

Executive Summary

1. Primus Telecommunications Canada Inc. and Globility Communications Corporation (collectively “the Companies”) support the Minister’s determination that it is not possible to rely on market forces to ensure reasonable rates and terms for antenna tower, site sharing and roaming arrangements for new AWS competitors. The Minister’s announcement establishes the fact that forbearance is no longer appropriate for the telecommunications services in question. The Companies endorse the suggestion by the Canadian Radio-television and Telecommunications Commission (“the CRTC”) that it could act as an arbitrator to disputes involving antenna tower, site sharing and roaming. However, the Companies do not agree with the CRTC that it should rule out the use of its statutory powers under the *Telecommunications Act* in the arbitration process. The rates, terms and conditions associated with these telecommunications services should be governed by the CRTC using an *ex ante* tariff. Failing this, and if Industry Canada proceeds with its proposed arbitration model, the Companies endorse the comments submitted by MTS Allstream on 22 January 2008.

Regulatory Implications of Minister’s Announcement

2. At paragraph 10 of its submission, the CRTC states:

The CRTC notes that, as any arbitration will take place pursuant to conditions of licence under the *Radiocommunications Act*, it would not be able to use any of its statutory powers under the *Telecommunications Act* nor would parties be able to avail themselves of any appeal routes under the *Telecommunications Act*.

3. The Companies do not agree that the CRTC should limit itself in the manner proposed in its submission. Instead, it should use the full scope of its powers under the *Telecommunications Act* to ensure a fair and transparent arbitration process and rates that are just and reasonable.

4. By way of background, forbearance in the wireless market was addressed by two separate but related CRTC decisions. In its first decision relating to wireless forbearance – *Regulation of Wireless Services*, Telecom Decision CRTC 94-15, 12 August 1994 - the Commission explicitly determined that:

...the provision of wireless telecommunications constitutes the provision of a telecommunications service within the meaning of the Act. Thus, the provision of such services by Canadian carriers, within the meaning of the Act, is subject to regulation by the Commission. The Commission notes that parties to this proceeding generally agreed with this view.¹ (emphasis added)

5. Then in *Regulation of Mobile Wireless Telecommunications Services*, Telecom Decision CRTC 96-14, 23 December 1996, the CRTC stated:

[It] finds as a matter of fact that to refrain from exercising its powers and performing its duties... with respect to the provision of public switched mobile voice services by Canadian carriers... would be consistent with the Canadian telecommunications policy objectives.

The Commission also finds as a matter of fact that public switched mobile voice services... are, or will be, subject to competition sufficient to protect the interests of users.²

¹ Section II Conclusions, A. General.

² Section III Conclusions, (i) Public switched mobile voice services.

6. Therefore, while the CRTC considered wireless telecommunications services as “telecommunications services” and consequently subject to regulation, it also was of the view that the state of competition in that market was such that it could forbear from regulating these services.³

7. In his 28 November 2007 auction announcement the Industry Minister revisited the state of competition in the wireless market and announced that in certain circumstances, market forces are no longer operating in a manner that merits complete forbearance and that government intervention, in the form of a mandate for antenna tower site sharing and roaming is in the public interest:

In addition to setting aside spectrum, we are also mandating roaming and tower sharing – but at commercially negotiated rates.

Tower sharing is common in the telecommunications industry today, much the same way telephone poles are shared. To make our goal of more competition achievable, we want to ensure that new entrants have the same opportunities and the same access to networks and infrastructure as existing providers have had in the past and have today; no more and no less.⁴ (emphasis added)

8. In other words, the Minister believes that without government intervention the goal of more competition is not achievable and that new entrants will not have the same opportunities and network access as existing providers. It is notable that the Minister did not refer disputes in this previously forborne market to the Competition Bureau for resolution.

³ Antenna and site sharing arrangements are captured as “telecommunications services” by the *Telecommunications Act*. According to the *Act*, “*telecommunications service* means a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise” (underlining added). Antenna and site sharing arrangements are similar in nature to co-location floor space, riser space and power, which are regulated by the Commission.

⁴ Official Auction Announcement, Speaking Points, 28 November 2007, The Honourable Jim Prentice, PC, QC, MP, Minister of Industry.

This suggests that the Bureau does not have the necessary legislative or regulatory tools to resolve complaints such as this in a satisfactory manner or timeframe.

