditions of licence be adopted in order support the requirement for cellular, PCS and AWS mobile wireless licensees to provide mandatory roaming:
1. Licensees must facilitate sharing of antenna sites, including rooftops, and supporting structures ("Site(s)") and not cause or contribute to the exclusion of other radiocommunication antenna operators ("Operator(s)") from gaining access to Sites. Without limiting the generality of the foregoing, where a Licensee is party to an agreement that includes a provision excluding other Operators from the use of a Site, then, in order to facilitate the sharing of Sites, the Licensee must consent to waiving that portion of the agreement to facilitate a request to share. Further, Licensees must not enter into or renew agreements that exclude other Operators from using a Site.
 2. Licensees must share where technically feasible except where national security concerns exist or the Site is used solely for personal enjoyment.
 3. In order to fulfill the condition of sharing in accordance with this licence, the Licensee must respond to a request to share by any other Operator within 30 days as follows:
 - a. In the event that the request to share is technically feasible, the Licensee must provide the requesting Operator with a response and an offer to enter into a sharing agreement. The department expects that Site-sharing arrangements would be offered at commercial rates that are reasonably comparable to rates currently charged to others for similar access.
 - b. In the event that the request to share is not technically feasible, the Licensee must provide the requesting Operator with a response detailing the reasons why it is not feasible

(accompanied by any applicable technical information) in accordance with CPC-2-0-03.

4. Site-sharing arrangements will be negotiated expeditiously and in good faith. If after 90 days from the initial request, the Licensee and the Operator requesting a Site-sharing arrangement cannot agree to the terms of the arrangement, the Licensee must agree to submit the matter to an arbitrator as agreed upon by the parties in accordance with the provisions of the applicable provincial arbitration legislation. The Licensee agrees that the arbitrator shall have all necessary powers to determine all of the questions in dispute (including those relating to determining the appropriate terms of the Site-sharing arrangement and those relating to procedural matters under the arbitration) and that any arbitration under this section shall be legally binding. The Licensee must participate fully in such an arbitration and follow all directions of the arbitrator in accordance with any arbitration agreement or with the applicable legislation. At any time, the Licensee and the Operator requesting antenna tower and site sharing may agree to specific terms with regard to submitting their dispute to an arbitrator and may withdraw their arbitration, on agreed terms, so long as they agree to a Site-sharing arrangement.¹³

38. MTS Allstream concurs with the need to include conditions of licence in relation to antenna tower and site sharing and the prohibition of exclusive arrangements. MTS Allstream proposes that Industry Canada include in the conditions of licence a provision for an initial request for information from an Operator regarding tower/site ownership, tower loading, elevation and other site-specific information. Following such a request for information, a Licensee would have 10 days to provide this basic information.

39. As well, MTS Allstream proposes that Industry Canada specify that a formal request for tower/site sharing must include specific information regarding the Operator's technical and physical requirements.

40. MTS Allstream also proposes that Industry Canada specify that the Licensee response to a formal request for site sharing (which must be made within 30 days) identifies requirements and general conditions specific to the actual installation as well as the proposed terms and conditions of site sharing, including rates.

¹³ DGRB-01-07, pages 3386 and 87.

41. As well, MTS Allstream submits that an Arbitration Framework that would apply in circumstances where the parties are unable to agree on the terms of their own arbitration framework, should be incorporated by reference into the conditions of licence applicable to antenna tower and site sharing and would be published by the Department in a separate Client Procedures Circular or other suitable document form.
42. The same Arbitration Framework would apply to roaming disputes as to antenna tower and site sharing disputes.

VI. PROPOSED LICENCE CONDITIONS

43. For all of the foregoing reasons, MTS Allstream proposes that the following conditions relating to roaming, antenna tower and site sharing be inserted into the licences of all spectrum and radio licences and broadcasting certificates:
 - A) Proposed Licence Conditions for Roaming**
 - (a) Roaming services offered by the Licensee must include digital voice and data services, such as Internet access, e-mail, and other data services and includes all services required to fully support the provision of digital voice and data services, as well as the provision of inter-network connectivity as required to support automatic seamless digital roaming and the exchange of pertinent network information between the Licensee and the mobile wireless operator ("Operator") requesting access to roaming in a timely fashion and on an ongoing basis.
 - (b) Subject to technical restrictions, roaming services offered by the Licensee should provide end-customers of all Operators with whom the Licensee has entered into a roaming or other arrangement with the same level and quality of services, including coverage, voice quality and speed of data transmission of services, as that provided by the Licensee to its own end-customers or to end-customers of other Operators and must not discriminate based on the identity of the Operator to whom the end-customer is subscribed. Where roaming is not technically or

