



Thursday, February 07, 2008

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

**Re: Reply Comments – Canada Gazette, Notice No. DGRB-010-07 —  
Consultation on Proposed Conditions of License to Mandate  
Roaming and Antenna Tower and Site Sharing and to Prohibit  
Exclusive Site Arrangements**

Dear Mr: Hill:

Niagara Networks Incorporated is pleased to provide this reply comments submission to comments submitted by other parties with respect to Canada Gazette Notice DGRB-010-07. We highlight that Niagara Networks has added two requests given the addition of the reply phase as well as the quantity and complexity of concerns put forth by all parties. Just as with the Bell Mobility request, we note the significance and potential impact on the business case that must be seriously assessed as a direct result of this consultation process. We therefore urge the department to give careful consideration to and grant our requests.

We appreciate this opportunity to provide comments on these very important policy issues. Should you have any questions, please contact the undersigned.

Sincerely,

Murray I. Kline  
Chief Executive Officer,  
Niagara Networks Incorporated  
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416 450 9060

## Requests

1. Given the unique nature of the policy framework and makeup of parties who will participate in the AWS auction, we urge the department to consider holding a “blind” auction. A blind auction would ensure that there is no possibility of collusion as well as ensuring that the spectrum bid upon is actually needed and used by the bidder. Furthermore, a blind auction will ensure that Canadians receive a fair return for the spectrum.

Incumbents have made it clear that they are dissatisfied with the AWS auction policy. In the past, incumbents have demonstrated a propensity to implement bidding strategies that are aimed at eliminating the potential for competition. A blind auction is not unusual and is being used by the FCC in their 700 MHz spectrum auction.

2. We urge the department to consider extending the date for application. This request is not unlike the Bell Mobility request to hold a reply comments phase. We note that the Bell Mobility request was granted. No proponent could have anticipated that such a request would have been raised or granted. The high quality and complexity of issues being raised in this consultation process will in no small way alter the business model for all industry participants and therefore demands careful attention and consideration by the department and all potential bidders.

Niagara believes that the extension period to file an application on March 10 is insufficient to adequately consider the impact of decisions made as a result of this very useful consultation process. All parties will need to digest the complexities that have arisen and make up for the time lost as a result of extending the time to final language of the policy by way of a reply phase. We note that other proponents have asked for a similar push back on the application phase. Certainly, we empathize with and acknowledge that the department must make determinations in the best interests of all parties concerned. We want the department to arrive at the most equitable policy rules in order to promote fair competition. We agree with Bell Mobility that the policy decisions made in response to this consultation by the department will significantly impact everyone’s business model. Certainly, the decisions arising from this consultation process will impact all participants bidding strategy and that must be carefully considered by the department.

We urge the department to consider pushing back the date to file an application from March 10 to a mid or late April date. We believe this would deliver the best possible outcome for the AWS auction, which is in the best interest of all Canadians. We note that such a decision would afford all parties including the department ample time to carefully consider the final language for AWS policy rules with respect to conditions of license, site sharing and roaming. Furthermore, such a request would not give rise to a need for altering the start

date of the auction of May 28<sup>th</sup>. We urge the department to give serious thought to this request given the significant nature and impact of the issues under consideration in this consultation.

## Introduction

Niagara Networks appreciates the opportunity to respond to comments submitted by interested parties in reference to Notice No. DGRB-010-07 — Consultation on Proposed Conditions of License to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements. Niagara Networks acknowledges the detail and complexity of issues submitted in those responses. We anticipate the result of this consultation will be a smooth and well run auction as well as the successful implementation of Industry Canada's policy initiatives, all of which we believe are in the public interest.

Niagara Networks has reviewed the comments and concerns of all parties. In general, we note that the majority of the comments are mostly unanimous in favor of the Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements, resulting in positive commentary and constructive feedback. The notable exceptions were the three national incumbents. The incumbents are clear in their desire to prevent the stated policy initiatives of Industry Canada. Incumbents use aggressive arguments and rely upon outdated, non Canadian data, and obscure definitions and examples in order to try and circumvent the implementation process.

Incumbents utilize two key strategies for circumventing policy. First they try to intimidate Industry Canada by questioning the authority of Industry Canada and in particular the Industry Minister to alter conditions of license. Incumbents forget that their spectrum holdings belong to the people of Canada and the Minister has the mandate of the people to change conditions of license as required. Next, they seek to confuse, confound and/ or introduce loopholes to create a quagmire of legal issues in order to delay proponents from building a viable 4<sup>th</sup> competitor.

Many associations and government agencies also commented on the proposed policy and we believe they provided useful guidance to Industry Canada. We will respond with our views on each groups comments in the following submission.

## Reply Comments to Respondents

### Incumbents

The three national incumbents are not in favor of the AWS auction policy as proposed by Industry Canada. The responses all have been carefully constructed so as to either intimidate the department and/ or frustrate the initiative of Industry Canada to foster successful new entrants and return vigorous competition into Canada's mobile wireless sector. Incumbents seek to protect their oligopoly. Acquiescing to incumbents demands will simply relegate Canada to the backwaters of the global wireless revolution. Entrenching and protecting the incumbents position will accomplish no less than prolonging and aggravating Canada's lowly position amongst third world countries with ridiculously low penetration rates, unconscionably high data pricing and a world beating "rational pricing" regime. Incumbents would like nothing more than to propagate Canada's experience of a failed new entrant while maintaining their stranglehold on scarce radio spectrum and dictating how the market will operate.

Niagara Networks comments in large part agree with MTS Allstream that<sup>1</sup>;

*"the proposed conditions of license 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."*

The additional provisions that MTS Allstream refers to are reasonable and fair to all parties. As will be detailed further in our reply, the conditions of license proposed by the three national incumbents are designed to create a subjugated competitor, hobbled by debilitating and impossible time frames, imposed business directives and with rules and rulings planned to suppress and frustrate new entrants from any chance of success. In essence, the incumbents propose conditions that allow them to continue to control, "who and how" any new entrant participates until incumbents can determine the best strategy for eliminating them from the market altogether.

A number of statements made by the incumbents were general and far reaching in nature. These statements however, do not necessarily answer any of the questions posed by Industry Canada in this consultation. The comments they do state come across as facts, but are, never-the-less, opinions of those interested in maintaining the status quo. Some of these comments demand a response.

