Friday, January 11, 2008

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

Re: Comments – Canada Gazette, Part 1, November 28, 2007, **Notice DGRB-010-07 — "Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements"**

Dear Director;

Niagara Networks Incorporated is pleased to provide comments on Canada Gazette Notice DGRB-010-07 dated November 28, 2007. We appreciate this opportunity to respond on these very important policy issues.

Please find attached the comments of Niagara Networks in regard to the above noted consultation document. Should you wish to discuss these comments, please contact the undersigned.

Sincerely,

Douglas S. Evashkow
President,
Niagara Networks Incorporated

devashkow@niagaranetworks.net
905 520 2857

Introduction

The goal of our included comments are meant to reduce if not eliminate the need for arbitration as well as encourage a spirit of industry wide cooperation. We believe it is in the best interests of licensees', the department and all Canadians to minimize the total number of tower sites while providing the best wireless coverage in the world.

With that in mind, we do not prejudice that any existing site owner/ occupant would want to unreasonably delay or preclude any proponent from utilizing an existing site if it were otherwise feasible. However, business negotiations could present onerous demands on negotiating parties resulting in unnecessary delay of service delivery or undesired proliferation of newly erected tower sites. More directly, the department has set target rollout requirements for national new entrants. Of concern is that a proponent may be significantly impacted by unnecessary cost or delay. That event may result in the department having to reconsider and change the policy deployment targets for some new entrants. While changing policy deployment targets is not difficult to accommodate, in our view it is unnecessary and the time lost cannot be recovered. Further, unnecessary proliferation of newly erected towers sites and a less competitive market than could otherwise have been achieved may be the end result.

We applaud and support the departments desire to enhance and encourage a truly competitive and cooperative wireless industry. We believe shorter time frames prior to arbitration, additional conditions of license, adoption of a default national arbitration code and more clarity in policy definitions outlining expectations of licensees is required. These measures will aid in streamlining the process as well as avoiding unnecessary cost and delays. We hereby respectfully submit our comments for consideration by the department.

Comments

1.0

> *"Are the timelines for responding to requests to share and roam and for submitting agreements that have not been finalized to an arbitrator appropriate? Are there other timelines that should be considered?"*

We submit that there is a need for Industry Canada to reduce the proposed timelines. Our main concern is that Industry Canada has proposed certain coverage requirements for a national new entrant to follow whereby mandated roaming agreements may be extended for an additional period of 5 years if the new entrant meets the established deployment targets. We believe, reducing the timelines to agree on sharing cell sites would help ensure a new entrant has every opportunity to comply with rollout targets as prescribed in the policy.

Furthermore, ‘other’ license conditions can be required of licensees to accommodate shorter timelines. Finally, more clarity and uniformity will help precipitate more certainty and thereby ensure a reduction in the overall time required by all parties to comply with site sharing and roaming. The net effect would be to streamline these processes from the onset.

Tower/ Cell Site Sharing

All site owners/ occupants should be aware of the engineering particulars and any other extraneous considerations of sites within their network. They should also know the potential to expand usage of any site. If not, this information is relevant to expansion of their network in light of new AWS policy and licensing conditions. As such, an immediate condition of license should be set whereby each site is required to be catalogued according to its existing state and include documentation discussing its potential for expansion. If there are any known problems pertaining to potential expansion of any site it should be documented specifically as to what those problems are. The department could make this requirement an immediate condition of license in that all licensees of cellular, PCS and future AWS frequency bands develop and maintain a catalogue of all sites with respect to existing state and potential for site expansion. Cataloging of all sites should be required to be developed prior to conclusion of the AWS auction process. (See 3.0 below for more detail)

With sites catalogued, the following timelines for events would be possible;

If within 15 days of a request by a proponent to utilize an existing site it is known the site may have little or no capacity to support expansion the incumbent should provide an explanation along with supporting documentation to the proponent. This would allow the proponent 15 days to evaluate and propose modifications to be undertaken at the proponent’s expense, which is to be considered in the overall leasing arrangement. If it is mutually agreed that site expansion is not feasible for whatever reason, the proponent would have sufficient supporting evidence to convince local LUA’s that there is a bona fide reason to warrant erecting a new site. This predictable sequence of events would streamline the deployment process for proponents by reducing unnecessary *finger pointing* and for the timely construction of a new site only if warranted.

Within 30 days after receiving the initial request the incumbent will have had ample time to review a proposal to modify a site by a proponent. If it is deemed that a site can be shared, both parties would only require an additional 30 days to negotiate an amicable arrangement prior to arbitration. Proponents may potentially be submitting hundreds if not thousands of requests especially during the initial months following an AWS licensing. These recommendations to the department would reduce the overall deployment process by one third at minimum from what is currently being proposed. In any event, a specified date for an arbitrator to make a final decision is required to limit the potential for

abuse, unnecessary delay and potential abandonment from the procedure altogether.