commercially feasible, alternative arrangement to allow new entrant mobile wireless operators to extend their network reach and to permit additional competition shall be provided by the Licensee where feasible. The feasibility of alternative arrangements will be determined in part by the service arrangements already established between the Licensee and other mobile wireless operators.

- (c) The Licensee must provide roaming services to requesting Operators, including sub-licensees, at commercial rates that are reasonably comparable to the rates that are currently charged to other licensees for similar services.
- (d) Within thirty (30) days of an initial request for roaming from a requesting Operator, the Licensee must provide a written draft agreement or Term Sheet incorporating all relevant and material terms and conditions upon which it would be prepared to grant roaming. The Licensee must include in this draft agreement or Term Sheet a representation that the services that will be provided to the requesting Operator will be of the same level and quality, as defined above, as services offered to its own end-customers or to end-customers of other Operators with whom the Licensee has entered into a roaming arrangement and that the rates offered by the Licensee are reasonably comparable to rates currently charged to other Operators for similar services.
- (e) Also within thirty (30) days of an initial request for roaming from a requesting Operator, the Licensee shall provide to the requesting Operator a copy of all of its current offers, Term Sheets and agreements in relation to roaming or alternative arrangements.
- (f) The Licensee shall negotiate roaming arrangements with any requesting Operator expeditiously and in good faith.
- (g) If after ninety (90) days from the initial request for roaming from an Operator, the Licensee and the requesting Operator cannot agree to the terms of the roaming arrangement, the Licensee must agree to submit the matter to an arbitrator as agreed upon by the parties or in accordance

with the arbitration framework set out in [Industry Canada's Arbitration Guidelines for Mobile Wireless Licensees]. In either instance, the Licensee agrees that the arbitrator shall have all necessary powers to determine all of the questions in dispute (including those relating to determining the appropriate rates, terms and conditions of the roaming arrangement and those relating to procedural matters under the applicable arbitration framework and that any arbitration under this section shall be legally binding. The Licensee must participate fully in such arbitration and follow all directions of the arbitrator in accordance with the applicable arbitration framework. At any time prior to arbitration, the Licensee and the requesting Operator may agree to specific terms with regard to submitting their dispute to an arbitrator and may withdraw their arbitration, on agreed terms, so long as they agree to a roaming arrangement.

- B) Proposed Licence Conditions for Mandatory Antenna Tower and Site Sharing and Prohibition of Exclusive Site Arrangements**
- (a) Licensees must facilitate sharing of antenna towers and sites, including rooftops, and supporting structures ("Sites") and not cause or contribute to the exclusion of other radiocommunication antenna operators ("Operators") from gaining access to Sites. Without limiting the generality of the foregoing, where a Licensee is party to an agreement that includes a provision excluding other Operators from the use of a Site, then, in order to facilitate the sharing of Sites, the Licensee must consent to waiving that portion of the agreement to facilitate a request to share. Further, Licensees must not enter into or renew agreements that exclude other Operators from using a Site.
- (b) Licensees must share their Sites where technically feasible, except where national security concerns exist or where the tower or site is used solely for personal enjoyment.