Bell Mobility states<sup>2</sup>;

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<sup>1</sup> MTS Allstream Comments Page 3

<sup>2</sup> Bell Mobility Comments Page 1

*“Industry Canada has to recognize that wireless networks were developed using shareholder equity and that providing new entrant access to that infrastructure: (1) confers an enormous benefit on the entrant...”*

Telus likewise states that<sup>3</sup>;

*“...providing material competitive advantages to new entrants at the expense of incumbent carriers.”*

In both cases the incumbent carriers fail to disclose that;

1. Incumbents themselves have been beneficiaries of numerous regulatory advantages whereby they received virtually free spectrum in the past via licensing events in the Eighties and Nineties. In those spectrum awards incumbents did not have to pay for spectrum in advance and therefore were afforded a similar opportunity to build the very infrastructure they discuss. Without the advantages granted by the department in those awards and competitive prodding by way of new entrants, it is certain that infrastructure would not exist today. Furthermore, incumbents have demonstrated a “follower mentality” with respect to infrastructure builds. That fact in itself should signal to the department exactly what needs to be done. Most recently incumbents are more interested in not spending to expand or update their infrastructure aggressively as would be the case in a truly competitive market. An aggressive infrastructure build was in fact a direct result of the last admittance of new entrants in 1995.
2. Incumbents try to portray themselves as victims when in fact expanding cell site potential is to the benefit of themselves and their shareholders. Certainly, many additional benefits will accrue to the incumbents by way of tower and site sharing.
3. Incumbents will themselves be beneficiaries of infrastructure built by new entrants. Nowhere do the present licensees mention that the quid pro quo for a new entrant is the requirement for the sharing of any new towers that they themselves will have to build. Indeed, Bell Mobility states<sup>4</sup>;

*(that it) “holds no spectrum in Saskatchewan or Manitoba, has no market share in those provinces...”*

Despite insisting to the contrary, Bell mobility certainly stands to benefit from the proposed conditions of license.

4. Incumbents suggest that new entrants should pay for cataloging their sites and act as if they don’t know what infrastructure they have or it’s potential

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<sup>3</sup> Telus Comments Page 2

<sup>4</sup> Bell Mobility Comments Page 11

to be expanded. This is an arrogant suggestion as a direct result of their monopolistic roots. Every industry participant should know what they have in terms of infrastructure and its potential and should pay for their own catalogue of cell sites. The catalogue should be shared or alternatively, a “confidential national registry” should be developed. A confidential national registry would be a simple and convenient solution for all parties concerned including the arbitrator who would be the likely choice to maintain such a registry.

Rogers submits that<sup>5</sup>;

*“there is no exceptional basis that would justify the amendment of these licenses.”*

Bell Mobility states<sup>6</sup>;

*“No exceptional circumstances have been cited by the Minister, and in any event, no such circumstances exist.”*

This is nothing more than an attempt to intimidate Industry Canada. Obviously the proponents of the AWS policy have proven the case sufficiently to the Minister that there is a serious and detrimental lack of robust competition in the wireless market via their May - June 2007 consultation submissions.

Rogers would have us believe that<sup>7</sup>;

*“Companies would not be willing to bid hundreds of millions of dollars for the right to use spectrum, and then spend billions of dollars more to develop infrastructure, if the conditions of its use were subject to unilateral change during the term of the license.”*

To our knowledge, all spectrum remains the property of the people of Canada. Bidding on spectrum implies a term for right of use and does not imply rights of ownership. The Incumbents act as though they did not know the Minister has the right to change the conditions of license. This is unreasonable to believe while incumbents themselves have been clearing spectrum for their own use in PCS and other bands. We highlight that this suggestion by Rogers is contrary to the level of interest in the AWS auction by potential new entrants. Incumbents are fully aware of the history of spectrum licensing in Canada and the conditions of license which are being fully and openly proposed in the present process. We believe the key problem for the incumbents is that potentially, this is the first time they themselves have faced a change in their spectrum licenses. Many companies have publicly stated that they are willing to bid hundreds of millions of

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<sup>5</sup> Rogers Comments Page 1

<sup>6</sup> Bell Mobility Comments Page 10

<sup>7</sup> Rogers Comments Page 2

dollars for the right to use spectrum, and then spend billions of dollars more to develop infrastructure. As with the last introduction of competition in the market, incumbents fear that they will once again have to embark on an infrastructure build due to real competitive market pressure.

### Rogers

In their submission, Rogers was vociferous in their objection to Industry Canada modifying existing conditions of license. Rogers summarizes<sup>8</sup>;

*“Thus, a breach of the undertaking would constitute a breach of the Deed and would give rise to a claim for breach of contract against the Minister.”* And

*“Rogers reserves the right to utilize any and all remedies available to prevent an unlawful amendment of our license conditions.”*

Rogers makes it clear that all further comments are subject to the above statements.

Rogers goes into great detail, using spurious arguments as to why the proposed timelines for tower and site sharing should be a minimum of eight months and only if the volume of sharing requests do not exceed their current levels. We find it extremely interesting to note that neither SaskTel nor MTS Allstream, (both of whom will be subject to tower sharing requests in their own territories) have requested anything similar in their submissions. The only rational conclusion that can be drawn is that Rogers knows that this is one of the main tactics that would be in their power to restrict, frustrate and/ or delay competition. Delays in this process could significantly degrade the viability of a new entrant and impact their ability to meet deployment obligations.

In paragraph 16. Rogers states<sup>9</sup>;

*“there is no opportunity to “short cut” or “rubber stamp” the technical analysis or design that is required to determine the technical feasibility of a given proposal.”*

In fact, many of the respondents including Niagara Networks have made reasonable suggestions that would easily expedite and streamline the process. MTS Allstream states<sup>10</sup>;

*“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. As well, MTS Allstream proposes that Industry Canada specify that a formal request for tower /site sharing must include*

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<sup>8</sup> Rogers Comments Page 4

<sup>9</sup> Rogers Comments Page 6

<sup>10</sup> MTS Allstream Comments Page 19

*specific information regarding the Operator's technical and physical requirements.”*

Niagara Networks goes further to suggest that<sup>11</sup>;

*“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”*

These proposed solutions will greatly reduce timeframes necessary to implement tower/ site sharing agreements. Many existing tower/ site owners have legitimate concerns with large volumes of requests. Bell Mobility states<sup>12</sup> that the number of requests should be capped at no more than 12 new requests in a six month period. Rogers<sup>13</sup> is a little more accommodating suggesting they are only limited to 15 to 20 sharing requests per month, without requiring additional resources. As we note in our comments above, a national and confidential site catalogue registry would facilitate multiple requests and allow for faster processing within timeframes acceptable to all parties. Indeed, a condition of license that requires tower/ site owners to start cataloguing now, would afford several months head start for incumbents. Furthermore only spectrum licensee's should have access to the registry and then, only in territories for which they are licensed.