9. The Companies submit that under these circumstances (i.e. where the market conditions for forbearance are no longer present) and because antennas, the space making up cellular sites and the carriage of roaming traffic are telecommunications services, the logical entity to deal with these issues is the CRTC employing the full range of its powers under the *Telecommunications Act*.

The Policy Direction to the CRTC

10. In their first round comments TELUS, and to a lesser extent Bell Mobility, raise the spectre of the *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534⁵ (“the Policy Direction”) and argue that the government should not, in their view, reverse course and “[depart] significantly from pure reliance on market forces in order to facilitate entry in the wireless market.”⁶

11. First of all, the Companies would point out that the Policy Direction was not issued to either the Minister or Industry Canada. Therefore, it has no direct impact on the proposals and decisions around antenna tower, site sharing or mandatory roaming. However, the Companies believe that even though it does not directly apply to this situation, the Minister’s proposal does in fact rely on market forces to the extent *feasible*. His is not “a pure reliance on market forces” but rather a realization that it is not feasible to

⁵ *Canada Gazette Part II. Vol 140. No. 26, SOR/2006-355.*

⁶ See TELUS’ submission, dated 22 January 2008, page 2.

rely on market forces alone to achieve his goal of more competition in the wireless market. Hence the need for government intervention. TELUS asserts that the Minister's proposal conflicts with or is a departure from government policy.⁷ However, the antenna tower and site sharing proposals as well as the proposal for mandatory roaming share the same source as the Policy Direction - the office of the Industry Minister. To assert that the Minister is violating his own government's policy in some way simply holds no water. In his deliberations leading up to his proposal the Minister has clearly determined the extent to which he is able to rely on market forces to meet his goals of greater competition.

The CRTC is the logical choice for the arbitrator

12. The Companies endorse the suggestion by the CRTC that it could act as an arbitrator to disputes involving mandated roaming, antenna and site sharing and the prohibition on exclusive site sharing. In fact, the CRTC should be appointed as the sole arbitrator over these issues. The CRTC's 11 January 2008 submission demonstrates that it:

- [has] expertise in telecommunications and dispute resolution would be valuable in allowing it to arbitrate any disputes in a timely and efficient manner;
- has many years of experience dealing with telecommunications services and telecommunications service providers;
- is familiar with the wireless services market and industry players in that market;
- would be able to undertake any arbitration pursuant to the proposed conditions of licence without the need for the same learning curve that than an arbitrator who lacked experience would face;

⁷ Ibid, page 1.

- regularly adjudicates competitive disputes relating to agreements between TSPs and/or relating to access by TSPs to each other's network infrastructure
- continues to adjudicate disputes regarding access to public rights of way, access to telecommunications support structures and access to multiple-unit dwellings.

13. The Companies note that Shaw has also endorsed the CRTC as the logical arbitrator:

The CRTC's independence and broad experience in telecommunications make it a natural candidate for the role of arbitrator. In addition, reliance on a single body would ensure consistency of process and decision-making, thereby helping to achieve a level playing field for all participants.⁸

14. For all of the reasons noted earlier in this submission and in its first round comments, the Companies would once again urge the Minister to assign the responsibility of setting the rates, terms and conditions for antenna, site sharing and roaming, all of which are telecommunication services as defined by the *Act*, to the CRTC. These arrangements should be governed using an *ex ante* tariff.

15. If, however, the Minister ultimately decides to abide by his initial arbitration proposals, the Companies would like to endorse the comments and proposals made by MTS Allstream in its comments of 22 January 2008.

Conclusion

16. The Companies agree with the Minister's determination that it is not possible to rely on market forces to ensure reasonable terms for antenna

⁸ See Shaw's submission, 22 January 2008, para. 21.

tower and site sharing for new AWS competitors and to prohibit exclusive site arrangements. The Minister's announcement establishes the fact that forbearance is no longer appropriate for the telecommunications services in question. The CRTC should be appointed as the national arbitrator to disputes involving mandated roaming, antenna and site sharing and the prohibition on exclusive site sharing. However, the Companies do not agree with the CRTC that it should rule out the use of its statutory powers under the *Act* in the arbitration process. The rates, terms and conditions associated with these arrangements should be governed by the CRTC using an *ex ante* tariff. Failing this, and if Industry Canada proceeds with its proposed arbitration model, the Companies endorse the comments submitted by MTS Allstream on 22 January 2008.