- (c) In order to fulfill the condition of Site sharing in accordance with this licence, the Licensee shall respond to an Operator's initial request for specific site information within 10 days.
- (d) In order to fulfill the condition of Site sharing in accordance with this licence, the Licensee must respond to a formal request to share a Site by any other Operator within thirty (30) days as follows:
 - (i) In the event that the request to share is technically feasible, the Licensee must provide the requesting Operator with a response and an offer to enter into a Site sharing agreement. The Licensee must provide a written draft agreement or Term Sheet incorporating all relevant and material terms and conditions upon which it would be prepared to grant access to a Site or Sites, as the case may be. The department expects that Site sharing arrangements would be offered at commercial rates that are reasonably comparable to rates currently charged to others for similar access.
 - (ii) Also within thirty (30) days of an initial request from an Operator, the Licensee shall provide to the requesting Operator a copy of all of its current offers, Term Sheets and agreements in relation to Site sharing.
 - (iii) In the event that the request to share is not technically feasible, the Licensee must provide the requesting Operator with a response detailing the reasons why it is not feasible (accompanied by any applicable technical information) in accordance with CPC-2-0-03. Disputes concerning the feasibility of Site sharing will be resolved in accordance with Arbitration Framework.
- (e) The Licensee shall negotiate a Site sharing arrangements with any requesting Operator expeditiously and in good faith.
- (f) If after ninety (90) days from the initial request, the Licensee and the Operator requesting a Site sharing arrangement cannot agree to the terms of the arrangement, the Licensee must agree to submit the matter

to an arbitrator as agreed upon by the parties or in accordance with the arbitration framework set out in [Industry Canada's Arbitration Framework for Mobile Wireless Licensees]. In either instance, the Licensee agrees that the arbitrator shall have all necessary powers to determine all of the questions in dispute (including those relating to determining the appropriate rates, terms and conditions of the Site sharing arrangement and those relating to procedural matters under the arbitration) and that any arbitration under this section shall be legally binding. The Licensee must participate fully in such arbitration and follow all directions of the arbitrator in accordance with the applicable arbitration framework. At any time prior to arbitration, the Licensee and the requesting Operator may agree to specific terms with regard to submitting their dispute to an arbitrator and may withdraw their arbitration, on agreed terms.

Schedule "A"

Arbitration Rules for Cellular, PCS and AWS Licensees

1. **Application and Purpose**

All disputes arising out of or in connection with establishing the terms of a roaming or Site-sharing agreement as required by Gazette Notice No. DGRB-010-07 shall be arbitrated and finally resolved pursuant to the Arbitration Rules for Cellular, PCS and AWS Licensees ("the Rules").

The purpose of the Rules is to enable the Licensee and the Operator to achieve a just, speedy and cost effective determination of the terms of a Roaming or Site-sharing agreement, and resolve any other issues in dispute that are related to or arise from the establishment of such an agreement.

A failure to comply with the Rules is an irregularity and does not render an arbitration or a step, document or award in the arbitration a nullity.

2. **Interpretation**

In the Rules:

"Arbitrator" means a person appointed to serve as an Arbitrator of a dispute pursuant to the Rules.

"Chair" means the person elected or appointed to chair the Tribunal.

"Claimant" is the Party commencing the arbitration in accordance with Rule 10.

"Commencement Date" means the date the arbitration is deemed to commence under Rule 10.

"Party" or "Parties" refers to the Claimant and the Respondent.

"Respondent" is the Party responding to the Notice to Arbitrate referred to in Rule 9.

"Rules" mean these Arbitration Rules for Cellular, PCS and AWS Licensees Rules.

"Term Sheet(s)" means the Terms Sheet(s) referred to in Rule 24.

"Tribunal" means either a sole Arbitrator or a panel of Arbitrators, as the case may be, appointed to serve as the Arbitrator or Arbitrators of a dispute pursuant to these Rules.

3. **Time**

(a) In the Rules, where the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday. In the calculation of time, the first day shall be excluded and the last day included.

(b) The Parties may modify any period of time by agreement.

4. **Delivery of Documents**

Any document required by the Rules to be delivered may be delivered either by personal delivery, mail, e-mail or facsimile. If delivered by personal delivery, delivery shall be deemed to have been effected on the day of such delivery to a Party at its regular place of business or mailing address or that of its legal counsel where applicable. If delivered by mail, except for confirmation copies of documents delivered by e-mail or facsimile, delivery shall be deemed to have been effected 2 days following the date of mailing. If by e-mail or facsimile, delivery shall be deemed to have been effected when sent. A confirmation copy of any such document shall be delivered by mail in the case of any electronic transmission.

5. **Communications with Tribunal**

No Party or person acting on behalf of a Party shall have a communication with the Tribunal in the absence of the other Party concerning the substance of the dispute or any contentious matter relating to the proceeding.