Rogers relies on circular arguments to make their case. In Paragraph 18. Rogers suggest that<sup>14</sup>;

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<sup>11</sup> Niagara Networks Comments Page 7

<sup>12</sup> Bell Mobility Comments Page 18

<sup>13</sup> Rogers Comments Page 10

<sup>14</sup> Rogers Comments Page 6

*“the technical feasibility of the request cannot be finally determined since the specific design of the requesting party’s antenna system and the site modifications required to accommodate the design have not have been started”.*

Rogers is asking for the final design before they have provided any technical details on the existing structure. Assuredly, the requesting party cannot provide a specific design for a new antenna system before receiving the structure specifications and drawings from the incumbent.

Paragraphs 19., 20. and 22.<sup>15</sup> of Rogers’ comments can only be designed to obscure the process. A needlessly complex and unclear procedure cannot be used to thwart the system and impose crippling delays. We acknowledge that there may be third party approvals that are necessary, but that is not a reason to withhold a contract that could be delivered conditional upon the third party’s approval. It is critical that Industry Canada not allow separate agreements between incumbents and third parties to be used solely for the purpose of denying a request. This is tantamount to circumventing policy that prohibits exclusive arrangements

Paragraph 25.<sup>16</sup> is unreasonable. Rogers argues that activities which must be completed before the signing of a contract be mixed with those that would be completed after signing a contract. Timeframes after a contract is signed are a separate and critical issue that must be included in the jurisdiction of the arbitrator. Rogers’ suggestion would provide equal opportunity to delay the actual physical implementation as there was to delay the contract process. This is not acceptable.

Rogers adds in paragraph 22.<sup>17</sup>

*(that) “All issues of technical feasibility should not be arbitrated but rather should be referred to Industry Canada, which has a great deal of expertise in these matters.”*

Niagara Networks maintain that while Industry Canada could offer it’s expertise to arbitrators, it should only be as a technical advisor and consultant. Arbitrators must have full control over the process to avoid unnecessary delays.

Niagara networks fully agrees with Rogers’ assessment that<sup>18</sup>;

*“it is essential that a fair, streamlined arbitration process be adopted.”*

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<sup>15</sup> Rogers Comments Pages 6 - 8

<sup>16</sup> Rogers Comments Page 10

<sup>17</sup> Rogers Comments Page 7

<sup>18</sup> Rogers Comments Page 13

Niagara Networks believes that the CRTC could be appointed the arbitrator, under the conditions that will be addressed later in this document. Rogers' recommendation of ADR Chambers Inc. is also a reasonable choice. ADR Chambers Inc. is a prestigious and competent alternative to the CRTC and as such, should be given due consideration. We however disagree with some of the guidelines recommended by Rogers, specifically:

1. Having more than one arbitrator for most site specific requests will introduce unnecessary complication and potential delay into what should be no more complex than necessary. It may be possible to consider that the three arbitrator model be used for a dispute on an umbrella request of more than 200 sites.
2. Rogers recommends that arbitrators be only senior lawyers and retired judges. It may be more reasonable to use arbitrators that are experienced but distanced from the industry. In panels of three arbitrators, in the case of a dispute on an umbrella request, it is reasonable that the third arbitrator be a retired judge.
3. Niagara Networks supports the Industry Canada proposal that there be no right of appeal on arbitrated decisions. The damage resulting from this type of delay outweighs the potential damages from a poorly arbitrated decision based on a point of law. A reasonably simple alternative to an appeal process is to allow the offended party to submit their complaint to the arbitrator at any time after the fact. In most cases, precedent would alleviate a need for appeal. The arbitrator could be mandated to update decisions from time to time, industry wide, if significant damage has been proven. The update should propose an appropriate remedy.
4. It is critical that discovery rights be fully in control of the arbitrator. The rules of arbitration should adhere to a guiding philosophy of minimal delay, maximum efficiency and limited disclosure of confidential information.

The three national incumbents put forth many arguments supporting a position that Industry Canada is proposing a roaming policy that is contrary to accepted definition, tradition and experience. Incumbents cite precedent, rulings by regulators in other countries and new technical obligations that would arise from a modified definition of roaming. We believe this is little more than an attempt by incumbents to deprecate Industry Canada's policy initiatives. On some of the technical points of their arguments, we do not necessarily disagree. While we appreciate that the incumbents may be experiencing a difficult time accepting change and modification of their business model, we as Canadians must trust Industry Canada to develop policy that is unique to Canada and specific to the Canadian experience. Other countries have a different landscape with different motivation and needs. Canada is lagging in many areas of this industry due to a distinct lack of real competition. That competition must be empowered not further diluted.

To facilitate the concept of mandated roaming, we propose a new term to describe the exact circumstances that the Minister wishes to create, unhindered by a traditional definition. The term “roving” could be defined in a manner that perfectly suits the fundamental objective of new entrants into Canada’s wireless industry stimulating robust competition where it did not otherwise exist. Roving could be defined and used to describe a Canadian reality without offending the sensibilities of those so insistent on maintaining the definition of roaming.

*“Roving” is a contractual arrangement between two licensees, each operating and/ or developing digital mobile radio access infrastructure that provides real time, two-way voice and data services that are interconnected with the public network and utilize an in-network transfer facility that enables the licensees to reuse frequencies and facilitate subscriber calls within their respective networks. The customer of one licensee utilizes the digital radio access facilities of the other licensee with which the customer has no direct pre-existing service or financial relationship, to seamlessly place and receive calls and/ or transmit data, at optimal clarity and rates, inside or outside of their home territory. Roving involves seamless handoff between various operators. The services offered must include digital voice and data services such as internet access, e-mail and other data services presently offered, in development or to be developed by the licensees. Roving extends to 2G, 3G, and 4G services and beyond.*

It is important to note that all three national incumbents suggest either new definitions for roaming or modifications to new conditions of license that will define how roaming will be utilized in Canada. The new term “Roving”, will clarify the issue, while not confusing traditional industry terminology which is already in use internationally.

Apart from determining how mandatory roaming should work, Rogers has provided definitions that seek to dictate and constrain the business model for new entrants. Further, Rogers describes rules of competition beyond the scope of questions outlined in this consultation. Specifically, the amendments proposed by Rogers as to the definition of a national new entrant are outlined in Paragraph 39.<sup>19</sup> They are onerous and unnecessary. We do not agree that any particular business model can or should be imposed upon a new entrant to limit their ability to compete.