If there is no reason to oppose expansion of an existing site, the proponent should have 15 days to propose modifications to the site and the incumbent 15 days to approve. (See ‘Summary of Suitable Timelines for Site Sharing’ below for more detail)

In any case, financial arrangements for leasing and site modifications should be negotiated simultaneously. Site particulars such as engineering modifications etc. should be negotiated separately from leasing arrangements. We propose 60 days to arrive at an agreement prior to arbitration should be sufficient to accommodate all site sharing agreements with 90 days being the arbitrator’s deadline for a final decision. Acknowledging the ubiquity and reliability of email, date and timestamps, information and documentation exchange should not be a consideration for reasonable delay. Both parties should retain the right to mutually waive these timelines on any or all site agreements if they so wish. The following summary outlines our view of how the process could be streamlined;

Summary of Suitable Timelines for Site Sharing

1. Day 0: Proponent request for site(s) sharing, (identifying site(s) under consideration) delivered to site(s) incumbent
2. Day 15: Site(s) incumbent delivers proposed leasing arrangement to proponent irregardless of site(s) suitability
3. Day 15: Site(s) incumbent delivers relevant documentation to proponent including an assessment for site(s) expansion capabilities
4. Day 30: Proponent delivers proposed modifications to site(s) incumbent if it was suggested as not suitable for expansion and proponent disagrees
5. Day 30: Proponent delivers termination of request for site(s) to incumbent if mutually agreed site(s) not suitable for expansion
6. Day 30: Proponent responds to incumbents proposed leasing arrangement from Day 0 if request not terminated
7. Day 30: Proponent delivers proposed modifications for site(s) if mutually agree site is suitable for expansion
8. Day 45: Site(s) incumbent responds to modifications proposed by proponent with explanatory rationale if still insist site(s) not suited for expansion accompanied with an offer to move to dispute arbitration
9. Day 45: Site(s) incumbent responds to modifications proposed by proponent with offer to begin construction if mutually agree to share site
10. Day 45: Site(s) incumbent responds to proponents response for leasing arrangements with offer to settle or move to arbitration if proponents response to leasing arrangement deemed not suitable by incumbent
11. Day 60: Agreements finalized (technical and leasing) for site sharing if mutually agreed site(s) suitable for sharing and leasing arrangement acceptable to both parties

12. Day 60: Move to arbitration if leasing arrangement or site sharing technical or other disputes exist, both parties submit documentation to arbitrator
13. Day 90: Arbitrator issues decision for resolution of disputes

Roaming Agreements

Similarly, roaming agreements should not require 90 days to complete before moving to arbitration. The following summary outlines our view of the process;

Summary of Suitable Timelines for Roaming Agreements

1. Day 0: Proponent request for roaming (identifying area(s) under consideration) delivered to incumbent service provider
2. Day 15: Incumbent service provider delivers proposed roaming agreement for area(s) to proponent
3. Day 30: Proponent responds to incumbent service providers roaming agreement offer
4. Day 45: Incumbent service provider responds to proponents response with offer to settle or an offer to move dispute to arbitration
5. Day 60: Agreements finalized if parties are in agreement
6. Day 60: Parties submit documentation to arbitrator for decision
7. Day 90: Arbitrator issues decision on resolution of dispute(s)

2.0

> *"Specific provisions regarding arbitration may vary from province to province. Would it be useful to adopt a national code such as the ADR Institute of Canada's* National Arbitration Rules *in default of any specific arbitration agreement?"*

We are of the opinion that it would be in the best interests of all parties to adopt a national code of arbitration rules as a default option. This would ensure timely and more uniform resolution of all disputed issues. Notwithstanding all parties desire to avoid arbitration there exists the potential for a large number of disputes to arise given the nature of issues and diverse geography contemplated. A national arbitration code would yield a more uniform expectation as well as provide early precedence sufficient for any arbitrator to deal with issues irregardless of jurisdiction. This mechanism would also facilitate both regional and national new entrants and would precipitate a willingness to avoid arbitration given a reasonably well known result. Furthermore, it would be easier to identify that the arbitration route was being abused by a licensee. In the event of abuse allegations, the arbitrator should be allowed to issue serious penalties.

"Are there any special provisions which should be made applicable to the arbitrators concerning sharing and roaming?"