6. **Communications between Parties**

Parties to an arbitration under the Rules may deliver any written communications required or permitted under the Rules by personal delivery, by mail, e-mail or by facsimile to a Party at its regular place of business or mailing address. A confirmation copy of such communications shall be sent by mail in the case of any electronic transmission.

7. **Address for Delivery of Documents**

The Parties shall provide to one another a full mailing address, telephone number, facsimile number and e-mail address, as may be applicable.

8. **Waiver of Right to Object**

A Party that knows that any provision of, or requirement under, the Rules has not been complied with and yet proceeds with the arbitration without promptly stating an objection shall, unless the Tribunal otherwise orders, be deemed to have waived its right to object.

9. **Notice to Arbitrate**

A Claimant may submit a dispute to arbitration by delivering a written Notice to Arbitrate to the Respondent at the last known mailing address or place of business of the respondent. The Notice of Request to Arbitrate shall contain:

- (a) the names, place of business or mailing addresses, telephone numbers, fax numbers and e-mail addresses of the Parties to the dispute, if known;
- (b) the Term Sheet;
- (c) a request that the described dispute be referred to arbitration;
- (d) any variation of the Rules which has been agreed by the Parties in writing.

10. Commencement Date

The arbitration is deemed to have commenced when one Party ("the Claimant") serves a Notice to Arbitrate on another Party ("the Respondent").

11. Selection of Tribunal

The Parties have 10 days from the Commencement Date to agree on a sole Arbitrator. If the Parties are unable to agree on a sole Arbitrator, the Parties shall each appoint an Arbitrator by serving notice of the Arbitrator's name and contact information on the other Party. A third Arbitrator ("the Chair") shall be selected by the two Arbitrators appointed by the Parties.

If either Party fails to appoint an Arbitrator within 15 days after one of the Parties has appointed an Arbitrator, then the matter shall be decided solely by the Arbitrator then appointed.

If the Arbitrators appointed by the Parties are unable to agree on the appointment of the Chair within 20 days from the commencement of arbitration, then a Party may apply to a court of competent jurisdiction to make the required appointment.

12. Arbitrators Qualifications

No Arbitrator may be or have been within the five years immediately preceding the Notice to Arbitrate

- (i) a director, officer, employee or shareholder of any Party to the dispute or of any affiliate or associate of such a Party;
- (ii) an associate of any such director, officer, employee or shareholder described in subsection (i);
- (iii) a member of the audit or legal firm or firms who advise either Party to the dispute;

(iv) a professional or consultant who is regularly retained by either Party to the dispute;

(v) any other person who has a direct financial interest in a Party to the dispute or in any associate or affiliate of such Party or of a director, officer, employee, or shareholder of such Party; or

(vi) any other person who has a direct financial interest in the dispute.

Each Arbitrator shall have at least five years experience in the Canadian telecommunications services industry preferably with direct experience negotiating terms of roaming or Site-sharing agreements.

If a Chair is to be appointed, the Chair must be a lawyer or a judge with at least 15 years of legal experience.

13. **Applicable Law**

The Tribunal shall apply the laws of the Province where the Arbitration is to be held. The arbitration shall be conducted in accordance with these Rules and any applicable arbitration legislation of the place of arbitration.

14. **Independence and Impartiality**

(a) Unless otherwise agreed by the Parties, an Arbitrator shall be and remain at all times wholly independent.

(b) An Arbitrator shall be and remain wholly impartial and shall not act as an advocate for any Party to the arbitration.

(c) Every person must, before accepting an appointment as Arbitrator, sign and deliver to the Parties a statement declaring that he or she knows of no circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality and that he or she will disclose any such circumstances to the Parties if they should arise after that time and before the arbitration is concluded.

15. **Substitution**

If an Arbitrator refuses to act, is incapable of acting, withdraws from office, is removed from office by order of the court or dies, a substitute Arbitrator shall be appointed according to the provisions of the Rules, or the agreement of the Parties, that were applicable to the appointment of the Arbitrator being replaced.

Where a single Arbitrator or Chair is replaced, any hearings previously held shall be repeated. Where any other Arbitrator is replaced, any hearings previously held may be repeated at the discretion of the Arbitrators.