Niagara Networks is supportive of Rogers’ desire to ensure that the new policy rules are applied fairly. Paragraphs 45. and 46.<sup>20</sup> of the Rogers submission deal with new entrants selling outside of their licensed territory. We believe that Rogers is justified in seeking clarification on this issue;

*“Specifically, a new entrant must not be permitted to market and sell to subscribers outside of their licensed territory using local telephone numbers and*

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<sup>19</sup>Rogers Comments Page 18 - 19

<sup>20</sup> Rogers Comments Page 21 - 22

*relying on the their out-of-territory roaming rights to provide service. In addition, a new entrant must not be permitted to directly market and sell services outside its licensed territory. This includes establishing a retail distribution network in regions where a new entrant holds no spectrum and would rely exclusively upon their roaming rights instead of delivering the service itself.”*

We agree that network quality is a means by which competitors can differentiate their services. “In territory” roaming necessarily implies that an incumbent’s network will be used as network in-fill. The incentive for a new entrant to develop a proficient network “in territory”, is to increase the profitability of their own service. Subscribers at this stage of wireless industry development are rapidly growing intolerant of sub par quality and/ or disruption to their service.

Not all of the incumbents worries are justified. New entrants are not going to depend on incumbents networks as a permanent solution. Mandated roaming is only for a specified period of time. Relying solely on roaming does not present a stable business model. We submit that it is not financially viable for any carrier to rely on roaming as a basic business strategy. Just as roaming is a revenue stream for the incumbents, it is a significant expense for the new licensee. The industry has clearly established that the most profitable business model is based on “on net” subscribers for both origination and termination of calls.

Rogers clearly details the history and definitions of roaming and makes the case that in no instance should roaming include consideration of handoff. We have already discussed history and precedent above, and will confine our comments to hand off only. Specifically, Rogers is concerned that hand off<sup>21</sup>;

*“obligations could unfairly require the licensee to make capital expenditures.”*

and<sup>22</sup>;

*“FCC’s roaming policy has explicitly excluded any requirement for hand-off between networks and interconnection between networks, in part, due to the complexity of these issues.”*

We emphasize that the FCC is also, now advocating that operators open up their networks to third party device and applications services providers. We suggest capital expenditures by the incumbents are indicative of a truly competitive market. It is not unlikely that the incumbents themselves may be the beneficiary of such investments made by proponents moving forward. Moreover, Rogers fails to disclose that despite the complexity of hand off, they are intimately familiar with the process. Rogers dealt with hand off issues with their purchase of Fido as did Telus with their purchase of Clearnet. In Rogers case, the task was so complex that they could not offer a roaming arrangement to Microcell until they

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<sup>21</sup> Rogers Comments Page 24

<sup>22</sup> Rogers Comments Page 25

were insolvent. Miraculously, after Fido was acquired, all things became possible. Given this history, we suggest that hand off will not be the great burden implied. Hand off should be mandated as a condition of license. Incumbents must offer handoff upon request and the handoff must be flexible enough to consider the network build out of another licensee.

Niagara Networks takes issue with the narrow views in many of Rogers' arguments. We provide an example of where the proposed conditions of license may actually spur innovation despite Rogers' concern in paragraph 72.<sup>23</sup>;

(whether roaming) *"should also apply to upgraded enhanced digital networks, such as 2.5G or 3G systems"* and

(would this) *"undercut incentives to differentiate products and ... chill innovation".?*

What is disregarded here is the potential for operators to cooperate in the development of high cost 3G and 4G services. Once operators are cooperating on tower/ site sharing and roaming, it is a logical step to cooperate on the deployment of new infrastructure that can also be shared. In our opinion, the AWS policy may be very effective at encouraging and speeding up innovation while accelerating development of enhanced services across the country.

Rogers<sup>24</sup> makes the case that a high volume of roaming traffic could be a burden on their network, ultimately degrading service for both their own customers and customers of the new entrant. It is reasonable to assume that a new entrant is going to focus its network building efforts in those areas where subscriber growth is at a maximum. The impetus for new entrants may not necessarily be to assist the incumbent. Rather it is more likely a new entrant would want to take advantage of mutual benefits in construction for the very purpose of building revenue & profits while reducing dependence on the incumbents capacity as well as ensuring survival. That is natural in a truly competitive market. We add that Rogers as well as the other incumbents are no strangers to cooperative and collaborative partnerships. This is a strategy they have all pursued at one time or another successfully, and to the benefit of cooperating parties.

In Paragraph 95.<sup>25</sup> Rogers has asked that;

*"When requested, a licensee who is receiving mandated automatic digital roaming must provide quarterly and annual forecasts of expected traffic on a per market basis to its roaming provider. The licensee will be responsible to compensate the roaming provider for any losses it suffers due to a shortfall in the forecasted traffic or due to a substantial overage."*

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<sup>23</sup> Rogers Comments Page 33

<sup>24</sup> Rogers Comments Page 39

<sup>25</sup>Rogers Comments Page 41

Niagara Networks respectfully submits that these losses could never be calculated in any practical sense without new entrants opening themselves up to devastating contractual penalties. What if anything would a new entrant with no historical data base, base this calculation on? Is Rogers implying that they will disclose all commercial, engineering and historical data as well as technical information on their network capacity, excess capacity and actual costs and requirements based on their internal needs? We suggest it is more likely that in territories where high growth is taking place, the new entrant will expedite the construction of additional network capacity.

## Telus

Many of the comments of the three national incumbents were similar and certainly their tone was the same. We will therefore only reply to those parts of the Telus submission that materially differ or offer new ideas.

As a matter of principal, we point out an internal inconsistency in the Telus submission. Telus states that<sup>26</sup>;

*“one of the consequences of the set aside is that incumbents must overpay for spectrum to ensure they have the ability to roll out AWS.”*

Telus also states that<sup>27</sup>;

*“The Department has set aside spectrum to build more advanced networks, at a likely cost in subsidy from the Treasury of hundreds of millions of dollars...”*

We query – does the treasury gain from the incumbents or loose from subsidizing the new entrants? We do not believe that either is the case. Furthermore, Telus implies that spectrum being set aside is somehow unjustly being taken away from their first right of refusal. That’s not indicative of an attitude for a business in a truly competitive market. Also, in early 2007, Telus admitted at a telecom conference that they were content with current spectrum reserves. How could they possibly be somehow forced to overpay for spectrum they don’t need? An auction is a public process. You pay only what you believe the spectrum is worth.

