

Summary

1. Primus Telecommunications Canada Inc. and Globility Communications Corp. (“the Companies”) agree with Industry Minister Prentice that market forces alone cannot be relied on when it comes to the ability of new wireless entrants to obtain the required roaming, antenna tower and site sharing agreements. However, problems associated with industry negotiations and third party arbitration will pose obstacles to achieving the Minister’s ultimate goal of the proposed conditions of licence.

2. The Companies respectfully submit that the most logical “arbitrator” for dealing with roaming, antenna tower and site sharing issues is the Canadian Radio-television and Telecommunications Commission (“the CRTC”). Other prospective arbitrators will likely not have the expertise or necessary background on these issues. Any rates ultimately set by the arbitrator (i.e. the CRTC) should be governed by a tariff approved by the CRTC. This approach is the best approach to achieve the quickest, most efficient and consistent decisions on these items.

The Federal government has determined that market forces are not enough

3. In his November 2007 announcement, Industry Minister Prentice effectively determined that market forces are not sufficiently strong to, by themselves, protect the interests of consumers. He therefore proposed to mandate automatic digital roaming on cellular, PCS and AWS networks as well as antenna tower and site sharing. Furthermore, in the event of failed negotiations between parties for such arrangements (*a highly likely outcome*

based on the experience of the Companies), he proposed to refer the dispute to arbitration.

4. Even a cursory overview of the various carriers operating in the wireless market confirms the Minister's view that relying on market forces to ensure the necessary roaming agreements will be reached will not be enough. Of the networks of the three national wireless carriers only one, Rogers, uses GSM technology. TELUS and the Mobility group of companies continue to rely on the CDMA technology. Any new entrant with a realistic view of the future will opt for GSM technology over CDMA. In fact, the draw to GSM over CDMA has apparently stimulated internal debate at TELUS. According to a report in the Toronto Star, TELUS itself is considering a move to GSM.¹ However, the article makes it clear that TELUS has not actually made the decision to convert its network to GSM. Therefore, new entrants wishing to roam on a GSM network are facing a monopoly situation for many years, at a minimum.

5. Existing towers were deployed based on significant engineering analysis of topography and population density and are, hence, strategic locations for both incumbents and new entrants. The inability to access these existing towers is an impediment to the efficient deployment of a new entrant's network. The Companies therefore also support the Minister's determination that it is not possible to rely on market forces to mandate antenna tower and site sharing and to prohibit exclusive site arrangements. That being said, conditions in some geographic markets are such that there are a number of competitive rates available for these services. Those rates could be used as the benchmark to determine the going commercial rate. However, there will be other markets where competitive rates are not

¹ "Telus considers dumping its "Betamax" of wireless networks" article by Chris Sorensen, The Toronto Star, 12 January 2008.

available and government intervention will be required. This fact is accounted for in the Companies' proposal found later in this submission.

Arbitration shortfalls

6. The Companies believe that using third party arbitrator(s) to resolve questions dealing with access to telecommunications networks and setting rates for telecommunications services would be problematic, and therefore should be discarded, for many reasons.

7. The net effect of the Minister's proposal is that the arbitrator(s), whomever is chosen by the parties, will be put in the position of setting rates, terms and conditions for telecommunications services, a role reserved for the CRTC by the Act. The arbitrator(s) will therefore take the place of the CRTC and implement public policy through their decisions.

8. Arbitration typically involves an independent third party addressing a fairly well defined set of facts within a well understood structure. Notice No. DGRB-010-07 ("the Notice"), states that the "Industry Canada expects that roaming would be offered at *commercial rates* that are *reasonably comparable* to rates that are currently charged to others for similar services." (emphasis added) However, in order to decide on "reasonably comparable" rates the arbitrator(s) will first have to decided on what constitutes a "commercial rate" for these services. The Notice has not given any advice on how this term should be defined. It is not clear to the Companies whether there are commercial rates currently in existence for all of the services contemplated by the Notice that could serve as a reference point. There are no commercial rates negotiated in Canada in a truly competitive environment. Any rates available reflect the current

“unbalanced” oligopoly situation and do not reflect truly competitive rates. In this scenario, the arbitrator(s) will have to define what these rates should be, once again filling the CRTC’s shoes.

9. Compared to CRTC procedure, arbitration is a closed process which works in favour of the incumbent service provider. Commercial rates, like all public policy, should not be decided by private parties in what amounts to “closed door” decisions. For example, the incumbent service provider could point to a rate agreed to by a “desperate” customer and claim that such a “higher than normal” rate is a commercial rate that should be paid by new entrants. Further, two incumbent service providers with roughly equal traffic patterns could agree to very high prices for the carriage of each other’s traffic (since the imbalance payments would net out to near zero). This would again result in an unfairly high commercial rate that could be used to set rates for new entrants that are artificially high. Finally, the use of different arbitrators in different disputes could also result in different outcomes relating to the same service provider (i.e. different entrants may end up paying different rates to roam on a single provider’s network). This would amount to unjust discrimination.

10. The Notice does not give any indication that the arbitration process is to adhere to the principles for the pricing of telecommunications services found in the Act. Section 27 of the Act contains a number of key provisions used by the CRTC in its day to day operations. Subsection 27.(1) states

Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.