16. Challenges

An Arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality, or if he or she does not possess the qualifications agreed upon by the Parties.

A Party who intends to challenge an Arbitrator shall, within 7 days after becoming aware of the appointment, or after becoming aware of any circumstances referred to in this Rule, send a written statement of the challenge and the reasons for the challenge to the Tribunal, if it has been fully constituted. If the challenged Arbitrator withdraws or the other Party agrees to the challenge, the mandate of the Arbitrator terminates.

In the case of an arbitration with a single Arbitrator, if the Arbitrator challenged does not withdraw and the other Party does not agree to the challenge, the single Arbitrator shall decide on the challenge. If there is a three-person panel the Chair, if he or she is not challenged, shall decide the challenge. If the Chair is challenged, all the Arbitrators may decide the challenge.

17. Representation

Where a Party intends to be represented or assisted by a lawyer, that Party shall, in writing, advise the other Party of the lawyer's name, address, telephone number, facsimile number, e-mail address and the capacity in which he or she is acting at least 15 days before any scheduled hearing or meeting.

18. Place of Arbitration

The Parties may agree in writing on the place of arbitration. If no place is agreed upon, the place of arbitration shall be at the discretion of the Tribunal. The Tribunal may meet at any other place it considers convenient or necessary for consultation, to hear witnesses, experts or the Parties or for the inspection of documents, goods or other property. Part or all of the arbitration may be conducted by telephone, e-mail, internet or electronic communication if agreed by the Parties.

19. Language of Arbitration

The Parties may agree, in writing, on the language of the arbitration. In default of any such agreement the Tribunal may specify the language of the arbitration.

20. Conduct of the Arbitration

(a) Subject to these Rules, the Tribunal may conduct the arbitration in the manner it considers appropriate.

(b) Each Party shall be treated fairly and shall be given full opportunity to present its case.

(c) The Tribunal shall strive to achieve a just, speedy and cost effective determination of every proceeding on its merits, taking into account Rule 1.

21. **Jurisdiction**

The Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence, validity or application of these Rules.

22. **No Waiver of Right to Object**

A Party is not precluded from raising a jurisdictional issue by the fact that it has appointed, or participated in the appointment of, an Arbitrator.

23. **General Powers of Tribunal**

The Tribunal may:

- (a) order an adjournment of the proceedings from time to time;
- (b) make an interim award on any matter with respect to which it may make a final award;
- (c) grant such interim measures of protection as it deems appropriate, including an order for security for costs;
- (d) make an award or interim award granting equitable relief, injunctions or specific performance on such terms as may be just;
- (e) order inspection of documents, exhibits or other property;
- (f) at any time extend or abridge a period of time fixed or determined by it, or any period of time required in the Rules, except the time within which the award is to be made, where it considers it just and appropriate in the circumstances;
- (g) request further statements clarifying issues in dispute;
- (h) give such direction with respect to procedural matters having regard to Rule 1; and
- (i) request from a court of competent jurisdiction assistance in taking evidence.

24. **Term Sheets**

At the time of commencement of the arbitration, the Claimant must deliver to the Respondent and the Tribunal a written Term Sheet setting out the material terms and conditions the Claimant seeks to have entered into a Roaming or Site-Sharing Agreement.

Within 10 days after the Respondent receives the Term Sheet, the Respondent shall deliver to the Claimant and the Tribunal its own Term Sheet which shall be a written response to the Claimant's Term Sheet that either accepts, refuses or modifies the Claimant's terms and adds any additional material terms and conditions the Respondent seeks to have entered into a Roaming or Site-Sharing Agreement.

The Claimant shall have five days from the receipt of the Respondent's Term Sheet to deliver to the Respondent and the Tribunal a reply Term Sheet which shall contain only the acceptance, refusal, or modification of any additional terms introduced in the Respondent's Term Sheet.

If a Respondent fails to deliver its Term Sheet, the Respondent shall be deemed to have accepted the Claimant's Term Sheet. If the Claimant does not deliver a reply Term Sheet, then the Claimant shall be deemed to have accepted the additional terms introduced by the Respondent.