Telus states that<sup>28</sup>;

*“conditions which discourage carriers from building can create incentives for players to participate in the auction simply to hoard and speculate on subsidized spectrum knowing that they can under build without consequence.”, and;*

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<sup>26</sup> Telus Comments Page 3

<sup>27</sup> Telus Comments Page 3

<sup>28</sup> Telus Comments Page 4

(that) *“the Department must require carriers benefiting from the set-aside and other concessions in the AWS policy framework to meet certain build-out obligations before receiving these benefits.”*

First, Telus is aware that having to meet build out obligations before the new rules apply would effectively negate the policy initiative of the Minister. Second, the build out obligations already specified in the policy are being applied as a check on the new entrants by way of minimum 5 year roll out targets. Industry Canada has done an excellent job of balancing the conditions of license necessary to nurture successful new entrants and inserting targets to be met in order to maintain their licenses while being fair to incumbents. Finally, Telus continues to erroneously imply that AWS set aside spectrum is somehow “subsidized”. Telus’ monopolistic roots continue to blind them to the fact that new competition is coming. Telus will have to eventually come out of denial and face the fact that competition exists and they are not the rightful heirs to Canadian mobile spectrum.

Niagara Networks appreciates the difficulty the national incumbents must be facing in accepting the proposed conditions of mobile licenses. Niagara is a proponent of a well thought out and carefully drafted AWS policy that is cautious of unintended consequences. In this regard we agree with Telus (and the other national incumbents) that the department should take every precaution in ensuring that “simple resale” and related commercial practices are not to be permitted. We fully support Telus in the following statement<sup>29</sup>;

*“Accordingly, in its decision on the issues in this consultation, TELUS respectfully submits it is of critical importance that the Department expressly state that roaming for either voice or data is not intended to be defined or used directly or indirectly for resale, MVNO, wholesale or other similar commercial activities.”*

Telus introduces a new concept<sup>30</sup> in their submission; reservation of tower space. This can only be designed to prevent rapid and successful tower/ site sharing with a new entrant which is contrary to the spirit of the policy as proposed. It is reasonable that if the incumbent is in the process of modifying the tower/ site, then that can be taken into account. If modifications are not actively in process, then the owner will have to convince an arbitrator that there is merit to their argument. Eastlink contemplates tower space reservation in their submission and insist that tower owners<sup>31</sup>;

*“must act reasonably when doing so and they must be realistic in terms of their estimates of their future needs’.*

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<sup>29</sup> Telus Comments Page 12

<sup>30</sup> Telus Comments Page 14

<sup>31</sup> Telus Comments Page 14

Telus<sup>32</sup> requests that the Department clarify that tower/ site access does not extend to sharing secure compounds, equipment shelters or closets. Bell Mobility is more reasonable in their position<sup>33</sup>

*“Bell Mobility further notes that while the AWS Policy Decision mandates wireless tower and site access it unequivocally does not require incumbents to make access available to their antennae systems nor to in-building wireless distribution systems.”*

We believe that the proposed conditions of the AWS policy must be clear on this matter. For tower/ site sharing to have any value, all infrastructure including access conduit etc. must be shared.

### Bell Mobility

Bell Mobility’s summary of their position, in paragraph 21. of their submission, sets the tone for their further comments<sup>34</sup>;

*“For all of these reasons the proposed amendments to the PCS and cellular conditions of license are improper and must be withdrawn.”*

They leave the reader with the distinct impression that their modus operandi is to discourage, convolute or corrupt to the greatest extent possible, any implementation of the policy rather than provide constructive comment in order to facilitate a more cooperative and highly competitive wireless industry.

Bell Mobility makes reference to monopoly wireline infrastructure and non-monopoly wireless, multiple times in their submission. They would like the reader to believe that Canada’s wireless market is already “competitive”. It is clear from this consultation process that there is a large gap between a truly competitive market and a market that has been controlled by three powerful incumbents for roughly three decades. Wireless competition in Canada is more akin to an oligopoly.

Once and for all we provide incumbents with a definition: An oligopoly is a market form in which a market or industry is dominated by a small number of sellers (oligopolists). Because there are few participants in this type of market, each oligopolist is aware of the actions of the others. The decisions of one firm influence, and are influenced by the decisions of other firms. Strategic planning by oligopolists always involves taking into account the likely responses of the other market participants.

Bell Mobility sites a 1998 CRTC telecom order in paragraph 9. that states<sup>35</sup>;

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<sup>32</sup> Telus Comments Page 15

<sup>33</sup> Bell Mobility Comments Page 15

<sup>34</sup> Bell Mobility Page 10

*“no essential facilities exist in the wireless market”, and*

*“that it cannot be said that facilities are monopoly controlled or cannot be economically or technically duplicated.”*

As we mentioned in our previous reply comments, incumbents like to point to outdated telecom orders taken out of context from when they were drafted. It is noteworthy that ten years later, the Canadian public is vocal in its opposition to the proliferation of towers in our cities and towns. The situation has changed significantly since 1998. Towers have now become an essential facility. As wireless technology becomes ubiquitous, Canadians are demanding a limit to the number of tower sites popping up all over the landscape.

We take exception to Bell Mobility’s insinuation<sup>36</sup>;

*(that) “wireless entities were built using shareholder equity and were not cross-subsidized by revenues derived from regulated operations”.*

Bell disregards the fact that the incumbents are utilizing public resources which are being leased to them in the public interest. Bell appears confused over what it means to be a spectrum licensee. Bell believes they are unique, and indispensable to the industry and therefore, should not be subject to the same rules, rights, oversight or conditional licenses as are other licensees of Canadian spectrum.

It is evident from Bell’s submission that Bell Mobility chooses not to consider the intent of the policy.<sup>37</sup>

*“Bell Mobility submits that rather than warehousing spectrum that could be put to productive use by incumbent carriers, if the minimum bid for new entrant licenses is not met in the first phase of the auction, incumbent carriers should be permitted to bid on that spectrum immediately.”*

It is clear that if Industry Canada’s goals of diversifying spectrum ownership are not met, then it is the responsibility of the department not to encourage the status quo by allowing the incumbents to also bid on the set aside spectrum. Rather, Industry Canada should re-evaluate and implement alternative methods to achieve the stated policy goals.

A comment on the vernacular used is in order as Bell Mobility uses terms such as “material advantages” and “substantial public subsidy”. This terminology as

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<sup>35</sup> Bell Mobility Page 6

<sup>36</sup> Bell Mobility Comments Page 6

<sup>37</sup> Bell Mobility Comments Page 12

used in Paragraph 31<sup>38</sup>. is tantamount to inciting panic in the marketplace. Given the restrictions that an oligopolistic structure places on the market, new entrants will be given access to a rather uncompetitive market, which is significantly different from material advantages and substantial public subsidies.

Some of Bell Mobility's recommendations on the arbitration policy would only inject confusion and delay into a process that must be efficient and most critically, occur in a streamlined manner on a very short timeline<sup>39</sup>;

*"Parties are free to determine procedure and all details of arbitration."*

This is a recipe for disaster. All of the underlying details for arbitration must be explicitly described in the policy and known by both parties well in advance of a request.