11. Subsection 27.(2) states:

No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

12. These strong preventative measures have served to protect competition as the CRTC has opened successive markets to new entrants. However, there is no indication that multiple arbitrators will either attempt or achieve these same levels of protection for customers.

13. The proposed negotiation/arbitration process would be very one-sided. The incumbent licensee would be in an exclusive position concerning the costs associated with the sought after arrangement. The incumbent could supply evidence to support its position and neither the arbitrators nor the new entrant would be in any position to challenge it.

14. The Notice does not provide any guidance to the arbitrator(s) as to the ultimate level of the rates or the inputs upon which they are set. However, it is clear that the Minister wants new entrants to succeed. Therefore, decisions issued in these disputes need to fairly and consistently lay the ground work for a workable business case on the part of the entrant, without unduly impacting the operations of the incumbents. The CRTC routinely engages in this balancing act.

15. One of the tools that the CRTC uses to fulfill its section 27 mandate is through the use of Phase II incremental costing. For mandated Incumbent Local Exchange Carrier ("ILEC") services provided to competitors the ILECs must adhere to a pricing formula that generates rates at Phase II costs plus a mark-up of 15% or Phase II costs plus a mark-up

approved by the Commission as reasonable given the circumstances in the market. No such guidance is given to arbitrators.

16. Finally, there is no indication as to the appropriate length of time between a dispute being submitted to the arbitrator(s) and the issuance of the decision. Depending on the case, arbitration processes can take years and in the roll-out of telecommunications networks and new services, lapsed time always works to the benefit of the incumbent provider, never the new entrant. The Companies would highlight the fact that the CRTC has well established timelines for processing applications. For example, section 26 of the Act states that the CRTC has forty-five business days to either approve or deny a tariff or provide, in writing, the period of time within which it intends to do so. The CRTC has also published *A guide to the CRTC processes for telecommunications applications*, Telecom Circular CRTC 2007-16, 11 June 2007. This document not only provides a description of the types of applications handled by the Commission but more importantly the service standards (i.e. timeframes) under which it operates.

The Companies' proposal

17. The services mandated by the Notice are properly considered telecommunications services as defined by the *Telecommunications Act* ("the Act"). Roaming is the carriage of telecommunications traffic by a carrier on the behalf of another telecommunications service provider. Antenna towers and related sites easily qualify as telecommunications support structures. The Commission maintains tariffs for incumbent support structures. However, antenna towers and related sites are not currently included.

18. Historically, in a regulated environment the offering of telecommunications services such as roaming and support structures were both governed by tariffs. Wireless services offered by the incumbent providers (i.e. TELUS, SaskTel, MTS Allstream, the Mobility Group of companies and Rogers), including roaming, have been granted forbearance by the Commission. The CRTC's decision to forbear was premised on its determination that the markets in question were competitive enough to be forborne – that market forces were adequate to protect the interests of consumers. As noted above, some support structures continue to be regulated by the CRTC.

19. By deciding to mandate roaming in the wireless market the Federal government has formally declared that market forces are not sufficient to protect the interests of end customers and by extension determined they no longer qualify for forbearance. The monopoly on GSM roaming held by Rogers reinforces this determination. According to the Act, a telecommunications market subject to monopoly supply has to be regulated by tariffs approved by the CRTC. It is the companies' position that, due to the problems raised in paragraphs 6-16 of this submission, the involvement of a third party arbitrator is inappropriate.

20. Out of all possible alternatives in Canada, the CRTC is the logical choice to act as the national regulator or "overseer" of these arrangements. It has an experienced and capable staff of costing experts and has an unparalleled view of the entire industry through its annual telecommunications monitoring process. The panel of Commissioners has experience with setting rates for wholesale services and would be well suited to applying this experience to setting wholesale rates for roaming services.

21. Since the Industry Minister has determined that the market is not competitive, the Commission must employ its standard approach of *ex ante* tariff approval for mandated roaming agreements.

22. Similarly, the government's declaration concerning antenna towers and site sharing implies that some degree of regulatory oversight is required. As noted above, the Companies agree with the Minister's decision to mandate sharing and to prohibit exclusive site arrangements and that the market is not competitive enough to expect new entrants to be successful in these negotiations. The Companies' preference would be to have site and tower sharing regulated in the same manner as their proposal on roaming. While there are enough commercial rates that could be referenced by an arbitrator in a decision making process, as noted earlier in this submission, those rates are not the product of a competitive market and should not be relied on by a decision maker to set rates for a new entrant.

23. For those cases in which competitive commercial rates are not available and therefore require arbitration, parties should continue to have the option of appealing to an arbitrator. It would be more efficient and consistent for the CRTC to set rates for all these services in an *ex ante* tariff approval process.

Conclusion

24. The Companies agree with Industry Minister Prentice that market forces alone cannot be relied on when it comes to the ability of new wireless entrants to obtain the required roaming, antenna tower and site sharing agreements. However, the Companies respectfully submit that the CRTC, as opposed to non-telecom-expert arbitrators, should set the rates,

terms and conditions for roaming and in the event that new entrants are unable to negotiate antenna tower and sharing arrangements, it should be prepared to set those rates as well. The Companies have demonstrated the problems with private arbitration processes when dealing with rate setting for access to incumbent telecommunications networks compared to the procedures and expertise already in place at the CRTC.