Each Party shall exchange with its Term Sheet a list of relevant documents in accordance with Rule 26 (Production of Documents) taking into account Rule 1, and shall file this list of documents with the Tribunal. The type, date, author, recipient and subject matter of each document must be specified, where applicable. Documents not so identified may be subject to exclusion from the proceedings at the discretion of the Tribunal.

25. Amendment of Term Sheets

No amendments may be made to the Term Sheets once they have been exchanged by the Parties and delivered to the Tribunal.

26. Production of Documents

- (a) Unless the Tribunal otherwise orders, at least 15 days prior to the hearing, or at such other time as the Tribunal may direct, each Party shall disclose all documents relating to the matters in issue in the arbitration that are or have been in the possession, control or power of the Party. Where the Tribunal considers that the disclosure of all such documents is unnecessary, unduly costly or burdensome or for other reasons is inconsistent with Rule 1, the Tribunal may give directions to limit the scope of disclosure of documents.
- (b) At a Party's request, the Tribunal shall order the disclosure of any Roaming or Site-sharing agreements that are in the possession, control or power of the other Party. The Tribunal may, on motion by a Party, order production for inspection of roaming or Site-sharing agreements or other documents that are in the possession, control or power of a person not a Party to the arbitration where the Tribunal is satisfied that the document is relevant and would assist with the determination of the issues in dispute, and where such order is made the Parties may inspect those documents and take copies of them.

27. **Arbitration Hearings**

The Tribunal shall set the dates for any interim hearings or meetings, whether oral or not, and shall, except in cases of urgency, give at least 4 days written notice thereof to the Parties.

28. **Confidentiality**

The Parties, the witnesses and the Arbitrators shall treat all meetings and communications, the proceedings, documents disclosed in the proceeding, discovery and the awards of the Tribunal as confidential, except in connection with a judicial challenge to, or enforcement of, an award, and unless otherwise required by law. Nothing in this Rule shall preclude disclosure of such information to a Party's insurer, auditor, lawyer or other person with a direct financial interest in the arbitration.

29. **Evidence**

The Parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence under oath as the Tribunal may deem necessary to an understanding and determination of the dispute. Strict conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of the Tribunal and all of the Parties, except where any of the Parties is voluntarily absent, in default or has waived the right to be present.

The Tribunal shall determine the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed by the Tribunal to be repetitive.

The Tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

30. **Witnesses**

The Tribunal may determine the manner in which witnesses are to be examined, and save for a Party or the person nominated as that Party's representative for the purpose of the arbitration, may require witnesses to absent themselves from an oral hearing during the testimony of other witnesses.

Where the evidence of a witness is presented by written statement or sworn declaration, the Tribunal may order that the witness be present at an oral hearing for cross examination.

31. **Tribunal's Experts**

If the Parties agree, the Tribunal may appoint one or more independent experts to report on specific issues to be determined by the Tribunal and may require a

Party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for its inspection.

The Tribunal shall communicate the expert's terms of reference to the Parties. Any dispute as to the terms of reference or the relevance of the required information, or production of it, shall be referred to the Tribunal for decision. The cost of any such expert shall be borne by the Parties on a basis determined by the Tribunal.

Upon receipt of the expert's report in writing, the Tribunal shall deliver a copy of it to the Parties who shall be given the opportunity to challenge all or any part of the report in a manner determined by the Tribunal.

The expert shall, on the request of a Party, make available to that Party for examination all documents, goods or other property in the expert's possession which the expert has used to prepare the report and shall provide that Party with a list of all documents, goods or other property not in the experts' possession, but which were provided in order to prepare the report, and a description of the location of those documents, goods or other property.

An expert shall, after delivery of the report, be required to attend for the purpose of cross examination on some or all of the contents of that report, unless the Parties agree that such cross-examination is not required.

32. Default of a Party

Where a Party, without sufficient cause, fails to appear at a hearing or to produce evidence, the Tribunal may continue the arbitration after satisfying itself that a reasonable attempt has been made to communicate with the defaulting Party. The Tribunal shall make an award based upon the evidence before it.

33. Offers of Settlement

At any time before the hearing on the merits, a Party may deliver to the other Party an offer to settle marked "without prejudice" to settle one or more of the terms in dispute. An offer to settle may specify a time within which it may be accepted and it will expire if not accepted within that time.