*"Parties will have a full right of appeal on questions of law, mixed fact and law and fact to a panel of three retired appellate justices."<sup>40</sup>*

This can only result in unwarranted delay. The rules of arbitration need to be set so that all parties have confidence in the final rulings and precedence can be established early. Parties should seek to avoid arbitration, not force it as an alternative means of voicing their displeasure with the rules.

*"No documents, information, evidence, correspondence, proceedings, or awards from one arbitration shall be referenced, referred to, used, or disclosed at a separate arbitration."<sup>41</sup>*

Bell wants to use law but does not want to acknowledge precedence. We find that contradictory. The timing and efficiency of arbitration are important to the success of the policy initiatives. We recommend a single national body for arbitration wherein rulings and experience can be used internally as precedent to guide the quick and efficient processing of future requests. We agree that outside of the arbitration body and the participants, all information should be confidential.

*"The arbitrator shall have regard to whether there is available to the applicant an alternative, effective, adequate and competitive means of attaining access to a tower or roaming."<sup>42</sup>*

The service provider is in the best position to determine where cell sites should be located. This is outside the bounds of what an arbitrator should be dealing with because it is open to interpretation and opinion for which the arbitrator may

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<sup>38</sup> Bell Mobility Comments Page 13

<sup>39</sup> Bell Mobility Comments Page 24

<sup>40</sup> Bell Mobility Comments Page 25

<sup>41</sup> Bell Mobility Comments Page 25

<sup>42</sup> Bell Mobility Comments Page 25

not or does not necessarily need to be an expert. An arbitrator needs to be more of a judicial expert in determinations that are based on fairness within a prescribed set of rules, or guidelines in the absence of prescribed rules. That implies the importance of clearly specified rules and guidelines as part of the final language of the policy.

### Proponents

We applaud the proponents for providing useful guidance to Industry Canada in refining the final AWS policy. Proponent's submissions were on the whole, measured, reasoned and responsible, even though Niagara Networks did not necessarily agree with all comments.

### MTS Allstream (MTS)

Niagara Networks congratulates MTS Allstream on the thoroughness and quality of their submission. MTS presents detailed, well thought out and lucid proposals. We believe that the strength of MTS Allstream's arguments, combined with those of the other proponents including Niagara Networks, will assist Industry Canada in navigating through the myriad of details and the newfound complexity of this consultation initiative.

MTS is rightfully concerned with the quality of services offered to all roaming customers.<sup>43</sup> We urge the department to consider including this concern in setting guidelines for the arbitrator to consider;

*"The amended conditions of license 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."*

MTS perceives the potential difficulties that a new entrant may encounter if circumstances dictate that roaming was not commercially or technically feasible. MTS suggests that<sup>44</sup>;

*"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."*

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<sup>43</sup> MTS Allstream Comments Page 8

<sup>44</sup> MTS Allstream Comments Page 9

Both of the above points indicate the need for Industry Canada to contemplate many eventualities and include those considerations in the language of the policy. These remedies may alleviate certain events that could occur due to various interpretations of the policy.

MTS wisely proposes a detailed framework for arbitration. Although Niagara Networks agrees that a detailed framework is necessary, we believe some of MTS' suggestions could be improved upon based on alternative ideas and the submissions of other proponents.

MTS proposes a "final offer" arbitration model<sup>45</sup>;

*"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."*

Niagara Networks is not in favor of any arbitration model that takes away the flexibility of the arbitrator. We propose that the arbitrator have the final say in imposing a contract and be able to bridge the gap between the licensee and the requesting party.

Another recommendation made by MTS is that<sup>46</sup>;

*"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."*

We suggest that this process may be too cumbersome. It may be simpler if an arbitrator such as the CRTC was already assigned for a particular jurisdiction by the national arbitration council. The arbitrator should be required to meet all the requirements for impartiality that MTS sets out in paragraph 36. (d)<sup>47</sup>;

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<sup>45</sup> MTS Allstream Comments Page 15

<sup>46</sup> MTS Allstream Comments Page 16

<sup>47</sup> MTS Allstream Comments Page 16

## EastLink

Eastlink recommends additions to the conditions of licence:

On roaming, Eastlink proposes<sup>48</sup>;

*“d) The conditions of licence should define the expected incumbent collaboration with respect to management of the evolution of the border between new entrants’ home networks and adjacent incumbent networks.”*

We have discussed the importance of handoff with respect to new entrants viability and agree that the recommendation should be added to the language of the policy.

On Tower and Site Sharing<sup>49</sup>;

*“EastLink agrees that the 30 day and 90 day timeframes proposed by Industry Canada are appropriate for the first set of negotiations” and “the result of these initial negotiations is, generally, a master agreement that can apply to all subsequent requests for tower and site access, a much shorter timeframe would be appropriate for requests that are made after a master agreement is in place.”*

We agree that a master agreement would be a useful tool for shortening the time frames for all subsequent requests.

Another useful suggestion put forward by EastLink is<sup>50</sup>;

*“(b) To prevent tower owner/operators from being able to reject sharing requests for technical reasons that could be resolved through cooperation between the parties, EastLink proposes amendments to the conditions of licence that would permit the party requesting access to determine whether it is willing to undertake the work necessary to make sharing feasible and, if that is the case, that would require the tower owner/operator to cooperate with all such efforts. Additionally, EastLink proposes that a mechanism be developed to expeditiously resolve any disputes relating to whether sharing is technically feasible.”*

This process will make it much more difficult for incumbents to unreasonably refuse access to a site. Eastlink is correct in their assumption that there are many parties and situations which could frustrate the successful implementation of the policy. We believe that every contingency that can be envisioned in advance should be dealt with. An excellent example is<sup>51</sup>;

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<sup>48</sup> Eastlink Comments Page 2

<sup>49</sup> Eastlink Comments Page 2

<sup>50</sup> Eastlink Comments Page 2

<sup>51</sup> Eastlink Comments Page 3

*“EastLink requests that the Department consider communicating to municipalities that the Department, in CPC-2-0-03, has implemented a new procedure aimed at discouraging the proliferation of towers by requiring the sharing of tower space by multiple carriers and that any restrictions placed on the height of tower structures by municipalities may undermine the success of the Department’s initiative, as well as compromising the success of new entry into the wireless market.”*

As stated above, Niagara Networks supports a national code for arbitration as does EastLink<sup>52</sup>;

*“a national code is EastLink’s preferred alternative as it would allow for greater certainty and consistency. Additionally, EastLink proposes that the Department set out explicit timeframes for each step in the arbitration process, to ensure that the process moves along at an expeditious pace.”*

Eastlink is perceptive in understanding that some policy rules are too vague. That vagueness in terms of imprecise guidance on technical feasibility may result in tower sharing requests being rejected due to minor technical problems that could otherwise easily be resolved. We are supportive of the procedure laid out in paragraphs 19 and 20<sup>53</sup> of the Eastlink submission.