We appreciate and applaud the department's effort for providing industry the widest latitude in resolving disputes and agreements at commercial rates. We are however concerned that the policy is too open to interpretation and as such, this looseness could be used to dilute the overall effectiveness of the mandating effort. For instance, the term "commercial rate" is too vague of a description to arrive at a timely resolution as it basically says nothing about what is expected of the parties or how they would arrive at an agreement. The term is too vulnerable to abuse should parties be unable to resolve disputes. Further, in one recent industry analyst's report they discuss another obvious vulnerability in the policy on tower sharing that is detrimental to a new entrant's viability;

> *"Furthermore, any operator that heavily relies on tower sharing is likely to be stuck in arbitration for months discussing engineering specs, weight-loading and wind shear"*

This report highlights that even with mandated sharing the rules as outlined in the November 28th, 2007 policy framework are vague enough that they predict the rules will likely be abused by incumbents. The report is suggesting that incumbents still have the ability to delay deployment or force a potential new entrant to erect more new cell sites than might otherwise be necessary. While this is only one view, it highlights an obvious potential for abuse and could be utilized to punish an industry competitor. Furthermore, even with inevitable arbitration, costs could become artificially prohibitive. This may cause licensees to abandon arbitration altogether thereby proliferating new cell site construction contrary to the spirit of the policy. Similar abuses could cause mandated roaming arrangements to become unnecessarily delayed thereby negating the most essential elements of the policy necessary for new entrant's viability.

It should be the goal of the final policy to deter all parties from seeking arbitration as a vehicle to punish, exhibit selective prejudice or take unfair advantage of another licensee. Parties should also remain free to arrive at any arrangement they feel is mutually beneficial prior to arbitration. There is some obvious guidance that can be provided to the arbitrator that would deter a need for dispute resolution.

In order to proactively mitigate the potential for arbitration we suggest more clarity in terms of guidelines by which an arbitrator may draw in making a decision for resolution. While it would be regulatory in nature to suggest any particular pricing target it would not be unwise or regulatory to set a target pricing percentage for an arbitrator to consider while taking into account market rate fluctuations over time. The prospect of arbitration should be considered unlikely to produce unnecessary delays and/ or precipitate an unfavourable roaming rate or sharing arrangement. If so, the parties are more likely to come to terms between themselves without the need for arbitration.

Roaming

Recommended guidance for an arbitrator to consider should include;

Current terms offered to MVNO's are approximately 33.3% of the national average ARPM. We would suggest that it would not be unfair to any party to recommend an arbitrator tend toward targeting roaming rates with an "upper bound" of 33.3% of the licensees (offering the roaming arrangement) average national ARPM including any deals and specials they offer their customers at the time of arbitration or in the future. We believe the inclusion of this clarification in the policy document would provide the industry with some certainty while inherently eliminating a potential for prejudice and/ or unnecessarily delaying such arrangements from being acquired by any requesting licensee. Furthermore, such an inclusion of clarity would not preclude facilities based licensees from competing by offering preferred rates for roaming arrangements to other licensees.

Site Sharing

Recommended guidance for an arbitrator to consider should include;

A proponent wishing to expand a cell site should be required to do so at their own expense including any costs that are required to move, service or otherwise maintain an incumbent's equipment to facilitate the sharing of a site. If a proponent is willing to undertake such modifications at their own expense, the incumbent should not be able to refuse such an undertaking as a means of forcing arbitration.

Site leasing and maintenance should be assumed to be shared in proportion to use. More directly, proportionate cost should be defined to mean the degree to which a licensee is utilizing a site should be the amount the proponent is required to contribute toward the overall leasing costs relative to all monthly costs associated with the site once modifications are completed. Also, licensees that share should be required to notify one another of maintenance schedules etc. or work together to develop mutual maintenance schedules to reduce overall costs of site sharing.

In the event that a large number of individual sites are being sent to arbitration simultaneously or over time, the arbitrator should have the power to resolve multiple site disputes with guideline resolutions to be employed to all sites in the interim in order to speed up deployment and reduce overall arbitration costs. Minor site specific issues can then be resolved in a timely fashion as per the order of the proponent's deployment schedule.

Penalties should be within the arbitrator's toolkit for timely resolution of disputes. The toolkit should include the ability to impose a loss of right to object to a

proponents future requests in arbitration should documented abuse be evident. A continuously objecting party may also face having all future disputes settled under one umbrella in the proponents favor. Other penalties might include financial awards etc.

3.0

"*Are there any other license conditions required to facilitate sharing and roaming?*"

As discussed in 1.0 above, a license condition for site cataloging should be immediately implemented by the department. The requirement to develop the catalogue should commence immediately and be completed prior to the close of the AWS auction process. The catalogue documentation for each site should include (but not be limited to);

1. Pictures, engineering drawings etc.
2. Existing structure specifications such as maximum load, wind shear, current load etc.
3. Sensitive equipment housing availability/ capacity etc.
4. Backhaul capability & costs
5. Potential for site expansion
6. Site maintenance schedule
7. Site security considerations
8. Site costs including maintenance
9. Current leasing arrangements
10. Other site license documentation including municipal, provincial, federal conditions/ permits etc.
11. Other relevant considerations as become apparent over time