The Tribunal shall take into consideration the offer, the time at which the offer was made and the extent to which it was accepted when dealing with questions of costs and interest.

The Tribunal may be informed by a Party of the fact that an offer had been made under this rule at the time of making any submission on the question of costs, but not before.

The Parties may not deliver offers on a "with prejudice" basis.

34. Closure of Hearings

Where the Parties have, on inquiry, advised they have no further evidence to give or submissions to make, or the Tribunal considers further hearings to be unnecessary or inappropriate, the Tribunal may close the hearings.

On its own motion or on the application of a Party, the Tribunal may, in exceptional circumstances, re-open the hearings to receive evidence or submissions concerning a matter at any time before the issuance of a partial final award or final award concerning that matter.

35. Settlement

The Tribunal may encourage settlement of the dispute and, with the written agreement of the Parties, may order that mediation, conciliation or other procedures be used by the Parties at any time during the arbitration proceedings to encourage settlement.

If, during the arbitration proceedings, the Parties settle the dispute, the Tribunal shall, upon receiving confirmation of the settlement or determining that there is a settlement, terminate the proceedings and, if requested by the Parties, record the settlement in the form of an arbitration award on agreed terms.

36. Award

The Tribunal shall be limited to making its award by selecting either the Claimant's Terms Sheet together with its reply (if any), or the Respondent's Term Sheet. The Tribunal shall make its award in writing and shall deliver to the Parties sufficient originally signed copies of the award for each Party.

Where the Tribunal consists of more than two Arbitrators, the award shall be made by a majority of the Tribunal. Where there is no majority decision, the decision of the Chair of the Tribunal shall be the award.

37. Costs

The Tribunal shall be entitled to fix the costs and expenses of the arbitration, including reasonable legal fees, the costs and expenses of the arbitration and the Tribunal. If costs and expenses are awarded, such costs and expenses shall be made part of the award. The Tribunal shall be entitled to make separate awards for legal costs and the fees and expenses of the arbitration and shall be entitled to apportion costs and expenses between the Parties.

38. Amendments and Corrections to the Award

A Tribunal may, on the application of a Party or on its own initiative, amend or vary an award or interim award to correct:

- (a) a clerical or typographical error;

- (b) an accidental error, slip, omission or other similar mistake; or
- (c) an arithmetical error made in a computation.

An application by a Party to amend or vary shall be made within 15 days after that Party is notified of the award.

An amendment or variation shall not, without the consent of the Parties, be made more than 30 days after the Parties have been notified of the award.

A Party may, within 15 days after being notified of the award, apply to the Tribunal for clarification of the award, and the Tribunal may clarify the award where it considers it appropriate, in which case the clarification becomes part of the award.

A Party may, within 30 days after receiving the award, apply to the Tribunal to make an additional award with respect to claims presented in the proceedings but omitted from the award.

Unless otherwise agreed, the award of the Tribunal shall be final and binding and there shall be no appeal.

39. **Immunity**

The Tribunal shall not be liable to any Party for any act or omission in connection with any arbitration conduct under these Rules. The Tribunal shall have the same protections and immunity as a Judge of the Superior Court in the province or territory in which the arbitration takes place.

40. **Timetable for Arbitration**

Within 10 days of the appointment of the Tribunal, the Tribunal shall convene a pre-arbitration meeting of the Parties which may be held by conference telephone call, video conferencing or other electronic means to determine:

- i. a timetable for the conduct and completion of all pre-hearing and preliminary matters in a period not to exceed 60 days from the date of the commencement of the arbitration;
 - ii. the time and place of the hearing; and
 - iii. such other directions as may be necessary.
- (a) Unless agreed by the Parties or ordered by the Arbitrator, there shall be no oral discovery.
 - (b) No transcript of the proceedings shall be required.

- (c) Sworn statements of evidence shall be filed at the hearing in lieu of examination in chief and shall be subject to cross-examination and re-examination only.
- (d) The record of the arbitration shall consist of the documents and exhibits produced and filed by the Parties.
- (e) A date for the hearing of the arbitration shall not be more than 90 days from the date of the commencement of the arbitration, and
- (f) The Tribunal shall deliver the award and reasons for the award within 10 days from the completion of the hearing.

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