Eastlink provides detail on tower/ site reservation by an owner<sup>54</sup>;

*“Firstly, EastLink proposes that, if a tower owner/operator wants to reserve a portion of the available space on a tower for its future use, the party requesting access (the “requester”) would be permitted to immediately use the space on the condition that if, within a set period of time, the tower owner/operator develops a legitimate need for the space, the requester would either: (a) vacate the space and extend or reinforce the structure so that its equipment could be moved to a new location; or (b) assume the costs of adding the appropriate amount of space to the tower to accommodate the tower owner/operator’s needs, subject to the condition that the amount of space the requester would be required to add in the future to accommodate the tower owner/operator’s needs would be limited to the amount of space to which the requester was granted access. In all such cases, it would be the choice of the requester as to whether it will vacate the space it is currently occupying, or, extend or reinforce the tower so as to accommodate the tower owner/operator’s needs.”*

We agree with the above, however we emphasize that there must be time limitations on its implementation.

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<sup>52</sup> Eastlink Comments Page 3

<sup>53</sup> Eastlink Comments Page 8

<sup>54</sup> Eastlink Comments Page 10

## Quebecor Media Inc. (QMI)

QMI's submission supports many of the recommendations of the other proponents. The submission is noteworthy for its clarity on three issues in particular. The first issue is a discussion on seamless digital roaming and the second issue is their discussion of technical feasibility. The third issue is a start date for roaming.

*"QMI highlights the fact that seamless digital roaming and the sharing of towers and antenna sites are unexceptional activities that are readily undertaken by operators who have an economic incentive to do so."<sup>55</sup>;*

Astutely, QMI analyses readily available information made public by Bell and Telus and concludes that the extensive network sharing and resale agreement between Bell Canada and Telus, signed in 2001, provides one example of both sharing of towers and seamless digital roaming across frequency bands and for current and future technologies and which have since been implemented by Bell and Telus on a wide scale. Most importantly QMI concludes that<sup>56</sup>;

*"Industry Canada should not be led to believe that their implementation is anything other than routine."*

Niagara Networks appreciates the significance of this conclusion and highlights it for the department to consider.

On technical feasibility, QMI makes recommendations based on their own experience.

*"QMI considers that the potential for valid technical difficulties related to sharing of tower and antenna sites is minimal. We respectfully submit that, based on our own experience, **it is nearly always possible to share a tower**, except where concerns related to national security are at play" and*

*"It is usually possible to reinforce or to increase the height of a structure to accommodate the current and immediate future needs of the owner/existing user of a tower and the needs of the Operator who initiated the request to share the tower. Furthermore, interference mitigation techniques have evolved significantly to the point where it is now possible for different systems (such as TDD and FDD) to co-exist with only a few meters of separation between them."<sup>57</sup>*  
(emphasis added)

Niagara Networks requests that these concepts are accounted for in the language of the final policy, despite arguments to the contrary by the incumbents.

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<sup>55</sup> Quebecor Media Inc Page 4

<sup>56</sup> Quebecor Media Inc Page 5

<sup>57</sup> Quebecor Media Inc Page 6

QMI makes another valid point regarding when the date that digital roaming would commence.

*“QMI recommends that the Rules explicitly state that the arbitrator may decide that roaming services be offered from the date that the matter is referred to arbitration, even though agreement on commercial terms has yet to be reached. Retroactive payments would be made upon the final decision from the arbitrator. This Rule would be consistent with the new policy, which requires Licensees to offer roaming to other Operators (subject only to agreement on commercial terms), and would increase the incentives for the parties to reach agreement on commercial rates prior to the expiry of the negotiating period.”<sup>58</sup>*

### Look Communications

Look raises a number of valid and key points in their submission. We include some discussion here either because we wish to emphasize the point or believe it is necessary to highlight potential flaws.

*“Look endorses the proposal, outlined in the consultation, of a 30 day deadline to respond to a request, but recommends a 60 day limit (from the initial date of request) to negotiate an agreement, after which the matter may be submitted to binding arbitration, which is to be completed within a period of 90 days from the date of request.”<sup>59</sup>*

Shortened time frames are a common theme through out all proponents' comments which Niagara Networks echoes.

Looks suggest that<sup>60</sup>;

*“Submissions relating to disputes should be made public”*

Making submissions public may be advantageous for new entrants but we do not agree that public access to these documents is an acceptable way to handle confidential corporate information. Most of this information could present a national security issue and should not be made available widely except to parties who have a bona fide reason for access.

We agree,<sup>61</sup>;

*“The modifications to cellular, PCS and AWS licenses to permit mandatory roaming should apply to the operators of all current and future mobile bands”*

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<sup>58</sup> Quebecor Media Inc Page 18

<sup>59</sup> Look Comments Page 4

<sup>60</sup> Look Comments Page 8

<sup>61</sup> Look Comments Page 8

We do not agree with point number 7:

*“Incumbents should be excluded from entering into new roaming agreements on each others networks during the five and ten year build-out periods prescribed for new entrants.”<sup>62</sup>*

As much as any new entrant would want advantages over the competition, this could be interpreted as anti-competitive and Niagara Networks is not predisposed to any more intrusion into the market than is absolutely necessary.

We do not agree that<sup>63</sup>;

*“Incumbents should be excluded from entering into new tower and site sharing agreements on each others networks during the five and ten year build-out periods for new entrants.”*

Again, it is very important that this policy not include potentially anticompetitive restrictions. However, if an arbitrator perceives that an anti-competitive abuse is taking place by way of incumbents entering into such agreements for the sole purpose of blocking new entrants from deploying, the arbitrator should have the power to nullify any such agreements and make financial restitution to the offended party.

An interesting concept that Look proposes is that of the Most Favoured Nation (MFN). We note that other proponents have also requested this type of a clause in specifying the conditions of license.

Look states their case as follows<sup>64</sup>;

*“Look believes that it would be highly undesirable to determine the rate structure for roaming between numerous parties on a case-by-case basis. This would prolong the negotiations if done on a city, regional, provincial and international basis with individual agreements being made between the three established incumbents and each of the new wireless entrants. These mandatory roaming rates should be consistent from one applicant to another and in all cases a “most favoured nations” clause should be implemented to safeguard against price gouging.”*

In this way the licensee would provide all new entrants roaming that is no less favorable than the most favored terms given by the licensee in existing contracts. MFN is not a magic bullet. While it presents one potential solution it precludes other avenues for negotiation between parties prior to arbitration. The concept is

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<sup>62</sup> Look Comments Page 8

<sup>63</sup> Look Comments Page15

<sup>64</sup> Look Comments Page 5

discussed by Mobile Exchange however we do not agree with Mobile Exchange that arbitration is not a preferred method for dispute resolution. We include the Mobile Exchange description only for its clarity and recommend the department consider this as a guideline for an arbitrator to consider only as a last resort. The description of MFN is detailed by Mobil Exchange in their comments<sup>65</sup>;

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

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

Niagara Networks would fully support the MFN concept being incorporated into the language of the final policy but only for use as guidance for the arbitrator to consider. Further, MFN should be considered as a last resort by the arbitrator in lieu of more appropriate and available remedies. We are not in favour of MFN replacing arbitration.

#### Globalive Communications Corp.

Globalive is generally supportive of the policy recommendations as set out by Industry Canada. They stipulate that timelines should be tightened and technical feasibility should be narrowly defined, commercial rates must be reasonable yet dynamic and roaming must be offered on the best terms with the best service possible. We agree that all of the above would enhance the policy.

#### Jaguar Wireless

Jaguar has the same concerns as most other proponents, including Niagara. Jaguar asks that the term “technically feasible” be defined so as not to be open to abuse and that the timeframes for tower sharing be reduced by 50%.

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<sup>65</sup> Mobileexchange Comments Page 5 - 6

## Other submissions

### CRTC

The CRTC offers its venerable services as the arbitrator of disputes which occur as a result of tower/ site sharing and roaming requests.

The CRTC suggests that it is best positioned to act as an arbitrator of such disputes and that it would be pleased to do so in order to assist with the furtherance of the government's stated aim of improving competition and innovation in the wireless services market.

We would tend to agree with this proposal on the condition that Industry Canada provides a clear mandate to the CRTC based on an explicitly detailed structure which states that there is no mandate to regulate the wireless market segment in conjunction with its role to act as arbitrator.

We note that the CRTC has made their request known and provided arguments as to why they believe they would be in the best position to serve as Arbitrator. We also note that certain proponents argue in favor of CRTC performing such a function. Niagara Networks notes that in our original comments to the AWS consultation we suggested the department consider assigning this function to a government department. Having reviewed the submission of the CRTC and other proponents, we are satisfied with the CRTC submission and recognize the experience and capabilities of the CRTC to function adequately in performing this service for the industry. However, we applaud the CRTC for the foresight in choosing to forebear regulation of the wireless industry. Niagara Networks therefore has no problem with the CRTC acting as arbitrator, with the following provisos;

1. The CRTC must be provided with a clear mandate in taking on this unique role of arbitrator. The CRTC must acknowledge that it will decouple this unique function from its function to act as a potential Industry regulator.
2. Further, the CRTC should not extend this function of arbitrator to add another layer of complexity in the licensing process by way of requiring cellular, PCS, AWS or future mobile band operators to obtain a license separate from the spectrum license.
3. Furthermore, in accepting the role of arbitrator, the CRTC must recognize a potential conflict in acting as an industry regulator and therefore must in the role of arbitrator recuse itself from participating in the contractual arrangements between industry competitors, their shareholders etc.

If the CRTC can accept this unique role and acknowledge the potential for conflict of interest, then Niagara Networks has no problem recommending that the department accept the CRTC's offer to act as industry Arbitrator.

## Other Government Agencies

Many government agencies replied to the Consultation on Proposed Conditions of License to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements. Many of the comments focused on three main themes:

1) Security clearance and health and safety standards - Niagara Networks recognizes that public safety is a requirement in any civilized and well functioning society and Canadians fully appreciate the benefits accrued from the dedication and leadership of our public safety agencies. Niagara completely concurs with all efforts to maintain public and personal safety by incorporating security clearance procedures and health and safety standards into the language of the AWS policy.

2) Site security - We support the government agencies that have requested that site and tower management, including site management and physical access, remain under their control. However, access must be made available to new entrants. We recommend that these parties either provide qualified staff to perform functions on site or training to ensure that certain staff are available to any industry participant who can perform necessary functions on behalf of the proponent requesting access to the site.

3) Retaining future capacity - In general, the concept of future capacity seems reasonable as it applies to government agencies and public safety. We are concerned, however, as to how this would be applied in practice. We therefore suggest that future capacity be considered only in the case of government agencies where public safety is concerned. The guidelines set out for the arbitrator to consider should be defined so as to take only reasonable future needs into account and specify what reasonable is so as to provide certainty prior to the need for arbitration.

## Conclusions

We respectfully submit that in view of the comments received and the rationale of our arguments above, we believe:

1. The proposed conditions of licence need to be further clarified and reinforced with more precise language and definition.
2. Many of the arguments of the national incumbents can be dismissed outright as they are not productive nor are they helpful in developing the language of the final policy.
3. We note a general consensus amongst the respondents that timeframes for completing tower/ site sharing and roaming agreements can and

should be shortened. These timeframes are critical to the success of new entrants and with the appropriate tools such as detailed catalogues being completed in advance of the auction, this is entirely possible. Certainly the concept of “umbrella (block) requests” should be allowed and preferred in the language of the policy.

4. We note a general consensus that the term “technically feasible” is too vague and if it remains open to broad interpretation, it could lead to unnecessary delay and costly arbitration.
5. We note a general consensus that the term “commercial rates” is too vague and if it remains open to broad interpretation, it could lead to unnecessary delay and costly arbitration.
6. Arbitration of disputes related to tower/ site sharing and/ or roaming is a critical component of the process which needs to be more carefully and meticulously detailed in order to achieve smooth implementation of the proposed policy. A “national code” and “shorter more specific timeframes for arbitration” could be fairly implemented by the CRTC. The concept of “Most Favoured Nation” could be used as a guideline tool by the arbitrator but we do not believe MFN should replace arbitration as the key means of effective dispute resolution.
7. The conditions surrounding “roaming” are too vague and if it remains open to broad interpretation, it will inject unwarranted confusion into the process. Niagara Networks has offered and defined a new term “roaving”, to clarify the entire issue and identify a truly unique Canadian experience. In any case, clear definitions of service levels and of how hand off is performed are required.
8. The final policy language should exclude the case of simple resale.
9. Tower space reservation is a concept discussed by many parties. It should only be considered in cases where public safety is concerned, and then only by an arbitrator.
10. Security clearance, health and safety and site security, when dealing with government agencies and public safety, could be taken into account in the final policy.

We would like to take this opportunity to thank the department for allowing us to provide our views with respect to these very important issues. On behalf of Niagara Networks we wish the department all the best in making their final determinations on the Proposed Conditions of License to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements.